



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 308 OF 2011**

**In the Matter of the Estate of ITHINJI ABUTU alias M'ITHINJI ABUTU (Deceased)**

**SILAS MURINDU ITHINJI ..... PETITIONER**

**Versus**

**FREDRICK KAUMBU M'ITHINJI ..... OBJECTOR**

**JUDGMENT**

1. The late M'ITHINJI M'ABUTU (hereinafter "the deceased") died on 14<sup>th</sup> November, 1987 and left behind one property *NTIMA/NTAKIRA/1362* (hereinafter "the property") to his name. He left the following as his beneficiaries:

- a) Fredrick Kaumbu - son
- b) Silas Murindu - son
- c) Charity Gacheri - daughter
- d) Hellen Ngiriki - daughter
- e) Florence Kanyuru - daughter
- f) Jenerusa Karuta - daughter
- g) Harriet Kinya - daughter

2. On 10<sup>th</sup> June, 2011, Silas Murindu Ithinji (hereinafter "the Petitioner") petitioned for letters of administration for the estate of the deceased which was issued to him on 14<sup>th</sup> September, 2011. Pursuant thereto, on 17<sup>th</sup> July, 2015, the Petitioner applied for confirmation of that grant. In that application, the Petitioner proposed that the deceased should be inherited as follows:-

**A. LAND PARCEL NO. NTIMA/NTAKIRA/1347**

- a) Lucy Rugaru Murindu )
- b) Audrey Karuthu Murindu ) Jointly
- c) David Mutua Murindu )

**B. LAND PARCEL NO. NTIMA/NTAKIRA/1350**

Fredrick Kaumbu M'Ithinji

**C. LAND PARCEL NO. NTIMA/NTAKIRA/1362**

- a) Fredrick Kaumbu M'Ithinji - 0.17 Acres
- b) Silas Murindu Ithinji - 5 Acres
- c) Lucy Rugaru Murindu )  
Audrey KaruthuMurindu ) - 3.63 Acres jointly  
David Mutua Murindu )

3. On 16<sup>th</sup> October, 2013, the Objector filed an objection to the making of the grant. His grounds were that the Petitioner was his step brother and that he had not been involved in the filing of the Petition. The Objector was also apprehensive that the distribution of the estate might not be fair.

4. Although earlier on directions had been made that the Objection be determined through viva voce evidence, on 7<sup>th</sup> June, 2017, the parties recorded a consent varying that order and adopted their respective affidavits and witness statements as their evidence. They further agreed to file their respective submissions within 10 days a piece. However, as at the 29<sup>th</sup> June, 2017 only the Objector had filed his submissions and the Petitioner had not.

5. The Objector's case was that the deceased had two wives Derevina Mwari and Marion Kathambi. That the Objector belonged to the first house constituting himself, Charity Gacheri, Sarah Nyoroka (deceased) and Florence Kanyuru. That the Petitioner belonged to the second house which included Augustino Kaithuria Ithinji (deceased), Jenerosa Karuta, Harriet Kinya and Hellen Ngiriki. He contended that the only property left by the deceased was *Ntima/Takira/1362* measuring 8.8 acres and that *Ntima/Ntakira/1350* was his property since 1<sup>st</sup> registration and at no time did it belong to the deceased.

6. The Objector further contended that *Ntima/Ntakira/1347* was demarcated in the name of Kaithuria M'Ithinji alias Agostino Kaithuria M'Ithinji who, upon his demise, his widow was inherited by the Petitioner who also inherited the said property. That on inheriting Agostino's widow, Agostino's children became those of the Petitioner. That in 1978, the deceased divided *Ntima/Ntakira/1360* into two halves of 4.40 acres for each house. He therefore urged that the said property be distributed as such.

7. The Objector called three witnesses, Florence Kanyuru (his sister), Ciliro Mbogori M'Buri (a cousin) and Patrick Muthamia (also a cousin). Their narrative was like that of the Objector, that both him and the Petitioner had their own properties and that the deceased had divided his property, *Ntima/Ntakira/1362* into two between his two houses. They supported the Objector's case, that the only available property for distribution is *Ntima/Ntakira/1362* which should be distributed into two between the Petitioner and the Objector.

8. For the Petitioner, in addition to the Affidavit in support of the application for confirmation, he filed a Further Affidavit on 18<sup>th</sup> February, 2016. He contended that during his lifetime, the deceased had caused *Ntima/Ntakira/1350* and *Ntima/Ntakira/1347* to be registered in his name and that of the Objector at the time of demarcation. That *Ntima/Ntakira/1350* measuring 4.77 acres was registered in the Objector's name while *Ntima/Ntakira/1347* measuring 1.16 acres was registered in the Petitioner's name. That his late brother Agostino Kaithuria M'Ithinji had passed on and left behind three children, namely, Lucy Rugaru, Audrey Karuthu and David Mutua surviving him.

9. The Petitioner further contended that the deceased had caused *Ntima/Ntakira/1350 and*

*Ntima/Ntakira/1347* to be registered in the Objector's and the Petitioner's names because of the then obtaining policy that no one could have more than one property registered in his name. That accordingly, *Ntima/Ntakira/1362*, should be distributed having in mind the fact that the two had benefited as aforesaid.

10. On their part, the Petitioner's witnesses, Elias Nkamani M'Buuri (an elder of Kiamuku clan from which the parties hail), Rugaru Lucy Murindu (a granddaughter to the deceased) and Harriet Kinya Marete (a daughter to the deceased) supported the Petitioner's narrative. They told the court that all the Parties, to wit, the Objector, the Petitioner and the estate of the late Agostino, were entitled to five acres each in all the three properties disclosed by the Petitioner. They urged the Court to uphold the Petitioner's proposed distribution.

11. In their submissions, learned Counsel for the Objector submitted that the only property available for distribution and which constitutes the estate of the deceased was *Ntima/Ntakira 1362* and that from the available evidence the said property should be divided equally between the two houses of the deceased. The Petitioner did not file any submissions.

12. I have considered the evidence and the submissions on record. One thing that turned out clear is that none of the daughters of the deceased was interested in the sharing of the estate. Those who made statements supported the position of either the Objector or that of the Petitioner. The issues for determination therefore are; what constitutes the estate of the deceased; who are the beneficiaries of the deceased and finally how should the deceased's estate be distributed?

13. At the time the Petitioner filed the Petition, he disclosed at paragraph 6 of Form PA No.5 *Ntima/Ntakira/1362* as the only property constituting the estate of the deceased. He also filed a certificate of search for the said property to accompany the Petition. That search showed that the deceased was registered as owner of that property on 7<sup>th</sup> April, 1965. His was first registration. The other two properties, *Ntima/Ntakira/1350 and 1347* were first introduced in these proceedings in the application for distribution.

14. I have seen the copies of the green cards for *Ntima/Ntakira/1350 and 1347*. *Ntima/Ntakira/ 1350* was first registered in the Objector's name on 7<sup>th</sup> April, 1965 while *Ntima/Ntakira/1347* was also registered on the same day in the name of Kaithuria Ithinji. The latter property was later succeeded by the Petitioner on 1<sup>st</sup> April, 1977. However, the Succession Cause that resulted in the Petitioner being the registered owner was not disclosed. In view of the foregoing, it is quite clear that at no time whatsoever was the deceased ever registered as owner of any of the said properties before they were registered in the respective names of the Objector and the Petitioner.

15. It was the Petitioner's contention that the two properties belonged to the deceased but he caused them to be registered in the names of his children during adjudication because of the then prevailing policy of not having any one person being registered with more than one property. Other than that bare averment, the Petitioner did not produce any evidence to prove the existence of such a policy being in force at the time of registration. Further, if that was the case, since the deceased had three sons, there is no plausible explanation why the deceased did not likewise cause *Ntima/Ntakira/1362* or a part thereof to be registered in the name of his 3<sup>rd</sup> son during his lifetime.

16. For the foregoing reasons, I am satisfied that *Ntima/Ntakira/1362* constitutes the only property of the estate of the deceased. It is only that property that is available for distribution. The Court cannot purport to extend its jurisdiction to properties belonging to or registered in the names of other living persons other than the deceased.

17. The next issue is who the beneficiaries of the deceased are. According to the Chief's letter dated 15<sup>th</sup> October, 2011, the deceased was survived by; Fredrick Kaumbu, Silas Murindu, Charity Gacheri, Hellen Ngiriki, Florence Kanyuru, Jenerusa Karuta and Harriet Kinya. It later turned out that the deceased also had another son, Agostino Kaithuria Ithinji who had died before the deceased but had left behind children

and a widow. The evidence on record shows that the said Agostino Kaithuria Ithinji left Lucy Rugaru Murindu and Audrey Karuthu Murindu.

18. It was alleged by the Objector, which was not denied by the Petitioner, that the widow of Agostino was subsequently inherited by the Petitioner and the two begot one David Mutua Murindu. Since the late Agostino Kaithuria Ithinji left children behind, his demise did not dissipate or exterminate his right to his father's estate. He left behind the widow and two children who would succeed him. This being the case, the late Agostino Kaithuria was entitled to a share of his father's estate as any other child of the deceased.

19. The last issue is how the estate should be distributed. The deceased was a polygamous man. He had two houses, that of Delvina Mwari and the one of Marion Kathambi. The first house had four children while the second had five. The Objector's case was that the deceased had subdivided *Ntima/Ntakira/1362* into two for the respective houses in 1978. The court was not told when the two wives died. There was no evidence to show that there had been such division or that the deceased had divided his property while alive. If that were the case, the deceased would have caused the registration of such subdivisions by the time he died in 1987.

20. The Objector further contended that since the Petitioner inherited the widow of the late Agostino Kaithuria, the latter's children belong to the Petitioner and are not entitled to a separate share from that of the Petitioner. It is trite that once the widow got married to the Petitioner, she lost her right to Agostino Kaithuria's share (***See Section 35 of the Law of Succession Act, Cap 160 of the Laws of Kenya***). However, the understanding of this Court is that, in the African tradition the culture of wife inheritance, practice was meant to safeguard the interests of the deceased man in that, the widow and the children of the deceased were not to suffer because of the demise of the husband. They were to be protected and provided for by the person who inherited the widow.

21. As regards the position of the widow once inherited, she becomes the wife of the new husband and an entirely new marriage is created. The children born out of that relationship belong to the man inheriting the widow. In the ***Reinstatement of African Law: The Law of Succession by Eugene Cotran London Sweet & Maxwell 1969***, the author states at page 17:-

***“The widow may choose to continue living at her deceased husband's home, and, in such a case she may enter into a levirate union if she so wishes, though this is not compulsory. She usually enters into such a union if she is still capable of producing children. The person preferred as levir (i.e. the person to sleep with the widow in order to have children) is the younger brother of the deceased who is next in order of seniority, in no circumstances may she cohabit with an elder brother of the deceased. in the absence of any brothers, or if the widow does not wish to cohabit with any of the brothers, the levir may be another male relative of the deceased husband, or even a complete outsider provided he has the approval of the muhiriga elders.***

***Children resulting from a levirate union take the name of the deceased husband and are regarded for all purposes as his children. They inherit his property or share the inheritance with any previous sons ... A widow may choose this option only if she had no children by her deceased husband. In such a case she is inherited by a younger brother and becomes his wife in all respects. Widow-inheritance differs from a levirate union in two ways.***

***(i) In widow-inheritance the widow abandons the home of her deceased husband and goes to live with his brother as his wife. She does not, as with a levirate union, merely have sexual intercourse with the brother in order to produce children.***

***(ii) In widow-inheritance, any children born are regarded as those of the brother inheritor and not as those of the deceased husband as in a levirate union. Hence they take the inheritor's name and succeed to his property.”***

Accordingly, having been inherited by the Petitioner, the child that resulted from her relationship with him is his.

22. The lineage of the deceased man did not end by his demise. The children of the deceased man remained his own notwithstanding that his widow was inherited. Accordingly, I reject the contention of the Objector that the children of the late Agostino are not entitled to a separate share on the alleged grounds that they are children of the Petitioner. However, since it was contended and not denied that David Mutua was the child of the Petitioner, his father being still alive, he does not qualify for the share of the late Agostino Kaithuria Ithinji.

23. Since the deceased was polygamous, the applicable law is **section 40 of the Law of Succession Act** which provides:-

***“40(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”***

24. In view of the foregoing, the number of units are not two as contended by the Objector but nine. Since however, the daughters are not claiming, the number of units reduce to three. Accordingly, the estate of the deceased will be distributed as follows:-

**NTIMA/NTAKIRA/1362 – 3.52 Ha**

a) Fredrick Kaumbu M’Ithinji - 1.173 ha

b) Silas Muringu Ithinji - 1.173 ha

c) Lucy Rugaru Murindu )

Audrey Karuthu Murindu ) - 1.173 ha in equal shares

David Mutua will inherit his share from his father, the Petitioner, who is still alive.

25. This being a family matter, I will order each party to bear own costs.

**DATED and DELIVERED** at Meru this 21<sup>st</sup> day of September, 2017.

**A. MABEYA**

**JUDGE**