



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 82 OF 2015**

**IN THE MATTER OF THE ESTATE OF M'TUERANDU MBURUGU alias M'TWERANDU MBURUGU (DECEASED)**

**ESTHER KARIMI ..... PETITIONER/APPLICANT**

**VERSUS**

**SILAS MBUI ..... OBJECTOR/RESPONDENT**

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

1. **M'Tuerandu Mburugu alias M'Twerandu Mburugu ("the deceased)** died on 16<sup>th</sup> June, 1987 aged 100 years. He was survived by his son **Silas Mbui** and left behind **Igoji/Kiangua/701** as the only asset forming his estate.
2. On 16<sup>th</sup> February, 2015, the petitioner petitioned for grant of letters of administration intestate which was issued to her on 16<sup>th</sup> June, 2017. She then applied for its confirmation vide an application dated 16<sup>th</sup> September 2015 wherein she proposed to distribute the entire estate to herself.
3. Silas M'Mbui Rwaimba, her father, objected to both her proposed mode of distribution as well as her being the administrator of the estate of the deceased. He contended that he was the only son of the deceased and the petitioner was his first born child. That at no time did the deceased hold any meeting concerning distribution of his properties before his demise.
4. He further contended that the only meeting held was in respect to sharing and or distribution of the suit land held by himself on 12<sup>th</sup> April, 2014 in the presence of the area chief, his assistant and all the members of the family. That the petitioner never opposed his mode of distribution in which he had distributed to her and her children ½ acre each.
5. The matter was determined vide *viva voce* evidence. **PW1 Silas Mbui Rwaimba** testified that he is the only surviving child of the deceased. That the deceased did not give the petitioner the suit land as it was left to him. He did not file any succession cause but he went to the surveyor and the land was sub-divided in 2014. He had divided the land unevenly amongst his children depending on the conduct of each child and how they were relating to him by way of support. He denied ever assaulting the petitioner or chasing her away from home.
6. **PW2 Erastus Muchungu Mbui**, a son of **PW1** and grandson to the deceased testified that, the deceased did not give the suit land to the petitioner as contended by her. That 10 years before the deceased passed on, the deceased gave him the title to the suit land to keep for him. Since the petitioner could not agree with **PW1**, she went to live with him in the early 1970s and only returned to the suit land after it was divided, which was after the deceased had passed away. She had been settled by **PW1** on her portion together with her children.
7. At the close of the protestor's case, the petitioner gave a sworn testimony as **RW1** and called one witness. She told the court that the suit land was left to her by the deceased whom she was living with and assisting. That her father, **PW1**, was given land by the deceased but he sold it which resulted in the two quarreling.
8. That using the clan elders, the deceased chased the protestor and all his children away from the property. The deceased refused to give him land and told him that he was going to give it to her. **PW1** then went and bought two acres of his own. However, he still used to come to the suit land.
9. **RW2 Mbijiwe Kanampiu** stated that **PW1** was his neighbor and he had known him and his family since 1945. That the deceased quarreled with the objector when the latter sold land and told him that he would not give him land but would give it to the petitioner.
10. I have considered the entire record and the submissions of the petitioner. The issues for determination are; ***did the deceased leave the suit land to the petitioner? who should be the administrator of the estate of the deceased and, how should the estate be distributed?***
11. It was the petitioner's case that the deceased left the suit land to her and not her father. However, when challenged she could not tell the

court when the deceased did this. She stated that there were four witnesses but that she could not produce them as the deceased had left a curse that no one should come to court to fight about the land.

12. She however, called one witness **RW2** who told the court that the deceased told him that he had left the suit land to the petitioner when he was in his house in 1984. However, the court noted that **RW2** was not among the persons present when the deceased allegedly gave the petitioner the land.

13. On the other hand, **PW1** testified how the deceased had four wives and how he was the only child of the deceased who survived him. He denied the petitioner's contention that the deceased had left the suit land to her. **PW2**, his son and grandchild of the deceased supported his testimony.

14. It is the cardinal principal of law of evidence that he who alleges must prove. The petitioner sought to prove that she ranked in priority in bringing the cause than her father. That the property forming the estate was left to her and not the deceased's son who is her father.

15. The petitioner failed to offer sufficient evidence to prove her claim. She failed to procure the attendance of the witnesses who allegedly attended the meeting where the deceased gave her the suit land. I did not believe the explanation offered. It was not stated when, where and to whom the deceased pronounced the alleged curse. In any event, if there was such a curse, she never explained why she and her father are now embroiled in the present dispute concerning the same land.

16. To my mind, there were no such witnesses and if there was, it is likely that if they appeared, they would have given evidence that would have been adverse to the petitioner. disfavour. See **section 112 of the Evidence Act, Cap 160**.

17. I did not believe her testimony or that of her witness, **RW2**. It is unlikely that the difference in age between the deceased and **RW2** of nearly 40 years, could have allowed the deceased to be visiting **RW2** and discuss with him as alleged. The deceased died in 1987 aged 100 years at which time **RW2** must have been about 50 years.

18. The evidence on record is that; the petitioner has had a turbulent life with her father, the objector, ever since she dropped out of school in the late sixties. She has been living in and off the suit land because of their irreconcilable differences. The court notes that on 12<sup>th</sup> April, 2014, the objector called a meeting at his home and in the presence of the area Chief and his Assistant, 'distributed' the suit land to all his children including the petitioner and her children.

19. The petitioner was not happy with the objector's 'distribution' of the suit land. Indeed, she is recorded to have been absent from that meeting. It is not lost of this court that, while the deceased died on 16<sup>th</sup> June, 1987, the petitioner did not seek to succeed the deceased for 28 years which she would have done immediately after his demise if the land had been bequeathed to her. However, she filed the present petition only 10 months after the meeting of 12<sup>th</sup> April, 2014 in which the objector had purported to 'distribute' the suit land.

20. To my mind, the petitioner came to court vide this Succession Cause in order to counter her father's act of illegally distributing the suit land without first taking succession.

21. The petitioner did not strike me as truthful. In the petition, she told this court that she had lodged the same as a daughter in law to the deceased, a fact she very well knew was untrue. She was but a grandchild of the deceased and had no priority over and above her father or her siblings.

22. In view of the foregoing, I make a finding and hold that the petitioner has not proved that the suit land was given to her by the deceased during his lifetime. He never put her in exclusive possession. The objector his wife and children continued to live in and make use of the land until the deceased died and even to date. To the contrary the petitioner is said to have been living elsewhere until 2014. Her right to the suit land is through her father. That the objector as the sole surviving son of the deceased is the one entitled to administer the estate of the deceased.

23. The probate and administration of a deceased person is, as a general rule, to be conducted according to the law laid down under **the Law of Succession Act** together with the **Probate and Administration Rules**.

24. In a case, such as the present one where a deceased dies intestate leaving behind children and no spouse **section 38 of the Law of Succession Act, Cap 160** applies. That section provides:-

***"Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children."***

25. This being the case, the estate of the deceased ought to be left to the surviving child as stipulated under **Section 38 of CAP 160**. Accordingly, the suit land is to be held by the objector wholly.

26. Since the objector is the one who is entitled wholly to the suit land, it is him who has the right to determine how the estate is to be distributed. At the trial, he set out his proposed mode of distribution which this court will adopt.

27. However, since his distribution was in excess of over 3 acres, the court will reduce the shares that are largest and leave those shares that were small intact.

26. Accordingly, the objection is hereby allowed. I will make the following orders:-

a) the grant issued to **Esther Karimi** on 16<sup>th</sup> June, 2016 is hereby revoked;

b) a fresh grant hereby issues to **Silas Mbui M'Rwaimba**;

c) the estate of the deceased is to be distributed as follows: -

**Igoji/Kiangua/701**

- i) Silas Mbui M'Rwaimba - 3 acres
- ii) Esther Karimi - 0.5 acres
- iii) Douglas Mwiti - 0.5 acres
- iv) Peterson Kariuki - 0.5 acres
- v) Asford Mwenda - 0.5 acres
- vi) Samson Muriuki - 3.7 acres
- vii) Erastus Muchunku - 3.7 acres
- viii) Lucy Kaguthi - 0.75 acres

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

**DATED and DELIVERED at Meru this 23<sup>rd</sup> day of May, 2019.**

**A. MABEYA**

**JUDGE**