



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**  
**SUCCESSION CAUSE NO. 47 'B' OF 2016**  
**(FORMERLY MERU SUCCESSION CAUSE NO. 273 OF 2014)**  
**IN THE MATTER OF THE ESTATE OF N N ALIAS N N - ( DECEASED)**  
**B M M .....PETITIONER**  
**VERSUS**  
**M K .....OBJECTOR**

**J U D G M E N T**

1. The late M N is said to have died in February, 1967. On 5th August, 2009, B M M , a son to the deceased (hereinafter) "*the Petitioner*," petitioned for Letters of Administration Intestate for the estate of the deceased. In form No. P & A 5 he set out the names of the four (4) sons of the deceased as his beneficiaries and three (3) properties, to wit, Mwimbi/S.Mugumango/[particulars withheld] as forming the estate of the deceased.

2. On 23rd November, 2011, the grant was issued to the Petitioner. On 4th May, 2012, he applied for the confirmation of the same whereby he proposed to distribute the estate as follows:-

**(A) LR MWIMBI/S. MUGUMANGO/[particulars withheld]**

- i. B M M - 4.68 acres
- ii. H N - 4 acres

**(B) LR MWIMBI/S.MUGUMANGO/[particulars withheld]**

- i. P K - 1acre
- ii. M M - 4 acres to hold in trust for himself and that of his 2 brothers M M - and K M (Both minors).

**(C) LR MWIMBI/S. MUGUMANGO/[particulars withheld]**

- i. P K - whole

This was met with a Protest by M'Abae Kiraithe on 5th June, 2012, who claimed ownership of Mwimbi/S. Mugumango/[particulars withheld] The Protest proceeded by way of viva voce evidence whereby each party called two (2) witnesses in support of their respective cases.

3. PW<sub>1</sub>, the Objector, told the court that at the time of demarcation, he temporarily hosted the deceased on LR Nos. Mwimbi/S. Mugumango/[particulars withheld] but the deceased caused plot No. [particulars withheld] to be registered in this name. That on discovering that fact, the Objector reported the same to the clan who sat and determined that the deceased do leave the said land and transfer it back to the Objector. However, the deceased died shortly thereafter before complying with the decision of the clan. The Protestor later forwarded the matter to the land committee where he was advised to wait until a succession cause for the estate of the deceased was lodged. In cross-examination, he told the court that the deceased died in 1966 but he had been advised to wait until the children of the deceased were of age before he could claim the land. He admitted that although the children had become of age along time ago, he had neither taken out any citation on the estate or sued them. He admitted that he had no evidence to show that he had lodged the claim with the land committee. He further admitted that he was neither a relative of the deceased nor had anything of his on plot No. 629.

4. PW<sub>2</sub> was Nkonge Murithi. He told the court that at the time of adjudication, the Objector hosted him and the deceased on plot No.[particulars withheld] . That the deceased wrongly registered that plot in his name but died before he could comply with the direction given by the clan that he retransfers it back to the Protestor. That the clan had sat on 19th September, 1997 and ruled that the land belonged to the objector. That it is the objector who currently lives on plot No.[particulars withheld] . He stated that although the deceased had constructed a house on plot No. 629, he never got to occupy it. PW<sub>3</sub> Silas Kaburu M'Ithara repeated the same testimony as PW<sub>1</sub> and PW<sub>2</sub>. In cross-examination, he stated that the deceased lived on plot No. 629 for a period he could not recall. He stated that there were however no houses elected on that property.

5. The Petitioner testified in support of his case and called two witnesses. He told the court that he was three (3) years old when the deceased died. That upon the demise of his father, the Objector took over the deceased's wife with whom he begot four (4) children. That the deceased left three properties to his name in which the Objector has no claim. That there had been some disagreement in the family which led to his brother P K assault the Objector. That since the Protestor was their foster father, a clan meeting was held on 19th September, 1997 whereby the said P K and his brothers were ordered to give three (3) goats to the Objector. That at that meeting nothing was discussed concerning plot No. [particulars withheld] . In cross-examination, he maintained that the minutes relied on by the Objector for the meeting of 19th September, 1997 were not authentic. That if the meeting, was about land, the deceased's wife, who was then alive, would have been in attendance at that meeting.

6. RW<sub>2</sub> was Benard Mukunga. He was the acting Chief of Mugumango in 1997. He recalled ordering for the elders meeting of 19th September, 1997. That the said meeting was about the disrespect by P K to his foster father, the Objector and was held in accordance with the Meru customs. He disowned the minutes produced by the Objector. RW<sub>3</sub> Mwenda Muthiitio told the court that he attended the meeting of the 19th September, 1997 and was supposed to be its the Objector insisted that since it was a family issue, his son by the name N M be the secretary. At that time RW<sub>3</sub> was the village elder. The meeting had been called to resolve the dispute where P K had assaulted his foster father, the Objector. He also disowned the minutes produced by the Objector as not reflecting what the meeting discussed in that they had introduced issue which was never discussed thereat concerning plot No. [particulars withheld] . In cross-examination, RW<sub>3</sub> told the court that if the Objector was not a foster father of P K and his siblings, the Objector could not have accepted the goats from them at that meeting.

7. In his submissions, the objector submitted that the Petitioner and his brother had signed the minutes accepting that plot No. [particulars withheld] belonged to him. That the case by the Petitioner was not authentic as none of the witnesses he called knew anything about Plot No. [particulars withheld]. On his part, Mr. Mugo learned Counsel for the Petitioner did not file any submissions but opted to rely on the evidence on record.

8. After having carefully considered the evidence on record, the only issue for determination is whether the objection is sustainable. The objector testified and called two witnesses who supported him. The evidence was that during adjudication, the Objector had temporarily hosted the deceased on plot No. [particulars withheld] . That however, the deceased defrauded him of the same by causing it to be

registered in his name. That on reporting the matter to the clan, the clan ordered the deceased to retransfer the property back to the Objector but he died before he could comply. According to the Objector, he then reported the matter to the Land Committee Court but he was advised to wait until succession was undertaken on the estate of the deceased. He produced minutes of a meeting held on 19<sup>th</sup> September, 1997 wherein he claimed both the Petitioner and his brother P K admitted that plot No. [particulars withheld] belonged to the Objector.

9. As far as this court is concerned, succession matters are litigated before the family court. Its jurisdiction is limited to ascertaining that there once lived a person who has since died (now deceased), that he left behind an estate, whether he left liabilities and who his/her beneficiaries and dependants are under sections 26 through 42 of the Law of Succession Act. Once the family court ascertains the foregoing, the family court presides over the distribution of the estate. It either adopts the distribution proposed by a Petitioner as agreed to by the rest of the beneficiaries and dependants, or where there is no agreement, it undertakes distribution. I do not think that it is within the jurisdiction of the family court to ascertain or proclaim ownership rights of properties belonging to deceased persons. The jurisdiction of proclaiming ownership to property belongs either to the civil or Land and Environment Courts. The jurisdiction of the family court, in my view does not extend to determining ownership rights on properties of deceased persons, but rather entitlement and extent (shares thereon). In **Re Estate of Zakaria Nthiga Matuma (deceased), Chuka H.C Succ.Cause No.660 of 2015 (UR)** the Court held:-

***"The net holding in those decisions was that the jurisdiction of a family court dealing with a Succession Cause is limited. Such a court's sphere of inquiry is limited to ascertaining what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate. Such a court cannot delve into establishing the validity of a claim such as the one before this court. In the case before this court, there are serious issues that need to be established and or ascertained by either the lower court which has jurisdiction to entertain a claim to land. That however, does not bar a family court from ascertaining if one is a creditor or an estate. In the circumstances of this case, the Interested party and the Objector have not yet been so determined by a court of law, this court cannot determine their claims in these proceedings."***

10. In the current case, the Objector's case is that plot No. 629 belongs to him and not the deceased. That the deceased had defrauded him of the same during adjudication. According to the certificate of official search dated 3rd August, 2009 which was lodged in court on 5th August, 2009, that property measures 3.24 Ha and was registered on 18th November, 1970 in the name of Nangu Nkanya, the deceased. The encumbrance section is clear. From the date of registration to date is approximately forty five (45) years. It is therefore safe to hold that for over forty five (5) years, that registration has not been challenged. If it has been challenged, that challenge is not apparent on the register and there was no evidence tendered to show that the challenge had been successful.

11. The Objector's case was that he had challenged the registration before the clan elders in 1967 before the deceased died; that the dispute was then forwarded to the Land Committee Court which advised that the Objector awaits succession. Four (4) issues arise on that argument. Firstly, save for the oral testimonies of PW<sub>1</sub> and PW<sub>2</sub>, there is nothing to show that there was a clan meeting that discussed the issue of the alleged wrongful registration of the deceased as the owner of plot 629. The court was not told, who the elders were, when and where they met to deliberate the dispute. Secondly, the clan is not the proper forum to discuss a wrongful registration of a property during adjudication. It is trite that during adjudication, there are processes to be followed before the registration is finally effected. The court was not told if these processes were ever followed and what the final conclusion was. In this regard, even if there was any clan decision on the ownership of the subject property, that decision does not supersede the legal effect of the registration of the deceased as the owner of the property. Thirdly, it was contended that the matter was reported to the Land Committee Court that was to deal with the alleged wrongful registration. That remained as such, a mere allegation. There was no proof to show that there was any land dispute formally registered anywhere in respect of plot No.[particulars withheld]. To my mind, such disputes are formally registered as claims which are verified and decisions made and evidence of their existence are there for everyone to see. In the present case, nothing was produced to prove that there was any such registration of a dispute in the relevant Land Committee Court for the area for Plot

No. [particulars withheld] . Fourthly, there was no evidence to show that the Land Committee Court ever advised the Objector to await succession. In any event, the wait itself was too long to be reasonable, 1967 to 2009, a period of forty two (42) years! This court's view is that that was too long a period for any interest or right not to have been caught up with laches.

12. The other issue was the quality of evidence proffered by and on behalf of the Objector. The Objector sought to show that since the property (plot 629) did not belong to the deceased, the latter did not settle there. The evidence of the Objector and that of his witnesses was full of contradictions. The Objector admitted that he has never occupied plot No. [particulars withheld] and that there is nothing of his that is on that property. However, PW2 told the court that the objector was living on that property and that the deceased had constructed a house on that property. On his part PW3 told the court that the deceased lived on the property for sometime but there were no houses thereon. The question that arises is whether the deceased was living on trees! To this court's mind, what the Objector and his witnesses were out to show but miserably failed to prove, was that the deceased had fraudulently registered himself as owner and wrongly taken possession of plot [particulars withheld] . The Objector and his witnesses were however unable to explain his occupation thereon.

13. The other issue is the alleged meeting of 19th September, 1997 where the Petitioner and his siblings allegedly admitted that plot No. 629 belonged to the Objector. This court has carefully looked at the minutes of the meetings of 19th September, 1997 and 20th February, 1998 which the Objector relied on. It is clear from the said minutes that the discussions therein was about the misunderstanding and disrespect between P K (the Petitioner's brother) and the Objector. There is an indication in the minutes that the said P K had assaulted the Objector. It is therein indicated that the Objector was the traditional and/or cultural father of the said P K and the rest of the deceased's children. The result was that the said P K was ordered to give a he-goat to the Objector which he did. RW2 testified that that was the Meru traditional way of a son showing remorse for wronging a parent. Nowhere in the said minutes was there any mention of plot No. 629.

14. In his testimony, the Petitioner told the court that after the demise of the deceased, the Objector took over the family of the deceased and sired four (4) children with the widow of the deceased. That the Objector acted as his foster father. RW2 and RW3 were also in agreement that the Objector was a foster father of the Petitioner. Of course the Objector denied all this. He denied ever having taken over the widow of the deceased and sired children with her or having been a foster father of the Petitioner and his siblings. To him, the meeting of 19th September, 1997 was about plot No. [particulars withheld] .In order to understand what the meetings was all about, the court herein below sets out the salient parts of the said minutes.

***"P K M had a dispute with his brother B M M over a land site where the later wanted to construct a timber house. This issue was taken to the Sub-Area who advised them to have the dispute arbitrated by their cultural father. They came back to the one M K. This M refused to attend to K problems because the latter had earlier abused and openly shown disrespect by saying that K is the one who shared out land to M and that he has no say over M's family. ....***

***In the presence of the aforementioned elders M'explained that although he is the one who has the cultural and moral responsibility over family matters in N's house, K had disowned him .....***

***He (K) had also punched at the chief's office. The chief authorised K to give M the traditional he-goat as a way of repentance and remorse K for the previous six years had not given out this penalty so as to release M to attend to his needs as a traditional father.***

.....

***1. K openly accepted that M is the one who was left in charge of the family by the late M***

*N, his biological father*

2. ....

3. *Kangori denied knowledge of another traditional father same to M K*

4. ....

*The elders then told him that to show that he would abide by the above he should give M K the traditional he-goat to show that he is sorry and repentant. ....*

*This is the day that P K M gave the he-goat to M K as the traditional name of his sorry and repentance.....*

*When K discovered that he was only being misused for another person's gain and that he had nothing to benefit, he then decided to abandon the group and rejoin with his other brothers and mother in the family of M.*

*In response M K accepted K apology and gesture of repentance and assured him that they would work hand in hand for the good of the family."*

15. It is crystal clear from the foregoing that the said meetings were about the assault of K on the Objector. It had nothing to do with plot No. 629. The testimony of the Objector and his witnesses frises on the face of the said minutes.

16. Having considered the foregoing, and analysed the testimonies of the witnesses, and further, having carefully seen the witnesses testify in court, the court makes the following findings:-

a) the court is sitting as a family court and has no jurisdiction to adjudicate on the ownership dispute on plot No.629;

b) according to the certificate of official search on record, the property is registered in the name of the deceased;

c) the Objector was not telling the truth. He lied to the court as to his relationship to the family of the deceased. The minutes he relied on referred him to as the traditional or cultural father of the children of the deceased;

d) the testimony of the Petitioner was firm, consistent and more cogent believable;

e) the meetings of 19th September, 1997 and 28<sup>th</sup> February, 1998 was about the assault on and disrespect by P K towards the objector and the Objector's duties towards the family of the deceased as the traditional, cultural or foster father. That is why a he-goat was given to him and not the clan members as he contended in his testimony;

f) the claim by the objector of plot No.[particulars withheld] has no legal basis. His claim seems to be an attempt by him to hit back at the sons of the deceased for having refused to accept him as a father.

16. Accordingly, the objection is without basis and the same is dismissed with costs. I confirm the grant issued on 23rd November, 2011 in terms of paragraph 3 of the Affidavit in support of the Summons dated 3rd May, 2012.

It is so decreed.

**DATED and delivered at Chuka this 27<sup>th</sup> day of October, 2016**

**A. MABEYA**

**JUDGE**

Judgment read and delivered in open court in presence of all the parties.

**A.MABEYA**

**JUDGE**

**27/10/2016**