



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 536 OF 2004

IN THE MATTER OF THE ESTATE OF M'KUNGANIA M'MBUI (DECEASED)

KIRIMI M'KUNGANIA PETITIONER

VERSUS

JULIUS MUTHOMI M'KUNGANIA PROTESTOR

J U D G M E N T

1. **M'KUNGANIA M'MBUI ("the deceased")** died on 29th May 2004. On 6th December, 2004 the Chief of Igoki location wrote a letter of introduction setting out the survivors of the deceased as **Grace Kanyamu (wife), Virginia Kungania (wife-deceased) Kirimi Kungania, Hellen Nkuene, Sibora Gatwiri, Jenniffer Kinanu, Julius Mwitii, Charity Kinanu, Penina Kathambi, Felicity Karambu and Elizabeth Gatwiri.**
2. In the letter he listed the following as the grand-children of the deceased; **Dennis Kimathi, Mercy Gacheri, Dorothy Kagendo, Julius Muthoni, Nannies Muthoni, Maurice Gitonga, Kawira Nkuene, Makena Kinanu, Purity Gakii, Doris Karwirwa, Patrick Mwenda and Kendi Kathambi.** The great grandchildren were listed as **Nicholas Muriuki and Anthony Mutuma.**
3. On 8th December 2004, **Kirimi M'Kungania** petitioned for letters of administration intestate and listed **ABOGETA/U-CHURE/1650** as the only asset of the estate. On 24th February 2005, the grant of letters of administration intestate was issued to him. He thereafter applied for its confirmation on 11th April, 2005 proposing to distribute the whole estate to himself.
4. On 7th March 2006, **Julius Muthomi Kungania (the protestor)** lodged an objection on the basis that the petitioner had not sought and obtained the necessary consent before filing the petition. He further contended that there was concealment of material facts as all the beneficiaries were not included in the petition. He set out the names of the alleged beneficiaries who had been left out as **Jeniffer Kajuju (wife), Denis Kimathi, Morris Gitonga, Dorothy Kagendo, Nanis Kinya and Mercy Gaceri.**
5. On 5th July, 2006, the petitioner filed a replying affidavit wherein he averred that **Jeniffer Kajuju** was not a wife but a step daughter of the deceased and that the named children i.e. **Dennis Kimathi, Morris Gitonga, Dorothy Kagendo, Nanis Kinya and Mercy Gaceri** were not survivors of the deceased.
6. It would seem that there were efforts to amicably settle the matter before the clan but nothing came out of it. The parties went to sleep until the court issued several notices to revoke the grant in 2017. It is then that the protestor responded by filing an affidavit of protest on 15th October, 2018. In that protest, he alleged that the deceased was polygamous. That he had married the first wife **Grace Kanyamu** whom he divorced customarily, the 2nd wife was **Virginia Kungania** who was deceased while the 3rd wife was **Jennifer Kajuju.**
7. Despite being served with the Protest, the petitioner did not respond. Directions were given that the protest be determined by way of written submissions on the affidavits on record.
8. The objection and answer to petition that had remained on record since 2006 were treated as abandoned. Having carefully examined the entire record, it is difficult to conclude with certainty who the actual children of the deceased were. This is so because, according to the Chief's letter of introduction that commenced these proceedings, **Jeniffer Kinanu** is listed as a daughter of the deceased while in the protest, one **Jeniffer Kajuju** is listed as the 3rd wife of the deceased. The Protestor, had in one of the affidavits admitted that she was a step daughter not a wife.
9. Further, all those that are listed in the protest as children of the 3rd wife were listed as grandchildren of the deceased in the Chief's letter of introduction dated 6th December, 2004. Despite the foregoing, the petitioner failed to respond to the Protest which was a statement made on oath. He also abandoned this matter since 2006 until 2017 when the court threatened to revoke the grant and dismiss the proceedings. Even

then, he never responded to the Protest nor did he turn up in court.

10. In view of the foregoing, the court has no otherwise but to rely on the statements in the Protest in determining the matter. In the Protest, the protestor swore that the deceased was polygamous; that he had three houses with 16 survivors.

11. The estate of a polygamous who dies intestate is governed by the provisions of **section 40 of the law of Succession Act Cap 160**. That section provides that such an estate is to be distributed equally amongst all the children of the deceased whereby each child is treated as an independent unit and if there is a surviving wife, she is considered as a separate unit.

12. In **Re estate of John Musambayi Katumanga (deceased) [2014] eKl** 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.

27. 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”.

13. 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. The petitioner had proposed that the estate be distributed to him wholly. That will be against the law.

14. 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:-

a) ABOGETA/ U-UCHUURE/ 1650 measuring 2 acres

To be shared equally. It is hereby distributed at 0.125 acres each to the following: -

- i.) Kirimi Kungania
- ii.) Hellen Nkuene
- iii.) Zipporah Gatwiri
- iv.) Susan Kinanu
- v.) Charity Kinanu
- vi.) Elizabeth Gatwiri
- vii.) Felicity Karambu
- viii.) Julius Mwiti
- ix.) Penina Kathambi
- x.) Jeniffer Kajuju
- xi.) Julius Muthomi
- xii.) Mercy Gacheri
- xiii.) Dorothy Kagenda
- xiv.) Denis Kimathi
- xv.) Nanis Kinya

xvi.) Moris Gitonga

b) Since the petitioner seems to have abandoned his intention to act as an administrator, I issue a grant of letters of administration intestate to **Julius Muthomi M'Kungania** and confirm the same accordingly.

15. This being a family matter, I make no Order as to Costs.

SIGNED at Meru;

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 13th day of December, 2018.

F. GIKONYO

JUDGE