



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
SUCCESSION CAUSE NO. 342 OF 2015
(FORMERLY CHUKA SPM SUCC. CAUSE NO. 416 OF 2011)
IN THE MATTER OF THE ESTATE OF THE LATE M'NKAMBI
M'RINGAI.....DECEASED

AND

FESTUS KABURU NKAMBI.....PETITIONER

VERSUS

RUFUS MUTEGI NKAMBI.....1ST PROTESTOR
EUSTACE KIMATHI NKAMBI.....2ND PROTESTOR
HELLEN MUKWANJUE NKAMBI.....3RD PROTESTOR
BILIA MUTETHIA NKAMBI.....4TH PROTESTOR

J U D G M E N T

1. By summons dated 23rd November, 2012, Festus Kaburu Nkambi applied for the confirmation of grant issued to him on 16th April, 2012 for the administration of the estate of the late M'Nkambi M'Ringai ("the deceased"). He disclosed the beneficiaries to the estate as being himself and all the protestors who are two (2) sons, daughter and the widow of the deceased respectively. He proposed that the only two (2) assets of the estate be distributed as follows:-

(a) Mwimbi/Murugi/377

- i. Rufus Mutembei Nkambi
- ii. Eustace Kimathi Nkambi - 2.75 Acres - jointly
- iii. Hellen Mukwanjue Nkambi - 0.57 Acres

(b) Muthambi/Erega/192

- i. Festus Kaburu Nkambi - 3.00 Acres
- ii. Mbiria Nkambi - 0.45 Acres

2. The protestors would hear none of that and they filed Affidavits of Protest on 9th January, 2013 and 20th May, 2013, respectively. In the said Affidavits, the Protestors sought to clarify that the assets forming the estate were as follows:-

a) Mwimbi/Murugi/377 - 4.56 Acres

b) Muthambi/Erega/192 - 3.50 Acres

They objected to the distribution as proposed by the Petitioner.

3. The Protest was determined by way of Affidavit evidence on which the respective Advocates submitted. In his Affidavit evidence, the Petitioner swore that the deceased had left him as the administrator of his estate; that his proposed distribution was in accordance with the wishes of the deceased; that the 4th protestor, the widow of the deceased, had been chased by the deceased but returned at the instance of the Petitioner. That the deceased had settled the Petitioner in Muthambi/Erega/192 where he lives with the 4th Protestor. That the clan had sat, deliberated on the matter and confirmed his proposed distribution to be the correct one. He produced minutes of an alleged meeting of the clan held on 9th March, 2013. He further told the court that the 1st to 4th Protestors had been settled at Mwimbi/Murugi/377 measuring 6.07 Acres and that the deceased was in the process of transferring Muthambi/Erega/192 before he died. He produced a letter of consent by the Meru South Land Control Board dated 22nd February, 2001 in support of his contention. He urged that his proposed distribution be upheld. He also filed an Affidavit by John Njeru Chabari sworn on 2nd February, 2016 which supported his contestations.

4. Mr. Mutani learned counsel for the Petitioner submitted that there was no evidence that any specific property had been given to any beneficiary by the deceased; that the beneficiaries had lived on the separate properties and the court should not disrupt their lives. That since the report of the Land Registrar that was filed pursuant to the court's directions showed that property No. Mwimbi/Murugi/377 was 4.86 Acres and not 6.07 acres as earlier on contended by the Petitioner, the proposed distribution should be reduced prorata. Finally, that since the deceased had given Muthambi/Erega/192 to the Petitioner during his lifetime, the same should be left to him. Counsel urged that the protest be dismissed.

5. The Protestors relied on the Affidavit evidence of Rufus Mutegi Nkambi and Bilia Mutethia Joseph both sworn on 9th November, 2015, respectively. They contended that Muthambi/Erega/192 measures 3.50 acres while Mwimbi/Murugi/377 measures 4.86 acres. They denied that the deceased had divided any of his assets as contended by the Petitioner. They also denied that the clan held had any meeting or had adjudicated over the dispute as contended by the Petitioner. They contended that the mode of distribution proposed by the Petitioner was grossly unfair and unjust. That the same was discriminatory, unequal, unjust and inequitable. That the Petitioner had forged the signatures of the protestors when he filed this succession cause. Therefore, the Protestors proposed that the estate be distributed as follows:-

a) Muthambi/Erega/192

i. Festus Kaburu Nkambi - 2 Acres

ii. Hellen Mukwanjue Nkambi & Biria Mutethia Joseph - 1.50 Acres jointly

b) Mwimbi/Murugi/377

i. Eustace Kimandi Nkambi - 2 Acres

ii. Rufus Mutegi Nkambi - 2 Acres

iii. Hellen Mukwanjue Nkambi & Biria Mutethia Joseph

- 0.86 Acres

6. Mr. Mugo learned counsel for the Protestors submitted that the law prohibits discrimination; that the estate should be shared equally. That the 3rd and 4th Protestors had agreed to take a smaller share. He urged the court to uphold the mode of distribution proposed by his client.

7. I have considered the Affidavits on record and the submissions of learned counsel. There is no dispute as to who the beneficiaries of the estate are. The issues that arise are; whether the deceased had divided his properties before his demise; whether the clan had adjudicated and settled the dispute and finally if the first two issues are in the negative, how should the estate of the deceased be distributed.

8. On the first issue, it was the Petitioners contention that the deceased had settled him on Muthambi/Erega/192 before his death and that the 1st to 3rd Protestors were settled in Mwimbi/Murugi/377. The protestors denied this contention and testified that none of the assets of the deceased had been given to anyone during his lifetime. The parties agreed that the matter be determined by way of Affidavit evidence on which their respective Advocates submitted. This was contrary to the earlier direction by the court that the issues be determined by the way of viva voce evidence. If the witnesses had been cross-examined the veracity of their testimonies would have been tested. This leaves the court with no option but to analyse the contested evidence as contained in the affidavits to arrive at a decision.

9. While the Petitioner contended that his father had settled him on Muthambi/Murugi/192, the Protestors denied that fact. Under Sections 107 and 108 of the Evidence Act, Chapter 80 of the Laws of Kenya, it is he who alleges of the existence of a fact that must prove the existence of such fact. In his affidavit evidence, the Petitioner did not state when (the year) the alleged settlement by the deceased took place. He also did not state those who were present when the deceased was dividing his properties and settling the beneficiaries on those properties. The document that was produced by the Petitioner was a letter of consent by the Meru South Land Control Board dated 22nd February, 2001. The same showed that vide an application lodged as 348/2/2001, the deceased had applied to subdivide Muthambi/Erega/192 into "**two portions of 1.00 acre and balance**". It does not show that there was intention to transfer the whole portion to the Petitioner. To the contrary, the deceased intended to divide that property into two portions of one (1) acre and two point five (2.5) acres respectively (balance). This goes contrary to the Petitioner's assertion that the said property had been given to him. If there was an intention on the part of the deceased to give it to the Petitioner, it must have been a lesser portion and not the whole. This is borne by the deceased's application to sub-divide the same as set out above. Accordingly, this court's view is that the Petitioner has not proved that Muthambi/Murugi/192 was given to him by the deceased during his life time as he had contended.

10. On the second issue, the Petitioner contended that the clan had met and settled the dispute in terms of his proposed distribution. He produced the minutes of the clan meeting made on 9th March, 2013. He also relied on the Affidavit evidence of John Njeru Chabari sworn on 2nd February, 2016 which greatly supported his side of the story. The protestors denied that allegation. The alleged minutes are dated 9th March, 2013. They are headed

"THE FAMILY ELDERS MEETING AT THE HOME OF THE LATE NKAMBI M'RINGAI".

They are in respect of this succession cause. It is noted in the minutes that:-

" Rufus Mutegi Nkambi the Caveator and his brother Eustus Kimathi failed to come. That they have refused to come to clan elders two times....."

That Nkambi M'Ringai after eating a goat he asks Festus Kaburu Nkambi to take his mother and go to live at Iriga Land PNO 192 which is 3.48 acres.

That Nkambi remained at another land at Mwimbi/Murugi/377- 6.07 Acres with Rufus Mutegi and Eustus Kimathi."

11. The evidence on record is clear that the deceased lived on, died and was buried in

Mwimbi/Murugi/377. The uncontroverted evidence is that it is on this property that the 1st and 2nd Protestors have lived throughout their lifetime. If that be the case, for all purposes and intents that should be the home of the deceased. In this regard, it is unclear in the said minutes which home of the deceased the meeting was held where the 1st and 2nd Protestor refused to go. The two (2) cannot be said to have refused to go to their own home. If such a meeting was actually held, it should have been recorded that they absented themselves or were not found at home or refused to attend. Further, it is not clear which clan was holding the meeting. The deliberations are not clear as to what the dispute was. It is only recorded that the mode of distribution proposed by the Petitioner had been approved. To this courts mind, it is very unlikely that the meeting ever took place. In any event, even if it took place, the clan elders resolutions are not binding on this court unless they are in accordance with the Constitution of Kenya and the law.

12. This leaves the third issue open for determination. How is the estate to be distributed? I have considered the proposals tendered by both sides. Before determining the shares, I need to state that I have taken into consideration the following matters. That the Petitioner has been living in Muthambi/Erega/192 with the 4th Protestor during the life time of the deceased and since his demise in 2004; todate that the 1st to 3rd Protestors have been living in Mwimbi/Murugi/377 throughout their lifetime; that Article 27 of the Constitution bars discrimination; that Section 38 of the Law of Succession Act decrees equitable distribution of an estate of a deceased who has died intestate and has left no widow. I have also considered that the widow of the deceased is said to be very old, past 90 years and that Hellen Mukwanjue Nkambi is unmarried and has no family. I have also considered that the two properties that form the estate are in two different locations and that both the widow of the deceased and Hellen Mukwanjue had agreed to get a smaller share as compared to the sons of the deceased. This is both in the Affidavit evidence of the 1st Protestor as well as in Mr.Mugo's submissions. I have also considered the report of the Land Registrar filed in court on 26th January, 2016 which shows the properties as measuring as follows:-

- a) Muthambi/Erega/192 - 3.508 Acres
- b) Mwimbi/Murugi/377 - 4.86 Acres

13. Taking into consideration all the foregoing, the estate of the deceased is distributed as follows:-

- (a) Muthambi/Erega/192 (3.508) Acres
 - i. Festus Kaburu Nkambi - 2.508 Acres
 - ii. Hellen Mukwanjue Nkambi
 - Bilia Mutethia Nkambi 1 Acre- jointly
- (b) Mwimbi/Murugi/377 - (4.86) Acres
 - i. Rufus Mutegi Nkambi - 2.43 Acres
 - ii. Eustace Kimathi Nkambi - 2.43 Acres

It is so decreed.

DATED and delivered at Chuka this 1st day of September, 2016.

A.MABEYA

JUDGE

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

A.MABEYA

JUDGE

1/9/2016