



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO 437 OF 2011
IN THE MATTER OF THE ESTATE OF JEREMIAH M'TWERANDU (DECEAED)

FLORENCE KITHIRU.....1STPETITIOENR

JOYCE IGOKI GILBERT.....2ND PETITIONER

VERSUS

JACKIM IKUNDA M'TWERANDU.....1STOBJECTOR

MOSES RIUNGU.....2ND OBJECTOR

JUDGMENT

Distribution of estate

[1] This decision relates to the Summons for Confirmation of Grant filed on 22nd November 2013 as well as the Protest dated 2nd April 2014. The grant to be confirmed is the one that was made to all the four parties in this matter on 13th November 2014. The point in contention is distribution of the estate. The Petitioners filed affidavits and submissions as was ordered by court on 13th November 2014. The Petitioners proposes the estate to be distributed as follows:-

(1) L.R NO ABOGETA/U-KINTHANGARI/151

(i) FLORENCE KITHIRU MUTUERANDU.....2.99 Acres

(ii) JACKIM IKUNDA MUTUERANDU.....4 Acres

(iii)JOYCE IGOKI GILBERT.....2 Acres

(iv) MOSES RIUNGU MUTUERANDU...4 Acres

(2) L.R NO ABOGETA/U-KINTHANGARI/589

FLORENCE KITHIRU MUTUERANDU- whole

[2] The Petitioners argued that their proposed mode of distribution to be most fair and equitable. The Petitioners on the other hand termed the proposals by the Objectors to be unfair, discriminative of women, and propelled by greed and selfishness. They also proposed an alternative mode of distribution

under section 35 of the Law of Succession Act. But, they insisted on allocation of parcel No 589 to the 1st Petitioner for she is the widow of the deceased and is in occupation of the said land.

[3] The Protestors submitted that the proposals by the parties are so far apart and cannot be reconciled in any other manner other than by section 35 of the Law of Succession Act. They cited the case of JUSTUS THIORA KIUGU [2015] eKLR to support their said position. They stated that the widow to have life interest on parcel No 589 as she is over 80 years with no dependants and that is where she is living.

DETERMINATION

[4] I have carefully considered all the rival submissions of the parties. The Protestors seem to have abandoned their earlier proposals contained in their affidavit of protest. They stated that the change of heart is quest for reconciliation of the proposals by parties which are far apart. That may be the case. However, it be noted that those proposals were oozing outfestering waters; discrimination of women and selfishness. Be that as it may, should I order distribution on the basis of section 35 of the Law of Succession Act?

[5] Section 35 of the Law of Succession Act provides as follows:

35. Where intestate has left one surviving spouse and child or children

(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Let me say something about this section. Law is dynamic. Whereas strict application of section 35 of the Law of Succession Act had been insisted upon, but it now appears that the Court of Appeal is favouring a distinct portion being given to the surviving spouse as opposed to placing a life interest upon the entire estate. In my view, this approach is quite pragmatic and should be dictated by the facts of the case. I should add also that it is out of sheer recognition of the distinct right of the surviving spouse to the property. See a work of court in **INOKOBIA M'KAILIBA M'ITARU vs. SILAS MUTUMA M'ITARU [2017] eKLR** that:-

It is time we reinforced the rights of a surviving spouse or spouses in accordance with the Constitution. It is now becoming ludicrous to fathom that, upon death of a spouse, the right of the surviving spouse to their property of marriage is; (1) extinguished; or (2) reduced into mere share in equality with the other dependants; or (3) reduced to mere life interest in the estate. As for life interest of surviving spouse, the Court of Appeal seems to favour a distinct share being given to the surviving spouse rather than subjecting the entire estate to a life interest; it has also declared that part of section 35 of the Law of Succession Act which provides that the life interest of a widow extinguishes upon re-marrying to be discriminative. See for instance the case of Stephen Gitonga M'Murithi vs. Faith Ngira Murithi [2015] eKLR where the Court of Appeal succinctly stated that:-

“As for the issue of the widow having been given an outright tangible shareholding in the net intestate estate of the deceased as opposed to a life interest, we find nothing in section 40 of the Law of Succession Act that can prevent a court of law from looking at the peculiar circumstances of each case and then determine whether to apply strictly the rule on life interest or tamper with it in the interest of justice to all the affected parties...”

This is a step in the right direction but more subtle pronouncements are needed in this subject of life interest in honor of the constitutional command in article 20 and 259 that courts should develop the law from where it seems to be currently ending; to the extent that it

does not give effect to a right or fundamental freedom; and give an interpretation that most favour the enjoyment of a right or freedom in the bill of rights. My view is that Section 35 of the Law of Succession Act requires a serious reconciliation with the Constitution in accordance with section 7 of the Transitional provisions of the Constitution so that to remove the seeming mandatoriness of application of life interest. Having said that, I should be guided by the peculiar circumstances in this case.

In this case, there are two properties. The 1st Petitioner seems to be saying that she should be given parcel No 589 as she is the wife of the deceased and she lives on the said property. The second Petitioner supported that stand point. But the Petitioners in their submissions seems to give an alternative proposal, to wit, that the widow gets a life interest. The objectors in their submissions also seems to suggest that the widow to have life interest as per section 35 of the Law of Succession Act. Except, however, on another part, they suggest that since the widow lives on parcel NO 589, her life interest should be on that parcel. I note the widow is over 80 years old and has no dependants. Accordingly, it is fair that the widow shall have her life interest on parcel No 589 and thereafter, the property shall be shared among the children of the deceased equally. I so order. Other important consideration; Parties herein have families and will need exclusive use of their respective parcels. This is apparent in their submissions and affidavits filed. It may therefore be imprudent to postpone sharing of the estate by creating a life interest of the widow on this property especially noting that some of the family members reside on the property. Again, it would be inconsiderate to place the entire estate under the life interest of the widow who has been provided for above. In the circumstances, it is only fair that parcel No 151 shall be shared equally among all the children of the deceased. In the result, I make this specific orders:-

1. The grant herein is confirmed

2. Distribution of the estate shall be as follows:-

(1) L.R NO ABOGETA/U-KINTHANGARI/151 to be shared equally among:

- (i) JACKIM IKUNDA MUTUERANDU
- (ii) JOYCE IGOKI GILBERT
- (iii) MOSES RIUNGU MUTUERANDU

(2) L.R NO ABOGETA/U-KITHANGARI/589 To registered in the name of FLORENCE KITHIRU MUTUERANDU for life interest and thereafter to be shared equally among the children of the decease namely-

- (i) JACKIM IKUNDA MUTUERANDU
- (ii) JOYCE IGOKI GILBERT
- (iii) MOSES RIUNGU MUTUERANDU

3. This being a case 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 19th day of July 2017

F. GIKONYO

JUDGE

In the presence of:

Muringi advocate for Arithi advocate for petitioner

Muthama advocate for objectors

Objectors –present

Petitioner - absent

F. GIKONYO

JUDGE