



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 132 OF 2007**

**IN THE MATTER OF THE ESTATE OF RUTERE RWITO (DECEASED)**

**ZIPPORAH NDURU RUTERE..... PETITIONER**

**VERSUS**

**JASON MURITHI RINGERA ..... OBJECTOR**

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

1. **Rutere Rwito** (“the deceased”) died on 9<sup>th</sup> September, 1962. A letter of introduction by the Chief of **Kanyakine** location dated 20<sup>th</sup> April, 2007, stated that the deceased was survived by **Zipporah Nduru Rutere (widow)**, **Benson Mbae Mukura (step-son)**, **Juster Ncoro Kiruki (daughter)** and **Kaari Rutere (daughter)**.

2. On 25<sup>th</sup> April, 2007, **Zipporah Nduru Rutere** (“the petitioner”) petitioned for letters of administration listing **Abogeta/L-Kithangari/52 (“the suit property”)** as the only property constituting the estate of the deceased. The grant was issued to her on 21<sup>st</sup> October, 2008 and subsequently confirmed as follows:-

**Abogeta/L-Kithangari/52**

**Zipporah Nduru Rutere - 2 acres**

**Benson Mbae Mukura - 0.50 acres**

**Benson Mwirigi Murunga - 1.50 acres**

**Patrick Mwirigi Riungu - 0.60 acres**

3. On 15<sup>th</sup> January 2013, the petitioner applied for the cancellation of the title held by **Jason Murithi Ringera (“the objector”)** and the lifting of the inhibitory orders issued against the suit property which was opposed by the objector.

4. The application and the reply thereto revealed the existence of **Meru Succession Cause No. 294 of 1994, In the matter of the estate of Rutere Rwito** in which the objector had succeeded in having the suit property distributed to himself. However, the grant in that Cause was revoked on 19<sup>th</sup> November, 2010 and an inhibitory order issued against the suit property.

5. On 18<sup>th</sup> August 2014, the objector applied for the revocation of the grant issued to the petitioner in this cause claiming that; the grant was obtained by the petitioner making untrue allegations, false statements and concealment from the court factors material to the cause. The petitioner opposed the application vide a replying affidavit sworn 6<sup>th</sup> October, 2014. The matter proceeded by way of viva voce evidence.

6. **OW1, Jason Murithi Ringera**, the objector, testified that the deceased was his uncle who died unmarried and with no child. That the suit property belonged to the deceased but the objector’s family moved thereunto in 1979 and have been living there to-date. That the letter of introduction from the chief, **Kanyakine** location, was not reliable as the suit property was situated at **Kithangari** location where the deceased hailed from.

7. In cross examination, he denied that **Benson Mbae Mukura (“Benson”)** was adopted by the deceased. He stated that **Benson** had his own parents, **Ezekiel Mukura** and **Beatrice Mukura** and that **Benson** was residing on his own father’s land. That Benson’s father had a dispute

with his late uncle, one **Mwirichia** in 1981 over the suit property and that having been defeated, Benson was now staking a claim on that property.

8. The objector admitted that he had referred to himself as the son of the deceased in **Succession Cause No. 294 of 2004** but explained that it was because the deceased was his uncle and had no child and that he had been named after him. He denied the suggestion that the only relationship he had with the deceased was that of a neighbour. He stated that the deceased was a brother to his father Ringera Michubu. That he, the objector, had buried his first wife on the suit property in 1998 without any objection by anyone.

9. **OW2 Wilson Kaburu Julius** testified that he resides in Kithangari location on a property that is eight parcels from the suit property. That he had known the objector since 1974 when the objector's family started cultivating the suit property. That he has never seen the petitioner on the suit property. That a claim had been lodged earlier on by Benson Mbae Mukura on the suit property but had been dismissed by the clan. That the petitioner has never settled on the land nor has she ever come to the land seeking to settle there. That the deceased had not constructed on the property and that it was the objector who first constructed on the same.

10. **PW1 Zipporah Nduru Rutere**, the petitioner, testified that she was married to the deceased in 1940's and that they resided in the suit property before his demise. That after his demise, the objector's father, one **Ringera Mucugu** chased her away from the suit property. That the village elders intervened and **Ringera Mucugu** allowed her to be farming on the land. That however, one year after the demise of **Ringera Mucugu**, the objector, his brothers and the sons of one **Mwirichia Mucugu** descended on her home and chased her away.

11. On cross-examination, she admitted that the suit property was in Kithangari location but that at the time she sought the letter of introduction from the area chief, Kanyakine location had not been subdivided to Kanyakine and Kithangari locations. That she had three (3) children with the deceased i.e. Njuu, Mbae and Kaari. That Benson Mbae was not the deceased's biological child as they adopted him from her father Mukura and her mother Beatrice.

12. She admitted that there was a case in 1981 that concerned the suit property which pitted the objector's family and Benson. She acknowledged that she knew **Gladys Ngera**, as the mother of the objector and that the said Gladys Ngera had been living in the suit property since 1970. She also admitted that Benson had constructed his home in his father's property.

13. When the court asked her to clarify who **Benson Mwirigi Muriuki** and **Patrick Mwirigi Riungu**, the persons she had distributed the estate property to, were, she stated that she did not know them. She also denied having sold any part of the suit property to **Benson Mwirigi**.

14. On the invitation of the court, **Juster Ncooro** took the stand and admitted to having knowledge of the existence of the proceedings. She stated that she did not claim a share in the estate in 2011 because she knew Benson would distribute to her her share. She denied having signed the consent attached to the application for confirmation.

15. **PW2 Earnest Kambi Muchai** testified that he was a brother in law to Juster Ncooro, the petitioner's daughter. That the petitioner was residing on the land belonging to John Miriti, her brother. He denied that he was a land broker and that he assisted the petitioner to get purchasers for the suit property.

16. The parties filed their respective submissions, which I have carefully considered. Having analysed the evidence on record, the issues that fall for determination are? **Who are the immediate beneficiaries of the deceased? Should the grant be revoked or should the title of the objector be revoked?**

17. From the outset, I should point out that it be-holves parties who appear in court to tell the truth. It is disheartening that the oath administered to witnesses sometimes seem not to obligate them to tell the truth. Witnesses fail to realise that that oath obligates them to tell the truth at all times. Be that as it may, the court's duty is always to gauge the testimonies of those who appear before it and act on the truth, which will always come out.

18. The cardinal principle of law is that he who alleges must prove. The objector alleged that he was a nephew of the deceased. That the petitioner was but an imposter in the estate as she was not related in any way to the deceased. That she had misrepresented facts which led her to be issued with the grant. On the other hand, the petitioner retorted that while the deceased was her husband, the objector was not related to the deceased. Each party called one witness in support of his/her contention.

19. Due to the aforesaid contradictory positions taken by the parties and for the reason that the parties made certain contradictory and untruths, the court will gauge the evidence carefully with a view to establish where the truth lies. Put in another way, who between the objector and the petitioner is to be believed?

20. The objector was categorical that he is a nephew to the deceased. That the deceased was a brother to his father Ringera Michubu. That his grand-father was one Michubu Ngomango who had three sons, M'Mwirichia Michubu, his father Ringera Michubu and the deceased Rwito Rutere Ngomango. That the deceased died leaving no wife or child. That after the demise of the deceased, his family started utilising the estate property until 1979 when his father died. Later that year, his uncle M'Mwirichia Michubu asked him and his mother to move unto the suit property. That he and his family have since been in occupation and use of the suit property to-date.

21. He was firm that he was not a neighbour to the deceased. That those who bordered the deceased were Mwitiri Ikiara and Jara Kagiri. That the first time the said land was built on was by his family in 1979. He admitted that he had described himself as the only son of the deceased in **Meru Succession Cause No. 294 of 1994 In the Matter of the estate of Rutere Rwito** but explained that he did so because the deceased had no child and was his uncle.

22. He was firm that the petitioner has never been to the suit property and that he had never seen the letter by the Kanyakine Chief dated 1<sup>st</sup> March, 2010. That the letter of introduction was given by the chief who was not for the area where the deceased hailed from or where the suit

property was situated. That he had buried his 1<sup>st</sup> wife in 1998 in the suit property without any complaint.

23. The testimony of the objector was corroborated by that of **PW2**. **PW2** was firm that the Kanyakine Location was divided in 1993 into Kanyakine and Kirangari Locations. That the petitioner had never come to claim the suit property. That he was born in 1959 and had known that the objector's family had used the suit property since 1974.

24. On her part, the petitioner testified that she was the wife of the deceased. That she was evicted from the suit property after his demise. That the objector was not related at all to the deceased. That she and the deceased had 3 children together with Benson Mbae being an adopted son.

25. She stated that the objector had lied that he had informed the court in **Meru Succession Cause No. 294 of 1994 In the Matter of the estate of Rutere Rwito** that he was a son of the deceased yet he later explained that he was only a nephew. The court however, notes that the objector explained that he stated so because the deceased did not have a child and him being a nephew, traditionally he considered himself his son.

26. Although the petitioner accused the objector of the aforesaid contradiction, the court noted however that it is the petitioner who gave very contradictory testimony on many aspects as follows:-

a) in her Replying Affidavit sworn on 2<sup>nd</sup> September, 2013, she swore that **"the objector does not live on"** the suit property. At the trial she admitted that the objector has been living with his mother on the suit property since 1970s;

b) in the same affidavit, she swore that **"the Objector has never buried his wife in the subject parcel of land"**. At the trial, she admitted that he had actually buried his wife as aforesaid.

c) in her Replying Affidavit sworn on 6<sup>th</sup> October, 2014, she swore in **paragraphs 6, 7, 8 and 9** that she, the deceased and their "three children" were living on the suit property. That after the deceased died, the objector descended on the suit property and **"evicted me together with my family and demolished the houses that the deceased had put up before his death"**. On cross-examination, she stated that, **"None of all the children I have named has ever occupied this land"**.

d) as regards her children with the deceased or her children, her evidence was both contradictory and unclear.

i) in the application for confirmation, **Benson Mbae** was indicated as a son of the deceased. In paragraph 9 of the replying affidavit sworn on 6<sup>th</sup> October, 2014, she stated; **"THAT BENSON MBAE MUKIRA is my first born son and stepson to the deceased and my husband helped me to bring him up. I have the right to pursue his interests as I pursue mine. ... "**

ii) in her witness statement dated 8<sup>th</sup> April, 2017, which she adopted as part of her evidence in chief, she stated; **"We were blessed with a total of four children but two of them are now deceased. I presently have two remaining children namely BENSON MBAE MUKURA and JUSTA NCHOORO RUTEERE. We adopted BENSON MBAE MUKURA after his mother died way back in 1957 and ever since then he was my son as I took care of all his needs and he lived in our home"**.

iii) in her cross-examination, she testified as follows; **"I had children with the deceased. These are Njuu, Mbae, Kaari. These are alive. Kirimi (deceased) and Mbaabu (deceased). All these children belong to the deceased."**

**I have stated that Benson Mbae was an adopted son. He was left to me by my own father. He was not my biological son but that of one Mukura, my father. His mother was known as Beatrice.**

**After his birth, there were other children by Beatrice. They were not given to me to adopt.**

**In 1981, the said Mbae lodged a case before the elders claiming ownership Abogeta/L-Kithangari/52"**.

iv) from the foregoing, she was not clear as to the position of **Benson**. If **Benson** was a child of **Mukura**, her own father, he was then either a brother or step brother. She wasn't clear.

v) while the consent to confirmation dated 9<sup>th</sup> June, 2008 showed that **Kaari Rutere** signed the consent, **Justa Ncooro** told the court that **Kaari** died in 1978. How then did **Kaari** sign that consent? Why did the petitioner state in her testimony that **Kaari** was one of her children who were alive?.

vi) in her application for confirmation and ultimate distribution, she distributed to **Benson Mwirigi Murungi** and **Patrick Mwirigi Riungu** 1.50 acres and 0.60 acres, respectively. She had specified them in paragraph 2 of the supporting affidavit as having a purchaser's interest.

vii) then, in her replying affidavit sworn on 6<sup>th</sup> October, 2014, she swore at paragraph 4; **"THAT BENSON MWIRIGI and PATRICK MWIRIGI are my grandchildren and are catered for in the grant because they have been helping me in my upkeep"**. When the court asked her at the trial who the two were, she denied ever knowing them.

viii) after the grant was issued to her on 21<sup>st</sup> October, 2008, the petitioner filed an application in court on 2<sup>nd</sup> January, 2009

in which she sought to be allowed to apply for confirmation before the expiry of 6 months. In her supporting affidavit, she swore:-

**“7. THAT due to financial problems, I decided to sell 1 acre to Benson Mwirigi Murungi at KShs. 150,000/- who assisted me financially to file the succession cause in the High Court.**

**8. ...**

**9. THAT I have urgent financial problems particularly for buying drugs and upkeep of the said grandchildren but the purchaser is unwilling to pay me any proceed before confirmation of grant.**

**10. THAT I feel 6 months period to expire and have the confirmation granted is a long period and I would seriously suffer particularly this time of famine”.**

She then produced as “ZNRI” a Sale Agreement dated 30<sup>th</sup> April, 2008 between **Benson Mbae Mukura and Benson Mwirigi Murungi** for sale of 1 acre of the suit property for KShs.150,000/.

x) At the trial, when the court asked her about that fact she stated; **“Benson Mwirigi is not in occupation and neither do I know him. I do not know Patrick Mwirigi Riungu. I have never sold any portion of this land. I did not sell any portions to Patrick Mwirigi or Benson Mwirigi. I never informed the court at confirmation that I had sold any portion of the property to Patrick Mwirigi or Benson Mwirigi...”**

The foregoing then is the contradictory, inconsistent and unconvincing evidence that the petitioner provided the court with.

27. After carefully observing the parties and their witnesses, I was fully convinced that the petitioner was but an avowed stranger to the truth. Notwithstanding her respectable and advanced age, she struck me as an untruthful person who was prepared to be used by others for unknown reasons. The court was convinced that there were people who, knowing that the deceased left no immediate survivor, wanted an imposter “widow” who will ‘help’ them acquire the suit property.

28. To my mind, these were the people, who together with Benson Mbae were out to acquire the suit property by all means. It did not escape the court’s attention that the Sale Agreement dated 30<sup>th</sup> April, 2008 was as between Benson Mbae and Benson Mwirigi Murungi. This is the agreement the petitioner attempted to use to have expedited confirmation of grant.

29. Further, Since **Meru Succession Cause No 294 of 1994** was referred to in the testimonies of the witnesses, I called for the file and perused the same. I noted that the application that led to the ruling dated 19<sup>th</sup> November, 2010 that led to the revocation of the grant therein was heard exparte. The court concluded that the objector herein had been served with the application pursuant to the Affidavit of service sworn therein by **Mwirigi Kaburu** on 9<sup>th</sup> November, 2010. He stated at paragraph 2 and 3 as follows:-

**“2, THAT on 6<sup>th</sup> October, 2010 at around 12:30 pm I served an application dated 17/09/10 to the petitioner herein one JASON MURITHI RINGERA at Nkubu Township market.**

**3. THAT the said petitioner was pointed out to me by BENSON MWIRIGI MURUNGI who is one of the beneficiaries of the estate of the deceased”.**

30. **Benson Mwirigi Murungi** was the person to whom the sale agreement of 30<sup>th</sup> April, 2008 had purchased 1 acre of the suit property from **Benson Mbae Mukura!**

31. I should point out here that, I carefully observed the petitioner testify in court. Every time she was asked a question, she would turn towards the gallery where **Benson Mbae** was sitting for help. At some point, the objector’s advocate **Mr. Basilio** moved and blocked her view of **Benson Mbae** whereby she started fidgeting and answering questions with a lot of difficulties.

32. I believed neither her nor her witness. **PW2** was a brother to her daughter’s husband. He stood to gain from his testimony as opposed to **OW2**. Although the petitioner had sworn to bring witnesses to testify as to her marriage to the deceased and eviction from the suit property by the objector, she brought none.

33. To the contrary, I believed the objector. He was consistent in his testimony. He narrated to the court the family tree of the deceased and how he was connected to the deceased. He also brought **OW2** who testified as to the history of the occupation and use of the suit property. **OW2’s** evidence that Kanyakine Location was divided in 1993 into Kanyakine and Kithangari locations was unchallenged. It contradicted the petitioner’s testimony that when she came to court in 2007, Kithangari was still under Kanyakine Location. The irresistible conclusion is that, the chief who should have written the letter of introduction in this case should have been the chief of Kithangari and not of Kanyakine. The petitioner avoided him for obvious reasons. He might not have known her. The testimony of the objector that he had never received the letter of the Kithangari Chief of March, 2010 was not displaced.

34. Having evaluated the evidence on record, the court’s conclusion and findings is that; the deceased died leaving no wife or child; he was an uncle to the objector having been a brother to the objector’s father, Ringera Muchubu; that it is for that reason that the family of the objector have been in occupation and use of the suit property since 1970’s That the petitioner was unable to tell the court when and how the objector evicted her from the suit property and where she reported the matter to.

35. The court takes judicial notice that in Kenya on matters land, it is inconceivable that one would be evicted from what he/she considers to be his/her land and fail to have a trail of complaints from the village elder to the Assistant Chief's office, all the way to the County Commissioner's office. When the court asked the petitioner to specify where she had lodged her complaint after she was allegedly evicted, she stated "everywhere". She was not able to specify what she meant by "everywhere". As a result, the court was unable to summon anyone from "**everywhere**" to appear and shed light on the matter of the alleged eviction.

36. Accordingly, I am satisfied that the petitioner obtained the grant fraudulently. The objector has proved his case on a balance of probability. The objection succeeds with the following orders:-

- a) the petitioner's application dated 15<sup>th</sup> January, 2013 be and is hereby dismissed.
- b) the grant issued to **Zipporah Nduru Rutere** on 21<sup>st</sup> October, 2008 is hereby revoked.
- c) since the objector's grant in **Meru Succession Cause No. 294 of 1994 In the Matter of the estate of Rutere Rwito** was revoked, a grant is hereby issued to the objector forthwith.
- d) the inhibition on the property known as **Abogeta/L-Kithangari/52** is hereby removed and the property distributed to the objector wholly. For avoidance of doubt, since the property is already in the objector's name, the property shall continue to remain in his name as such.

37. Although this is a Succession matter, since the petitioner and those who sponsored her were out to execute a well calculated fraud, I order that she bears the costs of both applications.

**DATED** and **DELIVERED** at Meru this 25<sup>th</sup> day of April, 2019.

**A. MABEYA**

**JUDGE**