



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 43 OF 2015

(FORMERLY SPM'S CHUKA SUCC. CAUSE NO. 21 OF 2014)

**IN THE MATTER OF THE ESTATE OF THE LATE M'MBURUGU M'RUBIA alias
M'MBURUGU M'IRUBIA.....DECEASED**

MORRIS MWITI MBURUGU.....PETITIONER

VERSUS

DENIS KIMANTHI M'MBURUGU.....CAVEATOR

J U D G M E N T

1. M'Mburugu M'Iruba (hereinafter 'the deceased') died on 3rd December, 2009. He left behind an estate comprising of Karingani/Muiru/482 measuring 3.1 acres only. On 28th January, 2014, Morris Mwiti Mburugu petitioned for letters of administration for the estate of his late father. He disclosed land parcel No. Karingani/Muiru/482 ("the asset") as the only asset forming the estate and himself, Casty Kanini Njagi, Dorothy Kawira Mbogo and Joy Kathambi Cianthuni as the only survivors and/or beneficiaries of the estate. A grant was issued to him on 28th March, 2014.

2. Pursuant thereto, on 23rd July, 2014, the petitioner applied for the confirmation of that grant. He proposed to distribute the estate (asset) as follows:-

- a. Morris Mwiti Mburugu - 0.378 Ha
- b. Francis Njiru Mburugu - 0.40 Ha
- c. David Mutembei Nthigai - 0.29 Ha
- d. Dennis Kimathi Mburugu
- e. Dickson Murithi 0.20 Ha.
- f. Faridah Kainyu
- g. Caroline Gakii

3. However, on 21st March, 2014, Dennis Kimathi Mburugu ("**the Protestor**") had lodged a caveat. He followed this with an Affidavit of Protest filed on 7th January, 2015. In it, the protestor contended that he and his sister one Faridah Kainyu were dependents of the deceased; that they had grown up under the care of the deceased who had educated them; that the proposed distribution had omitted him and his said sister; that the deceased had left the following children at the time of his death; the Petitioner, Francis Njiru Mburugu, Caroline Gakii, Ciagitari Mburugu, Murugi Mburugu and Ciamati Mburugu. That those who depended on the deceased were the protestor, his sister Faridah Kanini and Dickson Murithi. He further contended that the petitioner's proposed distribution included one David Mutembei Nthigai who was neither a beneficiary nor a dependent. The Protestor therefore proposed that the estate be distributed

as follows:-

- a. Morris Mwiti - 0.81 Ha
- b. Francis Njiru - 0.81 Ha
- c. Denis Kimathi - 0.81 Ha
- d. Faridah Kainyu
- e. Dickson Murithi 0.75 Ha
- f. Ciagitari Mburugu
- g. Murugi Mburugu
- h. Ciamati Mburugu

4. At the trial, the Protestor adopted his Affidavit of Protest and the Affidavit Evidence filed on 30th October, 2015. He told the court that the deceased had eight (8) children of which two (Kaari Mburugu and Cianthuni Mburugu) were deceased. That he and Faridah Kainyu were the children of the late Kaari Mburugu. That save for the two deceased daughters and Ciagitari Mburugu, all the rest of the daughters of the deceased were happily married. That before his demise, the deceased had taken in all his grandchildren as his dependants; that the grandchildren are therefore entitled to a share of the estate and that the objector was opposed to David Mutembei Nthigai being given 0.29 Ha in the estate. The Objector therefore contended that the land sold to David Mutembei be deducted from the share of the Petitioner; that none of the daughters of the deceased or grandsons had disclaimed their interest in the estate. He further contended that the distribution proposed by the Petitioner, was unjust and unfair. That his proposed distribution was not unfair as he had occupied 0.05 acre and settled his family on the subject property. He disputed that the amount paid by David Mutembei was ever used to commence and prosecute the present proceedings. According to him, a sum of Kshs. 15,000/- was adequate for that purpose.

5. In cross-examination, the Objector stated that he was unaware that the family had met to discuss the succession before the current Petition was lodged; that none of the grandchildren were complaining about the proposed distribution because none was living on the property; to him he did not want to hold his share with others as proposed in the distribution by the Petitioner. He stated that the estate could have commenced the present proceedings without necessarily having a portion of the estate being sold to David Mutembei. He confirmed that he was aware the purchaser had constructed a permanent house and was living on the subject property. He confirmed that he was not opposed to the purchaser having his portion if he, the objector was given his own separate portion.

6. The Petitioner opposed the Objection vide a Replying Affidavit sworn on 15th January, 2015. He deponed that he was a son of the deceased and that he had proposed to distribute the estate in accordance with the wishes of the deceased and in an equitable manner. That he had settled the Protestor together with the other grandchildren. At the trial, the Petitioner stated that he had been advised by his advocate that the law of intestacy does not recognize dependants when there are surviving children of the deceased; that the Protestor has no locus standi under Section 38 of the Law of Succession Act; (**“the Act”**); that there were only two surviving children of the deceased, the Petitioner and his brother Francis Njiru Mburugu; that the Purchaser of the portion of the estate was entitled to the portion he had purchased because his funds had assisted in the administration of the estate. That since the Protestor was only a grandson, he was not entitled to a bigger share than the other grandchildren. That the other members of the family were not protesting the proposed distribution. That there was neither an oral or written will left by the deceased. That the protestor did not have the permission of the other grandsons and daughters of the deceased to protest on their behalf.

7. In cross-examination, the petitioner admitted that the protestor has been living on the subject property ever since the lifetime of the deceased but denied that the protestor had been shown a half an acre to live on by the deceased. He told the court that the deceased had given half an acre (0.50) to both the daughters (Caroline Gakii, Ciagitari Mburugu) and the grandchildren (Denis Kimathi, Dickson Muriithi and Faridah Kainyu). That this is the portion which he had proposed to distribute to them. He admitted having sold 0.50 acres to David Mutembei for Kshs.500,000/-. That the proceeds from the sale was meant to assist the family to lodge the present proceedings but that there was still a balance of

Kshs.250,000/= due on the purchase price. That part of the money received as deposit was used to set out the boundaries. He admitted that the Protestor was entitled to inherit except that they had disagreed on the actual share.

8. David Mutembei Nthigai was the Purchaser of a portion of land from the estate. He told the court that in or about 2012 he met the members of the family and agreed to purchase 0.60 acres for Ksh.500,000/- He paid Kshs.250,000/- and there was a balance of Kshs.250,000/ payable after the transfer. That he was permitted to occupy the portion sold to him and he had since constructed a permanent home thereon and that he has been living there since. He stated that the deposit of the purchase money was paid to the family and not any singular individual. He produced CExh 1, being the agreement which was entered into for the purchase aforesaid. He contended that he was not buying a share of the petitioners interest but from the estate.

9. At the close of the trial, Counsels submitted on behalf of their respective clients. Mr. Mugo Learned Counsel for the Protestor submitted that the protest was that the proposed distribution was unjust and unfair; that it was biased in favour of the Petitioner and his brother; that the deceased had allowed the protestor to make use of the suit land but was now being bundled with others including, the sisters and the other grandchildren. Counsel urged that the portion sold to David Mutembei be hived off from the petitioner's share and that the petitioner should account for the monies received for the sale of the estate land to Mr. Mutembei. Counsel therefore urged that the protest be upheld.

10. Mr Mutani Learned Counsel for the Petitioner submitted that under Section 38 of the Act the two surviving sons of the deceased, the Petitioner and Francis Mburugu were the only beneficiaries. That the protestor's interest is unknown in law; that there was no will and that the court should apply the provisions of Section 38 of the law of Succession Act, to the letter. Counsel urged that the grant be confirmed in terms of paragraph 5 of the Affidavit in support of the application for confirmation.

11. The parties filed separate issues for determination. After considering the pleadings, the testimony of the witnesses, the submissions of Learned Counsel and the issues filed by the parties, my view is that the following are the issues that fall for determination:-

- a. Whether the Protestor is entitled to inherit from the estate of the deceased.
- b. Whether David Mutembei Nthigai is entitled to the portion of the land he purchased from the estate.
- c. How the estate should be distributed

12. The protestor contended that he is a dependent of the deceased. That he was therefore a full beneficiary of the estate of the deceased entitled to equal share of 0.81 Haas were the sons of the deceased, the petitioner and his brother Francis Njiru Mburugu. On the other hand, the petitioner contended that the protestor had no locus standi to claim from the estate since he was only a grandson of the deceased. That under Section 38 of the Act, since there were two surviving sons of the deceased, the protestor had no right to claim anything from the estate.

13. Section 38 of the Act Provides:-

“38 Where an intestate has left a surviving child or children but no spouse, the next 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.”

It is this provision that Mr. Mutani for the petitioner urged the court to strictly apply in this case. A literal reading of that section agrees with Mr. Mutani's submission that in an intestacy where there is no spouse, such as in this case, then the children of the deceased takes the entire estate equally.

14. To my mind however, one cannot read any particular part of a statute to the exclusion of the rest of the statute. Part V of the Act on intestacy must be read in conjunction with the other parts of the Act.

Part III (sections 26 to 30) of the Act makes provision for dependants. I do not agree with Mr. Mutani that Section 29 of the Act only applies to testate dispositions. That Section must be read in conjunction with Section 26 of the Act. The said Section 26 of the Act provides:

“26 Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his, will or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable, provision for that dependant, or that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”

15. It is clear from the said provision that it applies to circumstances where the dependants are not adequately provided for either under a will or law on intestacy. That is clear from the use of the words “.....**if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift.....or the law relating to intestacy.**” That provision directs the court to order reasonable provision for a deserving dependant out of the net estate. Accordingly, I am of the opinion that, notwithstanding the express wording of Section 38 of the Act, once a dependant has brought himself within the provisions of Section 29 of the Act as dependant, the court will be enjoined to make a provision for him being but guided by the provisions for Section 28 of the Act.

16. Is the Protestor a dependant under Section 29 of the Act? Under Section 29 (b), a dependant includes the deceased’s parents, grand-parents, step-parents, grand children, step children, children whom the deceased had taken as his own, amongst others. The only condition imposed is that in order for such persons to qualify as dependants, they must have been maintained by the deceased immediately prior to his/her demise. The evidence on record is that the Protestor was a grandson of the deceased born to the deceased daughter the late Kaari Mburugu. The Protestor testified that the deceased had showed him a place to farm in the asset land measuring 0.05 acres. That he had been in occupation thereof and had constructed thereon and was living on the subject portion. It is for that reason that he contended that he was entitled to an equal share with the sons of the deceased. The petitioner admitted that the protestor was a grandson to the deceased and that he had constructed on the asset land during the lifetime of the deceased with the latter’s blessings. He did not dispute that the protestor was eching his livelihood from, inter alia, the said portion. He only denied that the deceased had shown the protestor a potion measuring half (1/2) an acre.

17. From the foregoing, I am satisfied that the protestor is a dependant of the deceased and is entitled to a share in the estate based on the provisions of Sections 26 and 28 of the Act. I hold so notwithstanding Mr. Mugo’s submission that the protestor is entitled to the share of his mother in the estate. Mr. Mugo’s submission cannot hold water since there was no evidence that the late Kaari Mburugu survived the deceased. From the record, it would seem that she may have predeceased the deceased and did not therefore leave any estate upon which the protestor could claim. However, had she survived the deceased and later died before succession, her share in the estate would have been intact and capable of being claimed once her estate was administered. Since there was no evidence to show that she survived the deceased, the protestor’s entitlement to the estate is only that of a dependant.

18. The next issue is the position of David Mutembei Nthigai. The protestor’s position is that the share of 0.29 Ha proposed for the purchaser should be lived from that of the petitioner. That the property was purportedly purchased from the petitioner and not the estate. On the other hand, the petitioner and the purchaser contended that the property was purchased from the estate and the portion of the purchaser should remain undisturbed.

19. Section 45 of the Act provides:-

“45 (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a decease

person.

(2) Any person who contravenes the provisions of this Section shall

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

20. The above provision of the law is quite clear. No one is entitled to intermeddle with any free property of a deceased person. There are sanctions that follow any such intermeddling. Intermeddling includes, taking possession, disposing or even trespassing on the property of a deceased person. In this regard, any act done in contravention of that provision of the law is unlawful and cannot stand. In the case of **Muriuki Musa Hassan V Rose Kanyua and 4 Others (2014) eKLR**, when faced with a situation of sale of a property before succession, my brother **Makau J** delivered himself thus:-

“The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased beneficiaries and the sale of the land to them is challenged in this application. In such circumstances the interested parties interest cannot be considered in this matter and the remedy for them if they would be aggrieved by final court’s decision and distribution, is to file suit against the said Muriuki Musa Hassan. That in any event, Muriuki Musa Hassan is entitled to share of the deceased estate and he will definitely be interested in the interested parties interest so as to legitimize the sale of the land to the interested parties.”

21. In **re Estate of John Gakunga Njoroge (2015) eKLR** Muriithi J delivered himself as follows:-

“10 A person can only lawfully deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the Court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act.....

“15 For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with immovable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under section 82 (b) Proviso (ii), which provides that:

“no immovable property shall be sold before confirmation of the grant:

The persuasive authority of Wakiaga J. in Stephen Waweru Ng’ang’a v. Kimani Ng’ang’a, Nyeri HC P& A No. 1 of 2011 would be relevant in a claim against the beneficiaries who sold their interest so that they should not defraud the innocent purchasers of their money.”

22. In the case of **Francis Musyoki Kilonzo and another -V- Vincent Mutua Mutiso (2013) EKlr Mutende J** held that where a beneficiary purports to sell a property of a deceased person before the grant is confirmed and in contravention of section 45 of the Act, it amounts to intermeddling and the court cannot protect the purchaser.

23. From the foregoing, it is clear, and I so hold, that where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of sections 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of the innocent beneficiaries who may have been affected by the act but were not involved in the same.

24. The question that arises is what will happen in circumstances where all the beneficiaries participate in a disposition or are in agreement to such disposition and the said disposition is for the benefit of the estate? Will a court of both equity and law strictly apply the provisions of section 45, nullify the transaction and prejudice one of the parties? I think the spirit behind section 45 is that the free property of a deceased person should not be dealt with in a manner that will prejudice any of the beneficiaries or dependants. The court will not allow the provision of the law to be used as a vehicle for fraud. In my view, if the purchaser is shown to be acting in good faith, for the benefit of the estate, in conjunction and concurrence with all the beneficiaries of the estate and that such transaction does not prejudice either the estate or the beneficiaries of the estate, the harshness of the law should be tampered with the equitable principle set out under Article 159 of the Constitution, that substantive justice is the principle behind any application of the law. In this regard, if the dealing with the property of the estate does not prejudice any of the beneficiaries and is supported by or concurred with those section 45 seeks to protect, such transaction should be saved.

25. In the present case, the testimonies of the witnesses was that sometimes in 2012, David Mutembei Nthigai learnt that the beneficiaries of the estate of the deceased were selling some portion of the estate property. The purpose of the sale was to get money to assist in the lodging and prosecution of the succession cause to administer the estate. It came clear that without the purchasers money, the beneficiaries may not have been able to mount the present succession cause and the estate would have remained unadministered for a long time to the detriment of both the estate as well as the beneficiaries. It is not strange that in rural Kenya, sometimes beneficiaries from humble background find it difficult to petition for letters of administration and many estates remain unadministered for far much too long. The only last resort is the very estate that is sought to be administered. In the present case, the purchaser met all the beneficiaries of the estate and it was agreed that he purchases 0.60 acres out of the estate for a sum of Kshs. 500,000/=. A deposit of Kshs. 250,000/= was paid which the petitioner testified was applied to lodge this succession cause and the rest went to demarcating the boundaries in the suit property. All the beneficiaries were in agreement with that arrangement. The protestor opposed the arrangement on the grounds that he did not attend the meeting that approved the sale. He however, indicated that if he was given his own share separate from the other grandsons and daughter of the deceased, he was not objecting to David Mutembei Nthigai having his share. The purchaser was allowed into occupation and has since constructed a permanent home on the portion sold to him.

26. From the foregoing, my opinion is that the beneficiaries agreed to the transaction; the transaction was for the benefit of both the estate and the beneficiaries as it was meant to assist in the lodging of the succession cause and have the beneficiaries get their own shares from the estate; there is a sum of Kshs 250,000/= which is yet to be paid; the same can be paid to the estate and be divided amongst all the beneficiaries; the purchaser having been allowed to take possession and construct a permanent home, he will suffer a massive loss if the transaction is nullified at this stage. In my view, no one has suffered any prejudice as a result of the transaction and since what the protestor needs is a separate identifiable share in the estate, I hold that the purchase by David Mutembei Nthigai is not to be nullified.

27. The final issue is how the estate be distributed. Taking into consideration that 0.29 Ha is removed from the estate in favour of the purchaser which he already occupies, the area that remains is 1.01Ha.

28. In arriving at the distribution, this court has been guided by the provisions of sections 38, 26 and 28 of the Law of Succession Act. The court has considered that the protestor is only an dependant and not a beneficiary so called. That he had been shown somewhere to build and occupy by the deceased unlike the other grandchildren and daughter. That the petitioner and his brother are the surviving sons of the deceased. That although Ksh. 250,000/= deposit was paid to the petitioner in the presence of his

brother, the entire sum was nevertheless not fully accounted for as no proper accounts were produced. That the other grandchildren and daughter were already properly satisfied with the proposed distribution by the petitioner. It will be noted that none of them appointed anyone to urge their positions. The protestor did not have their authority to do so as no documents of authority from them were ever filed. The court has also considered the current and future needs of all the concerned parties.(From the first issue, the beneficiaries entitled to inherit are the petitioner and Francis Njiru and the dependants the Protestor, Faridah Kainyu Dickson Muriithi and Caroline Gakii. The other daughters of the deceased were said to be in agreement with the Petitioners mode of distribution.

29. Accordingly, the estate should be distributed as follows:-

a. Karingani /Muiru/482

- i. Morris Mwiti Mburugu – 0.315 Ha
- ii. Francis Njiru Mburugu – 0.315 Ha
- iii. Denis Kimathi Mburugu – 0.18 Ha
- iv. David Mutembei Nthigai -0.29 Ha
- v. Dickson Muriithi
- vi. Faridah Kainyu 0.19 Ha.
- vii. Caroline Gakii

b. Kshs 250,000/=

- i. Morris M. Mburugu – 70,000/=
- ii. Francis N. Mburugu – 70,000/=
- iii. Denis K. Mburugu – 47,000/=
- iv. Dickson Murithi 21,000/=
- v. Faridah Kainyu 21,000/=
- vi. Caroline Gakii 21,000/=

It is so decreed

DATED 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 counsels for the parties.

A. MABEYA – JUDGE

07.04.2016