



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 291 OF 2015**

**(FORMERLY CHUKA SUCCESSION CAUSE NO. 366 OF 2011)**

**IN THE MATTER OF THE ESTATES OF DAVID NYAGA Alias NYAGA KATUMUTA  
(DECEASED)**

**RUTERE NYAGA KATUMUTA.....PETITIONER**

**VERSUS**

**STEPHEN MUTURI NYAGA.....PROTESTOR**

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

1. The late David Nyaga ("*the deceased*") died on 7th April, 1989 at Embu Provincial General Hospital. He left two properties to his name, to wit, Karingani/Mugirirwa/67 and 673. He also left Elizabeth Mugeni, Joyce Kaari, Fidis Kaari Ndugo, Lydia Nthiga, Peter Nyaga, Stephen Muturi and Rutere Nyaga surviving him. On 8th December, 2011, Rutere Nyaga petitioned for Letters of Administration Intestate which was issued to him on 26th March, 2012. On 31st October, 2012, he applied for confirmation of that grant which was met with a protest on 19th November, 2012 by Stephen Muturi the protestor who complained that although he was a son of the deceased, he had been left out of the proposed distribution which amounted to discrimination.

2. Although the court had on 4th November, 2015 directed that the protest be disposed off by way of submissions, nevertheless the same was determined through viva voce evidence at the instance of the parties. The Protestor called one (1) witness while the Petitioner also called one witness, the widow of the deceased.

3. PW1 was Stephen Muturi Nyaga, the Protestor. He told the court that he is a son of the deceased. That the deceased had two properties, Karingani/Mugirirwa/67 and 673, respectively. That the proposed distribution was meant to disinherit him; that LR No. Karingani Mugirirwa/253 ("*plot No.253*") was given to him by one Thomas M'Garu Njuki for having taken care of his cattle when he was a young boy. He contended that the estate should be shared equally amongst all the male children of the deceased together with the widow. He stated that it was Enjemino Mbuba Njuki (PW<sub>2s</sub>) father Mbungu Njuki that since the Protestor had been looking after his animals and had not been given any cattle, he should be given his, Thomas' land. That Mbungu instructed him to follow and comply with wishes of Thomas Njuki. That at adjudication since both Thomas Njuki had died; he caused the property to be registered in his name then hired off 2 acres from the share of Thomas and gave it to the Protestor. This was plot No. 253 while he gave eight (8) acres to his brother. He swore that that land had never belonged to the deceased. In cross examination, PW<sub>2</sub> maintained that plot No. 253 was given to the Protestor in a meeting which took place between him, Thomas and Mbungu Njuki.

The Petitioner and the widow testified in support of the application for confirmation. RW<sub>1</sub> was Elizabeth

4. PW<sub>2</sub> was Engemino Mbuba Njuki. He is a son of Mbungu Njuki a brother to Thomas M'Garu Njuki. He testified that his uncle Thomas Njuki had directed his, (PW<sub>2</sub>'s) father, Mbungu Njuki that since the Protestor had been looking after his animals and had not been given any cattle, he should be given his Thomas' land. That Mbungu Njuki instructed Eugemilio, to follow and comply with the wishes of Thomas Njuki. That at adjudication, since both Thomas and Mbungu Njuki had died, he caused the property to be registered in his name then hired off 2 acres from the share of Thomas and gave, it to the Protestor. This was while Plot No 253 while he gave eight (8) acres to his brother. He swore that that land never belonged to the deceased. In cross-examination, PW<sub>2</sub> maintained that plot No.253 was given to the Protestor in a meeting which took place between him, Thomas and Mbungu Njuki.

5. The Petitioner and the widow testified in support of application for confirmation. RW<sub>1</sub> was Elizabeth Mugeni, the widow. She gave her evidence de bene esse on 14th June, 2016 as she was aged then 103 years frail and sickly. She disclosed to the court that the Protestor was one of her children. That the deceased had three properties, plot Nos. 673, 672 and 253. That before the deceased died, he had settled his children as follows; he gave the protestor plot No. 253 which the deceased had received as gift from Thomas because of his generosity; that he settled Samuel Nyaga was settled on the Karureni property (plot No. 673) and that he settled her, Fidis Kaari, Rutere Nyaga and Peter Nyaga on plot No. 673 (Gitwaka). In cross- examination, she stated that she is the one who appointed the Petitioner to bring the current proceedings; that the Protestor had declined to contribute to the costs of the petition because he did not have any interest in the estate; she expressed ignorance that the land of Thomas was shared between the Protestor and one of the sons of Thomas' brother. She denied that there was an intention to disinherit the Protestor.

6. RW<sub>2</sub> the Petitioner, told the court that he was authorised by the family to petition for the grant; that the deceased divided his properties in 1970 and each one was shown where to cultivate before the deceased died in 1979. He termed the Protestor's evidence as mere lies. In cross-examination, he stated that in 1970 he was 17 years old; that it is the Protestor who did not want to be included in the Chief's letter as he did not want anything from the estate; and that plot 253 was given to his father by Thomas who gave it over to the Protestor.

7. I have considered the affidavits on record and the testimonies of witnesses. The issues for determination are; whether the deceased had settled his beneficiaries before his demise; whether plot No. 253 belonged to the deceased; and, in the circumstances, how the estate should be distributed.

8. On the first issue, it was the testimony of the widow, RW<sub>1</sub> that before the deceased died, he divided the three properties which he had as follows:-

- a) the property he received as a gift from Thomas (Plot No. 253), he gave to Stephen Nyaga, the Objector;
- b) one of the properties at Gitwaka (plot No. 67) he divided between herself, Fidis Kaari (now deceased), Rutere Nyaga and Peter Nyaga, and
- c) the property at Karureni (plot No. 673) was given to Samuel Nyaga.

That since the daughters of the deceased were at the time married, they were given nothing.

9. This testimony was supported by RW<sub>1</sub>. He told the court that the deceased called the elders in 1970 and distributed his properties between his children as stated by RW<sub>1</sub>. That on such distribution, each beneficiary occupied the position shown to him in 1970 and continued to be in such occupation until 1979 when the deceased passed on. According to him, none of the beneficiaries had complained on how the deceased had settled his family. The Objector on his part denied that the deceased had settled his family during his lifetime. According to him, only Peter Nyaga had been shown where to cultivate in plot No. 673. He told the court that the deceased could not have been settled him in 1970 because the Objector by

then was a young boy of 12 years.

10. Apart from the evidence of the widow, the Petitioner and the Protestor, there was no other independent evidence on this issue. Due to age probably, the widow would not recall when the alleged division of properties was effected by the deceased. She never told the court who was in attendance during the exercise. The Petitioner put the date as being 1970 and that the villagers were called to witness. According to the Protestor, in 1970 he was only a young boy of 12 years and he could not have been settled then. On the other hand, the Petitioner told the court that he is the last born of the deceased and at the time he was giving evidence he was aged 59 years. That in 1970 he was about 17 years and that the deceased passed on in 1979.

11. According to the Petitioner's National Identity Card that is on record, he was born in 1957 in Mugirirwa, Mugwe Location. That agrees with the age the Petitioner gave of 59 years at the time he testified. However, the particulars in the identity card will place the Petitioner at 12 or 13 years in 1970 when the alleged division of the properties of the deceased took place. According to the testimony of the Protestor, when plot No. 673 was bought by the deceased, the eldest son of the deceased Samuel Nyaga went to live there. A look at the certificates of official search for the three (3) properties on record shows as follows; that plot No. 673 was first registered in the name of the deceased on 30th September, 1970. That was first registration. Plot No.673 was registered on 5th January, 1971 in the name of the deceased as second entry thereby confirming the testimony of the Protestor that it was a latter acquisition by way of purchase and not first registration. Plot No. 253 was registered on 27th August, 1980 in the name of the Protestor.

12. In view of the foregoing, the question that begs is whether the deceased could have divided the properties between his children in 1970 as contended by the Petitioner. Before two of the properties, plot Nos. 673 and 253 had been acquired in 1971 and 1980, respectively. I do not think so. It is not feasible that the deceased would settle his family in 1970 when one of his children, the Petitioner was only 13 years old. I saw the witnesses testify. For what I would later say in this judgment, I did not think the Petitioner and RW<sub>1</sub> were telling the truth. The first issue is therefore answered in the negative. The deceased had not settled his family during his lifetime.

13. The next issue is whether Plot No. 253 is part of the estate of the deceased. According to RW<sub>1</sub> and the Petitioner, plot No. 253 was given to the deceased by Thomas Njuki who in turn gave it to the Protestor. On his part the Protestor and his witness PW<sub>2</sub> told the court that the said property was given to the Protestor by Thomas Njuki. According to the widow, that property was given to her late husband because of his hospitality. She did not tell the court what sort of hospitality and to whom the deceased had shown. RW<sub>2</sub>, the Petitioner alleged that it is because the deceased and RW<sub>1</sub> were looking at Thomas Njuki's animals. However, the testimonies of PW<sub>1</sub> and PW<sub>2</sub> was firm and consistent that between the ages of 9 and 12 the Protestor was looking at the animals of the said Thomas Njuki; that because Njuki did not give the Protestor any cattle for his services, he instructed his brother Mbungu Njuki, the father of PW<sub>2</sub> to give the Objector a portion of his land. PW<sub>2</sub> was firm that it is he who gave plot 253 to the Protestor after adjudication when the said Thomas and Mbungu were long dead. That out of the 10 acres due to Thomas, he excised two (2) acres for the Protestor and the rest of it he gave to his own brother. RW<sub>1</sub> had testified that the property was given to her late husband by Mbungu to avoid a curse, but when pressed to disclose the nature of the curse, she withdrew and stated that there was no curse over the said property. The court's view is that the witness was to give evidence to her allegation that the property was first given to her husband before he gave it over to the Protestor.

14. Apart from the credible evidence of PW<sub>2</sub> on how he followed the instructions of both his uncle, Thomas, and his father Mbungu, in having to give plot No. 253 to the Protestor, it is clear that the Protestor's registration as owner thereof was subsequent to first registration. If the property belonged to the deceased as contended by both the Petitioner and RW<sub>1</sub>, why did the deceased not cause it to be registered in his name as he had done to plot No. 673 which he had acquired nine (9) years before. I accept the evidence of PW<sub>2</sub> who was an independent witness as being credible. Plot No. 253 is not part of the estate as the same was given by Thomas Njuki to the Protestor as an appreciation. The same can not therefore be taken into account in the distribution of the estate.

15. The widow told the court that she gave instructions that the name of the Protestor be excluded from the Chief's letter of introduction allegedly because the Protestor had refused to contribute money for the Succession Cause. I did not believe her. To my mind that cannot be a basis of excluding a beneficiary from succession proceedings. The estate did not belong to her. Indeed both the name of the Protestor as well as plot No. 253 are missing from Form No. P& A 5. That is clear indication of what the intention of both RW<sub>1</sub> and the Petitioner was from the beginning to exclude the Protestor and plot No. 253 from this Cause. Their attempt to include the name later in the application for confirmation and purport to distribute to him his own property plot No. 253 does not help. He is a son of the deceased and entitled to inherit from the estate of his father like all the others.

16. In view of the foregoing and taking into consideration the net estate, I consider the mode of distribution proposed by the Protestor in paragraph 12 of his Affidavit sworn on 2<sup>nd</sup> December, 2015, to be credible equitable and I adopt the same as follows:-

**1.LR KARINGANI/MUGIRIRWA/672**

- a) Samuel Nyaga - 1.118 acres
- b) Stephen Muturi Nyaga - 0.602 acres

**2.LR KARINGANI/MUGIRIRWA/67**

- a) Elizabeth Mugeni David - 1.118 acres
- b) Rutere Nyaga - 1.118 acres
- c) Stephen Muturi Nyaga - 0.516 acres
- d) Boniface Kirimi Peter  
Susyline Murungi Peter  
Wanja Peter 1.118- Jointly  
Stella Kawira Peter

It is so decreed.

**DATED and delivered at Chuka this 27th day of October, 2016**

**A. MABEYA**

**JUDGE**

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

**A.MABEYA**

**JUDGE**

**27/10/2016**