



**REPUBLIC OF KENYA**

**IN THE HIGH COURT KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**SUCCESSION CAUSE NO. 4 OF 2016**

**IN THE MATTER OF THE ESTATE OF MARTHA KAREGI M'ITUNGA alias KARIGI d/o ITUNGA (DECEASED)**

**BETWEEN**

**MBIJIWE MAKANDI MERCY.....PETITIONER**

**AND**

**STEPHEN MBIJIWE.....PROTESTOR/APPLICANT**

**RULING**

**Introduction**

1. Deceased's died sometimes on 20<sup>th</sup> December, 2000. According to the chief's letter dated 19<sup>th</sup> August, 2014, deceased was neither married nor blessed with children. Deceased's comprised of **LR. NTIMA/IGOKI/266**.
2. Mbiyiwe Makandi Mercy (*Petitioner*) pleaded that she was granddaughter of deceased and was on 26<sup>th</sup> April, 2016 issued with Letters of Administration.
3. By Summons for Confirmation of Grant dated 04<sup>th</sup> February, 2019, the Petitioner proposed to distribute deceased's estate as follows:
  - 1) **Stephen Mbiyiwe - nephew - 20 by 80 plot**
  - 2) **Mbiyiwe Makandi Mercy - granddaughter - Balance**
4. Subsequently, **Stephen Mbiyiwe** filed an affidavit of protest dated 27<sup>th</sup> November, 2019 on the following grounds:
  - 1) **That Petitioner is daughter to his sister Anice Karachu**
  - 2) **That deceased took care of him and his siblings after the death of their mother Mwari Mary in 1965**
  - 3) **That the deceased's estate be distributed to him and his siblings as follows:**
    - i. **Grace Ntinyari ¼ acre**
    - ii. **Anice Karachu ¼ acre**
    - iii. **Stephen Mbiyiwe Balance**
5. The Protest was heard by way of viva voce evidence.

### **Protestor's case**

6. Protestor stated that the deceased who was neither married or blessed with children was sister to their father Ntumbui M'Itonga who was blessed with 8 children. It was his evidence that deceased took care of him and his siblings after their mother died in 1963 and also took care and lived with the Petitioner who is daughter of his sister Anice Nkarachu after Anice got married. His witness Benard Mpinda also stated that both Petitioner and Objector lived on deceased's land.

### **Petitioner's case**

7. It is Petitioner's case that she was brought up by deceased and lived with her until she died. It is her evidence that Objector who had put up a shop on deceased's land during her lifetime and had chased her away after the death of the deceased. She urged the court to distribute the estate to him and the Objector as she has proposed. Petitioner's witnesses, who included her mother Anice Karachu Mbui and uncles Silas Gituma and Pancras Mukanda all of whom are Protestor's siblings stated that they were not interested in deceased's estate. They proposed that the estate be distributed to the Petitioner who was brought up by the deceased as her own child.

### **Analysis and determination**

8. I have considered the application in the light of the affidavits and oral evidence and also on the submissions filed on behalf of the Protestor and the issue for determination revolves around distribution of deceased's estate.

9. The evidence on record reveals that the deceased was neither married or blessed with children. The deceased had a brother and two sisters and out of all their children, only the Protestor has shown an interest in deceased's estate.

10. There is uncontroverted evidence that the deceased took care and lived with the Petitioner until her death. There is also evidence that deceased during her lifetime allowed the Protestor to put up a shop on her land. Except that the Petitioner no longer lives on deceased's land, there is evidence that both the Petitioner and Petitioner lived on deceased's land with her full authority and consent.

11. Section 3(2) of the Law of Succession Act in reference to meaning of a child provides as follows: -

***“(2) References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”***

12. Although the deceased is female, I have for the purpose of this cause applied the foregoing provision to include the Petitioner for whom the deceased voluntarily assumed permanent responsibility to have the same rights as if she was a child of the deceased and not merely a grandchild.

13. Other than that the Protestor built a shop on deceased's land, his position remains that of a nephew and he cannot have a better right over the deceased's estate than the Petitioner whom evidence reveals was like a child to her.

14. There being evidence that the Protestor's siblings are not interested in deceased's estate, the mode of distribution proposed by the Protestor is rejected.

15. Having found that the Petitioner ranks in higher priority to the Protestor, it is hereby ordered that Deceased's estate comprised in **LR. NTIMA/IGOKI/266** shall be distributed as follows:

**1) Stephen Mbijwe - 1/3<sup>rd</sup> share**

**2) Mbijwe Makandi Mercy - 2/3<sup>rd</sup> share**

16. Each party shall bear its own costs of this cause.

Delivered in Meru this **24<sup>th</sup>** DAY OF **February** 2022

**WAMAE. T. W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**

**For Protestor/Applicant - Mr. Igweta for Igweta Muriithi & Co. Advocates**

**For Petitioner - Present in person**