



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO.469 OF 2012

In the Matter of the Estate of Henry M'Mukindia Kaumbuthu (Deceased)

STEPHEN MURITHI.....1ST ADMINISTRATOR/APPLICANT

Versus

SILAS THURANIRA.....2ND ADMINISTRATOR/RESPONDENT

CATHERINE KATHURE.....3RD ADMINISTRATOR/RESPONDENT

JUDGMENT

Distribution of estate

[1] These proceedings relate to the estate of Henry M'Mukindia Kaumbuthu, the deceased who died on 1st June 2012. He left the following children surviving him:-

1. Samuel Mwiti
2. Peter Kirema
3. Stephen Murithi
4. Silas Thurania
5. Florence Mwari
6. Susan Kairuthi
7. Mercy Kanyiri; and
8. Catherine Kathuri

He also left one property namely; L.R NO NTIMA/IGOKI/510.

Directions

[2] But, the above beneficiaries are not able to agree on the distribution of the estate amongst them,

hence this ruling. The court directed parties to file their respective modes of distribution together with submissions to justify the position taken. Parties obliged and I will consider the affidavits and submissions filed herein. The Applicant filed two affidavits; one sworn on 28th January 2015 and the other on 16th March 2016. He proposed that the estate property be distributed as follows:

1. Peter Kirema.....0.057 ha
2. Silas Thurania0.066 ha
3. Samuel Mwiti.....0.057 ha
4. Stephen Murithi.....0.054 ha
5. Florence Mwari]
6. Susan Kairuthi]
7. Mercy Kanyiri; and]
8. Catherine Kathuri]...to share equally 0.112 ha
9. Peter Kirema]
10. Silas Thurania]
11. Samuel Mwiti]
12. Stephen Murithi]....to jointly own 0.038 ha

[3] Samuel Mwiti filed his proposal on distribution which was contained in the affidavit sworn on 18th December 2015. He has supported the mode of distribution suggested by the Applicant. But, all the others opposed the mode of distribution proposed by the two above. Silas Thurania filed the affidavit of protest sworn on 29th April 2015. From the affidavit, the major departure from the proposal by the Applicant was on Plot A (as designated in the Survey Sketch plan marked RMM) measuring about 0.038; he proposed it be given to Catherine Kathure. Catherine Kathure, Mercy Kanyiri, Susan Kairuthi and Florence Mwari filed affidavits all sworn on 25th April 2016 and they categorically supported the proposal by Silas Thurania.

Submissions by parties

[4] According to the Applicant his mode of distribution is most fair, free of discrimination and in accordance with the law. He, however, stated that the court should not order equal distribution of the estate especially of the portions which were given to the sons by the deceased as such distribution would harm them for they have already developed the respective portions which they also occupy. His view is that the court should, as nearly as possible, provide for all the beneficiaries taking into account the sizes of the portions each occupies. In particular, he submitted that these portions of land are very small such that it would be uneconomical to share each equally by all. In addition, he argued that he is a step brother to and all the other beneficiaries are born of one mother late Charity Rigiri; and for that reason they have ganged up against him to deny him a share in plot A. He urged that plot A, although small in size, is a commercial plot; it is touching the tarmac and more valuable in use and value than the rest of the portions. He continued to submit: that Silas had already illegally started to build on the said plot A on the pretext that he was doing it for his late mother until this court stopped him; and that his proposal to give the plot to his sister Catherine is just but another of his stealth plans of getting plot A. The Applicant even expressed serious doubts whether the sisters are aware of these stealth machinations by Silas.

[5] On the other hand, Silas and the other beneficiaries seem to agree with the Applicant except on account of plot A. According to them plot A should go to Catherine Kathure. Their major justification is that it will be most prejudicial to the daughters of the deceased to give plot A to the male beneficiaries who are already adequately provided, yet the daughters are sharing a very small portion i.e. plot F, each getting 0.028 ha. Silas took the view that, under the Law of Succession Act, the daughters have equal right as sons to inherit their father's estate. He, therefore, termed the proposal by the Applicant to be tantamount to discrimination of women contrary to the Constitution and CEDAW which Kenya ratified in 1984. He proposed that the sons should get what they already occupy, the three daughters to share plot F equally and Catherine to get plot A.

DETERMINATION

[6] It is quite apparent that these beneficiaries cannot agree on the distribution of part of this estate. Accordingly, I am called upon to distribute the estate in accordance with the law. Towards that end, I will consider the facts of this case, the submissions by the parties and the applicable provisions of law on distribution of estate intestate under the Law of Succession Act. But, first things first: the Survey sketch plan marked as RMM 1 and annexed to the affidavit of Samuel Mwiti seems to be agreed by all the parties as the true representation of the lay out of the estate property. The surveyor also later conducted picking of the existing boundaries of these plots on 19th September 2014- see annexure SM1. According to the said Sketch plan, the property is divided into 6 portions of different sizes marked A, B, C, D, E & F. I will refer to the said plots as such.

[7] After careful consideration of the arguments by the parties, the facts of the case and the law, I take this view of the matter. Two things are agreed by the parties (including the daughters herein):

- (1) That the sons Silas Thurania, Stephen Murithi, Samuel Mwiti and Peter Kirema are already in possession of and have developed plots B, C, D & E respectively. All parties propose that the sons keep these portions as is. From the record, they were allocated and settled upon those plots by their late father during his lifetime. See their affidavits and submissions filed.
- (2) That plot F should go to the daughters for they had not been provided for by their father.

Therefore, the only point of contest is plot A.

[8] It would be easy to just say that under section 38 of the Law of Succession Act, the estate property shall be divided equally amongst the children of the deceased. But, this case presents unique circumstances as will be borne below; and I do not think, the law precludes a judge from considering the peculiar circumstances of each case in resolving distribution of the intestate estate. On this, I am particularly impressed by the concurring opinion by Omolo JA in the case of **RONO vs. RONO (2008) 1 (G&F) 803 at 816**. In the case before me, there is unequivocal convergence of minds of the parties on the substantial matters I have mentioned in paragraph 7 above; those are agreed and are not in controversy. Again, from the evidence on record, the sons were settled on the respective portions they occupy by the deceased during his lifetime. Of importance, the sketch plan marked DMM 1 for subdivision of the estate property was done during the deceased's lifetime and clearly indicates who settles where and the size of each parcel. There is, therefore, conviction upon the court and the parties that the deceased intended to settle them in those portions. Except, however: two things stand out for determination; (1) two plots namely, No A & F are not appropriated; and (2) the daughters were not provided for. These, from the evidence led and, are the two issues for determination. Accordingly, in these circumstances, is the court not entitled to conclude that this case should be decided upon these peculiar circumstances? Given these circumstances, shouldn't equality be attained by falling back to section 42 of the Law of Succession Act whereat the court should take into account whatever property the intestate estate had settled to the sons in determining the net estate accruing to each one of them? In addition, shouldn't this court seek to attain equality in the distribution of, by making provision for the daughters from the estate? I believe the two plots No A and F should provide the equilibrium to this legal equation. If we give Plot F to the daughters and Plot A to the sons as proposed by the Applicant, this court will not only greatly prejudice the daughters of the deceased but shall also partake in the shameless table of demeaning the elegant

provisions and command of our Constitution that; thou shalt not discriminate against any person on account of gender or any of the prohibited grounds in section 27 of the Constitution. Again, if I give Plot A to Catherine Kathure alone, the equality balance shall preponderantly tilt into her favour at the expense of the other daughters, thus, completely distorting the equity enshrined in the law of Succession Act. I sat this because, although Plot A is small in size, it is commercial plot of much greater value than the rest of the plots. Accordingly, the order which I hereby make is:-

(1) That Plot A& F measuring approximately 0.038 ha and 0.112 ha respectively shall be shared equally by all the daughters namely;

1. Florence Mwari]
2. Susan Kairuthi
3. Mercy Kanyiri; and
4. Catherine Kathuri

(2) Plot B, C, D & E shall be go to the following, respectively;

1. Peter Kirema.....0.057 ha
2. Silas Thurania0.066 ha
3. Samuel Mwiti.....0.057 ha
4. Stephen Murithi.....0.054 ha

(3) Accordingly, the grant herein is confirmed in the above terms

(4) As this is a dispute involving close family members, I order that each party shall bear own costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 6th day of February 2017

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F. GIKONYO

JUDGE

In the presence of:

Ndubi advocate for Mrs. Ntarangi for 1st Administrator

Munoru advocate for Otieno advocate for 2nd Administrator

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F. GIKONYO

JUDGE