



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 147 of 2005

In The Matter of the Estate of Mugambi Mwirichia (Deceased)

SAMUEL MUTIA.....APPLICANT/OBJECTOR

Versus

ABUSINA MUGAMBI.....RESPONDENT/PETITIONER

MARY Z. KATHURE MUGAMBI.....INTERESTED PARTY

TOM KINOTI MBUTURA.....INTERESTED PARTY

JUDGMENT

1. **MUGAMBI MWIRICHIA (“the deceased”)** died intestate on 10th June 1996. On 26th April 2005, **Abusina Mugambi** petitioned for letters of administration which were later granted. She listed **KIIRUA/RUIRI/1833** and **KIIRUA/RUIRI/1834** as the deceased assets. An introduction letter by the chief of Ruiiri Location dated 20th July 2004 cited the following as the deceased’s dependants;

AbusinaMugambi - Widow

SeberinaNkirote - Daughter

DamarisKinanu - Daughter

Elijah Mugambi - Son

2. On 25th July 2006 Abusina Mugambi was issued with a certificate of confirmation of grant, where Land Parcel KIIRUA/RUIRI/1834 was issued to Aburucina Muthaura and KIIRUA/RUIRI/1833 to Mary Z Kathure Mugambi. However on 11th October 2011, Samuel Mutia filed for Revocation/Annulment of grant and orders for inhibition for the deceased assets on the grounds that the grant were fraudulently obtained, the estate was distributed and sold to strangers without the applicants knowledge who is the only son and surviving heir of the deceased. In his affidavit dated 26th September 2011 and his supporting affidavit dated 17th September 2012 he averred that the petitioner omitted him in the matter, he used to work and live in Narumoro just to come back and find that strangers took over the deceased estate.

3. The deceased was married to his mother N and separated when he was young. Thereafter he married Jennifer who brought him up as she did not bear any children of her own. She later passed away and at that time he had constructed and was living on the said land with his wife and children. After the death of Jennifer the church considered it wise to look for a house help to assist his father and Abusina Mugambi was employed to do so. The deceased allowed her to raise his children in his home a decision that was supported by the church.

4. After the death of the deceased Abusina Mugambi sold the deceased land to Mary Kathure and the land which he was occupying to Kinoti Mbutura. He affirmed that the dealings of Abusina are fraudulent and a concealment of the true state of affairs as regards the estate of the deceased.

5. However, the objector died on 18th August 2013. The respondents filed several applications objecting to the substitution of the objector with his wife Esther Regeria Mutia. Nevertheless, this honorable court dismissed the preliminary objection and substituted the objector with his widow.

6. This case was heard *vide viva voce* evidence. **OWI ESTHER REGERIA MUTIA** testified and told the court that she adopts her

statement made on 9th May 2014, where she reiterated what the objector had averred in his statements. Additionally, she stated that the deceased gave a portion of his land to the church where he was buried. Upon the death of the deceased the petitioner took his documents as the objector was away working and that was how she was able to secretly file the succession cause without their knowledge. This was corroborated by a statement sworn by **OW5 TERESIA KAGWENE JACOB** a niece to the objector.

7. **OW2 ANDREW KIRUNJAH WAKIBWI** adopted the affidavit he swore on 13th May 2017 where he averred that he was born in the same village with the objector and they grew up together until they moved in 1959. He restated what was contained in the objector's affidavits. He added that before the death of the deceased had subdivided his land into 3 pieces, and gave one to the church and kept the other two. The deceased feared the titles would be stolen and gave them to the area chief who later gave them to the area manager John Nkonge to keep in safe custody until the objector came from Narumoru. When the village elders found out that the titles were given to the petitioner they told the objector so that he could follow up.

8. **OW 3 M'RWITO M'RINCHUMI** also adopted the affidavit he swore on 16th May 2017 where he stated that M'Mugambui M'Wirichia was his cousin and they were both born in Muringa O Mbugi where they grew up together as their houses were built adjoining each other. He also confirmed what the objector had stated in his affidavits that truly Samuel Mutia was the only son of the deceased and his only heir.

9. **OW 4 JULIUS KIRIMI MBOROKI** swore an affidavit dated 13th May 2017 where he averred that he is the immediate neighbor of the deceased. He came to know the deceased in 1964 when they came to Ruiru and even when the objector's mother died he was the master of ceremony in her funeral. After the death of his wife the petitioner came to care for him as the church had employed her and two years after the deceased died. Thereafter the petitioner started living with Elijah M'Imongi in the deceased home who they later chased away. Later when they heard that the land was sold by the petitioner the whole village met and they demonstrated publicly against it. This was supported by affidavits sworn by **M'INOTI M'NCHURAI** and **JOHN M'IKIRIMA M'MWONGERA** dated 13th May 2017.

10. **PW1 ABUSINA MUGAMBI** in her statement dated 28th April 2014 indicated that the deceased was her husband. She agreed that the deceased had a wife named Jennifer but she bore no children as the deceased was unable to father children. She had 2 children Damaris Kinanu and Severina Nkirote who were adopted by the deceased and he married off the former and took dowry. Upon the death of the deceased she filed this cause and later sold the parcels of land to the 2nd and 3rd respondent. The objector is not the son to the deceased because she was married to him for 30 years and she never knew or met him. **PW5 SILAS MUTABARI** repeated the same in his statement dated 29th November 2016.

11. **PW2 MARY Z KATHURE** in her statement dated 28th April 2014 indicated that she bought KIIRUA/RUIRI/1833 from the petitioner for Kshs. 200,000 which was transferred to her in 2008. In 2004 she occupied the said piece of land and carried out developments which included farming.

12. **PW3 TOM KINOTI MBUTURE** in his statement dated 28th April 2014 stated that he bought KIIRUA/RUIRI/1834 from the petitioner at Ksh. 250,000 in 2009. He occupied the land and started cultivating it. Around May 2013 he found some people on the said land harvesting the coffee and beans he had planted. Later he found out that the intruders were the Applicants/objectors widow.

13. **PW4 BUNDI MWITHIGA** in his statement dated 29th November 2016 stated that the deceased was his neighbor and that the petitioner was his wife, who had two daughters. The elders once said that the deceased could not have children. He recalled that in 2009 the objector's wife cut down trees by force and built her house on the land.

14. **PW6 M'KIRIMANA M'KIRIGIA** in his statement dated 29th November 2016 stated that he knew the deceased as he used to stay with him in Baptist Church. The deceased was the pastor when he was chairman. They stayed together but after sometime the wife died. Thereafter M'Tarachia one of the followers said that he had found a woman the pastor could marry. The Deceased brought the petitioner home and later they went to see her parents. He sold a piece of his land to pay dowry and build a new house for his wife. The deceased informed him they he had finalized marriage rites with the parents of the woman and therefore she was now his wife.

Submissions

15. The objectors and petitioner filed submissions in support of their respective a vowed positions. The parties recapitulated their respective witnesses' testimonies and cited the law supporting their arguments. The objector argued Samuel Mutia was the only son of the deceased and he lived on the estate with his family. She submitted that the petitioner was brought in 1994 to help with cleaning and cooking for the pastor-the deceased. She was therefore an employee and is not a beneficiary of the estate. The grant issued to her was therefore fraudulent and should be revoked. They cited section 45, 66 and 76 of the Law of Succession Act as well as the case of Estate of Aggrey Otieno [2011] eKLR and Estate of Nzuta Mutavi [2016] eKLR.

16. The petitioner submitted and emphasized that she proved that she was the wife of the deceased as he paid dowry to her parents and also married off one of her daughters and took her dowry. She dismissed the evidence by Senior Pastor M'Ikiugu as one riddled with falsehoods and contradictions. She also questioned where the son of the deceased was during the lifetime, death and funeral of the deceased. She defended her sole entitlement to the estate.

ANALYSIS AND DETERMINATION

Issues

17. I have carefully considered the applications, affidavits, submissions and the record. The petitioner claims that she is the wife of the

deceased. The Objector denies it and claims that the petitioner was a mere employee of the deceased. The objector claims that the original he is the only son of the deceased. The petitioner denied it and stated that the objector was not the son of the deceased, for the deceased could not and never sire any child. Each wants to take the entire estate. Amidst this mix, the following issues emerge for determination by this court;

- a) **Whether Samuel Mutia is a son to the deceased?**
- b) **Whether Abusina Mugambi was a wife to the deceased?**
- c) **How KIIRUA/RUIRI/1833 and KIIRUA/RUIRI/1834 should be distributed?**

Wife

18. It is the petitioner's case that she is a wife of the deceased on the basis that she had been married to him for 30 years; lived with and took care of him till his demise. According to her, the deceased also adopted her children and went as far as marrying one off and took dowry thereof.

19. **In the Restatement of African Law by Eugene Contran**, The Law of Marriage and Divorce at pg. 35 while considering the Meru and Tharaka customary practices set out the essentials of a valid marriage thus:-

1. Personal Capacity

That there is no fixed age as such or attainment of which persons become legally capable of entering into marriage, however, no person male or female can marry before he or she has been circumcised and before a female has passed her first menstrual period. This has however changed with modern development and passing of the Children Act and the Constitution of Kenya, so that one cannot marry before the age of majority."

2. Consent

Prior consent of both spouses is essential to validity of marriage. The consent of husband's family was essential to the validity of first marriage in which the family is represented by husband's father..... Nowadays, however, if the husband has independent means, and can pay the "ruracio" without assistance of his family, he may marry without their consent. The family of the wife is essential to the validity of the union, and the family is represented by the bride's father.

3. Prohibited Degree

A man may not marry a woman to whom he is related.

4. Marriage Negotiations

The standard procedure for negotiating the formation of a regular formation of a regular marriage is by way of betrothal. That once a boy selects his bride and proposes to her, upon acceptance his parents invites the girl's parent to their home to have the beer known as "Ncobi ya Kuria Uthoni" i. e beer of asking the gift's hand, followed by several visits between the parents of the boy and the girl follows. An appointment is then fixed at the home of the girl's father where the "ruracio" negotiations are held. This centres on how ruracio is to be paid as it is standard, rather than or how much it is to be given. A first installment is paid normally, the other installment following gradually.

5. Marriage Consideration.

Ruracio is a payment or payments of cattle, other livestock or other property rendered by or on behalf of the bridegroom to the father or other guardian of the bride or the agreement to pay, which is necessary to validity of the marriage and to establish the affiliation. The character of marriage consideration consists of cattle, sheep, goats and honey or other equivalent in money. In South and North Imenti one ewe, one heifer, two bulls and one tin of honey is taken as standard consideration.

20. A claim of marriage should therefore be established. It is worthy of note that, according to the **Marriage Act, 2014**:

"Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act."

21. In this case however, there was no witness who personally witnessed the payment of dowry to the parents of the petitioner. Also this court noted that the deceased was a pastor in the Baptist Church and it is curious that the deceased did not marry the petitioner in church. Or celebrate a church wedding as expected of a church minister. Her claim that she was married to him for 30 years was not supported by evidence. However, evidence has it that she was brought by church elders to live with the deceased who was now aged. She lived with him for about 2 years until his death. She claims that they lived as husband and wife. She even stated that the deceased adopted her two daughters, married off one of her daughters and received dowry thereof. Although the objector and her witnesses stated that she was merely an employee of the deceased, they did not deny that the petitioner lived with the deceased. They did not also deny that the deceased, the objector and her daughters lived together. Without doubt, there existed some relationship between the deceased and the petitioner which I do

not think was purely employee-employer relationship.

22. But whatever the relationship, the petitioner and her daughters are dependants of the deceased. Section 29 of the Law of Succession Act defines a dependant. Evidence shows that the petitioner was being maintained by the deceased immediately prior to the date of death of the deceased. Her children were also maintained by the deceased immediately before his death. With that proof, the petitioner and her children are dependants under section 29 of the Act. I am content to cite the case of **Beatrice CiamutuaRugamba .v. Fredrick NkariMutegi& Others Chuka Succ. Cause No. 12 of 2016 (UR)**, the court held:-

"From the foregoing, a dependent under section 29 (b) and (c) must prove that he/she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency."

Therefore, I find that the petitioner and her daughters are dependants as they were being maintained by the deceased prior to his death.

Was objector son of deceased?

23. The objector claimed that he is the only son of the deceased. The claim was supported by the testimonies of several witnesses and family members. According to **In the Restatement of African Law by Eugene Contran**, The Law of Marriage and Divorce at pg. 44

Custody of Children In Meru law, the children always remain with the husband on divorce. However, if they are very young, the husband may allow the wife to keep and care for them until they grow up

24. In this case the objector claimed that the first wife of the deceased and who was his mother, deserted the deceased, leaving the objector to be raised by his step mother Jenifer until her demise. Although witnesses testified that Samuel Mutia is a son of the deceased, many questions linger. For instance, where was he during the lifetime of the deceased until the church saw the need to find the deceased a person to live with him? Where was he at the time of death of the deceased? Where was he during the funeral of the deceased? Nonetheless, I will grant him the benefit of the doubt and treat him as a dependant under section 29. I so find that he was a dependant of the deceased.

25. Consequently, the objectors/applicants objection is merited. In light thereof, the grant herein was obtained by concealment of material facts and therefore fraudulent. The sale of the estate land was therefore unlawful, null and void. In the upshot. I make the following order;

I. The confirmed grant issued on 25th July 2006 is hereby revoked and all the subsequent titles KIIRUA/RUIRI/1833 and KIIRUA/RUIRI/1834 are cancelled and titles thereto to revert back into the name of the deceased.

II. Fresh grant of letters of administration to be issued to the petitioner jointly with Esther Regeria Mutia.

III. In view of the age of the matter and as rightful beneficiaries have been identified, the grant issued herein is confirmed.

IV. The assets of the estate shall be distributed as follows:-

a. KIIRUA/RUIRI/1834 to Esther Regeria Mutia to hold it on her own behalf and that of her children in equal shares; and

b. KIIRUA/ RUIRI/1833 to Abusina Mugambi to hold it on her own behalf and that of her children in equal shares.

V. There will be no orders as to cost.

Dated, signed and delivered in open court this 22nd day of January, 2019.

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F.GIKONYO

JUDGE

IN PRESENCE OF

M/s Rimita for Petitioner

Murithi for M/s Kiome for Objector

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F.GIKONYO

JUDGE