



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 142 OF 2008

IN THE ESTATE OF MITARU NJAU MBIRU alias M'CHURI MITARU (DECEASED)

NJERU M'CHIURI.....PETITIONER

VERSUS

STEPHEN NTHIGA MITARU.....OBJECTOR

RULING

1. Stephen Nthiga Mitaru, the protestor has challenged the appointment of his brother (Njeru M'Chiuri) as the administrator of the estate of their deceased father (Mitaru Njau Mbiru). Furthermore, he has also challenged the sub-division of land No. Gathuri/Nembure/3306 to the extent that the administrator has a share in the said parcel of land. According to him this parcel of land is meant for himself, his brothers and sisters, all of whom are siblings of the second house.

2. It is the evidence of the protestor that the administrator did not notify him before filing the succession cause. He only learnt of it after it had been filed by the administrator. And even when he came to court, it was in obedience to the summons served upon him on the application of the administrator. It is also his evidence that the land in dispute belongs to the family and for that reason, he should not have been sued by the administrator.

3. Furthermore, the protestor (PW 1) testified that before his late father died, he had divided the suit land between his two wives, which are represented in this cause as the first and second house. He also testified that each wife got 1 ½ acres. He further testified that his deceased father never shared the land among his children. It is important to point out that the protestor produced what he called a will written by his father, which he produced in court in his recalled evidence as exhibit PEX 1 in support of his case.

4. Finally, he testified that the land in dispute is registered in the name of the administrator as a trustee for the first house and it measures 3 acres. He has also added that the land in dispute belongs to the second house to which the protestor belongs.

5. The protestor called Francis Nyaga Mitaru (PW 2) as his witness. According to PW 2 when their father was ill, the administrator never visited him in Nairobi. It is also his evidence that the administrator has been trying to sell PW 2's plot at Kavutiri being plot No. 177. He supported the evidence of PW 1 that the suit land belongs to the second house and that it should not have been subdivided without his participation.

6. He has also supported the evidence of PW 1 that he learnt of the filing of the succession cause after it had been filed by the administrator in court.

7. Njeru M'Chiuri, the administrator testified in his own behalf. He told the court that the protestor and Francis Nyaga (PW 2) are among his brothers who accompanied him to court when he filed the succession cause. He has also stated that he served summonses upon his brothers to attend the magisterial court at Runyenjes. He dwelt at length telling the court about the history of the gazzetment of the land in dispute and what happened in court and the court registry.

8. According to him under Kiambu Customary Law, a polygamist is required to share his land amongst his wives. It is also his evidence that his late father had two wives and that he belongs to the first wife.

9. Finally, he stated that the estate of his late father comprised of 1 ½ acres which he subdivided amongst the beneficiaries namely:

1. Francis Nyaga (PW 2)

2. Stephen Nthiga (PW 1)

3. Muriuki.

4. He then gave himself a ¼ of an acre and another ¼ of an acre to be shared equally among his six married sisters. Finally he has stated that there is a ¼ of an acre to be sold to cater for the costs of this succession. According to him he did the subdivision and distribution in accordance with the Kiambu Customary Law.

5. After the protestor (PW 1) claimed that the suit land belonged to his mother, the administrator carried out a search and confirmed that the land in dispute belongs to his late father in respect of which he produced a search certificate as exhibit DEX 1. More importantly, he confirmed that he had not called all family members to consent to his filing the succession cause in Runyenjes magisterial court. He only invited male members of the family of the deceased.

6. It is also his evidence that the six sisters who are to share a ¼ of an acre are married and are staying with their husbands. Finally, he has stated that he went alone to court to file the succession cause.

7. In support of his case, he called Martin Mugo Migwi (PW 2). PW 2 testified that he is the one who gave the administrator a parcel of land that belonged to his late father, which is land reference No. Gaturi/Nembure/997. He denied giving land to Mugo Migwi.

The Applicable Law:

14. The administrator in matters of the estate of deceased persons is required to consult all family members before proceeding to file a succession cause. He is also required to seek their consent on the mode of distribution of the estate. Such an administrator does not have a free hand in the distribution of an estate without the consent of all the beneficiaries. These are the basic requirements of section 76 (a) of the Succession Act (Cap 160) Laws of Kenya.

Evaluation of the Evidence, Findings and the Law:

15. I have considered the entire evidence of the protestor, his witnesses and that of the administrator and his witnesses. I believe the evidence of the protestor that the administrator (DW 1) did not consult him before filing the succession cause in court. I also believe the evidence of the protestor (PW 1) that his sisters were not consulted by the administrator as to the mode of distribution of the estate. The administrator has confirmed in his evidence that he only consulted the male members of his father's children.

16. In the circumstances, I find that the administrator acted in breach of the law. He was under an obligation to seek the consent of all members of the family of both houses before filing the succession

cause. He was equally under an obligation to seek the consent of all family members on the mode of distribution of the estate of their late father.

17. The failure by the administrator to comply with the requirements of section 76 (a) the Succession Act is not excusable.

Verdict and Disposal Order:

18. In the circumstances, I find that the protestor has proved his case on a balance of probabilities. The protest is hereby upheld. The confirmed grant of the Runyenjes magisterial court is hereby set aside. The parties are at liberty to re-start the confirmation proceedings.

19. Being a family matter, I make no orders to costs.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this 2nd day of February **2016**

In the presence of both the protestor and the administrator

Court clerk Njue

J.M. BWONWONGA

JUDGE

02.02.16