



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 2 OF 2007

IN THE MATTER OF THE ESTATE OF JUSTUS MUGO CHOMBA (DECEASED)

JAMES MUNENE MUGO.....PETITIONER

VERSUS

JOHN CHOMBA MUGO.....1ST RESPONDENT

STEPHEN NJIRU MUGO.....2ND RESPONDENT

J U D G M E N T

1. The three sons of the deceased were appointed joint administrators of the estate after a successful application for revocation of grant. The parties failed to agree on distribution and the case was heard through *viva voce* evidence. The administrators jointly filed summons for confirmation of grant dated 8/4/2015 to which the protestor disagreed with and filed his own mode of distribution.

2. The protestor's case was that the deceased was his father and that he had eight children. The deceased's five daughters are married and currently stay with their husbands. The protestor, PW1 testified that he is not agreeable to his two brothers inheriting five acres each while giving him only one acre. He said that some of his sisters have also been given a bigger share than him. Their mother is also deceased. Currently the protestor cultivates a portion of the deceased's estate measuring two acres.

3. His case is that the land should be shared equally among the three sons of the deceased and that the applicant (DW1) was a child of the deceased. The deceased had seven children. The protestor was taken into the family of the deceased where he was brought up. The mode of distribution in the affidavit for confirmation of grant was agreed upon by the entire family except the protestor and hence the same should be adopted by the court.

4. DW2 was one of the administrators/applicants and a son to the deceased. He testified that he supports the mode of distribution proposed by his brother DW1.

5. DW3 is also a daughter to the deceased. She testified that the protestor's mother was their mother's step sister and that she was adopted by her parents. The proposed mode of distribution grants the protestor one acre as he is adopted and grants the other sons of the deceased 5 acres each. The protestor's parents are still alive but the witness did not say who they are and where they lived.

6. DW4 is a daughter to the deceased. She told the court that the protestor was adopted by their parents when he was still young. The protestor cannot get 3½ acres as he is not the biological son of the deceased.

7. Section 3 (2) defines a child or children as

“References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

8. IN THE MATTER OF THE ESTATE OF VERONICA NJOKI WAKAGOTO (DECEASED) [2013] eKLR the court held as follows;

the concept of taking in a child and accepting him as one’s own or assuming parental responsibility over him only applies to a male person. Indeed, this is the construction given to this provision by the Court of Appeal.

9. In the case of **ISAIAH GICHIMU WAWERU VS ELIJAH NGANGA WAWERU [2015] eKLR** the court noted the provisions of Section 3(2) of the LSA that a child includes one which a male person has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

10. In the instant case, it is not in dispute that the deceased and his wife adopted the protestor as their own and raised him. The deceased’s involvement in the informal adoption has also not been disputed. In view of this, the protestor qualifies to be a child of the deceased by virtue of section 3(2) of the Law of Succession Act.

11. I wish to restate that the court had ruled on this issue before that protestor in its ruling delivered on 25th February 2015 when the grant issued to the protestor was revoked. In the same breath the three sons of the deceased including the protestor were appointed by the court as joint administrators. The issue of whether the protestor is a child of the deceased was decided by a court of competent jurisdiction and it is therefore *res judicata*. The applicants did not appeal against the ruling. The only issue for determination is of distribution of the estate of the deceased among the heirs.

12. The heirs were identified as James Chomba Mugo, Stephen Njiru Mugo, James Munene Mugo, the protestor and five daughters namely Ruth Wanjiru Mugo Sarah Wakabari Njagi, Margaret Wamkori Ndambiri, Jane Wawira Thitu and Mary Mukami Ephantus.

13. The only asset for distribution is LR.Gichugu Settlement Scheme/278 otherwise known as Ngariama/Gichugu/278. The three sons of the deceased had engaged an advocate Ken Githinji & Co. who filed an application for confirmation for him. Later on, the protestor withdrew the advocate and decided to act in person. He also denounced the application filed by the advocate dated 30/3/2015 through his affidavit sworn on 16/12/2015.

14. The administrators filed a joint application for confirmation of grant dated 30/3/2015. Although it included the name of the protestor as the applicant, it was only signed by the 1st and 2nd administrator. The protestor did not sign it.

15. The mode of distribution by the 1st and 2nd administrator is as follows:-

Ngariama Gichugu/5/278 – 17.80 acres

John Chomba Mugo (1st administrator) - 5 acres

Stephen Njiru Mugo (2nd administrator) - 5 acres

Mary Mukiami Ephantus - 1 acres

Margaret Wanjiru Ndambiri	-	1¼ acre
Jane Wawira Thitu	-	1 acre
Sarah Wakabari Njagi	-	1 acre
Ruth Wanjiru Mugo	-	2½ acres
James Munene Mugo	-	1 acre

16. It is interesting to note that when the court revoked the original grant the 1st and 2nd administrators did not include their sisters as heirs. It was said that they were all married and staying with their husbands with the assumption that they were not interested in sharing the land.

17. Now that they have been brought into the fold and given shares which they have not disputed the court will include them in the inheritance. This is informed by Section 38 of the Act that all children of the deceased whether married or not married are entitled to inherit.

18. The protestor testified that it was wrong for his two brothers to inherit 5 acres each while he gets only one acre. The two had earlier given the protestor 2 acres and have now reduced the share to one acre.

19. Section 38 of the Act provides:-

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.

20. All the children of the deceased are supposed to get equal shares. The court will not disturb the proposed mode for the 5 daughters of the deceased because they did not oppose the shares given to them by the 1st and 2nd administrators. Two of them testified and did not raise any issue on their shares.

21. It was not explained why one of them Ruth Mugo was given 2½ acres while the rest got one. The court will give her one acre like her sisters to maintain equality among the one gender.

22. As for the sons who have never agreed on their shares, Section 38 will be applied in their case to give them equal shares out of the twelve and half (12½) acres left after removing the daughters shares. Each will get 4.13 acres.

23. The estate will therefore be distributed as follows:

(i) John Chomba Mugo	-	4.13 acres
(ii) Stephen Njiru Mugo	-	4.13 acres
(iii) James Munene Mugo	-	4.13 acres
((iv) Mary Mukami Ephantus	-	1 acre
(v) Margaret Wanjiku Ndambiri	-	1 acre
(vi) Jane Wawira Thitu	-	1 acre
(vii) Sarah Wakabari Njagi	-	1 acre
(viii) Ruth Wanjiru Mugo	-	1 acre

24. Each party will meet their own costs.

25. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF JULY, 2016.

F. MUCHEMI

J U D G E

In the presence of:-

The Petitioner/Protester

Both Respondents/Petitioners