



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO. 18 OF 2015

(FORMERLY MERU MISC SUCC. CAUSE NO.208 OF 2014)

IN THE MATTER OF THE ESTATE OF M'MURUNGI KANAKANYI (DECEASED)

CATHERINE RUGURU AKASIOUS.....1ST PROTESTOR

DOREEN GATWIRI MIRITI.....2ND PROTESTOR

VERSUS

BRUNO M'THARA M'MURUNGI.....PETITIONER

J U D G M E N T

1.This cause relates to the estate of the late **M'MURUNGI KANAKANYI** who died intestate on 27th December, 1994 resident at Murugi Location. He left the following persons surviving him as per the chief's letter dated 21st December 2011.

- i. Elizabeth Juliano - widow (now deceased)
- ii. Bruno M'Ithara M'Murungi
- iii. Daniel Mburia
- iv. Constansio Mutegi
- v. Nasarina Itheru
- vi. Catherine Ruguru Akasious (daughter in law)
- vii. Judith Mumu

2. The only property listed as comprising the estate is that parcel known as Mwimbi/Murugi/880. This court on 19th September 2018 appointed Bruno M'Thari M'Murungi as the administrator and issued him a grant dated 20th September 2018.

3.The appointed administrator on 13th November 2018 moved this court vide Summons for Confirmation of Grant dated 12th November 2018 for confirmation of the said grant and proposed to have the estate distributed as follows:-

a. Mwimbi/Murugi/1693

- Basilio Kinyua Mutegi - whole

b. Mwimbi/Murugi/1694

- Joscilene Anne Muthoni - whole

c. Mwimbi/Murugi/1695

- Bruno M'Ithari M'Murungi - whole

d. Mwimbi/Murugi/1696

- Mary Ncuguni Daniel - whole

4. The above proposal was opposed by Catherine Ruguru Akasious who filed an affidavit of protest sworn on 5th February, 2019. The gist of the protest was that she was left out and yet she is a daughter in law to the deceased by virtue of having been married to Akasious Miriti, a deceased's son who is also deceased.

5. At the hearing of the protest, the administrator testified that the deceased had expressed his wish on how his estate should be distributed and according that the estate be distributed as follows:-

(a) Mwimbi/Murugi/1693

- Basilio Kinyua Mutegi - whole

His justification is that, Basilio Kinyua is a grandson who took care of the deceased during his old age.

(b) Mwimbi/Murugi/1696

- Mary Ncuguni Daniel - for also having taken care of the deceased during old age.

(c) Mwimbi/Murugi/1694

- Joscilene Anne Muthoni - (purchaser who purchased from Mary Murugi)

(d) Mwimbi/Murugi/1695

- Bruno M'Ithari M'Murungi
- Nazarine Ithiru equal share
- Catherine Ruguru Akasious

6. According to the petitioner, each son got 4.34 acres and that the deceased prior to his death transferred 4.34 acres to 3 sons and gave them title deeds to each. It was his evidence that Basilio Kinyua Mutegi, is a son of his brother Constansio Mutegi who is alive and who also got a share of land during the lifetime of the deceased herein. He has proposed that Basilio Kinyua Mutegi be given one acre because he took care of his late grandfather. He also stated that Mary Ncuguni Daniel - a wife to Daniel Mburia who is son to the deceased should also be given a share because she also took care of the deceased. He however stated that Daniel Mburia got his separate share and should not be given a share in the estate herein.

7. The Petitioner when asked about the late Mary Murugi, stated that Mary Murugi was his late sister and that his late father had given her one acre but could not explain why the deceased did not formalize to transfer like he did to the sons. He justified his proposal to also get a share despite having previously got one insisting that he has worked hard as an administrator to ensure all beneficiaries get their respective shares. He denied the suggestion that Catherine Akasious was married to his late brother Akasious Miriti. He however averred that he had decided to give her a share in order to bring this matter to an end.

8. The protestor on the other hand insisted that she was married to Akasious Miriti and tendered a marriage certificate (D. Exhibit 1) to prove that she was married to the late Akasious Miriti on 20th December 2003. She also tendered official searches of all the properties comprising the estate. She added that her husband died in 2009 after his demise and her brothers in law turned hostile to her forcing her to get police assistance in order to bury her late husband.

9. It was the protestor's case that her deceased husband was the youngest son in the family and having not benefitted from any share from his father during his lifetime he was supposed to get what remained with his father after giving his other sons their respective portions.

10. The protestor further testified that Mary Murugi (deceased) died without any child and that she knew that she sold her share to Joscilene Muthoni but did so after the deceased had died.

11. This court has considered the protest filed herein and the evidence tendered by both the administrator and the protestor. There is no dispute that the deceased herein died intestate and left the following surviving him.

i. Elizabeth Juliano M'Murungi (deceased)

ii. Bruno M'Ithara M'Murungi

iii. Daniel Mburia

iv. Constansio Mutegi

v. Nasarina Itheru

vi. Akasious Miriti (deceased)

vii. Judith Mumu

viii. Mary Murugi (deceased)

12. It is also not in dispute that prior to his death, the deceased had gifted all his sons parcels of land except the late Akasious Miriti. The disputed fact was the protestor's claim that she was a dependant by virtue of her marriage to the late Akasious Miriti but that dispute in my view was settled when the protestor tendered a marriage certificate proving marriage and the fact that the administrator later in the course of proceedings herein changed his mind and proposed to give the protestor at least a share of the estate.

13. The main issue for determination in this cause is who are the dependants of the deceased. Going by the provisions of **Section 29 (a)** the following are dependants;

i. Bruno M'Ithara Murungi

ii. Daniel Mburia

iii. Constansio Mutegi

iv. Nazarina Itheru

v. Luciano Nyaga

vi. Judith Mumu

14. The other dependant going by the provisions of **Section 29(b) of Law of Succession Act** is Catherine Ruguru Akasious by virtue of having been married to Akasious Miriti, a late son of the deceased. It is evident from the evidence on record that while all the sons of the deceased benefited from portions of land gifted to them by their late father during his lifetime, the late Akasious Miriti did not get any share. The protestor therefore deserves a share of the estate based on the fact that she is a dependant because she was legally married to the late Akasious Miriti as per the marriage certificate which she tendered in evidence (D. Exhibit 1)

15. This court has considered the claim of dependency by Mary Ncuguni Daniel and Basilio Kinyua Mutegi. Although the two did not come to court to stake their claim on the estate, the administrator justified their entitlement to a share in the estate on the ground that they assisted the deceased during his old age. The administrator has submitted that the deceased had expressed his wish that the two gets a share of the estate but I find that the said contention is unfounded in law. In the first place, the deceased died intestate. That is factual and there is nothing presented before me to show that he made a will whether oral or written prior to his demise. Secondly in law, dependency is begged on the fact that the deceased must have taken care of a person prior to his demise for that person to qualify to be a dependant under **Section 29 (b)** but it is not the other way round. It could be true that Basilio Kinyua Mutegi and Mary Ncuguni Daniel may have taken care of the deceased which in commendable but in law that in itself does not render them dependants by dint of **Section 29 of Law of Succession Act**.

16. Basilio Kinyua Mutegi and Mary Ncuguni Daniel did not tender any evidence to demonstrate that they were being maintained by the deceased prior to his demise. The husband to Mary Ncuguni (Daniel Mburia), is a son of the deceased herein and he is alive. He is one of the sons who benefitted from a parcel of land gifted to him by the deceased during his lifetime and has no claim in the net estate herein. In the same note, Basilio Kinyua Mutegi, is a son of Constansio Mutegi, who is a son of the deceased who also benefitted from a gift given to him by the deceased *intervivos*. He is also not claiming a share of the estate herein. This court finds that based on the evidence tendered the two that is Basilio Kinyua Mutegi and Mary Ncuguni Daniel are not dependants of the deceased herein. Their benefits if and shall accrue from his father's share and husband's share respectively.

17. This court has been urged to recognize that Joscilene Anne Muthoni is a purchaser of a parcel forming part of the estate having purchased it from one Mary Murugi- a deceased daughter of the deceased. I am however hesitant to do so for two reasons namely:-

i. There is no evidence placed before indicating that there was such a transaction between the said Joscilene Anne Muthoni and Mary Murugi and when that took place. The alleged purchaser did not come to court to stake her claim in the estate. In the absence of any evidence of purchase this court is unable to sustain the claim.

ii. The protestor claimed that the transaction took place after the demise of the deceased and if that is the case, obviously the

transaction would run into legal hurdles by dint of **Sections 55(1) and 82(b) (1) of Law of Succession Act**. In the premises, I find that the claim by the administrator that Joscilene Anne Muthoni should be considered as a beneficiary, is unsustainable in law.

18. In view of the foregoing the following dependants therefore are by law entitled to be considered as beneficiaries or dependants who should get a share of the estate of the deceased herein.

- i. Bruno M'Ithara M'Murungi
- ii. Daniel Mburia
- iii. Constansio Mutegi
- iv. Nasaria Itheru
- v. Catherine Ruguru Akasious &
- vi. Judith Mumu

The estate in this cause comprises the following parcels;

i. Mwimbi/Murugi/1693	-	0.402 Ha
ii. Mwimbi/Murugi/1694	-	0.202 Ha
iii. Mwimbi/Murugi/1695	-	0.413 Ha
iv. Mwimbi/Murugi/1696	-	<u>0.162 Ha</u>
Total acreage	-	1.181 Ha

The total acreage of the estate is 1.181 Ha or 2.893 acres. The administrator in his own admission stated that all the sons of the deceased save for Akasious Miriti (deceased) each got 4.34 acres of land from the deceased in his lifetime. The provisions of **Section 42 of Law of Succession Act** provide that a previous benefit to a dependant should be taken into account in determining what each beneficiary should get from the estate. It is obvious that Bruno M'Ithara Murungi, Daniel Mburia, and Constansio Mutegi having got much more than the net estate herein cannot claim any further share from the estate herein. The net estate measures approximately 2.893 acres and the beneficiaries who missed out should be given even though the portion they will get is far less than what the others got. The beneficiaries who are entitled to the net estate herein are;

- i. Nazarina Itheru
- ii. Catherine Ruguru Akasious &
- iii. Judith Mumu.

In the end, the grant issued to the administrator on 14th March 2018 is hereby confirmed as per the following mode of distribution;

(A) **Mwimbi/Murugi/1693**

Nazarina Itheru - whole

(B) **Mwimbi/Murugi/1694**

Judith Mumu - whole

(C) **Mwimbi/Murugi/1695**

Catherine Ruguru Akasious - whole

(D) **Mwimbi/Murugi/1696**

Judith Mumu - whole

This court has arrived at the above mode of distribution given the fact that parcels comprising estate are so small that it would not make economic sense to subdivide them into equal shares. This being a family matter, I make no order as to costs.

Dated, signed and delivered at Chuka this 11th day of July 2019.

R. K. LIMO

JUDGE

11/7/2019

Judgment dated, signed and delivered in the presence of Protestors in person and in the absence of the Petitioners.

R.K. LIMO

JUDGE

11/7/2019