



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCC CAUSE NO. 23 OF 2006

IN THE MATTER OF THE ESTATE OF ITIRITHIA KABIRA- (DECEASED)

ANGELICA MUTHONI GABRIEL

ALICE NCURI M'MBURUGU..... PETITIONERS

VERSUS

JACKIM KIMATHI MARETE.....OBJECTOR

J U D G M E N T

1. **ITIRITHIA KABIRA (“the deceased”)**, died on 7th August 1975. On 20th December, 2005 the Chief of Kithangari Location wrote a letter of introduction setting out the survivors of the deceased as **Angelica Muthoni Gabriel, Alice Ncuri M'Mburugu** and **Marete Itirithia (deceased)**.
2. On 31st January, 2006, **Angelica Muthoni Gabriel and Alice Ncuri M'Mburugu (“the petitioners”)** petitioned for letters of administration intestate and listed **PARCEL NO. ABOGETA/ U-KITHANGARI/464** as the only asset of the estate. On 2nd July, 2007, the grant of letters of administration was the petitioners. The grant was confirmed on 15th February, 2008 with the entire estate being distributed to the petitioners equally.
3. On 14th December 2010, Jackim Kimathi Marete applied for the revocation of the grant allegedly on the basis of concealment of facts as all beneficiaries were not included. That the deceased had three children one being his father Wilfred Marete (deceased) who was not given any portion of the estate. That he was now utilizing his father's portion of the land as he had planted maize in the preceding season. There was no replying affidavit to that application as the petitioners filed affidavits in opposition to other subsequent applications for injunction but not the main application for revocation.
4. The application for revocation was heard through viva voce evidence. The parties and their witnesses filed their witness statements on which they were cross-examined. **PW1 Alice Ncuri** stated that she is the third born of the deceased who had other two children Wilfred Marete and Angelica Muthoni Gabriel. That her father had three parcels of land; **ABOGETA/ U-KITHANGARI/544, ABOGETA/ U-KITHANGARI/613 and ABOGETA/ U-KITHANGARI/464**. That this could be established from Meru Succ. Cause No. 422/04. That their brother was allocated **L.R ABOGETA/ U-KITHANGARI/544** where he built his residence and **ABOGETA/ U-KITHANGARI/613**. That she and her sister, her co-petitioner, established their residences on **LR. No. ABOGETA/ U-KITHANGARI/464**. That the alleged utilization of a third of their land by the objector was untrue.
5. **PW2 Angelica Muthoni Gabriel** relied on her affidavit she swore on 16th May 2017. She testified that her brother Wilfred Marete died on 22nd February, 2002. That when their father died in 1975, the objector was not even born. That the deceased had three parcels of land of which he transferred two of them to their brother's name. That their late father used to live on **ABOGETA/U-KITHANGARI/464** and it is where all of them grew up. She further testified that she and her co-petitioner allowed their sons, **PW3 Genesisio Kinyua and PW5 Felix Gikunda Gaitirithia** to work and settle on the said land.
7. **PW3 and PW5** stated that they live on **ABOGETA/U-KITHANGARI/464**. They both stated that they entered that property in 1998 and have continued to use the same and substantially developed the same.
8. **PW 6 Aidah Karimi Muriungi and PW 4 Janet Marete** testified that they were daughters of the late **Wilfred Marete Itirithia**. **PW4** stated that she is the one who filed **Succession Cause No. 422 of 2004** which was in respect of her father's estate. That prior to filing the cause they held several meetings as a family and none of the members laid any claim to **ABOGETA/ U-KITHANGARI/464** since they all knew it belonged to their aunties. That her father never farmed, lived nor developed the above mentioned property.
9. **RW1 Jackim Kimathi Marete** stated that he is the grandson of the deceased. That his father died having left him cultivating a third of

L.R No. ABOGETA/ U-KITHANGARI/464. That there was a Succession cause pending in respect of his father's estate wherein **PW4 and PW6 want LR No. ABOGETA/U-KITHANGARI/613.**

10. **RW2 M'Guantai M'Mwithirwa** testified that he knew the family of the deceased. That he was a member of the land committee which was charged with the task of demarcation and consolidation of land in U-Kithangari. That the process of demarcation and adjudication which he was involved in, took place in Kithangari area in 1975. He was also a member of the deceased's clan and would sometimes be called upon to solve land disputes. That the deceased had only one piece of land **L.R No. ABOGETA/ U-KITHANGARI/464.** That he was aware that Marete Itirithia, the deceased's son, had bought land from M'Riara and Karuguma.

11. **RW3 Zipporah Gacheri Marete** told the court that she is the daughter in law of the deceased herein. That her father in-law did not intend to leave **LR No. ABOGETA/ U-KITHANGARI/464** to his daughters because he was a traditional Meru man and during his lifetime, daughters could not inherit land. She also supported the testimony of **RW2** that the two parcels owned by Marete Itirithia were sold to him by Simon M'Riara and Karuguma.

12. I have carefully considered the record, the testimony of the witnesses and the submissions of Learned Counsel. The issues for determination are:-

a) whether the deceased settled all his children in their respective properties in his lifetime;

b) whether the grant should be revoked; and

c) how the estate should be distributed.

13. It was the testimony of the petitioners that the deceased had three properties, namely, **L.R No. ABOGETA/U-KITHANGARI/464, L.R No. ABOGETA/U-KITHANGARI/544** and **L.R No. ABOGETA/U-KITHANGARI/613.** That during his lifetime, the deceased gave two of the said properties **L.R No. ABOGETA/U-KITHANGARI/544** and **L.R No. ABOGETA/U-KITHANGARI/613** to his son Marete M'Itirithia and left **L.R No. ABOGETA/U-KITHANGARI/464** to the petitioners. That since their brother had 'inherited his share' during the lifetime of the deceased, the latter property belong to them and they had properly distributed it to themselves to the exclusion of their deceased brother. That they have at all times been in occupation and use thereof.

14. On the other hand, the objector contended that the deceased had three children, the petitioners and his late father. That his father had been cultivating a 3rd of **L.R No. ABOGETA/U-KITHANGARI/464.** That the petitioners did not involve the family of his late father when they applied for the grant of letters of administration for the estate of his late grandfather. That the properties held by his late father were acquired by him independent of the deceased. He disputed the petitioners contention that the deceased had left **L.R No. ABOGETA/U-KITHANGARI/464** to them and he contended that his late father was entitled to a share thereof.

15. There were several matters that were not in dispute. These were that; the deceased died in 1975. That the deceased had three children, the petitioners and the late **Marete M'Itirithia** and that the deceased's estate constitute **L.R No. ABOGETA/U-KITHANGARI/464** only.

16. On the first issue, the petitioners admitted that they were married before the deceased died in 1975. They told the court that their late brother had been given **L.R No. ABOGETA/U-KITHANGARI/544** and **L.R No. ABOGETA/U-KITHANGARI/613** by the deceased while the estate property was left to them. However, they did not tell the court when (by way of date, year and place) when the deceased willed himself as they contended.

17. To the contrary, the evidence of **RW2** was that during the time of demarcation and adjudication in their area in 1957, the deceased was reasonably old. That he was only able to gather **L.R No. ABOGETA/U-KITHANGARI/464** to his name. That the deceased's son, **Marete M'Itirithia** got **L.R No. ABOGETA/U-KITHANGARI/544** and **L.R No. ABOGETA/U-KITHANGARI/613** through his own effort. That he got **L.R No. ABOGETA/U-KITHANGARI/544** from one Karuguma while he purchased **L.R No. ABOGETA/U-KITHANGARI/613** from one M'Riara. The testimony of **RW3** was that **Karuguma** was an uncle to **Marete M'Itirithia** and that since **Karuguma** only had a daughter who passed on, he bequeathed his **L.R No. ABOGETA/U-KITHANGARI/544** to him.

18. The petitioner's answer to that evidence was that of **PW2 Angerica Muthoni Gabriel.** She testified that **Karuguma** was one of her father's brothers who died during the 1st world war (1914-1918). That all her grandfather's sons died in that war and the only one who remained was the deceased because he was still a minor. That in the circumstances, all her grandfather's land went to the deceased and none of her uncle's had any land to bequeath her late brother, **Marete M'Itirithia** who had not been born by the time they died.

19. I saw the witnesses testify. I did not believe the testimony of **PW2.** Her allegation that all the brothers of the deceased died in World War 1 had no basis. From her testimony, she was born in or about 1931 long after World War 1. She never disclosed who and how many of these brothers of the deceased were who died in that war. She did not state where they died. She concluded her testimony by stating that because all the brothers of the deceased died in that war, all the land belonging to her grandfather, the father of the deceased, including that of **Karuguma** reverted to the deceased.

20. One piece of evidence on record which was neither denied nor challenged was that, demarcation and adjudication in Kithangari took place in 1957 afterwards. That means that before then, no land had been demarcated to the deceased's father which the deceased would have inherited. In any event, the unchallenged evidence of **RW2** was the deceased gathered **L.R No. ABOGETA/U-KITHANGARI/464,** by himself. He never inherited it from his father as alleged by **PW2.** I reject the contention that the deceased owned three properties which he distributed to his children as alleged by the petitioners. The deceased died intestate.

21. The petitioner's witnesses, **PW1, PW2** and **PW6** referred the court to **Meru Succession Cause No. 422 of 2004.** It related to the estate of the late Marete M'Itirithia, the brother to the petitioners. The court called for that file and perused the same. The court ascertained that in

that cause, **PW5 and PW6** were the petitioners. That they were born by two mothers who were not wives of the deceased. That they were against the interests of the 2 wives of Marete M'Itirithia, **RW 2** included. That they were claiming 9 acres for themselves from the estate of Marete M'Itirithia leaving the 9 other beneficiaries to share the balance of 13 acres.

22. The court further established that the two properties allegedly given to the petitioner's brother, **L.R No. ABOGETA/U-KITHANGARI/544** and **L.R No. ABOGETA/U-KITHANGARI/613**, were first registered on 27th May, 1965 in the name of **Marete Gaitirithia**. In the event the deceased had caused the said two properties to be registered in the name of his son and wanted **L.R No. ABOGETA/U-KITHANGARI/464** to be for the daughters, there was no explanation that was given as to why he did not likewise cause the latter property to be registered in their names for ten years before he died in 1975.

23. Further, in the said **Meru Succession Cause No. 422 of 2004**, the petitioners in this case testified in favor of **PW5 and PW6**. The court made a finding therein that they exhibited a deep grudge against the wives of their brother. It is therefore no surprise that **PW5 and PW6** decided to testify in this Cause in support of their case. petitioners.

24. In view of the foregoing, I find that the deceased died intestate. Since he died in 1975, by dint of **section 2 of the Law of Succession Act, Cap 160 Laws of Kenya**, the applicable law to his estate is the African customary law that he was subject to. The deceased was Merian. The applicable custom is Meru Customary Law.

25. To this court's mind, the petitioners had the right to occupy and make use of **L.R No. ABOGETA/U-KITHANGARI/464** as it belonged to their father until representation was undertaken in accordance with the law. The fact that their brother did not evict them or claim that property is not proof that he did not have a right to it. He may have felt that the 21 acres he had was enough at the time. However, once representation of the estate of the deceased is sought, the rights of all beneficiaries entitled must be ascertained and enforced.

26. In **Eugene Cotran's Restatement of African Law, Sweet and Maxwell 1969, pg. 34** daughters were not entitled to inherit land. Land of a deceased man was distributed equally to his surviving sons. Under **Section 7(1) of the 6th Schedule of the Constitution**, all law in force immediately before the effective date is supposed to continue to be in force but is to be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the constitution. That being the case, the Meru Customary Law on inheritance is to be varied to accommodate the principle of equality.

27. The next issue is whether the grant should be revoked. There was evidence that the family of the late brother, Marete M'Itirithia was not involved. The petitioners only involved **PW5 and PW6** who did not have the interest of the larger family of Marete M'Itirithia at heart. All they wanted was to rubber stamp the actions of the petitioners who were likewise to support them in **Meru Succession Cause No. 422 of 2004**. They were after their own personal interests in mind. There was no consent that was obtained from the family of the late brother.

28. To that extent, I am satisfied that under **section 76 of the Law of Succession Act**, the grant was obtained fraudulently without disclosure of material facts. The grant cannot therefore stand. It is hereby revoked. A fresh grant issues to the petitioner and Zipporah Gaceri Marete.

29. Since the Meru customary law on inheritance is discriminative and therefore contrary to **Article 27 of the Constitution**, it will be applied with modifications so as to be aligned with the Constitution.

30. Applying the principle of non-discrimination and equality, the estate of the deceased is to be distributed equally between all the three children of the deceased as follows: -

LR No. ABOGETA/ U-KITHANGARI/464

a) Angerica Muthoni Gabriel - 0.943 ha

b) Alice Ncuri M'Mburugu - 0.943 ha

e) The Estate of the late Marete M'Itirithia - 0.943 ha

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

DATED and DELIVERED at Meru this 18th day of December, 2018.

A. MABEYA

JUDGE