



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 298 OF 1998

IN THE MATTER OF THE ESTATE OF MELIKSEDECK MBATA GITHANDA-DECEASED

BENSON KIRAGU KING'ORI.....PETITIONER

VERSUS

KIRAGU MBATA.....1ST OBJECTOR

DAVID KANG'ARA MBATA.....2ND OBJECTOR

JUDGEMENT

The deceased in these proceedings died intestate on the 29th day of May 1997 at the age of 74 years. On the 9th December 1998 the petitioner herein took out citations to accept or refuse letters of administration for service upon Wanjuku Mbata, Wairimu Mbata, Mugati Mwangi, Kiragu Mbata, Wanjuku Mbata, David Kangara, Kingori Mbata and George Wamumwe.

On 7th December 1998, the petitioner herein describing himself as "*a step son to the deceased*" petitioned for letters of administration. The only asset listed as belonging to the deceased is title number **Mahiga/Kiamako/451**.

On 14th April 1999, the objectors herein filed an answer to petition and an objection to the making of a grant to the petitioner and stated that the deceased had prior to his death expressed his wish on the distribution of his estate and that the petitioner is neither a son to the deceased nor a dependant and that the objectors are the rightful heirs to the deceased.

On 9th March 2000, by a consent order, the objectors were appointed as joint administrators of the deceased's estate. Other disputes were to be determined during the confirmation of the grant. On 14th March 2012 the petitioner applied for the confirmation of the grant and proposed that title number **Mahiga/Kiamako/451** be shared equally between himself and **Kiragu Mbata** prompting the protestors to file an affidavit of protest on 11th June 2012 in which they stated that they are step brothers and the only sons of the deceased. They proposed that the said land be shared between themselves equally and that the second protestor will hold his share in trust for himself and his two brothers one whom is deceased but is represented by his wife.

When hearing commenced before me on 4th November 2015, counsel for the petitioner sought an adjournment arguing that the petitioner needs to establish a trust in these proceedings, hence he intended to file proceedings in the E.L.C. Court. The application for adjournment was opposed by the protestors counsel and after evaluating the age of the case which was filed in 1998, and the reasons offered, I found no justifiable reason to adjourn the case and directed hearing to proceed.

Both protestors case is that they are sons to the deceased while the petitioner is their cousin. Their evidence was that **Mahiga/Kiamako/451** was registered in the name of their late father, the deceased in these proceedings. They insisted that the petitioner has never lived or worked on the said land and that the protestors occupy and use the land, each occupying the portions which belonged to their respective mothers that is the two wives of the deceased. That is the position on the ground.

The protestors maintained that the petitioner and his family live at Kieni and that although the deceased died in 1997 and the petitioners father died in 1982, the petitioners father never claimed the said land at all. The petitioners mother is alive and she too has never claimed the said land. They disputed the existence of any trust in respect of the said land.

The petitioners evidence was that the deceased was his uncle, that the land in question belonged to his grandfather but was registered in the name of the deceased, hence he held it in trust for his father, that his father was in detention during the land adjudication period hence the reason why it was registered in the name of the deceased alone. He stated that he and his late father did discuss the issue with the deceased herein who agreed to give his father his portion, but since the process needed money, they did not do it then. No details were given as to who else attended the said discussion and whether the deliberations were reduced into writing and if not why.

In support of the petitioners case is the evidence on Muchemi Kingara who stated that he worked at KTDA as a field technical officer and was posted to Mahiga Location to recruit new tea growers and in the said process he encountered the deceased in these proceedings who told him that he could not immediately plant tea on the said land since the land in question was not wholly his. Upon cross-examination the witness admitted that he was required to file reports at the Ministry but he could not avail any to the court to support his claim.

In his submissions, the protestors counsel submitted that there is no basis either in law or evidence to support the alleged trust and urged the court to dismiss the petitioners claim and allow the protest.

On 29th August 2016 I granted counsel for the petitioner 7 days to file their submission and by close of business on 5th September 2016, no submissions had been filed.

What **constitutes estate or free property of the deceased?** Section 3 of The Law of Succession Act^[1] defines "*Estate*" as the free property of a deceased person. "**Free property,**" in relation to a deceased person, is defined under the Act as the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death. Title number **Mahiga/Kiamako/451** was registered in the name of the deceased as at the time of his death. I find no difficulty in concluding that the said property constituted the deceased's free property.

The petitioners contention is that the land originally belonged to their grandfather but was registered in the name of the deceased at a time when his father who was a brother to the deceased was in detention. No cogent evidence was offered to show that the petitioners father ever claimed this land from the deceased during the lifetime of both persons. Further, no evidence was offered to show that the petitioners father ever lived on the land nor is there evidence that the petitioner himself ever lived on the land or ever used it. I am afraid there is absolutely no evidence to demonstrate that the petitioner's father ever had any interest in the land.

Further, the petitioner is not a son of the deceased. He claims his father was a brother to the deceased and that he is claiming what he says was his father's share. He has no letters of administration to his own fathers estate, hence strictly speaking he has no capacity to purport to claim what he states belonged to his deceased father, and even if he had a grant to his father's estate, the interest he is raising is based on alleged trust which has not been proved.

Section 38 of the Law of Succession Act^[2] provides that:-

"Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children"

The two protestors are sons of the deceased and therefore entitled to the deceased's estate. Accordingly, I find that the protest has merits and I hereby allow it and order as follows:-

i. That the grant of letters of administration intestate issued to **Kiragu Mbata** and **David Kangara Mbata** on 12th May 2004 be and is hereby confirmed.

ii. That land parcel number be **Mahiga/Kiamako/451** be divided into two equal portions as follows;-

a. Kiragu Mbata.....0.95 acres

b. David Kangara Mbata

c. Peter Kingo'ori-deceased 0.95 acres in equal shares

d. George Wamumwe

iii. That the Petitioner shall pay the costs of this cause.

No orders as to costs. Right of appeal 30 days

Signed, dated and delivered at Nyeri this 19th day September of 2016

John M. Mativo

Judge

[\[1\]](#) Supra

[\[2\]](#) Cap 160, Laws of Kenya