



REPUBLIC OF KENYA

High Court at Meru

Succession Cause 225 of 2011

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**IN THE MATTER OF M'MUGWIKA M'ARICHA ALIAS MUGWIKA RICHA ALIAS
M'MUGWIKA M'RICHA**

M'MUGAMBI M'MUGWIKA.....PETITIONER

Versus

CHARITY MPINDA M'MUGWIKA.....OBJECTOR

JUDGMENT

The proposed Administrator in the instant Succession Cause one M'Mugambi M'Mugwika petitioned the court on 29th April 2011 for Grant of letters Administration intestate of the Estate of the late M'Mugwika M'Aricha alias Mugwika Richa alias M'Mugwika M'Richa who died intestate on 15th January 2011.

Pursuant to the said petition there was consent to the making of grant of letters of Administration intestate, purportedly signed by all the beneficiaries of the estate. On or about 13th July 2011, and no notice of objection to granting the said letters of administration intestate having been filed by any person within the stipulated period by law, the court proceeded and issued the said Letters of Administration Intestate to the Petitioner.

Six months later, one of the beneficiaries of the estate one Charity Mpinda, moved to court and filed an objection to the issuance of the grant alleging inter alia that the said grant was issued to the Petitioner by concealment of material facts and that she had actually not signed the consent to the making of the grant and that her signature on the document had actually been forged by the Petitioner.

The Petitioner filed a replying affidavit deponing inter alia that contrary to the Objectors proposed objection, all the children of the deceased had by consent agreed that the Petitioner pursue the succession cause by virtue of him being the first born child of the family; and further that the Objectors objection was misplaced since the same was filed out of time and the same was filed without leave of the honorable court as required by law.

Subsequently the Petitioner filed an application for confirmation of grant simultaneously with the consent

to the mode of distribution of the estate, which appears to be signed by all the beneficiaries except the Objector herein.

On 30th April 2012, the Objector herein filed an affidavit of protest to the application for confirmation of grant alleging inter alia that the consent attached to the distribution is not enforceable in law as it has not been signed by all the family members, and that further one of the other beneficiaries to the estate one Sabella Mbuthu can attest to that fact and that the thumb print in the consent is actually not hers, and further beseeching the honorable court to dismiss the mode of distribution as currently filed by the Petitioner. The Objector further contends that her deceased father prior to his demise had through a written will bequeathed to her 2 acres of one of the parcels of land now being contested namely L.R ABOTHUGUCHI/RUIGA 336 and has annexed a copy of the said will.

When the matter came up before court on 25th June 2012, and in the presence of all the beneficiaries, indeed the said Sabella Mbuthu stated before court that she was in agreement with the Objector's assertions. The court further directed the said Objector Charity Mpinda to file her suggested mode of distribution of the estate within a period of two weeks.

The same has now been filed and there are now two modes of distribution of the estate before court for determination. One of them has been filed by the Petitioner **M'Mugambi M'Mugwika** and the other by the Objector **Charity Mpinda**.

The main assets for distribution are as follows:

- (a) ABOTHUGUCHI/RUIGA/3336**
- (b) ABOTHUGUCHI/GAITU/2187**
- (c) ABOTHUGUCHI/GAITU/2189**

There are six Dependants to the estate as follows:

Sabella Mbuthu, M'Mugambi M'Mugwika, John Muriungi Mugwika, Loise karimi David, David Kinyua Mugwika and Charity Mpinda Mugwika.

The Petitioner in his mode of distribution which he has filed in court proposes to distribute the estate as follows:

- 1. L.R ABOTHUGUCHI/RUIGA/336 should go to JOHN MURIUNGI-WHOLE (4.18 ACRES**
- 2. L.R ABOTHUGUCHI/GAITU/2187 should go to M'MUGAMBI M' MUGWIKAWHOLE (4.19 ACRES)**
- 3. L.R ABOTHUGUCHI/GAITU/2189 should go to DAVID KINYUA-WHOLE (4.19 ACRES)**

The Petitioner has not made a provision for the other Dependants who are the daughters of the deceased namely: Sabella Mbuthu, Loise Karimi and Charity Mpinda who is the Objector herein. It is important to note that despite the Petitioner having not made a provision for one of the Dependants namely Loise Karimi she has opted not to contest the same.

The Objector on the other hand has proposed to distribute the estate as follows:

- 1. L.R ABOTHUGUCHI/RUIGA/336 be shared between JOHN MURIUNGI AND CHARITY MPINDA (HERSELF) 2.12 ACRES AND 2.00 ACRES RESPECTIVELY.**
- 2. L.R ABOTHUGUCHI/GAITU/2187 should go to M'MUGAMBI MUGWIKAWHOLE-4.19 ACRES (WHOLE)**

3. L.R ABOTHUGUCHI/GAITU/2189 should go to DAVID KINYUA-4.19 ACRES (WHOLE)

The Objector has not made a provision for the other Dependants who are her two sisters namely: Sabella Mbuthu and Loise Karimi.

From the filed proposed modes of distribution both the Petitioner and the Objector have made no provision for Sabella Mbuthu and Loise Karimi. Yet Sabella Mbuthu the co-objector agrees with the Objector but disagrees with the Petitioner.

The issue before the court is whether the mode of distribution suggested by the Petitioner should be allowed or whether there should be any change, whether in terms suggested by the Objector or any other. The first issue to decide is who is a dependant? **Section 29** of The Law of succession Act CAP 160 of the laws of Kenya provides inter alia as follows:

”for the purposes of this Act a “Dependant” means-

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

All the six persons named as dependants of the deceased are children of the deceased herein. There is no doubt that they are all entitled to a share of the estate of the deceased as his dependants.

The Honorable court is vested with wide discretion in making a provision for Dependants. **Section 27** of the Law of Succession Act provides as follows:

”in making a provision for a Dependant the court shall have complete discretion to order a specific share of the estate to be given to the Dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit...”

Section 28 of the Act further provides as follows:

”in considering whether any order should be made under this part, and if so what order, the court shall have regard to:

(a) the nature and amount of the deceased's property

(b) any past, present or future capital or income from any source of the dependent

(c) the existing and any future needs of the Dependant

(d) whether the deceased had made any advancement or other gift to the Dependant during his lifetime

(e) the conduct of the Dependant in relation to the deceased

(f) the situation and circumstances of the deceased's other Dependants and beneficiaries under any will

(g) the general circumstances of the case including, so far as can be ascertained, the testator's reasons for not making a provision for the Dependant.”

The Petitioner has raised a pertinent issue that the Objection filed herein by Charity Mpinda and Sabella Mbuthu was filed out of time and without leave. That has not been denied and looking at the record it is the correct position. However, I will still consider the Objection by virtue of Article 159 of the Constitution which requires the court to do justice to the parties without giving undue regard to technicalities.

The Petitioner in his affidavit in support of the confirmation of grant, at paragraph 7 and also in his replying affidavit to the objection at paragraph 6 states that the Objector Charity Mpinda was bequeathed land ABOTH/GAITU/2188 before their father died. The Green Card for that transaction is annexed to his replying affidavit and shows that indeed the land was transferred from the deceased to Charity Mpindu. Charity did not answer this point in her response and as the law provides any attestation which is not denied should be considered admitted.

Section 28(d) of the Law of Succession provides that every provision made to a dependant during a deceased lifetime should be considered during distribution. I find that the Objector Charity was provided for during the deceased lifetime. She was given land which is 1.21 which is almost the same size as the land being given to her brothers.

The Objector Charity has contended that she has developed two acres out of land Parcel ABOTHUGUCHI/RUIGA/336. That has been contested by the Petitioner who has demonstrated that it is in fact JOHN MURIUNGI who has developed the said land by planting trees and cash crops.

Charity has claimed further that her father had written a will bequeathing to her two acres out of the said land. The said will is annexed to her affidavit. That will is not attested at by any party all. The original has not been supplied. More importantly it is not admissible since it has not complied with the law for lack of any authenticity, and is null and void for want compliance with mandatory provisions of The Law of Succession Act.

It is clear that all three brothers have equal acreage of land distributed to them going by the Petitioner's suggestion. That acreage is almost same size as land bequeathed to the Objector Charity before the deceased died. The Objector's claim over 336 cannot stand as it will give her an unfair advantage over the rest of the family which is not justified.

All the beneficiaries to this estate signed the Consent on the Distribution of the deceased estate. Apart from Charity's allegation that Sabella had not signed as indicated in the consent, Sabella herself has not claimed so. Sabella was in court when I told her and Charity as Objectors to file their responses. The fact she filed none can only mean that she was not challenging the Petitioner's affidavits. It also means that all the dependants including Sabella were in agreement with the Mode of Distribution suggested by the Petitioner.

Having considered the Objector's Objection I find that the same has no merit and dismiss it. I rule that the Estate of the deceased should be distributed as follows:

- 1. L.R ABOTHUGUCHI/RUIGA/336 should go to JOHN MURIUNGI-WHOLE (4.18 ACRES)**
- 2. L.R ABOTHUGUCHI/GAITU/2187 should go to M'MUGAMBI M' MUGWIKA-WHOLE (4.19 ACRES)**
- 3. L.R ABOTHUGUCHI/GAITU/2189 should go to DAVID KINYUA-WHOLE (4.19 ACRES)**

There will be no order as to costs.

DATED SIGNED AND DELIVERED THIS 11th DAY OF SEPTEMBER 2012

**LESIT, J.
JUDGE.**