



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO. 286 OF 2011

IN THE MATTER OF THE ESTATE OF FRANCIS

M'IKIARA alias IKIARA KIMOTHO alias M'IKIARA KIMOTHO.....DECEASED

AND

TERETHINA NCEGE M'IKIARA.....PETITIONER

J U D G M E N T

1. The Petitioner Terethina Ncenge M'Ikiara on 07/08/2013 filed summons for confirmation of grant in respect of the estate of Francis M'ikiara alias Ikiara Kimotho alias M'ikiara Kimotho getting out her proposed mode of distribution in respect of the deceased assets being L.R.Abothuguchi/Igane/184,Abothuguchi/Kariene/1306,Abothuguchi/U-Kaongo/270,Livestock consisting of two cows and 5 goats and cash Ksh, 40,000/= held by Meru Capital Sacco Ltd .
2. Anicia Kajijo M'ikiara, Peter Kimotho, Rosemary Ntibuka Muriuki, Jeniffer Muthoni, Damaris Kiende and Judith M'ikiara beneficiaries to the deceased estate appointed the firm of Ms G.O. Ombachi & Co. Advocates and filed affidavit of distribution on confirmation of grant through Alicia Kajijo M'ikiara.
3. The petitioner and all beneficiaries sought time to agree on mode of distribution. They were unable to do so hence the matter was set down for hearing by way of oral evidence. The objector gave evidence and called no witness whereas the petitioner gave evidence and called no witness.
4. The objector's testified that the deceased was survived by two wives, herself and the petitioner. That she has 5 children and her co-wife has 3 children and that the objector resides at Abothoguchi/Igane/184 where she has lived for 50 years whereas the petitioner stays at her own plot number Abothuguchi/U-Kaongo/270. She stated that the deceased assets comprised of 3 parcels of land. She proposed distribution be as per occupancy of the land by each wife and her children. She averred that Abothuguchi/Igane/184 is 6 acres. That Abothuguchi/U-Kaongo/270 is 2 acres and Abothuguchi/Kariene/1306 is 0.8 acres. On the livestock she stated the 5 cows and 5 goats all are hers as she acquired them jointly with her husband. She claimed the coffee trees are on plot 184 and are hers. She states that she is not agreeable to share at plot number Abothoguchi/Igane/184 as the one petitioner has is enough. On Ksh. 40,000/= the objector said the

same is hers, being Ksh. 20,000/= from her coffee proceeds and Ksh. 20,000/= being dowry from her daughter Damaris Kiende. On cross-examination the objector testified that she has one son and 4 daughters who are all married whereas her co-wife has 1 daughter and 2 sons. The daughter is married. She testified on plot No. 184 there is a stone building of a shop and a permanent house which is incomplete. The objector confirmed the shop is used as her matrimonial home. She agreed that Edward Nyamu M'Ikiara son of the petitioner lives on plot No. 184 having entered and constructed a house during the life of the deceased and that it is only the objector and Edward Nyamu who lives on plot No. 184. She stated she wants the land shared between herself and Edward Nyamu, proposing Edward gets $\frac{1}{2}$ an acre because his father had told him he would go to Warunga which is 0.80 acres. She proposed the remaining 7 acres to be shared by her and her children equally so that each child gets 1.4 acres. On Abothuguchi/U-Kaongo/270 comprising of 0.29 hectares equivalent to 0.71 acres she proposed it be allocated to the petitioner so that each child of Terethina gets 0.23 acres. On Abothoguchi/Kariene/1306 which is 0.49 hectares equivalent to 1.21 acres she proposed it should go to the petitioner to share to each of her children so that each gets 0.30 acres. She proposed that each of the petitioner's child should get 0.53 acres and hers each 1.4 acres. All in all She averred that she wanted more than her co-wife and her children, though she had not contributed to the acquisition of the land but found them when she was married. She also testified that she wants the more developed land. She confirmed the money in the bank is in the name of the deceased and not hers and the coffee trees on plot 184 belonged to the deceased.

5. The petitioner Terethina Ncege M'ikiara confirmed that the objector is her co-wife stating that she is the first wife and that objector is the second wife. She produced marriage certificate as exhibit PI. She confirmed she has 3 children and her co-wife 5 children. She stated all 8 children of the deceased being 3 sons and 5 daughters are all adults and all the daughters are married. She confirmed that deceased assets were as stated by the objector being 3 parcels of lands. She provided green cards for Abothuguchi/Kariene/1306 as exhibit P2; Abothoguchi/Igane/184 as exhibit P3 and Abothuguchi/U-Karongo/270 as exhibit P4. She testified the deceased left livestock, some with her and others with the objector. She has one cow and others are with her co-wife. She wished the livestock to remain whenever they are as of the time of giving her evidence. On distribution of the land she proposed:-

Abothuguchi/Igane/184 comprising of 7.5 acres Anicia to get 1acre, herself 1 acre remainder of 5.5 acres to be shared equally amongst all children save Geoffrey Murithi so that each gets 0.418 acres. That the objector should get a portion where the shop is situated and the petitioner where her late husband had constructed a house for her which is still incomplete. She proposed her children to get share of plot 184 as they stay there, save all daughters who are married and Geoffrey Murithi who stays at Kariene which is less developed. She further added plot Abothuguchi/Igane/184 is occupied by the sons of the deceased Peter Kimotho and Edward Nyamu. On Abothoguchi/Kariene/1306 measuring 0.49 hectares (1 acre) she proposed it be allocated Geoffrey K. Murithi as he stays at the land. She proposed he gets the whole of it as the value of land at Igane is higher than that of Kariene. On Abothoguchi/U-Kaongo/270 measuring 0.29 hectares (0.71) acres the petitioner proposed it goes to Anicia Kajijo as it is leased and objector gets rent from it. On cash of Ksh. 40,000/= she proposed it be shared equally. During cross-examination she confirmed that she stays at plot No. 1306 and the objector at 184 stating she once used to live on plot No. 184. She testified her house at plot No. 184 was under construction as her husband had promised to take her to Igane. She averred she was opposed to objector's proposal of distribution and confirmed plot 270 should go to Anicia Kajijo. She reiterates the money in the bank was from proceeds of coffee from the deceased farm which she was involved in planting and has been caring for it till her husband passed on. She confirmed her house on plot 184 is unoccupied by the objector.

6. I have carefully considered the proposed mode of distribution by the petitioner, the proposal by the objector, their evidence and the law relating to distribution of an estate in a polygamous family. The issue for determination is how should deceased estate be distributed and which of the proposal is fair and reasonable and in compliance with the Law of Succession Act.

7. The objector and petitioner are in agreement on the deceased dependants as being the two widows, and 8 children. They are in agreement on the deceased assets as comprising of Abothoguchi/Igane/184, Abothoguchi/Kariene/1306 and Abothoguchi/U-Kiango/270; Kshs.40,000/= and livestock comprising 5 cows and 5 goats. The objector proposes Abothoguchi/Igane/184 be shared equally amongst herself and her 5 children including Edward Nyamu who she proposes gets ½ acre out of the said land so that each of her children gets 1.4 acres. That Abothoguchi/U-Kiango/270 to be allocated to the petitioner and her children so that each gets 0.23 acres excluding the petitioner. On Abothoguchi/Kariene/1306 to the petitioner to share with her children so that each gets 0.30 acres. The objector wishes the petitioner's children to get 0.53 acres each all in all whereas her children gets 1.4 acres each. She did not hide her wishes of getting more shares together with her children though she did not have any justification for seeking to have a bigger share. She did not call evidence to show that the deceased had shared the land during his time or gifted any of his properties to the petitioner's children or herself. Her proposal is not supported by any provisions of law nor is it reasonable, fair and equitable and if the same is accepted it would be contrary to section 40 of the Law of Succession Act which provides:-

40. (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.

The petitioner was married under statute law to the deceased in 1961 whereas the objector was married under customary law in 1963 when the deceased lacked capacity to marry the objector however that notwithstanding and the issue as to whether the objector is entitled to share or not; having not been raised or objected to as the petitioner is willing to share the estate with the objector; I will not go to the issue as to whether the objector should share or not but, will take that the petitioner as per her mode of distribution and her evidence has no objection to the objector being treated and having equal rights with her and as such this court shall treat the objector as equally entitled as the petitioner who has no objection. Had the issue been raised or canvassed before me, I would have dealt with it but I think I have said enough on the point.

8. I have considered the two proposals and I am of the view that if the proposal by the objector is adopted the court would be acting contrary to Section 40 of the Law of Succession Act (already quoted) and will be discriminating against the petitioner and would be favouring the objector and her house which would be contrary to the constitution. On the other hand I have considered the proposal by the petitioner, it is fair, equitable reasonable, and justifiable. It is not discriminatory of the beneficiaries on ground of houses, or sex or marital status. I find the proposal equitable. The lands in issue solely belonged to the deceased. The coffee on the plot 184 and all proceeds from the coffee belonged to the deceased. The objector failed to prove coffee trees belonged to her, she failed to prove part of Ksh. 40,000/= was part of dowry of her daughter Damaris Kiende. On the issue of livestock, each party is willing to keep the livestock in her possession and I find no need to deliberate further on that issue.

9. In view of the foregoing and considering all the evidence on record and occupancy of the deceased parcels of land the deceased estate shall be distributed as follows:-

A. Abothuguchi/Igane/184 – Comprising of 7.5 acres

I. *Terethina Ncenge M'ikiara (life interest)*

(where her house under construction is and where deceased grave and upon her demise the same to equally go to her sons – 1 acre

II. *Anicia Kajijo M'ikiara (life interest) on the side where she resides and where there is shop* –
1 acre

III. *Edward Nyamu M'ikiara (where his house is)* – *1 acre*

a. *Peter Kimotho* – *1 acre*

b. *Anjerica Ncekei Murangiri* –*0.7 acres*

c. *Rosemary Ntibuka Muriki* –*0.7 acres*

d. *Jennifer Muthoni* –*0.7 acre*

e. *Damaris Kiende* –*0.7 acres*

f. *Judith M'ikiara* –*0.7 acres*

(as the five daughters are married and do not reside on the land.

B. Abothoguchi/Kariene/1306 to Geoffrey K. Murithi

C) Abothoguchi/U-Kaongo/270 to Anicia Kajijo M'ikiara

D) Livestock Petitioner and Objector each to keep livestock in her possession.

E) Ksh. 40,000/- held with Meru Capital Sacco Ltd to be shared equally between Terethina Ncenge M'ikiara and Anicia Kajijo M'ikiara.

F) Each party to bear its own costs.

DATED AT MERU THIS 6TH DAY OF NOVEMBER, 2014

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:

1. Mr. Ombachi for objector

2. Mr. M. Mwenda for Petitioner.

J. A. MAKAU

JUDGE