



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 679 OF 2011**

**IN THE MATTER OF THE ESTATE OF MUGAMBI ABURIA Alias MUGAMBI S/O ABURIA (DECEASED)**

**JAPHETH KIAMBI M'MUGAMBI.....PETITIONER**

**-V-**

**SALESIO MWEBIA M'MUGAMBI & 6 OTHERS.....PROTESTORS**

**R U L I N G**

1. This Cause relates to the estate of **Mugambi Aburia alias Mugambi S/O Aburia (deceased)**. By Summons for Confirmation of Grant dated 11<sup>th</sup> September 2013, the petitioner sought to distribute the estate of the deceased as follows: -

**PARCEL NO. ABOTHUGUCHI/KITHIRUNE/1069**

**First House**

**Japhet Kiambi - 1.8 acres**

**Second House**

**Jamlick Mwenda**

**Salesio Mwebia**

**Samson Kinyomoo**

**David Mbobua - 1.8 acres equally**

2. The protestors filed a Protest on 12<sup>th</sup> May, 2014 opposing the proposed mode of distribution. They denied the petitioners contention that the deceased had two houses. They stated that the deceased had only one wife (their mother) and that the petitioner who was the 1<sup>st</sup> child of their deceased father was born out of wedlock during the state of emergency.

3. In his response, the petitioner stated that his mother had been married by the deceased; that she together with her three children were living with the deceased on the estate property. That the protestors had been hostile to the first house ever since the demise of the deceased.

4. This court referred the matter for mediation on 4<sup>th</sup> July, 2018. However, the Githongo Mediation Committee on Alternative Justice System was unable to reach any consensus. On 4<sup>th</sup> July, 2018 when referring the matter to mediation, the court directed that in the event the mediation failed, the matter would proceed to hearing on 22<sup>nd</sup> October, 2018.

5. On 21<sup>st</sup> March 2018, the court had directed that the Protest be heard by way of *viva voce* evidence with the parties being given 30 days each to file and serve affidavit evidence beginning with the Protestors.

6. When the matter came up for hearing on 22<sup>nd</sup> October 2018, Mr. Anampiu for the petitioner intimated to court that mediation had failed. On that day, neither the protestors nor their Advocate was in court despite the date having been given in their presence. In the premises, the petitioner proceeded with his case *ex-parte*.

7. The petitioner adopted his Further Affidavit sworn on 22<sup>nd</sup> May, 2014 and testified that he was the eldest child of the deceased. That his late father had divided the land into two equal portions in 1975 and put one boundary and that he designated each house to live on its portion. That the family continued to live that way until 2007. That in 2009, Salesio Mwebia destroyed the boundary that the deceased had put. Consequently, he urged the court to maintain how his father had divided the land.

8. I have carefully considered the proposed mode of distribution by the Petitioner. I have also taken note of the fact that on 22<sup>nd</sup> October 2018, the court closed the protestors' case due to their absence and that of their advocate. In this regard, the petitioner's case remained uncontroverted.

9. The petitioner's testimony was that the deceased was polygamous. That he had 10 children whose names he had set out both in the Petition and the affidavit in support of the application for confirmation.

10. Although the evidence of the petitioner that the deceased had divided the estate property into equal portions in 1975 was not challenged, I note that the deceased died on 18<sup>th</sup> February, 2007. The deceased's estate is therefore subject to the provisions of the **Law of Succession Act, Cap 160 of the Laws of Kenya**. The petitioner only stated that the deceased had divided the land into two between the two wives. That might have been the case. That might not have signified that the intention of the deceased was that his property be settled as such. It never amounted to a bequest to any of his children.

11. One misconception that many beneficiaries have is that, when a father shows his children, especially sons, where to cultivate during his life time, that amounts to a deceased sharing his property. To my mind, that is not the case. In our African set up, once a son is of age and is ready to start a family, in most cases the father will show him a place where the son will eke out a living to sustain the young family. That status quo ordinarily obtains until the demise of such a father when the provisions of **the Act** sets in. That is the time such a father is to be succeeded by ALL his children equally in accordance with the law, unless of course he leaves behind a will.

12. If the intention of such a father is to absolutely bequest such portions of land to those he has pointed them out to, it is expected that he would either leave a valid will or have the portions transferred to such beneficiaries during his lifetime. A written disposition would be the most appropriate and only safeguard against the property/estate being put up for succession under the relevant provisions of the law of succession Act.

13. In the present case, the evidence of the polygamous nature of the deceased was not controverted. There was no credible evidence that the deceased had shared himself before he died. The petitioner stated that the portion of his sisters should go to him.

14. None of those daughters of the deceased appeared before court to renounce their interest in the estate. If they had denounced their interest, their share would be distributed equally to the rest of the beneficiaries and not the petitioner alone as he suggested. The interests of beneficiaries in an estate is usually joint.

15. Accordingly, in terms of **section 40 of the Act**, the estate of the deceased will be distributed equally between all the beneficiaries as follows: -

**ABOTHUGUCHI/KITHURINE/1069**

- a) Japhet Kiambi M'Mugambi
- b) Samson Kinyomoo
- c) Salesio Mwebia
- d) David Mbobua
- e) Jamlick Mwenda
- f) Rael Nkatha
- g) Elizabeth Kiende
- h) Johanina Kanyua
- i) Marion Kambura M'Mugambi
- j) Florence Kanana M'Mugambi - In equal shares

16. This being a succession matter there will be no order as to costs.

**SIGNED at Meru**

**A. MABEYA**

**JUDGE**

**DATED and DELIVERED at Meru this 15<sup>th</sup> day of November, 2018.**

**F. GIKONYO**

**JUDGE**