



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 553 OF 2011**

**IN THE MATTER OF THE ESTATE OF FREDRICK MUNGATIA M'MBIRITI (DECEASED)**

**JENNIFER KAGURI MUNG'ATIA.....PETITIONER**

**VERSUS**

**JANET KANANA MUNG'ATIA.....PROTESTOR**

**JUDGMENT**

1. **FREDRICK MUNGATIA M'MBIRITI (“the deceased”)**, died on 22<sup>nd</sup> June, 2011. By a letter dated 20<sup>th</sup> September, 2011, the Chief of Naari Location introduced the deceased’s survivors as **Jennifer Kaguri** (wife), **Freda Makandi Mung’atia** (daughter), **Agnes Kathure** (daughter) and **Charles Mutwiri** (son). The letter also set out the assets that constituted the estate.

2. Pursuant thereto, on 29<sup>th</sup> June, 2011, **Jeniffer Kaguri Mungatia (“the petitioner”)** petitioned for Letters of Administration Intestate for the estate of the deceased. The grant of letters of administration was issued to her on 19<sup>th</sup> January, 2012. On 4<sup>th</sup> September, 2012, she applied for confirmation thereof.

3. On 25<sup>th</sup> February, 2013, **Janet Kanana Mungatia (“the protestor”)** filed an affidavit of protest against the confirmation of that grant. In that protest, she deponed that she was the first wife of the deceased and that the petitioner was her co-wife. That the petitioner had filed the cause without her knowledge. That she had omitted her name from the petition but had included her daughter Freda Makandi Mungatia as a beneficiary. She therefore urged the court to distribute the estate equally among the beneficiaries.

4. The protest was heard through *viva voce* evidence. The protestor testified in support of her protest but did not call any other witness. She relied on her affidavit of protest sworn on 22<sup>nd</sup> November, 2012 and her statement dated 10<sup>th</sup> April 2017. She stated that she married the deceased in 1960 and lived at Naari. They had two children, **Freda Makandi** and **Joyce Muthoni** (deceased) who left behind a son, **Joseph Michael Kaimenyi** aged 34 years. That the petitioner was married, she started living at Naari with the deceased but the deceased used to come to where the protestor lived in Kithoka. That since 1988 to-date, she was living at Kithoka on land which she had personally bought.

5. The protestor further testified that in 1970, the deceased attempted to divorce her but the case was never concluded. That as at the time she was testifying, she was living on **Kiirua/Nkando/76** measuring 26 acres which the deceased had given to her. That she was cultivating up to 5 acres of that property whilst the rest was being utilized by a lady that was to be married to her grandson, **Joseph Kaimenyi**.

6. On the other hand, the petitioner opposed the protest. She called two other witnesses who testified in support of her case. She testified that she was married to the deceased in 1970 under customary law. That when she was married, she never found the protestor. She only found the protestor’s two children who were very young at the time and took care of them until they became adults.

7. She denied the protestor’s claim that the protestor ever lived with the deceased or ever visited him. That before his demise, the deceased had given 3 properties to the protestor’s children. That it was her who was utilizing parcel number Kiirua/Nkando/76. That plot number 294 had been given to the protestor’s daughter by the name Joyce Muthoni. That in the premises, the protestor was not entitled to anything from the estate.

8. **RW2 Paul M’Ririnya M’Richuni**, a friend of the deceased, adopted his statement filed on 6<sup>th</sup> November 2017 as his evidence. He testified that the protestor had separated from the deceased in 1966, but he did not know if the deceased was maintaining her at the time of his death. That since the protestor separated with the deceased in 1966, he had never seen her as her two children with the deceased were taken care of by the petitioner.

9. **RW3 Sarah Nkacii Jeremiah** stated that she was the deceased’s sister. She told the court that the protestor lived with the deceased at his

Naari farm for only 6 years. The deceased bought two properties at Nkando/Kiirua. That the protestor was at the moment using one of the deceased's properties which measures 26 acres.

10. The parties filed their respective submissions. It was submitted for the protestor that she is entitled to a share of the estate as her husband was maintaining her. That the allegations that they had divorced was not supported by any evidence as the order in the **Meru Chief Magistrate's Court Divorce Cause No. 9 of 1970** that was produced did not specify what order was granted. It was urged that the court do make a provision for her under **Section 29 of the Law of Succession Act**.

11. On the other hand, it was submitted for the petitioner that the court should be persuaded that the protestor left the deceased in 1966 after marriage to him for six years. That the gesture of total separation with the protestor irresistibly points to a factual situation that the protestor was divorced. That in the circumstances, the protestor ceased to be the deceased's beneficiary. The burden to prove that her marriage to the deceased had not been terminated laid with her. The case of **Sabera Kagwiria Gichunge & another v Cecilia Kanana Josphat [2011] eKLR** was relied on in support of that submission.

12. It was submitted in the alternative that, the court should consider that all the properties forming the deceased's estate were acquired by the deceased and the petitioner. That the court should then award the protestor the property given to one of her daughters and which she currently uses, that is, **Kiirua/Naari/294**.

13. Having carefully considered the evidence on record and the submissions of Learned Counsel, the issues for determination are; ***whether the protestor is a beneficiary of the deceased and how the estate should be distributed.***

14. On the first issue, the protestor's case was that she was the first wife of the deceased but had been excluded as a beneficiary. The petitioner disputed this fact and stated that when she was married to the deceased in 1970, she never found the protestor in the deceased life. That she only found the protestor's two children whom she brought up. She called **RW2** and **RW3** who supported her testimony.

15. From the funeral program of the deceased which was produced by the protestor and not disputed, it was stated that the deceased married the protestor in 1960 and later married the petitioner in 1972. All the witnesses who testified were in agreement that the protestor was married to the deceased in 1960 and they begot two daughters. The dispute is whether, as at the time of his demise, the protestor was still a wife of the deceased.

16. The evidence on record is that, in 1966, the protestor and the deceased separated. It is not clear where the protestor went to live after separating with the deceased. The petitioner produced an order made in the **Chief Magistrate's Court, Meru Divorce Cause No. 9 of 1970** on 22.01.1979. That order read, **"Order as prayed"**. It was not clear what order had been prayed for that was being granted. The protestor admitted that the deceased had filed for divorce but no final orders had been made on the Cause.

17. The petitioner stated that she had tried to look for the court proceedings of that divorce cause but the court file was missing. To my mind, in the absence of an order nisi that have been made absolute, there is nothing to show that the protestor had ceased to be a wife of the deceased. She remained as such until death parted them.

18. The evidence on record is clear that the deceased and the protestor were married in 1960, bore two children then were separated in 1966. The deceased then married the petitioner in 1970 with whom he lived with until he died in 2011. The Protestor did not tell the court where she went after the separation. However, the question that arises is, where was the protestor between 1966 and 2011? Although still a wife, for lack of any divorce, the protestor was not in the life of the deceased for 45 years (1966-1970).

19. The next issue is how the estate should be distributed. In her proposed distribution, the petitioner proposes to wholly distribute the estate to herself. The protestor contended that as widow of the deceased she was entitled to a share in the estate.

20. The protestor testified that the deceased was maintaining her. She never tendered any evidence to prove that fact. What came out is that, since she was also in active employment, she bought her own property at Kithoka where she lived. She could not account for the 45 years she remained separated from the deceased.

21. The record shows that, all the properties in dispute were acquired after 1970. That is, four years after the protestor separated from the deceased. They were acquired during the active marriage between the deceased and the petitioner. Indeed, while the deceased was a successful businessman, the petitioner was in gainful employment as a teacher.

22. In the case of **Beatrice Adhiambo Sijenyi v. Josephine Kapukha Khisa [2018] eKLR**, the Court of Appeal considered circumstances which may be similar to the present one. In that case, the 1<sup>st</sup> Respondent had been married in church by the deceased. After 16 years of marriage, the 1<sup>st</sup> respondent filed for divorce in Kisumu. No divorce orders were obtained. She later moved to the United States and married another man there. After her first husband died, she came back to Kenya and claimed that she was still a wife of the deceased as the divorce cause was never concluded.

23. The Court of Appeal held that she was a widow of the deceased as there was no evidence of divorce. The court proceeded to deliver itself as follows: -

***"Nevertheless, we cannot overlook the conduct of Josephine. Though a widow of the deceased, she abandoned the deceased during his lifetime and has been flagrantly enjoying life with another man. The most valuable property that is now attracting attention,... was developed in 2009 when she was away in the United States. .. To the contrary, it would appear that it is Zuwena who provided the deceased with the necessary emotional support and stability during the period that the property was developed. While the court will not wish to disinherit Josephine, it would be amoral to allow her to reap from the death of the deceased.***

***Indeed that would be tantamount to allowing her to dance on the deceased's grave. In accordance with decision in Irene Njeri Macharia v. Margaret Wairimu Njomo & Another (supra), she only deserves a token".***

24. The petitioner told the court that before his demise, the deceased had given some properties to his daughters that he bore with the protestor as follows: -

**a) Freda Makandi Mungatia**

**Gakoromone/Block/117**

**b) Joyce Muthoni (dcd)**

**i) Kiirua/Naari/ Maitei/1450 (26 acres)**

**ii) Isiolo/Kisima Market No 33**

25. There was undisputed evidence that the protestor was utilizing part of the property given to her daughter, **Joyce Muthoni**, by the deceased. That the said property measures approximately 26 acres. That property is also being utilized by or on behalf of **Joseph Michael Kaimenyi**, a son of **Joyce Muthoni**. The evidence on record shows that the property that measures approximately 26 acres is known as **Kirua/Kiirua Nkando/76**.

26. The petitioner claimed that she was the one utilizing **Kiirua/Kiirua Nkando/76** and that the protestor was utilizing **Kiirua/ Kiirua Nkando/294**. The petitioner did not produce a copy of the title for **Kiirua/ Kiirua Nkando/294**. If it existed, the petitioner should have produced a copy of the title as she is the administrator of the estate of the deceased.

27. In the consent dated 28<sup>th</sup> August, 2012, all the beneficiaries were agreeable to the proposed mode of distribution proposed by the petitioner. She had proposed that the entire estate be distributed to her. In view of the findings I have made above, I will not disturb the distribution as relates to the petitioner and her two children, but I will distribute the estate as relates to the protestor and her children.

28. Guided by the decision of the Court of Appeal in **Beatrice Adhiambo Sijenyi v. Josephine Kapukha Khisa [2018] eKLR** as relates spouses who disappear from the lives of their partners only to emerge after the demise of such partners, I hold that the protestor shall be entitled to the property she is currently utilizing in equal shares with the child of **Joyce Muthoni**. **Freda Makandi Mung'atia** will be entitled to the plots given to her by the deceased.

29. Accordingly, the estate will be distributed as follows: -

**a) Janet Kanana Mung'atia**

**Joseph Michael Kaimenyi**

i) Kiirua/Nkando/76 - Equally

**b) Freda Makandi Mung'atia**

i) Gakoromone Block 117

ii) Isiolo/Kisima Market No.33

iii) Nyaki/Thuura/2446

**c) Jeniffer Kaguri Mung'atia**

**Agnes Kathure**

**Charles Mutwiri**

i) Kiirua/Nkando/294

ii) Kiirua/Naari/Maitei/450

iii) Kiirua/Naari/Maitei/451

iv) Nyaki/Thuura/1934

- v) Nyaki/Thuura/1935
- vi) Kiirua/ Naari/1515
- vii) Kiirua/Naari/1340
- viii) Municipal Meru – Block I/35
- ix) Kaweru LTD B II & 3 - Equally

**d) Jeniffer Kaguri Mung'atia**

- i) Ntima Farmers Co-operative Society
- ii) B. A. T. (K) LTD
- iii) Kenya Breweries LTD
- iv) Barclays A/C No. [xxxx]
- v) M. A.C.C.U Banking section A/C No. 3456
- vi) Motor Vehicle Reg No. KYP 993

e) If the petitioner is able to show that the property the protestor is currently utilizing and that was given to the late **Joyce Muthoni** is **Kiirua/Kiirua Nkando/294** and not **Kiirua/Kiirua Nkando 76** she is at liberty to apply for the rectification hereof.

30. This being a family matter, each party is to bear own.

**DATED and DELIVERED at Meru this 21<sup>st</sup> day of February, 2019.**

**A. MABEYA**

**JUDGE**