



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 496 OF 2015

(FORMERLY CHUKA SPM SUCCESSION CAUSE NO. 107 OF 2014)

IN THE MATTER OF THE ESTATE OF THE LATE MWARANIA MARIA (DECEASED)

AND

EUNICE NGURU MWARANIA.....PETITIONER

VERSUS

JULIUS IRERI MWARANIA.....PROTESTOR

J U D G M E N T

1. The deceased in this cause, Mwarania Maria, died on 11th February, 1983. He had two wives and was survived by the following:-

- a. Eunice Nguru Mwarania - wife
- b. Jiamwihi Mwarania - daughter
- c. Esther Mukwati - daughter
- d. Evelyne Mukwanjeru - daughter
- e. Dorothy Thigaa - daughter
- f. Bridget Kagendo - daughter
- g. Igoji Mwarania - daughter
- h. Mercy Kagwanja - daughter
- i. Jane Wanja - (deceased)
- j. Wilfred Kinyua - son
- k. Elias Nkonge - son
- l. Kenneth Kithusi - son

m. Julius Ileri - son

2. On 28th April, 2014, Eunice Nguru Mwarania (hereinafter "*the Petitioner*") petitioned for Letters of Administration Intestate. Julius Ileri Mwarania objected to the Petition on 30th June, 2014 and contemporaneously filed an Answer to Petition and Cross-Petition. On 6th April, 2016, the grant was issued to both Eunice Nguru and Julius Ileri. Due to the age of the matter, leave was granted for an application for confirmation to be made before the expiry of the six (6) months period.

3. On 25th April, 2016, Eunice Nguru applied for the confirmation of the grant as follows:-

(a) **MWIMBI/N.MUGUMANGO/540 -1.05 Ha**

i. Kenneth Kithuci - 0.52 acres

ii. Eunice Nguru- to hold in trust for:-

-Esther Mukwaiti and the other married daughters- 0.52 acres

iii Elias Nkonge - 0.52 acres

iv. Wilfred Kinyua - 0.52 acres

v. Julius Ileri - 0.52 acres

(b) **MWIMBI/N.MUGUMANGO/855- 0.60 acres**

i. Gerald Kenneth Kathenya (purchaser) - 0.30 acres

ii. Kenneth Kithuci - 20 x 80 feet

iii. Elias Nkonge - 20 x 80 feet

iv. Wilfred Kinyua - 20 x 80 feet

v. Julius Ileri - 20 x 80 feet

4. The Protestor would have none of that and when the matter came up for confirmation, he insisted that his protest which he had filed on 31st March, 2016 still stood. In the Protest, he contended that the wish of the deceased was that Mwimbi/N. Mugumango/540 ("*plot 540*") be shared amongst all the family members and that Mwimbi/N. Mugumango/855 ("*plot 855*") be divided into two between the two houses. That contrary to that intention, the Petitioner had taken the whole of plot 855 and sold part of it to Kenneth G. Kathenya. The protest was ordered to be determined by way of viva voce evidence.

5. PW₁ Julius Ileri Mwarania told the court that he wanted plot 540 be divided into two between the two houses. That plot No.855 had been divided into two by the clan five (5) years ago. That he did not recognise the purchaser's claim on plot 855. In cross-examination, he admitted that before his demise, the deceased had divided plot No. 540 into five equal portions and settled his sons on four (4) portions and one portion was left for the widows. That the situation has remained as such for thirty three (33) years now. He admitted that the purchaser had purchased 0.30 acres from 855 which should be deducted from the half share due to the Petitioner's house. That plot 855 should therefore be distributed to him and Wilfred Kinyua whilst Elias Nkonge and Kenneth Kithuci should be deemed to have inherited the 0.30 acres sold by their mother to Kenneth G. Kathenya.

6. PW₂ Evelyne Mukwanjiru, a daughter to the deceased fully supported the testimony of PW₁. In cross-examination however, she told the court that the deceased had not settled any of his children during his lifetime but had said that the land should be divided into two between his wives. She said that she was not

interested in getting any share but only wanted her brothers to get theirs. PW₃ Dorothy Thigaa, a daughter of the deceased told the court that the deceased had settled the sons on plot 540 and left one portion which was to be divided between the widows equally. She wanted the portion due to her deceased mother to be given to one of her sisters in trust for others. Mercy Mukwanyaga (PW₄) Wilfred Kinyua (PW₅) and Kenneth Kithuci (PW₆) all repeated what the Petitioner's earlier witnesses had told the court. They supported the mode of distribution proposed by the Protestor.

7. RW₁ Eunice Nguru, the Petitioner defended her mode of distribution. She told the court that she had sold a portion of Plot 855 to Kenneth G. Kathenya for Kshs.125,000/- to be able to finance the Succession Cause. That the purchaser had so far paid Kshs.41,175/- and there was a balance of Kshs.83,825/- that was yet to be paid. She produced the agreement for sale between her and the purchaser as R Exh 1. She opposed the proposal of dividing plot No. 540 into two (2) because the deceased had already divided it as per his wishes; that is, into five (5) portions as proposed in her application for confirmation Elias Nkonge and Esther Mukwaiti (RW₃) supported the evidence of their mother, RW₁.

8. CW₁ was Kenneth Kathenya. He told the court that he had purchased 0.30 acres of plot 855 from the Petitioner to help in lodging the succession cause. That he had already paid a total of Kshs.150,000/- and was not prepared to pay any additional sum.

9. I have considered the Affidavits on record and the testimonies of the witnesses. The issues for determination are; did the deceased divide his properties during his lifetime? How should the estate be distributed?

10. On the first issue, most of the witnesses were agreeable that before the deceased died, he had divided plot No. 540 into five (5) portions. These portions were for his four (4) sons whom he settled there and one portion was for his two (2) widows. It is this portion meant for the widows that was also reserved for the daughters if and when they returned from wherever they were married. All the witnesses were in agreement that no one questioned this mode of settlement for the last thirty three (33) years. Those who were propagating for the division of plot No. 540 into two in accordance with the houses were doing so for their own selfish reasons. To my mind, as far as plot 540 is concerned, the deceased had fully bequeathed it to his sons, widow and daughters during his lifetime and nothing has been produced to revisit the same.

11. As regards plot 855, there was no evidence to show that the same had been settled. What the witnesses told the court is that subsequent to the death of the deceased, the two widows had, with the help of the clan and the chief. subdivided it into two as per the two houses of the deceased. The children of the first house, whose mother is now deceased, insist that that position be maintained whilst the Petitioner and her children insist that since she has already sold a half thereof to one Kenneth G. Kathenya for Kshs.125,000/-, the balance should be distributed amongst the four (4) sons equally. Obviously there is no agreement amongst the family how this property should be distributed.

12. Section 35 of the Law of Succession Act provides:-

"(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to:-

a. the personal and household effects of the deceased absolutely, and

b. a life interest in the whole of residue of the net intestate estate;.....

subject to the Provisions of section 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on death, or in the case of a widow's re-marriage; of the surviving spouse devolve upon the surviving child, if there be only one, or be equally divided among the surviving children."

13. Expressing itself on this provision in the case of **Justus Thiora Kiugu & 4 others .v. Joyce Nkatha Kiugu & Another [2015] eKLR, the Court of Appeal** held:-

"We have wondered as a court time without number why the distribution of an estate such as this one would be protracted. What legal or even moral justification would compel children of the deceased to object their mother, the only widow of the deceased from obtaining the grant of letters of administration over their father's estate? Secondly why was the estate not distributed simply as provided for under section 35 of the Law of Succession Act.".....We appreciate that an estate of a deceased person who died intestate leaving one spouse and children like in this case of M'Ikiugu Mwirichia cannot legally be distributed in any other way other than the parties agreeing among themselves and filing a consent, or by the court following the provisions of section 35 of the Law of Succession. In the event that parties agree and they record consent on the mode of distribution, the court has no choice but to adopt the consent and make it an order of the court. Short of a written consent on the mode of distribution, the court has no discretion but to distribute the estate of the deceased as per the provisions of section 35 of the Law of Succession which makes provisions for an intestate who has left one surviving spouse and child or children." (underlining mine).

14. It is clear from the foregoing that in circumstances where there is a surviving spouse and the family does not agree on how the property of a deceased person is to be distributed, the property is not to be distributed to the children. The spouse acquires a life interest over the entire property in trust for all the children equally.

15. As regards the sale of 0.30 acres in plot 855 to Kenneth G. Kathenya by the Petitioner, the same was illegal as it contravened sections 45 and 82 of the Act. That sale cannot stand. See the cases of **Re Estate of Gakunga Njoroge [2015] eKLR and Muriuki Hassan .v. Rose Kanyua & Another [2014] eKLR**

16. According, the estate of the deceased will be distributed as follows based on the fact that the deceased had bequeathed part of his property to his heirs during his lifetime under section 42 of the Act:-

A: Mwimbi/N. Mugumango/540

i. Kenneth Kithuci Mwarania - 0.52 acres

ii. Eunice Nguru Mwarania - 0.52 acres

to hold for herself and in trust for:-

- Esther Mukwaiti Mwarania

- Evelyne Mukwanjeru Mwarania

- Dorothy Thigaa Mwarania

- Bridget Kagendo Mwarania

- Igoji Mwarania

- Mercy Mukwanyaga Mwarania

iii. Elias Nkonge Mwarania - 0.52 acres

iv. Wilfred Kinyua Mwarania - 0.52 acres

v. Julius Ileri Mwanania - 0.52 acres

B: Mwimbi/N.Mugumango/855

Eunice Nguru Mwarania - Whole

to have a life interest thereon and hold in trust for all the children of the deceased in equal shares.

It is so decreed.

DATED and delivered at Chuka this 3rd November, 2016.

A. MABEYA

JUDGE