



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 551 OF 2010

IN THE MATTER OF THE ESTATE THIBARU KACHIUKI (DECEASED)

ANTONY KATHALI M'THIBARUPETITIONER

VERSUS

DUNCAN NTONGAI M'THIBARU..... OBJECTOR

J U D G M E N T

1. The Objector **DUNCAN NTONGAI MTHIBARU** brother to the Petitioner herein **ANTONY KATHALI M'THIBARU** filed an affidavit dated 26th September 2012 in support of his mode of distribution as opposed to the Petitioner's mode of distribution dated 14th September 2012.

2. M/s Gituma learned Advocate appeared for the Objector whereas Mr. Ayub Anampiu learned Advocate appeared for the Petitioner. The Counsel agreed that there is no contention on what are the deceased assets nor is there contention on the deceased dependants. All agree the deceased assets comprised of two parcels of land namely; **NJIA/BURI-E-RURI/2146 AND 2057**. They further agreed the deceased dependants are 7 in number namely;

- 1) *Antony Kathali M'Thibaru*
- 2) *Charles Munyi*
- 3) *David Ncubiri M'Thibaru*
- 4) *Bernard Kirituria*
- 5) *Duncan Ngongai M'thibaru*
- 6) *Benjamin Mbwiria*
- 7) *M'Mirongo M'Thibaru*

All the seven (7) dependants are sons of the deceased.

3. The dispute in this cause is limited to distribution of the deceased estate. The Objector is opposed to the Petitioner's and all other brothers' mode of distribution and has put up his own mode of distribution.

4. I have carefully considered the pleadings and the rival mode of distribution by the objector on one hand and that of the Petitioner and his other brothers on the other, similarly I have considered the Counsel opposing submissions dated 3rd December 2012 and 26th September 2012. The issue that I consider relevant for consideration is as follows;

a) Whether the Objector has established that he is entitled to 1.4 acres from the deceased estate which he claims he purchased and was registered as part of the deceased estate before the distribution of the deceased estate is carried out?

b) How should the deceased estate be shared?

5. The Objector's case is that the deceased herein died on 17th January 1966; that the dependants are all sons of the deceased but from different mothers; that the Objector has more interest in the estate as he personally bought some of the land included in the deceased estate. The Objector contends that he had bought 1.4 acres of the suit land which he avers should first be removed from the deceased's estate. He contended that he purchased the 1.4 acres during the gathering period and the same was registered in his father's name. The Objector has no objection to balance of the land being shared equally amongst the seven (7) sons of the deceased. He further averred that no purchaser from any of the deceased's son should be included in the distribution. The Objector averred the size of the land of the deceased amounted to 8.05 acres.

6. The Petitioner's position is that each of the deceased's dependants should get equal share of the land equivalent to **0.92 acres**. He further stated the purchasers should get their entitlement by reducing the portions due to the beneficiaries who had sold part of their shares. The Petitioner denied the Objectors claim of having purchased **1.40 acres** of land which forms part of the deceased estate, urging that the record of official search supports his position. The Petitioner argued all parcels of land of the deceased combined measured **6.44 acres** and not 8.05 acres. The Petitioner proposed that the Objector should get the whole of **NJIA/BURI-E-RURI/906** and **0.62 acres** from **NJIA/BURI-E-RURI/2057** to make a total of **0.92 acres** as his homestead is on plot **No.906**.

7. The deceased assets are confirmed in the attached certificates of official search as follows;

a) NJIA-BUR-EI-RURI/2146

1.3 hactares registered on 10/6/1988

b) NJIA/BURI-E-RURI/2057

1.2 Hactares registered on 10/6/1988

There is no official search for **NJIA/BURI-E-RURI/906** but the Petitioner has given the size as **0.12 acres**. The Objector's Counsel in his submissions has agreed with the measurements given by the Petitioner. The deceased parcels of land therefore measures cumulatively **6.49 acres** or thereabouts.

8. The Objector asserted that he bought **1.4 acres** during the gathering period and his portion was registered in his father's name. The burden of proof lies with he who asserts. The Objector has not disclosed when he bought the said **1.4 acres**, and from whom and why while he was an adult the same was registered in his father's name. He did not produce any evidence of purchase document. He did not opt to call the seller or any witness who witnessed the purported transaction (if any). He didn't state amongst his father's three (3) lands on which of the three lands the alleged **1.4 acres** is situated and whether he has been in exclusive possession and use of the alleged **1.4 acres**. The objector has failed to prove his claim on balance of probabilities. In view of the foregoing, I do not believe that the Objector bought a portion of **1.4 acres** and the same was registered in his father's name. I find that the Objector is not entitled to **1.4 acres** from the deceased estate before the same is distributed amongst the deceased beneficiaries.

9. The deceased is survived by **seven (7)** sons and no spouse(s). The only logical way of distribution of the estate of a deceased person survived by his children is as provided under **SECTION 38 OF THE LAW OF SUCCESSION ACT** which provides-

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of the sections 41, and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”.

10. The beneficiaries who sold part of the deceased estate did not have any capacity to do so whether he or she had Grant of Letters of Administration or not by virtue of **SECTION 82 (b) (ii) OF THE LAW OF SUCCESSION ACT** which provides;

“Section 82(b) (ii) No moveable property shall be sold before confirmation of the grant”.

11. The upshot is that the Objector’s objection has no merits. The same is dismissed. The deceased estate shall be distributed as follows;

a) Antony Kathali M’Thibaru

Whole of L.R. NJIA/BURI-E-RURI/906 – 0.30 acres and 0.62 acres from NJIA/BURI-E-RURI/2057

b) Charles Munyi

David Ncubiri M’Thibaru

To get each 0.92 acres from

Bernard Kirituria

parcel no.NJIA/BURI-E-RURI/2146 &

Duncan Ngongai M’thibaru

parcel no.NJIA/BURI-E-/RURI/2057

Benjamin Mbwiria

M’Mirongo M’Thibaru

c) The balance if any to cater for road of access. The sub-division to take

into account of each parties developments and no party should be

evicted from his portion unless the same exceeds his legal share of

0.92 acres.

d) The purchasers who are not beneficiaries to the deceased estate to sort out their claims if any with the beneficiaries who sold land to them and who are at liberty to have their portions sub-divided to include the purchaser(s) share if they so wish.

e) Each party to bear its own costs as the parties are brothers.

DATED AND DELIVERED AT MERU THIS 11TH DAY OF JUNE, 2015

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. M/s Gituma for Objector
2. Mr. Ayub Anampiu for Petitioner
3. Clerk – Penina/Mwenda

J.A. MAKAU

JUDGE