



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 2116 OF 1997**

**IN THE MATTER OF THE ESTATE OF TITUS MWAURA KIARO (DECEASED)**

**JUDGMENT**

1. The matter relates to the estate of Titus Mwaura Kiara who died on 3<sup>rd</sup> March 1997.
2. Representation to his estate was sought in a petition filed herein on 13<sup>th</sup> October 1997 by Samuel Kimani Mwaura and Elizabeth Wairimu Kamande in their respective capacities as son and widow of the deceased. He was said to have been survived by thirteen (13) individuals, being widow and children of the deceased. The survivors are Peris Nyambura, Margaret Wanjiku, Esther Wairimu, Charles Kinuthia, Charity Wangui, Rose Waithira, Robert Kiara, Samuel Kimani, Judy Wanjiru, Humphrey Njenga, Christine Njeri, Alice Nyambura and Samuel Karanja. He was expressed to have died possessed of two assets, Plot No. 8 Kihumbu-ini and Parcel No. 608 Kihumbu-ini.
3. A grant of letters of administration intestate was duly made to the petitioners on 16<sup>th</sup> December 1997. The grant is yet to be confirmed.
4. A summons for revocation of the grant, dated 22<sup>nd</sup> March 1999, was filed herein on 24<sup>th</sup> March 1999. The application is brought at the instance of John Kiara Mwaura sworn on 23<sup>rd</sup> March 1999. He claims to be a child of the deceased. He states that the deceased had three (3) wives, namely Peris Nyambura, Wanjiku Kiburi and Mary Wairimu. Wanjiku Kiburi had three (3) children – John Kiara, Kiburi Mwaura (deceased) and Wanjiku Mwaura. Peris Nyambura had three (3) children too – Nelson Kamande (deceased), Karanja Mwaura and Elizabeth Wairimu (widow of Nelson Kamande). Mary Wairimu had eleven (11) children – Esther Wairimu, Charles Kinuthia, Margaret Wanjiku, Charity Wangui, Rose Waithira, Robert Kiara, Samuel Kimani, Judy Wanjiru, Humphrey Njenga, Christine Njeri and Alice Nyambura. All three wives were at one point chased away, but they came back after arbitration. All three families lived and worked on Loc. 8/Kihumbu-ini/608. He avers that his side of the family has been excluded from the proceedings.
5. There is a reply to the application by Samuel Kimani Mwaura, through an affidavit sworn on 20<sup>th</sup> May 1999. He asserts that the deponent of the affidavit in support of the application was not a child of the deceased, and never lived on Loc. 8/Kihumbu-ini/608. He refers to proceedings that were conducted in Thika CMCCC No.2 of 1999, where it was held that applicant's mother was never married to the deceased, and ruled that the remains of his brother could not therefore be buried on Loc. 8/Kihumbu-ini/608. He mentions that there was an appeal pending against that holding in HCCA No. 99 of 1999.
6. The oral hearing of the application began on 2<sup>st</sup> February 2007. The first to take the witness stand was Evan Karumbe Kearo, a brother of the deceased. He testified that the deceased had married three times, and his wives were Peris Nyambura Eunice Wanjiku and Mary Wairimu. He identified the applicant as a son of the deceased with Eunice. He said the deceased's wives, including Eunice, lived on Loc. 8/Kihumbu-ini/608. The applicant was said to have been involved in the burial of his father. Eunice and his family were recognized at the burial as part of the family of the deceased. The eulogy was said to have been read by the applicant. As at the date of the deceased's death, Eunice was said to have been cultivating on Loc. 8/Kihumbu-ini/608, although she lived in Nairobi. Peris lived at Thika, and it was only Mary who lived on the land, according to the witness.
7. The next witness for applicant was the applicant himself, John Kiara Mwaura. He identified the

deceased as his father, saying that the deceased had three wives and several children. He produced a birth certificate which identified the deceased as his father. He stated that the certificate was obtained when he was fifty (50) years old and after the deceased had died. He stated that at the time of the death, he, the witness, lived at Garissa, where he worked. He said his mother was at Mombasa, while one of his stepmothers lived at Thika and the other at Kihumbu-ini. The deceased was said to have been living at Kihumbu-ini alone. He was said to have been separated from his three wives. He said that the separation with Peris occurred in 1966 while that with his own mother happened in the 1940s, adding that when he came of age they were not living together. He said that he grew up with his maternal grandmother. He stated that his father used to visit him wherever he was. He conceded that when his brother died, he was not buried at the alleged family land for there was a case at Thika, being Thika CMCCC No. 2 of 1999, where it was held that his mother was not a wife of the deceased. He stated that he did not agree with the decision, and his voice was not heard at that trial. He mentioned that at the funeral the eulogy recognized his mother as a wife of the deceased and mentioned him as a child of the deceased. He stated that when his mother passed on she was buried at Ruiru.

8. The administrator's case opened on 12<sup>th</sup> October 2015. The administrators called only one witness, Samuel Kimani Mwaura, who is one of the administrators of the estate. He testified that the deceased had only two wives, Peris and Mary. He said that the applicant's mother was not involved in the burial of the deceased. He stated that he never saw the applicant during the entire period of the deceased's lifetime. He further mentioned that the court held in Thika CMCCC No. 2 of 1999 that the applicant's mother was never married by the deceased, and barred the burial of the remains of the applicant's brother on the land. An appeal in HCCA No. 99 of 1999 against that decision was withdrawn on 8<sup>th</sup> December 2000. He said that there had been bad blood between the deceased and their uncle Evan Karumbe Kearo.

9. At the close of the oral hearing, I directed the parties to file written submissions. They complied with the said directions and filed the written submissions, which I have had occasion to go through.

10. The only issue for determination is whether there was a valid marriage between the applicant's mother and the deceased, for the legitimacy of the applicant and his side of the family depended on the validity of the alleged marriage. The applicant's case is that he and his family had not been disclosed in the petition for representation.

11. From the material that was placed before me, it would appear that that issue arose in Thika CMCCC No. 2 of 1999. It had been directed by consent on 19<sup>th</sup> March 2001 that the court file in Thika CMCCC No. 2 of 1999 be availed. My perusal of the record reveals that the said court file was never made available. What is available is the court file in HCCA No. 99 of 1999 which is in respect of the appeal brought against the decision made in Thika CMCCC No. 2 of 1999.

12. I have perused the record in HCCA No. 99 of 1999. There is in it a copy of the proceedings in Thika CMCCC No. 2 of 1999, inclusive of a certified copy of the ruling the subject of the appeal. The decision was on an application to bar burial of the remains of a brother of the applicant on the property of the deceased. The application was disposed by way of affidavit and *viva voce* evidence. It turned on whether the applicant's mother was ever married to the deceased, which would have then determined the question as to whether the applicant's brother was a child of the deceased to warrant the interment of his remains on the deceased's property. It was concluded that the deceased had never married the applicant's mother and, as a consequence, the applicant's brother was not a child of the deceased and could not be buried on the deceased's property. The applicant's mother was aggrieved by the decision and she lodged an appeal in HCCA No. 99 of 1999. That appeal was withdrawn by consent on 8<sup>th</sup> December 2000.

13. The applicant is inviting me to make a determination as to whether his mother was a widow of the deceased. The court in Thika CMCCC No. 2 of 1999 made a finding on that issue. That decision is still valid and standing, for it has not been reversed on either appeal or review. The matter is for all purposes *res judicata*. I cannot revisit it in the circumstances. I cannot sit on appeal on the decision in Thika CMCCC No. 2 of 1999 as no such appeal is before me. Based on that decision, there cannot be any basis for me, one way or the other, holding that the applicant's mother was ever a wife of the deceased and, by extension, that the applicant was a child of the deceased. That being the case, there cannot be any merit in

the application dated 22<sup>nd</sup> March 1999. I shall therefore hereby dismiss the same with costs. The administrators should proceed to prosecute their pending application for confirmation of their grant.

14. I have noted from the record before me that the estate comprises of property situated at Kihumbu-ini of Murang'a County. I shall consequently direct that the matter be transferred to the High Court of Kenya at Murang'a for final disposal.

**DATED, SIGNED and DELIVERED at NAIROBI this 25<sup>TH</sup> DAY OF NOVEMBER, 2016.**

**W. MUSYOKA**

**JUDGE**