



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 294 OF 2012

IN THE MATTER OF THE ESTATE OF HENRY M'BAGINE M'ITHIKA alias BAGINE NTAKA (DECEASED)

SUSAN NKATHACO-ADMINISTRATIX/APPLICANT

CHARLES MUTUACO-ADMINISTRATOR

VERSUS

JUSTUS GITUMA.....1ST PROTESTOR/CO-ADMINISTRATOR

BARTHOLOMEW M. MBOGORI.....2ND PROTESTOR

JAMES MWICHUURI.....3RD PROTESTOR

J U D G M E N T

1. **HENRY M'BAGINE M'ITHIKA alias BAGINE NTAKA** ('the deceased') died on 22nd June, 1976. He had two wives and was survived by:-

- 1st House – Ann Maibine** - (deceased)
- M'Mbogori M'Bagine - son (*now deceased*)
- 2nd House – Lydia Karimi** - (deceased)
- a) Angerica Kanana Munyua - daughter
- b) Francis Muriithi - son
- c) Susan Nkatha - daughter
- d) Charles Mutua - son
- e) Margaret Kamenwa Mworira - daughter
- f) Alice Kendi - daughter

2. His only asset that constituted his estate was listed as **L. R. Ntima/Ntakira/537**, (hereinafter '*the suit land*').

3. The grant of letters of administration intestate was issued to **Susan Nkatha, M'Mbogori M'Bagine** and **Charles Mutua**, on 22nd June, 2012. Shortly thereafter, **M'Mbogori M'Bagine** died and he was replaced by his son **Justus Gituma** and the grant was amended accordingly on 20th December, 2016.

4. Vide a Summons for confirmation of grant dated 16th December 2016, **Susan Nkatha** proposed that **Ntima/Ntakira/537** and **Kshs.4,444,340/-**, being the compensation from the compulsory land acquisition of the suit land and held in bank A/C No. xxxx be shared equally amongst all the children of the deceased.

5. A protest was lodged by **Justus Gituma, Bartholomew M. Mbogori** and **James Mwichuri** (hereinafter referred to as “the protestors”). They contended that in or about 1974, the deceased shared out his land equally amongst his three sons. That the daughters were not given any land but they were to be entitled to a share in the portion of their brothers who received their respective dowry in the event they returned from their marriages.
6. That while the brothers of the petitioner partook in the dowry of their sisters, the protestors’ father, **M’Mbogori M’Bagine**, did not partake in any dowry as he was from the first house which did not have a daughter. That all the persons have continued to date to be in occupation of their allocated portions of which they have substantially developed.
7. The protest was supported by **Joshua Nteere M’Kiriinya** and **Thomas Kamundi M’Eniu** through their affidavits sworn on 15th February 2017.
8. The petitioner opposed the protest contending that, the deceased had two parcels of land, the suit land and **Ntima/Ntakira/1353**. That he gave **Ntima/Ntakira/1353** to **M’Mbogori M’Bagine** as the only child of the first wife and the suit land to the children of the second wife. **M’Mbogori** requested the father to be allowed to live on the suit land since his land was not developed and that it was situated in an area that did not have good schools.
9. That the deceased acceded to **M’Mbogori’s** request on condition that he accommodated his brothers on **plot No. 1353** which was subdivided into three portions. That the late **M’Mbogori** breached the agreement and took the entire plot. She was supported by her brothers, **Francis Murithi** and **Charles Mutua M’Bagine**.
10. The protestors responded to the contentions of the petitioner and her brothers’ contentions and denied them through their affidavit and that of **Thomas Kamundi M’Eniu** sworn on 15th May, 2017, respectively.
11. The protest was heard vide *viva voce* evidence. All the witnesses adopted their respective affidavits as their evidence in chief and were cross-examined on them. **PW1 Justus Gituma** testified that the deceased had divided the suit land to his sons equally in 1974. That the daughters were to get a share from their respective brothers as per the deceased’s directive. That the caution placed on **plot No. 1353** by his uncles was lifted through **Civil Suit No. 100 of 2011** because there was no evidence that the said property belonged to the deceased. No appeal had been preferred against that decision.
12. **PW2 Joshua Nteere M’Kiriinya**, the Senior Assistant Chief of Mpuri sub-location from 1986 to 2005, told the court that in 1987, he was called for a reconciliation meeting at the deceased’s home. That the said meeting was called by the widow of the deceased **Lydia Karimi** and the clan. After deliberations, the elders decided that **Susan Nkatha** should occupy a part of **Charles Mutua’s** portion. That the said decision was informed by what the widow told them that the deceased had directed that his daughters should get shares in their respective brothers’ portions if and when they came back.
13. **PW3 Thomas Kamundi M’Eniu** told the court that he was present when the deceased distributed the suit land in 1974. He corroborated the testimony of **PW1**.
14. **RW1 Susan Nkatha**, the petitioner, told the court that before the deceased died, he had divided his land between his three sons. When she came back home, her mother was still alive and her brother **Charles Mutua** gave her a portion to live on with her children. She confirmed having received Kshs.350,000/-from the government as compensation for her house and coffee trees after compulsory acquisition.
15. **RW2 Francis Murithi** stated that the deceased had showed his sons their respective portions where they have been cultivating since 1976. That the three married daughters came back in 2016 to ask for land. That his sisters were cultivating the suit land whereby **Anjerica** was using 1/8 and **Margaret** 1/16 of his portion. **Alice Kendi** was not cultivating any portion but the petitioner was using **Mutua’s** portion.
16. **RW3 Charles Mutua M’Bagine** told the court that the sons of the deceased are settled in their respective portions where they have developed and cultivated. That his sisters live where they are married but usually come to cultivate on his land.
17. I have considered the evidence on record and the submissions on record. The issues for determination are; **Was M’Mbogori Mbagine given L.R. No. Ntima/Igoki/1353 by the deceased? Did the deceased distribute L. R. No. Ntima/Igoki/537 before he died? How should the estate of the deceased be distributed?**
18. On the first issue, the petitioner contended that the deceased had given **L.R. No. Ntima/Igoki/1353** to **M’Mbogori M’Bagine** while **L. R. No Ntima/Igoki/537** was distributed to the two sons of the 2nd house. That the deceased allowed **M’Mbogori M’Bagine** to live in **No Ntima/Igoki/537** because there were no schools within the vicinity of the property he had given him.
19. The protestors presented evidence to show that, not only was their father, **M’Mbogori M’Bagine** the first registered owner, of that property but they also presented satisfactory evidence to show that the said land was given to him by their grandmother, one **Katheuri M’Nthaka**.
20. The protestors produced minutes of a meeting held at the area Chief’s office on 16th June, 2011 which had concluded that, the said property never belonged to the family. This was after **RW2 and RW3** had lodged a caution in 2010 against the title.
21. To my mind, the totality of the evidence on record show that title **No Ntima/Igoki/1353** did not belong to the deceased. That was an independent property belonging to the late **M’Mbogori M’Bagine** who had been registered as such way back in 1965. That is why, even after the caution was lifted and the aforesaid Chief’s meeting ruled in his favour, **RW2 and RW3** did not challenge it.

22. In any event, apart from mere allegations, neither the petitioner nor her brothers tendered any evidence to prove that **Plot No. 1353** had at any time belonged to the deceased. Accordingly, that property belonged to **M'Mbogori M'Bagine** and not the deceased.

23. The next issue is whether **L.R. No. Ntima/Igoki/537** is available for distribution. The protestor's case was that the deceased had divided **L.R. No. Ntima/Igoki/537** equally to his 3 sons in 1974. That he directed that any of his daughters who returned from her marriage should get accommodation from the brother who partook her dowry.

24. On the other hand, the petitioner and her brothers contended that, the deceased had only shown his 3 sons where to cultivate. That the daughters were intermittently cultivating the portions belonging to **RW2** and **RW3**.

25. I saw and observed the witnesses testify. The petitioner and her witnesses were erratic and gave contradictory testimonies. They were not truthful and their narrative was not convincing. They alleged that the daughters of the deceased were still using the suit land a fact that was found to be false when the Deputy Registrar visited the suit land together with the parties and their respective advocates.

26. The totality of the evidence on record shows that all the parties were in agreement that the deceased divided **L.R. No. Ntima/Igoki/537** equally amongst his 3 sons in 1974. That by the time of his demise, his 3 sons had occupied and continued to cultivate their respective portions exclusively. That the deceased did not give his daughters any land.

27. **Section 2 (2) of the Law of Succession Act, Cap 160** provides that:-

“(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

28. In this case, the deceased died in 1976 before the said Act came into force. In this regard, the applicable law to his estate will be the Meru Customary Law as he was Merian. Meru customs on inheritance were discriminatory against women as daughters could not share in the land of their parents. (See: **Eugene Cotran, Restatement of African Law: 2 Kenya II, The Law of Succession at page 34**).

29. The **Constitution of Kenya, 1963** had provisions that outlawed discrimination on grounds of race, sex, amongst others in **section 82**. In **Mary Rono v Jane Rono & another [2005] eKLR** the Court of Appeal held: -

“The Constitution of Kenya also in section 82 outlaws discrimination on grounds, inter alia, of sex.”

30. The **Constitution of Kenya 2010** reinforced this position whereby Article **60 (1) (f)** provides: -

“(1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—

...

(f) elimination of gender discrimination in law, customs and practices related to land and property in land; and...”

31. In this regard, any custom that promotes discrimination cannot be applied as it would be repugnant to justice and morality. I will therefore refuse to apply the Merian Customary law on inheritance in this matter.

32. In the circumstances, how then should the estate of the deceased in this case be distributed? There is overwhelming evidence on record that before the deceased died, he had distributed the suit land amongst his three sons. The testimony of the protestors is that the brothers from the second house were to accommodate their sisters in accordance with how they received and consumed the dowry obtained from the daughters. The petitioner and her brothers denied this fact.

33. To this court's mind, what is of significance is that, any adult of sound mind is entitled to will and give away his property during his lifetime as he wishes without any restrictions. In the making of wills, the freedom to will away ones property is perfectly free and unrestricted. (See **Sections of the Act**). This includes the giving of gifts and specific bequests.

34. In the present case, the deceased divided his **L.R. No. Ntima/Igoki/537** to his sons equally in 1974. The said sons remained in possession thereof for over a generation, 38 years to be exact, before the present Cause was lodged. During the said period, they not only cultivated and developed their respective portions, but they also settled their children thereon and made the use thereof exclusively.

35. As earlier indicated, I did not believe the testimony of the petitioner that all what the deceased did was to show the sons where to cultivate. The deceased not only gifted but he actually surrendered the exclusive possession of the property to the said sons and that is how they have continued to be in occupation to date.

36. The deputy registrar of this court visited the suit land on 5th March, 2019 and filed his report. According to the said report dated 17th March 2019, the suit land is sub-divided into three portions with clear boundaries between them. The boundaries comprise of mature trees both exotic and indigenous as well as barbed wire fence.

37. The three portions are occupied by the 3 sons of the deceased and their respective families. The sons have also settled their grown up

children on their respective portions. The only daughter in occupation is the petitioner who occupies a part of Charles Mutua's portion. From the evidence on record, she was settled on that portion after the clan ruled in her favour in 2011 that the deceased had directed where each of the daughters was to settle in the event she returned home.

38. From the foregoing, it turned out that the testimonies of **RW2** and **RW3** that **Anjerica and Margaret** were cultivating parts of their portions was misleading. The status quo has been obtaining now for over 40 years. The parties retained that state of affairs as they knew and respected the decision of the deceased. They never sought to disrupt it. While our Constitution is a living Constitution that looks backwards and forwards, it is not to be applied to cause chaos where there was none hitherto.

39. I have already held that during one's lifetime, an adult of sound mind is entitled to will and dispose any of his properties without any restrictions whatsoever. In the present case, the deceased wholly divested himself of the land by dividing it into 3 equal portions and gave it to his 3 sons. None of the daughters questioned his action in his lifetime. All the parties accepted and acquiesced to that state of affairs and lived with it for over 40 years. Circumstances changed as the sons also divided their portions and had their children occupy portions thereof which they also developed. Is the status quo reversible?

40. I do not think so. Not only did the said children settle and develop their respective portions, they also settled their children who have likewise occupied parts thereof and developed the same. All this happened on the basis that the deceased had properly settled his property during his lifetime.

41. Both the law and the Constitution are predestined there to organize and preserve societal set up. In any civilized society, both the Constitution and the law exist for purposes of maintaining certainty, predictability, stability, peace, harmony and for the development of the human person. They are not meant to cause uncertainty, disharmony, instability and chaos in society. The law exists to promote harmony, an orderly and organized society.

42. It is not for the courts to organize peoples personal affairs. Where an adult of sound mind has organized his personal affairs in a particular manner, and those affected thereby either approve of it or acquiesce to that state of affairs, it is not for the court to intervene and disrupt the same. Moreso, in a set up like the one of Meru, it is highly inflammatory to attempt to disrupt the lives, structured and set up of the people who have lived peacefully and harmoniously for 40 years by attempting to read into their situation, abstract principles in the name of non-discrimination. Of course, where people die intestate and have not distributed their properties during their lifetime, their estates cannot escape the dictates of **part V** of the **Law of Succession Act** and the Constitution.

43. I hold and support the view expressed in the cases of **Silas Ruguaru M'Itambu v. Gedion Mutwiri M'Itambu & Another [2017] eKLR** and **In re Estate of Nahason Arimba Ndiira (Deceased) [2019] eKLR**. In the latter case, the court held:-

'Having settled the 1st 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. ...

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 that it is part of this 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. ... Moreso, where there was no objection by his beneficiaries during his lifetime".

44. I reiterate the foregoing here in toto. The state of affairs set up by the deceased remained unchallenged between 1974 and 2012. When the petitioner returned home in 2007, she found the widow of the deceased who buttressed the position decreed by the deceased and made the petitioner occupy the portion of Charles Mutua.

45. To my mind, to disrupt the state of affairs that has existed for 40 years would be unfair. That is how the deceased wished his children to be settled. All the parties have respected that position until 2016. For tranquility, harmony, stability and orderliness of the deceased's family set up, the said state of affairs should not be disrupted. In view of the foregoing, I find that the deceased had divided his land in 1974 and gifted the same equally to his sons. The same is to be maintained. The suit land is to be distributed in accordance with the occupation thereof by the parties.

46. Although the court had directed the district surveyor to carry out a survey of the property and specify how the parties have occupied the same, this was however not done. The court is therefore unable to ascertain how the parties occupy the land.

47. Accordingly, the protest is hereby allowed on the following terms: -

a) the property **L.R. No. Ntima/Igoki/537** is to be distributed in accordance with the way the parties occupy the same on the ground that is; the family of **M'Mbogori M'Bagine, Francis Murithi, Charles Mutua** and **Susan Nkatha**;

b) the Meru District Surveyor do visit **L.R. Ntima/Ntakira/537** and establish the acreage held by the family of **M'Mbogori M'Bagine, Francis Murithi, Charles Mutua** and **Susan Nkatha** and file a report in respect thereof within 30 days in order to finalize on distribution;

c) the sum of Kshs.4,444,340/- from the compulsory land acquisition lying on bank A/C No. xxxx together with interest accrued thereon be distributed equally amongst all the children of the deceased;

d) This matter be mentioned within 45 days to make final orders;

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

It is so decreed.

DATED and **DELIVERED** at Meru this 23rd day of May, 2019.

A. MABEYA

JUDGE