



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 159 OF 1999

**IN THE MATTER OF THE ESTATE OF THE M'MURUNGA M'RINKANYA ALIAS
MURUNGA GACIUNGU - DECEASED**

TIRITHA MARINGA DANIELPETITIONER

AND

REGINA ATIA NTOITI.....OBJECTOR

LUGINO KIRUKI JEREMANO.....INTERESTED PARTY

JUDGEMENT

This cause relates to the intestate estate of M'Murunga M'Rinkanya alias Murunga Gaciungu who died on 9th August 1978 according to Certificate of death annexed to P & P11.

His estate is made up of parcel of land No. Nkuene/Taita/198 measuring 4.76 acres. According to senior Chief Nkuene Location Agostino M'Mbui is letter dated 7th April 1999 the deceased was survived by:

1. Tiritha Maringa Daniel – Daughter
2. Florence Mweni – Daughter
3. Paul Muthaura Agostino – Grandson
4. Mary Gacheri Muthaura – Grand daughter.

The chief acknowledge that the 1st born daughter of the deceased Tiritha Maringa Daniel was given consent to act as Administrator of the estate. By a letter dated 20th March 1999 the survivors indicated receiving letter complained to OCS Nkubu Police Station that one Luginio Kiruki had destroyed 191 coffee trees from estate land after occupying illegally. An application dated 19th May 1999 was filed by Tiritha Maringa Daniel seeking to restrain Luginio Kiruki from taking possession or occupying land parcel No. Nkuene/Taita/198 till further orders.

Grant of Letters of Administration was made on 8th February 2000 to Tiritha Maringa Daniel and summons for confirmation of grant dated 8th August 2000 was filed on 9th August 2000. Regina Atia Ntoita by an application dated 24th May 2000 objected to grant being confirmed to Tiritha Maringa Daniel for reasons she filed petition secretly and that she was sister to the deceased and was already married. On 10th January 2001, the petitioner/Administrator filed an application dated 14th December

2000 seek presentation of land No Nkuene/Taita/198 and restrain Lugino Kiruki from entering the said land or otherwise interfering with petitioners user of the same. The petitioner in her supporting affidavit said land in question was being used for subsistence by dependants of the deceased and the Respondent who was not dependant was interfering with perennial crops namely bananas growing on the said land. From the court file it appears Regina Atia Ntoiti petitioned to grant of Letters of Administration to the estate of her late husband Agostino Mburabu who was the brother of Tiritha Maringa Daniel and son to the M'Murunga Gaciungu in which she inherited parcel of Land No. Nkuene/Kithunguri/231 through succession cause no. 130 of 1998 together with other beneficiaries/Dependants listed in certificate of confirmation dated 30th November 1999. It is important to know the proprietor background of the said property to establish if Reginas husband received it as gift inter vivos from the deceased herein during his life time.

Agreement for sale of land dated 11th March 1998 is in reference to parcel of land No. Nkuene/Taita/198 between Lugino Kiruki Jeremano and Regina Atia Ntoiti and Paul Muthaura as assignees of Murunga Gaciunga.

By 11th March 1998 Grant of Letters of Administration to the estate had not be taken out to either of the alleged assignees to give them capacity to dispose estate property in the manner they purported to do. In fact grant of letters of Administration was made 2 years later on 8th February 2000 to Tiritha Maringa Daniel. The sale of estate led to Lugino Kiruki Jeremano on 11th March 1998 was therefore null and void ab initio for lack of locus standi and/or capacity. Regina Ntoiti made cross application for letters of Administration to the estate of her father in law the deceased herein in her respond to application by Tiritha Maringa, swearing that she will be able to administer the estate faithfully according to the law and render a just and true account of the estate whenever by law required to do so. She said that with consent of family members including the petitioners Tiritha Murunga Daniel she sold 0.79 acres of Nkuene/Taita/198 to Lugino Kiruki Jeremano. On 12th June 2006 by consent of the parties and counsels it was ordered that all applications pending in the matter be abandoned subject to interested party (Intended purchaser/cases forthwith from intermeddling, interfering or entering the suit land;

That the main cause be heard on priority both on objection and distribution by way of viva voce evidence. The OCS Nkubu Police station was to be served with order to ensure compliance. On 12th November 2008 the petitioner Tiritha Maunga Daniel testified and said that Regina Atia the Objector was wife to her late brother Agostino Mwithimbu and they were blessed with one child namely Paul Muthaura. She also said Agostino sired one daughter by his 1st wife who left him before he married Regina Atia. She said that her father bequeathed her land parcel No. Nkuene/Taita/198 to hold in trust for herself, her sister and her 2 brothers children Gaceru and Muthaura. She said her brother Agostino was given land parcel No. Nkuene/Kithunari/123 during their life time and therefore Regina Atia having benefited from the estate of Agostino was not entitled to the estate of the father in law. She said even husband Daniel and her brother Agostino were registered as proprietors of land No. Nkuene/Kithunguri/123 and when Regina petitioned for letters of Administration she transmitted Daniels portion to him. She said her brother Agostino was present when her father handed her title to parcel No. 178 to hold in trust for herself, her sister and niece Gaceru. Thuta said Regina managed to sell one acre of land in Taita and she lodged a caution. She also lodged caution on land at Kithunguri on behalf of her late brothers children. Objector testified on 16.7.2007 but was stood down until on 12th February 2008 to complete her testimony. Regina said that her husband bought land in Kithunguri and it was not given to him by the deceased. She said when she petitioned for letters of Administration to her husband Agostinos estate she gave Tiritha's husband 2 acres even though her husband had instructed her to give him ½ acre.

She said the 2 acre she gave Tiritha's husband is the one they were occupying. She said she shared land to Mary Gaceru daughter to her husband but she also sold her portion. She said she sold one acre from the Kithunguri land when she had her child admitted in hospital. The 2nd witness to petitioner/Respondent Michael Kiwaaria said the deceased who died in 1978 had shared his land between Agostino and Tiritha. That he gave Tiritha land in Taita whereas Agostino was given Kithunguri land in Mitunguu.

He confirmed Regina Atia was Agostino's second wife and they had one child namely Paul Muthaura. He said Agostino's child by 1st wife was Mary Gaceru. He said Agostino died after about 6 to 7 years of marriage to his 2nd wife and was buried in the land at Mitunguu. He said by the time the deceased herein died Agostino had not married Regina. 2nd petitioner's witness said that Agostino was his age mate and the deceased called him among other elders and made his wishes how he wanted his estate shared. He said land in Taita was 5 acres whereas land in Mitunguu was 8 acres. He said when Regina was married Agostino had already constructed his home in Mitunguu. The 3rd petitioner's witness Mathew Muthamia said the deceased sired 4 children namely;

1. Tiritha Maring'a
2. Mware
3. Margeine
4. Agostino

He said deceased had 2 parcels of land. One in Nkuene/Taita and another Nkuene/Kithunguri and he gave land in Taita to Tiritha Maringa whereas land in Kithunguri he gave to Agostino. He said Tiritha was to hold land in Taita in trust for herself and her 2 sisters. He said Agostino's daughter Gaceru stayed with Tiritha. He said Regina was to inherit land in Mitunguu and not Taita. He said Regina was not present when deceased distributed his property. He said the deceased M'Murunga Gacuingu left title for land in Taita to Tiritha. He said the deceased called elders separately to say his will and wish concerning his estate. This was approximately 3 years before he died. He confirmed that Agostino was 1st Registered.

Whereof land in Mitunguu upon close of Objector and petitioners case counsels filed submissions. The petitioners counsel's submissions were to the effect the deceased distributed his land while he was still alive and Agostino settled in land in Mitunguu while Tiritha settled on land in Taita and petitioners 2 witnesses confirmed the same that position. Mr Kioga submitted that the deceased made oral declaration according to Kimeru customary law in presence of the 2 witnesses to the petitioner. He further submitted the objectors evidence was not supported and was therefore mere allegations.

Mr Kioga submitted further that the deceased died in 1978 and Agostino didn't petition for Letters of Administration to his estate until he died in 1998 about 6 to 7 years after marrying Regina Atia. That Tiritha Maintained land in Taita after her father's death. After Agostino's death Regina quickly filed petition to succeed his estate and sold large portion of land in Mitunguu and was at the verge of selling land in Taita when the court ordered the stranger to vacate the estate property. It was also argued that the deceased handed over title deed for land in Taita to Tiritha in his hospital bed and the question of Agostino, his wife and children inheriting land in Taita didn't arise.

It was urged that the court confirms grant in favour of Tiritha. The objectors advocate in submission said petitioner did seek her consent to file petition. She said that her objection was not responded to and there she ranked in equal standing with petitioner in filing petition. It was argued that petitioner daughter who substituted her upon her death ranked lower in comparison to objector when it comes to petitioning for grant and therefore objector should be made Administratrix to the estate of the deceased.

It was submitted that being the deceased died almost 3 years before the coming into force of the Law of Succession Act that is on 9th August 1978, the applicable law is Kimeru customary law as per section 2(2) of Cap 160 Ldk. The advocate relied on Eugene Contrans Restatement of African Law: 2 Kenya II, the Law of succession where it states categorically that inheritance under Meru Law is patrilineal and that daughters receiving no share of the estate. It was argued that since petitioner was married in a different family would not get any share of the estate. It was urged that beneficiaries and dependants of the late son of the deceased should share the estate. It was further submitted that alleged Oral Will would be invalid by virtue of section 9(1) of the Act as it was made 3 years long before the deceased died. It was

also questioned why petitioner swore an oath the deceased died intestate. If she was aware of Oral will?

It was argued that the other parcel claimed to have been given to deceased son was his home and therefore not part of the deceased estate. That it was not proved that Agostino inherited land from the deceased. It was urged that the objector be appointed Administrators and distribution be done to Objector and children of Agostino namely Paul Muthaura and Mary Gaceru.

From evidence and submissions on record the issues to be determined are:-

1. What is net estate of the deceased?
2. Who are the beneficiaries/Dependants to the deceased?
3. What shares do each of the beneficiaries get?
4. Is the estate subject to customary or statutory law?
5. Whether there was any inter vivos gift to Agostino (Deceased) which should be factored in the distribution of the estate.

The initial petitioner said that the deceased had 2 parcels of land but had given his son the late Agostino land in Mitunguu and left the land in Taita for the petitioner and her 2 sisters.

The parcel of land listed in the inventory of assets is Nkuene/Taita/198 which is registered in the name of the deceased, Murunga Gacuingu. The titled certificate of free hold – title was issued on 14th May 1966.

Parcel of land No. Nkuene/Kithunguri/231 was registered in the name of Agostino Mbuiraru on 20th September 1965 earlier than the Taita land. Nothing shows it belonged to the deceased Murunga Gacuingu prior to registration and it is not understandable why he would give priority to his son instead of having himself registered first. It was therefore in order for Regina Atia the objector herein to petition for Letters of Administration to the estate of husband which comprised of Land No. 123 – Kithunguri. If the caution placed on it by the petition is still subsisting then it should be removed forthwith.

As regards parcel No. 198 Regina Atia the Objector herein was wrong to purport to sell it to the interested party without authority of the court in terms of letters of Administration. The objector being daughter in law to the deceased was however entitled to petition for Letters of Administration being that her deceased husband was son to the deceased herein

This court therefore finds that the only property belonging to the deceased estate is Nkuene/Taita/198 which is to be distributed amongst the deceased persons 4 children or their surviving children and or spouses. I will find that they are entitled to share equally amongst the four children. Whatever is due to any one of the four children of the deceased will be shared equally among their surviving children. It was claimed that the deceased died in 1978 before the Law of Succession Act came into force and therefore the Meru people being patrilineal the deceased estate should be distributed to his sons/son and their dependants/beneficiaries.

That would mean that the entire estate goes to Paul Muthaura who is the only surviving male in the deceased lineage. It would also infer that the objector and her step daughter Mary Gaceri would also miss out on the distribution. The property in question was registered in 1966 under the Nature Land Registration Ordinance of 1959. Such Land cannot therefore revert to Customary Law merely because the Law of succession Act had not come into force by the time the deceased died. It's registration brought it under regime that is Statutory which take precedence over customary law. In consideration of the provision of that constitution the fact that the estate is made up of a registered immovable property this court cannot make orders that are discriminatory in nature or inconsistent with the constitution as such an order would be null and void ab initio. This court therefore finds that the objector and petitioner are granted letters of Administration to jointly administer the estate of the late Murunga

Gaciugu. Certificate of confirmation to issue as ordered above i.e. Parcel of land No. Nkuene/Taita/198 to be shared equally among the four children of the deceased and/or their survivors where they are themselves deceased. Costs of the cause and distribution to be paid from proceeds of the estate and/or by the beneficiaries equally as agreed.

Judgement Signed, Delivered and Dated this 22nd Day of June 2017.

HON. A.ONG'INJO

JUDGE

In the presence of:

C/A: Penina

Petitioner:-

Objector:-

HON. A.ONG'INJO

JUDGE