



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 98 OF 2016 CONSOLIDATED WITH SUCCESSION CAUSE NO. 217 OF 2015

IN THE MATTER OF THE ESTATE OF IBETE NYAMU ALIAS IBEERE INYAMU ALIAS

IBERE INYUHIU ALIAS CHIRSTOPHER M'IBERE M'INYAMU (DECEASED)

JULIUS MUTHAURA M'IBERE.....PETITIONER

VERSUS

PETER KIMATHI M'RINKAYA.....PROTESTOR

RULING

1. This file was on 20<sup>th</sup> July 2016 consolidated with **Succession cause No. 217 of 2015** where **Salome Kiende Ibeere and Catherine Ngito ibeere** were the petitioners. The petitioner herein had also cited them to accept and/or refuse letter of administration interest.
2. The petitioner herein has since filed summons for confirmation of grant seeking to distribute the estate of the deceased i.e. **Abothuguchi/Gaitu/427, Abothuguchi/Kaongo/175, Abothuguchi/Kariene/1393** among its beneficiaries. The same was protested by the protestor through Affidavit dated 5<sup>th</sup> June 2018 proposing his own mode of distribution of the estate and stating that **Mercy Wachira** is not a beneficiary of the estate as she is not related to the deceased by blood or adoption.
3. The matter proceeded through viva voce evidence. Rw1 Peter Kimathi testified that he was granted parcel No. **Abothuguchi/Kariene/1393** by his uncle over 20 years ago for the sole purpose of maintaining his mother. He denied knowing Mercy Wachira and stated that his claim is for a share of the property of **Atanasio Kithana (deceased)** who was a son of the deceased.
4. **Rw1 Peter Kimathi** son to **M'Rikanya M'Ibere**, testified that he is in occupation of L.r. No. Abothuguchi/Kariene/1393 and that he was given the same by his uncle (Atanasio) on behalf of their mother to take care of their siblings. He denied that Mercy Wachira is a daughter to Atanasio Kithana (deceased) nor was he known to him.
5. **Rw2 Magdaline Kacheru M' Rikanya**, mother to Kimathi, testified that the deceased is his father in law. That it is Peter Kimathi, Desterio and Gatobu who are supposed to be on Abothuguchi/Kariene/1393. That Kimathi is in occupation of the aforesaid land. She denied knowledge of Mercy Wachira. She also stated that Atanasio had only one child, Moses Mawira. That Basalio and Gatobu are children of Muroki. She could not remember when Atanasio gave the land to Kimathi but stated that she had heard it on phone and people speak of the same.
6. **RW3 Japheth Kinyua** testified that Kimathi had informed him that he was in occupation of LR No. Abothuguchi/Kariene/1393 for over 25 years. Kimathi had in the year 2008 leased out the land to him for 2 years. He used the land and later on reverted the same back to Kimathi. When Kimathi leased out the land to him he leased it as his own, he was however familiar that the land belonged to Atanasio.
7. **Pw1 Julius Muthaura M'Ibere**, son to the deceased testified that Atanasio had two children i.e. Mercy Wachira and Moses Mauria. Atanasio resided in Mombasa but put up a house in Plot 1393. Mercy was brought up in Plot 1393 and attended Kiirua Primary School and Nkando Secondary School. Moses Mauria has since died. Mercy's mother was chased away by Atanasio. That she is therefore entitled to the full share of his father's portion. He stated that the land belonged to Mercy but Kimathi has been in occupation and has since sold one acre from the same. It was his further testimony that kimathi will benefit from 2.6 acres out of his father's share. Stanley Muroki shall also get 2.6 acres.
8. **PW2 Ann Kagwiria**, sister to Kimathi, testified that she was familiar that Atanasio had two children i.e. Moses Mauria and Mercy

Wachira. That Mercy's mother was known as Wacera. Her grandmother left Atanasio's land to her and Kimathi. Kimathi would later on chase her away from the land and sell the same. It was her further testimony that Mercy later on went with his father to Mombasa but would frequently visit them. That during the lifetime of Atanasio both her and Kimathi used to utilise the land of Atanasio. Kimathi would use the land for three years he would later on chase her away from the land after Atanasio died. She told the court that she reported the matter to the police station. She denied that Atanasio had granted the land to Peter Kimathi. She also told the court that they both took part in the burial preparations of both Atanasio and Moses. That currently Mercy carries out business in Gitumbene.

9. **Pw3 Mercy Muthoni Wachira** testified that she is a daughter of Atanasio. Her mother is known as Florence. She told the court that she was born at Nkubu Consolata Hospital but does not have a birth certificate to prove the same. Her mother was chased away by her father when she was young, she went with her mother but would later on stay with her uncle's wife known as Naomi Gacheru. It was her testimony that her father paid for her education, she did not however have receipts to ascertain this fact. She testified that her father died in the year 2014 and relatives from her father's side assisted in their burial preparations. Her cousins i.e. Kimathi and Kagwiria used to utilise her father's land. Her identity card also bears her husband's names and not that of her father.

10. **Pw4 Basilio Andrew Maganja**, testified that he is a nephew of the deceased. The deceased had the following children i.e. **M' Ringera, M' Rinkanya Ibere, Atanasio Kithana, gervasio, Kaumbuthio and Muroki** all of whom have since passed on. That Atanasio had two children i.e. Mercy and Moses, Moses died. They used to stay in Kiirua initially. He told the court that he was present was born and brought at home. Mercy was schooled at Kiirua and later on at Nkando Secondary School. He did not have evidence of the fees paid. He confirmed that Kimathi and Kagwiria used Atanasio's land but stated that the same was not transferred to Kimathi. He lastly testified that both the church in Mombasa and family members took part in Atanasio's funeral arrangements.

11. Both parties filed their written submissions. The petitioner submitted that the protestor's intent is to disinherit the beneficiaries of the estate illegally as the said Mercy Wachira is a daughter of her late brother. The protestor submitted that the petitioner had failed to establish any basis upon which Mercy Wachira ought to be treated as the deceased beneficiary/dependant.

### **Analysis and Determination**

12. I have considered the testimonies of the parties herein, the facts of the case and the submissions of the parties and the issues for determination herein are;

- (a) *Who are the beneficiaries of the deceased' estate?*
- (b) *How should the estate of the deceased be distributed.*

13. From the letter of introduction from the District County Commissioner, Meru Central District dated 15<sup>th</sup> April 2016, the deceased herein prior to this death in 1980 had the following beneficiaries;

- (i) **Ciontuara M' Ibeere (wife-deceased),**
- (ii) **Margaret Wanja (wife-deceased)**
- (iii) **M' Ringera M' Imbeere (deceased),**
- (iv) **M' Rinkanya M' Imbeere (now deceased),**
- (v) **Atanasio Kithara M' Ibeere (deceased),**
- (vi) **Stanley Muroki Ibeere (deceased),**
- (vii) **Sacinta Nanci Ibeere (deceased),**
- (viii) **Annah Mugure Ibeere (deceased),**
- (ix) **David Mbaabu M' Ibeere (deceased),**
- (x) **Robert Mworio Ibeere (deceased)**
- (xi) **Julius Muthaura M' Ibeere,**
- (xii) **Catherine Ngito Ibeere,**
- (xiii) **Salome Kiende Ibeere.**

14. The deceased also left behind the following assets i.e.

- (i) **Abothuguchi/Gaitu/427(11.75 Acres),**

(ii) **Abothuguchi/U-Kaongo/175 (1.8 ha),**

(iii) **Abothuguchi/Kariene/1393 (7.00 Acres).**

15. What spurns out from the protest and the testimonies of the parties is whether Mercy Muthoni Wachira is a beneficiary/dependant of the deceased estate. **Section 29** of the Law of Succession Act provides as follows;

**Section 29(b) of the Law of Succession provides,**

**“dependant means**

**(a)....**

**(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and....”**

16. **Musyoka J.** in the case of **Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR** stated as follows:

**“.....grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”**

**See also In re Estate of Joyce KanjiruNjiru(Deceased) [2017] eKLR**

17. I have considered the evidence as to **Whether Mercy Wachira was a daughter to Atanasio**. I find that from the circumstances of this case whereas Mercy Wachira neither provided a birth certificate nor proof that the deceased paid for her school fees her evidence was corroborated by that of the petitioner, Pw2 and Pw4. I find their evidence to be consistent and credible in this respect and cannot be challenged by the weak evidence by the Protestor and his mother. **First**, their evidence dissuaded the notion that Atanasio had granted the protestor parcel No. Abothuguchi/Kariene/1393 during his lifetime. **Secondly**, given the familial relations Pw1 was best to know the relationships of the now deceased Atanasio. Still on familial relations Pw3 being a sister to the petitioner recanted the evidence of RW1 who had sought to insist that Atanasio did not have a daughter. The actions of Rw1 being chased away by Pw3 from the suit premises, one might say may have bred malice, but I have weighed the same evidence against the protestors own actions of intermeddling with the estate. The just conclusion is that the protestor is clearly seeking an unjust benefit from the estate of the deceased perhaps from his long occupation of Atanasio’s land. **Couple** this with the fact that the protestor did not seek to give its own version of the lifetime of Atanasio and only made a blank statement that Mercy Wachira was not a daughter of the deceased. It is therefore, this court’s finding that **Mercy Muchoni Wachira** was the daughter of the deceased herein Atanasio Kithara M’Ibeere

18. On the distribution of the estate I have considered the different modes of distribution presented by the parties and find that the mode of distribution proposed by Julius Muthaura Ibeere is most fair and just as shown in his affidavit sworn on 21<sup>st</sup> May 2018. The estate of the deceased shall therefore be distributed in terms of paragraph 4 of the affidavit of Julius Muthaura M’Ibeere sworn on 21<sup>st</sup> of May 2018 as follows:-

**ABOTHUGUCHI/GAITU/427(11.75 ACRES),**

(i) Salome Kiende Ibeere - 1 acres

(ii) Catherine Ngito M’Ibeere – 1 acre

(iii) Annah Mugure – 1 acre

(iv) Lucy Nkuruguchu – 1 acre

(v) ulius Muthaura M’Ibeere – 1 acre

(vi) Kathure Mbaabu – 1 acre

(vii) Mburu mbaabu – 1 acre

(viii) Mutuma Mbaabu – 1 acre

(ix) Stanley Muroki Ibeere (deceased), - 1 acre

(x) Sacinta Nanci Ibeere (deceased), - 1 acre

(xi) Robert Mworira Ibeere (deceased) – 1 acre

(The deceased beneficiaries shares in the above property to be taken by their survivors)

**ABOTHUGUCHI/U-KAONGO/175 (1.8 HA)**

- (i) David Mbaabu M' Ibeere (deceased), his share to be taken by his wife and children in equal shares.- 1 acre
- (ii) Julius Muthaura M' Ibeere -2 acres
- (iii) Charles Mutugi- 2 acres

**ABOTHUGUCHI/KARIENE/1393 (7.00 ACRES)**

- (i) Peter Kimathi - 2.6 acres
- (ii) Atanasio Kithara M' Ibeere (deceased), - 2.6 acres to go Mercy Muthoni Wachira
- (iii) Fredrick Gatobu
- (iv) Boniface Gikunda to hold 2.6 acres on their behalf and on behalf of their Duncan Muriungi siblings

Each party to bear their own costs

**HON ANNE ADWERA ONG'INJO**

**JUDGE**

**RULING DATED AND DELIVERED VIA EMAIL ON THIS DAY 28TH OF OCTOBER 2020**

**HON ANNE ADWERA ONG'INJO**

**JUDGE**