



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 499 OF 2011**

**IN THE MATTER OF THE ESTATE OF KIRICHU MAKARA ALIAS KERICHO MAKARA**

**STANLEY KIRICHU MAKARA ..... PETITIONER**

**VERSUS**

**JOEL KOBIA KIRICH ..... 1<sup>ST</sup> OBJECTOR**

**PETER KIMANI KIRICHU .....2<sup>ND</sup> OBJECTOR**

**TERESIA MUKONJIRA KIRICHU..... 3<sup>RD</sup> OBJECTOR**

**PETRO MUGAA KIRICHU .....4<sup>TH</sup> OBJECTOR**

**JERIKA KARITU KIRICHU ..... 5<sup>TH</sup> OBJECTOR**

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

1. This succession cause relate to the estate of **Kirichu Makara** who died on 17<sup>th</sup> August, 1992. The only issue for determination is to the distribution of his estate.

2. From the testimonies of the witnesses, it was established that the deceased had 2 houses. During his lifetime, he settled the 1<sup>st</sup> house at Linjoka. He also divided his **Ithima/Ntunene/148** measuring 11.40 acres into 7 subdivisions (**Ithima/Ntunene/1722 – 1728**).

3. It was not disputed that he later bequeathed the said properties to his sons as follows:-

- a) **Ithima/Ntunene/1722 (1 acre) to Joel Kobia Kirichu;**
- b) **Ithima/Ntunene/1724 (3 acres) to Peter Kimani & Erastus Kiricho;**
- c) **Ithima/Ntunene/1725 to Peter Mugaa Kirichu;**
- d) **Ithima/Ntunene/1726 to Moses Ithabu.**

4. Three subdivisions, to wit, **Ithima/Ntunene/1723 (0.81ha)**, **Ithima/Ntunene/1727 (0.542Ha)**, **Ithima/Ntunene/ 1728 (0.20Ha)**, remained unallocated. These are the ones that are the subject of the dispute.

5. Three witnesses testified on behalf of the objectors. **Joel Kobia Kirichu (OW1)** stated that **Ithima/Ntunene/1727** was granted to Stanley Kirichu Makara whereas **Ithima/Ntunene/1728** belonged to Magdaline. That Angelica Kaari was given a portion of **Ithima/ Ntunene/1723**. He therefore sought to distribute the balance to the beneficiaries.

6. He sought justification from the fact that the beneficiaries have settled, built and made developments to **Ithima/Ntunene/1723**. He produced photographs to prove this assertion. He also sought justification to his mode of distribution on the grounds that if each of the beneficiaries gets a portion in **Ithima/Ntunene/1723**, there shall be an equal distribution of the estate.

7. **David M’Aciita OW2** and **Jackson John Mutoria OW3** supported the testimony of **OW1**. Their testimony was to the effect that the petitioner was given **Ithima/Ntunene/1727**. That the petitioner was present during the subdivision and the same was done as a local arrangement in the presence of clan elders. When cross-examined, **OW3** was unable to provide prove of the resultant subdivisions which he

alleged he undertook.

8. The petitioner, **PW1** testified that the objectors had constructed on land that belonged to him (**i.e. Ithima/Ntunene/1723**). He acknowledged that the objectors did this before the deceased died. He alleged that while he was in Mombasa the deceased called him and gave him **Ithima/ Ntunene/1723** but was not able to transfer it as he died shortly thereafter. He acknowledged that Anjelica was occupying 0.30 acres in **Ithima/Ntunene/1723** which he willing to give her.

9. **Pw2 Jacob Kamee Mati** testified that the deceased divided his land during his lifetime. That he gave portions to his sons but the petitioner did not get any part of the property. However, the petitioner was utilising two acres of the suit property.

10. **Section 42 of the law of Succession Act** provides:-

**“42. Where -**

**(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or**

**(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.**

11. I have considered the rival testimonies of the parties. The deceased had catered for all his children, save for the petitioner and the 2 daughters of the deceased, **Magdalene Mami and Anjerica Kaari**. The 1<sup>st</sup> objector contended that **Magdalene Mami** had been given **Ithima/Ntunene/1728** but had declined as she was married. However, when challenged, he was unable to prove that the said beneficiary had renounced her right to inheritance. I reject that allegation.

12. The evidence on record is that, all the beneficiaries had constructed on **Ithima/Ntunene/1723** during the lifetime of the deceased. This they were entitled to do as they were lawful children of the deceased. They were entitled to residence. However, once the deceased divided his property amongst them, they were expected to vacate and each to construct in his own subdivision.

13. Having analysed the evidence on record, I am satisfied that the deceased subdivided his land into 7 portions and intended that each gets a portion as nearly equal as possible. That is why, he gave **Ithima/Ntunene/1724** (3 acres) to Peter Kimani and Erastus Kiricho to share as it was bigger than the other subdivisions.

14. I am satisfied that the three subdivisions that were left were intended for those who had not received any portion. Even if that was not the case, there is evidence that the three are the only children of the deceased who were not catered for during the lifetime of the deceased.

15. Since each beneficiary is entitled to inherit from the deceased, I will make the following orders:-

a) the protest is hereby allowed.

b) the grant is hereby confirmed and the estate distributed as follows:-

i) **Ithima/Ntunene/1723**

**Stanley Kirichiu Makara - whole**

ii) **Ithimu/Ntunene/1727**

**Jerika Karitu Kirichu - whole**

iii) **Ithimu/Ntunene/1728**

**Magdalene Mami Kirichu - whole**

c) this being a family matter, I will make no order as to costs.

It is so decreed.

**DATED** and **DELIVERED** at Meru this 30<sup>th</sup> day of May, 2019.

**A. MABEYA**

**JUDGE**