



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO.564 OF 2014

**THE MATTER OF THE ESTATE OF M’KAILIBA M’ITARU Alias KAILIBA ITARU
(DECEASED)**

INOKOBIA M’KAILIBA M’ITARU.....PETITIONER

-VS-

SILAS MUTUMA M’ITARUOBJECTOR

JUDGMENT

Person of unsound mind has right to inherit

[1] This decision relates to the estate of M’Kailiba M’itaru alias Kailiba Itaru (Deceased) who died on 9th April 1985 and was survived by the following:

- 1. Inokobia M’Kailiba M’itaru-Widow**
- 2. Alice Kalayu Kubania-Daughter**
- 3. Pauline Kanye (Deceased) - Daughter**
- 4. Margaret Ncororo Meeme–Daughter**
- 5. Martha Mwathimba Gituma–Daughter**
- 6. Silas Mutuma–Son**

The estate of the Deceased consists in:

- a) L. R No. NJIA/BURI_ERURI/139 (approximately 1.3 HA)**
- b) L. R No. NJIA/BURI_ERURI/2374 (approximately 0.08 HA)**

[2] Grant of letters of administration were issued on 18th January 2015 to the Petitioner. The Petitioner filed summons for confirmation of grant and proposes the estate to be distributed as follows:

NJIA/BURI-ERURI/2374

- a) MARTHA MWATHIMBA GITUMA -0.20Acres

- b) MARGARET NCORORO MEME - 0.20Acres
 - c) SILAS MUTUMA - 1.00 Acres
 - d) REUBEN KINYUA KIBANIA - 0.30 Acres
 - e) J G - 0.50 Acres
 - f) DAVID KITHINJI M'IMARIA -0.40 Acres
 - g) INOKOBIA M'KAILIBA M'ITARI -Balance
- L.R NJIA/BURI-E-RURI/139
- a) INOKOBIA M'KAILIBA MITARU - 0.50Acres
 - b) SILAS MUTUMA M'KAILIBIA -Balance

The protest

[3] On 15th July 2015, the Objector filed an affidavit of protest to the proposed mode of distribution by the Petitioner. He states that all his sisters except Pauline Kanye (Deceased) are married and comfortable in their homes. He averred further that Pauline Kanye is survived by a son J G who is of unsound mind. In addition, he stated that the Petitioner, J and he live at their homes situate on LR NJIA/BURIERURI/139. According to him, the sole motive driving the Petitioner is to disinherit him by giving out the Deceased's estate to total strangers, especially REUBEN KINYUA KUBANIA son of ALICE KUBANIA and DAVID KITHINJI M'IMARIA, son of the Petitioner's brother. Instead, the Objector proposes that the estate of the deceased should be distributed as below:

L.R NJIA/BURI-E-RURI/139

- i. SILAS MUTUMA M'KAILIBIA -whole

NJIA/BURI-ERURI/2374

- ii. INOKOBIA M'KAILIBIA M'ITARI -0.40 Acres
- iii. ALICE KALAYU KUBANIA -0.20 Acres
- iv. MARGARET NCORORO MEME -0.20 Acres
- v. MARTHA MWATHIMBA GITUMA -0.20 Acres
- vi. SILAS MUTUMA M'KAILIBIA - Balance

[4] According to the Objector, his main point of objection to the mode of distribution by the Petitioner is because it has included outsiders. He also quarreled with the Petitioner describing her share as "balance" when the balance thereof is in excess of one acre. He argued that, being a widow the Petitioner doesn't require all that land, in any event she is only entitled to a life interest. He further states that REUBEN KINYUA KUBANIA, J G and DAVID KITHINJI M'IMATIA are persons not beneficially entitled to a share of the estate for they are neither sons nor daughters of the Deceased.

Petitioner returned fire

[5] In her further affidavit dated 21st March 2016, the Petitioner states that the Objector erroneously believes that because he is the only surviving son he has a better claim than his female siblings. Yet, the

entire family is of the opinion that everyone should have an equal share. The Petitioner submitted that being the widow of the Deceased she is entitled to half of the estate. She acknowledged that she and the Objector have built on the parcel no. NJIA/BURI-E-RURI/139 but which she proposes it be given to the Objector wholly. She stated that she will move from her home to join the daughters on parcel no. NJIA/BURI-E-RURI/2374 so that she and her daughters can continue taking care of J G who is of unsound mind. She also proposes that ALICE KALAYU to hold Joseph's share in trust. She proposes in her revised mode of distribution that the estate should be shared as follows:

L.R NJIA/BURI-E-RURI/139

c) SILAS MUTUMA M'KAILIBIA -whole

NJIA/BURI-ERURI/2374

h) INOKOBIA M'KAILIBIA M'ITARI -0.69 Ha

i) ALICE KALAYU KUBANIA -0.138Ha

j) MARGARET NCORORO MEME -0.138HA

k) MARTHA MWATHIMBA GITUMA -0.138Ha

l) ALICE KALAYU KUANIA GITUMA -0.138Ha

(to hold in trust for J G

A person of unsound mind)

m) SILAS MUTUMA M'KAILIBIA -0.058Ha

DETERMINATION

[6] I have considered all the rival submissions of the parties as well as the law. I take this view of the matter. Two issues emerge:-

- (i) The identity of the persons entitled to a share; and
- (ii) Their respective shares in the estate.

Before a grant is confirmed, persons entitled to a share and their respective shares in the estate must be identified and ascertained respectively. Dependants of the deceased are the persons entitled to inherit the estate of the deceased. Normally, the wife or wives or children of the deceased are known to be the persons entitled to inherit the intestate whether or not maintained by the deceased immediately prior to his death. See section 29(a) of the Law of Succession Act. But grandchildren must prove they are dependants of the deceased in the sense of section 29(b) of the Law of succession Act. See section 29 below:-

29 For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

Issues have arisen about grandchildren taking a share directly in this estate. I have in mind REUBEN KINYUA KUBANIA son of ALICE KUBANIA and J G son of PAULINE KANYEE (DECEASED). I have already stated that a grandchild will take a share directly in an estate if he is a dependant of the Deceased in the sense of section 29(b) of the Law of Succession Act that is to say that he was:-

(b) such of the deceased's...grandchildren, step-children, children whom the deceased had taken into his family as his own....as were being maintained by the deceased immediately prior to his death;

I should also state that grandchildren will also take a share under the principle of representation in section 40 of the Law of Succession Act but this is limited to the share which their deceased parent was entitled in the intestate estate were it not for his death. Applying these tests, REUBEN KINYUA KUBANIA is the son of ALICE KUBANIA. ALICE KUBANIA is still living and should be the one to get a share in the estate. REUBEN has not proved to be a dependant as per the law. He is therefore not entitled to any share. I will exclude him completely. However, J G son of PAULINE KANYEE (DECEASED) stands in a different position. But before I deal with the status of J G, let me discuss DAVID KITHINJI M'IMARIA. David is the son of the brother of the petitioner and he has not shown to be a person whom the deceased had taken into his family as his own and was being maintained by the deceased immediately prior to his death. Therefore, he is not a dependant of the deceased. I will also exclude him from the estate. I note that even the Petitioner in her new proposal contained in her submissions did not include REUBEN and DAVID as persons entitled in the estate.

Person of unsound mind has right to inherit

[7] I turn to J G. I stated that he stands in a different position. First of all he is the son of the deceased daughter of the deceased. He has a right to inherit his late mother's share in the estate. On that basis alone he will be entitled to a share in the estate of the deceased. In addition, all parties including the Objector have claimed that J G is of unsound mind and that that he stays with the Petitioner in her home. His state of mind does not disinherit him. The Constitutional approach today is that such person has rights and all that he needs from the courts is provision of appropriate accommodations to facilitate enjoyment of his rights. In law, that is achieved by appointing a manager or a trustee for his estate and for his benefit. The Petitioner stated that she and her daughters take care of him. In the affidavit of DAVID MITHEA (Assistant Chief of ThuuruSublocationIgembe Central Sub-County) he stated that Joseph has lived in the family home all his life. This evidence may also portend that Joseph has always been maintained by the Deceased and thus fortifying his position as a dependant. Either way J G is entitled to a share in this estate. I so hold.

Discrimination; right of surviving spouse

[8] I have come to the foregoing conclusions. But one thing is disheartening; that the objector is advancing patriarchal biases against the widow and the daughters of the deceased on the basis that they are female; they are married; and they are happy and comfortable in their marriages. Again, it is unappreciative of the objector to state that as a widow, the petitioner does not need the amount of land she claims to be entitled to. 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 discriminatory. 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. More important is that the widow takes care of J G and will need a distinct place to enable her discharge that onerous task. In considering whether the widow herein should merely enjoy a life interest, all the foregoing factors are relevant.

The upshot

[9] From the documents filed by the Objector, it seems that he feels that since his sisters are married and living comfortable in their matrimonial homes they are not entitled to such large share or a share greater than his. But taking all the facts into account, I will follow the path of law that posit that all children of the deceased are to be treated equally. No one should be discriminated upon based on gender or status or any other ground which is prohibited under Article 27 of the Constitution. Gratefully, and quite selflessly, the widow is willing to move from parcel No 139 to a smaller portion in parcel No 2374 despite the fact that; (1) she has her house on the former parcel of land; (2) she has a greater right to remain on it; and (3) is entitled to a greater share in the estate. All these she is willing to forego in order to join the daughters on parcel no. NJIA/BURI-E-RURI/2374 where they will be able to take care of J G who is of unsound mind. She has also proposed ALICE KALAYU to hold J's share in trust. I therefore find her proposal to be equitable and in line with the law for she has even provided more for the objector in parcel 2374. In the upshot the grant herein is confirmed and distribution of the estate shall be as follows:

L.R NJIA/BURI-E-RURI/139

SILAS MUTUMA M'KAILIBIA -whole

NJIA/BURI-ERURI/2374

(i) INOKOBIA M'KAILIBIA M'ITARI -0.69 Ha

(ii) ALICE KALAYU KUBANIA -0.138Ha

(iii) MARGARET NCORORO MEME -0.138HA

(iv) MARTHA MWATHIMBA GITUMA -0.138Ha

(v) ALICE KALAYU KUANIA GITUMA -0.138Ha

(to hold in trust for J G

A person of unsound mind)

(vi) SILAS MUTUMA M'KAILIBIA -0.058Ha

Dated, signed and delivered in open court at Meru this 17th day of July 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Mutura advocate for Objector

Petitioner in person

F. GIKONYO

JUDGE