



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

SUCCESSION CAUSE NO 611 OF 2013

(FORMERLY NYERI HC SUCCESSION CAUSE NO 1381 OF 2012)

FORMERLY MACHAKOS SUCCESSION CAUSE NO.387 OF 2006)

1. TERESIAH KASENDI MUTUNGA

2. ESTHER MUTINDA.....ADMINISTRATORS

VERSUS

GRACE MBOKA MUTUNGA.....PROTESTOR

J U D G M E N T

1. A grant of letters of administration intestate was made in this cause on 07/09/2011 (at Machakos before the matter was transferred to Nyeri and then to this court) jointly to **Teresia Kasendi Mutunga** and **Esther Mutinda**. This judgment concerns the summons dated 25/05/2012 for confirmation of grant. The main disputants are the two widows of the Deceased – **Grace Mboka Mutunga** (Protestor) and **Teresiah Kasendi Mutunga** (1st Administrator).

2. The summons for confirmation of grant was heard by way of oral evidence. My predecessor, Ngaah, J took the evidence on 12/02/2014. The parties then filed written submissions, the 1st Administrator filing hers on 08/07/2014 and the Protestor on 20/06/2014. The matter was then placed before me for preparation and delivery of judgment.

3. I have read the evidence as recorded by Ngaah, J. I have also read the written submissions of the parties. Finally, I have perused the affidavit sworn in support of the summons for confirmation and also the affidavit of protest.

4. It is common ground that the Deceased died intestate on 23/10/1995. He was survived by two widows – the Protestor (who was the elder wife) and the 1st Administrator. The Protestor had one child with the Deceased, **David Makau**. The 1st Administrator had seven children with the Deceased –

i. **Peter Mutua Mutunga**

ii. **Raphael Mwewa Mugunga**

iii. **Samuel Wambui Mutunga**

iv. **Daniel Mutiso Mutunga**

v. **Susan Syombua Mutunga**

vi. **Rael Mukonyo Mutunga**

vii. **Agnes Mbithe Mutunga**

5. It is also common ground that the Deceased had another wife (the 1st wife) who pre-deceased him. She and the Deceased had a daughter called Esther Mutinda, the 2nd Administrator. So, the Deceased was survived by two widows and nine children.

6. It is further common ground that the estate of the Deceased comprises two parcels of land –

i. L.R. MAKUYU KAMBITI/BLOCK II (MATHENGETA)/246 - measuring approx. 0.848 Ha (2.1 acres).

ii. L.R. MAKUYU KAMBITI/BLOCK II (MATHENGETA)/255 measuring approx. 1.588 Ha (3.9 acres).

7. The Protestor has claimed that she and the Deceased acquired the two properties before the 1st Administrator was married. But the court is here not dealing with matrimonial property but with the estate of an intestate deceased person. Both properties are in the sole name of the Deceased.

8. It would appear that the Deceased had assigned the smaller parcel (No 246) to the Protestor and her son, while he assigned the larger parcel (No 255) to the 1st Administrator and her children. That is how the two widows and their children were living when the Deceased died. The child of the very first wife, Esther, was already married and living in her married home.

9. It is not too difficult to conclude that the Deceased probably intended that after his death his two properties should be inherited as he had arranged for his two wives and their children to live. This was what the *Maragua District Land Disputes Tribunal* held on 17/09/1998 after two of the 1st Administrator's sons had taken over portions of parcel No. 246 occupied by the Protestor. This was after the Deceased's death. The tribunal directed that the two sons of the 1st Administrator should go back to parcel No. 255 occupied by their mother, while the Protestor and her son remained in parcel No. 246, though she was required to give Esther (the only child of the very first wife) a portion of half an acre.

10. The tribunal was of course dealing with issues of occupation and use of the two parcels of land of the Deceased under the relevant statute in place then (the *Land Disputes Tribunals Act*, since repealed). It was not dealing with the issue of intestate succession under the *Law of Succession Act, Cap 160*. It could not as it had no jurisdiction.

11. While the intention of the Deceased in the way he arranged for his two wives and children to live in the two parcels of land may not be difficult to discern, he does not appear to have expressed that intention in writing (in some form of written will) or to anyone (in the form of an oral will). The bottom line is that he died intestate and his estate must devolve as by law provided.

12. In the circumstances of this cause that law is **section 40** of the Law of Succession Act which provides

“40. Where intestate was polygamous

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each

house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

13. The Deceased was a Kamba whose customary law permitted polygamy. The two parcels of land comprising his estate amount to approx. 6.0 acres. The Deceased was survived by nine (9) children and 2 widows – a total of 11 units. The 11 beneficiaries must share equally the 6.00 acres in accordance with the formula set out in section 40(1) aforesaid of Cap. 160. Each will therefore get 0.55 acres.

14. I will therefore confirm the grant and direct that the two parcels of land comprising the Deceased's estate be distributed as follows –

i. The Protessor GRACE MBOKA MUTUNGA and her son DAVID MAKAU will both get a total of 1.1 acres in parcel No. 246.

ii. Esther Mutinda will get 0.55 acres in parcel No 246

iii. Teresia Kasendi Mutunga and her seven (7) children will get the remainder of parcel No 246 (about 0.45 acre) and the whole of parcel No 255.

It is so ordered.

15. Parties shall bear their own costs of these proceedings.

DATED AND SIGNED AT MURANG'A THIS 8TH DAY OF SEPTEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 9TH DAY OF SEPTEMBER 2016