



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 497 OF 2013

IN THE MATER OF THE ESTATE OF M'RWANDA M'IRUKA

SAMSON MUTHAMIA M'RWANDA..... PETITIONER

VERSUS

JOYCE MUTHOMI M'IRURA RESPONDENT

J U D G M E N T

1. **M'Rwanda M'Iruka** ("the deceased") died on 12th November 2011 domiciled at Kathera Location, Meru. As per the letter of introduction by the area Chief dated 16th April, 2013, the deceased left behind **Joyce Muthoni M'Rwanda, Joseph Kithinji (deceased but left children), Josephine Karambu, Samson Muthamia M'Rwanda, Jenniffer Kabaka, Lydia Mugotio (deceased) and Kijiira M'Rwanda** as his dependants.

2. On 13th September, 2013, **Samson Muthamia M'Rwanda** ("the petitioner) petitioned for letters of administration intestate whereby he listed **Plot No. 68 'B', Nkubu Market, Abothuguchi/Kiija/1164, Nkuene/Kathera/1751, Nkuene/Kathera/1752, Abothuguchi/Kiija/1162 and Abothuguchi/ Kiija/1163** as the assets forming the estate of the deceased.

3. On 12th March, 2013, the grant was issued to him which was confirmed on 30th April, 2015 whereby save for **Nkuene/Kathera/1751**, the rest of the estate was distributed to the petitioner.

4. Pursuant thereto, the petitioner filed an application dated 14th May, 2015 citing difficulties in transferring **Nkubu Market Plot No. 68 B** to one **Lawrence Gitonga**. He prayed for substitution of his name with that of **Lawrence Gitonga**. The application was allowed and the grant was rectified accordingly.

5. On 25th November, 2015, **Joyce Muthoni M'Rwanda ("the objector")** lodged a summons for the revocation and/or annulment of the grant. She contended that she was the only surviving widow of the deceased. That the petitioner had fraudulently petitioned for letters of administration by making a false statement and by concealment of material facts.

6. On 26th September 2018, the parties recorded a consent whereby the grant was revoked and **Samson Muthamia M'Rwanda and Josephine Karambu** were appointed as joint administrators of the estate.

7. On 6th May 2019, before the matter proceeded for hearing, the parties recorded consent distributing part of the estate as follows:-

- a) L.R. Nkuene/Kathera/1752 (3½ acres) - **Samson Muthamia M'Rwanda.**
- b) L.R. Nkuene/Kathera/1750 (3½ acres) - **Charles Mutwiri to hold in trust for himself and;**
 - i) **Japheth Murithi Kithinji**
 - ii) **Benard Kiogora Kithinji**
 - iii) **Mureti.**

8. In the consent, the parties acknowledged that the deceased had given his daughters **Josephine Karambu, Jenniffer Kabaka and Lydia Mugito (deceased) L.R. Nkuene/ Kathera/1751** measuring 1 acre which they sold. The issue therefore that was tried for determination was how **Plot No. 68B, Nkubu** and 3 acres comprised in **L.R. Abothuguchi/Kiija/369**, are to be distributed.

9. The matter thereafter proceeded for hearing by way of viva voce evidence.
10. **PW1 Jenniffer Kabaka** testified that she is a daughter of the deceased and the objector herein. She was at the time residing with and taking care of the objector who was aged 79 yrs old and **Kijiira M'Rwanda**, her brother who was mentally challenged.
11. She told the court that, during his lifetime, the deceased had distributed his properties. That he had stated that **Plot No. 68B, Nkubu** be granted to the objector and **Kijiira M'Rwanda**. That she should be given a portion of **Abothuguchi/Kiija/369** so that she can reside there with her said brother and mother and bury them there in their eventual demise.
12. It was her testimony that the deceased had also granted **Charles Mutwiri** and **Susan Kagwiria** (her daughter) an acre each on the said **Abothuguchi/Kiija/369** on the basis that they had both taken care of him before his demise.
13. As for **Plot No. 68B, Nkubu**, it was her testimony that to-date, she was collecting the rent therefrom for the use by the objector and **Kijiira M'Rwanda**. She admitted that the deceased had not left any written will. That **Abothuguchi/Kiija/369** had been sub-divided into portions with new numbers, to wit, 1162, 1163 and 1164.
14. **RW1**, the petitioner testified that he is the one who constructed the premises erected on **Plot No. 68B, Nkubu** completing the same in the year 1980. He thereafter allowed the deceased to collect the rent so that he could take care of the children of **PW1**. That he had constructed on **Abothuguchi/Kiija/369** and that is where the deceased, the objector and **Charles Mutwiri** lived. He proposed that the same should be distributed to **Joyce Muthoni (1acre)**, **Kijiira M'Rwanda (1acre)** and the remaining acre be shared between him and Joseph.
15. **RW2, Romano Mbae Kaiga** testified that he was aware that the petitioner had been given **Plot No. 68B** by the deceased as a gift through a family meeting and that the petitioner had also constructed on the same. That he knew this because he had been deputised by the area chief to go and settle a dispute on rent collection from the said premises between the petitioner and his sister.
16. The deceased was polygamous. He had two wives who had three children each as follow:-

Karoki M'Rwanda (deceased)

- a) **Joseph Kithinji (deceased)**
- b) **Josephine Karambu**
- c) **Kijiira M'Rwanda (mentally challenged)**

Joyce Muthoni M'Rwanda (objector)

- a) **Jenniffer Kabaka**
- b) **Samson Muthama M'Rwanda**
- c) **Lydia Mugito (deceased)**

17. In view of the foregoing, the provisions of **section 40 of the Law of succession Act ("the Act")** applies to this estate. That is, the estate of the deceased is to be distributed equally amongst the children of the deceased with the widow(s), if alive, forming a separate and independent unit.
18. From the evidence on record, it is clear that the deceased had distributed most of his properties during his lifetime. It would seem that the only properties the deceased had not distributed or settled were the ones currently in dispute by the beneficiaries. Indeed, the consent recorded by the parties seems to have been as had been decided or how the properties had been divided by the deceased during his lifetime.
19. The only issue therefore for determination is, how **Plot No. 68B, Nkubu** and **Abothuguchi/Nkuene/369** should be distributed.
20. I have taken into consideration the evidence as outlined above, the affidavits presented in the course of these proceedings and the submissions of the parties. It is clear from the record that at all times **Plot No. 68B, Nkubu**, was in the name of the deceased. The rental proceeds therefrom have been collected by **RW1** for the benefit of the deceased, the objector and **Kijiira M'Rwanda**. This has continued to-date.
21. It was the petitioner's contention that the deceased had given him the said property whereby he erected a premises thereon from 1970 to 1980. However, he failed to present credible or any evidence to prove his allegations. I did not believe his evidence at all. He appeared to me to be driven by nothing but greed to disinherit the other beneficiaries.
22. It should be recalled that immediately he was issued with the grant in 2013, he could not wait for the same to be confirmed before he rushed to sell it. On 10th February, 2015, he purported to execute a sale agreement with one **Lawrence Gitonga Kirima** for the sale of the said property for Kshs.3,000,000/-. In order to perfect the fraud, he returned to court with an application in May that year and had the name of the said **Lawrence Gitonga Kirima** included as a beneficiary of that property!

23. The petitioner's witness, **RW2** was no better. He contradicted himself as to the nature of the dispute for which he had allegedly been called to solve at the home of the deceased. He was not clear as to whether he was called to solve a rent dispute or a land dispute at the deceased's home. I did not believe him.

24. From the bequests that were made by the deceased, no property was given to the widow and **Kijiira M'Rwanda**. **Section 42 of the Act** provides to the effect that when distributing property, the court has to take into consideration the properties, gifts or bequests made to any of the beneficiaries during the lifetime of the deceased.

25. Two of the sons of the deceased had been given 3 ½ acres each as can be seen from the consent entered by the parties in respect of **L.R. No. Nkuene/Kathera/1752** and **Nkuene/Kathera/1750**. The daughters got only one acre which they sold. The widow and **Kajiira M'Rwanda** also got nothing.

26. **Plot No. 68B, Nkubu** has remained in the name of the deceased and the rentals therefrom have to-date been used for the benefit of **Kijiira M'Rwanda** and **Joyce Muthoni Muirura**. I saw both in court, the former was mentally challenged while the latter was old and frail. I distribute that property to them with **Joyce Muthoni Muirura** having a life interest thereon. **Jennifer Kabaka** shall hold the same in trust of **Kijiira M'Rwanda**.

27. As for **L.R. Abothuguchi/Kiija/369**, which was subdivided by the deceased into **Abothuguchi/Kiija/ 1162, Abothuguchi/Kiija/1163** and **Abothuguchi/ Kiija/1164**, respectively, I have dully considered the proposal by both parties. **Section 29 of the Act** gives priority to the children of the deceased to inherit first as opposed to grandchildren.

28. There was no acceptable evidence to show that the deceased had given parts thereof to his grandchildren as alleged by **PW1**. If that was his intention, nothing would have easier than for him to transfer the same as he had done to the sons and daughters on the **Kathera** properties.

29. In **Veronica Njoki Wakagoto (deceased) (2013) eKLR**, the court held:-

“... grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

30. **PW1's** testimony that **Susan Kagwiria**, her daughter, took care of the deceased and the objector by staying with them during her formative years and the old age of deceased was not reason enough for her to be entitled to a share of the estate. The fact that the deceased paid school fees for the grandchild does not necessarily prove that she was maintained by the deceased prior to his demise. **Susan Kagwiria** benefited or will benefit from the inheritance of **PW1**.

31. Since the sons had already benefited from bequests of 3 ½ acres each, while all the daughters shared only one acre, the remaining asset **Abothuguchi/Kiija/369** should be distributed to the daughters of the deceased. The fact of them being female does not justify them being given a lesser share to that of the sons.

32. In **the Matter of the Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (Deceased) [2017] eKLR**, the court expressed itself as follows regarding discrimination of daughters in inheritance:-

*“... From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when **RONO vs. RONO [2008] 1 KLR 803** delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement the Constitution- which states categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the Constitution.”*

33. In this regard, I find that **Abothuguchi/Kiija/1162, Abothuguchi/Kiija/1163** and **Abothuguchi/Kiija/ 1164** is to be distributed to **Josephine Karambu Murithi, Jennifer Kabaka** and **Joyce Muthoni M'Rwanda**.

34. The upshot of this judgment is that the application by the Objector is allowed. The net estate of the deceased shall be distributed as follows: -

a) **Nkubu Plot No. 68B** to **Kijiira M'Rwanda** and **Joyce Muthoni Muirura** shall have a life interest (**Jennifer Kabaka** shall hold the same in trust of **Kijiira M'Rwanda**).

b) **Abothuguchi/Kiija/1164** – **Josephine Karambu Murithi (wholly)**.

c) **Abothuguchi/Kiija/1163** - **Jennifer Kabaka (wholly)**.

d) Abothuguchi/Kijja/1162 - Joyce Muthoni M'Rwanda (wholly)

35. This being a family matter, I make no order as to costs.

It is so decreed.

DATED and **DELIVERED** at Meru this 20th day of June, 2019.

A. MABEYA

JUDGE