



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 22 OF 2015

(FORMERLY MERU SUCCESSION CAUSE NO. 481 OF 2011

AND CHUKA SUCC. CAUSE NO. 178 OF 2010)

**IN THE MATTER OF THE ESTATE OF THE LATE KIBERENGE NKANDO ALIAS
KIBERENGE S/O NKANDO (DECEASED)**

**M N M (ACTING IN HER CAPACITY AS ADMINISTRATOR AD LITEM FOR THE ESTATE
OF THE DECEASED**

W N F M N).....PETITIONER

- VERSUS -

C K N.....OBJECTOR

AND

STANLEY NTEERE MUTONGA.....INTERESTED PARTY

J U D G M E N T

1. K N alias K S/O N (*"the deceased"*) died in or about 1964. He had three (3) children, J W, B G K and G N K. On 28th September, 2010 W N.F. M N (*"the Petitioner"*) now deceased petitioned the Chuka Principal Magistrate's Court for Letters of Administration Intestate for the estate of the deceased. He did so in his capacity as a grandson. In form No. P& A5, he indicated those surviving the deceased as the deceased's said two children and himself. He also specified Abothuguchi/Kithirune [particulars withheld] as the only asset constituting the estate. The grant was issued to him on 8th November, 2010 and confirmed on 13th June, 2011 whereby plot. No. [particulars withheld] was distributed to Stanley Nteere Mutonga (*"the Interested Party"*).

2. On 7th September, 2011, C K N (*"the Objector"*) applied for the revocation of the said grant and for other orders. The grounds for the application were that the Chuka Principal Magistrate's Court lacked both geographical and pecuniary jurisdiction to hear the matter and that the cause was filed secretly without consulting the family members and other beneficiaries.

3. The court directed that the matter be determined by way of viva voce evidence. The Objector filed Affidavits as well as witness statements and called three (3) witnesses. The Petitioner filed a Replying Affidavit sworn by himself and another one sworn by B G K while the Interested Party filed an Affidavit and appeared at the trial and opposed the application. Both the Petitioner and B G passed on while the matter was still pending. On the death of the Petitioner, his wife M N M was substituted as the

Petitioner.

4. The Objector (OW₁) told the court that the deceased died in 1964 leaving behind eleven (11) beneficiaries. These were two (2) daughter-in-laws, two (2) grandsons and seven (7) granddaughters. That the Chief's letter that was used by the Petitioner to commence the Succession Cause was not genuine as it was written by a person who was not the Chief of the area where the deceased hailed from and that neither he nor any of his siblings were consulted for the filing of this Succession Cause. In cross-examination, the Objector admitted that he was only a step-brother to the Petitioner; that the Petitioner's mother had been divorced by his father, G N long ago; that the deceased had three (3) properties Abothuguchi/Kithirune/[particulars withheld] but the latter two (2) had been transferred into his father's name in 1990. He further admitted that the properties that were in the name of his father were being used by him, his mother and his siblings to the exclusion of the Petitioner. That he was born after the deceased had died and that it is the deceased who took care of the Petitioner after the latter's mother was chased away by his father.

7. F N K (OW₂) told the court that she was a granddaughter of the deceased and a sister to the Objector. That she had been given plot No. [particulars withheld] by her father and had been cultivating the same for 30 years before the Interested Party invaded it and evicted her therefrom in 2011. That the Petitioner had the right to inherit from his father like all the other children of her father. In cross-examination, she admitted that B G was a daughter of the deceased who was the last to die in 2014/2015; that her father had been given properties by the deceased; that the Petitioner had not been given any land by his/her father, G N; that the Petitioner sold plot. No.[particulars withheld] after having obtained the grant. She confirmed that no one had constructed on plot No. 790.

8. G N (OW₃) was the mother of the Objector and OW₂. She was the wife of G N and therefore a daughter in law to the deceased. She testified that she was neither consulted by the Petitioner when bringing the Succession Cause 790 nor selling the same to the Interested Party. That while her husband was given land by the deceased, his sisters, one J and B G were given none. She was unable to explain why her husband caused two of the properties to be transferred to his name but plot No. 790 was not.

9. Stanley Nteere Mutunga (I/ PW₁) relied on the Affidavits sworn by the Petitioner and B G. He told the court that he had consulted those concerned before buying plot No. [particulars withheld]. That he was also a grandson of the deceased as the deceased was a brother to his grandfather. That he purchased the property after Succession. He did not know if the Petitioner had sought consent from his siblings before he lodged the Succession cause.

10. In his submissions, Counsel for the Objector submitted that the testimony of both the Petitioner and B G should be considered to be of less probative value as it was not tested as the two died before the trial. That the sale of plot No. [particulars withheld] to the Interested Party amounted to intermeddling. That the testimonies of the Objector and OW₂ that they were not consulted was enough prove of fraud on the part of the Petitioner. That on the authority of **Musa Nyaribari Gekone & 2 others .v. Peter Miyianda & Anor [2015] eKLR**, the sale to the Interested Party should be nullified. On behalf of the Petitioner and the Interested Party, it was submitted that the evidence of B G was unchallenged; that the Objector was not a beneficiary of the estate of the deceased; that on the authority of **Sirrah Mweru Mukindia .v. Ruth Nkatha Rukaria [2016]eKLR** the sale to the interested party should be upheld. That there was nothing to show that the Chuka Principal Magistrate's Court did not have jurisdiction to entertain the matter.

11. Having considered the evidence on record and the submissions of Learned Counsel, the following issues fall for determination:-

- a. Did the Subordinate Court have jurisdiction to hear the matter?
- b. Who are the beneficiaries of the estate of the deceased?
- c. Was there any fraud in obtaining the grant?

d. Should the sale to the Interested Party of plot No. [particulars withheld] nullified?

12. The first ground is that the Chuka Principal Magistrate's Court had neither the geographical nor pecuniary jurisdiction to entertain the Cause. That the property was valued at one Kshs.1 million and was situated in Central Imenti and that therefore the court with jurisdiction was the Meru Court. The Objector did not produce any evidence to show that at the time the Cause was lodged the value of the estate was Kshs.1 million as alleged. A mere allegation is not enough. The Objector should have produced a valuation report which should have given the value of plot No. [particulars withheld] with mathematical precision. The court cannot just speculate as to what the actual value of a property is unless there is expert evidence by way of a valuation report. This is missing in this case. As regards the property being situated in Central Imenti, I do not think that geographical location per se destroyed the court's jurisdiction. The prejudice that may have been suffered is the one of inconvenience which can be addressed by way of costs. I reject that ground.

13. The second issue is, who are the beneficiaries of the deceased? Under Section 38 of the Law of Succession Act, Cap 160 Law of Kenya (*"the Act"*), the beneficiaries of an intestate of a deceased person is the spouse and children of such deceased. Section 39 of the Act, sets out the hierarchy and/or priority where there is no surviving spouse or children. The disputants herein are but grandchildren of the deceased. The deceased left children who, however as at the time the cause was being filed had died except one (1), B G who allowed the Petitioner to lodge the Cause. In my view, B G run in priority as the beneficiary while the Petitioner, the Objector and his siblings are second in line as beneficiaries to the estate of the deceased. Both did not automatically qualify as beneficiaries as B G was alive. In this regard, I will answer this issue together with issue number 3, whether there was fraud in the lodging of the cause.

14. It was contended for the Objector that neither the Objector nor any of his siblings was notified of the Cause. The Petitioner swore that he was a grandson of the deceased. That his father had three (3) wives who had their own children. That his mother separated with his father when he was young and he was therefore left in the custody and care of the deceased; that before the deceased passed away, he gave the Petitioner plot No. [particulars withheld] as a gift. That on the other hand, the deceased gave the Petitioner's father, G N, his own properties. That plot No. [particulars withheld] was his and he therefore did not need anyone's consent before lodging the Cause. That the direct beneficiary, apply for the grant as she knew that the property was his. The Objector and his witnesses denied that the deceased gave plot [particulars withheld] to the Petitioner. They insisted that it was given to his father, G N. They insisted that the Petitioner was brought up under the care of their mother OW₃ and not the deceased.

15. I have considered the evidence on record. I warn myself that the evidence of both the Petitioner and B G was never subjected to cross-examination. However, I note that B G was a daughter of the deceased and therefore a direct beneficiary of the deceased. She corroborated the evidence of the Petitioner as to how he was brought up under the care and custody of the deceased and that the deceased gave the Petitioner plot No. [particulars withheld] That the deceased had fully provided for her brother, G N, the father of the deceased and the Objector. By giving the testimony she gave, B G stood to gain nothing. It was prejudicial to her as the person who was in priority for the grant of the Letters of Administration. It is therefore highly probable that she was telling the truth. She stood to gain nothing in telling the court what she swore.

16. The other thing is that conduct of the father of the Petitioner and the Objector. There was no dispute that the deceased settled the said G N during his lifetime. He gave him land said to measure approximately 13.5 acres (plot Nos. [particulars withheld]), respectively. The father of the Objector caused those two properties that had been given to him by the deceased to be registered in his name. According to the Certificates of Official Searches produced, the transfers to the name of G N were effected in 1990. The question that arises is, if G N had been given all the plots by his father (the deceased) plot Nos. [particulars withheld], why did he transfer the latter two (2) only and left plot No. 790 to remain in the name of the deceased. This leaves the court with no alternative but to believe that, he must have known that plot No. [particulars withheld] was not meant for him. It must have been meant for or given to the Petitioner by the deceased.

17. The other aspect is the sizes of the properties in question. While plot No. [particulars withheld] measures approximately 1.6 acres, plot Nos. [particulars withheld] total about 13.5 acres. The record shows that G N had a total of eleven (11) children. These were given as H N N and C (1st House), W N (2nd House) and C K, M K, A N, B G, D K, F N, D K and L K. L K is said to be deceased. Nothing was said about C K or his mother, E N N, the first wife. This means that apart from the Petitioner, the beneficiaries of the estate of G N total about nine (9) including OW3, the 3rd wife but excluding the Petitioner. Plot No. [particulars withheld] measuring 1.6 acres therefore compares very well with plot Nos. [particulars withheld] measuring 13.5 when divided amongst the rest of the beneficiaries of G N. Each beneficiary will get approximately 1.5 acres. There is evidence that the Petitioner got nothing from plot Nos. 796 and 400. The same are occupied and fully utilised by all the other survivors of the late G N.

18. In view of the foregoing and by inference, the court makes the following findings:-

a. considering the size of plot No. [particulars withheld] and the circumstances the Petitioner found himself, that his mother separated with his father early in life, that plot was given to the Petitioner by the deceased. The deceased took care of the Petitioner; after his mother had been abandoned or chased away by G N;

b. the deceased settled G N by giving him plot Nos [particulars withheld]. He did not provide for his daughters. This is why his daughter, B G swore that plot [particulars withheld] was given to the Petitioner by the deceased;

c. plot Nos. [particulars withheld] was given to G N and that is where the Objector and his siblings including OW3, the wife of G N are supposed to inherit from.

d. knowing that plot No. 790 was not meant for him, G N did not transfer it to his name when he transferred plot Nos. [particulars withheld] in 1990.

19. Accordingly, the court makes a finding that the only beneficiary of the estate of the deceased was the Petitioner. In the circumstances, he was not obliged to seek the consent of his step brothers and sisters before he applied for the grant. Plot No. [particulars withheld] belonged to the Petitioner having been given to him by the deceased. That is why his father G N did not transfer it into his name, although he had the opportunity to do so when he transferred to his name plot Nos. [particulars withheld] which were given to him by the deceased. OW3 and all her children have occupied the entire of plot Nos. [particulars withheld] to the complete exclusion of the Petitioner.

20. Having made the foregoing findings, this court finds that there was no fraud in the lodging of the present cause. The Petitioner did not need to seek the consents of any of his step brothers, sisters or step mother before lodging the Cause.

21. The final issue is whether the sale of plot No. [particulars withheld] to the Interested Party should be nullified. There is no dispute that the Petitioner is the one who sold plot No. [particulars withheld] to the Interested Party. The sale was effected by the Petitioner as an administrator of the estate of the deceased. The sale was but effected at confirmation on 11th June, 2011. In this regard, the sale is protected under Section 93 of the Law of Succession Act, Cap 160 Laws of Kenya.

22. In view of the foregoing, the court makes the following conclusions:-

a. after the separation of the father of the Petitioner and his mother, the deceased took care of the Petitioner;

b. the deceased bequeathed plot No. [particulars withheld] to the Petitioner during his lifetime;

c. the deceased settled his family by, inter alia, giving the Petitioner's and Objector's father G N plot Nos. [particulars withheld];

d. the area of plot No. [particulars withheld] is equal to that of plot Nos. [particulars withheld] when the latter two (2) are divided equally to all the beneficiaries of G N the father of the, Petitioner and the Objector;

e. G N did not cause plot No. [particulars withheld] to his name because he knew it belonged to and was intended to belong to the Petitioner as he anticipated rivalry from the Petitioner's step siblings;

f. all the beneficiaries of G N have been in occupation of and continue to occupy plot Nos. [particulars withheld] to be registered in the exclusion of the Petitioner;

g. plot No. [particulars withheld] belonged to the Petitioner and he did not need to consult anyone or procure anyone's consent before Petitioning for Letters of Administration;

h. the grant of Letters of Administration for the estate of the deceased was properly and lawfully obtained;

i. the application for revocation was actuated by greed, extreme malice and rivalry on the part of the Objector, his siblings and mother against the Petitioner;

j. the sale of plot [particulars withheld] to the Interested Party was lawful and protected under section 93 of the Act.

23. Accordingly, the application for revocation is without merit and is hereby dismissed with costs.

DATED and Delivered at Chuka this 20th day of December, 2016.

A.MABEYA

JUDGE