



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.343 OF 2010

IN THE MATTER OF THE ESTATE OF M'IMPWI

KILAKU ALIAS MBAABU M'IMPWI KILAKU (DECEASED)

BEATRICE CIOMAROO M'IMPWI.....1ST PETITIONER

JOHN BARIU MBAABU.....2ND PETITIONER

VERSUS

CHARITY KANINI M'IMPWI.....OBJECTOR/PROTESTER

RULING

1. By an application dated 8th July 2011 Beatrice Ciomaroo M'Impwi sought that grant of Letters of Administration made to her and John Bariu Mbaabu on 15th of February 2011 be confirmed. The application was supported by grounds on the face of application and affidavit sworn on 8th July 2011 by Beatrice Ciomaroo M'Impwi.
2. Charity Kanini M'Impwi filed an affidavit of protest on the petitioner's mode of distribution as the 2nd wife of the deceased. She listed the children of the deceased in applicants house as well as children of the deceased in her house. She objected to Beatrice Ciomaroo and John Bauri being the sole administrators since there were 2 minors and due to hostility and animosity shown by the 1st house which don't have interest of her children at heart. She said motor vehicle Registration KBK 257 A didn't belong to the deceased but a neighbour known as M'Njiria and that motor vehicle Registration KAC 926 N Land Rover belongs to his son Isaac Kaberia. She said that it is only LR Upper Athiru Adjudication Section plot 1167, 1504 and 1392 which belonged to the deceased. She said she was not aware of plot No. Upper Athiru Adjudication section No.s 1439, 1121 and 1728 is part of the deceased estate. She said it is was established they belong to the deceased they should be distributed equally between the 2 houses.
3. She said land no Upper-Athiru Adjudication section No. 1453 belongs to Isaac Kaberia who was gifted by the deceased and it is not available for distribution. She said Isaac Kaberia bought land No. Upper Athiru Adjudication section No. 1453; She said plot no. 6629 Upper Athiru Adjudication is hers as she bought it. She said that plot No. 9068 Upper Athiru Adjudication section belonged to Stanley Kobia as deceased bought it for him. The protester also averred that Isaac Kaberia bought plot No. 7149 – Amwathi Maua Adjudications section partly and the other part was gifted to him by the deceased and is not available for distribution. She also said that the deceased gave plot No. 5598 – Amwathi/Maua Adjudication section to James Mwenda and it doesn't form part of the estate. she said at paragraph 19 that plot No. 9829 she alluded to at paragraph 18 as belonging to Isaac Kaberia also belongs to Charity Kanini.
4. At paragraph 20 the protester averred that plot no. 3714 Amwathi/Maua Adjudication section belongs to Jeniffer Kalimbi and is not part of the deceased's estate.
5. At paragraph 21 she said that plot in Athiru Gaiti within Kilindani/Ndila Adjudication section belonged to her and that she was given land by her maternal uncles. She said that she is the one who tends to the tea bushes and she is entitled to monies held at Kiegoi Tea Factory Ltd as she has several minor children in school unlike the 1st wife to the deceased whose children are all grown ups. She said the 3 parcels of land in the name of the deceased should be shared between the 2 houses.
6. The protest was heard by way of viva voce evidence. The protester Charity Kanini adopted her statement as her evidence in court. The petitioners advocate concurred that land Nos. 6629 and 6650 belonged to the protester and should not therefore form part of the estate of the deceased. The protester in cross examination admitted she withdrew money from the deceased persons account after he had died and she was charged. She said the money she withdrew was proceeds of tea leaves she had taken to Kiegoi Tea Factory. She claimed the tea leaves were partly on the land she bought and on the land belonging to her husband in Kiremewe. Protester said that the deceased transferred one

parcel of land to petitioners son when he was ailing. She said the 2nd petitioner beat the deceased –wife and he was arrested and taken to police station.

7. She said parcel No. 763 – Upper Athiru has miraa and it is registered in the name of Isaac. She said the deceased gave land to Isaac. She said she didn't know how old her 3rd born son Isaac was. She said that her husband was very sick and was unable to walk and it is Isaac who went to lands office and was given land. She said the deceased was admitted severally. She said that her husband mentioned the children to be given land including Isaac, Jennifer, Nkunja and Kobia. She said 2 parcels were bought for Kobia and he sold them. She said Kobia was son to 1st Petitioner.

8. Protester said that the deceased used to stay with her as petitioners family members used to beat him. She said parcel No. 1504 was transferred to her name she said that parcel No. 1504 had tea leaves and that they used her husbands Out grower number to deliver tea leaves. Protester admitted she was charged in Maua Criminal case and convicted for offence of forging documents. She said she didn't forge documents .

9. She said she didn't forge documents to transfer land to her name and her sons name. she said her husband had signed documents for transfer of land and withdrawal of money but died before they were executed.

10. In re-examination petitioner said that her husband the deceased gave her land and also gave Kobia and Nkunja the sons of the 1st Petitioner. She said she stays with her children on one piece of land and her co-wife and her children stay on another parcel of land . she said 1st petitioner was given land by the deceased and her children were also given land.

11. The 2nd protesters witness Ibrahim Mutura testified on 24th July 2017. He said the deceased was his friend and neighbour and he had 2 wives the 1st petitioner and protester herein. She said 1st petitioner was staying in Athiru whereas protester stayed in Giteretu. The witness said the deceased gave land to 1st petitioners children. He said the protester was given land in Kirimene. He said the deceased was older than him by 15 years but could call him to resolve disputes in company of the deceased persons brother namely Peter Kalaiyo.

12. PW2 said he was formerly a lands committee member and his duties were to make sure boundaries were agreed upon and there were no fights. He said he didn't take protester to Maua court to file succession cause and he was not aware of Criminal case against Charity. He said they went to apply for school fees for protesters children. He said the deceased shared hi land to his children. He said Nkunja was given land and Kobia was given land that had been bought. He said 2 of the deceased sons were not given land but they were to take land that they were using.

13. He said the deceased transferred parcels of land to Jeniffer and Isaka, but 2 children in Charity's house were not given land. He said he only heard that land was transferred but Kaberia constructed his home on plot no. 763 Athiru. He confirms the land adjudication officer refers to LR 763 as being in the name of the deceased. PW2 said he didn't know particulars of land transferred to Isaka Kaberia. He said Bariu had not been given land as well as Kareria but harvest tea and miraa on the land. He said he was not aware of Isaka and M'Mauta's lands committee members are related. He said Muriu is not sister of the deceased but is a distant relative.

14. The 3rd protester witness George Bernard Owuor Senior Land Adjudication Assistant based in Maua – in charge of Amwathi/Maua Adjudication section and Upper Athiru Adjudication section referred to letter dated 16th February 2012- copy confirming ownership of land Nos 763/1453, 6624 and 9068. The officer was stood down to get certified copies of the document confirming ownership of parcels No. 763, 1455, 6629 and 9068. On 8.11.2018 when he resumed he said that extracts for parcels No. 7149, 9828, 5598, 9829 and 3714 –he was not custodian. He said owners of land should have custody of MFIP 5(a).

15. He said in cross examination that Demarcation officers are the right people to confirm ownership of land and they rely on correspondence from Demarcation officers to establish ownership of land.

16. The petitioner testified on 4th December 2018 and said she was 1st wife to the deceased. She confirmed that the deceased prior to his death resided at the home of the protester. She admitted the deceased had a case in Maua against her son John Barui the 2nd Petitioner herein. She said she is the one who bought parcels no. 1504 and 763 Upper Athiru and that Isaac Kaberia was only allowed to use the land by the deceased as a caretaker. She said although she bought the 2 parcels they were registered in her husband's name. she said that Isaac Kaberia may have changed land No. 763 to her name because she didn't understand how it came to be in his name as the deceased didn't share his property during his lifetime. She said Isaac Kaberia and the protester wanted to grab her land.

17. She admitted Isaac started using parcel No. 763 when deceased was in hospital. She said No. 5598 is occupied by protester and she has no objection to protester having it. She said that her 1st born child was born in 1963 and that protester got married in 1970. She said she acquired parcel No. 763 before protester got married to the deceased. She said she lives on parcel no. 1392 – upper Athiru/Gaitu Adjudication section which is in the name of the deceased. Sabina Mwiru M'Lingera testified in support of 1st Petitioner and said that she 1st petitioner and protester sty in separate parcels of land in Kirumene and Iteretu respectively. She said it's her brother who sold the land with Miraa to the 1st Petitioner. She said the land with tea plantation was given to 1st petitioner by her father. She said that it was protester was protester who was using the land with tea plantation. She said the relationship between 1st petitioner and her brother the deceased herein was cordial.

18. Isaka M'Maguta also testified as land Committee member. Upper Athiru/Gaitu Adjudication was still ongoing. He said the deceased was at his 2nd wife – the protesters home at the border of Maua and Akachiu. He said the petitioner had a home in Iteretu. He said that 1st petitioner bought the land with miraa from the father of Sabina but during demarcation the land was registered in the name of the deceased. He said that the deceased could not deal with land without consulting his wife and children. He said that Beatrice bought land in 1987. He said Isaka Kaberia is using miraa land illegally. He said the homes of 1st petitioner and protesters are about 2Kms apart from each other in

Athiru and Maua. He said the miraa farm should be inherited by 1st petitioner as process of transfer of land to Isaka was not proper.

19. At the close of both the protester and petitioners case the protester at the time of writing this ruling had filed written submissions filed on 3.6.2019 but the 1st petitioner had not filed any submissions. It was agreed that parcel No.s 6629 and 6650 are rightly in the name of the protester Charity Kanini and should therefore not fall for distribution. The 1st Petitioner also had no objection that parcel No. 5598 on which protester home stands should go to her. It is also not in dispute that parcel no. 1392 Upper Athiru is occupied by 1st Petitioner but in the name of the deceased.

20. What is strongly contested is the land which has tea plantation which protester claims is in her name and which petitioners witness said was given to petitioner by the deceased persons father and which delivery number is in the name of the deceased as well as parcel of land upon which miraa is grown and which Isaka Kaberia is said to have constructed his land but which Sabina Mwiru and Isaka Maguta say was bought by 1st Petitioner and should therefore go to her. The court noted that when protester was questioned about these parcels of land she was evasive and could not answer questions put to her in respect of the 2 contentious parcels of land and the court concluded that her demeanour was questionable. It was noted that the deceased died on 3rd January 2010 but letter of ownership is written on 10th June 2010 by an Adjudication officer who failed to attend court and whom the 3rd Protester witness George Bernard Owuor Senior Land Adjudication Assistant was unable to obtain a register to court to confirm that EXP5(a) was authentic as its author didn't attend to testify. He said where there are 2 letters contradicting each other the later should prevail.

21. He said that Demarcation officers who work at the Division level are the right persons to confirm ownership of land. The protester was charged for forging documents and using the same to withdraw money that was proceeds of tea leaves in the name of the deceased and land no. 1604. Protester said the deceased transferred the land when he was ailing to her son and to one of Beatrice's sons.

22. She admits that the deceased could not walk and that Isaac went to land office on his own and would clarify but didn't call Isaac to testify and clarify. The deceased persons brother Peter whom protester said knew much about the transactions that the deceased carried out also died. The petitioners witness Isaka Maguta confirmed that he and the deceased brother witnessed most of the transactions the deceased carried out. She confirmed that parcel No. 1504 which has tea leaves is still in the name of the deceased. Protester confirmed that her husband had written and signed transfer and withdrawal forms but died before they were executed. The protesters witness claims he heard the deceased transferred land to his children but has said 2 of the children were not given land. He has not said which children were given land and which 2 children were not given land. He has also not given particulars of the parcels of land that were given to the children.

23.

24. The undisputed properties.

- a. Upper Athiru Adjudication Section plot no. 6629 goes to protester and her children to agree on how to share.
- b. Upper Athiru Adjudication section 6650 is also to go to protester.
- c. Plot no. 5598- Amwathi Maua Adjudication section also goes to the protester and her children to share equally or as agreed.
- d. Plot no. 1392 where 1st petitioners home stand – Upper Athiru Adjudication section will go to the 1st Petitioner and her children.
- e. The Protester and her son Isaack Kaberia forged documents and accessed money in deceased persons account at Barclays amounting to Kshs 266539.05. The monies in that account No. 3754636 to be shared equally by the widows. The protester will get less what she obtained.
- f. Land upon which tea is grown –half should go to 1st Petitioner who gave evidence that she acquired it but it was registered in the name of her husband. The remaining half to be shared between the protester and the children of the deceased in equal shares.
- g. Upper Athiru adjudication section plot No. 763 – with miraa plantation – Protester said that the deceased had signed transfer forms and because he was unable to walk to go to lands Office Isaack Kaberia went to lands office and had transfer executed to him.

25. It is apparent that transfers of the deceased persons parcels of land were executed after his death without the authority of the court and as such the transfers were a nullity ab initio.

26. In the circumstances it is the view of this court that except for parcels no. 6629, 6650, 5598 and 1392 which are not in dispute, the remaining parcels of land in adjudication 1-13 shall be distributed equally amongst the widows of the deceased and the children of the deceased equally.

27. Evidence was tendered that motor vehicle Registration KAC 926 N Land Rover and KBK 257 A Toyota G. Touring was not in the name of the deceased and the petitioner didn't controvert this evidence. The 2 motor vehicles are therefore not open for distribution.

28. This estate shall be administered by the 2 widows of the deceased Beatrice Ciomaroo M'Impwi and Charity Kanini Impwi. Grant that was made on 15th February 2011 is therefore revoked and replaced with one making the 2 widows as Administratrixes. A certificate of confirmation to issue to that effect.

HON A. ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON 18TH DAY OF JUNE 2019.

In the presence of :

C/A: Kinoti

Petitioner: M/s Kiautha Arithi for Petitioner

Protester: Mr Kithinji Advocate for Protester.

Court: Copy of the ruling to be supplied at parties cost.

HON A. ONG'INJO

JUDGE