



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. SUCCESSION CAUSE NO 52 OF 2018

IN THE MATTER OF THE ESTATE OF THE LATE MURUNGI RUTERE (DECEASED)

EUSTACE MUTEGI MURUNGI.....APPLICANT

VERSUS

AGRIVINE KABURU NJOKA.....RESPONDENT

J U D G E M E N T

1. This cause relates to the estate of the late **MURUNGI RUTERE** (deceased) who died on intestate on 16th May 1992 domiciled at Mugwe Location. The deceased died and left the following assets that comprise the estate namely:-

(i) Karingani/Weru/461

(ii) Karingani/Muiru/145

This is another property which is disputed and that property is L.R. No. Karingani/Mugirirwa/392.

2. The Petitioner Agrivine Kaburi Njoka was granted a grant for letters of administration on 7th September 2017 vide Chuka Chief Magistrate's Succ. Cause No. 50 of 2016. The said grant was confirmed on 11th October 2017 and the Petitioner was vested with the three aforesaid assets comprising the estate.

3. Eustace Mutegi Murungi has moved this court vide Summons for Revocation of Grant dated 13th December 2018 for revocation of the said grant on the following grounds namely:-

i) That the proceedings to obtain the grant and other subsequent proceedings were fraudulent as the Respondent concealed material facts.

ii) That the Respondent did not disclose that the deceased had other children apart from the Petitioner.

iii) That the Respondent did not disclose the fact that the Applicant and other siblings reside on parcel No. Karingani/Muiru/145 and Karingani/Weru/461 and have developed the same .

iv) That the Respondent has registered the properties to herself and that unless the grant is revoked the Applicant and his siblings will be rendered landless and destitute.

4. The Applicant has sworn an affidavit in support of the above grounds and deponed that he is a biological son of the late Murungi Rutere, the deceased herein. He claims that the deceased had 3 wives namely Ciakiura Murungi, Catherine Cianjoka Murungi and Edith Cianjoka Murungi. He avers the Petitioner is a child to Ciakiura Murungi while the Applicant and 3 other siblings are children of Edith Cianjoka.

5. He further avers that the estate of the deceased comprises L.R No. Karingani/Muiru/145 and Karingani/Weru/461. He faults the Petitioner/Respondent for not involving them in the administration of the estate of the deceased.

6. The Applicant claims that Karingani/Mugirirwa/392 is not part of the estate and according to him that property is registered in the name of Nthiiri Murungi whom he claims is a son to the deceased.

7. In his oral evidence in court, the Applicant reiterated the contents of his affidavit. He told this court that the Petitioner/Respondent lives in

her matrimonial home and that he is in occupation of parcel No. Karingani/Muiru/145 measuring 0.9 ha while his siblings Bedford Ndege, a cousin named Cianjoka and a nephew named Kirimi live on parcel No. Karangani/Weru/461.

8. According to the Applicant the deceased herein was married to three wives and the following child with each wife.

i) 1st wife - Ciakiura Murungi (deceased)

Child - Agrivine Kaburi (Petitioner/Respondent.)

(ii) 2nd wife - Cianjoka Murungi (deceased)

Children - (a) Delavina Ciangege

(b) Justus Ciambuba

(c) Eustace Murungi (Applicant)

(iii) 3rd wife - Edith Cianjoka (deceased)

(a) Bedford Indege

(b) Kaari Rose

(c) Jamalick Nyamu

(d) David Ngai

(e) Frankline Murithi

9. The Applicant told this court that all the children to the deceased are alive. He further claimed that he did not have a birth certificate to show that the deceased herein was his father and when pressed under cross-examination he stated that he was born at home and had not bothered to acquire late birth registration certificate. He however stated that his identity card reads Murungi which in his opinion shows that he is a son to the deceased.

10. Francis Ntwara (PW2) a witness brought by the Applicant to give evidence told this court that that he knew the deceased well as he was a cousin to him. According to him, one of the brothers to the deceased named Muthaa Ngune (deceased) died during the emergency period (around 1952) and left behind wives and children who were brought up by the deceased. He further testified that when adjudication was done Murungi Rutere was given a parcel of land to hold in trust of his late brother Muthaa Nkune (deceased) and that he was to hold the parcel in trust of the children. He however did not state which parcel was given to the deceased as his own and which one was to be held in trust. He however insisted that the children left behind by Muthaa Nkune belong to the late Murungi Rutere (the deceased herein). He also could not tell which children were sired by Muthaa Nkune and which children were sired by Murungi Rutere. All he knew was that the wives of Muthaa Nkune were inherited by the deceased herein when the former died during emergency.

11. Franklyn Murithi Muthaa (PW3) on his part testified that he knew the deceased as his biological father because his own father Muthaa Nkune died before he was born in 1967. He further told this court that Augustino Nthiiri is his elder brother. He conceded that his brother Augustino Nthiiri was given parcel No. Karingani/Mugirirwa/392 which he has subdivided and given shares to the following:-

(i) Bedford Nyamu

(ii) David Ngai

(iii) Jamlick Nyamu

(iv) Frankline Muthaa

He further conceded that that their mother was Edith Cianjoka. He further stated Muthaa Nkune had two wives namely:-

(i) Catherine Cianjoka (deceased) and

(ii) Edith Cianjoka (deceased)

According to him the deceased had a wife named Ciakiura (deceased) who was the mother of the Petitioner/Respondent herein. He added that the parcels of land that belonged to his late father (Muthaa) went to Murungi (deceased herein). He however did not give details of what parcels went to the deceased to be held in trust. He added that he now lives on parcel No. Karingani/Weru/461.

12. Bedford Ndeke M'Ithaa (PW4) testified and told this court that the deceased herein and Muthaa Nkune were brothers. According to him land parcel No. Karingani/ Weru/461 was left by their grandfather for Muthaa Nkune and Murungi Rutere. He conceded Muthaa Nkune was his biological father and that he was born in 1952. He denied suggestions that land parcel No. Marembo/Rianthiga/6 was the parcel given to his late father Muthaa Nkune. He insisted that the parcel belongs to him exclusively. He added that he has been residing in parcel No. Karingani/Weru/461 and denied the suggestion that the parcel belongs to the Petitioner/Respondent.

13. In his written submissions through Njeru Ithiga & Co. Advocate, the Applicant insists that the deceased had 3 wives and other children. He has named them as follows:-

(i) 1st wife Ciakiura Murungi (deceased)

(ii) Catherine Cianjoka (deceased)

(iii) Edith Cianjoka (deceased)

He adds that the deceased herein had other children namely, Delvina Cianjege, Justa Ciambuba, Augustino Thiiri, Eustace Mutegi Murungi, Bedford Ndege, Jamleck Nyamu, David Ngai and Frankline Murithi.

14. It is submitted that the Applicant concealed the above material facts when he filed succession cause vide **Chuka Chief Magistrate's Court Succession Cause No.50 of 2016.**

15. The Applicant has further contended that the Petitioner fraudulently included parcel No. Karingani/Magirirwa/392 when the said parcel did not form part of the estate. He contends that the parcel initially belonged to Nthiiri Murungi before it transferred to Agostino Thieri Muthaa who is alive. He contends that if the Petitioner claims that the property was irregularly transferred to Agostino Thieri Muthaa, she should have filed a suit in the ELC as the Succession Court was not the right forum to reverse the registration.

16. The Applicant further submits that the Petitioner do not reside on any of the properties comprising the estate contending that she got married to one Njoka who is resident to Kieni village.

17. He claims that the Respondent had initially filed another **Succession Cause No. 151 of 2013** in Meru High Court where a grant given to her was revoked in that court. The Applicant believes that the Respondent's conduct shows that she should not be entrusted with the administration of the estate. He urges this court to revoke the grant and issue a fresh one to him.

18. The Applicant further urges this court to find that, the deceased herein inherited Muthaa Nkune's 2 wives after his own wife Ciakiura Murungi passed on. It's the Applicant's submission that the children of Catherine Cianjoka and Edith Cianjoka grew up with the Respondent knowing no other father other than the deceased herein. He contends that the deceased took them as his own family and that the arrangements is a common feature in many African customs.

19. The Respondent on the other hand has opposed this application through her Replying Affidavit sworn on 21st May 2019. The Respondent avers that the Applicant had made a similar application which was dismissed. She claims that she is the only surviving child to the deceased in this cause.

20. The Respondent avers that her father the deceased herein had a brother by the name Muthaa Nkune who had 2 wives namely Catherine and Edith and that Catherine had five children while Edith had 4 children including the Applicant herein. According to the Respondent, the deceased was married to one wife Ciakiura Murungi (deceased) who had the following children namely:-

(i) Mbungu Murungi (deceased)

(ii) Thieri Murungi (deceased)

(iii) Agrivine Kaburu Njoka- the Petitioner/Respondent herein.

21. She further claims that her uncle Muthaa Nkune had 2 wives and the following children

(i) Catherine Cianjoka 1st wife's children;

a) Delvina Ciangege

b) Justa Mbuba

c) Agostino Thieri

d) Eustace Mutegi Murungi (Applicant herein)

(ii) Edith Cianjoka (deceased) 2nd wife children;

- a) Bedford Ndege
- b) Rose Kaari
- c) Jamlick Nyamu
- d) David Ngai
- e) Frankline Murithi

22. The Respondent claims that the estate comprises the following properties:

- (i) Karingani/Muiru/145
- (ii) Karingani/Weru/461 and
- (iii) Karingani/Mugirirwa/392.

She claims that Karingani/Mugirirwa/392 was fraudulently acquired by Agostino Muthaa before sharing it with David Muthaa, Bedford Ndeke, Franklin Murithi Muthaa and Jamlick Nyamu.

23. The Respondent claims that the Applicant and his siblings have threatened to cause her harm simply because they do not believe that a woman should inherit her father's estate once she gets married.

24. The Respondent has denied that her earlier grant issued vide **Chuka Chief Magistrate's Court Succession Cause No. 151 of 2013** was revoked because of dishonesty on her part but because the lower court lacked jurisdiction and has exhibited a decision to that effect by **J. A Makau J** vide **Meru High Court Misc. Application No.187/2014**.

25. In her oral submissions the Respondent recalled that when Muthaa passed on, her two wives and all the children moved in and stayed with her father the deceased herein.

26. She further stated that Bedford Ndege Muthaa holds parcel No. Marembo/Rianthiga/6 in trust of all the children of Muthaa Nkune.

27. Mbuba M'Rindiria (DW2) testified and supported the Respondent's position. He reiterated that Muthaa Nkune was a brother to Murungi Rutere who he also knew by the name Thieri Murungi Rutere. He told this court that he is from the same clan with both Muthaa Nkune (deceased) and Thieri Murungi Rutere. It was his evidence that the late Muthaa Nkune left his children with a parcel of land measuring about 48 acres which parcel borders parcel No. Karingani/Weru/461. He however denied this fact when he was cross-examined.

28. In her written submissions through Kiutha Arithi and Co Advocates, the Respondent denied that the deceased herein inherited his brother's wives contending that there was no evidence of the same. She contends that she is the only surviving child while the Applicant and his siblings are children to the late Muthaa Nkune.

29. She further submits that the deceased was the owner of that property known as Karingani/Mugirirwa/392 contending that the green card she tendered shows that the first registered owner was Nthiiri Murungi and that the deceased was also known as Nthiiri Murungi.

30. The Respondent avers that the grant herein was obtained regularly and procedurally. She contends that the Applicant has not proved that the deceased recognized them as his children under **Section 3(2) of Law of Succession Act** to entitle them to claim a share in the estate. She has relied on the case of **Re-Estate of M' Mwirebua [2018]** to buttress her contention that the Applicant has not proven a balance of probability that the deceased took care of him and his siblings other than the fact that they are in occupation of the estate.

30. The Respondent further submits that the land held by Bedford Ndeke (parcel No. 6) shows that the Applicant and his siblings have land and cannot claim that they would be landless if they did not get a share of the estate of the deceased herein. She faults the Applicant for initially trying to hoodwink this court by lying that he is a biological child to the deceased.

Analysis and determination:

31. This court has considered this application and the evidence tendered in support. I have also considered the response made and the evidence tendered by the Respondent. The main issue for determination is whether the deceased had other dependants/children other than the Petitioner/Respondent and if there was material non disclosure of that fact when the Respondent filed for letters of administration vide **Chuka Chief Magistrate's Court Succession Cause No. 50 of 2016**. The other issue is whether parcel No. Karingani/Mugirirwa/392 is part of the estate in this cause. I will first consider the later issue before delving on the former.

Whether parcel No. L.R No. Karingani/Mugirirwa/392 forms part of the Estate.

32. The Respondent has claimed that parcel No. Karingani/Mugirirwa/392 comprises of the estate and enclosed a copy of the registration certificate (Green Card) to assert her claim. I have looked at the copy of registration certificate and the first registered owner is indicated as **"Nthiiri Murungi"**

The said property as of 25th August of 2015 was in the hands of Agostino Thieri Muthaa. The big question here is who is "**Nthiiri Murungi**". The Respondent claims that her father the deceased herein was also known as "**Nthiiri Murungi**" but when she lodged the petition for letters of administration, she did not indicate that her late father had an alias name Nthiiri Murungi. I have also considered the affidavit and indeed the evidence tendered by Respondent's witness Mbuba M'Rindiria (DW2) and noted that in his paragraph 5 of his affidavit sworn on 21st May 2019 he avers that Nthiiri Murungi (deceased) was a brother or sibling of the Respondent. The same is conceded by the Respondent herself in her affidavit sworn on 21st May 2019. Both of them have deposed that Nthiiri Murungi was a brother to the Respondent and that he died while still young. This court finds that in the face of this inconsistency in the evidence tendered by the Respondent, the claim that the deceased owned parcel No. Karingani/Mugirirwa/392 has not been proved on a balance of probability.

33. Besides the above if the Respondent had issues on how the property changed hands from Nthiiri Murungi (whoever he was) to Agostino Thieri Muthaa, she should take the dispute to the right forum which as correctly pointed out by the applicant is the ELC Court.

Whether there was non disclose of other dependants.

34. This court has carefully considered the evidence tendered and the grounds cited in the Summons for Revocation of Grant herein. It is true that **Section 76 Law of Succession Act** provides as follows:-

"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently....."

35. It is clear from the evidence tendered that the deceased herein and one Muthaa Nkune (deceased) were brothers. It is not disputed that when Muthaa Nkune died, the deceased herein took over his family two wives and children and took care of them. The Respondent herself conceded in her oral evidence in court that her deceased father took children of her uncle Muthaa Nkune and his wives and looked after them when Muthaa Nkune passed on. This is what she said in part;

"..... when Muthaa Nkune passed on his children came and stayed with my father. Even the wives Edith and Esther came and stayed with my father. At that time I was already married and my mother had died..... my father died when he was living with Edith, Catherine and their children....."

The evidence tendered therefore shows that even though there is no evidence that the deceased inherited the wives of his late brother, there is no dispute that he assumed some responsibility over them and I agree with the applicant's counsel that it is a common practice among African communities that a surviving brother would normally take over responsibility of a deceased brother's family and provide for them. This was clearly apparent in the present case notwithstanding the fact that the applicant did not establish the extent of parental responsibility or how much the deceased in this cause provided for his brother's children. I am persuaded based on the evidence presented before me that it is more likely than not that he catered for them fully at least immediately prior to this death.

36. The provisions of **Section 29 (b)** of the **Law of Succession Act** extends the definition of a dependant to include *inter alia*;

".....children whom the deceased had taken into his own family as his own....."

The Applicant and his siblings in my view are within that description and to that extent they are dependants. In the case of **Re Estate of Jaspeth M'Tuamwari M'Ikandi (deceased) [2019] eKLR Gikonyo J** held as follows:

"21. The petitioner claimed that the deceased willingly took the children of John Mururu born of his first wife Grace Maringa and raised them as his own, therefore making them his adopted children. He stated that when his father separated from his first wife Grace maringa and he remarried, the deceased refused the children to live with their father. Instead he took them into his family, and he and his wife took care of them as their own children. In a statement dated 14th February 2017 Andrew Kirema M'Itwamwari the only surviving son of the deceased stated that his father wished that the land at Giaki should go to his son John Mururu (deceased) and to remain with his widow Rosalia and her sons. He stated further that the land at Mulathankari was gifted to Henry Koome and finally the land from the road to the river to belong to him and Henry Koome. Other witnesses supported this position. I also note that evidence show that Henry has lived all his life in the said land and has his home there. There is sufficient evidence that the deceased took the petitioner into his family as his own child and maintained him immediately before his death. The petitioner is therefore a dependant as of his own right."

37. Furthermore a "**child**" under **Section (3)2 Law of Succession Act** is defined as a biological child as well as a child whom a man "**has expressly recognized or in fact accepted as a child of his own or for whom he has voluntary assumed permanent responsibly.**"

38. This court is persuaded that the deceased took up some level of voluntary parental responsibility over the applicant and his siblings and

that fact should have been disclosed by the Respondent. There is no evidence that he was a biological father to any of the children and I do find that the claim by Franklyn Murithi that he is a biological son to the deceased herein because Muthaa Nkune had died by the time he was born, is a mere speculation. This court makes decisions based on evidence tendered and not mere speculations.

39. I have considered the evidence tendered by the Respondent regarding the ownership of parcel No. Marembo/Rianthiga/6 but I am not persuaded that the property forms part of the estate of the deceased herein. Furthermore this court is also dealing with the estate of the late Murungi Rutere and not Muthaa Nkune. In the end this court finds that the Applicant has established that there was concealment or non-disclosure by the Respondent on the existence of other dependants. This court finds that though the Respondent is the sole biological child of the deceased had other "*children*" including the Applicant whom he catered for as his own immediately prior to his demise. The Applicant has therefore disclosed sufficient reason to invoke provisions of **Section 76 of Law of Succession Act** which I hereby do by revoking the grant issued to her on 18th January 2017. This court finds that the Respondent is the right person under **Section 66** to be appointed the administratrix of the estate of the late Murungi Rutere and I hereby appoint her as the administratrix of the said estate. I direct that the lower court file ***Chuka Chief Magistrate's Court Succession Cause No.50 of 2016*** be transferred to this court and the administratrix is given liberty to move this court for confirmation of grant before the expiry of statutory period in view of the age of this cause. I will not make any order as to costs as this a family matter.

Date, signed and delivered at Chuka this 24th day of June 2020.

R.K. LIMO

JUDGE

24/6/2020

Judgement dated, signed and delivered in the open court in presence of Mutua (Miss) for Applicant and in the absence of Kiautha Arithi for Respondent.

R.K. LIMO

JUDGE

24/6/2020