



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 43 OF 1987**

**IN THE MATTER OF THE ESTATE OF ARIBU MIRU (DECEASED)**

**LAWRENCE KABURU.....PETITIONER**

**-VS-**

**ELIPHAS KINYAMU M'RIBU.....PROTESTOR**

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

1. **ARIBU MIRU (“the deceased”)** to whom this Succession Cause relate, died on 15<sup>th</sup> December, 1975. On 2<sup>nd</sup> September, 1986, the Chief of Mwimbi-Kiera Location wrote a letter of introduction wherein he introduced both the parties to this cause as the children of the deceased who were desirous of instituting a succession cause in respect of the estate of the deceased.

2. On 30<sup>th</sup> April, 1987, Judith Mukiomuga M'Ribu, the widow of the deceased, petitioned for letters of administration of the estate intestate and set out the following as the survivors of the deceased:-

- a) Judith Mukiomuga M'Ribu - widow
- b) Eliphas Kinyamu M'Ribu - son
- c) Elizabeth Kasai M'Ribu - daughter (married)
- d) Lawrence Kaburu M'Ribu - son
- e) Beatrice Kainyu M'Ribu - daughter (married)
- f) Eunice Ciamati M'Ribu - daughter

3. She also set out parcel no. *Mwimbi/C.Magutuni/7* measuring 1.2 ha as the only asset of the estate.

4. On 17<sup>th</sup> August, 1987, the grant was issued to the said Judith Mukiomuga M'Ribu whereby, on 15<sup>th</sup> March, 1988 she applied for confirmation of that grant. In that application, she proposed that the estate be distributed as follows:-

- a) Judith Mukiomuga M'Ribu - 0.22 ha(sic)
- b) Lawrence Kaburu M'Ribu - 1.50 ha(sic)

5. On 8<sup>th</sup> July, 1988, Lawrence Kaburu M'Ribu filed an objection and answer to petition. In those pleadings, he contended that the deceased had two wives, his mother one Karigu who allegedly died in 1967 and Judith Mukiomuga. That for that reason, the estate should be distributed equally between him and Eliphaz Kanyamu M'Ribu. The matter was thereafter referred to the panel of elders for resolution. By their award filed in court on 21<sup>st</sup> December, 1989, that tribunal ruled that Lawrence Kaburu ("the petitioner") and Eliphaz Kinyamu ("the protestor") were sons of the deceased and that the estate should be distributed as proposed by Judith Mukiomuga.

6. Sometimes in 1993, Judith Mukiomuga M'Ribu passed on consequent whereof, Lawrence Kaburu was substituted as the petitioner. Subsequently, on 24<sup>th</sup> March, 2011, the petitioner lodged an application for the confirmation of the grant. In that application, he proposed that the entire estate be distributed to him as he was the only surviving child of the deceased. On 4<sup>th</sup> November, 2011, the protestor filed his protest to the proposed mode of distribution.

7. In his protest, he deponed that the petitioner had mislead the court by concealing material facts. He stated that he is a son to the deceased and a brother to the petitioner and that he is entitled to a share in the estate. That contrary to the averments of the petitioner, the deceased had left other survivors as set out in Form No. P&A 5 at the time the Succession Cause was lodged in 1987. That it had been agreed at the time of filing the Cause that the deceased's land be shared between the petitioner and himself. That as at the time of his mother's death, the matter had been sent to the clan elders for arbitration on distribution because the petitioner was opposed to his mother getting any share as he had insisted that the land be subdivided into two portions only, for the petitioner and him.

8. He further deponed that the petitioner had not disclosed to court that on the ground, the estate property had already been subdivided into two equal portions for each of them and each had fully developed and settled on their respective portions.

9. It was ordered that the protest be canvassed by way of viva voce evidence. **OW1** was the protestor. He reiterated what was in his affidavit and annexures. That the petitioner was his step brother. He urged that the property be distributed equally between the two of them as his sisters were not interested with the estate.

10. **PW1** was the petitioner. He told the court that his father had two wives; his mother who had two children (Elizabeth and himself) and Judith who had two children (Alice Keunyu and Eunice Ciamati). That the protestor was unknown to him and did not agree to the scheme of distribution proposed by the protestor. In cross-examination, he told the court that the protestor is not the deceased's child but the 2<sup>nd</sup> child of Judith. That the protestor has been on the estate property since 1987 yet he had not sued him for eviction. He had also not appealed against the elders' decision or rejected the same.

11. Those were the only two witnesses who testified in this matter. I have considered the entire record and the testimonies of the witnesses. The only issue for determination is: ***whether the protestor is a son of the deceased and if so, whether he is entitled to a share in the estate.***

12. The testimony of the petitioner was that the deceased had two wives his mother and the previous petitioner, Judith Mukiomuga M'Ribu. That the protestor was the second born of Judith Mukiomuga but not a child of the deceased. He never availed any further evidence to prove that although born to the wife of the deceased during the currency of the marriage between Judith Mukiomuga and the deceased, the protestor was not a child of the deceased. The protestor testified to the contrary and insisted that he was a lawful child of the deceased and that even the petitioner had admitted as much.

13. ***Section 118 of the Evidence Act Cap 80 of the Laws of Kenya*** provides:-

***"The fact that any person was born during the continuance of a valid marriage between his***

***mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of the man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten”.***

14. The petitioner’s own testimony was to the effect that the deceased was married to two wives, his mother and Judith Mukiomuga, the mother of the petitioner. That the protestor was the second born of the said Judith Mukwamuga who had two other children with the deceased. There was no evidence that there was no opportunity for the deceased to have had access to each other when the protestor could have been begotten. That alone answers the petitioner’s contention that the protestor is not a son of the deceased.

15. However, there is yet another fact regarding the protestor’s paternity. Both Judith Mukiomuga and the local Chief listed the protestor as a son of the deceased in the documents filed in Court as early as 1987. The petitioner himself swore in his affidavit sworn on 7<sup>th</sup> July, 1988 as follows:-

***“3. That before the death of my father he had said to the members of the clan that the subject land should be share (sic) between two sons namely: myself and Eliphaz Kanyamu M’Ribu.***

***4. That this objection is based in the interest of parcel no. Mwimbi/C.Magutuni/7 to be shared as under:***

***(a) Lawrence Kaburu M’Ribu - 1.50 Acres***

***(b) Eliphaz Kanyamu M’Ribu - 1.50 Acres”***

16. The petitioner had admitted in his Answer to Petition For Grant and Objection dated 7<sup>th</sup> July, 1988, respectively that the protestor was his step brother. How then would the protestor suddenly change to be a stranger to him 20 years later after the demise of Judith Mukiomuga? That is incredible. To my mind, the evidence on record is overwhelming that the protestor and the petitioner are step brothers. The protestor is a son to the deceased and therefore a beneficiary.

17. Is the protestor entitled to a share of the estate? ***Section 2 of the Law of Succession Act*** provides for the application of the Act and it states that:-

***“(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.***

***(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. ... ”***

18. As already stated, the deceased died on 15<sup>th</sup> December, 1975 before the commencement of the Act which came into operation on 1<sup>st</sup> July, 1981. In this regard, the succession of the deceased would be in accordance with the custom that he was subject to, to wit, the Meru custom.

19. This matter was referred to the panel of elders on 27<sup>th</sup> January, 1989. By an award of that tribunal filed in court on 21<sup>st</sup> December, 1989, the elders decided that each son of the deceased gets an equal share of 1.50 acres each and Judith Mukiomuga 0.22 acres which was later to be divided equally among the sons. The award was adopted by the court on 19<sup>th</sup> January, 1990. That award has to-date not been appealed against or set aside.

20. The primary duty of a family court is distribution of the estate of a deceased among his beneficiaries. **The estate of the deceased has been established as parcel no. Mwimbi/C. Magutuni/7.** The dependants

of the deceased have been identified as the petitioner and the protestor only.

**21. According to Eugene Conran, *Restatement of African Law: 2 Kenya II Law of Succession*, (Sweet & Maxwell, 1969) at page 30, the estate of the deceased in Meru and Tharaka community was divided among the sons. The daughters and the widows received no share from the estate.**

**22. In the present case, whether we apply the Meru custom or the Constitution of Kenya, 2010 or section 38 of the Act, the share of the two remain the same, equal period. Accordingly, the estate of the deceased will be distributed as follows:-**

**a) Lawrence Kaburu M'Ribu - 0.60 ha**

**b) Eliphaz Kinyamu M'Ribu - 0.60 ha**

**23. This being a family matter, I will make no orders as to costs.**

**It is so decreed.**

**DATED and DELIVERED this 12<sup>th</sup> day of April, 2018.**

**A. MABEYA**

**JUDGE**