



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**SUCCESSION CAUSE NO. 410 OF 2015**

**(FORMERLY CHUKA SPM SUCCESSION CAUSE NO. 342 OF 2012)**

**AND**

**MWANDIKI M'RITHAA.....PETITIONER/APPLICANT**

**VERSUS**

**KIMATHI M'RITHAA.....CAVEATOR/PROTESTOR**

**J U D G M E N T**

1. This cause relates to the estate of the late M'Rithaa Mwanirua who died at Chogoria Hospital on 22<sup>nd</sup> June 2011 resident at Mutindwa- Maara District. The deceased died intestate as per the petition leaving behind the following dependants namely:-

- (i) John Nkonge Riungu
- (ii) Eliphaz Nyaga M'Rithaa
- (iii) Mwendwa M'Rithaa
- (iv) Grace Ithiru Mwati
- (v) Rose Wanjiru Jaban
- (vi) James Muchunku M'Rithaa
- (vii) Rose Wanjiru Jaban
- (viii) Wanja Njagi
- (ix) Caroline Kangai Karuga
- (x) Dickson Mugendi Kithuci

(xi) Eliatha Njage Kinyua

(xii) Kimandi M'Rithaa Grandchildren

(xiii) Dickson Murithi M'Rithaa

(xiv) Evans Kinoti M'Rithaa

2. The properties comprising the estate are listed as follows namely:-

(i) L.R. Mwimbi/Chogoria/530

(ii) L.R. Mwimbi/Chogoria/25

3. The petitioner herein Mwandiki Rithaa, was appointed the administrator of the estate of the deceased herein on 8<sup>th</sup> March 2016 and vide Summons for Confirmation of Grant dated 3<sup>rd</sup> October 2017 he sought for confirmation of grant and listed the following beneficiaries:

(i) Mwandiki M'Rithaa

(ii) Johnson Nkonge Riungu

(iii) Eliphas Nyaga M'Rithaa

(iv) Betty Wanja Njagi

(v) Rosebeth Kanjiru M'Rithaa

(vi) Grace Ithiru M'Rithaa

(vii) Caroline Kangai

(viii) Ann Nkinga

(ix) Dorothy Ruguru

(x) Dickson Mugendi Kithuci

(xi) Eliatha Njagi Kinyua

(xii) Dickson Murithi Kinyua

(xiii) James Muchunku M'Rithaa

4. The administrator proposed to have the estate distributed as follows:-

(a) **L.R. Mwimbi/Chogoria/530**

- (i) Mwandiki M'Rithaa - 4 acres
- (ii) Johnson Nkonge Riungu - 3 acres
- (iii) Eliphas Nyaga M'Rithaa - 4 acres
- (iv) Dickson Mugendi Kithuci - 1.5 acres
- (v) Eliatha Njagi Kinyua  
Dickson Murithi Kinyua - 3 acres jointly
- (vi) James Muchunku M'Rithaa - 1 acre
- (vii) Betty Wanja Njagi - 0.75 acre
- (viii) Rosebeth Kanjiru M'Rithaa - 0.50 acre
- (ix) Caroline Kangai - 0.50 acre
- (x) Ann Nkinga  
Kimathi M'Rithaa - 1 acre jointly
- (xi) Dorothy Ruguru  
Evans Kinoti M'Rithaa - 0.75 acres jointly

(b) **L.R. Mwimbi/Chogoria/25**

Johnson Nkoge Riungu - whole

5. The petitioner's proposal on the distribution of the estate elicited some protest from Kimathi Rithaa, a grandchild to the deceased who filed an affidavit of protest sworn on 17<sup>th</sup> March 2018. In his affidavit the protestor listed the following as dependants:-

- (i) Mwandiki M'Rithaa
- (ii) Johnson Nkonge Riungu
- (iii) Eliphas Nyaga M'Rithaa
- (iv) Kinyua M'Rithaa (deceased) left behind Eliatha Njagi Kinyua and Dickson Murithi Kinyua).
- (v) Kithuci M'Rithaa (deceased left behind Mugendi Kithuci).
- (vi) Betty Wanja Njagi
- (vii) Rosebeth Kanjiru M'Rithaa

(viii) Grace Ithiru M'Rithaa

(ix) Caroline Kangai

(x) Ann Kinga

(xi) Dorothy Ruguru

(xii) Ncuguni M'Rithaa

The protestor has also listed the following as dependants:-

- a. Kimathi M'Rithaa - son to Ann Nkinga and grandson to deceased.
- b. Evanson Kinoti - son to Dorothy Ruguru
- c. James Muchunku - son to Ncuguni M'Rithaa
- d. Mugendi Kithuci - Great grandson of deceased.

6. The protestor has deposed that the petitioner's proposed mode of distribution is neither equal nor equitable citing that Ncuguni Rithaa has been left out. He further contends that he should be given a share independent from her mother's (Ann Nkinga) share. He proposes to have the estate distributed as follows:-

(a) **L.R. Mwimbi/Chogoria/530- 19.5 acres**

(i) Mwandiki Rithaa - 1.63 acres

(ii) Dorothy Ruguru - 1.63 acres

(iii) Eliphias Nyaga M'Rithaa - 1.63 acres

(iv) Eliatha Njagi Kinyua - 1.63 acres jointly

Dickson Murithi Kinyua

(v) Mugendi Kithuci - 1.63 acres

(vi) Kimathi Rithaa - 1.63 acres

(vii) Betty Wanja Njagi - 1.63 acres

(viii) Evans Kinoti - 1.63 acres

(ix) James Muchunku - 1.63 acres

(x) Ann Nkinga - 1.63 acres

(xi) Rosebeth Kanjiru M'Rithaa - 1.63 acres

(xii) Johnson Nkonge - 1.57 acres

(b) **L.R. Mwimbi/Chogoria/512 - 4.90 acres**

(i) Johnson Nkonge Riungu - 0.06 acre

(ii) Grace Ithiru M'Rithaa - 1.63 acres

(iii) Ncuguni M'Rithaa - 1.63 acres

(iv) Caroline Kangai - 1.63 acres

7. The protestor has justified the above proposal on grounds that the deceased 3 grandchildren namely Kimathi Rithaa, Evans Kinoti and James Muchunku were dependants within the meaning of **Section 29 (2)** of the **Law of Succession Act** and that the deceased had given them a share of land where they are now settled. He has further deposed that though her mother Ann Kinga is married, the person who married her is not his father and that is why he was shown where to settle by the deceased herein.

8. At the hearing of the protest herein, Kimathi M'Rithaa, the protestor herein reiterated that he had always lived with the deceased even after his mother Mary Nkinga was married as he was left to stay with the deceased herein as his grandfather. He further claimed that he was taken to school by the deceased and that when the rite of passage came, the deceased made the arrangements for him to be initiated and go through the rite of passage.

9. According to the protestor the deceased gave him 1 acre out of parcel No.530 and  $1\frac{3}{4}$  acre out of parcel No. 25. Under cross-examination, the protestor stated that his mother should not be given a share because according to him, she does not need it. He also conceded that his mother Mary Nkinga had not filed any protest to the proposed mode of distribution but denied being a cause of differences in the family.

10. The petitioner on his part testified that he was a son to the deceased and the appointed administrator in this cause. He testified that the protestor has always been quarrelsome and even differed with the deceased when he demanded to be given a portion of land and threatened to take him to court in 2009. He however conceded that the protestor has lived in the estate all his life. He further stated that Johnson Nkonge had been told to go and occupy parcel No.25 and that all the family members agreed to the arrangements. It was his evidence that the deceased left behind 12 children 2 of whom are now deceased. He named the deceased children as;

(i) Kinyua Rithaa &

(ii) Kithuci M'Rithaa

He further clarified that the late Kinyua left behind Njagi and Murithi whom he had catered for in his proposed mode of distribution.

11. This court has considered the protest filed on the proposal given by the petitioner on how the estate of the deceased should be distributed. I have also considered the petitioner's case and the written submissions made through learned counsel Mr. Mutani. I have also considered the protestor's final written submission through Ms I.C Mugo & Co. Advocates.

12. The main issues in this matter are as follows:-

(i) Whether the protestor is a dependant within the meaning of **Section 29(b)** and if he should be considered for distribution exclusive of her mother.

(ii) Whether there are other beneficiaries locked out in the petitioner's proposed mode of distribution and what is applicable in distribution of the estate herein.

13. There is no much dispute as to whether the protestor herein Kimathi M'Rithaa is a dependant within the meaning of **Section 29(b)** of the **Law of Succession Act**. This is because the petitioner himself in his evidence agreed with the protestor's claim that he grew up in the estate and has been living in the estate of the deceased since he was born. This court finds that based on the evidence tendered he is a dependant within the meaning of **Section 29(b)** of the Act. The deceased took care of him and maintained but as whether he should get a separate share of land independent of her mother, is an issue that this court shall determine shortly.

14. The evidence tendered before this court shows that the following are dependants left behind by the deceased or who survived the deceased. They are as follows namely:-

(i) Mwandiki Rithaa - son

(ii) Johnson Nkonge - son

(iii) Eliphas Nyaga M'Rithaa - son

(iv) Eliatha Njagi Kinyua

Dickson Murithi Kinyua left behind by Kinyua M'Rithaa -late son of the deceased

(v) Mugendi Rithaa - Grandson to deceased left behind by Kithuci M'Rithaa.

(vi) Betty Wanja Njagi

(vii) Rosebeth Kanjiru M'Rithaa

(viii) Grace Ithiru M'Rithaa

(ix) Caroline Kangai

(x) Ann Nkinga

(xi) Dorothy Ruguru

(xii) Kimathi M'Rithaa - Grandson to the deceased.

(xiii) James Muchunku - Grandson to deceased and son to Kithuci M'Rithaa (xiv) Ncuguni M'Rithaa

15. The estate of the deceased in this cause comprises the following properties namely:-

(i) L.R Mwimbi/Chogoria/530 - 7.80 Ha or 19.4 acres

(ii) L.R. Mwimbi/Chogoria/25 - 0.544 ha or 1.33 acres

**Total acreage 20.43 acres**

16. This court has looked at the proposal made by the petitioner and finds that they are none of the beneficiaries listed above who have not been catered for save for Ncuguni M'Rithaa.

This court finds same for excluding Ncuguni M'Rithaa that the petitioner's proposed mode of distribution is all inclusive. The only question posed is how can the estate of deceased herein be distributed fairly to all the beneficiaries"

17. In this cause, there are no surviving spouse(s). It is also apparent that parties have not agreed on how the estate should be distributed because had they agreed as put forward by the petitioner/administrator then a consent to that effect would have been filed and this court would have adopted the same when confirming the grant issued herein. However that is not the case here and the only option for distribution in such instances is to resort to the relevant provisions of the law. As I have observed above, where there are no surviving spouse(s), **Section 38** of the **Law of Succession Act** applies. That section provides that an estate of a deceased person dying intestate without a surviving spouse should be distributed equally among the surviving children.

The deceased in this cause had 12 children 2 of whom are deceased but left behind children. They are as follows: -

- (i) Mwandiki M'Rithaa
- (ii) Johnson Nkonge Riungu
- (iii) Eliphias Nyaga
- (iv) Betty Wanja Njagi
- (v) Rosebeth Kanjiru M'Rithaa
- (vi) Grace Ithiru M'Rithaa
- (vii) Caroline Kangai
- (viii) Ann Nkinga
- (ix) Dorothy Ruguru
- (x) Ncuguni M'Rithaa
- (xi) Late Kinyua M'Rithaa- (deceased) left behind Eliatha Njagi and Dickson Murithi.
- (xii) Late Kithuci M'Rithaa - (deceased) left behind Mugendi Kithuci.

18. The grandchildren namely Dickson Murithi Kinyua, James Muchunku, Kimathi Rithaa and Evans Kinoti are also entitled to a share but their share shall flow from what their parents (children of the deceased) gets in the distribution to ensure that the distribution is fair and equitable to all the dependants without anyone getting unfair advantage over the other dependants. In any case, a grandchild or any dependant under **Section 29(b)** cannot also claim the same or equal share with a dependant described under **Section 29(a)** of **Law of Succession Act**. Their entitlement to the estate cannot be equal to the entitlement of dependants under **Section 29(a)** of the Act.

19. In view of the foregoing this court finds that the estate of the deceased should be divided equally among the 12 children of the deceased named above. Which means that each child shall get approximately 1.7 acres each. The upshot of this is that the grant issued to the administrator on 8<sup>th</sup> March 2016 is hereby confirmed and the estate shall be distributed as follows:-

(a) **L.R Mwimbi/Chogoria/530**

(i) Mwandiki Rithaa - 1.7 acres

(ii) Eliphas Nyaga M'Rithaa - 1.7 acres

(iii) Johnson Nkonga Riungu - 0.45 acres

(iv) Eliatha Njagi Kinyua

Dickson Murithi Kinyua - 1.7 acres jointly

(v) Dickson Mugendi Kithuci - 1.7 acres

(vi) Ncuguni M'Rithaa

James Muchunku M'Rithaa 1.7 acres jointly

(vii) Betty Wanja Njagi - 1.7 acres

(viii) Rosebeth Kanjiru M'Rithaa - 1.7 acres

(ix) Caroline Kangai - 1.7 acres

(x) Ann Nkinga

Kimathi M'Rithaa - 1.7 acres equal share

(xi) Dorothy Ruguru

Evans Kinoti M'Rithaa - 1.7 acres jointly

(xii) Grace Ithiru M'Rithaa - 1.7 acres

(b) **L.R Mwimbi/Chogoria/25**

Johnson Nkonge Riungu - whole

This being a family matter I make no order as to costs.

**Dated, signed and delivered at Chuka this 17<sup>th</sup> day of December, 2018.**

**R.K. LIMO**

**JUDGE**

**17/12/2018**




Judgment signed, dated and delivered in the presence of parties and Mugo for protestors and Mutani for petitioner.

**R.K. LIMO**

**JUDGE**

**17/12/2018**

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