



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 559 OF 2011

IN THE MATTER OF THE ESTATE OF M'ITUNGA

M'RUMURA ALIAS ITUNGA RUMURA (DECEASED)

STEPHEN JAIRO S. MUTUNGA.....1ST PETITIONER

FRANCIS MURUNGI ITUNGA.....2ND PETITIONER

VERSUS

REBECCA KANYUA RUTERE.....APPLICANT

NANKWI M'ITUNGA.....1ST PROTESTOR

JOYCE KANGAI M'ITUNGA.....2ND PROTESTOR

JUDGMENT

1. **M'ITUNGA M'RUMARA ('the deceased')** died intestate on 5th October 1984. On 29th September 2011, Stephen Jairo M'Itunga and Francis Murugi Itunga petitioned for letters of administration which was granted, citing Land Parcel No. **NTHIMBIRI/KIUTHA/ 219, 220, 221, 222, 223 and 224** as the deceased assets. A letter of introduction by the Chief of Mpuri Location listed the following as the deceased dependants;

- 1) Miriam Karegi - Wife
- 2) RebeccaKanyuaM'Rutere - Daughter
- 3) Isabella Gaceri Stephen - Daughter
- 4) Stephen Jairo M'Itunga - Son
- 5) Silas GachengiM'Itunga - Son
- 6) KamunaM'Itungi - Wife
- 7) Francis Murugi - Son
- 8) Benson Mwiti - Son
- 9) Naomi Chauria - Daughter
- 10) Florence Kathure - Daughter
- 11) Joyce M'Itunga - Wife

- 12) Jane Mukamuga - Daughter
- 13) Martha Karirwa - Daughter
- 14) Jacob Gitonga - Son
- 15) Beatrice Kanja - Daughter
- 16) Lilian Karea - Daughter
- 17) NakwiM'Itunga - Wife
- 18) Susan Nkirote - Daughter
- 19) SalomiMuthoni - Daughter
- 20) Ann Gaitenga - Daughter
- 21) Damaris Kanana - Daughter
- 22) Easter Kamenwa - Daughter
- 23) ZiporrahNcutubi - Wife
- 24) JacentaNyegera - Daughter
- 25) Joseph Ndubi - Son
- 26) Samuel Mutwiri - Son
- 27) Josephine Kajuju - Daughter

2. On 19th November 2014, Rebecca Kanyua Rutere applied to be joined as a co- administrator of the deceased estate on the grounds that the administrators are delaying the distribution of the estate and are threatening to disinherit some dependants.

3. In a supplementary affidavit filed on 23rd November 2015, Rebecca Kanyua M'Rutere proposed the following mode of distribution;

L.R NO. NTHIMBIRI/KIUTHA/219

- i. Jennifer M'Itunga- 3 acres
- ii. Francis Murugi- 1 acre

L.R NO. NTHIMBIRI/KIUTHA/220

- i. Joyce M'Itunga- 3 acres
- ii. Rebecca Kanyua M'Rutere- 1 acre

L.R NO. NTHIMBIRI/KIUTHA/221

- i. Harriet Nthama – 1 ½ acres
- ii. Francis Murungi Share Balance
- iii. Benson Mwiti equally
- iv. Silas Gachengi
- v. Jeniffer Nakwii Samson
- vi. Joyce M'Itunga

L.R NO. NTHIMBIRI/KIUTHA/222

i. Harriet Nthama Jairus

ii. Silas Gichengi Equal Share

L.R NO. NTHIMBIRI/KIUTHA/223

i. Francis Murungi

ii. Benson Mwiti Equal Share

L.R NO. NTHIMBIRI/KIUTHA/224 – Zipporah Ncurubi – Whole

4. On 10th April 2017 Nankwi M'Itunga and Joyce Kangai M'Itunga widows of the deceased protested the proposed mode of distribution. They stated that the deceased had five houses as follows;

I. MIRIAM KAREGI SAMSON WIDOW (deceased)

a. Rebecca Kanyua M'Rutere - Daughter

b. Isabella Gaceri Stephen - Daughter

c. Stephen Jairo M'Itunga - Son (deceased)

d. Silas GachengiM'Itunga - Son

II. ZIPORRAH NCUTUBI WIDOW

a. JacentaNyegera - Daughter

b. Joseph Ndubi - Son

c. Samuel Mutwiri - Son

d. Josephine Kajuju - Daughter

III. JOYCE M'ITUNGA WIDOW

a. Jane Mukamuga - Daughter

b. Martha Karirwa - Daughter

c. Jacob Gitonga - Son

d. Beatrice Kanja - Daughter

e. Lilian Karea - Daughter

IV. JENIFFER NANKWI SAMSON WIDOW

a. Susan Nkirote - Daughter

b. SalomiMuthoni - Daughter

c. Ann Gaitenga - Daughter

d. Damaris Kanana - Daughter

e. Easter Kamenwa - Daughter

V. RUTH KAMUNA SAMSON WIDOW (deceased)

a. Francis Murugi - Son

b. Benson Mwiti - Son

c. Naomi Chauria - Daughter

d. Florence Kathure - Daughter

5. Additionally their late husband had settled each house and had his own portion as follows;

A. Jeniffer Nankwi Samson - LR NO. NTHIMBIRI/ KIUTHA/ 219

B. Joyce Samson - LR NO. NTHIMBIRI/ KIUTHA/ 220

C. Mariam Samson (Deceased) - LR NO. NTHIMBIRI/ KIUTHA/222

D. Ruth Kamuna (Deceased) - LR NO. NTHIMBIRI/ KIUTHA/223

E. Zipporah Samson - LR NO. NTHIMBIRI/ KIUTHA/224

F. M'itunga M'rumura ('The Deceased') LR NO. NTHIMBIRI/ KIUTHA/ 221

The 1st and 2nd protestors stated that the deceased decreed that all the houses share LR NO. NTHIMBIRI/ KIUTHA/ 221 upon his demise.

6. This application was heard vide viva voce evidence. **PW1 Rebecca Kanyua Rutere** testified and told the court that she was the only one who was gifted one acre by the deceased in LR NO. NTHIMBIRI/ KIUTHA/ 221 where she continues to plant and pick tea. This was because she assisted the deceased. Additionally, the deceased gave his friend Mugambi land and was instructed to give it to his son Stephen Jairo if he did not intend to cultivate it. Further she informed the court that she is aware that the deceased developed Plot No. 1 at Mburi Market which he left to his wife Miriam. Their mother has however passed away and Jairo collected the rent there after. Also Jairo's wife Harriet and it is false that they are taking the land by force. She agreed that the deceased subdivided his land into 6 portions giving each wife their portion and retaining his.

7. **DW1 M'Maitima M'Mukindia** testified and adopted his statement dated 14th July 2018. In the statement, he indicated that the deceased was a member of the Kiutha clan where he was an elder. The deceased, before his demise called a meeting where he expressed his wishes on the distribution of his estate. In the meeting he stated that he did not trust his children and upon his death his estate should be distributed among his five wives. Additionally LR NO. NTHIMBIRI/ KIUTHA/221 and Plot No. 1 situated at Mpuuri market should be distributed equally among his five wives. To reinforce his wishes he started the process of transferring his property but met his death before completion. This was reiterated by the statement of M'Mwarania M'Aritho a retired surveyor.

8. Statements by Nankwi M'Itunga, Catherine Nkirote Murungi, Zipporah Ncurubi M'Itunga, Joyce Kangai M'Itunga, M'Makathimo, M'Nthieni and M'Maitima M'Mukindia reiterated what was stated by M'Maitima M'Mukindia.

ANALYSIS AND DETERMINATION

9. I have carefully perused through the applications, affidavit, statements and the record. The issue before this court is **how to distribute LR NO. NTHIMBIRI/ KIUTHA/ 219, 220, 221, 222, 223, 224 and Plot 1 at Mpuuri Market?**

10. Distribution of the intestate estate of a polygamous man is as per Section 40 of the Law of Succession Act which provides:

“40. Where intestate was polygamous

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

11. In the case of **Mary Rono v Jane Rono & another [2005] eKLR**, Omollo, JA had this to say about Section 40 of the Law of Succession Act:

“My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.”

12. The intention of the framers of Section 40 of the Act can be deduced from the Report of the **Commission on the Law of Succession 1968** as cited by Lenaola, J (as he then was) in **Re Estate of John Muia Kalii- (Deceased) [2008] eKLR**:

“In customary law, on the other hand, the matter is complicated by the rules of division amongst the “house” by which there is an equal division amongst the “ houses” irrespective of the number of children in each ”house”. We believe this rule to be highly unfair and discriminatory... We think that is necessary, for the purpose of determining beneficial interests, to make a division of the net estate between the “houses”. This accords with customary law and will work out well in practice since the property of each “house” is normally treated as independent and separate from the other. As to the mode of division, we have already stressed that the present system of equal division irrespective of the number of children in each “house” is inequitable. We believe that the fairest division would be one based on the number of children in each “house” but also adding to the number of children, the wife as an additional dependants especially to cater for the wife who has no children.”

13. Bearing the above in mind, evidence has it that the deceased had divided his properties in accordance with his five houses. He settled each house as follows:-

1. Jeniffer Nankwi Samson - LR NO. NTHIMBIRI/ KIUTHA/ 219
2. Joyce Samson - LR NO. NTHIMBIRI/ KIUTHA/ 220
3. Mariam Samson (Deceased) - LR NO. NTHIMBIRI/ KIUTHA/222
4. Ruth Kamuna (Deceased) - LR NO. NTHIMBIRI/ KIUTHA/223
5. Zipporah Samson - LR NO. NTHIMBIRI/ KIUTHA/224

The deceased M’ITUNGA M’RUMURA left for himself LR NO. NTHIMBIRI/ KIUTHA/ 221

[14] Accordingly, his intention was clear and should be given effect but as by law provided. The property he left to himself should be shared by all. In the upshot, I direct that the estate of the deceased shall be distributed as follows;

A. LR. NTHIMBIRI/ KIUTHA/ 222 – 1.701 HA

- i. Rebecca Kanyua M’Rutere**
- ii. Isabella Gaceri Stephen**
- iii. Estate of Stephen Jairo M’Itunga**
- iv. Silas Gachengi M’Itunga**

B. LR NTHIMBIRI/KIUTHA/224 – 1.893 HA

- i. Ziporrah Ncutubi**
- ii. Jacenta Nyegera**
- iii. Joseph Ndubi**
- iv. Samuel Mutwiri**
- v. Josephine Kajuju**

C. LR NTHIMBIRI/KIUTHA/220 - 1.62 HA

- i. Joyce M’Itunga**
- ii. Jane Mukamuga**
- iii. Martha Karirwa**
- iv. Jacob Gitonga**
- v. Beatrice Kanja**
- vi. Lilian Karea**

D. LR NTHIMBIRI/KIUTHA/219 - 1.62 HA

i. Jeniffer Nankwi Samson

ii. Susan Nkirote

iii. Salomi Muthoni

iv. Ann Gaitenga

v. Damaris Kanana

vi. Easter Kamenwa

E. LR NTHIMBIRI/KIUTHA/223 – 1.215 HA

i. Francis Murugi

ii. Benson Mwiti

iii. Naomi Chauria

iv. Florence Kathure

F. LR NTHIMBIRI/KIUTHA/221- shall be shared equally amongst the five houses including surviving spouses

G. PLOT 1 AT MPUURI MARKET- shall be shared equally amongst the five houses including surviving spouses

Grant herein is accordingly confirmed. No order as to costs.

Dated, signed and delivered in open court at Meru this 6th day of February, 2019.

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F. GIKONYO

JUDGE

In presence of

Kariuki for Mutegi for protestor

Mburugu for petitioner - absent

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F. GIKONYO

JUDGE