



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 20 OF 2015

(FORMERLY MERU MISC. APPL. NO 606 OF 2013)

IN THE MATTER OF THE ESTATE OF THE LATE JOSPHAT KAJOGI- (DECEASED)

LILIAN KARIMI.....PETITIONER

VERSUS

JAMES RIMUNYA MUTHARA.....PROTESTOR

J U D G E M E N T

1. This cause relates to the estate of the late **JOSPHAT KAJOGI** (deceased) who died intestate on 4th June 2002 resident at Chogoria. He died and left the following children surviving him namely:-

- i. Lilian Karimi Ndiu
- ii. Winfred Kagendo Rachi
- iii. Johnson Gitonga Majogi
- iv. Lucy Gaceri
- v. Millicent Maari Kajugi
- vi. Alex Mugambi
- vii. Evans Mwenda Kajogi &
- viii. Eric Marangu Gichunge

2. The estate of the deceased comprises that property known as **Kiera/East Magutuni/151**.

3. Lilian Karimi Ndio, the Petitioner herein was appointed the administratrix of the estate of the deceased on 7th May 2012 and vide summons for confirmation of grant issued on 5th April, 2017, she applied for confirmation of grant proposing to have the estate (**Kiera/East Magutuni/151**) distributed as follows:-

- i. Lilian Karimi Ndio - 0.9 acres
- ii. Winfred Kagendo Rachi - 0.30 acres
- iii. Johnson Gitonga Majogi - 0.80 acres
- iv. Lucy Gaceri - 0.30 acres
- v. Millicent Kaari Majogi - 0.7 acres

vi. Alex Mugambi - 0.80 acres

vii. Evans Mwenda Kajogi - 0.8 acres

viii. Erick Marangu Gichunge - 1.6 acres

4. The petitioner's application for confirmation met protests from James Rimunya Muthara and Mpuhia Asford Kithara.

5. Mpuhia Asford Kithara in his affidavit of protest sworn on 8th May, 2017 claims to have purchased 0.5 acres from the petitioner on 3rd December, 2012. He however did not turn up for hearing but that notwithstanding his protest really has no basis in law since his claims of purchase contravenes **Section 82 of Law of Succession Act**. The Petitioner had not legal capacity to dispose off any portion of the estate before the grant is confirmed. Any purported sale or contract of sale is void and a nullity in law.

6. The other protestor James Rimunya Muthara in his affidavit of protest sworn on 16th May 2017 states that the deceased was his uncle. He has deposed that the deceased left for Mombasa in the 1950s and returned in 1990 and settled in protestor's home together with his wife, two sons Alex and Evans and daughter Millicent.

7. The protestor further claims that he took care of the deceased before he later relocated to his own property which the property comprising the estate herein.

8. The protestor further alleges that he assisted the deceased in constructing a house in his parcel of land and assisted in meeting his medical expenses when he became unwell in 1995 and taken to Chogoria Hospital.

9. The protestor claims that the deceased called for a meeting on 20th September, 1995 and 15th October, 1995 where he expressed his desire to give him one acre of land as a gift and that he took possession of the 1 acre and has been utilizing it ever since.

10. The evidence tendered by the petitioner and her witnesses during trial in effect did not recognize the protestor's (James Rimunya's) claim on the estate. They all testified that their father, the deceased herein lived in Mombasa most of his adult life and came back home in his old age and was temporarily accommodated by the protestor's family before relocating to his parcel for land.

11. James Rimunya (DW1) on his part testified and I reiterated what he had deposed in his affidavit. He told this court that he went to great lengths to take care of the deceased and his family when they returned from Mombasa. He further stated that he spent money (Kshs.12,000/-) to treat him when he got sick and that it was on the basis of that he was given 1 acre by the deceased himself during his lifetime on a gift and in consideration of the assistance he extended to him.

12. The protestor's claim was corroborated by Fred Mugo (DW2) who testified that he was present when the deceased gave one acre to James Rimunya in consideration of the assistance he had received from the said James Rimunya.

13. This court has considered to protest filed by James Rimunya. The issues for determination in this cause are basically two:-

i. Whether James Rimunya was a dependant of the deceased.

ii. How should the estate be distributed.

14. On the 1st issue, the provisions of **Section 29(b) of the Law of Succession Act** stipulates that a dependant in regard to persons other than wife/wives/spouse and children of the deceased are:-

"Such of the deceased's parents, step parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers, sisters, half brothers, half sisters, as were being maintained by deceased immediately prior to his death....." (Emphasis added)

15. The above description of dependant shows that the protestor's claim is misplaced because his claim is based on the fact that he assisted the deceased prior to his demise rather than other way round. The law does not recognize caretakers or good Samaritans who take care of deceased persons as "**dependants**". The protestor's claim that he paid for medical bills for the deceased may have been good gesture which may have been appreciated by the deceased but the evidence that he gave him one acre in appreciation is not supported by any documentary evidence and what is remaining is simply his word against that of the petitioner. In such a situation this court must find as I hereby do that the claim by James Rimunya withdrawn has not been proved on a balance of probabilities in regard to the claim that he was given an acre as a gift by the deceased.

16. For the above reasons, this court finds that both protests filed herein have no merit and the same are disallowed.

17. On distribution **Section 38 of Law of Succession Act** provides that where a deceased person leaves behind children and no spouse, the estate shall be divided equally among all the surviving children. This court in the premises therefore directs that grant issued on 7th May 2012 as confirmed and the estate comprised in **Kiera/East Magutuni/151** shall be distributed equally among the children as follows:-

i. Lilian Karimi Ndiu

ii. Winfred Kagendo Rachi

iii. Johnson Gitonga Majogi

iv. Lucy Gaceri

v. Millicent Kaari equal shares

vi. Alex Mugambi

vii. Evans Mwenda Kajogi

viii. Erick Marangu Gichunge

This being a family matter, I shall not make any order as to costs.

Dated, signed and delivered at Chuka this 14th day of May, 2019.

R.K. LIMO

JUDGE

14/5/2019

Judgement dated, signed and delivered in the open court in presence of the parties and Kijaro for protestor.

R.K. LIMO

JUDGE

14/5/2019