



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 390 OF 2015

IN THE MATTER OF THE ESTATE OF MADARINA CIOMARETE KINENE (DECEASED)

PETER KINYUA KIUGU.....PETITIONER

VERSUS

VERONICA KAREA MBAYA.....PROTESTOR

J U D G M E N T

1. **MADARINA CIOMARETE KINENE (“the deceased”)** died on 4th July, 2013 and was “survived by five children: **Peter Kinyua Kiugu, Charles Kaaria, Julius Mworira, Timothy Mwenda** and **Veronica Karea Mbaya**. Her estate comprises **Land Parcel No. Kiirua/Naari/2075** (hereinafter ‘*the Suit Land*’).
2. The petitioner was issued with grant of letters of administration intestate on 24th November, 2015. When he sought to have the same confirmed through his application dated 17th June 2016 a protest was raised by **Veronica Karea Mbaya (“the protestor”)**.
3. In her affidavit of protest sworn on 12th January 2017, the protestor deponed that the petitioner did not consult her when filing this cause. That the deceased had only four children and that the petitioner was a stranger to the estate. That the suit land belongs to her because her siblings already inherited their shares from their deceased father. She concluded that the deceased was in the process of transferring to her the suit land before she passed on.
4. The protest was opposed vide the replying affidavit of **Peter Kinyua Kiugu** sworn on 31st January 2017 who denied all the allegations made by the protestor. He stated that the sons of the deceased had no objection to giving the objector a share of the estate.
5. This matter was heard vide *viva voce* evidence. **PW1 Veronica Karea Mbaya** stated that the petitioner was a son of the second wife of her late father while she and the other three beneficiaries were children of the deceased who was the first wife. That all her brothers were given land by their deceased father who gave the deceased only one acre, the suit land. That the deceased left her the suit land because she had lived with her for seven years before she died and was taking care of her. That after the demise of the deceased, her brothers demolished the deceased’s house and chased her away.
6. **PW2 Monica Regelia** testified that the deceased was her god mother during baptism. That the objector was living with the deceased before her demise. That the deceased once told her that the suit land belongs to the protestor. **PW3 George Koome**, neighbor to the deceased, stated that the sons of the deceased had been given land by their father and after the deceased’s death, he does not know who continued to use the suit land.
7. **PW4 Silas Mbogori**, husband to the protestor, told the court that his wife went to live with the deceased until her demise. That the deceased left the suit land to the protestor which was recorded in the lands office.
8. On the other hand, the petitioner testified as **RW1** and called two witnesses. He testified that when the deceased was unwell, he was the one taking care of her while the objector only visited the deceased occasionally. That she only lived with the deceased on the suit land for 2 years. He denied that the deceased had given the objector the suit land.
9. **RW2 Charles Kaara** and **RW3 Timothy Mwenda Kiugu**, sons of the deceased, both testified that they were given land by their deceased father. That they did not know why their father did not give the objector any land. That they would like the suit land to be distributed amongst the five children of the deceased as it belongs to their mother.
10. Having considered the averments on record and the testimonies of witnesses, the issues for determination are; ***did the deceased gift the objector the suit land? If not, how should the estate of the deceased be distributed?***

11. According to the objector, all her brothers had been taken care of because, her father had given each one of them at least, two acres each. She was not provided for by him. Instead, her father gave one acre to the deceased to which the objector was now entitled to. Her evidence was that it was the wish of the deceased that the protestor gets the whole of the suit land. That before her demise, the deceased had begun the process of having the suit land transferred to the protestor. She produced an application for the local Land Control Board Consent and the consent to transfer were produced in support of that contention.

12. On the other hand, the petitioner and his witnesses denied the protestor's claim. They stated that they did not know why their father did not give the deceased any land. That it was not true that the deceased gifted the protestor the suit land. They urged that they were as entitled to a share in the suit land as was the protestor. They disputed the documents produced by the protestor as to the application for transfer and the consent to transfer by the local Land Control Board.

13. I saw the witnesses testify. The protestor was categorical in her affidavits and testimony in court, that the petitioner was a stranger to the estate. That the petitioner did not inform her of his intention to bring the current proceedings.

14. However, when she was cross-examined and from the testimony of the other witnesses, it turned out that her late father had two wives. The petitioner's mother as 1st wife and the 2nd wife who was the mother to the petitioner. That she knew that after the demise of the petitioner's mother, he lived with and was taken care of by the deceased.

15. The foregoing being the case, the protestor came out as a person who was prepared to lie to court at any cost for her to achieve whatever she desired. While she swore that the petitioner had not informed her of the current proceedings, the letter from the Chief Naari Location dated 23rd September, 2013 shows that the protestor declined to give her National Identity Card when requested to for purposes of the introduction letter.

16. Looking at the documents that were relied on by the protestor, several questions remained unanswered. The evidence on record was that the deceased was sick for some time before her demise. It was not clear when and where the deceased signed the application for consent to transfer the suit land.

17. It was contended by the petitioner that the deceased was so sick to have executed the application for consent to transfer and the transfer produced by the protestor. Indeed, the record shows that the application for the consent to transfer was allegedly thumb printed on 12th June, 2013 and the deceased died on 4th July, 2013, less than a month later.

18. Accordingly, taking into consideration all the foregoing, I am satisfied that during her lifetime, the deceased did not gift the suit land to the protestor.

19. The next issue is, how the estate of the deceased should be distributed. The deceased was survived by her children. The petitioner did not challenge or contest the contention that although the petitioner was a step son of the deceased, the deceased had taken care of him and that he was largely dependent on her through the suit land.

20. *Section 38 of the Law of Succession Act, Cap 160* provides:-

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children”.

21. In the case of **Stephen Gitonga M'murithi v Faith Ngira Murithi [2015] eKLR**, the Court of Appeal stated:-

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried”.

22. From the foregoing, it is clear that, equal distribution of a deceased's estate amongst his/her children is to be effected regardless of sex, marital, social or financial status. It also applies notwithstanding the length of time any of the children has taken in taking care of a deceased.

23. The estate the subject matter of this Cause is not that of the protagonists' father, but that of their mother. In this regard, it does not matter that the petitioner and his brothers had been gifted by their father. The estate is that of their mother. All the children of the deceased are entitled to a share thereof without discrimination.

24. In this regard the suit land will be distributed amongst all the children of the deceased equally as follows:-

Land Parcel No. Kiirua/Naari/2075

a) Charles Kaaria - 0.081 ha

b) Veronica Karea - 0.081 ha

c) Julius Mworira - 0.081 ha

d) Timothy Mwenda - 0.081 ha

e) Peter Kinyua - 0.081 ha

25. There will be no orders as to costs.

DATED and DELIVERED at Meru this 7th day of March, 2019.

A. MABEYA

JUDGE