



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 14 OF 2016

IN THE MATTER OF THE ESTATE OF PKB (DECEASED)

SNK.....PETITIONER

VERSUS

WKK.....OBJECTOR

J U D G M E N T

1. **PKB (“the deceased”)** died on 14/11/2015. According to the letter of the area Chief dated 9/12/2015, the deceased left behind 2 wives, 4 sons and 5 daughters. These were set out as follows: -

a) **AK - 1st Wife (divorced)**

b) **SN - 2nd Wife**

c) **WK - Son**

d) **KK - Daughter**

e) **TK - Son**

f) **KK - Daughter**

g) **MK - Daughter**

h) **FK - Daughter**

i) **MK - Son**

j) **MK - Son (Deceased)**

h) **KK - Daughter**

2. **SNK (“the petitioner”)** petitioned for Letters of Administration on 14/1/2016 listing the beneficiaries as per the letter of the Chief. She also set out the following as the properties forming the estate of the deceased; **Kangeta Adjudication Section Plot Nos. [particulars withheld]**

3. On 6/6/2016, **WKK (“the objector”)** filed an objection to the taking out of the present proceedings by the petitioner on the grounds that the petitioner had failed to disclose the deceased’s 1st family.

4. By the consent of the parties, on 31/01/2017 the Court appointed the petitioner and the objector as joint administrators of the estate. It was directed that the petitioner does apply for confirmation and if the objector is not agreeable to the mode of proposed distribution, he does file a protest thereto. The Court also allowed the parties to file affidavit evidence on which the deponents thereof were to be cross-examined on.

5. The petitioner filed her Summons for Confirmation of grant on 6/04/2017. She stated that she and the deceased had jointly acquired **Parcel No. [particulars withheld]**. That she was the legitimate owner of **Parcel No. [particulars withheld]**, which has an airtel booster which is paid for on a yearly basis.
6. The petitioner alleged that, **Parcel No. [particulars withheld]**, belonged to **David Mbirithu** who had bought the same from the deceased during his lifetime. That **Parcel No. [particulars withheld]** had been sold to **Joshua Kimathi Muyuri** during the lifetime of the deceased.
7. The petitioner also filed several affidavit evidence by her witnesses in support of her case. **David Mbirithu** averred that he bought **Parcel No. [particulars withheld]**, from the deceased during his lifetime at a consideration of Kshs.540,000/=. That he even gave Kshs.30,000/- freely for the burial of the deceased.
8. **JKI** and **JMM** swore affidavits in support of the confirmation of grant and averred that; the objector and his siblings left their home (plot no. **[particulars withheld]**, in 1992 and went to live with their mother in Isiolo, that **JK** was born out of marriage but was brought home during the deceased's lifetime, that **GM** was born outside the marriage by the deceased with a woman called **M** but the deceased had taken care of him and that **JM** was a son of the deceased's son **RM (deceased)**.
9. The two averred that ever since 1992, none of the members of the 1st family had ever used any part of the deceased's land. That the deceased's intention was that the monies from the Airtel booster be divided amongst all his children. That **Plot No. [particulars withheld]**, was purchased by the deceased jointly with the petitioner and that the deceased had sold **Plot No. [particulars withheld]**, to **David Mbirithu** when the deceased was sick. The two supported the mode of distribution proposed by the petitioner.
10. The objector filed his protest to the summons for confirmation of grant vide his affidavit of 15/5/2017. He averred that the 1st wife's matrimonial home was **Plot No. [particulars withheld]** and that all her children were brought up there. That the 2nd, family's matrimonial home was **Plot No. [particulars withheld]**. He denied the sale of **Plot [particulars withheld]**. He stated that **Plot No. [particulars withheld]** had been allocated by the deceased to **JKK**. He admitted that **Plot No. [particulars withheld]** was sold by the deceased during his lifetime to **JKM**. He denied that his mother, the 1st wife had been divorced by the deceased. He gave his own mode of distribution which was contra that of the petitioner. He further contended that the **[particulars withheld]** Clan to which the parties belong had settled the issue of distribution of the deceased's estate. He produced the minutes dated 4/5/2016 in support of his contention.
11. The objector had several witnesses swear and file their affidavit evidence in his support. **Isaiah Kalunyu**, and **Joseph Mirika M'Mucheke** the Secretary and Member of the **[particulars withheld]** Clan, respectively together with **IMM**, the deceased's brother swore affidavits in support of the objector's case. They averred that the 1st house of **AKK** was allocated **Plot Nos. [particulars withheld]** while that of the petitioner was allocated **Plot No. [particulars withheld]**. They supported the minutes of the Amaku Clan annexed to the objector's protest. They also contended that **JKK** should be allocated **Plot No. [particulars withheld]** as the deceased had directed so.
12. On 23/9/2019, when the matter came up for trial, **Mr. Basilio** and **Mr. Mutembei**, Advocates for the objector and the petitioner, respectively informed the Court that the matter should be determined on the affidavits on record and submissions. Further, the Court had, on 30/5/2018, ordered that the Deputy Registrar do visit the estate property and make a report. This she did and made a report dated 7/8/2018 which is on record.
13. The parties filed their respective submissions which this Court has considered. The Court has also considered all the affidavits on record and the report of the Deputy Registrar dated 7/8/2018.
14. From the record and the submissions of learned counsel, the main issues for determination are; ***whether the deceased settled or divided his property during his lifetime, who the beneficiaries of the deceased are, what constitutes the estate of the deceased, and how the estate of the deceased should be distributed.***
15. From the outset, the Court takes caution that none of the affidavits were ever tested with cross-examination at the option of the parties. Further, the Court takes into account that the deceased was a polygamist.
16. On the first issue, it was the objector's contention that the deceased had settled his family before his demise. That the 1st family was settled on **Plot Nos. [particulars withheld]** and the 2nd family on **Plot No. [particulars withheld]**. He also alleged that **JKK** was settled on **Plot No. [particulars withheld]**.
17. The said allegations were denied by the petitioner and her witnesses. They alleged that since 1992, **Plot No. [particulars withheld]** has been under the occupation of the petitioner. That since then, she has extensively developed the same and that that is where the deceased left her. That the objector and his siblings left that property in 1992 and went to live with their mother in Isiolo. There was no rejoinder by the objector.
18. The Court observes that, whilst the objector did not deny the petitioner's allegations, he did not state when (the date) the alleged settlement was effected by the deceased, whether the alleged settlement was within three months of the deceased's demise or not, who was present at the time and whether the said beneficiaries had settled or occupied the respective portions as alleged.
19. The Deputy Registrar visited the ground and filed her report dated 7/8/2018. From the report, the allegations of the objector were unsupported by what the registrar found on the ground. Rather, the report agreed with the contention by the petitioner that **Plot Nos. [particulars withheld]** was in the occupation of the petitioner and her children and had been extensively developed by her.
20. Accordingly, the answer to the first issue is in the negative, the deceased had not settled his families during his lifetime.

21. The second issue is who the beneficiaries of the deceased are. All the beneficiaries are agreed upon save for two; **JM, and GM**.
22. According to the objector, the beneficiaries of the deceased are those set out in the letter of introduction by the area Chief dated 9/12/2015. However, on her part, the petitioner contended that **JM and GM** are also beneficiaries. That **JM** was a son of her late son **RM**. That the said **M** was now aged 10 years. She also contended that **GM** was born to the deceased out of wedlock to a woman by the name **M**.
23. As already stated, the statements made on oath by the combatants were never tested. The general rule is that, he who alleges must prove (*see section 107 of the Evidence Act*). As regards **JM**, there was no evidence to show that he was born to a son of the deceased. The objector stated that **RM** died childless when in form 4. It was expected of the petitioner to produce the Birth Certificate or other documents to prove her allegations other than just making mere allegations. This she did not do.
24. As regards **GM**, there was no evidence to show who he was. Unlike **JKK** whom the parties were in agreement that although she was born out of wedlock, the deceased received her into his family during his lifetime. That was not the same with **GM**. The woman by the name **M** did not swear any affidavit to confirm the allegation that she gave birth to **G** through the deceased. Further, it was not stated when and where the said **GM** was born, whether he was an adult or still a minor. To my mind, allegations were not proved.
25. In any event, it is the petitioner herself who procured the Chief's letter that was used to commence these proceedings. If those two were beneficiaries of the estate, why didn't she reject the letter and insist that their names be included in that letter. To my mind, the inclusion of the two was an attempt by the petitioner to include strangers into the estate so that she could defeat the interests of the 1st family. I reject the same.
26. The 3rd issue is what constitutes the estate of the deceased. All the properties are admitted to constitute the estate save for three, to wit **Plot Nos. [particulars withheld]**.
27. Both the petitioner and the objector were in agreement that **JKM** purchased **Plot No. [particulars withheld]** from the deceased during the latter's lifetime. An agreement dated 16/7/2015 was produced to back that contention. Accordingly, that property is not available for distribution. It will be distributed to the said **JKM**.
28. As regards **Plot No. [particulars withheld]**, the objector contended that it had been earmarked for **JKK**. On the other hand the petitioner contended that the deceased had sold it to **David Mbirithu** during his lifetime. **David Mbirithu** himself swore an affidavit and alleged that, he purchased the property from the deceased when the latter was sick. That he paid Kshs. 540,000/- for it and that he had paid the deceased Kshs.40,000/- in May, 2015 for his treatment. That the deceased died before he could execute documents for the transfer of the said property.
29. There was no agreement that was produced to back the allegations of the sale of **Plot No. 2804 to David Mbirithu**. The deceased died on 14/11/2015. He had on 16/7/2015 executed an agreement for sale of **Plot No. [particulars withheld] to JKM** for Kshs.270,000/-. How could he sell **Plot No. [particulars withheld]** for Kshs.540,000/- and never execute a similar agreement for the same?
30. In any event, there was no evidence that was produced to show that **David Mbirithu** paid the alleged sum of Kshs.540,000/- or any part thereof to the deceased. His claim was a pure fraud on the estate with the connivance of the petitioner. I reject the same and hold that the property properly belongs to the estate.
31. The other property is **Plot No. [particulars withheld]**. The petitioner alleged that she purchased the same with the deceased. That in the circumstances it belongs to her. The petitioner produced some documents to back her claim. On his part, the objector contended that it was bought by the deceased in order to settle the petitioner and her children thereon.
32. I have seen the agreement dated 12/8/1985 between **Samuel Ithirai** on the one part and the deceased and the petitioner on other. It was for the sale by the former and purchase by the latter of the subject property. The purchase price was for Kshs. 9,000/- which had already been paid. There is an acknowledgement of receipt of Kshs.9,000/- by the said **Samuel Ithirai** made on 10/8/1985. It was for the purchase of the subject property by the deceased. The money was paid by the deceased alone. There is no consideration by the petitioner for the purchase of the said property. It may as well be that the deceased wanted to include the petitioner in the sale agreement because he wanted to settle her there as contended by the objector.
33. In the circumstances, I am of the view and so hold that, the petitioner did not contribute anything in the acquisition of **Plot No. [particulars withheld]**. That by having the name of the petitioner included in the sale agreement for that property, the deceased wished to settle her and her children thereon. Of course this was not to be as the 1st wife run away and left **Plot No. [particulars withheld]** which the petitioner entered and occupied.
34. Accordingly, the property belonged to the deceased and is available for distribution.
35. The last issue is, how should the estate be distributed? In answering this question, the Court will take in consideration the following factors:-
- a) that the deceased died intestate;
 - b) that the deceased was polygamous and left behind two families. In that regard, the estate has to be distributed in accordance with **section 40 of the Law of Succession Act, Cap 160 of the Laws of Kenya**;
 - c) that the first wife **AK** left the deceased or was divorced in the 1990s which led to the deceased marrying the 2nd wife, the

petitioner;

d) that although the first family initially lived on **Plot No. [particulars withheld]**, after the 1st wife left the deceased and went to live in Isiolo, her children followed her there in or about 1992;

e) the petitioner has lived with her children on **Plot No. [particulars withheld]** for over 30 years now and has extensively developed the same;

f) that due to the existence of an Airtel booster on **Plot No. [particulars withheld]**, the same is more valuable than all the other properties of the estate. In this regard, those getting the other less valuable portions have to be compensated accordingly;

g) that the parties did not file any valuations for the properties. The values of the properties are therefore at large;

h) that **Jerusha Kagendo Kaanga** may have been given **Plot No. [particulars withheld]** by the deceased during his lifetime and she had constructed a timber house thereon but was evicted therefrom by goons at the instance of the petitioner; and

i) that there is extreme animosity between the two families and there is a need to separate them to avoid incessant and frequent frictions between the members thereof.

36. For avoidance of doubt, the beneficiaries of the estate of the deceased are:-

a) 1st House

i) WKK

ii) MKP

iii) MTK

iv) JKK

b) 2nd House

i) SNK (2nd Wife)

ii) AKK

iii) CMK

iv) FKK

v) MMK.

37. Accordingly, the estate of the deceased is distributed as follows: -

a) Plot No. Kangeta/Kangeta/[particulars withheld] - 8.80 acres

i) SNK

ii) AKK

iii) FKK

iv) CMK

v) MMK - To share equally

b) Plot No. Kangeta/ Kangeta/[particulars withheld] - (not known)

i) WKK

ii) MTK

iii) MKK - To share equally

c) Plot No. Kangeta/ Kangeta/[particulars withheld] - 2.5acres

i) WKK

ii) MTK

iii) MKK

iv) JKK - To share equally

d) Plot No. Kangeta/Kangeta/[particulars withheld] - 0.69 acres

JKK

e) Plot No. Kangeta/Kangeta/[particulars withheld]

JKM

f) Plot No. Kangeta/Kangeta/[particulars withheld] - 1.5 acres

i) WKK

ii) MTK

iii) MKK To share equally

It is so ordered.

DATED and **DELIVERED** at Meru this 14th day of November, 2019.

A. MABEYA

JUDGE