



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

SUCCESSION CAUSE NO. 110 OF 2010

IN THE MATTER OF THE ESTATE OF:- SAMWEL MIRITI.....(DECEASED)

M M M'M.....PETITIONER

VERSUS

A I M.....INTERESTED PARTY

J U D G M E N T

1. M M M'M, the 1st petitioner, through petition dated 16th March, 2010 petitioned for grant of letters of administration intestate in respect of the deceased estate herein and she was issued with grant of letters of administration intestate on 9th July, 2010.
2. A I M, the interested party filed summons for revocation and/or annulment of the grant issued to Mary Mwiti M'Munyi on 9th July, 2010 on the grounds that the proceedings to obtain the grant were defective in substance, that the grant was obtained fraudulently by making of a false statement, that grant was obtained by concealment from the court of something material to the case, that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant and lastly that the grant was obtained stealthily and secretly.
3. That on 19th August, 2010 the court upon perusal of a letter by the Deputy Chief State Counsel dated 30th July, 2010 revoked the grant issued to M M'm on 9th July, 2010.
4. That by consent letter dated 14th September, 2011 duly signed by M/S Maitai Rimita & Co. Advocates for the interested party and M/S J.G. Gitonga & Co. Advocates for the petitioner both the interested party and the petitioner agreed to be appointed as joint administratrixes of the estate of the deceased herein. The said consent was adopted as an order of this court on 21st November, 2011 and grant of letters of administration intestate issued to both parties.
5. The interested party through summons dated 6th April, 2012 and filed on 23rd April, 2012 sought confirmation of the grant as per her supportive affidavit dated 6th March, 2012. The 1st petitioner was opposed to the mode of distribution proposed by the 2nd petitioner/interested party, consequently she filed affidavit of her proposed mode of distribution dated 15th April, 2013.
6. On 31st May, 2013 both petitioners were given 14 days to put in written submissions on mode of distribution. The interested party/2nd petitioner filed her submissions on 2nd July, 2013 through the firm of M/S Maitai Rimita & Co. Advocates whereas the 1st petitioner's submissions were

filed on 8th April, 2014 by the firm of M/S J. G. Gitonga & Company Advocates.

7. The court have very carefully perused the mode of distribution proposed by both petitioners, the counsel submissions and authorities referred to by the counsel as well as the relevant provisions of the law of Succession Act and the issue on the mode of distribution.
8. The 1st petitioner's submissions are that the deceased had two wives. The first house is comprised of M M M'M (widow), 1st petitioner, G K M (son) and F K M (daughter) whereas the second house is composed of: A I (widow), 2nd petitioner, J M M (son) and L K M (daughter). The deceased assets were given by the 1st petitioner as land parcel No.[particulars withheld] Kitharene Adjudication Section measuring 7.70 acres; land parcel no. [particulars withheld] kitharene Adjudication Section measuring 11.30 acres; gratuity from police force amounting to Kshs.773,552/40, monthly pension of Kshs.124,920/40 and savings in equity Account No.0140190175766. The 1st petitioner proposed the deceased estate to be distributed as per paragraph 7 of her affidavit on mode of distribution dated 15th April, 2013 urging the said proposal was fair and equitable to all beneficiaries of the estate of the deceased.
9. The interested party/2nd petitioner submission is that the allegation that she has another parcel of land in Isiolo given to her by her deceased husband are baseless and she argued the 1st petitioner's intention is to disinherit her and her issues from getting what is rightly theirs from the deceased estate. She further argued that the 1st petitioner prayer to get bigger share over her is unreasonable and speculative and that she failed to bring up the issue of having been divorced by the deceased and the two having lived separately for a long time. The interested party/2nd petitioner averred that she is a wife for the purposes of the Succession Act and referred to Section 3(5) of the Law of Succession Act and Court of Appeal case No168 of 2009(I will refer to the judgment later) and Section 40 of the Law of Succession Act, urging the court to uphold her mode of distribution.
- 10.The 1st petitioner in her affidavit dated 15th April, 2013 in support of her mode of distribution averred that she is the 1st wife of the deceased and jointly acquired the two parcels of land subject of distribution with the deceased before the deceased married the 2nd wife, that is the interested party/2nd petitioner and that she resides and farms on land parcel No.[particulars withheld] Kitharene Adjudication section. That the deceased during his life time gave interested party another parcel of land at Isiolo details of which she was unable to disclose or obtain and that Godfrey Kithinji is a standard seven dropout and is unemployed. That the deceased paid school fees for J M M who is employed as a Police Officer. The deceased expressed his willingness to construct a permanent house for her using the money he was to obtain from gratuity/pension from Police Force and as such she was of the view that her proposal on mode of distribution was fair.
- 11.The issue raised by the petitioner in her affidavit were not supported by any documentary evidence nor was there any oral evidence called. The submissions on mode of distribution by the 1st petitioner with all due respect, is untenable for want of supportive evidence, if upheld it would be against the provisions of law, would be discriminative and unfair to the interested party/2nd petitioner and her issues. The law is clear that he who assets has the burden of proof. Section 107(1) and (2) of the Evidence Act provides:-

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

- 12.I find the 1st petitioner has failed to prove that she jointly acquired the two parcels of land that is [particulars withheld] and [withheld] Kitharene Adjudication Section with the deceased that she resides and farms on land parcel 947 Kitharene Adjudication Section. That the deceased gave the

interested party/2nd petitioner a parcel of land at Isiolo; that G K M was denied education by the deceased. She did not state his dropping from school had anything to do with the deceased failure to pay school fees for him and not his unwillingness to proceed with the education or any other reason. One cannot be denied his rightful share simply because he or she has opted to proceed with education or is well educated and has a good job otherwise children from well to do families or rich families won't proceed on with education with hope to become rich by getting most of their fathers' estate upon their death. The 1st petitioner similarly did not adduce evidence to support her claim that the deceased had promised to put up a permanent house for her with gratuity money and even if he had said so that was only a promise which could be enforced in a Succession Cause. The promise blew up with the deceased death.

13. Section 3(5) of the Law of Succession Act provides:-

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”

14. The Law of Succession Act recognizes polygamous marriage and in such marriages there is no lesser a wife as the 1st petitioner imputes in her affidavit. It is true from the parties affidavits that both 1st petitioner and 2nd petitioner were wives to the deceased. The Court of Appeal in **Civil Appeal No.168 of 2009 Marian Njoki Muturi V Bilha Wahito Muturi(Nyeri)** referring to the case of **In the Matter of Estate of Reuben Nzioka Mutua(deceased) P&A Cause No. 843 of 1986**, the Court said:-

“Our understanding of Section 3(5) of the Act is that it was expressly intended to cater for women who find themselves in the situation in which Josephine found herself. Mutua, previous to his union with Josephine had contracted a monogamous marriage which remained undissolved up to the time of his death. But subsequent to that marriage, he purported to marry Josephine under Kamba Customary Law. Kamba customary law recognizes polygamy and Josephine was telling the court that she was a woman married under a system which recognizes polygamy. Parliament in its wisdom and whatever it might have intended to do prescribed that.....”

15. The law of Succession Act provides how an estate of a polygamous intestate should be distributed. Section 40 of the Law of Succession Act provides:

“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.

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.

16. In the instant application the 1st petitioner is opposed to equal distribution while the interested party/2nd petitioner seeks and favours distribution according to Section 40 of the Law of Succession Act. This court is bound by Section 40 of the Law of Succession Act and has no discretion. The section clearly provides that the estate be divided between the houses taking into account the number of children in each house. It is fortunate that the two houses have equal

number of children however this court shall not shut its eyes to unfairness, meted on a deceased widows who are not allowed to take an extra share and whose efforts in acquisition of the properties are ignored and treated merely like children of the deceased notwithstanding having been equal partners with the deceased. It is further unfortunate when the first wife who sacrificed a lot of her energy and who participated in the acquisition of the greater part of the deceased estate and even in situation where the properties are solely acquired by the first wife but registered in husbands have ended up being shared equally among all the wives not taking into account of less contribution by the younger wife who is married after acquisition of the bulk of the properties if not all the estate and who has contributed very little or nothing towards the acquisition of the estate. It is the court's hope that the unfairness to widows, and discrimination on first wife as reflected under Section 40 of the Law of Succession Act will soon be corrected so that the distribution of the deceased estate takes into account the contribution of the first wife and that of the 2nd wife or any other wife and the shares of the wife or wives is calculated differently from that of children who are treated as the same as their mother.

17. Having considered the proposed mode of distribution by the 1st petitioner and the interested party/2nd petitioner I find the proposal by 1st petitioner contrary to Section 40 of the Law of Succession Act, it is also unfair and unjustified. The proposal by interested party is fair, reasonable and in accordance with the Law of Succession Act. I shall therefore adopt the same.

18. The deceased estate shall therefore be distributed in terms of paragraph 4(a), (b), (c), (d) and (e) of the supporting affidavit of the interested party dated 6th November, 2012.

19. The deceased estate is therefore distributed as follows:

a. LAND PLOT NO. [particulars withheld] KITHARENE ADJUDICATION SECTION MEASURING 7.0 ACRES

1. M M M'M.....1.37 acres
2. F K M.....1.24 acres
3. G K M.....1.24 acres
4. A I Mo.....1.37 acres
5. Jh M M.....1.24 acres
6. Lilian Karimi Miriti(Minor).....1.24 acres

b. LAND PLOT NO. [particulars withheld] KITHARENE ADJUDICATION SECTION MEASURING 11.30 ACRES

1. M M M'MI.....2.15 acres
2. F K M.....2.00 acres
3. G K M.....2.00 acres
4. A I M.....2.15 acres
5. J M M.....2.00 acres
6. L K M (Minor).....2.00 acres

(c). GRATUITY FROM POLICE FORCE AMOUNTING TO KSHS.773,522.40

1. M M M'M.Kshs.124,920.40

ii. F K M..... Kshs.124,920.40

iii.G K M..Kshs.124,920.40

iv. A I M..Kshs.124,920.40

v. J M M..Kshs.124,920.40

vi. L K M (Minor) Kshs.124,920.40

(d) MONTHLY PENSION PAYMENT KSHS.124,920.40

- a. M M M'M.....Kshs.4,000
- b. A I M...Kshs.4,000
- e. **SAVINGS IN EQUITY ACCOUNT NO. [particulars withheld] ISIOLO BRANCH**
 - 1. M M M
 - 2. A I M

Each party to bear its own cost as the parties are co-wives.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF SEPTEMBER, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

- 1. Mr. Rimita for the interested party/2nd petitioner
- 2. Mr. J. G. Gitonga for the 1st petitioner.

J. A. MAKAU

JUDGE