



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 10 OF 2007**

**IN THE MATTER OF THE ESTATE OF NAHASON**

**ARIMBA NDIIRA alias ARIMBA NDIIRA (Deceased)**

**JOTHAM MUTHURI M'ARIMBA.....PETITIONER**

**VERSUS**

**AGNES KAJUJU M'ARIMBA.....1<sup>ST</sup> PROTESTOR**

**FERISIAN MURUNGI M'ARIMBA.....2<sup>ND</sup> PROTESTOR**

**ALICE NCURUBI.....3<sup>RD</sup> PROTESTOR**

**J U D G M E N T**

1. **NAHASON ARIMBA NDIIRA (“the deceased”)** died intestate on 16<sup>th</sup> March 1994. **Jotham Muthuri M’Arimba (“the petitioner”)** petitioned for letters of administration which was granted on 13<sup>th</sup> March, 2008. On 3<sup>rd</sup> March, 2009, he applied for confirmation giving proposals on how to distribute the estate.

2. On 29<sup>th</sup> May 2009, **Felisian N. Muriungi M’Arimba (“the 2<sup>nd</sup> protestor”)** filed a protest to the proposed distribution. He contended that before the deceased died, he had showed him and the petitioner their parcels of land each measuring 1.9 acres and the deceased’s other 3 sons were to get the balance. That in 1982 the deceased sold to him the excess of 0.3 acres for Ksh. 800/=. That he developed his parcel extensively and has lived and worked thereon for the last 28 years without any complaints from the family members. He gave his own mode of distribution.

3. On 11<sup>th</sup> November 2016, **Agnes Kajau M’Arimba (“the 1<sup>st</sup> protestor”)** filed her protest stating that the deceased was her husband. That he had 13 children of which she had bore 7 with him and raised 6 other children born by other women. That **Land Parcel No. Nkuene/Mikumbune/251** was acquired through joint effort and that she was entitled to half-share as she is in occupation of a portion measuring 4 acres. That her wishes was that the 4 acres be registered in her name while the balance be distributed to the sons of the deceased. She would hold the 4 acres in trust for the daughters.

4. On 16<sup>th</sup> May, 2017, **Alice Ncurubi (“the 3<sup>rd</sup> protestor”)** filed her protest which basically supported the protest by the 2<sup>nd</sup> protestor.

5. Before the matter was heard, on 18<sup>th</sup> June, 2015, Makau J ordered that the District Surveyor do ascertain the portion occupied by the 1<sup>st</sup> protestor and a report be filed with the court. That report dated 13<sup>th</sup> October, 2015 was filed in court and showed that the surveyed area less the area occupied by the road is 4.0 Ha and the area occupied by the 1<sup>st</sup> protestor was approximately 2.40 acres.

6. The protests were heard vide viva voce evidence. **P1W1 AGNES KAJAU M’ARIMBA** told the court that she was married to the deceased in 1956. He constructed a house for her while the children of the first two wives were in their own house as **Julia Muthoni** was taking care of them. Together with the deceased they purchased 4 pieces of land which were consolidated to form **NKUENE/MIKUMBUNE/251** (“the estate land”). At the time, she was farming beans and maize which she sold and contributed to the purchase. In cross examination, she admitted that some of the properties were acquired through inheritance and that the petitioner occupies plot 252 that was given to him by the deceased. That she was given 4 acres which she occupies which she would like to share with her 8 daughters.

7. **P1W2 Stella Mbuthu** testified that part of the estate land was taken by the road to Kaguru Farmers Training Centre. Her mother, **PW1,**

occupies 4 acres and when the petitioner brought his surveyor they were not involved. She supported the 1<sup>st</sup> protestor's mode of distribution. She admitted in cross examination that the deceased showed Felician M'Arimba, Jotham Muthuri, James Mate, George Muthamia, Robert Mbaya and their mother portions which they have been occupying and cultivating to date.

8. **P2W1 Felisian N. Muriungi** adopted his affidavit sworn on 26<sup>th</sup> June, 2018 and stated that the deceased acquired land through purchase and inheritance. That all the portions of land were consolidated together to form **Nkuene/Mikumbune/252**. That all the properties owned by the deceased were acquired by the deceased and his first two wives. That the deceased married the 1<sup>st</sup> protector 7 years after the death of the deceased's first two wives.

9. He denied the 1<sup>st</sup> protestor's claim that she assisted in the acquisition of any of the deceased's properties or that she took care of any of the children of the deceased's two other wives. He further stated that by the time the 1<sup>st</sup> protector was being married in 1957, the estate land was fully developed with yams, oranges, cereals, bananas and grazing land. He set out the deceased's family as follows: -

**1<sup>st</sup> Household Martha M'Arimba (Deceased)**

- a) Julia Muthoni Kithae
- b) Lucy Ruth Nkuene
- c) Jotham Muthuri
- d) Elizabeth Igoki

**2<sup>nd</sup> Household Sarafina Arimba (Deceased)**

- a) Alice Ncurubi
- b) Felisian N. Marimba

**3<sup>rd</sup> Household Agnes Kajau**

- a) George Muthama
- b) James Mati
- c) Albert Mbae M'Arimba
- d) Juliet Nkirote
- e) Damaris Kiende

10. He further told the court that in 1982, the government of Kenya built a tarmac road through the property whereby the deceased called a meeting to divide his land. He gave two of his adult sons, the 2<sup>nd</sup> protestor and the petitioner 1.90 acres each while the balance was to be shared by the sons of the 1<sup>st</sup> protestor. **P2W1** was added 0.3 acres for which he paid Ksh.300/- to the deceased. His portion therefore totaled 2.2 acres. In 1984, another road yet passed through the deceased's remaining land and part of the petitioner's land for which the deceased was compensated.

11. **P3W1 Ruth Lucy Nkuene** testified that when the 1<sup>st</sup> protestor was married, the entire of the deceased's family was already living on the estate property although the land was yet to be formally registered. The deceased gifted 1.9 acres to the petitioner and the 2<sup>nd</sup> protestor before the clan and area chief.

12. **RW1 Jotham Muthuri Arimba** substantially supported the version of **P2W1's** testimony and proposed that the estate be distributed as follows: -

- a) Felisian N. Murungi – 2.1 acres
- b) Jotham Muthuri - 1.9 acres
- c) James Mati - 1.9 acres
- d) Mbae M'Arimba - 1.9 acres
- e) Muthamia Arimba - 1.9 acres

f) Geoffrey M. Mburugu - 0.25 acres

13. **RW2 Elias Muthama** stated that when the first protestor married the deceased, the deceased already had the estate of land as it was ancestral land. That the deceased shared his land among his two sons, the petitioner and **P2W1**, and that he was among the clan members who were present at the meeting when the deceased divided his land as aforesaid.

14. **RW3 Riungu M’Kieni** testified that the deceased bought land from one M’Ituambae and other parcels in 1950 and 1952. That his family moved to Nugu area and left their land to the deceased. That the deceased combined all his parcels into one which formed the estate land.

15. I have carefully considered the entire record and the testimonies of witnesses. I have also considered the submissions of Learned Counsel notwithstanding that I have not reproduced them here. The issues for determination are; ***whether the 1<sup>st</sup> protestor is entitled to 4 acres in the estate by virtue of having contributed to its acquisition, whether the deceased divided any part of his property prior to his death and how the estate should be distributed.***

16. The 1<sup>st</sup> protestor’s case was that she contributed to the acquisition of the estate. That she was married in 1956 whereby she contributed to the purchase of the land forming the estate through sale of beans and maize.

17. It is not in dispute that the deceased was polygamous. That before the 1<sup>st</sup> protestor, there were two other wives who bore the deceased a total of six children. The 1<sup>st</sup> protestor did not dispute the testimony of **P2W1** that she was married 7 years after the demise of the first two wives and that by that time, the deceased had already acquired all the parcels of land that were consolidated to create **Nkuene/L. Mikumbune/251**.

18. From the evidence on record, it is highly doubtful that the 1<sup>st</sup> protestor contributed in the acquisition of any of the parcels that led to the estate land. She was categorical in her testimony that it is her and the deceased who acquired the said parcels through purchase. However, when evidence was tendered to show that 3 of such parcels were inherited by the deceased, she had no answer. Indeed, she was unable to challenge the evidence that by the time she was being married, the deceased and his two families were already settled on the estate land. Indeed, she admitted that when she was married, her husband constructed for her a house on one side of the land while the children of the first two families lived on the other far corner of the estate land.

17. As regards the claim by the 1<sup>st</sup> protestor that she had been left on 4 acres which she was still in occupation, Makau J ordered that a government surveyor do visit the land in question and verify the extent or the area occupied by her. The report dated 13<sup>th</sup> October, 2015 showed that the 1<sup>st</sup> protestor occupies 2.30 acres. It should be recalled that, after the compulsory acquisition of the land in 1982, there was a 2<sup>nd</sup> acquisition in 1984 when a second road passed through the deceased’s land. That must have reduced the portion given to the 1<sup>st</sup> protestor.

18. Accordingly, there was no basis at all for the 1<sup>st</sup> protestor to claim 4 acres from the estate.

19. The second issue is whether the deceased shared his property during his lifetime. The evidence on record is that, in or about 1982, the deceased called a meeting which comprised of clan members, the area chief and neighbours and shared his land to the sons of the first and second wife. He gave each one of them 1.90 acres. The 1<sup>st</sup> protestor was added 0.3 acres for which he paid Kshs.300/-.

20. After showing the said sons their respective portions, they took possession thereof and developed the same. They have been occupation thereof to-date. None of the children of the deceased nor the 1<sup>st</sup> protestor questioned that arrangement for 12 years (1982-1999), when the deceased was alive. If it was the daughters, they remained happily married wherever they were and the other sons continue to occupy where he had showed them. It is clear that the intention of the deceased was to settle the sons of the 1<sup>st</sup> two houses for good.

21. In **Halsburys Laws of England**, 4<sup>th</sup> Edition Vol.20(1) pg 44 it is observed that:-

***“... If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”***

23. To my mind, for a gift to be valid, it must be established that the person giving the gift actually intends to make a gift. It must be demonstrated that the donor's objective was to make a gift when he or she transferred the property. The donee must accept the gift made to him and there should be actual delivery of possession of the subject-matter of the transfer by the donor to the donee. In the present case, all the foregoing was demonstrated to have existed.

24. Having settled the 1<sup>st</sup> protestor and the petitioner as aforesaid, did that constitute a gift *inter vivos*. I think yes. Although it was not in writing, the deceased surrendered physical possession thereof to the two to the exclusion of himself and everyone else in the family for the 12 years he lived after such sharing. Accordingly, I am satisfied that the deceased shared 2.1 acres and 1.9 acres to the 2<sup>nd</sup> protestor and the petitioner respectively. However, the share of the petitioner was eroded in 1984 when a second road passed through the property thereby reducing his share.

25. I am aware that the deceased did not write any will. That there was no transfer in writing. However, considering the traditional and rural set up of Meru at the time, 36 years ago, what the deceased did was the *modus operandi* at the time. In this regard, I do not think it is part of the court’s business to re-arrange the affairs of a person who willfully, knowingly and consciously has set up his affairs in a particular manner. See **Silas Ruguaru M’Itambu v. Geideon Mutwiri M’Itambu & Another [2017] eKLR**. Moreso, where there was no objection by his beneficiaries during his lifetime.

23. This is the scenario that is envisaged by *section 42 of the Law of Succession Act, Cap 160 (“the Act”)*. It provides:-

**“42. Where-an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate. That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.”**

24. To my mind, that section seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to be honored and effected if they are legal and just in the circumstances.

25. The final issue is, how the estate is to be distributed. I have considered the proposals made by all the parties. The deceased was polygamous. The applicable provision therefore is *section 40 of the Act*. The section requires that all the children of the deceased make a unit each with the surviving spouse forming a separate and independent unit.

26. Having given the 2<sup>nd</sup> protestor 2.1 acres and the petitioner 1.90 acres which was reduced by the road in 1984 to 1.55 acres, the rest of the beneficiaries will share the rest of the estate (5.37 acres), equally.

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

**Nkuene/L. Mikumbune/251**

- a) Jotham Muthuri M’Arimba - 1.55. acres**
- b) Felicien Murungi M’Arimba - 2.1 acres**
- c) Julia Muthoni Kithae - 0.537 acres**
- d) Lucy Ruth Nkuene - 0.537 acres**
- e) Elizabeth Igoki - 0.537 acres**
- f) Alice Ncurubi - 0.537 acres**
- g) Agnes Kajau - 0.537 acres**
- h) George Muthama - 0.537 acres**
- i) James Mati - 0.537 acres**
- j) Albert Mbae M’Arimba - 0.537 acres**
- k) Juliet Nkirote - 0.537 acres**
- l) Damaris Kiende - 0.537 acres**

28. This being a family matter, I will order no costs.

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

**A. MABEYA**

**JUDGE**