



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 505 OF 2008

IN THE MATTER OF THE ESTATE OF M'ARIMBI M'MUTUA (DECEASED)

CYPRIAN MURORI..... PETITIONER

VERSUS

FRANCIS MUTUA 1ST PROTESTOR

ANGELICA MBERENYA M'KARIMBI.....2ND PROTESTOR

MUCHUI KARIMBI..... 3RD PROTESTOR

AND

FLORENCE KAIMENYI.....INTERESTED PARTY

J U D G M E N T

1. **M'Arimbi M'Mutua (“the deceased”)** died on 9th December 2003. He had two wives with several children. The 1st protestor lodged this succession cause on 31st October, 2008 but failed to disclose, include or involve the 1st house of the deceased. Accordingly, the grant issued to him on 23rd July, 2009 and confirmed on 10th November, 2010 was on 28th September, 2016, revoked by Gikonyo J.
2. On 17th May, 2017, **Cyprian Murori M'Arimba (“the petitioner”)** was appointed the administrator of the estate. Thereafter, on 12th June, 2012, he applied for confirmation of the grant. The protestors, not agreeing with him, filed their protests and the interested party also protested against the proposed distribution.
3. The protests were determined by way of *viva voce* evidence. **PW1 Angelica Mberenya** testified that she was the 2nd wife of the deceased with 6 children whereas **Zipporah Kiburo** was the 1st wife of the deceased with 3 Children. That Zipporah Kiburo was later on married to another person, **M'Ikiria** and she never came back to the deceased.
4. That during his lifetime, the deceased had shared out his properties whereby he divided **Abothuguchi/Kariene/2077** into two (2) parts **Abothuguchi/Kariene/2246** which registered in the name of **Ruth Gatimba** while **Abothuguchi/Kariene/2247** remained in his name. That **Cyprian Murori** was given **Abothuguchi/Kariene/568** to hold in trust for the 1st house. **Abothuguchi/ Kariene/2077 & 2078** was left for the 2nd house.
5. **PW2 Muchui Karimbi** told the court that he was a son of the deceased. He reiterated the same testimony given by **PW1**. He further testified that when the deceased divided his land, there were elders whose names he gave and some were still alive. He admitted that the interested party had been in occupation of her portion on **Abothuguchi/Kariene/2078** for 10yrs.
6. **PW3 Francis Mutua** testified that he is a son of the deceased. He also reiterated the testimony of **PW1**. That the deceased had given the 1st house his grandfather's property, **Abothuguchi/Kariene/568** whereby the petitioner was to hold on their trust. That he had sold his interest of ½ acre to the interested party and that he was not interested in having any share in the estate.
7. **RW1 Cyprian Murori** testified that he is the eldest son of the deceased. That his mother separated with the deceased in 1956 but came back in the 1969. That his sister Sarah Kagwiria was born in 1970. That **Abothuguchi/ Kariene/568** was a gift from his grandfather because he had supported him from 1960. He denied that the said property was given to him by his father as alleged by the protestors. He denied that the deceased had subdivided his land as contended by the protestors. **RW2 Sarah Kagwira** supported the testimony of his brother, **PW1** in every material particular.

8. **Florence Kaimenyi**, the interested party, testified that she purchased ½ an acre from the petitioner in 2007 for Kshs 280,000/=. That at the time of the purchase, the protestors were in occupation thereof and had consented to the purchase.
9. Having considered the evidence on record and the submissions of Learned Counsel, the issues for determination are; **who are the beneficiaries of the deceased? Is the interested party entitled to a share in the estate? Did the deceased divide his land in his lifetime? How should the estate be distributed?**
10. On the first issue, the protestors contended that the 1st wife **Zipporah Kiburo** left the deceased and got married to one **M'Ikiara**. That she and **RW2 Sarah Kagwiria** were therefore not entitled to any share in the estate as they were not beneficiaries. The petitioner was of a different view. He averred that his mother separated with the deceased and later returned to him in 1969 and that is when **RW2 was born in 1970**.
11. It is clear from the evidence on record that the deceased had 2 wives, **Zipporah Kiburo and Angelica Mberenya M'Karimbi**. However, sometimes in the 1960s, **Zipporah Kiburo** separated with the deceased and was married elsewhere to one **M'Ikiara** with whom she got children. That she later rejoined the deceased and begot **Sarah Kagwiria, PW2** in 1970. That as at the time of the demise of the deceased, she was not living with the deceased. Family disputes had driven her away and she was living with her other husband, **M'Ikiara**. As at the time of the hearing of the case, she was living with her daughter **Beatrice Karimi**, begotten with the aforesaid **M'Ikiara**.
12. From the foregoing, it is clear that **Sarah Kagwiria** was indisputably a daughter of the deceased. Zipporah Kiburo as wife of deceased had returned to live with him in 1969 and the said Sarah was born to them the following year. Section 118 of the Evidence Act is applicable here. There was no evidence that was produced to rebut the presumption of legitimacy set up. She is therefore a beneficiary of the deceased as are the others. However, I entertain doubt as to **Zipporah Kiburo**. Not only did she separate with the deceased and got married elsewhere, she temporarily reunited with him and again went back to the other husband after she begot **RW2**. Indeed, as at the time of the deceased's demise as well as the hearing of this Cause, she was living away from the deceased's home. To my mind, she is not a beneficiary of the deceased.
13. As regards the interested party, the evidence on record is two-fold, that she is a wife of **Francis Mugambi**, a son of the deceased with the first wife and also, a buyer of **Francis Mutua's**, interest to the extent of ½ acre. **Francis Mutua** himself testified as **PW3**. He admitted having sold his interest to her and that he was not claiming any further share from the estate. Accordingly, the interested party is entitled to share from the estate both as wife of a son of deceased and holder of the 1st protestor's interest and share.
14. Accordingly, the answer to the first and second issue is that, the beneficiaries of the estate are; **Cyprian Murori, Florence Kananu, Sarah Kagwiria, Angerica Mberenya Karimbi, Stella Mukami, Mary Kajuju, Muchui Karimbi, Lazarus Gitonga, Julius Kinoti and Purity Kinya**.
15. The next issue is whether the deceased had divided his property during his lifetime. The testimony of the protestors was to the effect that he did while the petitioner denied that fact. It was the protestor's position that the deceased settled the 1st house on **Abothuguchi/Kariene/568** while the 2nd house was settled on **Abothuguchi/Kariene/2247 and 2078** respectively. The petitioner stated that **Abothuguchi/Kariene/ 568** belonged to his grandfather, **M'Mutua M'Wambogo**, who sold it to him for KShs.3,000/-.
16. Having considered the testimony and seen those who testified before me, there is no evidence that the deceased divided his property as alleged by the protestors. It cannot be that he settled the 1st house on **Abothuguchi/Kariene/ 568** and the 2nd house on the other two properties as alleged.
17. In the same vein, it is also not true that the petitioner's grandfather **M'Mutua M'Wambogo** sold **Abothuguchi/ Kariene/568** to the petitioner for KShs.3,000/-. To the extent that the petitioner swore to that effect, he lied to court.
18. What the record shows is clear. That the deceased left the petitioner living on **Abothuguchi/Kariene/568** and the 2nd family was left living on **Abothuguchi/Kariene/2247 and 2078**. **RW2 Sarah Kagwiria** was at the time living either with her husband or with her mother at the home of **Beatrice Karimi**. It was not clear where the interested party, **Florence Karimi** was living. The parties did not tell the court.
19. From 1980, the petitioner moved into and continued to live on **Abothuguchi/Kariene/568** and at no time did he move into or claim or occupy or cultivate in **Abothuguchi/Kariene/2247 or 2078**. This was between 1983 up to 2003 when the deceased died.
20. In this regard, the only inference is that, while the father of the deceased, **M'Mutua M'Wambogo** was alive, the deceased got his father to give his **Abothuguchi/Kariene/568** as a gift to the petitioner and settled him there. This is clear from the green card that was produced that **Abothuguchi/Kariene/568** was given to the petitioner as a gift. The Kshs.3,000/- mentioned therein was the value of the land for purposes of stamp duty and not the purchase price paid as alleged by the petitioner.
21. The deceased must have settled the petitioner on this portion to separate the 1st house from the 2nd house as it seems the two could not agree and live together. This is borne by the evidence on record that the 1st wife could no longer live in the deceased's compound. That her house was burnt forcing her to flee to the home of her other husband and later on her daughter Beatrice Karimi.
22. To my mind therefore, the 2nd house found itself living on **Abothuguchi/Kariene/2247 and 2078** not because it was divided to them but rather as members of the family of the deceased who were lawfully entitled to shelter. There was no evidence on where **Florence Kananu**, the interested party and wife of **Francis Mugambi** was living at the time. **Sarah Kagwiria PW2** was at the time either living with her husband or with her mother at **Beatrice Karimi's** home. As for the petitioner, he was comfortably living on **Abothuguchi/ Kariene/568** where the deceased had settled him.

23. In this regard, how should the estate be distributed? **Section 42 of the Law of Succession Act, Cap 160 (“the Act”)** provides to the effect that when the court is distributing the estate, it must take into consideration any bequests made during the lifetime of the deceased. I am satisfied that the petitioner got **Abothuguchi/Kariene/568** from his grandfather at the behest of the deceased. I will take that into consideration in the distribution of the estate of the deceased. That property measures in excess of 0.80 ha which is equivalent to 1.976 acres. He will be entitled to some share if the rest of the beneficiaries get an equivalent from the estate.

24. The deceased was polygamous. In this regard, the provision applicable is **section 40 of the Act**. It presupposes that all the children of the deceased do constitute a unit with any surviving widow of the deceased constituting an independent and separate unit. The estate constitutes two properties that measure a mere 1.28 ha equivalent to 3.161 acres. The beneficiaries are 10 in number. The share therefore will be far below the 1.9 acres the petitioner already got. In this regard, the estate will only be shared amongst the 9 remaining beneficiaries having in mind that the interested party would be entitled to the share of her late husband, Francis Mugambi, and the share of Francis Mutua.

25. For reasons that the two houses need to be represented in the administration of the estate and in order to maintain peace and for expeditious execution thereof, I make the following orders: -

a) **The grant issued to the petitioner on 9th May, 2017 is hereby revoked.**

b) **A fresh grant is hereby issued to Cyprian Murori M’Arimi and Francis Mutua M’Arimi forthwith.**

c) **The said grant is forthwith confirmed as follows: -**

i) **Abothuguchi/Kariene/2078 (2.7095 acres)**

Florence Kananu - 0.632 acres

Angerica Mberenya - 0.316 acres

Julius Kinoti - 0.316 acres

Lazaro Gitonga - 0.316 acres

Muchui Karimbi - 0.316 acres

Mary Kajuju - 0.316 acres

Purity Kinyua - 0.316 acres

Stella Mukami - 0.1815 acres

ii) **Abothuguchi/Kariene/2247 (0.4520 acres)**

Stella Mukami - 0.136 acres

Sarah Kagwiria - 0.316 acres

d) This being a family matter, there will be no order as to costs.

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

A. MABEYA

JUDGE