



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT KENYA AT MERU**  
**SUCCESSION CAUSE NO. 113 OF 2003**  
**IN THE MATTER OF THE ESTATE OF JOHANA M'MARETE IMANENE**  
**SOLOMON MBAYA**  
**PHYLIS NCEKEI MANENE.....PETITIONERS**

**JUDGEMENT**

The estate of Johana M'Marete Imanene who died on 2<sup>nd</sup> January 1996 is due for distribution, a petition having been filed on 8<sup>th</sup> April 2003 by Solomon Mbaya and Phylis Ncekei Manene with the consent of the beneficiaries and dependants listed on affidavit in support of petition for Letters of Administration intestate, being 9 sons and 3 daughters. The chief's letter dated 24<sup>th</sup> February 2003 identifies the deceased person's children and goes ahead to say instructively that the deceased had subdivided his land and transferred to all his sons but only 2 portions remained. He said the deceased owned parcels of land No.s Abothuguchi/Githongo/ 1317, 1318, 1319, 1320,1321,1322, 1323, 1324 which were already transferred save for which 1324, was in the deceased person's name whereas LR No. 1317 is portion for Solomon Mbaya who is crippled and there was dispute as to who should benefit from parcel 1317 and 1324.

Grant of Letters of Administration intestate was made on 12<sup>th</sup> June 2003 and when Summons for confirmation dated 18<sup>th</sup> December 2003 was filed on 7<sup>th</sup> January 2004 supported by affidavit of Phylis Ncekei sworn on 18<sup>th</sup> December 2003. Felix Kiugu, Paul Gichuru and Lucas Mugambi filed a joint affidavit in protest.

Phylis Ncekei Manene and Solomon Mbaya in response to affidavit in protest averred that their proposed mode of distribution is fair and just and should be approved since affidavit in protest lacks any substance and does not differ much with protesters proposal but only creates unwarranted objections.

Protest was heard by way of viva voce evidence and 2 protesters testified as well as the 2<sup>nd</sup> petitioner Solomon Mbaya who has had to come to court on a wheel chair. He testified on 22<sup>nd</sup> September 2009.

The 1<sup>st</sup> protester witness Felix Kiugu testified also on 22<sup>nd</sup> September 2009 and he admitted all the sons of the deceased had been given their portions during lifetime of the deceased. He said the 1<sup>st</sup> petitioner had not been granted use of land and that they were preserving land Number 1324 to their family. He said he had no interest in Solomon Mbaya's land.

Lucas Mugambi also testified on 22.9.2009 and said their father called them and told them to allow the daughters to use plot No. 1324 if they returned home. He said that Solomon Mbaya was being taken care of by their mother before she died. He said Solomon had no wife or children and Phylis wants to steal his

portion. He said Phylis children should inherit from their father and not from Solomon Mbaya their brother.

He said Plot 1324 is used by Susan Mwari and Karegi Kirimi. He said Solomon Mbaya was not fully in control of himself and was being influenced.

On 1<sup>st</sup> November 2011 Hon Justice Makau made directions to proceed with mater from where reached on 23.11.2011, Mr Mburugu Advocate for Protestors asked that proceedings be typed. When matter came up for hearing on 28<sup>th</sup> February 2012. Mr Mburugu Advocate for protestors said his witnesses had not arrived as one had been taken ill.

The petitioners counsel said he had the petitioner and one witness in court and was ready to proceed. Adjournment was granted with orders that matter being part heard and old should be given hearing date on priority.

Matter was fixed for hearing on 29<sup>th</sup> October 2015 before Justice Gikonyo and directions were taken that matter proceeds from where reached. This was unnecessary as similar directions had been taken before Justice Makau who didn't take any evidence Hearing date was fixed for 20<sup>th</sup> January 2016, when protestors were absent. On 4<sup>th</sup> May 2016 it appears no proceedings were taken.

On 27<sup>th</sup> September 2016 Mr Mburugu again was not present and protestors are not indicted as having attended. Mr Muthama Advocate for petitioners pleaded that considering condition of 2<sup>nd</sup> petitioner an early hearing date should be given. The court set hearing for 10<sup>th</sup> November 2016 when unfortunately the court was not sitting. The date 27<sup>th</sup> March 2017 was then given and on 27<sup>th</sup> March 2017 Mr Mburugu Advocate for Mr Munene Advocate holding brief for the protestors/Objectors submitted that the 2 protestors had already died. The matter was placed aside for Mr Mburugu Advocate to attend. At 2.30 PM Mr Mwirigi Advocate held Mr Mburugu's brief and said that deceased protestors kin were not interested in the matter and that protestors case should be closed.

What is in contention are 2 parcels of land 1317 and 1324 Abothuguchi/Githongo which portions the 2<sup>nd</sup> petitioner is entitled to No. 1317 and all beneficiaries are aware of that fact except the protestors feel 1<sup>st</sup> petitioner should not be registered jointly with 2<sup>nd</sup> Petitioner because they think 1<sup>st</sup> petitioner has control over him. They have gone ahead to say that 1<sup>st</sup> petitioner children should not inherit their fathers land. To them 2<sup>nd</sup> petitioner either is not worth inheriting or was likely to die sooner than later for 1<sup>st</sup> petitioners children to inherit from him if they were jointly registered. Whatever the case the 2<sup>nd</sup> petitioner has a choice to do what he wants with his property even to bequeath to a charitable organization. The protestors had their shares apportioned during the lifetime of their deceased father, they should not stand in the way of Solomon Mbaya in quiet enjoyment of his inheritance. I do therefore find that parcel No. Abothuguchi/Githongo/1317 should be transmitted and registered in the joint names of the petitioner. Concerning Abothuguchi/Githongo/1324 it remained registered in the names of the deceased.

According to the 2 protestor who testified, their father told them that the land should be kept for the family and any daughter who returned home should be allowed to use it. The deceased subdivided his land and gave each and everyone of his sons a portion. The daughters were not given any portion. The sons to the deceased were adequately provided for during the lifetime of the deceased. The daughters were not provided for pursuant to Article 27(i)b (8) of the constitution every person has equality and freedom from discrimination. The law doesn't discriminate between female and male child. All children are treated equally. Claims by the protestors that they were pursuing their father's wishes have not been proved. Where sons have attempted like in the current case to inherit everything from their parents the courts have frowned upon it and the case of:

**In the matter of the Estate of Mary Wanjiru Thairu (Deceased) Nairobi High Court Cause No. 1403 of 2002 by Justice Ang'awa is instructive. In the matter of the Estate of Ellan Warire Nthana (Deceased) Nairobi High Court Cause No. 971 of 2001.**

The court rejected a proposal that majority of the properties be divided equally between the 2 sons with the female survivor getting a small portion. This is on the basis that Section 38 of the Act envisages equal division of the estate amongst all the children.

Considering that the sons of the deceased had received their fair share of the estate during the lifetime of the deceased, it will only be fair and just that the remainder L.R No. Abothuguchi/Githongo/1324 be shared equally among the daughters of the deceased. To that extent the protest fails and distribution to be as ordered above.

Being a matter between family members each party will bear their own costs.

**Judgment Delivered, Dated and Signed in Court on**

**25<sup>th</sup> Day of April 2017.**

**HON. A.ONG'INJO**

**JUDGE**

In the presence of:

C/A- Penina

Ms Wangwe Advocate holding brief for Mburugu for Objector.

Mr Mwanzia Holding Brief for Gikunda Anampiu for petitioners.

**HON. A.ONG'INJO**

**JUDGE**