



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 443 OF 2008

IN THE MATTER OF THE ESTATE OF ZAVERIO M'MURUNGI M'IKABU (DECEASED)

JULIUS MWOBOWIA MURUNGI PETITIONER

-VERSUS-

PETER GIKUNDA OBJECTOR

JUDGMENT

1. **Zaverio M'Murungi M'ikabu** (hereinafter "the deceased") died on 26th February, 2008. He left behind five sons and three daughters. He also left behind a property known as **Kiirua/Ruiri/1133**. On 6th October, 2008, Talasisio Marete Saberio (hereinafter "Talasisio") petitioned for grant of letters of administration for the estate of the deceased.
2. The grant was issued to him on 3rd February, 2009 and on 17th February, 2010, he applied for confirmation of that grant. In that application, Talasisio proposed that all the sons of the deceased do get 0.83 acres while the daughters of the deceased get 0.80 acres jointly. All the named beneficiaries consented to the proposed distribution except Peter Gikundi.
3. On 15th May, 2010, Peter Gikunda (hereinafter "the Objector") filed a Protest to the proposed distribution. In the Protest, he alleged that the estate property was not available for distribution as it belonged wholly to him; that all the sons of the deceased were given land by the deceased during his lifetime except him; that the daughters of the deceased were all married and for that reason they were not entitled to inherit from the estate of their father and finally that Robert Mbaya Isaya was not a son of the deceased.
4. While the Cause was pending, Talasisio passed away and Julius Mwobobia M'Murungi was substituted as petitioner on 24th November, 2015. On 29th April, 2016, the court ordered that the parties do file affidavit evidence on which they were to be cross-examined.
5. **PW1, Peter Gikunda** testified that the deceased had other lands other than the estate property; that he had three brothers and three sisters; that the deceased gave his other brothers other lands and the estate property was left for him alone. He said he did not know the parcel numbers for the said lands given to his brothers. As far as he was concerned, the estate land was his since he had lived there alone since childhood.
6. In cross-examination, the objector told the court that he only recognized three brothers and two sisters who were married; that he had never seen Robert Mbaya; he denied that the petitioner had bought the land where he lives in; that his brothers left the estate property when he was still very young.

7. **RW1** was **Julius Mwobobia M'Murungi**, the petitioner. He denied that either him or any of his brothers was given land by the deceased as alleged by the protestor. He told the court that, the properties they had and were currently occupying belonged to them of their own right. That Robert Mbaya was a son of the deceased by another woman with whom the deceased lived with since 1975 at Karuri. That he, the petitioner, bought his own land where he shifted to in 1984. That the deceased had shown each of his sons where to cultivate on the estate property in 1992 but the objector destroyed their houses, coffee and trees after the demise of the deceased.

8. In cross-examination, the petitioner testified that he and all his other brothers were given land in the forest by the government but the objector refused to get one for himself; that only the objector who lives in the estate land as the others live on the properties where the government settled them after evicting them from the forest.

9. The parties closed their respective cases without calling any witnesses. However, the court allowed those named as beneficiaries to address the court. **B1W1 Consolata Kanyua** supported the testimony of the petitioner. She testified that the deceased had shown all his sons where to cultivate on the estate property in 1992 in the presence of neighbours. She stated that Robert Mbaya was a son of the deceased and that the protestor only chased them from the estate property after the deceased had died and not before. All other beneficiaries, **Cecilia Gaiti, Evangeline Mwengwa and Robert Mbaya** supported the testimony of the petitioner.

10. Although the court ordered that the parties do file written submissions, only the petitioner who did so. Mrs. Ntarangwi, learned Counsel for the petitioner submitted that the objector did not prove that the other beneficiaries had been provided for during the lifetime of the deceased; that the act of living on the estate property *per se* does not entitle the objector to the whole property to the exclusion of all the others.

11. Mrs. Ntarangwi further submitted that **section 42 of the Law of Succession Act** was not applicable in this case. She cited the Court of Appeal decision in **William Ngare & 4 Others v. The Public Trustee & 10 Others Civil Appeal No. 4 of 2006 (UR)** in support of the proposition that married daughters of a deceased person are entitled to a share in his estate. Counsel urged that the Protest be dismissed and the mode of distribution proposed by the petitioner be upheld.

12. Having considered the testimony of witnesses and submission of Learned Counsel, the issues that fall for determination are:-

a) Did the deceased provide for any of his beneficiaries during his lifetime?

b) Who are the beneficiaries of the estate of the deceased?

c) How should the estate be distributed?

13. The testimony of the objector was that, during his lifetime, the deceased gave land to his other elder brothers at Timau; that because he was young, he was left to occupy the estate property since 1973. The petitioner and the other beneficiaries were of a different view. The petitioner told the court that none of the beneficiaries was provided for by the deceased during his lifetime. That the properties where he and his brothers were living in were bought by themselves.

14. The objector's contention was that the properties which his brothers were occupying belonged to the deceased. That it is the deceased who settled them on those properties. When challenged, the protestor was unable to disclose and or identify the parcel numbers for those properties. He did not produce any document or any satisfactory evidence to prove that the alleged properties belonged to the deceased before he passed them on to the said beneficiaries.

15. The evidence proffered by the petitioner was not challenged. He was firm that he and his late brother went and settled in a government forest as squatters; that when they were evicted therefrom, the government gave them land which the objector now alleges belonged to the deceased. Further, the

petitioner produced an agreement dated 25th April, 1984 between him and one Stephen Muriira M'Mungania by which he purchased three acres from **Kiirua/Ruiri/241**. The testimony of the petitioner was supported by all the other beneficiaries.

16. As regards the objector's claim that he is entitled to the whole of the estate property because of long occupation, it goes without say that, as a son of the deceased, he had the right to such occupation. That however does not mean he is entitled to the whole of the property to the exclusion of all the others after the demise of his father. There was evidence, which he did not challenge, that he evicted all his brothers and sisters from the estate property and destroyed their trees and coffee after the demise of the deceased. The petitioner's evidence was consistent and firm. I believed him. Accordingly, I am satisfied that none of the beneficiaries was provided for during the lifetime of the deceased.

17. The second issue is, who are the beneficiaries of the deceased? According to the letter dated 25th July, 2008 by the Chief of Ruiri Location, the beneficiaries of the deceased are as follows:

- a) Tarasisio Marete - son
- b) John Kiogora Saberio - son
- c) Julius Mwobobia - son
- d) Robert Mbaya Isaya - son
- e) Peter Gikundi - son
- f) Cecilia Gaiti Fredrick - daughter
- g) Evangeline Mwengwa - daughter
- h) Consolata Kanyua - daughter

18. The objector claimed that Robert Mbaya was not his brother and that he did not know him. However, evidence was tendered that the said Robert Mbaya was a son of the deceased by another woman. That since 1975, the deceased started living with the mother of Robert Mbaya at Timau. That the deceased himself had introduced Robert Mbaya to the petitioner and his family as his own son. All the other beneficiaries agreed with this version of events. I am satisfied that that evidence was satisfactory and that Robert Mbaya is a son of the deceased and therefore entitled to a share in the estate.

19. The objector claimed that since his sisters were married, they were not entitled to a share in the estate. Neither the ***Constitution of Kenya nor the Law of Succession Act, Cap 160 Laws of Kenya*** discriminate against married daughters of a deceased. ***Section 38 of the Law of Succession Act*** provides:-

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

20. It is clear from the foregoing that, all that is required is one to be a child of a deceased to qualify as a beneficiary. The gender and personal status or circumstances of such a child does not matter. Indeed in the case cited by Mrs. Ntarangwi of ***William Ngare & 4 Others v. The Public Trustee & 10 Others (Supra)***, the Court of Appeal held:-

“It appears that the learned judge excluded the 3rd and 5th appellants on the sole basis that he found them to be married and that they were therefore not claiming anything out of the estate of their father. Going by the provisions of the law and the decisions that we have cited hereinabove, it is clear that the learned judges course of action was erroneous as it mattered not whether or not the said appellants were married or not. Marriage per se cannot disentitle a

party of his rights and obligations. The rights, benefits and obligations of a party have nothing to do with his or her marital status. Marriage is both a legal and social arrangement which had no bearing on the rights of the two appellants. In addition, the issue of these two appellants having not made a claim to the estate of their father does not arise. Their rights as beneficiaries matured upon the death of their father. Without the express indication by the beneficiary that he/she has forfeited his/her claim, then a court cannot purport to exclude him or her. The court's obligation is to distribute the property after determining any dispute as regards the beneficiaries."

21. Accordingly, I hold that all the eight people listed in the letter of introduction by the chief are rightful beneficiaries of the deceased and are entitled to inherit from the deceased's estate.

22. In view of the findings I have made above, I find the protest to be without merit. The same is hereby dismissed. The application for confirmation is hereby allowed and the grant confirmed in terms of paragraph 5 of the affidavit in support.

23. This being a family matter, I will make no order as to costs.

DATED and DELIVERED at Meru this 1st day of February, 2018.

A. MABEYA

JUDGE