



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

SUCCESSION CAUSE NO. 53 OF 2016

(FORMERLY MERU SUCCESSION CAUSE NO. 163 OF 2007)

IN THE MATTER OF THE ESTATE OF BUURI IRWARE (DECEASED)

AND

CECILIA KAGENDO MUGO.....PETITIONER/APPLICANT

VERSUS

MORRIS MWENDA STANLEY.....1ST PROTESTOR

EMILY KAGANI NGAL.....2ND PETITIONER

FLORENCE KAWIRA BORE.....3RD PROTESTOR

J U D G M E N T

1. This cause relates to the estate of the late **BUURI IRWARE** who died intestate on 11th November 2004. According to the petition herein filed the deceased left behind the following dependants namely;

- i. Engindia Ciatundu Boore (widow)
- ii. Sebastian Nyaga Boore
- iii. Augustine Njagi Irware
- iv. Cecilia Kagendo Mugo
- v. Nicholas Karani Stanley
- vi. John Makembu
- vii. Harriet Ciakuthi
- viii. Eucilia Stanley
- ix. Moi Stanley
- x. Florence Kawira

2. The estate of the deceased in this cause comprise the following;

- i. Karingani/Muiru/567

- ii. Karingani/Muiru/1719
- iii. Karingani/Muiru/697
- iv. Karingani/Muiru/1720
- v. Karingani/Muiru/775
- vi. Plot No. 231

3. Augustine Njagi Irware, the Petitioner herein was appointed the administrator of the estate of the deceased herein on 15th May 2018 and was issued with a grant for letters of administration on 24th May 2018. He was also granted liberty to move the court for confirmation of grant before the expiry of 6 months statutory period.

4. The Petitioner/Administrator vide Summons for Confirmation of Grant dated 8th October 2018 applied for confirmation of the said grant proposing to have the estate distributed as per paragraph 8 of the Supporting Affidavit sworn on 8th October 2018 but later modified it as per his Supplementary Affidavit, sworn on 7th October 2018 as follows:-

(a) Karingani/Muiru/697 - (11 acres)

- i. Augustine Njagi Irware - 3.748 ha
- ii. Onesmus Muthengi Thirika - 0.5 acre
- iii. Mercy Kendi Njeru - 0.5 acre

(b) Karingani/Muiru/775 (7 acres)

- i. Engindia Ciantundu Bore - 1.8 acres
- ii. Augustine Njagi Irware - 1.8 acres
- iii. Morris Kirimi Rutere - 0.2 acre
- iv. Nicholas Karani Stanley - 1.8 acre
- v. Nancy Gatakaa & Dina Mwendu Nyaga - 1 acre

(c) Karingani/Muiru/1720 - (22 acres)

- i. Justus Mwiti Kanga & Rita Murugi Murangiri - 2.5 acres
- ii. Shammah Morris Gitonga & Doyn Nyatha Gitonga - 1 acre
- iii. Rosemary Nyawira Chabari - 2 acres
- iv. Thomas Mugambi Nyaga & Grace Wanjiku Mwangi - 1.5 acres
- (v) Antony Mugendi Nyaga - 2.5 acres
- (vi) Speed Tech Connections Ltd - 3.5 acres
- (vii) Edwin Mwiti Mutegi - 3.5 acres
- (viii) Edwin Mwiathi Mutegi - 1.5 acres
- (ix) Dominic Muchiri - 0.25 acres
- (x) Joseph Muriithi Kaburu - 0.25 acres
- (xi) Augustine Njagi Irware - 5.085 acres
- (xii) Mary Jane Kambura Albino - 1 acre

(d) Karingani/Muiru/567 - 6.2 ha (15.5 acres)

- i. Dickson Kinyua Njue - 2 acres
- ii. Cecilia Kagendo Mugo - 2 acres
- iii. Harriet Ciakuthi Buuri - 2 acres
- iv. Nicholas Karani Stanley Buuri - 0.477 ha
- v. Grace Maringa - 0.5 acre
- vi. Augustine Njagi Irware - 4.469 acres

(e) Karingani/Mariani/231

Augustine Njagi Irware - whole

(f) Karingani/Mariani/3829

- i. Barnabas Kariuki Gatheka - 1 acre
- ii. Joy Kageni - 1.3 acres
- iii. Nicholas Karani Stanley Buuri - 1.78 acres
- iv. Michael Irungu Njuguna & v. Davy Mwangi - 0.89 acre
- vi. Jane Kananu Kaburu - 0.89 acres

(g) Karingani Muiru/1719 - 1.21 ha (3 acres)

- i. James Kamau Mwangi & ii. Pluto Nkatha Kinoti - 1.94 acres
- iii. Rosemary Nyawira Chabari - 1 acre

5. The administrator's proposal met resistance from Morris Mwenda Stanley who filed an affidavit of protest sworn on 8th February 2019. The main basis of his protest is that he is a grandson to the deceased herein and a daughter of Cecilia Kagendo Mugo who was a daughter of the deceased. According to him the surviving dependants to the deceased are as follows:-

- i. Engindia Ciantundu Boore - widow
- ii. Sebastian Nyaga Buuri
- iii. Augustine Njagi Irware
- iv. Nicholas Karani Stanley
- v. John Makembu
- vi. Harriet Ciakuthi
- vii. Emily Kageni Ngai
- viii. Moi Stanley
- ix. Florence Kawira Bore
- x. Morris Mwenda Stanley

6. The protestor claimed that the deceased took care of him and educated him and that he showed a portion of land in L.R. Karingani/Muiru/775 where he put up a house which he claims was demolished in 2012 by the administrator herein.

7. In his evidence in this court, the 1st protestor claimed that the deceased was his father and that Engindia Ciantundu was his mother.

8. Emily Kageni (DW3) one of the daughters of the deceased also testified and told this court that the deceased had gifted his sons with parcels of land in his lifetime. She claimed that the deceased left parcel No.Karingani/Muiru/775 for the daughters. She further added that 3 of her brothers have since died and named the following as having passed on;

i. Sebastian Nyaga

ii. John Mukembu

iii. Daniel Moi

She added that Sebastian left behind two children named Mwende and Munene.

9. Florence Kawira (DW4) testified and supported the evidence of DW2 and DW3. She confirmed that Morris was brought up by the deceased.

10. Engidia Ciatundu Bore, (DW1) the widow to the deceased testified and told this court that she was the only wife to the deceased that they were blessed with 10 children; 3 of whom are deceased. She named the alive children as;

i. Cecilia Kagendo

ii. Harriet Ciakuthi

iii. Emily Kageni

iv. Florence Kawira

v. Ansilia Muthoni

vi. Augustine Njagi

vii. Albert Karani

11. The administrator in his evidence to this court denied the claims by the protestors that the deceased had left parcel No. 775 to the daughters. He conceded that his mother was alive and had known Morris since he was young. He further testified that he had not given a share to Emily and Florence a share claiming that the two would benefit from share going to his mother.

12. Analysis and determination.

This court has considered both the Petitioner's case on one hand and the protestor's case. I have also considered the evidence by the widow who despite her advanced age, made efforts to come to court with a view to being heard.

13. There is no dispute that the estate of the deceased comprises the following assets namely;

i. Karingani/Muiru/567 - 15.5 acres (Approx)

ii. Karingani/Muiru/1719 - 3 acres (Approx)

iii. Karingani/Muiru/1720 - 22.4 acres (Approx)

iv. Karingani/Muiru/697 - 11 acres (Approx)

v. Karingani/Muiru/775 - 7 acres (Approx)

vi. Karingani/Muiru/3829 - 7 acres

vii. Karingani/Mariani/231

14. The only issues arising from the protest are as follows:-

i. Whether Morris Mwenda Stanley is a dependant

ii. What is the lawful mode of distribution of the estate herein.

15. (i) Whether Morris Mwenda Stanley is a dependant

The meaning of a '*dependant*' is provided under **Section 29** of **Law of Succession Act**. Children and spouses are automatic dependants and they need not prove dependency to be considered a dependant or a beneficiary. The grandchildren as per **Section 29(b)** on the same section on the other hand has to prove that the deceased immediately prior to his death, maintained or provided for them in order to qualify to be considered as a dependant. Dependency is a matter of fact which must be proved to the required standard (balance of probabilities). The burden of proof lies on whoever alleges as stipulated under **Section 107** of the **Evidence Act**. The 1st protestor (Morris Mwenda) had that burden in my view. He claims that the deceased took care of him but did not indicate when the deceased did that. He also says he was shown where to construct a house which he claims was maliciously destroyed but there is no evidence to prove that. This court also found his testimony that he is a son to the deceased to be misleading. He did not mention that his mother Cecilia Kagendo is alive and should be claiming any inheritary rights from her instead of the deceased herein. This court finds that the 1st protestor has failed to establish and prove the question of dependency to the required standard in law. His right to inherit hinges on share given to Cecilia Kagendo.

16. (i) Distribution of the estate of the deceased herein

Having found who the dependants and what the estate comprise the only issue remaining is the mode of distribution of the estate there is no dispute that the deceased left behind a surviving widow and seven children. This court was told that one of the deceased children Sebastian Nyaga left behind 2 children Mwende and Munene. The two grandchildren are considered dependants because obviously they should get their father's share and where their late father left them living.

17. The mode of distribution provided where a deceased dies leaving a surviving spouse and children is provided for **Section 35** of **Law Succession Act**. The law provides that the surviving spouse shall have life interest on the net estate and upon the end of the life interest the children shall have equal share. This court noted that the widow of the deceased is quite advanced in age and giving her life interest on the estate may not meet the ends of justice. This court finds that justice will be served if she is added as a unit and given her own share where she currently leaves so that she can do whatever she wishes to her share as she pleaded to this court to be allowed to do what she wishes with that share. I looked at her frailty due to her advanced age and I believe that substantial justice as espoused under Article **159 (d)** of the **Constitution** will be served if I grant her her wish.

18. The beneficiaries/dependants entitled to as share of the estate are therefore as follows:

- i. Engidia Ciantundu Boore
- ii. Harriet Ciakuthi
- iii. Emily Kageni
- iv. Florence Kawira
- v. Ansilia Muthoni
- vi. Augustine Njagi Irware
- vii. Albert Karani also referred to as Nicholas Karani Stanley Buuri
- viii. Dyna Mwende & Nicholas Munene
- ix. Cecilia Kagendo Mugo.

This court was not given exact acreage of 2 parcel namely;

- (i) Karingani/Muiru/3829
- (ii) Karingani/Mariani/231

The administrator's proposal in the mode of distribution suggest that parcel No.3829 is almost 7 acres but he gave no glue on parcel No.231. He only suggested that he should be given the entire portion. His proposed mode of distribution is skewed in his favour and obviously discriminative against the other beneficiaries. The declared total acreage of the estate is approximately 66 acres. This means that each beneficiary should get approximately 7.3 acres.

In order to ensure equitable distribution, the grant issued on 15th May 2018 is hereby confirmed and the estate shall be distributed as follows:-

(a) Karingani/Muiru/775 - (7 acres)

Engidia Ciantundu Bore - whole

(b) Karingani Muiru/1720 - (22.4 acres)

- (i) Augustine Njagi Irware - 4 acres
- (ii) Nicholas Karani Stanley Buuri - 3 acres
- (ii) Cecilia Kagendo - 6 acres for her own benefit and in trust for Morris Mwenda
- (iv) Emily Kageni - 3 acres
- (v) Ansilia Muthoni - 7.373 acres

(c) Karingani/Muiru/567 - (15.5 acres)

- (i) Nicholas Karani - 4 acres
- (ii) Dyna Mwende & Nicholas Munene - 7.3 acres jointly
- (iii) Florence Kawira - 3.7 acres

(d) Karingani/Muiru/697 - (11 acres)

- (i) Harriet Ciaguthie - 7 acres
- (ii) Emily Kageni - 4 acres

(e) Karingani/Muiru/1719 (3 acres)

Florence Kawira - whole

(f) Karingani/Muiru/3829

- (i) Florence Kawira - 1 acre
- (ii) Cecilia Kagendo - 1 acre
- (iii) Augustine Njagi Irware - 3 acres
- (iv) Engindia Ciantundu Bore - 1 acre

(g) Karingani/Mariani/231

- (i) Harriet Ciakuthi Buuri, (ii) Emily Kageni, (iii) Florence Kawira & (iv) Ansilia Muthoni equal share
- (v) Augustine Njagi Irware & (vi) Nicholas Karani Stanley
- (vii) Dyna Mwende & Nicholas Munene jointly
- (viii) Cecilia Kagendo Mugo

I also direct that the Deputy Registrar of this court shall execute requisite documents to facilitate transmission on behalf of any beneficiary who may be reluctant to execute the documents. On the same breathe, I direct the Land Registrar to dispense with production of pin and other documents from beneficiaries who may be reluctant to co operate to bring this matter to an end. The District Surveyor shall be provided with security from Chuka Police Station in carrying out subdivision as per the certificate of confirmation issued hereby.

The surveyors fees shall be paid equally by all the beneficiaries. I will not make any order as to costs as this is a family matter.

Dated, signed and delivered at Chuka on 7th day of October 2019.

R.K. LIMO

JUDGE

7/10/2019

Judgement dated signed and delivered in the open court in presence of the Petitioner/administrator, the 1st protestor, 2nd protestor and 3rd protestor and Engindia Ciantundu Boore.

R.K. LIMO

JUDGE

7/10/2019