



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**SUCCESSION CAUSE NO. 315 OF 2006**  
**IN THE MATTER OF THE ESTATE OF M'MUKINDIA MBURUGU**  
**ALIAS SAMUEL MUKINDIA MBURUGU – DECEASED**  
**AND**  
**JAPHET NDEGE MUKINDIA.....PETITIONER**  
**VERSUS**  
**ELIPHAS KARERE.....OBJECTOR**  
**(CORAM: J. A. MAKAU – J.)**

**JUDGMENT**

1. The petitioner herein **Japhet Ndege Mukindia** through a Petition for grant of letters of administration filed on 25.9.2006 sought grant of letters of Administration intestate in respect of the deceased's estate herein by virtue of being a son to the deceased. Grant of letters of Administration intestate was issued to the petitioner on 15th April 2008.
2. The Petitioner filed summons for confirmation of the grant on 12th March 2009, through the firm of M/s. Kiautha Arithi & Co. Advocates, that before grant was confirmed Eliphas Karere filed an affidavit of protest against the confirmation of the grant of letters of Administration, claiming that he is in occupation of plots L.R. Abogeta/U-Kithangari/1171, 1178, 1179, 1180, 1181 and 1182 being resultant titles from L.R. No. 245 and claiming further, the petitioner and his family has no interest in the aforesaid parcel of lands and the same do not comprise part of the deceased's estate.
3. That on 23rd July 2014 directions were made to the effect that, the objection be determined by way of **viva voce** evidence. The Objector gave evidence and called one witness whereas the Petitioner gave evidence and called one witness. Mr. Kiogora Ariithi Learned Advocate appeared for the Objectors while M/s Thibaru Learned Advocate represented the Petitioner
4. OW1, the Objector **Eliphas Karere** testified he knew the deceased but the grant was issued to the petitioner, being son to the deceased M'mukindia, who died in 2005. OW1 testified he is not related to the deceased as his father is M'mungania. He claimed the land Kithangari/Kowanyoma/245 belonged to his father through his grandfather Ikutha. He averred the land did not belong to M'mukindia Mburugu, claiming he has lived on the land since birth. He testified the land was secretly registered in the deceased's name through fraud. He testified the parcel of land is 29.45 acres, but it has since been sub-

divided but in spite of such subdivision QW1, testified he is still in occupation of the portion he was occupying before subdivision by the petitioner who pushed the objector to the upper side over a portion of 1 ½ acres.

5. QW1, testified that he stays on the land with his 4 sons and his wife which portion the petitioner is interfering with. He urged when the petitioner filed the petition he did not inform the Objector. He prayed that his portion be given to him. On cross-examination the Objector testified that he is 70 years and his father died in 1958, leaving him on L.R. 245 under care of his aunt. That M'mukindia took over the land in 1958. He stated the land is in the name of M'mukindia and that he did not file any suit to challenge the title. He agreed the Petitioner has the right to petition for the estate of his father. He admitted that M'mukindia did not bring him up. That the land was sub-divided by the Petitioner and others in 1969. He changed his evidence and stated the sub-division was done by the deceased giving the Objector a portion of land to where he is currently residing and has been since 1969. He testified that wa done in presence of clan members and he did not challenge the subdivision in court and tribunal. In re-examination the objector confirmed he was given the small portion of 1 ½ acres by M'mukindia and since then no one has removed him from that portion.

6. **OW2, Ngaku Nkirata** testified he did not know the deceased, but he knew the Objector and the Petitioner, but he immediately changed his story and stated he knew the deceased. He testified the Objector has developments of tea bushes, bananas and 3 diary cows, macadamia and 4 houses. He testified the Objector has lived on the land for long time. He stated that the Objector is the owner of the disputed land, through his late father Karere. He testified that before Karere died he called him and told him he was leaving his son with M'mukindia, so that he could care for him and the land. He stated the Objector's father was buried at OW2's land. He stated the land belongs to M'mungania's father, the objector adding the deceased's family has not lived in the disputed land. During Cross-examination OW2 testified, that M'mukindia was encroaching on the land of Elphas Karere before adjudication process started in the area. He testified by the time the deceased herein passed on, the disputed land had been registered in his name adding the Objector did not have the title to the land but he occupied a portion of the land, estimated at about 1 acre, while 27 acres are occupied by M'mukindia's children.

7. The petitioner, **Japhet Ndege Mukindia** PW1, testified that he is son to the deceased. That the Objector belongs to their clan Omuthomo. He referred to paragraph 6(f) of his affidavit in support of application for confirmation of grant in which he had indicated what the Objector is entitled to thus Abogeta/U-Kithangari/1177 approximately 0.81 hectares which arose from subdivision of L.R. 245 Abogeta/U-Kithangari, which land is registered in the name of the deceased herein, thus M'mukindia Mburugu after subdivision. PW1 produced copy of the green card as exhibit P1. PW1 testified he is giving the Objector, the portion as was left in his custody for the Objector Elijah Karere. He testified the Objector was left in custody of his father as a child and he used to visit them and go away. That in 1968 the Objector came to the Petitioner's fathers, showed the objector where to build his home because he was a clansman and as Objector's father had told Petitioner's father not to abandon the Objector and further more he did not have land. That the Objector settled and built on Abogeta/U-Kithangari/1177. That boundary was put for the Objector by the deceased and the Petitioner's father carried out subdivision of plot No. Abogeta/U-Kithangari/1177, that the other plots out of L.R. Abogeta/U-Kithangari/245 were for the sons of the deceased. Land No. 1178 was transferred to Ezekiel/Gikunda, on 25.5.2005, 1179 to Riungu Mukindia not yet transferred, 1180 for the deceased, occupied by his wife Magdalena Igoki Mukinda, 1181 allocated to the Petitioner, 1182 to Elias Riungu Mukindia, PW1 produced bundles of green cards as exhibit P2 (a) – (e). He added the Petitioner do not occupy any other land other than plot No. 1177 and that he does not share it with any other person. He prayed the land be shared as per his scheme of distribution. During cross-examination PW1 testified at the time of filing the petition he did not consult the Objector. He stated the Objector had lived on the land for long time but he was not living on the land before 1968. He stated in 2005 the deceased set boundaries for portions of the Objector and during the deceased time there was no problem. He added the subdivided portion save 1178 are in the name of the deceased herein. The Petitioner reiterated during subdivision they could not call the Objector since he is not a member of their family. The petitioner stated his scheme of subdivision is as per his late father's wish, who wished plot No. 1177 to go to the Objector. That they went to board even with the objector who never objected to the subdivision. On Re-examination PW1 testified that his

father moved his children to different portions of his land on agreement that they did not remove Karere from his portion of land as allocated by the deceased. He added that Karere has no blood relation to the deceased.

8. **PW2 Geoffrey M'Kiome M'kirika** testified that petitioner is son of the deceased but he does not know the relationship between the objector and the deceased. He stated there was a case between the Objector and the deceased before the Land Control Board in which the deceased was told to go and share his land which he did giving the Objector a portion of his land where he is still settled. He estimated the land was about 2 acres. During cross-examination PW2 stated the deceased indicated how his land should be shared adding the land belonged to the deceased.

9. That after the close of the Petitioner's case M/s Thibaru learned counsel for the petitioner relied on the Petitioner's evidence and opted not to file written submissions while Mr. Kiogora Arithi learned Advocate opted to put in written submissions. The written submissions were filed on 19th October 2015, that on 14th December 2015 my brother, Hon Justice Gikonyo, directed that the court file be forwarded to me to write the judgment. The file was received by the Deputy Registrar Siaya on 24th December, 2015 and forwarded to me on 4th January, 2016. I proceeded on leave upto 1st March 2016 and thus explains the delay in writing and forwarding the judgment to Meru High Court.

10. I have very carefully considered the pleadings in this matter, the evidence by the Objector and the Petitioner and Objector's Counsel submissions. The issues for consideration in this case can be summarized as hereunder:-

**(a) Who is the proprietor of parcel No. Abogeta/Kithagari/1177, 1178, 1179, 1180, 1181, and 1182?**

**(b) Do the above portions form part of the deceased's estate?**

**(c) Who is in occupation of the said portions of land?**

**(d) Is the Objector entitled to the said portions and if not so what is he entitled to?**

**(e) Is the Objector's claim over the said portions property before the court?**

**(f) Should the grant be confirmed?**

11. The Objector claimed the original land Abogeta/U-Kithangari/245 belonged to his late father through his late grandfather Ikutha and that it did not belong to the deceased M'mkindia Mburugu. He claimed since his birth he had been on the said land and that the deceased have secretly caused the said land to be registered in his name. OW2 claimed the land belonged to Karere's father M'mungania but when he died he was buried at OW2's land, however during cross-examination he conceded the disputed lands belonged to M'mkindia Mburugu.

12. PW1 and PW2 stated the disputed land was initially L.R. Abogeta/U-Kithangari/245 and was sole property of M'mukindia Mburugu. PW1 produced bundles of green cards P2 (a) – (e) showing exhibit P 2 (a) initially belonged to the deceased who transferred it to Hezekiel Gikunda Mukindia on 25.5.2005, whereas 1179, 1180, 1181, 1182 and 1172 as of 4.9.1996 belonged to M'mukindia Mburugu the deceased. The registration of any parcel of land is *prima facie* evidence that the owner is the registered proprietor. I am satisfied from the evidence of PW1, and PW2 as well as the produced exhibits P2 (a) – (e) and exhibit P 1, that the above mentioned parcel of lands are registered in the name of the deceased and the deceased was the proprietor of the said portions and not the father or grandfather of the Objector.

13. Do the above-mentioned parcel of lands form part of the deceased's estate? **Under Section 3 (1) of The Law of Succession Act (Cap 160) “estate”** means the free property of a deceased person. In view of my finding I hold that the above-mentioned portions of lands save plot No. 1177 and 1178 form part of the deceased's estate.

14. OW1 testified that he was pushed to the upper side of the land as the land was being subdivided and that he was given 1 ½ acres where he stays with his family. OW2 testified the Objector is occupying a portion of the land which he estimated to be an acre. PW1 testified the deceased gave the Objector plot No. 1177 after subdivision of L.R. Abogeta/U-Kithangari/245 and put a boundary for the Objector. He stated the portion is 0.81 hectares and that the Objector do not occupy any other portion as the rest is occupied by the family of the deceased. PW2 corroborated the evidence of PW1 and stated the Objector is occupying the portion he was given by the deceased. I find and hold all the deceased portions are occupied by his family members save plot No. 1177 which is occupied solely by the Objector.

15. **Section 29 (a) and (b) of the 2006 of Succession Act (Cap 160) provides:**

*“For the purposes of this part, “dependant” means:-*

*(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*

*(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and”*

In view of the above Section, I find the Objector who has no blood relation to the deceased and who is a clan member under the provision of **Section 66 of the Law of Succession Act** he not a dependant to the deceased's estate nor a creditor, however as the deceased had voluntarily during his life time gifted the Objector a portion referred to as plot No. Abogeta/U- Kithangari/1177 he is therefore entitled to that portion which the deceased put the Objector into occupation in 1968 and which the deceased had subdivided though the same is yet to be transferred to the Objector. In my view if the Objector feels he is entitled to more than he was given he cannot pursue his claim through this succession cause as he is not a dependant to the deceased's estate nor a creditor. Indeed from his evidence, that of OW2, PW1 and PW2 is a stranger to the deceased's estate in view of the provisions of the **Law of Succession Act**.

16. In view of my holding herein above, that the Objector is not a dependant or beneficiary to the deceased's estate nor a creditor and his claim being based on the fact that the whole land that formed Abogeta/U-Kathangari/245 and subdivided into several portions as indicated in the judgment was secretly and fraudulently registered in the deceased's name, his claim should have been filed in the Environment and Land Court for determination on the issue of ownership of the land but not to pursue the claim through the succession cause.

17. In view of my findings herein above and having found no merits in the Objector's Protest, I direct that the Petitioner do proceed to set down his application for Confirmation of Grant in respect of his application dated 12th March, 2009.

18. The upshot is that the objection is dismissed and I proceed to make the following orders:-

*(a) The Objector's objection dated 24th April 2009 is without merits and is dismissed.*

*(b) Parcel L.R. Abogeta/U-Kithangari/1177, 1179, 1180, 1181 and 1182 resultant from subdivision of L.R. 245 form part of the deceased estate out of which the Objector was gifted Plot No. 1177 which he has been in occupation since 1968.*

*(c) Petitioner's application for Confirmation of Grant dated 12th March 2009 be promptly set down for Confirmation of the Grant, on costs and in view of the nature of the claim and parties being neighbours and from the some clan I order that each party bears its own costs.*

**DATED AND SIGNED THIS DAY OF MARCH. 2016.**

**J. A. MAKAU**

**JUDGE**

**DATED AND DELIVERED AT MERU IN OPEN COURT THIS 19<sup>TH</sup> DAY OF APRIL, 2016.**

In the presence of:

M/s. Kiautha Arithi: for the Petitioner

Mr. Kiogora Ariithi: for the Objector

**By: FRANCIS GIKONYO**

**JUDGE**

**On behalf of:**

**J. A. MAKAU**

**JUDGE**