



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 361 OF 2013

IN THE MATTER OF THE ESTATE OF M'MURAGA M'MBURUGU (DECEASED)

KATHURE M'MURAA.....1ST PETITIONER

ISEKA KIMATHI M'NGITUI.....2ND PETITIONER

MARGARET KAIMURI.....OBJECTOR

J U D G M E N T

1. **M'MURAGA M'RIUNGU** ("the deceased"), died on 22nd July, 2001. On 22nd May, 2013 the Chief of Makandune Location wrote a letter of introduction setting out the survivors of the deceased as **Kathure M'Muraa, Patrick Mbaya M' Muraa, Mutembei M'Muraa, Dominic Mutwiri Muriuki** and **Margaret Kadogo**.

2. On 27th June, 2013, **Kathure M'Muraa** and **Josephat Kimathi** petitioned for the letters of administration intestate and listed **L.R. NO ABOTHUGUCHI/MAKANDUNE/325** as the only asset of the estate. On 9th January, 2014, the grant of letters of administration intestate were issued to **Kathure M'Muraa** and **Isekia Kimanthi M'Ngitui**. Summons for confirmation of grant dated 12th August 2015 were filed proposing the estate to be divided as follows:-

L.R. NO ABOTHUGUCHI/MAKANDUNE/325

- i. **Kathure M'Muraa** - 2 ¼ Acres
- ii. **Julius Mutembei M'Muraa** - 1 Acre
- iii. **Muraga Riungu** - ½ Acre
- iv. **Margaret Kadogo** - ¼ Acre
- v. **Patrick Mbaya M'Muraa** - ¾ Acre

3. On 12th May, 2016, **Margaret Kaimuri** lodged a protest against the said confirmation. She deponed that there was concealment of facts as all the beneficiaries were not included; that the petitioners had included the 2nd petitioner in the Cause yet he was not related to the deceased. Further, that she was not a minor as alleged in the petition documents and neither did she consent to the mode of distribution.

4. The protest was heard vide *viva voce* evidence. **OW1, Margaret Kaimuri** told the court that the deceased had five wives with children. These were:-

a) Lucia Gatwiria (deceased)

She had one child called John. However, both son and mother were now deceased.

b) Mukubu (deceased)

She had one son **Jeremiah Muriuki** who is deceased but left behind two children, **Dominic Mutwiri** also known as **Muraga Riungu** and **Edwin Gitonga**.

c) **Kathure M'Muraa**

She has two children, **Milkah Gaceru** and **Patrick Mbaya**.

d) **Mary Gatwiri (deceased)**

She had five children. **Margaret Kaimuri**, **Josphat Mutugi**, **Julius Mutembei**, **Catherine Makena** and **Lucy Kawira** (deceased).

e) **Muthoni (Remarried)**

She had three children. **Ngugi** (married), **Ruth Karimi** and **Kithure** who disappeared about 5 years ago and had not returned.

5. **OW1** confirmed that before the deceased died, he had showed his wives their respective portions which they were using with their respective children. That the proposed distribution affected her mother's portion.

6. **PW1 Kathure M'Muraa** told the court that she was a widow of the deceased and the fourth wife. She agreed with the testimony of **OW1** as regards the deceased's wives and children. That the deceased had showed each one of the wives where to cultivate and to date each house was cultivating where they were shown. It was her testimony that she had distributed the land as she had been informed by the deceased. She had left out the daughters as the land was small. That although all the daughters wanted a share in the estate, she wanted to strike the distribution.

7. I have carefully considered the record and the testimony of the witnesses. The issue for determination is; ***how should the estate of the deceased be distributed.***

8. When a deceased person dies intestate and is polygamous, the governing provision is **section 40 of CAP 160** which stipulates as follows:-

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”

9. **In Re Estate of John Musambayi Katumanga – (deceased) [2014] eKLR** the court held:-

“Under Section 40 of the Act, if the deceased had several wives, as opposed to households, the estate would devolve depending on the number of children. Ideally, the estate would be divided equally among all the members of the entire household, lumping the children and the surviving spouses together. After that the family members would retreat to their respective houses where Section 35 of the Act would be put into effect, so that if there was a surviving spouse in a house she would enjoy life interest over the property due to her children. The house without a surviving spouse would split its entitlement in terms of Section 38 of the Law of Succession Act, the children would divide the estate equally amongst themselves. Section 40 was not designed for the circumstances of the instant estate, but it would appear more appealing for the purpose of distribution of the said estate than Section 35.

The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”

10. Consequently, each child of a deceased constitutes a unit and the surviving widow will constitute an additional independent unit. Accordingly, the estate should be equally divided amongst the units.

11. The evidence on record was that the deceased had settled his family according to his wives. That he had shown each wife where to settle and cultivate with her respective children. That the respective houses had continued to occupy and cultivate those respective portions pointed out by the deceased before his demise. On 13th February, 2017, the court directed the Meru District Land Surveyor to visit **L.R. NO ABOTHUGUCHI/MAKANDUNE/325** and carry out a topographical survey and file a report. He was to pick up how the various families have been cultivating the estate land.

12. According to the report filed on 4th July, 2018 by the district surveyor, the respective beneficiaries were shown to occupy the estate land as follows:-

- | | | |
|--------------------|---|----------|
| a) Dominic Mutwiri | - | 0.162 Ha |
| b) Patrick Kathure | - | 0.291 Ha |

- c) Mama Kathure - 0.185 Ha
- d) Josphat Mutugi Gatwiri - 0.142 Ha
- e) Julius Mutembei Gatwiri - 0.194 Ha
- f) Silas Kinyua Luka - 0.099 Ha
- g) Margaret Kaimuri - 0.046 Ha
- h) Henry Mutembei Kag'ombe - 0.641 Ha
- i) *Not indicated* - 0.084 Ha

13. The foregoing clearly shows that there is an imbalance on how the estate is currently held vis a vis the principle of equality or fairness envisaged in **section 40 of CAP 160**. In addition, Silas Kinyua Luka and Henry Mutembei Kag'ombe are in occupation of the estate property yet they were never identified as beneficiaries of the deceased. Their interest and standing in the occupation thereof was not clear.

14. From the five wives of the deceased only Kathure M'Muraa and Muthoni are alive. However, Muthoni may not be entitled to a share of the estate as she is now remarried elsewhere. With regard to the children, each one has a right to a share whether married or not. No one ought to be discriminated upon by virtue of **Article 27 and 60 of the Constitution** as well as the provisions of **CAP 160**. One of the deceased's children, Kithure from the house of Muthoni is said to have disappeared about 5 years ago. In spite of this, he is entitled to a share as he may return home. It is not yet 7 years within which he may be presumed dead.

15. In view of the foregoing, and with the provisions of the law aforesaid in mind, the estate of the deceased will be distributed as follows:-

L.R. NO ABOTHUGUCHI/MAKANDUNE/325

To be equally distributed at 0.1666 ha each to the following:-

- a) Kathure M'Muraa
- b) Milkah Gaceru
- c) Patrick Mbaya
- d) Margaret Kaimuri
- e) Josephat Mutugi
- f) Julius Mutembei
- g) Catherine Makena
- h) Ngugi
- i) Ruth Karimi
- j) Kithure
- k) Domonic Mutwiri
- l) Edwin Gitonga

16. The grant was issued on 9th January 2014 to Kathure M'Muraa and Isekia Kimathi M'Ngitui. Isekia is a stranger to this cause as his relationship with the deceased is not within the bracket of those entitled to petition for grant. Accordingly, Isekia Kimathi M'Ngitui is hereby replaced with Margaret Kaimuri as the co-administrator with Kathure M'Muraa.

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

A. MABEYA

JUDGE