



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 757 OF 2015**

**(FORMERLY MERU SUCCESSION CAUSE NO.433 OF 2010)**

**IN THE MATTER OF THE ESTATE OF M'NYIRI MUNYAKA KICHUKURU ALIAS M'WANYIRI MUNYARA (DECEASED)**

**M'RIARA M'NYIRI.....1<sup>ST</sup> ADMINISTRATOR/APPLICANT**

**VERSUS**

**EVANGELINE CIANJOKA M'NYIRI.....2<sup>ND</sup> AMINISTRATRIX/PROTESTOR**

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

1. This cause relates to the estate of the late **M'NYERI MUNYORA KICHUKURU ALIAS M'WANYERI MUNYORA** who died on 27<sup>th</sup> December, 1987 domiciled at Kangutu village, Karingani Location. The estate of the deceased initially comprised that property known as L.R. No. **KARINGANI/MUIRU/14** which property was subdivided by the initial appointed administratrix Evangeline Cianjoka M'Nyiri. The grant was however later revoked and the property reverted back to the name of the deceased and subdivisions cancelled. Evangeline Cianjoka M'Nyiri and M'Riara M'Nyiri were appointed joint administratrix and administrator respectively on 12<sup>th</sup> September 2016.

2. Before this court now is the summons for confirmation of grant dated 19<sup>th</sup> September 2016 where M'Riara M'Nyiri has listed the following persons as beneficiaries who should be given a share of the estate herein namely:-

- (i) Evangeline Cianjoka M'Nyiri
- (ii) Harriet Ciambaka M'Nyiri
- (iii) Ciamuiru M'Nyiri
- (iv) Kageni M'Nyiri
- (v) Taracira Kanyua M'Nyiri
- (vi) Peter Ciamati
- (vii) Kinuna Ciamati
- (viii) Kithinji Ciamati
- (ix) Mutwiri Kanampiu
- (x) Mugambi Kanampiu
- (xi) Mutembei Kanampiu
- (xii) Gacheri Kanampiu
- (xiii) M'Riara M'Nyiri

(xiv) M M

3. On the other hand Evangeline Cianjoka M'Nyiri on her part listed the following as the only dependants of the deceased namely:-

- (i) Evangeline Cianjoka M'Nyiri (wife)
- (ii) Francis Kanampiu Nkondi (deceased son)
- (iii) Riara Nyaki M'Nyiri - son
- (iv) Tarasila Kanyua M'Nyiri - daughter
- (v) Teregina Cianthiiri - daughter
- (vi) Lucyline Ciamati - daughter
- (vii) Patrick Kimathi Nkondi - grandson
- (viii) Dinah Muthoni Mwangangi - granddaughter

In her affidavit sworn on 6<sup>th</sup> October, 2016, the Co-administratrix deposed that the deceased prior to his demise had gifted his two sons Riara M'Nyiri and Kanampiu M'Nyiri the following properties namely:-

**a. L.R. NO. KARINGANI/MUIRU/540 (2.47 acres)** to Riara M'Nyiri

**b. L.R. NO. KARINGANI/MUIRU/539 (2.22 acres)** to Kanampiu M'Nyiri (now deceased).

4. The Co-administratrix further deposed that she had sold 0.5 acre of the estate to Henry Mugambi Karwigi for valuable consideration and proposed that her grand children namely Patrick Kimathi and Dinah Muthoni Mwangangi be given a share because they are taking care of her in her old age. She further told this court that the two grand children were left with her when they were very young by her daughter Teregina Cianthiiri. It was her evidence that she took care of the two grand children together with the deceased. She proposed that the estate should be distributed as follows:-

- a. Henry Mugambi 1/2 acre
- b. Patrick Kimathi Nkondi
- c. Dinah Muthoni 3 acres

She further testified that the deceased did not give any land to be daughters including Tarasila Kanyua and saw no need to give them any share.

5. The 2<sup>nd</sup> administrator/Protector, M'Riara M'Nyiri has opposed the above proposed mode made by the 1<sup>st</sup> administratrix though an affidavit sworn on 29<sup>th</sup> October 2016 which he adopted as his evidence in chief. He has deposed that the deceased was married to two wives namely Viella Nduru and Evangeline Cianjoka. It was his evidence that Viella Nduru had the following children namely:-

- (i) M M - Son (allegedly mentally unstable)
- (ii) Lucia Cianthuni - Daughter (deceased)
- (iii) Harriet Ciambaka - Daughter (married)
- (iv) Ciamuiru M'Nyiri - Daughter (married)
- (v) Kageni M'Nyiri - Daughter (married)

He further deposed that Evangeline Cianjoka had the following children:-

- (i) Kanampiu M'Nyiri- Son (deceased)
- (ii) M'Riara M'Nyiri - Administrator

- (iii) Tarasila Kanyua - Daughter (married)
- (iv) Teregina Ciakurungu- Daughter (married)
- (v) Ciamati M'Nyiri - Daughter (deceased)

6. The 2<sup>nd</sup> administrator has suggested and proposed that the estate comprised in that parcel of land known as **L.R. KARINGANI/MUIRU/14** (3.6 acres) should be distributed as follows:-

- (a) Evangeline Cianjoka M'Nyiri

Harriet Ciambaka

Ciamuiru M'Nyiri                      0.5 acre

Kageni M'Nyiri

Tarasila Kanyua

- (b) Peter Ciamati

Kinyua Ciamati

Kithinji Ciamati being children of Ciamati M'Nyiri should get 0.6 acre.

- (c) Mutwiri Kanampiu

Mugendi Kanampiu

Mutembei Kanampiu and Gacheri Kanampiu as children of Kanampiu M'Nyiri (deceased's son) should get one (1) acre.

- (d) M'Riria M'Nyiri - 0.4 acre to hold in trust for M M and one (1) acre for himself.

The 2<sup>nd</sup> administrator has deposed that M M is mentally challenged hence the reason why he should hold the share in trust for him.

7. He has further denied the Petitioner's claim that he and the late Kanampiu were given parcels of land by the deceased in his lifetime insisting that they got their respective share from the clan. He denies that the parcel he has is part of the estate. He has criticized the Co-administratrix for proposing to give a share to Henry Mugambi Karwigi when Henry Mugambi is not a beneficiary. He opines that any development carried out by the said Henry Mugambi on the estate is an illegality.

8. Teresia Kanyua, a daughter to the deceased testified and also faulted her mother (the 1<sup>st</sup> administratrix) for tying to lock her out of the estate and bringing in strangers to benefit instead.

9. M'Baini Mugendi a brother to the deceased called to testify by the 1<sup>st</sup> administrator testified in this court and told this court that his late brother was married to two wives namely Viera Nduru (deceased) and Evangeline Cianjoka. He further told this court that the deceased at one time differed with his first wife and as a result separated after the 1<sup>st</sup> wife left him. He further told this court that the first wife got two other children while separated from his late brother and that the two children being girls were married and are not part of the beneficiaries in this cause. He conceded that the surviving widow, Evangeline Cianjoka is being taken care of by his two grand children Muthoni and Patrick Kimathi. He further testified that Henry Mugambi listed as a beneficiary by the 2<sup>nd</sup> administratrix is not a member of deceased family but a son to the sister of the 2<sup>nd</sup> administratrix.

10. In his written submissions made through learned counsel I.C Mugo, the 1<sup>st</sup> administrator urged this court to determine the following issues;

- (a) who survived the deceased
- (b) who is entitled to a share of the estate.
- (c) what properties form the estate.
- (d) who is to pay costs

11. The 1<sup>st</sup> administrator has submitted that the following persons survived the deceased.

- (i) Viella Nduru - 1<sup>st</sup> wife (deceased)
- (ii) M M - son (alleged to be mentally challenged)
- (iii) Lucia Cianthuni - (deceased)
- (iv) Harriet Ciambaka - Daughter (married)
- (v) Ciamuru M'Nyiri - Daughter (married)
- (vi) Kageni M'Nyiri - Daughter (married)
- (vii) Evangeline M'Nyiri - 2<sup>nd</sup> wife
- (viii) Kanampiu M'Nyiri - son (deceased)
- (ix) M'Riara M'Nyiri - son
- (x) Tarasila Kanyua - Daughter (married)
- (xi) Teregina Ciankurungu - Daughter (married)
- (xii) Ciamati M'Nyiri - Daughter (deceased)

12. The 1<sup>st</sup> administrator has submitted that no evidence was laid before court that parcel **NO. KARINGANI/MUIRU/540** was given to him by the deceased. He has justified his mode of distribution arguing that Dinah Muthoni and Patrick Kimathi are grand children and not direct beneficiaries as according to him they are only assisting the aging widow.

13. This court has considered the evidence tendered by both parties in this cause. The main issues of contention are as follows:-

- (a) whether the 1<sup>st</sup> administrator and the late Kanampiu M'Nyiri benefited from the deceased during the life time of the deceased by getting parcels of land from him.
- (b) whether the married daughters of the deceased deserve a share of the estate.
- (c) who are entitled to the estate and in what share.

14. There is no dispute that the deceased was married to two wives namely Viella Nduru (now deceased) and Evangeline Cianjoka the 2<sup>nd</sup> administratrix herein. There is also no dispute that the estate comprise that property known as **KARINGANI/MUIRU/14** measuring approximately 3.5 acres.

15. To go straight to the 1<sup>st</sup> issue at hand which is whether the 1<sup>st</sup> administrator and the late Kanampiu M'Nyiri benefited from the deceased prior to his demise is that this court has keenly considered the evidence tendered by both parties including the evidence of an 87 years old witness, M'Baini Mugendi. It is apparently clear that the 1<sup>st</sup> administrator and the late Kanampiu M'Nyiri got their respective parcels from the clan of which the deceased belonged. The two got their share because this court takes judicial notice that they were adults when land adjudication was taking place in this region in the early 50s. Both the late Kanampiu M'Nyiri and the 1<sup>st</sup> administrator left the deceased home and went to live in their respective parcels even during the lifetime of the deceased. The 1<sup>st</sup> administrator now contends that the land parcel **NO. KARINGANI/MUIRU/540** did not belong to the deceased which is true but the question is if he was not a son of the deceased, could he have got that share from the clan to which deceased belong? It is a fact and this court takes judicial notice of the fact that in this region when land adjudication was taking place, some fathers influenced adjudicators to include their adult sons in the allotment of land parcels and indeed several people got their parcels through intervention of their fathers and clan. In that case even if there is no documentary proof that they benefited through intervention of their fathers, the fact remains that they benefitted and constructively such benefit is a factor under **Section 42 of Law of Succession Act** because it constitutes a previous benefit. It would be unfair to treat such beneficiaries on equal terms with other children who may not have gotten any share by virtue of their ages at the time. This court therefore finds that the 1<sup>st</sup> administrator and the family of the late Kanampiu M'Nyiri having benefitted from a share of a parcel of land from the clan through his father cannot claim equal share with other beneficiaries in this cause. And since each one of them got approximately 10 acres each, they cannot claim any extra share in the estate in this cause because as I have said the estate comprises about 3.5 acres only and the beneficiaries who did not get any previous benefit are nine.

16. On the 2<sup>nd</sup> question of whether the married daughters are entitled to the estate is that the constitution and the law really does not discriminate children of a deceased person on the basis of gender or status. **Article 27 of the Constitution** provides that no one should be discriminated on account of sex, marital status etc and in my view it would be discriminatory to lock out married daughters of a deceased

person from the estate just because they are females and are married. The only exception is where they have renounced their right to inherit pursuant to Rule 18 (1) of Probate and Administration Rules. In this cause although the cited daughter save for Teresia Kanyua came out to stake their claim on the estate, there is no evidence that they have no interest on the estate.

17. The 2<sup>nd</sup> administratrix did propose that a share be given to Henry Mugambi Karwigi because she sold 1/2 acre to him. The law however is clear that an administrator can only dispose any portion of an estate once a grant has been confirmed. **Section 82 (b) (ii)** of Law of Succession Act clearly prohibits any disposition of the estate before confirmation of grant. There is no evidence tendered showing that the 2<sup>nd</sup> administrator had the capacity to dispose off 1/2 acre or any part thereof to Henry Mugambi or any other person. The transaction is not enforceable in law because it lacks legitimacy.

18. On the question of grandchildren namely Patrick Kimathi Nkondi and Dinah Muthoni Mwangangi, the law provides that a grandchild can be considered as a dependant if it can be shown that the deceased took care of them immediately prior to his demise **Section 29 of Law of Succession Act**. The two grandchildren were left in the hands of the 2<sup>nd</sup> administrator by her deceased daughter. The evidence of DW3, shows that the two dependants were pretty young when the deceased in this cause passed on. This court finds that the two grandchildren are dependants as per the provisions of **Section 29** of the **Law of Succession Act**. I also noted that they were the ones who were always bringing the 2<sup>nd</sup> administratrix in court and by all standards she is very old and vulnerable at her age and that is why perhaps she insisted that the two grandchildren should inherit the entire estate because they are the only persons looking after her. However the law provides that all dependants are to be treated equally and cannot therefore claim the estate in exclusion of other dependants.

19. In the premises this court finds that the following dependants are entitled to share of the estate.

- (i) Evangeline Cianjoka M'Nyiri
- (ii) Muce M'Nyiri
- (iii) Harriet Ciambaka
- (iv) Ciamuri M'Nyiri
- (v) Kageni M'Nyiri
- (vi) Teresia Kanyua
- (vii) Teregina Ciankurungu
- (viii) Patrick Kimathi Nkondi
- (ix) Dinah Muthoni Mwangangi

The estate comprised in **L.R. NO. KARINGANI/MUIRU/14** shall be divided equally among all the surviving dependants listed above (i) to (ix) and Evangeline Cianjoka M'Nyiri shall have life interest in the share going to her after which the same can go to her two grandchildren named above (viii and ix).

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

**Dated, signed and delivered at Chuka this 13<sup>th</sup> day of June, 2018.**

**R.K. LIMO**

**JUDGE**

**13/6/2018**

Judgment dated, signed and delivered in open court in the presence of Mugo advocate for the administrator/applicant and in the presence of both parties.

**R.K. LIMO**

**JUDGE**

**13/6/2018**