



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**SUCCESSION CAUSE NO. 268 OF 1996**

**In the Matter of the Estate of the Late Mithanga Ngunyura (Deceased)**

**FRANCIS KITHINJI.....PETITIONER**

**Versus**

**PETER KIAMBI M'MUTHAMIA.....RESPONDENT**

**JUDGMENT**

1. The late Mithanga M'ngunyura (hereinafter "the deceased") is said to have died in 1969. He left behind Land Parcel No. Abogeta/Lower-Kiungonge/182 as the only property forming his estate. On 8<sup>th</sup> October, 1996, Francis Kithinji (hereinafter "the Petitioner") applied for Letters of Administration Intestate which were issued to him on 20<sup>th</sup> March, 1998 and subsequently confirmed on 19<sup>th</sup> October, 1998.

2. According to the Affidavit in support of the Petition (Form No. P&A 5), the Petitioner disclosed the following as those surviving the deceased:-

- a) Joyce Wanjiku Ileri - wife
- b) Francis Kithinji - son
- c) Eliphas M'Mwamba - son
- d) Peter Kiambi - son

3. However, according to the Certificate of Confirmation dated 19<sup>th</sup> October, 1998, the estate of the deceased was distributed as follows:-

**Abogeta/L. Kiungone/182**

- b) Kenneth Mbae Mutiga - 0.5 acres
- b) Eliphas M'Mwamba - 1 acre
- c) Francis Kithinji - the balance
- d) Peter Muchiri - 0.5 acres

4. On 7<sup>th</sup> March, 2006, Peter Kiambi M’Muthamia (hereinafter “the Objector”) lodged his application for the revocation of the grant. The grounds cited were, inter alia, that the Petitioner had misled the court that he is a son of the deceased; that the Objector had not been involved in the bringing of the Cause; the grant was issued and confirmed by a Deputy Registrar and that the proceedings were defective in substance. As at that time, the estate property had been sub-divided into **Abogeta/L-Kiungone/1041, 1042, 1045 and 1046**, respectively.

5. In opposition to the application, the Petitioner filed a Replying Affidavit on 11<sup>th</sup> April, 2006. He stated that he was the only surviving beneficiary of the deceased; that the proceedings had been lodged openly with the knowledge of the Objector; that the Objector was not a beneficiary of the deceased but was a son of one Kananu M’Mburia and that the property had since been sub-divided and titles issued.

6. After several false starts, the trial began on 23<sup>rd</sup> June, 2015 before Makau J who concluded the Objector’s case. The Petitioner’s case was heard and concluded by this court on 13<sup>th</sup> June, 2017. The Objector testified and called two witnesses. In his testimony, the Objector told the court that; the deceased had two children, Ileri Mithanga and M’Muthamia Mithanga; that he was a son to M’Muthamia Mithanga while the Petitioner was a son of Ileri Mithanga; that the two were cousins and grandchildren of the deceased; that both were raised by their respective parents on the subject property until the death of the said parents. His mother was known as Margret Muthoni and was buried on the property upon her demise. That Joyce Wanjiku was the Petitioner’s mother and not the wife of the deceased as claimed by the Petitioner. He did not know about the succession cause until the Petitioner evicted him from the property. He wanted the property to be distributed equally between him and the Petitioner.

7. In cross-examination, the objector denied knowledge of one Kananu M’mbwiria. He told the court that all the three daughters of the deceased were dead; that he was born in 1957 and his father died in 1960. That his mother had other children apart from him.

8. OW2 was M’Mukindia M’Nginye, an 82 year old man from the same village as the parties. He confirmed to the court that he knew the parties. He knew their fathers to be Ileri and M’Muthamia who were both dead. That the two fathers were buried on the subject property and that the Petitioner and the Objector were both brought up on the subject property. That although the property should have gone to Ileri and M’Muthamia, the Petitioner had obtained tile secretly and evicted the Objector from the property. In cross-examination, he told the court that the clan of the parties had met and decided that the property be divided between the two. He admitted that the Objector and Kananu M’Mbuiria came from the same family.

9. OW3 Julius Kaburu Kithinji is a village mate to the parties. He knew that the Petitioner was a son to Ileri and the Objector a son of M’Muthamia. Ileri and M’Muthamia were sons of Kanthiiri a brother to the deceased. That the deceased did not have sons but daughters. The parties and their fathers were brought up on the subject land. The Objector had a house erected on the subject property but was demolished by people who had purchased the portion from the Petitioner.

10. The Petitioner testified and did not call any witness. He told the court that he did not know the Objector; that the chief had written him an introductory letter to lodge these proceedings and had not included the Objectors name. He stated that he was a son of Ileri who was a brother to M’Muthamia M’Mithanga. That the Objector’s mother was married to M’Muthamia M’Mithanga but was chased away before she bore him a child. That the Objector’s real father is one Kananu M’Mbuiria. That the Objector has never stepped on the subject property. That he was the one entitled to inherit the property of the deceased because he is the one who was paid the dowry of the daughters to the deceased.

11. In cross-examination, the Petitioner could not recall when the deceased died but he was very young then. He admitted that from his and the Objector’s National Identity card, the Objector was born in 1957 while he was born in 1960. He stated that Kananu M’Mbuiria had lived on the subject land. That the Objector was living with his father, Kananu M’Mbuiria. He denied that there had been any proceedings between him and the Objector before the Land Tribunal. According to him, the case was between him and Kananu M’Mbuiria.

12. Each party filed his submissions. It was submitted for the Objector that the Petitioner had named the Objector as a son of the deceased in the affidavit in support of the petition; that the Petitioner had admitted that the mother of the Objector had been married to M'Muthamia Mithanga yet there is no evidence of the dissolution of that marriage. The court was urged to share the estate to the parties equally.

13. For the Petitioner, it was submitted that according to the chief's letter, only three people were named as beneficiaries and the Objector was not one of them; that the proceedings were brought openly and duly gazetted; that the Objector knew of these proceedings that is why he had brought previous applications to challenge them. It was further submitted that the proceedings in LDT 16 of 2000 had no relevance as they were undertaken after the grant had been issued and confirmed. That the uncle of the Petitioner had married the mother of the Objector but had divorced her before the Objector was born. That Kananu M'Mbiria was the father of the Objector and three other children. That the Objector had not produced a birth certificate to show that M'Muthamia was his father. That in the premises the Petitioner was not under any duty to involve the Objector in the filing of these proceedings.

14. Having considered the affidavits on record, the testimony of the witnesses and the submission of counsel, the issues for determination are; ***were the proceedings herein defective in substance? Is the Objector a beneficiary to the estate and was he therefore entitled to be notified of these proceedings? How should the estate be distributed?***

15. On the first issue, it was the contention of the Objector in the Summons that the grant was issued and confirmed by the Deputy Registrar of this court contrary to law. However, both Counsels did not address this issue. The record shows that on 19<sup>th</sup> March, 1998, the firm of B. G. Kariuki & Company lodged an application in court. The Summons did not indicate the provisions of the law under which it was being made. The application read as follows:-

***“LET ALL PARTIES concerned attend the Deputy Registrar in chambers on the 20<sup>th</sup> day of 3 1998 at 9.00 a.m. in the forenoon or so soon thereafter on an hearing of an application for counsel for the applicant for orders:***

***1. THAT the applicant/Petitioner herein FRANCIS KITHINJI be granted temporary letters of administration intestate in respect of the estate of the deceased”.***

16. That application came up before Hon. Solomon Wamae, Deputy Registrar on 20<sup>th</sup> March, 1998 and was allowed. The Deputy Registrar proceeded to issue and sign the grant on the same day.

17. Again on 6<sup>th</sup> October, 1998, the Petitioner took out Summons for the confirmation of grant to be heard before the Deputy Registrar. The application came up for hearing before Hon N. H. Oundu, Deputy Registrar and was allowed. The Deputy Registrar again issued and signed the Certificate of Confirmation of grant the same day.

18. Under the law, a grant is to be issued and confirmed by a court of competent jurisdiction. Sections **48 and 49 of the Law of Succession Act, Cap 160**, the courts with jurisdiction to issue a grant and confirm the same is either the High Court or the Magistrates Court. The issuance and confirmation of grant is not an administrative act but a judicial function. The officer undertaking the function must be clothed with the necessary jurisdiction to undertake that function. A deputy registrar has no role under the **Law of Succession Act, Cap 160, Laws of Kenya** in the issuance and confirmation of grants. Other than satisfying himself that all the required forms and material has been supplied by the Petitioner, the deputy registrar cannot entertain the application for grant or confirmation thereof.

19. In entertaining an application for grant or confirmation thereof, the court exercises its judicial mind. There are many issues that the court has to establish before allowing any of those applications. In the present case, the deputy registrar did not consider that one while one Peter Kiambi had been disclosed as a son in **Form No P&A 5** there was no explanation why he had been excluded during distribution. Further, there was no explanation that was given to as who **Kenneth M'Mwamba and Peter Muchiri** were or their relationship to the deceased for them to be included as beneficiaries yet their names never

featured in **Form No. P&A 5** which is very crucial in a succession cause. That only goes to show how flippantly the matter was dealt with by the deputy registrar. He clearly had no jurisdiction to entertain the two applications.

20. Accordingly, to the extent that the grant was issued and confirmed by the deputy registrar at the instance of the Petitioner, the proceedings to obtain the grant were defective in substance in terms of **section 76 (a) of the Law of Succession Act** and cannot stand.

21. The second issue is whether the Objector is a beneficiary of the estate. The evidence on record is to the effect that one Kanthiiri was a brother to Mithange Ngunyire, the deceased. Kanthiiri bore two sons Ileri Mithanga and M'Muthamia Mithanga. Kanthiiri's brother, the deceased did not have sons. He therefore adopted both Ileri and M'Muthamia as his own sons and they lived with him together with their families on his land, the subject of these proceedings. The Petitioner is the son of Ileri. The Objector contended that he is the son of M'Muthamia but the Petitioner denies that fact.

22. Both Ileri and M'Muthamia are long dead as are their wives. We only have the evidence of the protagonists in these proceedings and the two witnesses who testified on behalf of the Objector. It was the Objector's case that M'Muthamia was his father; that his mother one Margret Muthoni was married to M'Muthamia and that upon her demise, she was buried on the subject land. That he was born and brought up on the subject land. His father died in 1960 when he was three years old. That he was only evicted by the Petitioner when the latter sold the portion of the land to 3<sup>rd</sup> parties.

23. The testimony of the Objector was supported by OW2 and OW3. They were categorical that they saw the Objector and the Petitioner grow up on the subject property. OW2 was an 82 year old man who stated that not only did he know Ileri and M'Muthamia, but he also knew Kanthiiri and the deceased. He knew the Objector to be the son of M'Muthamia. His testimony remained unshaken.

24. On the other hand, the Petitioner testified that although the mother of the Objector was married to his uncle, M'Muthamia, she was chased away by him before she gave birth to the Objector. That the Objector's real father is one Kananu M'Mbuiria with whom the Objector was living. He vehemently denied the claims that the Objector had ever lived on the subject property with him. He maintained that it is the Objector's father the said Kananu who was living on that property before he was evicted by the clan.

25. This court has considered the testimonies of the witnesses and the evidence on record. To start with, the Petitioner indicated in his Petition that the deceased was his father and that he was bringing the application as the son of the deceased. He indicated in **Form No. P&A 5** that one Joyce Wanjiku Ileri was the wife of the deceased. At the trial, he admitted that he was not the son of the deceased and that Joyce Wanjiku was his mother and not a wife of the deceased.

26. When he testified, the Petitioner was asked whether there had been any proceedings between him and the Objector before the elders. He vehemently denied it and stated that the case he was aware of was as between him and Kananu M'Mbuiria, the alleged father of the Objector. When shown the proceedings in **Meru Central District Land Disputes No. 39 of 1999 Peter Kiambi vs. Francis Kithinji**, whose award was recorded in court as **Meru CM'S Court Land Dispute No. 16 of 2000, Peter Kiambi vs. Francis Kithinji**, the Petitioner admitted that there was such a proceeding at Kanyakine before a panel of elders. The proceedings of that Tribunal were produced in an application before Onyancha J who referred them to his ruling dated 2<sup>nd</sup> February, 2004.

27. Since the proceedings in the aforesaid Meru CM's Land Dispute No. 16 of 2000 forms part of the record, the court has had an opportunity to look at it. The Petitioner admitted in those proceedings that the Objector was living with him in the subject property. His subsequent denial that the Objector has never set his foot on the subject property therefore casts doubt as to his honesty.

28. The totality of the foregoing is this; the Petitioner identified the Objector as survivor to the deceased in **Form No. P&A 5**; he referred to him as a son of the deceased the same way he identified himself; he

admitted before the panel of elders that the Objector was living with him in the subject property; he alleged that the 'father' of the Objector, one Kananu, was living within the property but was evicted by the 'clan'. He however did not explain to court how and on what basis the said Kananu, who according to him was not related to Mithanga, was living in the subject property.

29. From the foregoing and the evidence on record, the court did not believe the Petitioner. He came out as a perennial liar who would not hesitate to lie to achieve his goal. He lied that he was a son of the deceased; that his mother was a wife to the deceased; that he has never had any case with the Objector but one Kananu whom he christened the Objector's father. As is that was not enough, he attempted to explain the Objector's paternity by alleging that the Objector was sired by one Kananu before he himself, the Petitioner was born. The evidence on record shows that the Objector was born in 1957 and the Petitioner in 1960. The Objector told the court, which was not denied, that his father M'Muthamia died in 1960 the year the Petitioner was born. How would the Petitioner know what happened between the mother of the Objector and M'Muthamia before he, the Petitioner, was born? That would be sheer speculation.

30. The findings this court makes are that; Kanthiiri had two sons Ireri and M'Muthamia; Ireri and M'Muthamia were adopted by Kanthiiri's brother, the deceased because he did not have sons; Ireri and M'Muthamia bore the Petitioner and the Objector and the two were brought up and grew in the subject property; that the Petitioner knew and recognized the Objector as cousin at all times and that is why in **Form No. P&A 5**, he named him as a son of the deceased in the same manner he identified himself; that the Objector's mother was divorced by M'Muthamia after the birth of the Objector or shortly before and then married elsewhere and that is why the Objector was allowed to live within the subject property; that the Objector grew on, was brought up and continued to live within the subject property until after the Petitioner obtained the defective grant when he evicted him therefrom.

31. Accordingly, the Objector was a lawful beneficiary of the deceased. In this regard, he was entitled to be notified of the proceedings herein. As a grandchild of the deceased, he had an equal right as the Petitioner to apply for the letters of administration. He should have been notified of the lodging of the letters. However, he was not which was highly irregular.

32. The final issue is how the estate should be distributed. The evidence on record shows that the daughters of deceased are all dead. The deceased died in or about 1966/67 before the **Law of Succession Act** came into operation. The law applicable then to the estate of the deceased was the Meru Traditional Law which did not recognize the right of the daughter to inherit from their father. In this regard, the estate of the deceased was to be inherited by the son he had adopted, Ireri and M'Muthamia in equal shares. Now that the two also died before administration of the estate could be undertaken, their shares would fall on their children. The evidence on record is that their children are the Petitioner and the Objector.

33. Accordingly, the estate of the deceased should be distributed to the Petitioner and the Objector in equal shares.

34. On 1<sup>st</sup> July, 2008, a consent order was recorded which confirmed that the property known as **Abogeta/Lower-Kiungone/182** measuring 1.82 ha formed the entire net estate and that the 0.8 ha already sold to 3<sup>rd</sup> parties be deemed to be part of the Petitioner's entitlement from the net estate.

36. Accordingly, the grant is hereby revoked. A fresh grant is issued to the Petitioner and the Objector jointly and the estate will be distributed as follows:-

**Abogeta/Lower-Kiungone/182**

a) Francis Kithinji - 0.90 ha

b) Peter Kiambi - 0.90 ha

For the avoidance of any doubt and in order not to delay the execution of this order, the deputy registrar of this court is empowered to execute all the necessary documents to give effect to this order. This order

is made under Article 159 of the Constitution in order not to delay this matter that has been in our courts for the last over 20 years.

37. Since the parties had agreed to abandon any claim on the other sub-divisions of the estate property and were only concerned with the balance thereof being Abogeta/**Lower-Kiungone/1046**, the same will be distributed as follows:

a) Francis Kithinji - 0.12 ha

b) Peter Kiambi - 0.90 ha

38. Although the Petitioner behaved in the most callous manner and against the interests of justice in this case, the court deems fit not to order any costs as the matter is between family members.

It is so decreed.

**DATED** and **DELIVERED** at Meru this 28<sup>th</sup> day of September, 2017.

**A. MABEYA**

**JUDGE**