



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 952 OF 1989

IN THE MATTER OF THE ESTATE OF ABDALLAH KAURRAI also known as ALBERT KAURRAI (DECEASED)

RULING

1. What is before me for determination is the Summons for Confirmation of Grant dated 16th July 2003.
2. The deceased herein died on 26th June 1980. From the material before me, he had married four times, and therefore his family comprised of four houses. He died possessed of two assets, being Ngong/Ngong/ 5861 and 5862.
3. The grant sought to be confirmed was made on 5th June 2002 to William Ndichu Kaurrai, John Senewa Kaurrai, David Matheri Kaurrai and Mariro Kaurrai. The application before me is at the instance of one administrator, William Ndichu Kaurrai. He avers that the land available for distribution is roughly sixty-eight (68) acres and proposes that the same be shared equally between the four houses.
4. There is no affidavit of protest on record, and the application is therefore generally unopposed. I had directed on 27th February 2015 that all the survivors attend court at the hearing of the confirmation application on 11th May 2015. The matter did not proceed on the appointed date but came up on 7th July 2015.
5. At the hearing the application was urged by Mr. Isindu. Mr. Rono, for John Samol, informed the court that he had not yet received instructions on the matter, but he did not ask for adjournment. David Matheri urged that the estate be distributed according to the male children, so that the sons get their shares first and whatever remains be distributed equally among the houses. He mentioned that a portion of the land had been sold by the deceased prior to his death to individuals he named David Matheri, while another portion had been given out by the deceased before he died to some relatives. According to him only twenty-eight (28) acres were available for distribution, and should be shared equally. He said there was also Plot No. 5 at Kiserian trading centre which should be retained as family property.
6. There was a rejoinder by Mr. Isindu to David Matheri's submissions. He stated that the portions of the land allegedly sold to the individuals named by Mr. Matheri were sold unprocedurally by some family members after the deceased died. He added that the said transactions were annulled by the court on 8th May 2002, and therefore what should be available for distribution is 68 acres. He stated that he had not been instructed about Plot No. 5 Kiserian.

7. I have perused through the record and noted that on 8th May 2002 Aluoch J had revoked a grant that had been made earlier to Stephen Sokore Kaurrai and revoked any transactions done on the basis of the said grant. However, the transactions nullified by the court were not the ones that David Matheri was alluding to. But I do note that David Matheri did not present before the court any material to support the assertions made in his submissions.
8. I shall proceed on the premise that the deceased died possessed of land measuring 68 acres and that is the property that I am called upon to distribute. It is not disputed that the deceased died a polygamist, having married four times. The persons entitled to a share in the estate of the deceased are also not disputed. How then should I proceed to share out the land?
9. I have noted that the deceased died intestate in 1980, that was before the Law of Succession Act, Cap 160, Laws of Kenya, came into force on 1st July 1981. According to section 2(2) of the Act, the Act does not apply to estates of persons who died before the Act came into force, and the law to apply in the circumstances should be the law or custom, as the case may be, that applied to such estates as at the time of death
10. The applicant did not address on the law upon which he proposed the distribution that was placed before me. It is not pleaded in the application, neither did Mr. Isindu, nor Mr. Rono and David Matheri submit on it.
11. As the death occurred before 1st July 1981, devolution of the intestate estate of the deceased should not be according to the provisions of the Law of Succession Act on intestacy, but rather on the law or custom that governed the intestate estates then, which was African customary law. The ethnicity of the deceased has not disclosed and therefore I have no basis upon I can determine which customary law applied to the estate.
12. I am conscious of the fact that African customs on inheritance did not favour succession by women in general, and married ones in particular, to the estates of their deceased parents. There were circumstances then, that tended to encourage all women to find marriage mates, which favoured that approach. Those circumstances have changed for various reasons that I need not venture to discuss here. The modern approach is to give equal treatment to both male and female, regardless of their marital status. That is the spirit of Article 27 of the Constitution of Kenya 2010.
13. I shall proceed to deal with the matter before me guided by the provisions of Article 27 of the Constitution and section 40 of the Law of Succession Act. I am conscious that the Act does not apply to the estate of the deceased to the extent of devolution under the intestacy provisions set out in the Act, but as the parties have not submitted on the custom that should apply in the circumstances, I shall revert to section 40 thereof for guidance. Section 40 of the Act provides for the distribution of the estate of a polygamist. Its effect is that the property is to be shared equally amongst all the survivors with equal right, subject to life interest, if any.
14. Looking at the proposed distribution I note that the estate is proposed to be distributed equally between the four houses. In my view that would not amount to equal or equitable distribution, and would run counter to the clear provisions of Article 27 of the Constitution and section 40 of the Law of Succession Act, as the four houses do not have an equal number of members. The estate should be shared equally amongst all the widows, if any, and children of the deceased, where if any of the children are dead; their share is to be taken by their own children.
15. Consequently, I do hereby allow the application dated 16th July 2003 in the following terms-
 - a. That the grant of letters of administration made on 5th June 2002 is hereby confirmed;
 - b. That all the 68 acres comprised in Ngong/Ngong/5861 and 5862 shall be shared equally amongst all the widows and children of the deceased; and

c. That there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH DAY OF FEBRUARY, 2016.

W MUSYOKA

JUDGE

In the presence ofadvocate for the applicant.