



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 290 OF 2012

**IN THE MATTER OF THE ESTATE OF FRANCIS MIGWI MATU alias MIGWI MATU
NDEGE (DECEASED)**

AND

SIMON NYAMU MIGWI.....PETITIONER

VERSUS

PATRICK MUNENE MIGWI.....PROTESTOR

JUDGMENT

1. This cause relates to the estate of the late **FRANCIS MIGWI MATU ALIAS MIGWI MATU NDEGE** (Dcd) who died domiciled in Kenya on 1st August, 2005. **Simon Nyamu Migwi**, the petitioner herein was appointed the administrator of the estate through a grant issued by this court on 25th January, 2013. The petitioner upon appointment took out Summons for Confirmation of Grant albeit before expiry of the statutory period of six months. **PATRICK MUNENE MIGWI** protested not about the period but about the proposed mode of distribution. By the time the protest was heard through oral evidence, six months had long lapsed and so the requisite period to confirm the grant was no longer an issue.

2. **Petitioner's case**

The Petitioner listed the properties that comprise the estate in his petition for letters of administration as follows:

- i. ***Land parcel No. KABARE/NYANGATI/4094.***
- ii. ***Land parcel No. KABARE/NYANGATI/4095.***

He further listed the following dependants as the persons surviving the deceased herein;

1. Simon Nyamu Migwi (petitioner and the only son to the deceased)
 2. Patrick Munene Wanjiku (protestor and grandson to the deceased)
 3. Purity Wawira Wanjiku (Grand daughter to the deceased)
3. The Petitioner initially in his application for confirmation of grant, had proposed to have the entire estate devolved to him. However, when Patrick Munene Migwi, one of the beneficiaries herein and the protestor herein protested, he changed his mind and suggested that the protestor and his sibling should share one acre comprised in **KABARE/NYANGATI/4095** while he gets 2 acres comprised in **KABARE/NYANGATI/4094**.

4. While admitting the protestor's assertion that he had benefitted from 3 acres of land that was given to him by his late father the deceased herein as a gift *intervivos*, he testified before this Court that he sold the 3 acres in order to pay for a loan he had with Agricultural Finance Corporation (A.F.C.) and that he sold the parcel in 2002 before the demise of the deceased herein. He could not produce any document however, when challenged by protestor's learned counsel to show proof that he sold the parcel in order to service a loan.
5. The Petitioner faulted the protestor's proposal of distributing the estate between himself (Patrick Munene Migwi) and her sister Purity Wawira Wanjiku saying that the two grand children should go and benefit from their father's share allegedly in Lamu. He however, could not produce any document to prove that the protestor had a father who owned land in Lamu when challenged to prove the said allegation.

Protestor's case

6. Patrick Munene Migwi, the protestor herein agreed with the Petitioner in so far as the property forming the estate is concerned. In his affidavit of protest, the protestor deposed their late mother Margaret Wanjiku Migwi ought to have gotten a share in the estate and by virtue of being the only children of their mother, they should be given the property forming the estate to share equally between himself and his sister Purity Wawira Wanjiku.
7. The protestor opines that the petitioner had benefitted from the estate because he was given 3 acres by their grandfather when he was still alive and should therefore not claim any share just because he sold his share of 3 acres. He produced exhibits PExhibit 2 and PExhibit 2A (copies of register (Green cards) to show that the petitioner had sold the parcels after subdividing them from parcel number **KABARE/NYANGATI/4093** which he had been given by his late father as a gift as per P Exhibit 1 which he also produced in support of his case.
8. According to the protestor, the petitioner should not be given any share in the estate as he had already benefitted. He urged this Court to grant the two properties **KABARE/NYANGATI/4094** and **4095** to himself and his sister as the deceased was their maternal grandfather.

DETERMINATION

9. The Court has considered both the Petitioner's case and that of the protestor. The properties forming the estate herein are not contested. They are **KABARE/NYANGATI/4094** measuring approximately 2 acres and **KABARE/NYANGATI/4095** measuring 1 acre. The dependants to the estate are also uncontested. When the petitioner presented the petition, he named the protestor and his sister as grandchildren to the deceased and dependants to the deceased. Had he not done that, then the protestor would have been required to prove that he and his sister were dependants within the meaning given under **Section 29(b)** of **Law of Succession Act Cap. 160** and that they were being maintained by the deceased immediately prior to his demise.
10. It is also not disputed that the 3 acres given to the petitioner by the deceased herein was a gift *intervivos*. The provisions of **Section 42** of **Law of Succession Act Cap. 160** provides that previous benefits to a dependant in the estate shall be taken into account when distributing the estate and determining the share of each dependant. **Section 38** of the Act provides for equal distribution of the estate among surviving children of the deceased where there is no spouse surviving. This Court has noted that **Section 66** of the Act clearly gives priority or preference to the child/children of a deceased person over grand child/children. This being the position I note that the petitioner sold the share given to him during the lifetime of the deceased and there was no evidence to show that the deceased herein had made any suggestion that the petitioner was not going to get a share of what was remaining.
11. In view of the foregoing, I do find that the petitioner, the protestor and Purity Wawira Wanjiku are dependants to the deceased and are entitled to a share in the estate herein. The Court has taken into account the fact that he had already benefitted from the estate but nevertheless in view of the fact that he is the only child to the deceased, he should at least get a share. The properties forming the estate shall therefore be distributed as follows:
 - a. **KABARE/NYANGATI/4095** measuring approximately 1 acre shall devolve to **SIMON NYAMU**

MIGWI the petitioner herein.

- b. **KABARE/NYANGATI/4094** measuring approximately 2 acres shall be shared equally by **Patrick Munene Migwi** and **Purity Wawira Wanjiku**.

There shall be no order as to costs because this is a family matter.

Dated and delivered at Kerugoya this 2nd day of March, 2016.

R. K. LIMO

JUDGE

2.4.2016

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Maina for Protestor present

Petitioner Simon Nyamu absent

COURT: Judgment signed, dated and delivered in the presence of Maina for Protestor and in the absence of the Petitioner.

R. K. LIMO

JUDGE

2.3.2016