



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 322 OF 2012

IN THE MATTER OF THE ESTATE OF M'RINTAUGU M'RINKANYA (DECEASED)

AGNES KANYUA GITONGA.....PETITIONER

VERSUS

DORIS MUTHONI.....1ST RESPONDENT

EUNICE NKIROTE.....2ND RESPONDENT

KIRIMI JOSEPH M'RINTAUGU.....3RD RESPONDENT

JUDGMENT

1. This Cause relate to the estate of the late **M'Rintaugu M'Rinkanya ("the deceased")** who died on 30th October, 2007. On 29th January, 2014, a grant of Letters of Administration Intestate was issued to the Petitioner and the 3rd respondent, respectively.
2. Pursuant thereto, on 11th February, 2015, the petitioner applied for confirmation thereof making proposals on how to distribute the estate. The respondents were opposed to such proposal and filed their protest through the 3rd respondent.
3. The protest was heard by way of viva voce evidence. **Eunice Nkirote** was **PW1**. She told the court that, she was a daughter of the deceased and was in occupation of **L.R. Nanyuki/Marura Block 8/1362** where she has built. That she is also in occupation of **L.R. Nanyuki/Marura Block 8/1366**. That she was in such occupation as per the directions of the deceased and none of the other beneficiaries was in occupation thereof. That one **Paul Murithi** had not been provided for.
4. **PW2** was **Kirimi Joseph M'Rintaugu**. He testified that the deceased had 2 wives and 11 children. That **L.R. Abothuguchi/Kithirune/1242** was his own property given to him by one **M'Mugire Bagine** as a gift and that the deceased had given him **L.R. Abothuguchi/Kithirune/ 2392** of which he was utilizing one acre and the balance should be given to **Paul Murithi**. He alleged that there were other assets belonging to the estate that had not been disclosed by the petitioner and consequently gave his own mode of distribution.
5. The petitioner opposed the protest as (**RW1**) and called three witnesses. She testified that the deceased had 2 wives with 10 children. That the deceased had distributed his property at Kithirune to his sons before his demise. That each son was shown where to cultivate with the widow, **Stellah Ncekei**, being allocated **L.R. Abothuguchi/Kithirune/2392**.
6. She told the court that **Paul Murithi Marete** was not the deceased's son but that of one **Stanley M'Marete M'Imanyara**. That **L.R. Abothuguchi/Kithirune/1242** belonged to **M'Mugira M'Bagine** who was their grandfather and not a neighbour as alleged by the 3rd respondent.
7. **RW2, Julius Mirigo** testified that he was a neighbour of the deceased after he purchased some land next to the deceased. That he knew that the deceased had divided his land amongst his sons, to wit, **Japheth Mwendwa (plot 2389), James Muriungi (2390) and Githinji Joseph (2391)**. That the deceased was left with **Plot 2392** which he left to the widow after his demise.
8. **RW3, Githinji Joseph** told the court that the deceased had divided his Kathirune land during his lifetime amongst his children in 2000 and put them into possession. That the sons were unable to cater for the cost of transferring the titles into their names except the 3rd respondent. **RW4 Margaret Igoki M'Kirimana**, the elder sister to the deceased reiterated the testimony of **RW3**.
9. The parties filed their respective submissions which this court has carefully considered. The issues for consideration are; *is Paul Murithi a beneficiary of the deceased? Had the deceased distributed any of his property when alive? How should the estate be distributed?*

10. It was not in dispute that the deceased was polygamous. It was also not in dispute that **Paul Murithi** was a son of the deceased's 1st wife. The dispute is whether he was born of the deceased. The evidence on record shows that, the 1st wife of the deceased separated with the deceased in 1968 and she left the deceased home. She returned in 1977 with **Paul Marete** who was born in 1972.

11. Further, the evidence is clear that **Paul Marete** did not live with the deceased in his home. He was taken to the home of his biological father, **Stanley M'Marete M'Imanyara** by his mother and the deceased where he grew up. He is said to be 40yrs old and lives in Mombasa. He never participated in these proceedings. Neither did his name appear in the introduction letter by the Chief of Nduruma Location that commenced these proceedings.

12. The 3rd respondent who introduced the name of **Paul Marete** into these proceedings did not dispute the aforesaid evidence. In the circumstances, although **Paul Marete** was a son of the deceased's 1st wife, he was neither a child of the deceased nor his dependant. **Paul Marete** is not a beneficiary and is not entitled to inherit from the deceased's estate.

13. The next issue is whether the deceased had distributed any of his property during his lifetime. The evidence on record shows that the deceased owned **L.R. Abothuguchi/Kithirune/496 ("Plot 496")** and other properties in Nanyuki.

14. In 2000, he applied for and caused **plot 496** to be subdivided into four equal portions of 0.44 ha each. This is clear from the Mutation dated 15/12/2000 produced as **PEXh1**. The evidence was clear that he gave 3 of these portions to his sons born of the 2nd wife and retained **L.R. Abothuguchi/Kithirune/2392** for his own and his 2nd wife's use. The widow was left using this portion after the demise of the deceased but the 3rd respondent drove her away.

15. The evidence further shows that, the deceased surrendered the said portions to the exclusive possession of the respective sons. Each of the said sons took possession thereof and have continued to utilize their respective portions, except **Joseph Githinji** who surrendered the use of his portion to his mother after she was displaced by the 3rd respondent from **L.R Abothuguchi/Kithirune/2392**.

16. As regards **L.R. Abothuguchi/Kithirune/1242**, the evidence on record is that this property belonged to **M'Mugira M'Bagine**. The 3rd respondent told the court that **M'Mugira M'Bagine** was a neighbour to the deceased. That the said **M'Mugira M'Bagine** gifted him through the deceased the said property. He learnt this from the deceased in a family meeting that took place in 1989.

17. The other witnesses disagreed with the testimony of the 3rd respondent. They told the court that **M'Mugira M'Bagine** was an uncle to the deceased. That because he did not have a son and was being taken care of by the wife of the deceased, he gifted the deceased the said property. That when the deceased was distributing his **plot no. 496**, he gave the said property to the 3rd respondent.

18. I saw the witnesses testify. I did not believe the evidence of the 3rd respondent. He did not have any witness to the alleged meeting of 1989 where the deceased allegedly told him that an alleged neighbor had directed that his land be given to him.

19. I accept the evidence of the petitioner and her witnesses in this issue. That **M'Mugira M'Bagine** was a relative of the deceased who failing to have a male child, gifted his land, **Abothuguchi/Kithirune/1242** to the deceased as his own property.

20. It is clear from the evidence on record that, the deceased inherited the said **Abothuguchi/Kithirune/1242** from the said **M'Mugira M'Bagine** in November, 2000. He gifted it to the 3rd respondent the same month. It is not lost of this court that it is at the very same period that the deceased applied and subdivided his **plot no. 496** into 4 equal portions and gifted them to his other children.

21. In view of the foregoing, the totality of the evidence on record shows that; the deceased was given **L.R. Abothuguchi/Kithirune/1242** by **M'Mugira M'Bagine**; the deceased gifted the 3rd respondent the said property as the only son of the 1st wife; he divided **plot no. 496** into 4 portions amongst the sons of his 2nd wife and left a portion for himself and his 2nd wife.

22. Accordingly, the second issue is answered in the affirmative, that during his lifetime, the deceased had distributed his properties at Kithirune to his male children and this should be taken into account during distribution of his estate.

23. The next issue is how the estate should be distributed. The estate that remains for distribution is the properties at Nanyuki, **Nanyuki/Marura Block 8/1362** and **Nanyuki/Marura Block 8/1366**. The 3rd respondent alleged that **Ontulili/Katheri/1303** existed and had been dealt with illegally. He also alleged that there were shares in various institutions and bank accounts. He never proved the existence of the said assets. Evidence of the same lacking, I reject the contention that they are available for distribution.

24. There was also the allegation by **PW1 Eunice Nkirote** that she was in possession and exclusive use of **Nanyuki/Marura Block 8/1362** and **Nanyuki/Marura Block 8/1366**. That that was the intention of the deceased. She however did not give any sufficient evidence to back her allegation that that was the deceased's intention. Indeed, she admitted in court that her wish was that the estate be distributed equally. Those properties are therefore available for distribution.

25. Accordingly, the deceased having been polygamous, the applicable provisions of the law are **sections 40 and 42 of the Law of Succession Act**. The available estate is to be distributed equally amongst all the children of the deceased including the widow.

26. The distribution will take into consideration the fact that the 3rd respondent got **L.R. Abothuguchi/Kithirune/1242** which measures 2 acres while the other three male children of the deceased got one acre each. That the widow also got one acre while the daughters were given nothing. Since the 3rd respondent had his share already transferred to him, he will only be entitled to a share if and when the estate is big enough, which is not the case.

27. In this regard, the estate will be distributed as follows: -

a) Abothuguchi/Kithirune/2389

Mwenda Rintaugu

b) Abothuguchi/Kithirune/2390

James Muriungi M'Rintaugu

c) Abothuguchi/Kithirune/2391

Githinji Joseph M'Rintaugu

d) Abothuguchi/Kithirune/2392

Stellah Ncekei M'Rintaugu

e) Nanyuki/Marura Block 8/1362

Agnes Kanyua Gitonga

Eunice Nkitore

Florence Karwitha M'Rintaugu - equally

f) Plot No. 2396 Nturukuma

Japheth Mwenda

Githinji Joseph M'Rintaugu

James Muriungi M'Rintaugu - jointly

g) Nanyuki/Marura Block 8/1366

Rosemary Gacheri M'Rintaugu

Mercy Muchuka M'Rintaugu

Doris Muthoni - equally

28. This being a family matter, I will not make any order as to costs.

DATED and DELIVERED at Meru this 21st day of February, 2019.

A. MABEYA

JUDGE