



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 324 OF 2006

IN THE MATTER OF ESTATE OF:

BENSON M'ITIRITHIA ITUNGA ALIAS ITIRITHIA ITUNGA

EUNICE KARAMBU.....PETITIONER

VERSUS

ELIZABETH NKOYAI NDANDU.....INTERESTED PARTY

BUNDI MWONGERA.....INTERMEDDLER

J U D G M E N T

1. The late EUNICE KARAMBU ITUNGA petitioned for the grant of letters of administration intestate to the estate of her late husband Benson Itirithia Itunga on 21st September, 2006. The petitioner was issued with letters of administration intestate to the estate on 18th April, 2006; however the petitioner passed on in October, 2010 without having administered the estate.
2. The interested party ELIZABETH NKOYAI NDANDU, daughter-in-law to the deceased by virtue of being wife to the son of the deceased one HEADLY NTEERE(deceased) filed an application dated 19th September, 2011 seeking revocation and/or annulment of grant issued to EUNICE KARAMBU ITUNGA(deceased) on the ground that the grant had become useless and inoperative through subsequent circumstances and praying the grant be issued to her. The objector FRIDAH GAKII MWONGELA filed notice of objection to making of the grant on grounds inter alia; that the interested party filed the summons without her knowledge and consent being the only biological daughter to the deceased whose these proceedings relate; that the interested party had started interfering with the deceased estate; that the interested party has no relationship with the deceased whatsoever and the condition of the interested party had shown deceit and ill will to disinherit the beneficiaries of the deceased and as such the interested party cannot administer the estate faithfully and should not be entrusted with the administration of the deceased estate.
3. That on 18th June, 2012 by consent of the parties and their counsel both the interested party and the objector were appointed joint administratixes to the deceased estate and letters of

administration intestate to the deceased estate was issued to the two on 18th June, 2012 and the two were required to put in their scheme on mode of distribution.

4. The objector filed her proposed mode of distribution on 18th June, 2013 whereas the interested party filed hers on 20th September, 2012. The parties Counsel filed their written submissions on mode of distribution. The interested party filed her submissions on 8th July, 2014 and objector on 16th July, 2014.
5. I have carefully considered the parties mode of distribution in support of their opposing positions and the parties counsel respective submissions in support of their opposing positions. The issue for consideration is which of the two schemes of distribution would be fair to all beneficiaries and in accordance with the provisions of the law.
6. In this cause there is no dispute that the deceased was survived by the objector, his daughter and the interested party, a daughter in-law being wife to the deceased's son Heady Nteere(deceased). That the objector is married and has 5 children whereas the interested party has 5 children.
7. The interested party proposal is that the deceased land should go to Heady Nteere's family as the deceased had said he had bought the objector land at Kimiri and as such she was not entitled to the deceased estate. The interested party however stated the deceased said since objector was married and was cultivating 1 acre of the land she could continue cultivating but bear in mind the land belonged to Heady Nteere. The interested party averred that in distribution of the deceased land his wish should be taken into account.
8. The objector in her proposal averred that the deceased never left any wish that the land Nyaki/Giaki/32 should go to his son Heady Nteere(deceased) and his family. The objector averred if there was such a wish it would have been known by her deceased mother, her uncle and herself and termed the allegation of existence of deceased wish as a gimmick to mislead and confuse this court.
9. The objector averred that the deceased was survived by Eunice Karambu,(deceased), Frida Gakii Mwonjera daughter and Heady Nteere(deceased) a son, husband to Elizabeth Nkoyai Ndandu, interested party. She therefore proposed that the deceased land should be shared equally amongst his two children. She averred that the deceased left her cultivating half of the land and the issue of the interested party's children does not arise because the objector has also four children.
10. The objector in rejecting the interested party's proposal averred that the deceased had not bought any land for her at Kimirii or any other place and if such a land had been brought for her she would have been notified by her deceased father or mother and challenged the interested party for failure to have annexed evidence. The objector therefore proposed that it would be just and fair if the land Nyaki/Giaki/32 measuring 14.7 acres is distributed among the deceased two children so that each gets 7.35 acres.
11. In the instant cause none of the parties filed any affidavit in support of their proposal to the mode of distribution. That none of the parties called any evidence in support of their respective mode of distribution. This court finds no support of the interested party's assertion that the deceased wished the whole land to go to his son Heady Nteere. The interested party did not call any evidence in support nor attach any document in support. Similarly this court was not given any evidence to show that the deceased had bought a land at Kimirii for the objector as alleged by the interested party. I therefore do not find any evidence to support the allegation by the interested party. I therefore do not find any evidence to support the allegation by the interested party that the deceased wished the land to go to his son Heady Nteere nor is there evidence that the interested party got another land from her deceased father. I therefore reject the interested party's assertion as baseless.

12. The objector averred that she was using the land during the life time of the deceased who had allowed her to use the land. The party referred to in these proceedings as intermeddler, son to the objector in the affidavit dated 15th March, 2012 deponed that the deceased had given ¼ of an acre of his land to the objector who has been in actual possession and extensively developed the same by planting and conserving both indigenous and exotic trees. The interested party did not file a replying affidavit challenging or denying the contents of the affidavit by Bundi Mwongera. It is only in her proposal where she averred that the objector was given 1 acre to cultivate but to bear in mind the land belonged to Headly Nteere. The objector in her proposal averred that she uses half(1/2) of the land and the interested party the other half.
13. The issue of the use and occupation of the land would have better been resolved had the parties called evidence but that aside, may not be a basis for determination of distribution in a succession cause. The evidence herein points to one direction that both the objector and the interested party are beneficiaries and the deceased intention was not to deprive the objector from getting share of the land contrary to assertion by the interested party. I therefore find that both the objector and the interested party are beneficiaries to the deceased estate (**see Section 29 of the Law of Succession Act**) and that both are entitled to share the deceased estate.
14. The law of Succession Act and the Constitution of Kenya do not discriminate children in matters relating to Succession Cause on grounds of sex or marital status. **S 3(2) and (3) of the Law of Succession Act** defines child as follows:-

“(2) References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

(3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.”

Section 29 of the Law of Succession Act defines a dependent as follows:-

- a. *“The wife of wives, or former wife of wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.”*

Section 38 of the Law of Succession Act on distribution states:-

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

Equally divided among the surviving children.

Article 27(1),(2) and (3) of the Constitution of Kenya, 2010 on equality and freedom from discrimination provides:-

27. (1) every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

15. In view of the provision of the Law of Succession Act and the Constitution the objector should not be denied the right to inheritance of her late father's estate simply because she is married. Had the interested party proved that the objector had been given any other property by the deceased during his life time the court would have taken that into account during the process of distribution of the estate but the interested party did not prove that, but only alleged which allegation was not proved.

16. Having come to the conclusion as herein above and having considered the two proposals by both objector and the interested party I find the proposal by the objector to be fair and most likely to bring peace and unity to the deceased family. I shall therefore adopt the proposal by the objector. The interested party would get 7.35 acres and the objector 7.35 acres out of Nyaki/Giaki/32. The surveying of the land should take into account each parties developments and occupation. Each party to bear its own costs as they are daughter and sister in law to the deceased.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF OCTOBER, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. Rimita for the interested party/1st objector
2. Mr. Kirima for objector/2nd petitioner.

J. A. MAKAU

JUDGE