



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 139 OF 1990

In the Matter of the Estate of Erasto M'mbui (Deceased)

ERASTUS KIRIMI E. KAURA.....PETITIONER

VERSUS

M'ITONGA KAURA.....1ST PROTESTOR

DUNCAN GITOBU2ND PROTESTOR

JUDGMENT

[1] ERASTO M'MBUI ("the deceased") to whom this Succession Cause relates died on 12th January 1989. He was survived by his five sons: **M'itonga M'Kaura, James Gitonga E. Kaura, Erastus Kirimi E. Kaura, Silas Mugambi** (deceased) and **Isaac Mugambi** (deceased). His assets are listed as L. R. ABOGETA/L-KITHANGARI/500 and L. R. ABOGETA/L-KITHANGARI/166.

[2] The grant of letters of administration intestate issued were issued on 7th January 1991 to Erastus Kirimi and confirmed on 31st October 2007. On 20th July 2012 the court cancelled the confirmed grant but did not revoke it as the issue in controversy was on distribution of the assets.

[3] Summons for confirmation of the grant dated 19th November 2012 was filed by the petitioner supported by his affidavit sworn on the same date. He proposed that the estate be distributed as follows:

L. R ABOGETA/L-KITHANGARI/500 be shared equally amongst

- 1. Erastus Kirimi E. Kaura**
- 2. M'itonga Kaura**
- 3. Duncan Gitobu**
- 4. James Gitonga**
- 5. Silas Mugambi**

L.R NO. ABOGETA/L- KITHANGARI/166

- 1. Obadiah Riungu - 50ft x 100ft**
- 2. Eliud Murungi - 50ft x 100ft**
- 3. Paul Gitobu Mugambi - 50ft x100ft**
- 4. Zecheus M. Mugambi - 25ft x 100ft**
- 5. James Gitonga E. Kaura - 25ft x 100ft**

6. Erastus Kirimi E. Kauraa - 25ft x100ft

7. Duncan Gitobu - 25ft x 100ft

The balance to be shared equally amongst

a) Erastus Kirimi E. kaura

b) Silas Mugambi

c) James Gitonga

d) M'itonga Kaura

e) Dancan Gitobu

[4] John Kinoti Marangu, son of Isaac Mugambi, filed two affidavits sworn on 15th January and 30th September 2013. He buttressed his opposition to the share of their father going to Duncan Gitobu since he is not the one representing their family. He proposed their father's share to be shared equally amongst Isaac's six sons. Obadiah Riungu in his affidavit sworn on 15th January 2013 stated that he bought 50 by 100 feet from the deceased for a consideration of which he paid.

Submissions

[5] This matter was canvassed by way of written submissions. The petitioner supported his proposed mode of distribution but asserted that the estate of his brother Isaac Mugambi be inherited by him and not Duncan Gitobu.

[6] The protestor submitted that the two parcels of land ought to be distributed equally among the children of the deceased save for Silas Mugambi who died with no issues. That Obadiah Riungu and Eliud Murungi should get their respective shares of 50 x 100 feet and 25 x 100 feet respectively as they bought them directly from the deceased. Once distribution is done the petitioner to give a shares of 50 x 100 feet to Paul Gitobu who he sold to, Duncan Gitobu to give Eliud Murungi a plot measuring 25ft x 100ft being what he sold and James Gitonga to give Zacheus M'mugambi 25 x 100 feet plot he sold.

ANALYSIS AND DETERMINATION

[7] The issue of determination before this court is how the estate of the deceased ought to be distributed after ascertaining rightful beneficiaries and assets of the estate.

[8] In this case, the intestate was survived by his children only. In this case therefore **Section 38 of the Law of Succession Act** applies. the section states as follows:

“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.”

[9] The deceased has five sons and two are deceased that is Silas Mugambi and Isaac Mugambi. Silas left behind no spouse or issue but Isaac left behind his children. His share was initially given to Duncan Gitobu, his son but John Kinoti Marangu proposes that their father's share to be shared equally amongst Isaac's six sons. I have stated before that apart from the six sons of Isaac mentioned there might be other beneficiaries to his estate of which this court may not be aware of. As this cause relates to the estate of Erasto M'Mbui and not Isaac Mugambi, the court may not place special or intense focus on the rightful beneficiaries of the estate of the deceased beneficiary. Thus, injustices may occur. And should a dispute arise amongst the beneficiaries of the deceased beneficiary, such dispute may not be resolved in this cause but in a separate cause in respect of the deceased beneficiary. And it is not far-fetched to state that where courts have attempted to resolve disputes amongst beneficiaries of a deceased beneficiary in the cause of the estate of the deceased, untold delay is normally experienced. Such delay causes injustice to the beneficiaries of the original cause. Accordingly, the court should make an order that the share of the deceased should devolve to all his children equally. Even where names have been provided, the court must ensure that phraseology used in law appears in the order so that should the persons listed not be all children of the deceased beneficiary, the omission will be glaring. Otherwise, where disputes arise, and cannot be resolved at once, the share should be held by the personal representative of the estate of the deceased beneficiary for the estate thereof.

[10] Concerning the assets, it has been stated that the deceased sold part of LR NO. ABOGETA/L-KITHAGARI/166 to Obadiah Riungu and Eliud Murungi measuring 50 x 100 feet and 25 x 100 feet respectively and ought to get those parcels. Their argument was that the deceased had made an advancement which he was yet to complete; he had not issued the said parties with their title deeds. My considered view is that lawful transactions entered into by the deceased are enforceable against the estate of the deceased and the purchasers are entitled to apply for the court to compel the administrators to complete the said transactions. I also opine that such claims should be noted just like liabilities and creditors would be noted for purposes of distribution of the estate. I find and hold that these two parties are entitled to the land they purchased from the deceased.

[11] One other issue: The petitioner, Duncan Gitobu and James Gitonga are said to have sold to Paul Gitobu M'Mugambi, Eliud Murungi and Zacheus M'Mugambi plots measuring 50 x 100 feet, 25 x 100 feet and 25 x 100 feet respectively. Of these acquisitions, I wish to state

the law. **Section 82 of the Law of Succession Act** prohibits disposal and or selling of immovable assets of the estate of the deceased before confirmation of the grant. Any such acquisition is in violation of law and unlawful; and therefore null and void. It may also be a subject of criminal sanction under section 45 of the Law of Succession Act. That is not all; under article 40(6) of the Constitution:-

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

[12] Notably, acquisitions such as these cannot even claim the shield provided under **Section 93 of CAP 160**. In this case, it seems that the beneficiaries had no authority to sell the plots to the alleged purchasers. Accordingly, the court does not give effect to the said transactions.

[13] Consequently the estate of the deceased shall be distributed as follows:

L. R ABOGETA/L-KITHANGARI/500 shall be shared equally amongst:-

- 1. Erastus Kirimi E. Kaura**
- 2. M'itonga Kaura**
- 3. James Gitonga**
- 4. Estate of Isaac Mugambi- to devolve equally to all his children**

L.R NO. ABOGETA/L- KITHANGARI/166

- 1. Obadiah Riungu - 50 x 100 feet**
- 2. Eliud Murungi - 25 x 100 feet**

Balance thereof to be shared equally amongst:-

- 3. Erastus Kirimi E. Kaura**
- 4. M'itonga Kaura**
- 5. James Gitonga**
- 6. Estate of Isaac Mugambi- to devolve to all the children equally**

Dated signed and delivered at Meru in open court on 2nd day of April, 2019.

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F. GIKONYO

JUDGE

In presence of:

Gikunda for petitioner

Kiautha for objector – Mutegi present

Objector present

Petitioner present

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F. GIKONYO

JUDGE