



REPUBLIC OF KENYA



**In re Estate of Mboroki Mutiga (Deceased) (Succession Cause
552 of 2013) [2023] KEHC 19095 (KLR) (26 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 552 OF 2013**

EM MURIITHI, J

JUNE 26, 2023

IN THE MATTER OF THE ESTATE OF MBOROKI MUTIGA (DECEASED)

BETWEEN

LUCY KATHAMBI M'IGWETA 1ST PETITIONER

BRENDA CHEROTICH KOECH 2ND PETITIONER

JOSEPH G.IKABU 3RD PETITIONER

AND

JUSTER NKIROTE 1ST PROTESTOR

BETTY MUKIRI MUGAMBU 2ND PROTESTOR

AND

ESTHER NTINYARI IKABU INTERESTED PARTY

M'MBWII MBOROKI INTERESTED PARTY

RULING

1. By chamber summons dated January 11, 2019 brought under rules 49, 63 and 73 of the [Probate and Administration Rules](#), the 1st interested party seeks that:
 1. The honourable court be pleased to review its judgment dated November 8, 2018 and set aside the distribution which was done in regard to land parcel number Kiirua/ruiri/150.
 2. The honourable court be pleased to hear the applicant in regard to the applicants claim over land parcel number Kiirua/ruiri/150.



3. The honourable court be pleased to provide for the applicant from the asset that form the estate by giving the applicant the share of the late Francis Muchebe.
 4. The implementation of the court judgment dated November 8, 2018 be stayed.
2. The grounds upon which the application is premised are set out in the body of the application and the supporting affidavit of Esther Ntinyari Ikabu, the 1st interested party herein sworn on even date. She avers that Francis Muchebe, a son of the deceased (now deceased) adopted her as his child during his lifetime. The late Francis Muchebe, said that if he passed on, she was to get his share of land parcel No Kiirua/ruiiri/150. Those wishes were made in the presence of the elders and family members including the protestors, and that is why they agreed to have her name included in the chief's letter as a beneficiary in place of Francis Muchebe. She was not aware of the contents of the affidavit of protest and she prays to be allowed to bring evidence in regard to her claim over the share of the late Francis Muchebe. The late Francis Muchebe summoned her when he had an accident and informed her that when he died, she was to take his share of the estate property. As an adopted child of the late Francis Muchebe, she provided for his upkeep, maintenance, bought for him clothes, paid his hospital bills whenever he was sick and bore all the expenses for his burial without any help of other beneficiaries. The late Francis Muchebe also bought her things as his child and visited her at her place of business, and she prays that her application is allowed so that she can file statements and be heard in regard to her claim.
3. The application was opposed by the replying affidavit of the Betty Mukiri Mugambi and Juster Nkirote, the protestors herein sworn on February 7, 2019. They aver that the decision of the court of November 8, 2018 was well considered and they urge that the same remains without being disturbed. They aver that the applicant is the daughter to Joseph G. Ikabu, the administrator of the estate herein, who was granted 1.2 Ha out of the estate. They accuse the applicant of wanting to benefit twice by getting a share of the estate yet her father is also getting a share. According to them, the application has not met the threshold for review and there is no evidence whatsoever that the applicant was ever adopted by one Francis Muchebe as she alleges or at all. The applicant and her father, Joseph G. Ikabu, the administrator herein have been forging signatures on documents including the consents for confirmation of grant and mode of distribution, which matter was reported to the CID at Meru. Francis Muchebe is a son to the deceased who died without a wife or children prior to the filing of this cause, and they urge the court to dismiss the application with costs.
4. Joseph G. Ikabu swore a replying affidavit on March 28, 2019 in support of the application. He avers that indeed Francis Muchebe was their brother, who died without leaving a wife or a child. At the time of his death, Francis Muchebe had taken and adopted the applicant as his own child and that is why the chief's letter has included her name in the list of heirs. The applicant was supposed to get the share of Francis Muchebe as is their custom and tradition. Francis Muchebe declared publicly in front of clan elders and family members that he had adopted the applicant and that his inheritance should be enjoyed by her. Kimeru customary practice allows adoption of a close relative for purposes of inheritance and succession. They were not given an opportunity to participate during the confirmation hearing and the court adopted the proposal given by the objector only without due regard to other family members including the petitioners. Betty Mukiri was a step child of their brother Joseph Mugambi Anampiu, but he had not taken any parental responsibility over her. He is advised that the share of Joseph Mugambi Anampiu should not have been administered in this cause but in a different one so that all his properties can be distributed properly according to the prevailing law. The distribution and subsequent confirmation of the grant is against the wishes of the majority family members and only



Juster Nkirote and her daughter Betty Mukiri were given a hearing. It is proper for the court to review its decision and admit the new information that has been presented by the applicant.

5. Julius Kairanya Mboroki and Lucy Kathambi M'Igweta swore an affidavit on February 6, 2019 in opposition to the application. They aver that the decision of the court was fair and just, as the applicant should benefit from the share of 1.2 Ha given to her father, Joseph G. Ikabu. They accuse the applicant and her father of colluding and forging signatures in the consents in this cause, a matter which has been reported at Meru Police Station. Francis Muchebe is a son of the deceased herein, who died prior to the filing of this cause without a wife or children. The said Francis Muchebe lived alone in Isiolo and he never adopted the applicant or anyone else.
6. M'Mbwii Mboroki, one of the sons of the deceased and the 2nd interested party herein, supported the application *vide* his replying affidavit sworn on April 2, 2019. He avers that Francis Muchebe had adopted the applicant and it is right that she receives his share of the estate.
7. M'Mbui M'Mboroki, Margaret Kigetu Raikanya and Erick Kaimenyi, filed statements dated March 1, 2019, fully supporting the application.

Oral Evidence

8. Jacob Magana, the former chief of Kiirua Location testified as AW1 in support of the application. He stated that he wrote the introductory letter according to the information gathered from the family, that the applicant was an adopted child of Francis Muchebe.
9. The applicant, Esther Ntinyari testified as AW2 also supporting her application. Although she stated that she supported Francis Muchebe and paid his burial expenses, she had no document to prove the same. Francis Muchebe informed family members and neighbours that she should inherit him.
10. Daniel M'Mbwi M'Mboroki, AW3 and a son to the deceased, stated that he was the one who gathered the land in dispute. Francis Muchebe was his brother and the applicant was his child as she took care of him and cared for him until his death.
11. Margaret Kigetu, AW4 also testified in support of the application. She stated that Francis Muchebe had taken in the applicant as his child, because he had no children of his own.
12. Erick Kaimenyi, AW5 stated that he was the one who took Francis Muchebe to the hospital after he had been involved in an accident. He heard Francis Muchebe twice say that the applicant was to take his property if he died.
13. PW1 Joseph Ikabu M'Mboroki, the applicant's father stated that Francis Muchebe took in her daughter as his own and the family gave her 2 acres.
14. RW1 Juster Nkirote denied going to the chief's office and stated that the chief and Eric Kaimenyi were friends of the petitioner. Francis Muchebe was living in Isiolo when he was involved in an accident at Ruri, and all of them contributed for his burial.
15. RW2 Julius Kailanya Mboroki denied that his brother Francis Muchebe had taken in the applicant as his child, and stated that he was the one who paid the hospital expenses. Francis used to live with Joseph and he slept there.



Submissions

16. The applicant urged that she had proved that Francis Muchebe had taken her as his child, and cited *Nathan Chesang Moson v Grand Creek Llc & another* [2020] eKLR. She prayed that the distribution of the estate be reviewed so that she can get the share of Francis Muchebe.
17. The 3rd petitioner urged that Francis Muchebe had declared publicly in the presence of clan elders and family members that he had adopted the applicant, and implored the court to allow the application.
18. The protestors urged that the applicant failed to prove her adoption by Francis Muchebe either under Meru Customary law or any known law under statute, and cited *Japhet Kithinji Muguna v Julia Kanana Mwiti & another* (2014) eKLR. They submitted that the distribution as per the ruling delivered on November 8, 2018 was proper, equitable and in accordance with the law, and urged the court to dismiss the application with costs.
19. The 2nd interested party urged that an equitable approach would be to grant the shares of the late Francis Muchebe to his heir Esther Ntinyari.

Analysis and Determination

20. The court has considered the application, the affidavits, the oral testimonies and the submissions on record, and notes that the issue for determination is whether the review sought is justified.
21. It has been held that the 3 main grounds for review are stipulated under order 45 of the *Civil Procedure Rules* as follows:

“

- i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or
 - ii. That there was a mistake or error apparent on the face of the record; or
 - iii. That sufficient reasons exist to warrant the review sought.
- In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.”

22. The applicant contends that the decision of November 8, 2018 ought to be reviewed on the basis of her adoption by one Francis Muchebe (deceased), as his child. Out of the nine witnesses who testified in court, 7 of them supported the applicant’s contention that she had been adopted by Francis Muchebe as his child, and he had directed that his share of the estate property should go to her if he died.
23. The applicant was listed as a granddaughter of the deceased in the introductory letter dated August 29, 2013. It is not indicated that she was listed in the said letter in place of her alleged adoptive father Francis Muchebe. The court, in its ruling of November 8, 2018, which is now sought to be reviewed rendered thus,

“It is not in dispute that the petitioner proposed to distribute to himself 2.50 acres and his daughter Esther Ntinyari Ikabu 2.00 acres. Under section 42 of the *Law of Succession Act* (“the Act”), the said Esther Ntinyari Ikabu is supposed to get her share from her father’s share and not directly from her grandfather, the deceased. In this regard, the proposed mode of distribution by the petitioner is not only unfair, unreasonable, unjust and skewed towards



benefitting the petitioner, but it is out-rightly illegal as it is in breach of section 38 of the Act.”

24. AW1 Jacob Magana, the chief of Kiirua location conceded to have authored the introductory letter of August 29, 2013. He stated that the applicant was listed in that letter as an adopted child of Francis Muchebe, in order to take his share of the estate property. This court finds that if the applicant had indeed been an adopted child of Francis Muchebe, nothing would have been easier than to indicate as such there.
25. Besides, the said Francis Muchebe was not provided for in the decision sought to be reviewed, and thus attempting to provide for the applicant, a completely new beneficiary, who was not initially provided for would be tantamount to altering the entire mode of distribution as decreed by the court, which would be highly undesirable. That is not within the purview of review as envisaged by the Court of Appeal in *National Bank of Kenya Limited v Ndungu Njau*[1997] eKLR, that,

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

Orders

27. Accordingly, for the reasons set out above, the court finds the application dated January 11, 2019 to be wholly unmerited and it is dismissed.
28. There shall be no order as to costs.
29. Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF JUNE, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

M/S Omari Advocate for Petitioner.

M/S. Omari Advocate holding brief E. Kimathi for Protestors.

M/S. Otieno Advocate for Interested Party.

Mr. Karaja Advocate for 2nd Interested Party

