



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 294 OF 2012

IN THE MATTER OF THE ESTATE OF HENRY

M'BAGINE M'ITHIKA alias BAGINE NTAKA (DECEASED)

SUSAN NKATHA.....CO- ADMINISTRATIX/APPLICANT

CHARLES MUTUA.....CO-ADMINISTRATOR

-VS-

JUSTUS GITUMA.....1ST PROTESTOR/CO-ADMINISTRATOR

BARTHOLOMEW M. MBOGORI.....2ND PROTESTOR

JAMES MWICHUIRI.....3RD PROTESTOR

RULING

1. In its Judgment delivered on 23/5/2019, this Court directed, *inter alia*, that: -

- a) the property **L.R. No. Ntima/Igoki/537** be distributed in accordance with the way the parties occupy the same on the ground that is; the family of **M'Mbogori M'Bagine, Francis Murithi, Charles Mutua and Susan Nkatha**;
- b) the Meru District Surveyor do visit **L.R. Ntima/Ntakira/537** and establish the acreage held by the family of **M'Mbogori M'Bagine, Francis Murithi, Charles Mutua and Susan Nkatha** and file a report in respect thereof within 30 days in order to finalize on distribution.

2. Pursuant thereto, the Meru District Surveyor visited the subject property and lodged his report on 26/6/2019. He set out the areas occupied by the parties as follows: -

- a) M'Mbogori M'bagine - 1.23 ha
- b) Charles Mutua & Susan Nkatha - 0.87 ha
- c) Francis Murithi - 0.87 ha

3. Since at the trial, it had been firmly established that **Charles Mutua** and **Susan Ntkatha** occupied the portion that had been left behind for **Charles Mutua**, it was necessary that their respective shares of occupation and use be identified for purposes of confirming the grant.

4. Pursuant thereto, the Court once again directed that the Meru District Surveyor does return to the ground and identify the respective areas occupied by the said **Charles Mutua** and **Susan Nkatha**.

5. The District Surveyor filed his report on 5/3/2020 which stated the occupation as follows: -

- a) Susan Mutua - 0.01 ha (homestead only)
- b) Charles Mutua - 0.86 ha (physically defined)

6. **Susan Nkatha** was not agreeable with the said report. The Court therefore invited the parties to either file submissions on the said report or affidavits. **Susan Nkatha** filed her affidavit on 11/6/2020 but **Charles Mutua** filed none. On the other hand, the children of the late **M'Mbogori M'Bagine** filed their affidavit in opposition to the averments made by **Susan Nkatha** in her said affidavit.

7. In her affidavit, **Susan Nkatha** stated that when the District Surveyor went to the ground, her brothers pointed out to him her house/homestead as her portion. They disregarded her protestations that she had a portion inside the portion of **Charles Mutua** where she farms. She stated that she would only like to have $\frac{1}{4}$ of an acre which she has been hitherto occupying.

8. As I have already stated, **Charles Mutua** chose not to address the Court on the Surveyors report. He did not deny or challenge **Susan Mutua's** contentions. The protestations of the children of **M'Mbogori** were not specific or particular but were general in nature.

9. The Court has considered the evidence tendered at the trial. Because of the initial intention petitioner and her brothers to disinherit the family of **M'Mbogori M'Bagine**, the testimonies of the respondents (the family of the second house of the deceased) was cagy and unreliable. They did not tell the truth regarding their respective occupation on the ground. However, it was clear that **Susan Nkatha** occupied the portion of **Charles Mutua**. The only issue was, what was the extent of the occupation.

10. The Court is aware that **Susan Nkatha** was compensated for her area that was compulsorily accrued by the government. That when the Deputy Registrar visited the scene, he indicated in his report dated 13/3/2019 as relates the portion occupied by **Susan Nkatha** as follows: -

“This section is approximately 105 feet by 77.6 ft. On this section stand the following.

1. Semi-permanent timber house at one corner occupied by Susan Nkatha (administratrix). There is also a small timber kitchen, small kitchen garden with Sukuma wiki and some construction materials (sand and stones) outside.

2. ... ”.

11. I have considered **Susan Nkatha's** protestation that she has nothing for her son. However, it had been established at the trial that her son by the name Samuel had been taken care of by his father, whose name was given as **Jonah M'Mwitari**, and had given him land.

12. In view foregoing and the fact that the sum of Kshs.4,400,000/- was ordered to be distributed to all the beneficiaries equally, the grant is hereby confirmed and **LR. No. Ntima/Ntakira/537** distributed as follows: -

a) Estate of M'Mbogori M'Bagine - 1.23 ha

b) Charles Mutua - 0.78 ha

c) Susan Nkatha - 0.09 ha

d) Francis Murithi - 0.85 ha

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

It is so ordered.

DATED AND DELIVERED AT MERU THIS 25TH DAY OF JUNE, 2020.

A. MABEYA

JUDGE