



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**SUCCESSION CAUSE NO 351 OF 2005**

**In Matter of the Estate of Mugaine Raitachiu (Deceased)**

**JANEROSE KAIMEENYI WILLIAM..... PETITIONER**

**Versus**

**STANLEY KIREA NABEA.....OBJECTOR**

**RULING**

**Rightful beneficiary**

[1] The question that was put to the court for determination was:

***Who between the petitioner and the Objector is the rightful beneficiary of the estate of the deceased?***

By answering this question, the application dated 10<sup>th</sup> February, 2009 by the Objector will be determined. The said application is expressed to be made pursuant to Rule 17(8), 59(5), 67, 73 and 44 and 76 of Probate and Administration Rules. The significant orders sought in the said application are; an inhibition on the estate property and revocation of grant made to the Petitioner on 17<sup>th</sup> January, 2006 and confirmed on 31<sup>st</sup> July, 2007.

[2] Parties agreed on 2<sup>nd</sup> March 2016 that this question be determined upon written submissions and affidavits of the parties. Accordingly, I will consider the affidavits as well the written submission filed by parties herein.

**The Objector: I am entitled in equality with Petitioner**

[3] The Objector filed a Supporting affidavit sworn on 10<sup>th</sup> February, 2009 and submissions dated 31<sup>st</sup> March, 2016. His major argument is that the Petitioner and him are cousins; their fathers, William Kiuria Mwongo and Nabea Mwongo, respectively, having been brothers. He also stated that their fathers were brothers to the deceased. Therefore, as the deceased left no spouse or child, he is entitled to the estate property in equality with the Petitioner. He, thus, proposed that the estate property be divided equally between the two.

**Petitioner: I am adopted child of deceased**

[4] The Petitioner swore two affidavits; a Replying affidavit on 4<sup>th</sup> March, 2009 and a Further Supporting Affidavit on 28<sup>th</sup> January, 2014. She also filed other affidavits by her witnesses of which I will give

details and discuss later. According to the Petitioner, she was the biological daughter of William son of Mwongo. Her said father bequeathed her to the deceased who did not have a spouse or child. The deceased accordingly adopted her and left the estate property to her as his only adopted child. In bequeathing the estate property, the deceased at his death bed and in the presence of others, told her that she should never leave the land. The Petitioner regards those words to constitute a curse and so to avoid the curse she has never married. She said that the deceased even left the title deed to the estate property to her and that he had during his lifetime ordered the Objector to vacate his land but in vain. She has also tried to evict the Objector from the estate property using the Provincial Administration, council of elders and clan members in vain.

[5] SEBASTIAN MURIUNGI, in his affidavit sworn on 25<sup>th</sup> March, 2009, avers that he was present when the deceased made his last words to the effect that the Petitioner is the one who should inherit his land and that she should not be disturbed by anyone nor get married. He stated also that the deceased had vehemently demanded the eviction of the Objector from his land. The deponent deposed further that apart from him, at the time these words were uttered there were many other people present including Jema Gacheri, Samson Thuraniira, M'Ikiara M'Naribu and Silas M'Ilari.

[6] Another deponent JEMA GACHERI M'TURUA swore an affidavit on 25<sup>th</sup> March, 2009 in support of the Petitioner's case. In her affidavit she confirmed that she was present when the deceased made his last oral will bequeathing the entire estate land to the Petitioner alone. She also stated that the deceased asked the Petitioner never to leave the said land or get married. She deposed to more; that the deceased told the Objector never to touch his land. M'KYARA M'NARIBU also swore an affidavit on 28<sup>th</sup> January, 2014, in which he confirmed that he was present when the deceased uttered his last words to the effect that the Petitioner is his only child to whom he bequeathed his land. He again averred that he tried to arbitrate the eviction of the Objector from the land through the Provincial Administration but in vain. He asserted that the deceased, before his death had tried to evict the Objector from his land but the Objector refused to move out.

[7] More support of the Petitioner's claim is found in the affidavit of FRANCIS MWIRA M'ITWAMWARI sworn on 28<sup>th</sup> January 2015. He contended that the deceased had, during his lifetime tried to evict the Objector from his land but in vain. He supported the claim by the Petitioner that she is the only beneficiary to the estate of the deceased.

[8] On the basis of the foregoing, the Petitioner considers herself to be the only heir to the estate of the deceased. She stated, therefore, that the Objector is not entitled to any share of the estate. She submitted that the Objector's late father owns L.R NO ABOTHUGUCHI/GAITU/522 from where he should seek for inheritance but not from the estate property.

## **DETERMINATION**

### **Oral will**

[9] Upon consideration of the affidavits, the submission of parties and the law, I am of the following persuasion; that a claim of testamentary disposition through an oral is being made. What does the law say about such claims? According to section 9(1) of the Law of Succession Act:

***No oral will shall be valid unless-***

***(a) it is made before two or more competent witnesses; and***

***(b) the testator dies within a period of three months from the date of making the will:***

And according to section 102) of the Law of Succession Act:-

***If there is any conflict in evidence of witnesses as to what was said by the deceased in making an***

***oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.***

[10] Sebastain Muriungi, Jema Gacheri and M'Ikiara M'Naribu filed affidavits to the effect that they were among the persons who were present when the deceased made his last oral will at his death bed few hours before his death. The three are competent witnesses to an oral will. The evidence of these three is to the effect that the deceased said that the Petitioner was his only child and to whom he has given his entire land; and she should not be disturbed by anybody else. They were also consistent on the fact that the deceased was bent at seeing the Objector evicted from his land and that he had tried during his lifetime to evict the Objector from his land but the Objector refused to oblige. Other than stating that he is entitled to the estate in equality with the Petitioner, the Objector did not controvert these averments on the oral will; he neither filed any affidavit in opposition thereto nor requested for cross-examination of the deponents. I see no conflict in their evidence whatsoever about what the deceased said although they may not have used exactly same terminologies in their affidavits. Therefore, applying the test of the law I have set out above, the oral will by the deceased has been proved to the effect that the Petitioner was his only child to whom he bequeathed his entire estate. The oral will was made before two or more competent witnesses namely, Sebastain Muriungi, Jema Gacheri and M'Ikiara M'Naribu amongst others whose evidence was consistent what was said by the deceased. And finally, from the evidence before me, the oral will was made few hours before the deceased died. Therefore, the testator died within a period of three months from the date of making the will. Accordingly, despite the claims by the Objector that they are both cousins and therefore entitled in equality to the estate of the deceased, in view of the evidence available, the Petitioner would be the only rightful beneficiary to the estate of the deceased. In such circumstances the question of degree of hierarchy in inheritance does not arise and section 39 of the Law of Succession Act will not apply. I note that the Petitioner may not be a biological child of the deceased but was treated and viewed by the deceased as his child and that is sufficient in law for all purposes of inheritance.

[11] But before I close, I wish to state that the claim that the Objector should seek inheritance from the estate of his late father may not be important given my decision. I wish also to state that where an oral will exists, the Petitioner should always file the appropriate proceedings for *Proof of Oral Will* or for *Letters of Administration with Terms of Oral Will Annexed* using Form 78 or 92 prescribed under the Probate and Administration Rules. If that was done here, such subsequent proceedings for proof of oral will may have been averted.

### **The upshot**

[12] On the basis of the foregoing reasons, I find the application for revocation of grant dated 10<sup>th</sup> February, 2009 to be without merit and I dismiss it with costs to the Petitioner. It is so ordered.

**Dated, signed and delivered in open court at Meru this 28<sup>th</sup> July 2016.**

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**F. GIKONYO**

**JUDGE**

**In the presence of :**

**Mr. Muthomi advocate for Mr. Riungu advocate for petitioner**

**Mr. Mutegi advocate for Mr. Mokuu advocate for objector**

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**F. GIKONYO**

**JUDGE**