



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE 593 OF 2012

IN THE MATTER OF ESTATE OF JOHN M'KIRERA M'ITONGA ALIAS

JOHN M'IKIRERA M'ITONGA ALIAS KIRERA S/O ITONGA-DECEASED

DAVID KITHINJI.....PETITIONER/APPLICANT

VERSUS

CHARITY TIRINDI JOHN.....PETITIONER/RESPONDENT

JOSHUA KITHINJI M'IKIRERA.....PETITIONER /RESPONDENT

RULING

The deceased herein John M'Kirera M'Itonga died on 21st July 2008 domiciled at Katheri. He left behind 2 wives namely

1. Charity Tirindi John
2. Lucy Karwirwa.

He was also survived by 6 sons and 5 daughters:-

- a) Joshua Kithinji
- b) Ruth Gakii Anampiu
- c) Benjamin Kimathi
- d) David Kithinji
- e) Esther Kanana Mutwiri
- f) Rachel Mukomunene Mworia
- g) Joyce Kanoria Kirera
- h) Mercy Mparu Ringu Imanene
- i) Charles Kinoti Kirera
- j) PMK – 8 years by 11.9.2011 – 11.12.13-14-15-16-17-18-currently 14 years
- k) SGK – 10 years by 11.9.2011 -12-13-14-15-16-17-18

Currently 17 years old. According to the District Commission Meru Central who identified the beneficiaries in his letter dated 11.9.2011 the

deceased also had the following assets in his house:-

- i. LR Abothuguchi/Katheri/427
- ii. Lower Kongo/796,797 and 802.
- iii. Abothuguchi/Kariene/1070
- iv. Kiambu Municipality/Block 5/1248
- v. Plot No. 24 A Katheri market.
- vi. KCB shares A/C No. [particulars withheld]
- vii. Kiamumbi shares No. 186
- viii. Barclays shares A/C No. [particulars withheld]
- ix. GOK pension/KPSK [particulars withheld]
- x. MCF Sacco Githongo – Branch A/C No. [particulars withheld]
- xi. Abothuguchi/Katheri/238 jointly owned with his brother.

Charity Tirindi, Joshua Kithinji and David Kithinji petitioned for Letters of Administration with consent of the other beneficiaries and on 14th February 2013 grant of Letters of Administration was given to them.

By an application dated 18th August 2016 the 1st Administrator David Kithinji claimed that deceased persons Will had been discovered and that the grant made earlier should be revoked as it was intestate. Charity Tirindi by affidavit sworn on 11th October 2016 opposed the application and said the applicant had forged alleged will after the death of the deceased. She averred that if the applicant discovered a will in 2009 he should have petitioned for Letters of Administration with will annexed and not letters of Administration intestate. She also said the applicant was not in good terms with the deceased prior to his death and could not have made him an executor of his will. She said that the applicant had been charged and convicted an offence against the deceased and that the deceased had issued applicant with a notice to vacate his land in Katheri and relocate to Kaongo where the deceased had given him another land.

1st Respondent said the deceased could not have left applicant in charge of his 2 minor sons as the deceased was already harassing the 2nd wife to the deceased and mother to the minors.

On 5th June 2017 consent was recorded to substitute 2nd Respondent who had died. Ruth Gakii Anampiu became 2nd Administrator. Direction were taken that application dated 18.8.2016 be canvassed by way of written submissions but later Mr. Nyakwara Advocate for Applicant sought that oral evidence be taken to substantiate the claims by the parties. Statements were recorded and exchanged. Applicant in his testimony said that on 12th September 2009 the family of the deceased went to the officers of Nyamu Nyaga Advocate where a Will deposited by the deceased had been kept and it was read to them.

That when they went back home they had a meeting but the members of the family didn't accept the Will. That they agreed to petition for Letters of Administration as if there was no Will. He said the Will had provided for everyone. He said it is Lucy Karwirwa who discovered receipt for deposit of Will with advocate. He admitted the Will did not provide for the deceased persons daughters. He LR Kaongo/800 was given to Tirindi and she sold it and gave proceeds to the daughters of the deceased. He said the will appoints him as Executor. He said deceased had cordial relationship with him. He said he differed with the deceased when he refused to take the 2 minors. He said the deceased refused to give him resources to use in upkeep of the minors. He admitted having received letter dated 29.5.2008 written by deceased persons advocate instructing him to move to Kaongo land from Katheri. He admitted that the will is written 22 days after the demand letter and it says that applicant should remain in LR Katheri/238. He said that on 6.4.2008 the deceased didn't call a meeting. He said the deceased met his 2 brothers and 2 neighbours on a certain day and later he cautioned applicant to be careful as his brothers didn't like him. He said that the deceased gave him LR Kaongo/798 and it is registered in his name. He said beneficiaries refused to petition for Letters of Administration with Will annexed and that's why they filed petition for intestate succession. The land that had been given him in Kaongo is not mentioned in the Will.

2nd witness Justus Kimathi Mbijiwe said he was aware of the Will made by the deceased. He said it was Abraham Kirimi who called him when sent by the deceased. He said he wrote the will at the request of the deceased. He said he signed on a paper that the deceased had. He said he and Cyrus Murithi and Abraham Kirimi witnessed the will.

PW2 said the deceased told him he was shifting to his farm in Mwanika. He said he signed the document in June 2006. He said he found the deceased with his 2 children one of whom was Gitonga.

He said he didn't see the deceased write Will. He said he found the deceased had already written the will. He said he didn't see the deceased sign the Will. Cyrus Murithi said he witnessed a document in 2008. He said he could not remember date or month when the deceased wrote Will. He said he was with Kirimi and Kimathi at the deceased persons home. He said the deceased told the 3 of them he had written a letter

which he wanted them to sign. He said he didn't know how to read and he didn't read the will. Murithi said the deceased told them he wanted to go and deposit will with an advocate.

Murithi could not also remember month when Will was signed. He said he didn't deceased persons wife but his 2 young children were there. He said he found the deceased had already written the will and he signed. He said Kimathi was present when deceased signed the Will. Abraham Kirimi testified and adopted his statement which reiterated the evidence of applicant and his 2 witnesses. He however said the will was signed in June 2006. He said when they signed the will at about 9.00am the deceased didn't tell them who had written it.

He said they found the will already written and they were given to sign. He said the deceased accompanied them out of the home to go to town. He said the deceased signed and stamped the will. He said the deceased person's wife and children were not at home. He said he didn't know content of the will.

Charity Tirindi 1st Respondent relied on her affidavits sworn on 27th March 2015 and 13th November 2017 to oppose application to revoke grant. In cross examination she said the deceased left a will but it was not written. She said she resides in Katheri while Karwirwa stays in Mpuri and deceased was staying in Mpuri prior to his death. She said the deceased owned L.R No. 4278 and 238 Katheri.

She said there was another piece of land in Mpuri. There was land in Kariene and another in Mikinduri. She said the deceased also had cows. She said the land in Kiambu was sold when the deceased married his 2nd wife. She said the deceased shared the land in Katheri to her, Kinoti and Joshua and each one of them got an acre each. She said the land in Makandune was given to deceased person's daughter – 7 acres and the balance was to be shared between Kimathi and Kithinji – 5 acres each. She said Kithinji and Kimathi sold their portions of 5 acres each withheld in Makandune. She said they sold after the death of the deceased. She said Ruth Gakii was given deceased persons vehicle and she sold it. She said she didn't attend family meeting held on 26.8.2013. She said that Karwirwa and Kithinji were insulting each other at the meeting. She said family members agreed on mode of distribution before petitioning for letters of Administration. She said the deceased left 10 acres of land for Karwirwas 2 sons in Makandune as well as Mr. Mpuri.

2nd Respondent Ruth Gakii testified and said the deceased had shared his properties to his children and wives before he died. She said the deceased had land in Katheri, Mpuri Lower Kaongo and in Nairobi. She said the deceased person's daughters were given 7 acres of land in Lower Kaongo. She said herself and Joyce as well as Kanana were to get the 7 acres in Lower Kaongo. She said that it is Joshua who used to write as Secretary of the family.

SK – Respondents witness said that David Kithinji was born out of wedlock by the deceased and he came to stay at deceased persons home alter. Stephen Kaura said he witnessed when chief wrote a letter identifying his uncle the deceased persons beneficiaries and dependants.

In 2007 the deceased told him he had differences with the applicant. That he went to deceased persons home in Mpuri and he found the applicant whom he was seeing for the 1st time and he introduced himself. That applicant told him he had been chased away from where he was staying and he was told the deceased was his father and he came. The deceased had however caused him to be charged in court and had refused to give him land. Mr. Kaura said he talked to the deceased and told him if he had accepted the applicant as his son he should not take him to court. That the deceased promised to withdraw charge. That the deceased gave him title for 5 acre piece of land which he gave to the applicant. He said that the land in Lower Kaongo was given to all beneficiaries and applicant got 5 acres. He said the deceased persons land in Katheri was given to Joshua Kithinji, Kinoti and Charity?

That there was a shop in Katheri which was given to Joyce and Joshua. The land in Mpuri – one acre is occupied by deceased persons 2nd wife and her sons and Applicant also stays there.

From the evidence on record in support and opposition to application dated 18th August 2016 the issue for determination is whether alleged will by the deceased is valid. The applicant claims that the 2nd wife to the deceased recovered a receipt showing that the receipt had been issued by an advocate in whose firm a will was deposited. The applicant didn't call the advocate to testify and confirm under what circumstances the document was deposited and by who? The advocate would have clarified to the court if he knew content of the alleged will and if he attested to it.

The applicant didn't also call the deceased persons 2nd wife to confirm that indeed she recovered the alleged receipt. The applicants 3 witnesses allege that they found the deceased had written a document which they witnessed for him. They didn't see him write it and they didn't see him sign it. They said they didn't also know its content save that one of them said the deceased told him he wanted to shift. The 1st and 3rd witnesses say the will was written in 2006. The 2nd witness said the will was written in 2008 but he can neither remember the date and month. For a will to be valid, there are requirements that have to met:-

- The will must have been executed with testamentary intent.
- The testor must have had testamentary capacity.
- The will must have been executed free of fraud, duress, undue influence or mistake.
- The will must be witnessed by atleast 2 witnesses. The witnesses must not have interest and must identify the hand written will.

Attestation of a will especially hand written is not a must but it makes itself proving and makes it move faster through probate.

The 1st and 2nd Respondents have disputed that the deceased left a will. They said the deceased had already shared his estate to the children and wives orally but not in a written will. The Respondents witness confirmed and applicant admitted that the deceased had already bequeathed him 5 acres of land in Lower Kaongo and that the property was already in his name. The Respondents witness said he convinced the deceased to withdraw a complaint against the applicants and gave him land because he had accepted him as a son. Te deceased had instructed his advocated to write and give notice to the applicant to vacate his Mpuri land and go to the land he had given him in Lower Kaongo. Applicant admitted having received notice and it cant be true that coupled with the case in court and the notice to vacate the

deceased would have subsequently made a will in which the applicant becomes a beneficiary and Executor of his will. This situation is frowned upon and makes this court look suspiciously at the alleged will. The alleged will does not mention what the applicant had already benefitted from and this makes the court believe that applicant wants to benefit further unfairly with disregard to the interests of his step mothers and step sisters and brothers. The application to revoke the grant of Letter of Administration intestate for reasons a valid will had been discovered is disallowed. The will as analyzed is not valid and cant be relied upon to distribute the estate of the deceased.

However, this court will revoke the grant to the extent that the applicant will now be removed as an Administrator and replaced by Lucy Karwirwa. The applicant already benefitted from the deceased inter vivos and should as per notice dated 29.5.2008 vacate the deceased persons land in Mpuri and move to his land LR No. Abothuguchi/Lower Kaongo/798 and measuring 5 acres. The Administrators to the estate of the deceased shall now be Charity Tirindi John, Lucy Karwirwa and Ruth Gakii. The respondents as well as their witness testified that the deceased had already made his wish as to how the estate is to be distributed but the application for confirmation and distribution has to be formalized for record purposes.

The Administrator are therefore hereby ordered to file application form confirmation and distribution written 21 days to enable the court make formal orders distributing the estate. The applicant to pay costs of application.

HON. A.ONG'INJO

JUDGE

RULING SIGNED, DELIVERED AND DATED THIS 31ST OF JANUARY 2019.

In the presence of:-

C/A: Kinoti

Applicant: - Mr Nyakwara for 1st Administrator – N/A

Respondents: - Mr. Kithinji Advocate for 2nd and 3rd Administrator.

1st Administrator – Present in person

Charity – Present in person

Joshua – N/A– Deceased

Ruth Gakii – Present

HON. A.ONG'INJO

JUDGE