



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HIGH COURT SUCCESSION CAUSE NO. 14 OF 2015

(FORMERLY MERU 243 OF 2015 MISC 16/15 CHUKA 87 OF 2010)

IN THE MATTER OF THE ESTATE OF M'MURITHI GITUOKI.....DECEASED

M'ITONGA M'MURITHI.....1ST OBJECTOR

MUTHONI M'INOTI.....2ND OBJECTOR

And

RAPHAEL KARIUKI M'INOTI.....PETITIONER

JUDGMENT

1. The late M'Murithi Gituoki ("the deceased") died in or about 1967. Pursuant thereto, Raphael Kiruki M'Inoti, the Petitioner and, a grandson of the deceased, petitioned for Letters of Administration on 31st May, 2010 before the Chuka Principal Magistrate's Court. A grant was issued on 14th September, 2010 which was confirmed on 23rd October, 2014. On 15th January, 2015 the objectors filed Summons for the revocation of the said grant. On 24th February, 2016, the parties entered into a settlement whereby the grant was revoked and a new one in the names of the petitioner and M'Itonga M'Murithi, "the 1st objector," was issued. Pursuant thereto, the court gave directions that the parties do file their Affidavit evidence on the basis of which the petition was to be determined.

2. The objectors filed an Affidavit sworn by M'Itonga M'Murithi on 17th March, 2016 while the petitioner filed the Affidavit of Raphael Kiruki M'Inoti 21st March, 2016. At the hearing of the objection, the parties agreed that the estate of the deceased constituted only two assets, to wit, the properties known as LR NO. Nkuene/Ngonyi/695 measuring 4.94 Acres and LR NO. Nkuene/Ngonyi/695 measuring 1.40 Acres. The parties adopted their respective Affidavit evidence and the following was the evidence.

3. M'itonga M'Murithi, the 1st objector told the court that the deceased had three (3) children namely, M'Inoti M'Murithi, Ndao M'Murithi and M'Murithi. Ndao M'Murithi, the only daughter pre-deceased the deceased and did not therefore leave any estate. M'Itonga the other son of the deceased died in 2010 and left behind a widow and six (6) children. The 1st objector further told the court that according to him, the beneficiaries of the deceased were, the estate of his late brother, M'Inoti and himself only. That he had agreed with his late brother that the assets of the estate be distributed as follows:-

(a) Nkuene/Ngonyi/250

(i) M'Itonga M'Murithi – 2.47 acres

(ii) M'Inoti M'Murithi – 2.47 acres

(b) Nkuene/Ngonyi/695

(i) M'Itonga M'Murithi – 0.50 Acres

(ii) M'Inoti M'Murithi – 0.90 Acres

In this regard, the 1st objector urged the court to distribute the estate in terms of the aforesaid agreement between him and his late brother.

4. The 2nd objector Muthoni M'Inoti, is the widow of the late M'Inoti M'Murithi. She appeared in court on the date of the trial. However, due to her old age and frailty she conducted her case through an intermediary, Peter Muthuuri M'Inoti (PW2) who is one of her sons. She agreed with the 1st objector in all particulars concerning the distribution of the estate. That plot No. 259 be divided equally between her (representing the estate of the eldest son of the deceased, the late M'Inoti) and the 1st objector. The witness told the court that, save for one Salesio Kabura and the petitioner, the other children of M'Inoti were not catered for in the proposed distribution by the petitioner. On cross examination, he stated that currently he, Peter Kaburu, together with the 2nd objector and one George Kiambi were in occupation of LR Nkuene/Ngonyi/638. That another property of his late father, LR NO.627, was in his and George Kiambi's occupation. He concluded by stating that in terms of some proceedings undertaken before the D.O of their area, he was entitled to occupy a small portion of LR NO.695.

5. On his part, the petitioner told the court that he is the grandchild of the deceased. That he had constructed and lived on LR NO.259 for over fifty (50) years now. That the two properties forming the estate should be distributed between the 1st objector and their late father, M'Inoti M'Murithi, as had been agreed between the two during the lifetime of his late father. However, the portion meant for his late father should be distributed equally to the petitioner and his brother Salesio Kaburu M'Itonga. That the DO of Bogeta East had already made an order on how LR No.695 should be utilized. He admitted in cross-examination that there has been no succession undertaken in respect of the estate of his late father.

6. Ms Mutinda Learned Counsel for the objectors submitted that the parties were in agreement that the effect that the properties in dispute be divided between the 1st objector and the family of the late M'Inoti. That however, since no administrator has been appointed for the estate of the late M'Inoti, his portion should be held by the 2nd objector as the widow rather than the petitioner and Salesio M'Inoti. That this is so because there are other children of the late M'Inoti M'Murithi. On his part Mr. Wamache Learned Counsel for the petitioner submitted that there is agreement on the division of the disputed properties. That the grand children have been waiting for far too long for their parents, the 1st objector and the late M'Inoti M'Murithi to distribute the estate of the deceased. That it will be expensive and unnecessary delay to have the portion of the late M'Itonga pass through the 2nd objector considering her age. Counsel therefore urged that the distribution proposed by the petitioner be upheld.

7. I have considered the Affidavits on record and the testimonies of the parties. In my view, the parties having agreed on what constitutes the estate of the deceased, the issues for determination in this matter are two. Firstly, who are the beneficiaries of the estate of the deceased and secondly, how should the estate be distributed. It is clear from the evidence on record that the deceased died in or about 1967. He had three (3) children namely M'Inoti M'Murithi, Ndao M'Murithi and M'Itonga M'Murithi, the 1st objector. The parties were in agreement that M'Itonga died in or about 2010 and left an estate, and that Ndao M'Murithi had been married but she died sometimes in 2000. According to the parties those entitled to inherit the properties of the deceased are therefore M'Itonga M'Murithi and M'Inoti M'Murithi. There was no evidence to show that the deceased had given any person any part of his estate during his lifetime. It was also not contended that any grandson of the deceased was his dependant during his lifetime. Accordingly, considering the evidence on record and the testimonies of the witnesses, I am in agreement and so hold that the beneficiaries of the estate of the deceased are M'Itonga M'Murithi and

M'Inoti M'Murithi.

8. Having determined who the beneficiaries of the estate are, the next issue is how the estate is to be distributed. It would seem that the two beneficiaries had long agreed on how the estate was to be distributed. The problem arose when M'Inoti M'Murithi passed away before the estate of the deceased was administered and the same distributed. Basically, the dispute is how M'Inoti's portion to be distributed. The parties are in agreement that the portion or share of M'Itonga M'Murithi should remain untouched. Accordingly, I hold that since the beneficiaries themselves had already agreed as to their shares, I do not see why the parties are quarrelling over the estate of the deceased. As far as this court is concerned, the estate that is the subject of these proceedings is that of the late M'Murithi Gituoki. It is not the estate of his son, the late M'Itonga M'Murithi. The latter is only a beneficiary.

9. Since there was no contention that any of the grand children of the deceased was a dependant, this court cannot purport to ignore the provisions of Section 38 of the Law of Succession Act. That section provides

“38 Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”

In view of the foregoing, since the deceased left two identifiable sons, M'Itonga and M'Inoti, the court cannot overlook them and proceed to determine the interest of the grand children in the deceased's estate. The rights and interest of the grand children are and should be as against the two, M'Inoti and M'Itonga or their estates and not that of the deceased. The only time the grand children are to be considered at the same time as the children of a deceased person is when the grand child claim to be a dependant in terms of Section 29 of the Act. That is not the case here.

10. This court appreciates Mr Wamache's submission that both M'Itonga and the widow of M'Inoti are reasonably aged and that the interest of the grandchildren in the estate of the deceased should be determined to avoid delay and expense. That submission may sound attractive and to be in consonance with Article 159 (2) of the Constitution of Kenya, as regards not to delay justice. But if effected, it will be against the Law. Before court, is the Succession of the estate of the late M'Murithi Gituoki and not his son the late M'Inoti M'Murithi. If one wants the court to determine who and how the estate of M'Inoti M'Murithi is to be shared, let him/her mount a Succession Cause for his estate. It is only through a separate Succession Cause for his estate, that the court can legally then consider who is entitled to what of his estate. But to invite this court to make a pronouncement on his estate in these proceedings will be irregular. Let the family of M'Inoti M'Murithi mount a separate Succession Cause for his estate whereby the issues which the petitioner raised in this matter can then be determined in that cause. However, on the part of this court, since no administrator of the estate of the late M'Inoti M'Murithi has been appointed and none has applied to be soappointed for purposes of holding his share in the estate of the deceased, the share will remain in his estate.

11. Accordingly, the estate of the deceased will be distributed as follows:-

(a) LR Nkuene/Ngonyi/259

(i) M'Itonga M'Murithi – 2.47 Acres

(ii) Estate of the late M'Inoti M'Murithi – 2.47 Acres

(b) LR Nkuene/Ngonyi/695

(i) M'ItongaM'Murithi – 0.50 Acres

(ii) Estate of the late M'InotiM'Murithi – 0.90 Acres

It is so decreed.

DATED AND DELIVERED AT CHUKA THIS 7TH DAY OF APRIL, 2016

A. MABEYA - JUDGE

07.04.2016

Court

Judgment read and delivered in open court in the presence of the parties.

A. MABEYA – JUDGE

07.04.2016