



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 59 OF 2015

(Formerly Kehancha Resident Magistrates Court Succession Cause No. 6 of 2009)

IN THE MATTER OF THE ESTATE OF: NGINE MARWA NGINE (DECEASED)

-between-

CHACHA MWITA & 3 OTHERS.....APPLICANT

-versus-

MUNIKO RICHARD MWITA.....RESPONDENT

JUDGMENT

1. This judgment is in respect of the Summons for Confirmation dated 15/07/2015 (hereinafter referred to as '**the Summons**') filed by the four Applicants herein. The Summons was supported by the Affidavit of Chacha Mwita Ngine, the first Applicant/Co-Administrator, sworn and evenly filed on 16/07/2015.

2. The Summons sought the confirmation of the joint grant issued pursuant to the ruling of this Court (**Majanja, J.**) rendered on 17/04/2015 where Chacha Mwita Ngine and Muniko Richard Mwita, the Petitioner herein, were appointed as joint administrators of the Estate of Nginge Marwa Ngine, the deceased in this cause.

3. The Applicants proposed the distribution of the estate property which comprised of the parcel of land known as **Bukira/Bwisaboka/62** (hereinafter referred to as '**the land**') measuring about 18 Hectares as follows: -

- | | | |
|--------------------------|---|----------|
| (i) Chacha Mwita Ngine | - | 1.325 Ha |
| (ii) Moke Ngine | - | 4.25 Ha |
| (iii) Samson Maasai | - | 4.25 Ha |
| (iv) Kerioba Ngine | - | 4.25 Ha |
| (v) Stephen Mugaya Ngine | - | 3.925 Ha |

4. With an exception of Stephen Mugaya Ngine who is the son to Chacha Mwita Ngine and a grandson to the deceased, the first four intended beneficiaries, Chacha Mwita Ngine, Moke Ngine, Samson Maasai and Kerioba Ngine are brothers and the children of the deceased.

5. The foregone proposed distribution was opposed by Muniko Richard Mwita, the Original Petitioner/Co-Administrator. By way of an Affidavit of Distribution he proposed the following mode of distribution: -

- | | | |
|------------------------|---|-----------|
| (i) Chacha Mwita Ngine | - | 4 Acres |
| (ii) Moke Ngine | - | 4 Acres |
| (iii) Samson Maasai | - | 6.5 Acres |
| (iv) Kerioba Ngine | - | 8 Acres |

- (v) Stephen Mugaya Ngine - 11 Acres
- (vi) Muniko Richard Mwita - 6 Acres
- (vii) Matiko Chacha Nyabusugwi 3 Acres
- (viii) Esther Gati Wandwi - 2.5 Acres

6. The Summons was heard by way of *viva voce* evidence. Chacha Mwita Ngine (PW1) testified and called three witnesses Samson Maasai Ngine (PW2), Kerioba Ngine (PW3) and Stephen Mugaya Ngine (PW4) who all supported PW1's proposed distribution. They all concurred that the Petitioner herein, Muniko Richard Mwita, purchased only two acres of the land from the share of PW1. PW1 restated his willingness to transfer the 2 acres to the Petitioner once the distribution to the beneficiaries of the deceased is completed.

7. The Petitioner on the other hand contended that he instead bought 6 acres of the land from PW1. The Petitioner solely testified and stated that he wholly occupied and has since the sale utilized the 6 acres of the land. He further stated that PW1 was mischievous in bringing into the matter his son PW4 with the aim of the son getting a larger share of the land so as to curtail him, the Petitioner, from getting his 6 acres from PW1 since what will devolve to PW1 will be less than what the Petitioner purchased from PW1. He urged this Court to adopt his proposed mode of distribution. The Petitioner further stated that he was representing all the purchasers who variously bought portions of the land from the beneficiaries.

8. PW4 stated that he was gifted part of the land by the deceased. He however did not avail any such proof neither was the issue corroborated by PW1, PW2 or PW3.

9. There is no dispute that the Petitioner came into the land by way of a purchase from PW1 and not from the deceased. There is however a dispute as to the size of the portion of the land the Petitioner bought from PW1. As I stated in **Migori High Court Succession Cause No. 400 of 2015 John Mwita Murimi & Others vs. Mwikwabe Chacha Mwita & Another** (unreported): -

*.....The duty of a Succession Court is principally to protect estates of deceased persons which it has jurisdiction over and to oversee the transmission of those estates to the lawful beneficiaries. The duty of the Court to deal with any dispute arising out of that mandate cannot be gainsaid. However, if a dispute arises on the ownership of the land subject of the succession proceedings and/or the declaration of trusts over the land in issue, then such a dispute transcends the jurisdiction of a Succession Court courtesy of Article 165(5) of the Constitution, Section 13 of the Environment and Land Court Act, No. 19 of 2011 among other relevant legal provisions. It is a dispute which calls for evidence to establish ownership or the existence of such a trust upon which finding a party may be a beneficiary for purposes of the distribution of the estate property before a Succession Court or not. (See the Court of Appeal in **Peter Moturi Ogutu vs. Elmelda Basweti Matonda & 3 others (2013) eKLR**, **Muthuita vs. Muthuita (1982-88) 1 KAR 42** and **Chogera vs. Maria Wanjira Kimani & Others (2005) eKLR**)*

10. Since I still hold the foregone position I find and hold that the dispute between the Petitioner and PW1 falls squarely within the jurisdictional confines of the Environment and Land Court. In any event, the Petitioner's interest, as well as those of the other purchasers, can only crystalize upon the ascertainment of the shares of the beneficiaries and the consequent sub-division and distribution of the land. In essence, all the purported purchasers shall then be at liberty to pursue their claims from the respective beneficiaries.

11. As to whether PW4 was gifted part of the land by the deceased, I must say that the matter was not proved. As said, it was only PW4 who testified to that end. In any event, PW4 being a grandson to the deceased can only inherit from his father PW1. Given nature of the dispute between the Petitioner and PW1 (who is the father to PW4) and the possible effect if the Petitioner succeeds on his 6 acre-claim, I find that the proposal by PW1 is reasonable save that PW4 will therefore get his share, if any, from PW1.

12. Having so said, there is also the need to safeguard the portion of the Petitioner out of PW1's possible share and to that end the sub-division of the land shall take into account how the parties are settled on the land and as far as possible avoid any dislodgments, at least before the conclusion of the matter to be instituted before the Environment and Land Court.

13. In the end the following final orders do hereby issue: -

(a) The joint Grant issued be and is hereby confirmed.

(b) The estate property known as Bukira/Bwisaboka/62 shall devolve as follows: -

- (i) Chacha Mwita Ngine - 5.25 Ha**
- (ii) Moke Ngine (Deceased) - 4.25 Ha**
- (iii) Samson Maasai - 4.25 Ha**
- (iv) Kerioba Ngine - 4.25 Ha**

(c) The sub-division and distribution of the land known as Bukira/Bwisaboka/62 by the joint Administrators to the foregone beneficiaries shall take into account the portions occupied by the beneficiaries and the Petitioner, Muniko Richard Mwita with a view of not unnecessarily dislodging any of them. For avoidance of doubt, the portion for Muniko Richard Mwita and

that of Stephen Mugaya Nginge shall be included in the share of Chacha Mwita Nginge.

(d) This matter shall be fixed for a Mention on 14/03/2019 to confirm the status of the distribution and for further orders towards the closure of this matter.

(e) Each party do bear its own costs of this cause and each of the beneficiaries shall bear the costs for the sub-division and transfer.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 23rd day of November, 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Kerario Marwa Counsel instructed by the firm of Messrs. Kerario Marwa & Company Advocates for the Petitioner.

Applicants in persons.

Evelyne Nyauke - Court Assistant