



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**SUCCESSION CAUSE NO. 614 OF 2015**

**IN THE MATTER OF THE ESTATE OF THE LATE THAMBU BAIMUNDI (DECEASED)**

**JANET ITHIRU.....ADMINISTRATOR/APPLICANT**

**VERSUS**

**DAVID NJIRU MUGWIKA.....PROTESTOR**

**J U D G E M E N T**

1. This cause relates to the estate of the late **THAMBU BAIMUNDI** (deceased) who died on unknown date domiciled at Ganga Location, Chogoria. David Njeru Stanley the Petitioner in this cause was initially granted the letters of administration on 22<sup>nd</sup> August 2011. That grant was later revoked by this court and Janet Ithiru was issued with a grant on 9<sup>th</sup> October 2017.

2. The estate of the deceased herein comprised the following property:-

1. Mwimbi/South Mugumango/41 measuring approximately 4.5 acres

3. The administratrix in her Summons for Confirmation of Grant dated 22<sup>nd</sup> January 2018 listed the following persons as dependants:-

i. Janet Ithiru

ii. Benard Kamundi (deceased but survived by a wife and children)

iii. Daniel Njiru

iv. Aniel Njiru (deceased but survived by daughter)

v. Samwel Kaburu (deceased but survived by a daughter)

She proposes to have the estate distributed as follows:

i. Janet Ithiru - 1.75 acres

ii. Rosemary Kirumi (niece to Benard Kabundi) - 1.75 acres to hold in trust for herself and her son,

iii. Pauline Wawira - 0.25 acre

iv. Daniel Njiru Kalarwa - 0.5 acre

v. Caroline Kawira - 0.25 acre

4. The administratrix, in her supporting affidavit has deposed that the deceased died on 6<sup>th</sup> July 1987 and stated that though she has known David Njeru Mugwika (the protestor herein) for long, she denies that he is a son of the deceased and claims that she is older than him and therefore could have known that he was a son of the deceased if he was one. According to her the only children of the deceased who are

still alive are herself and Daniel Njiru. She further depones that she knows the protestor's mother as Marion Riungu and that the said Marion Riungu was never married to her late father the deceased herein.

5. The administratrix in her oral evidence in court testified that she is 90 years old now and saw the protestor grow up. She testified that the protestor was in the same school with her only that he was in the lower primary while she was in upper primary school at Kiamaugu Primary School. According to her the protestor has never built a house or even ploughed any part of the estate. He further claimed that her late father (deceased) did not take care of him or even took him for circumcision ceremony which he would have ordinarily done if the protestor was his son.

6. The administratrix has pointed that the clan met sometime in 2011 and imposed the protestor on them with no evidence that he was a son of the deceased. She discredits the evidence of Daniel Njiru stating that he cannot be in a position to know the status of the protestor in the family as he is young.

7. The position taken by the administratrix was supported by Beatrice Mugambi (PW2) who testified that her husband was a brother to the deceased. She told this court that she had never known the protestor to be connected to the deceased and that Marion Mugwika- deceased mother to the protestor was not a wife to the deceased herein. According to her the deceased herein had three wives namely:-

- i. Agnes Kanga - (deceased)
- ii. Naomi Mugai - (deceased) &
- iii. Brenda Mugai - (deceased)

The surviving dependants of the deceased according to her are Janet Ithiru- Daniel Njiru Kararwa, Rosemary Kirumi (daughter in law) and 8 grandchildren. She further testified that the deceased was a member of salvation Army church and that David Njeru did not take the name Stanley or Kalarwa which are the names connected to the deceased in this cause.

8. Rosemary Kirumi (PW3) on her part testified that she was a daughter in law to the deceased by virtue of having been married to Benard Kamundi (a son of the deceased who is also now deceased). She stated that she was married to Benard Kamundi Stanley (deceased son of deceased herein) in 1978. According to her the protestor is not a son to the deceased as she did not find him at the homestead of the deceased when she got married to that family. She claimed that when she got married she only found Micheni Stanley, Nthiga Stanley, Aniel and that those were the only sons of the deceased she knew.

9. In her written submissions through Counsel the administratrix insists that protestor is not a son to the deceased. She asserts that the protestor's Identity Card do not reflect the name of the deceased. She contends that the dedication card was not authenticated by anyone from the church and has urged this court to find the protestor's evidence unreliable.

10. She submits that as far as she is concerned the only beneficiaries are as follows:-

- i. Janet Ithiru
- ii. Rosemary Kirumi (wife Benard Kabundi)
- iii. Daniel Njiru
- iv. Lucy Wakuthi
- Polly Kawira
- Esther Kathambi
- Ann Kaimuri
- Janet Kaari
- Mwaniki Njeru - Grandchildren

She submits that the estate should be distributed as follows:-

- i. Janet Ithiru - 0.9 acre
- ii. Rosemary Kirumi - 0.9 acre
- iii. Daniel Njiru - 0.9. acre
- iv. Lucy Wakuthi

Polly Kawira

Esther Kathambi

Ann Kaimuru

Janet Kaari

Mwaniki Njeru - 0.9 acre

11. On the other hand, the protestor in an affidavit sworn on 28<sup>th</sup> May 2018 has protested to the proposed mode of distribution by the administratrix. He has deposed that he is a son to the deceased who was a polygamous man with the following 3 houses:-

1<sup>st</sup> House - Marion Riungu who had two children David Njeru and Sarah Karinchugu.

2nd House- Belinda Ithima who had four children namely;

i. Kini Stanely (deceased)

ii. Benard Kamundi (deceased)

iii. Micheni Stanley (deceased)

iv. Ndiga Stanley (deceased)

v. 3<sup>rd</sup> House- Naomi Mugai who had 3 children namely:-

(i) Daniel Njiru Kalarwa

(ii) Samwel (deceased)

(iii) Murungi (deceased)

12. The protestor has proposed that the estate should be distributed according to the houses and that each house should get 1.5 acres each.

13. He has asserted that the deceased was a member of Salvation Army Church and that he took him for baptism there in 1941 while his brother Daniel Njiru was baptized in 1949.

14. The protestor has claimed that in 2011 he learned that his brother Micheni Stanley had sold the land comprising the estate and after a clan meeting he was given a go-ahead to recover the land.

15. At the hearing of protest, the protestor acknowledged that Janet Ithiru (administratrix) is also a child of the deceased and that he was brought up by Naomi. He told this court that he grew up with the administratrix and went to school together at Kariakomo Primary School. When challenged to show his identity Card to this court during hearing of his protest he claimed that he had left it at home.

16. He further stated that he was born in 1941 and was aged 78 years old. He testified that he obtained his Identity Card in 1979 and that the name Mugwika is a name he took from his maternal uncle who gave him a parcel of land in 1972. He further conceded that he did not reside in the estate though he claimed that he did so in the past.

17. The protestor further conceded under cross-examination that though he was baptized in 1941 after he was born the dedication card he has exhibited was issued only recently when this cause was pending for hearing and that he got the card because he wanted to get recognition from the deceased family.

18. Daniel Njiru Kalarwa (DW2) a son to the deceased testified and supported the protestor's claim. He faulted the administratrix for trying to disinherit the protestor whom he recognized as his brother. He stated that the family met and decided to give the protestor their blessing to pursue succession proceedings in respect to the estate of their late father, the deceased herein. He further accused his sister in law Rosemary Kirumi for secretly selling part of the estate to one Purity Kaari and that the said Purity Kaari is the cause of division in their family. He stated that he was forced out of the estate by the said Rosemary Kirumi and had to seek shelter from his aunt Fridah Kaari.

19. When pressed in cross-examination, the witness conceded that the protestor has always lived at his maternal grandfather's place and only used to visit them. He further stated that the protestor and his family still live there to date because he was given some portion of land by his maternal grandfather who brought him up as his own son. He however stated that the protestor should get a share of the estate of the deceased.

20. Fridah Kaari (DW3) testified and also supported the protestor's claim on the estate. She accused Rosemary Kirumi of trying to chase away all the sons of the deceased so that she can monopolize the estate. She stated that her mother was sister to the deceased and therefore

an uncle to her adding that the deceased used to say that the protestor was his son. She confirmed that she gave shelter to Daniel Njiru and has been living with her since 2015 after he was chased away from the estate.

21. In his submission through counsel the protestor has asserted that he should not be disinherited on account of not using the name of deceased pointing out that even Janet Ithiru does not use any of the names associated with the deceased. He further points out that the other sons Daniel Njiru Kalarwa and Benard Kamundi Stanley also use different names which he submits are normal in polygamous marriages. He contends that the names he uses in his Identity Card cannot be used to determine the issue of paternity. He submits that his witnesses were credible and recognized the protestor as son to deceased. He contends that the estate should be distributed equally among all the surviving children of the deceased.

22. The protestor has submitted that he was baptized at Salvation Army Church just like his brother Daniel Njiru Kalarwa. He contends that his baptismal card he tendered as evidence indicates that the deceased was his father. He further contends that even the clan and other family members recognized him that is why he was mandated to pursue succession proceedings of the estate of the deceased after Benard Kamundi Stanley had attempted to disinherit other beneficiaries. He alleges that the administratrix changed her position after stating on oath that Rosemary Kirumi persuaded her to disown the protestor so that he can be locked out. He submitted that the same witness stated that she was forced to thumb print a statement which had already been prepared.

23. The protestor has submitted that he is a son of the deceased and this court should note that owing to the fact that the deceased was polygamous it is normal to find some children trying to lock out others from distribution of the estate and has contended that in this cause Rosemary Kirumi intends to get a large share so that she can transfer a share to a purchaser who had paid her secretly. The protestor has in an interest twist submitted that the estate should be distributed as follows:-

- a) Janet Ithiru - 1.75 acres
- b) Rosemary Kirumi - 1.75 acres
- c) Pauline Wawira - 0.25 acres
- d) Daniel Njiru - 0.3 acres
- e) Caroline Kawira - 0.25 acres

The proposal shows that he has not proposed any share to himself despite spending quite some time and resources claiming that he is entitled to a share as a son to the deceased.

#### **24. Analysis and Determination:**

This court has considered both the administratrix's case as well as the protestor's case. The main issue in this matter is whether the protestor is a dependant within the meaning of **Section 29 of Law of Succession Act**.

25. The position of the law in regard to **(Section 29 (a))** is that a child to a deceased person is automatically considered a dependant whether or not the deceased catered for the person or not. Any other person claiming dependency under **Section 29 (b)** must prove that the deceased took care of him/her immediately prior to his death.

26. The protestor in this matter is claiming pendency under **Section 29(a)** of the **Law of Succession Act** because he is claiming that he is a son to the deceased, a claim that the administratrix vehemently denies. The legal position is that where there is such contestation whoever alleges must prove. That is what **Section 107** of the **Evidence Act** (Cap 80 Law of Kenya) provides. The standard of proof required in civil matters is on a balance of probabilities and so this court is required to determine on a balance of probabilities of the protestor is a son of the deceased.

27. The evidence tendered before me by witnesses from both sides clearly show that the protestor did not stay with the deceased or has ever resided or utilized any part of the estate. There is evidence that the protestor went to the same School, Kiamaugu Primary School with the administratrix though he was in lower Primary School when the administratrix was in upper primary school. It is however clear that each of them went their separate ways after school as the protestor was staying with his maternal uncle named Mugwika. In fact going by the evidence of Daniel Njiru (DW2), the protestor was brought up by Mugwika who took him as his own child. The witness supported the protestor's claim but his support in my view appeared sentimental rather than factual. It is clear that the said Daniel Njiru has been mistreated by Rosemary Kirumi to the extent that he had to seek shelter in her aunt's place and probably was giving evidence in support of the protestor just to get back at the said Rosemary Kirumi.

28. The protestor in this cause insists that he is a child of the deceased and that even some clan members recognizes him. I however did not see any of the clan members come to testify in court to support his claim. Furthermore, a child as defendant in Section (Section 3(2) of Law of Succession Act) as:-

***" Reference in this Act to child" or "children" shall include child conceived but no yet born (as long as the child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assured permanent responsibility."***

In this cause, the evidence tendered do not show that the protestor fits that description or definition. As I have observed, he did not call any

clan member or even the Area Chief or village elders to prove his claims.

29. It is given that the protestor in this cause really went to great lengths in an attempt to prove that the deceased was his father. To acquire a baptismal card as well as a dedication card 60 years or more after the event is either not a mean task or simply an outright attempt to hoodwink this court. Either way I do not find any substance on both the baptismal card and dedication card which are the only pieces of documents that the protestor really had in trying to prove paternity or connection to the deceased. This is because I do not find such documents as baptismal cards or dedication cards reliable because there is no one to authenticate them. How does the protestor want this court to believe that a baptismal card issued in 1941 can still be traced and in the condition it was presented to this court. The question posed is if it is true that the protestor was known by the names in the baptismal card and dedication from the Salvation Army Church, why did not he subsequently use those names in School and later when he registered and got his Identity Card? I do not find any evidence that the deceased associated with him in anyway a father would associate with his son even if born out of wedlock or living elsewhere. Why didn't the deceased give him even a place to put a hut or plough if he knew had a responsibility over him?

30. In the case of **Re-estate Patrick Mwangi Wathiga (deceased) [2015] eKLR** Hon. Mativo J made the following relevant sentiments which I agree with:

***" In my view, the practice of a person emerging after the demise of a dead person purely to claim share of properties of the dead should be discouraged unless the alleged claimant can demonstrate that there were attempts to have him or her recognized as a beneficiary member of the family during the deceased's lifetime or the deceased left clear instructions to that effect, or his claim can be reasonably inferred from the express or implied circumstances of the case including the conduct of the deceased or from such reasonable or probable circumstances that can be proved by way of evidence. Alternatively such a claim can also be admitted if the claimant demonstrates that he was prevented from associating with the deceased during the deceased's lifetime by either infirmity of body or mind or both or any other reasonable circumstances. In my view where someone remains delinked from a family or the person he claims to be a parent for 24 years and only emerges after his/her death, the burden lies on him/her to establish his claim to the deceased's estate and to tender such evidence as may be necessary to establish his claim..."***

31. In this cause, the protestor does not state that he used to associate with the deceased or even close to him it is only DW3 who claims that she used to over-hear the deceased mention that the protestor was his son during visits he made to their home for a drink. However that on its own is insufficient to establish or prove paternity of the protestor. While it may be true that the protestor may have got involved in salvaging the estate of the deceased from being disposed irregularly by Rosemary Kirumi and her late husband, that does not confer him with a right to inherit the estate even if he says the clan mandated him to rescue the estate. I do not find any evidence that the deceased did anything in his lifetime that showed that he recognized the protestor as his son. I find that on a balance of probabilities the protestor has not proved that he is a son of the deceased herein to entitle him inherit any of his properties. All indications as per evidence on record shows that it is his uncle who brought him up, facilitated his circumcision and settled him where he currently lives. He has not proven connection with the deceased in this cause and cannot therefore have any basis to protest the mode of distribution suggested by the administratrix. That perhaps may have unconsciously informed his suggested mode of distribution in his written submissions.

In the end this court for the aforesaid reasons finds no merit in the protest filed. Consequently the grant issued to the administratrix on 9<sup>th</sup> October 2017 is hereby confirmed as per her suggested mode in her final submissions which I find reasonable. The estate comprised in L.R. No. Mwimbi/S. Mugumango/41 shall be distributed as follows: -

- i. Janet Ithiru - 0.9 acre
- ii. Rosemary Kirumi - 0.9 acre to hold in trust for own benefit and in trust for Morris Mwenda
- iii. Daniel Njiru Kalarwa - 0.9 acre
- iv. Lucy Wakuthi
- Polly Kawira
- Esther Kathambi
- Ann Kaimuri
- Janet Kaari
- Mwaniki Njeru - 0.9 acre jointly

I make no order as to costs.

**Dated, signed and delivered at Chuka this 14<sup>th</sup> day of November, 2019.**

**R. K. LIMO**

**JUDGE**