



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 35 OF 2013

IN THE MATTER OF ESTATE OF M'INYINGI KIRERU

MWORUCHIACA M'INYINGI.....PETITIONER

VERSUS

MWITHUMBU M'INYINGI.....OBJECTOR

R U L I N G

1. **M'Inyingi Kireru** died on the 30th May 2002. He left behind two widows and 11 children. The petitioner lodged the current Cause at the Maua Chief Magistrates' Court in 2010. On 5th May, 2011, that Court appointed both the petitioner and objector as joint administrators of the estate. The objector was the 1st wife while the petitioner was the 2nd wife of the deceased. The Cause was transferred to this court in January, 2013.

2. On 21st September 2012, the petitioner applied for the confirmation of the grant. She proposed to distribute the estate as follows:-

ITHIMA /ANTUAMBUI/3090 - 0.14 ha

a) Mworuchiaka M'Inyingi

b) Mwithumbu M'inyingi - Equally

ITHIMA/ANTUAMBUI/2587 - 0.8ha

a) Mworuchiaka M'Inyingi

b) Mwithumbu M'Inyingi - Equally.

3. On the 13th March, 2013, the objector objected to the petition on the grounds that she was the first wife of the deceased. She complained that the petitioner had evicted her from **ITHIMA/ANTUAMBUI/2587**.

4. That she should get a portion of **ITHIMA/ANTUAMBURI/2587** The court decided to treat the objection as a protest. The parties filed affidavits in support of their respective contentions. Learned Counsels for the respective parties agreed that they file submissions on the affidavits on record. Counsel for the petitioner filed his submissions but none was filed on behalf of the objector.

5. The petitioner's case was that the deceased had settled his two families during his lifetime. That he transferred various properties to his four sons, **Mutia M'nyingi, Kabwi Inyingi, Gilbert Kaberia Inyingi and Henry M'Inyingi** That in 1987, the deceased moved the objector from **ITHIMA/ANTUAMBUI/2587** and settled her on **ITHIMA/ANTUAMBUI/2535** where he built her a residence. The said **ITHIMA/ANTUAMBUI/2535** had been given to the objector's son Kabwi Inyingi. That the deceased left the petitioner on **ITHIMA/ANTUAMBUI/2587** with her family.

6. In support of her case, she had one **M'Itaaro Nabea**, a clansman of the deceased swear an affidavit on 4th April, 2018. In that affidavit, **M'Itaaro Nabea** reiterated what the petitioner had stated as regards the settlement of the deceased's family by the deceased during his lifetime.

7. In her protest, the objector admitted that the deceased had divided his properties to his sons. She however denied that the deceased had moved her out of **ITHIMA/ANTUAMBUI/2587**. Instead she contended that the petitioner had evicted her from that property which forced her to live with her son.

8. I have considered the affidavits on record and the submissions of Counsel. The issues for determination are; ***whether the deceased had distributed his land and settled his family during his lifetime, and, how should the estate be distributed?***

9. The record shows that the deceased was the registered owner of the following properties:-

- a) **Ithimbu/Antuambui/988**
- b) **Ithimbu/Antuambui/2443**
- c) **Ithimbu/Antuambui/2535**
- d) **Ithimbu/Antuambui/2587**
- e) **Ithimbu/Antuambui/3090**

10. Vide a letter dated 4th January, 1984, the deceased distributed a total of 13.33 acres out of the said properties to his 4 sons; **Mutie M’Inyingi, Kabui Inyingi, Gibert Kaberia Inyingi and Henry M’Inyingi**. The said 13.33 acres were excised from the said properties. However, he gave the entire of **Ithimbu/Antuambui/2443** to Henry M’Inyingi.

11. As regards his widows, there is conflicting testimonies in the affidavits on record as to whether they were settled. The petitioner contended that in 1987, the deceased removed the objector and her sons from **Ithimbu/Antuambui/2587** and settled them on their respective portions. That the objector was settled and had a house built for her by the deceased on **Ithimbu/Antuambui/ 2535** which he had shared to one of her sons, Kabwi Inyingi. This position was supported by M’Itaaro Nabea who testified on behalf of the petitioner.

12. On the other hand, the objector contended that throughout the lifetime of the deceased, the two families lived together with the deceased on **Ithimbu/Antuambui/2587**. She denied that the deceased had moved her to **Ithimbu/Antuambui/2535** in 1987 as contended by the petitioner but asserted that it is the petitioner who evicted her therefrom after the demise of the deceased.

13. Having analyzed the evidence on record, I find that the deceased commenced the process of resettling his family in January, 1984. It is then that he wrote to the Meru Adjudication Officer requesting that his property be divided among his 4 sons. A letter to that effect was produced and is on record. That was effected and the 4 sons obtained their respective separate titles for their portions.

14. Since the parties opted to have the matter determined on affidavit evidence, on which Counsel submitted, the court did not have the opportunity of observing the testimonies of the witnesses tested. The court was left to make inferences and deductions from the evidence on record in order to arrive at its determination.

15. Since the deceased set to settle his family towards the twilight of his years, it may not be far fetched to expect that he would likewise have settled his wives during his lifetime. The court believed the testimonies of the petitioner and her witness that the deceased removed the objector and her children from **Ithimbu/Antuambui/2587** to **Ithimbu/Antuambui/2535** in 1987. This is because of two reasons.

16. Firstly, he had begun to settle his family in 1994 when he wrote to the Land Adjudication Officer and settled all his sons. Secondly, I found it difficult to believe the objector’s contention that she was evicted by the petitioner from **Ithimbu/Antuambui/2587** after the demise of the deceased. The objector did not deny that she has a residence on **Ithimbu/Antuambui/2535**. That residence was alleged to have been constructed by the deceased for the objector. She never denied the allegation that it was constructed by the deceased for her. She never offered any evidence as to who constructed it for her and the year contradict the evidence of the petitioner. She never called any witness, including her own son whom she was living with to confirm her testimony or deny that of the petitioner.

17. In any event, the objector never stated which year she was allegedly evicted by the petitioner from **Ithimbu/Antuambui/2587**. She never told the court whether she protested against such eviction and if so, to whom and when.

18. Further, while the deceased died in 2002 and the Succession Cause filed in 2010, it is only on 14th March, 2013 that the objector filed an application under certificate of urgency wherein she sought to be reinstated to **Ithimbu/Antuambui/2587**. Even in the affidavit in support of that application, she did not state when she was allegedly evicted by the petitioner.

19. To my mind, the objector deliberately failed to disclose the date of the alleged eviction so that she could not be made to account for that allegation. I believe and hold that, the deceased moved and settled the objector on **Ithimbu/Antuambui/2535** in 1987 and build her a house thereon. That is where she has to-date resided.

20. On the second issue of distribution, the deceased having been polygamous, his intestate succession has to be under **section 40 of Law of Succession Act (“the Act”)** which provides that each child together with a surviving spouse constitute a unit. At the same time however, the court has to be alive to the provisions of **section 42 of the Act** which requires that the court does take into consideration any provision or bequest made by the deceased to any beneficiary during the deceased’s lifetime.

21. In the present case, all the sons of the deceased were fully catered for by the deceased during his lifetime. Looking at the estate land that

remained, the same is only adequate for distribution to the widows and the daughters of the deceased.

22. For the foregoing reasons, the estate of the deceased is to be distributed as follows: -

a) Ithimbu/Antuambui/988 (0.6Ha)

i) Mwithimbu M’Inyingi

ii) Mukokithaka Kilui - Equally

b) Ithimbu/Antuambui/2443 (0.20Ha)

i) Mworochiaka M’Inyingi

ii) Mbaa Mithika

iii) Sabina Kathekia Murungi

iv) Salome Karimi M’Inyingi

v) Saweria Thirindi M’Inyingi

vi) Jenniffer Chulubi M’Inyingi

vii) Martha Kaloo M’Inyingi - Equally

c) Ithimbu/Antuambui/2587 (0.8Ha)

i) Mworochiaka M’Inyingi

ii) Mbaa Mithika

iii) Sabina Kathekia Murungi

iv) Salome Karimi M’Inyingi

v) Saweria Thirindi M’Inyingi

vi) Jenniffer Chulubi M’Inyingi

vii) Martha Kaloo M’Inyingi - Equally

d) Ithimbu/Antuambui/3090 (0.14Ha)

i) Mwithimbu M’Inyingi

ii) Mukokithaka Kilui - Equally

23. This being a family matter, I will not make any order as to costs.

DATED and **DELIVERED** at Meru this 29th day of November, 2018.

A. MABEYA

JUDGE