



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 328 OF 1996

(IN THE MATTER OF THE ESTATE OF JOHN MAKARA MURIUKI (DECEASED))

ROSEMARY WAMBUI MAKARA.....APPLICANT

VERSUS

ANN MUTHONI NDUNGU.....PROTESTOR

FURTHER DIRECTIONS

Upon hearing the parties on the protest against the summons for confirmation of grant dated 7th November, 2008, this cause was set for judgment on 14th August, 2015. When I retreated to write the judgment during the August vacation I noted the following:-

I. No evidence was provided to prove the existence and the ownership of certain properties which are alleged to form part of the deceased's estate; these properties are the following:-

- a. Plot No. 622 Suguroi
- b. Nyeri Plot Owners Company Shares
- c. Plot No. 1755 Matanya
- d. Tetu Coffee membership No. 3011
- e. Plot No. 12 Kagunduini
- f. Othaya Mahiga/Chinga shares number 1534
- g. Cathedral Parish Co-operative Savings & Credit

II. The protestor produced copies of receipts purportedly being evidence of payment for Plot No. 622 Suguroi; I have considered those documents and in my humble opinion there is nothing in them that demonstrates the existence of this particular land or its proprietorship.

III. I am minded that under the proviso to **section 71(2)** of the Law of Succession Act, the court must be certain not only of the persons beneficially entitled to a share of the deceased's estate but also it must be certain that such estate exists and is available for distribution. It follows that the only assets that have been ascertained to exist and which are therefore available for distribution are those that were listed in the respective petitions or affidavits in support of those petitions. These properties are as follows:-

1. **LR. TETU/UNJIRU/780 (measuring 0.12 ha)**
2. **LR. TETU/UNJIRU/781 (measuring 0.108 ha)**
3. **LR. TETU/UNJIRU/782 (measuring 0.128 ha)**
4. **LR. TETU/UNJIRU/783 (measuring 0.52 ha)**
5. **LR. TETU/UNJIRU/784 (measuring 0.44 ha)**

6. **LR. TETU/UNJIRU/785 (measuring 0.4 ha)**
7. **68 shares at East African Breweries Ltd (Kenya Breweries Ltd)**
8. **A savings account at the Kenya Commercial Bank Ltd, Nyeri Branch.**

It is not clear from the last item if the deceased had any money in the bank account he is alleged to have held at Kenya Commercial Bank Limited, Nyeri Branch and if so how much.

IV. Of the properties that are available for distribution, the contestants have agreed that **LR. Tetu/Unjiru/780 and LR. Tetu/Unjiru/783** will be given to Charles Mwangi Maina while the shares at Kenya Breweries Limited will be transferred to Eustus Mwangi Ndungu. It would mean that with this agreement, the properties which this court has to share out amongst the persons beneficially entitled to the deceased's estate therefore are:-

1. **LR. TETU/UNJIRU/781 (measuring 0.108 ha)**
2. **LR. TETU/UNJIRU/782 (measuring 0.128 ha)**
3. **LR. TETU/UNJIRU/784 (measuring 0.44 ha)**
4. **LR. TETU/UNJIRU/785 (measuring 0.4 ha)**
5. **The money (if any) in the savings account at the Kenya Commercial Bank Ltd, Nyeri Branch.**

V. However, at the hearing, counsel for the respective parties informed the court that of these properties only those properties listed as items (2) and (4) were in dispute thereby implying that they were in agreement with the proposed distribution of the rest of the properties. There is no evidence, however, of such an agreement, at least from the affidavits filed by the respective parties. It is the applicant's position that **LR. TETU/UNJIRU/781** and **LR. TETU/UNJIRU/784** should both be transferred to Jane Wambui Muriuki; on the other hand, it is the protestor's position that the two parcels should be shared equally between Samuel Maina Muriuki and Jane Wambui Muriuki. In effect, what counsel informed the court is contrary to what is contained in the parties' affidavits.

VI. There is also the lingering question of identification of the survivors of the deceased and persons beneficially entitled to his estate.

It is a common ground that the deceased had three houses and that the contestants are from the second house; the applicant was born in that house together with the protestor's husband. Apart from their evidence and that of Stephen Muriithi Wanjohi who testified for the protestor, nothing was heard of the rest of the deceased's survivors. Curiously, although this witness introduced himself as one of the sons of the deceased, he was not listed as such in either of the petitions or in the summons for confirmation of grant.

The persons who were listed in the petitions as surviving the deceased were:-

- 1) Joseph Muriuki Makara (son)
- 2) Joseph Ndungu Makara (son)
- 3) Dorcas Wanjira (wife)
- 4) Rosemary Wambui (daughter)
- 5) Charles Maina Mwangi (son)
- 6) Eustas Ndungu Mwangi
- 7) Hannah Wangari Makara (wife)
- 8) Mwangi Makara (son)

VII. It is apparent from the petitions that with the exception of Eustas Ndungu Mwangi whose relationship to the deceased was not given, the persons listed in those petitions as surviving the deceased were either his children or wives. While it came out clearly that Joseph Ndungu Makara died while this cause was pending, it was not so clear whether the deceased's wives were alive at the time of hearing. Besides the applicant and the protestor who hailed from the second house, and the wives who must have been from different houses, it was also not so clear from which of the houses the rest of the survivors hailed.

VIII. If it is agreed that the deceased's survivors and persons beneficially entitled to his estate are in a polygamous family set-up, then his estate can only be distributed pursuant to **section 40** of the **Law of succession Act** which requires such estate to be divided amongst the houses according to the number of children in each house with the wife in each house as additional unit. That section 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.

Without the particulars of the survivors or persons beneficially entitled to the deceased's estate in each of his houses, this court is certainly ill-equipped to comply with this provision of the law and distribute the estate as required. In the absence of this vital and necessary material, the protest can neither be determined nor the grant confirmed.

IX . With these findings, I would direct the parties to provide this court with the requisite information to enable it make a final and conclusive determination of this matter. In particular I direct the parties to file:-

1. A full list of the deceased's children specifying the specific houses in which these children were born;
2. The surviving wife or wives of the deceased;
3. Any consent reached on transfer of any of the property which forms part of the deceased's estate to any of the persons beneficially entitled;
4. A list of any other survivors who are beneficially entitled to the deceased's estate and how they are related to the deceased;
5. Evidence of the existence and ownership of the following properties:
 - a. Plot No. 622 Suguroi
 - b. Nyeri Plot Owners Company Shares
 - c. Plot No. 1755 Matanya
 - d. Tetu Coffee membership No. 3011
 - e. Plot No. 12 Kagunduini
 - f. Othaya Mahiga/Chinga shares number 1534
 - g. Cathedral Parish Co-operative Savings & Credit Society shares.

X. Parties are directed to comply with this order within thirty(30)days of the date hereof failure of which the protest and the summons for confirmation of grant shall stand dismissed.

It is so ordered.

Dated, signed and delivered this 2nd day of October, 2015

Ngaah Jairus

JUDGE