



REPUBLIC OF KENYA
IN THE HIGH COURT KENYA AT MERU
SUCCESSION CAUSE NO. 602 OF 2010

IN THE MATTER OF THE ESTATE OF M'ITUNGA M'RWARA - DECEASED

MIRITI M'ITUNGA.....1ST PETITIONER

ERASTUS KIMATHI M'ITUNGA.....2ND PETITIONER

VERSUS

SUSAN KABURO.....PROTESTER

RULING

Application dated 7th November 2016 was filed by M/S Mwirigi Kaburu and Company Advocates on behalf of Miriti M'Itunga the 1st petitioner herein seeking that orders be issued directing that Gladys Gakii Ibrahim, Salesio Mbaya and Douglas Kimathi M'Miriti do stop intermeddling with the estate of the deceased. In the 2nd prayer the applicant wanted an order to be issued to Salesio Mbaya and Douglas Kimathi M'Miriti to vacate the deceased estate.

The application was supported by grounds on the face of the application and affidavit of applicant in which he claimed that Gladys Gakii Ibrahim, one of the daughters to the deceased had illegally sold part of parcel No. Nkuene/Uruku/386 – 1 ½ acres to Salesio Mbaya who is intermeddling with deceased estate. It was also claimed that the 2nd petitioner Erastus Kimathi M'itunga had brought a stranger namely Douglas Kimathi M'miriti into the estate and he was forcefully farming part of the deceased estate. The applicant claimed that he received a notification from Njuri Ncheke elders indicating that they were to visit the deceased's land on 29th August 2016 to subdivide the estate and it is his advocates warning letter that stopped them. He claimed that Douglas Kimathi M'Miriti who is a police officer is intimidating the beneficiaries of the deceased so he can do farming on the estate as he wishes.

In reply to the application Gladys Gakii Ibrahim swore an affidavit on 15th November 2016 and said that land was given to her by her father 1 ½ acres in 1980s when she redeemed the whole land parcel over a loan the deceased was unable to pay.

The said parcel of 1 ½ acres was occupied by her late son Jackson Mwendwa. She denied having sold land to Salesio Mbaya but she allowed him to occupy and till her portion in deceased estate while she occupied and tilled his portion in Kiambogo in Timau. She said that she opted to swap with Salesio when she realized that applicant was planning to harm her over land. She said they appeared together with applicant before Njuri Ncheke to iron out their differences. She claimed Salesio Mbaya was her licensee and should not be evicted. She claimed that applicant had also brought Ann Kimathi into his portion of the land. Ruth Murithi has also given one Ntungi Mungania a portion of her portion to work on. She

said she is not complaining over strangers applicant and Ruth Murithi have brought to estate and they should also leave her alone. She said that they proceed and distribute the estate rather than dealing with applications herein which should be dismissed.

Salesio Mbaya also swore affidavit saying he didn't buy land from Gladys Gakii but is in occupation of portion of Nkuene/Uruku/386 with authority and permission of Gladys Gakii Ibrahim a daughter to the deceased. He said he gave his land at Kiambogo Timau to Gladys and she allowed him to use her share in the father's estate. He said he has never worked on Miriti M'Itunga's portion of land or any other dependant's portion as all the family members have their respective portions in the family land.

Erastus Kimathi M'Itunga also swore an affidavit on 15th November 2016 opposing application and admitted that Douglas Kimathi M'Miriti is occupying his portion of the land in question and that if applicant is entertained the cause herein will be derailed. He said the status obtaining before filing of the cause has not changed and the applicant is raising a false alarm. Douglas Kimathi M'Miriti also filed affidavit sworn on 15th November 2016 opposing the application. He said he occupies the 2nd petitioners' portion of the land and he has never gone to the parcel as a police officer but as a civilian. He said applicant wants to direct courts attention from real issues since has an arrangement with the 2nd petitioner where he works only on his portion of family land for the last 20 years.

He said 2nd petitioner/respondent is not complaining and it is malicious for applicant to call him a stranger as all family members know him and the basis upon which he uses land. He denied that he has ever intimidated beneficiaries of estate.

The 1st petitioners counsel filed written submissions and said that Section 45 of the Law of Succession Act prohibits inter meddling with the deceased's estate which Tanui Justice aswas in Gitau and 2 others vs Wanderi and 5 others [1989]KLR 23 held

“According to section 45 of Cap 160 inter meddling with the property of the deceased man consists of taking possession, disposing or otherwise intermeddling with any free property.”

He submitted that Salesio Mbaya and Douglas Kimathi who are in possession of the deceased estate should be punished.

The view of this court is that the multiple applications might not resolve the issue. The applications relate to distribution of the estate which summons for confirmation was filed way back on 27th July 2012 by both administrators.

2nd administrator filed supplementary affidavit bringing courts attention to the death of Jackson Mwendwa son to Gladys Gakii who is daughter to the deceased.

In the affidavit in support of application for confirmation sworn by both administrator jointly on 19th July 2012 Miriti M'Itunga Jackson Mwenda and Ruth Murithi were to share equally balance of land No. 386.

On 5th December 2014 2nd Administrator filed affidavit in protest saying 1st administrator didn't consult them when he filed summons for confirmation and distribution as follows.

1. L.R. Nkuene/Uruku/993 to go to Miriti M'Itunga Wholly

2. L.R. No. Nkuene/Iruku/386

- One acre to be shared equally between Pauline Miriko and Karen Nkatha.
- Erastus Kimathi M'itunga to get one and half acre and the balance to be shared equally by 1st administrator Gladys Gakii and Ruth Murithi.

Another affidavit sworn by 1st Administrator and filed on 8th Jan 2015 makes different proposal for distribution at paragraph 5(a) and (b) but consent to confirmation is purported signed by Hellen Mugure, Pauline Miriko, Gladys Gakii, Ruth Murithi, Susan Kaburo and Karen Nkatha but not 2nd Administrator. Same distribution is shown in affidavit of Miriti M'Itunga sworn on 7th October 2014 and filed on 8th January 2015. Susan Kaburo has filed a statement indicating that on 11.4.2011 second petitioner sold to her 0.50 acres of land from Nkuene/Uruku/386 and she paid consideration of Ksh 430,000/- which 2nd administrator acknowledged. Ruth Murithi statement's to the effect she is widow of Stephen Murithi with whom they had 5 children she said she occupies 1 ½ acres of portion of Nkuene/Uruku/386 which is distinctly marked on the ground and other beneficiaries to the estate do not interfere with her portion.

She supported 1st Administrators mode of distribution. Pauline Miriko and Gladys Gakii in their statements support the mode of distribution by 2nd Administrator. It is therefore the view of this court that to bring all the issues herein to a conclusion, the beneficiaries and all interested should testify and have matter of distribution determined wholly; the application is disallowed with costs to Respondents.

Ruling signed, delivered and dated this 6TH day of April 2017. In the presence of:

C/A –Penina

RESPONDENT – Mr Gachunge Advocate for 2nd petitioner/Respondent and Mr Mwirigi Advocate for 1st petitioner/Applicant.

HON. A.ONG'INJO

JUDGE

Mr Mwirigi Advocate

We can take a date for hearing of proposals for distribution.

Order

Hearing 14.8.2017 – Distribution

HON. A.ONG'INJO

JUDGE