



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 228 of 2000

IN THE MATTER OF THE ESATE OF THOMAS MWIRICHIA (DECEASED)

JENNIFER NKUENE.....1ST PETITIONER

MARY KARAMBU.....2ND PETITIONER

-VS-

CORNELIUS MWITHURI MWIRICHA.....1ST OBJECTOR

M' ITUNGA THIURU.....2ND OBJECTOR

EZEKIEL KINUU (Substituted as the Legal Representative

of the estate of M' ITUNGA THIURU.....3RD OBJECTOR

JUDGMENT

[1] The deceased to whom these proceedings relate is **M'Itunga Thiuru**. He was domiciled in Katheri Location prior to his death. According to the letter of the Chief Katheri dated 3rd December 2000 the deceased left behind the following dependents; **Jennifer Nkuene (1st Wife), Mary Karambu, Grace Martha Gaceri, Cornelius Muthuri, Helen Mukiri, Catherine Wanja, Margaret Kagendo, Jane Nyaguthi, M' Itunga Thiuri (Brother to the deceased)**. The letter of the chief also stated that the brother of the deceased was included because he is staying in the Land registered in the name of the deceased.

[2] He also left behind the following assets; **Parcel No. Abothuguchi/ Katheri/1521, & Land Parcel No. Abothuguchi/ Katheri/807**.

[3] The petition for letters of Administration was filed on 3rd October 2000 and gazetted on 17th November 2000. Grant of letters of Administration was made to the petitioners on 20th December 2000. The petitioners filed Summons for Confirmation of Grant on 30th July 2001

[4] But, objection proceedings were filed on 25th March 2002 in which it was claimed that the 2nd objector is entitled to the whole Parcel No. Abothuguchi/ Katheri/1521 and also to 1.0 Acre in Parcel No. Abothuguchi/ Katheri/807. The basis for this claim was that the deceased herein was a brother to the 2nd Objector and so held the properties in trust for the family which included him and the 2nd Objector. The 1st objector also averred that Grace Martha Gaceri had been given a bigger parcel in the proposed mode of distribution in the summons of Confirmation of Grant.

[5] The court considered the Objection and on 3rd June 2010 reaffirmed the petitioners as the Administrators and Fresh letters were issued on 3rd June 2010. The parties also consented to the inclusion of Ezekiel Kinuu to substitute Ayub M'Itunga Thiru on 5th July 2010. The consent was adopted as an order of the court.

[6] The petitioners filed Summons for Confirmation of grant on 5th July 2010 and gave proposal on distribution of the estate at Paragraph 6. The 2nd objector filed an affidavit of protest to the mode of distribution on 16th September 2011 but he gave his proposed distribution at paragraph 15. The Court then directed that the matter be canvassed by way of *viva voce* evidence on 19th September 2011.

Witness testimonies

[7] **Ezekiel Kinuu, OBI** testified that the deceased was a younger brother to the objector. He averred that prior to the demise of the deceased they had agreed on how the properties should be shared but also that it be registered in the name of the deceased. He averred that they are

currently residing in L.R. Abothuguchi/Katheri/1521 and that his father was buried there. He stated that they have continued tilling plot L.R. No. Abothuguchi/Katheri/807 but affirmed that he has not built a house on plot L.R. No. Abothuguchi/Katheri/807, He referred to the letter of the chief dated 2nd May 2000 that showed that the deceased and the objector had agreed on the mode of distribution of the suit properties. He averred that prior to the deceased's death he had showed them a place to till. He denied conspiring with the 1st Objector to deny other beneficiaries their part of the estate.

[8] The petitioners never called any witnesses but they had initially filed a Replying affidavit on 16th November 2001 sworn by the 1st petitioner (**widow to the deceased**) in answer to the objection herein. She averred that the deceased was the registered proprietor of the suit premises and that the 2nd Objector was a stranger to this proceeding.. It was also stated that the proceedings made by the chief had no bearing because the deceased was sickly at the time and could not comprehend what was being said. She justified the allocation of a bigger portion of land to Grace Martha Gacheri; because Grace Martha Gacheri had helped them in servicing a loan at AFC bank which they were unable to pay and she had also helped them in their errands.

[9] On 21st November 2018, upon careful reflection, counsel for the objector conceded that the issues being raised in these proceedings are of trust and should be tried by the Environment and Land Court. The Court agreed with this proposition and directed parties to file submission in respect of distribution of the estate.

Submission by the petitioner

[10] Only the petitioner filed Submissions dated 5th December 2018. She restated the pleadings and emphasized that the claim by the objectors in the protest is one of trust which should be resolved by ELC. In her submissions and mode of distribution, she allocated the objector the property in 1521. The petitioner also submitted that the 2nd Petitioner is of age and that it would be best that the same be issued to Grace Martha Gacheri.

ANALYSIS AND DETERMINATION

Distribution of the Estate

[11] I wish to take note of two matters. The letter by the Chief shows that the 2nd Objector left behind other persons who may or may not be aware of these proceedings. Nonetheless, to obviate any prejudice to any beneficiary, the applicant Ezekiel Kinuu will hold the property as "trustee" on behalf of the estate of the late **M' ITUNGA THIURU** (deceased.)

Deceased was polygamous

[12] Be that as it may, I have considered the modes of distribution proposed by the petitioner and the objector. The deceased herein died intestate leaving behind 2 wives and children. Accordingly, the estate should be distributed in line with section 40 of the Law of Succession Act and section 38 that provides for equal distribution of the estate. The sentiments by the petitioners that Grace Gacheri took care of them and also helped them during the lifetime of the deceased to repay some loan does not place her in any vantage position over the other beneficiaries. It has not been shown that the deceased made a gift to her during his lifetime.

[13] Accordingly, the grant herein is confirmed and the estate of the deceased shall be distributed as hereunder;

a. Parcel No. Abothuguchi/ Katheri 807

To be shared equally amongst;ennifer Nkuene (1st Wife), Mary Karambu, Grace Martha Gaceri, Cornelius Muthuri, Helen Mukiri, Catherine Wanja, Margaret Kagendo & Jane Nyaguthi,

b. Parcel Abothuguchi/ Katheri/1521

To the estate of M' ITUNGA THIURU (deceased) (Ezekiel Kinuu to hold it as "trustee" on behalf and for the benefit of the estate)

c. Each party shall bear own costs.

Dated, signed and delivered in open court at Meru this 4th day of April, 2019

F. GIKONYO

JUDGE

In presence of:

Kibanga for objector

Mutegi holding brief for Mokuu for petitioner

F. GIKONYO

JUDGE