



**REPUBLIC OF KENYA**

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

**MISC SUCC. NO. 3 OF 2016**

**(FORMERLY CHUKA SPM SUCCESSION CAUSE NO. 10 OF 2009)**

**IN THE MATTER OF THE ESTATE OF THE LATE NKOROI NGARI**

**AND**

**PHYLIS CIATHARAKA.....APPLICANT**

**- VERSUS-**

**JORAMSON MUTEGI IKENDA.....RESPONDENT**

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

1. Nkoroi Ngari (*“the deceased”*) is said to have died in or about 1963 or 1968. He left Magumoni/Mwonge/415 (*plot No. 415*) as his estate. He left behind two widows who also died thereafter. On 3<sup>rd</sup> February, 2009, Joramson Mutegi Ikenda swore that the deceased was survived by Phylis Nkoroi, Ciambuba Nkoroi, Jemimah Thathi and Oliver Ciambuti but that all were then deceased and that he was the deceased’s grandson and the only surviving beneficiary. That Affidavit was made in lieu of a death certificate for purposes of commencing this Succession Cause. On the same date, Joramson Mutegi Ikenda (hereinafter *“the Petitioner”*) petitioned for the grant of Letters of Administration Intestate for the estate of the deceased. In form No. P&A 5, he indicated that all those survivors of the deceased were dead and he as the grandson of the deceased was the only survivor and beneficiary. He disclosed Plot No.415 as the only asset constituting the estate.

2. On 20<sup>th</sup> March, 2009, a grant was issued to the Petitioner which was subsequently confirmed on 27<sup>th</sup> May, 2009 whereby plot No.415 was distributed to one Erick Mugungi Simon (0.50 acres) and the balance to the Petitioner.

3. On 10<sup>th</sup> February, 2016, Philis Ciatharaka Kirimo (hereinafter *“the Applicant”*) applied for the revocation of that grant. She contended that the succession cause was lodged secretly; that she was a daughter of the deceased and was alive; that the Petitioner had concealed the fact that he was not related to the deceased in any way. Directions were made that the application be determined through viva voce evidence. The parties and witnesses filed Affidavit evidence which they adopted at the trial and were cross-examined on them.

4. The Applicant told the court that the deceased died in December , 1963. That he left two widows, Mbau Nkoroi and Gakirue Nkoroi. That the deceased was blessed with six (6) children all who have died. That in 2009 when the Petitioner commenced the Succession Cause, two children of the deceased that is herself and one Oliver Ciambuti, were still alive. That Oliver Ciambuti died on 26<sup>th</sup> November,

2015. She denied that the Petitioner was either a grandchild of or in anyway related to the deceased. That the Petitioner had been prosecuted and convicted to one (1) year probation in Runyenjes Criminal Case No. 738 of 2009 for having fraudulently lodged and prosecuted this Succession Cause. She maintained that the Petitioner had lied to court in the documents he filed in these proceedings as she was still alive and not dead as she had indicated in those documents Justus Mutegi Mboa (PW<sub>2</sub>) a 73 year old man of the Chuka sub-tribe told the court that under Chuka customs, the property of a deceased parent is inherited by his children. He was unaware of any circumstances under which such property is to be inherited by an outsider. In cross-examination, he denied that the Petitioner had buried either the deceased or any of his wives. He admitted knowing the Petitioner but denied that he had any relationship with the deceased. they were neighbours in the village.

5.The Petitioner (RW<sub>1</sub>) testified that the deceased was a brother to his father one Gitemba Ikenda. That while his father buried the deceased, the Petitioner buried the deceased's widows when they died. That before the deceased died, he had bequeathed him his property. That he had lived in the estate property for 30 years. In cross-examination, he admitted that he was not a grandson of the deceased. He denied that he had indicated that all the children of the deceased were dead since he knew that the Applicant and her brother Oliver Ciambuti were alive in 2009. He admitted not having informed them about the Petition and that he applied for confirmation in less than six (6) months. That he was aged 15 years and was alone when the deceased bequeathed him his properties in 1960. That the properties bequeathed to him included beehives, goats and cows. That before he occupied plot No.415, he was living in his father's land. Abon Baini Mbutu (RW<sub>2</sub>) testified in support of the Petitioner's Case. He told the court that he comes from the same clan as the Applicant and the Petitioner. That the deceased was buried by the Petitioner's father while the Petitioner buried the deceased's widows. That according to Chuka tradition, it was the Petitioner who is entitled to inherit the property of the deceased because he buried his widows. In cross-examination, he stated that under Meru customs it is the person who buries another who inherits his property.

6. Having considered the evidence on record, the following are the issues for determination; firstly, whether the deceased bequeathed the Petitioner his property; Secondly, should the grant be revoked, thirdly, who are the beneficiaries of the deceased and finally how the estate of the deceased should be distributed.

7. On the first issue, it was the Petitioner's testimony that before the deceased died, he had bequeathed all his properties to him. He stated that the bequest was made to him in 1960 when he was only 15 years old. That the deceased gave him his beehives, cows and goats. That he was alone when the bequest was made. Section 9 (1) of the Law of Succession Act Cap 160 (hereinafter "*the Act*") provides:-

***"9 (1). No will shall be valid unless-***

***a) it is made before two or more competent witness; and***

***b) the testator dies within a period of three months from the date of making the will:***

.....

8. In view of the foregoing, for an oral will to be valid, the same must be made in the presence of two (2) witnesses and the deceased must die within three (3) months of making such will. In the instant case, the Petitioner told the court that he was alone when the oral will was made; that it was made in 1960 and the deceased died in 1965. It is therefore clear that the said will did not satisfy the provisions of section 9 of the Act. There were no two witnesses and the deceased died beyond three (3) months after the making of the alleged will. Accordingly, if there was any bequest, the same fell short of the law and cannot therefore stand.

9.The second issue is whether the grant should be revoked. The Petitioner and his witness admitted that in 2009, the Applicant and her brother one Oliver Ciamboti were alive; that although they were children of the deceased he did not consult them before lodging the Petition in this cause. He admitted that he was

not a grandson of the deceased as he indicated in the Petition. As if this was not enough, while he indicated in the Form No. P&A 5 that all the children of the deceased were dead, it turned out that as at 2009, the Applicant and one of her brothers, who has since died, were still alive. In this regard, it is clear that there was concealment of material facts; that the statements contained in the Petition were false and that the grant was obtained fraudulently. Section 76 of the Act provides:-

***“ S76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-***

***a) .....***

***b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***

***c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.”***  
(Underlining provided)

10. In view of the foregoing, there is sufficient material to show that the grant was obtained fraudulently; was based on false statements and that the Petitioner concealed material facts from the court. The grant cannot stand. It is for revocation and it is hereby revoked.

11. The other issue is, who are the beneficiaries of the deceased? The Applicant's case is that as the deceased's daughter, she was the sole beneficiary entitled to inherit her father's land. On the other hand, the Petitioner testified that he was the one entitled to inherit the property under Meru customs; that he had buried the deceased and his widows and under Chuka customs, he was the rightful beneficiary. This version was supported by RW<sub>2</sub>, Abon Mbaini Mbutu.

12. Firstly, neither the Petitioner nor his witness claimed to be an expert in Chuka or Meru Customary Law. This court is not satisfied that any custom to the effect that he who buries another inherits his property was proved. The existence of this custom was disputed by Justus Mutegi Mboa (PW<sub>2</sub>) who told the court that he was a 73 year old man of the Chuka sub-tribe. Secondly, if there exists such a custom, the same will fall foul with the Law. It will be repugnant to justice and morality. The Law of Succession Act has made elaborate details on who constitutes a beneficiary and or a dependent of a deceased person under Sections 26 through 39 of the Act. Indeed section 39 of the Act sets out the priority of beneficiaries and there is no room whatever for tribal customs thereunder. In any event, both under Article 159 of the Constitution and section 3 of the Judicature Act, customary law applies if it is not in conflict with statute and is not repugnant to justice and morality. A custom that will disinherit children of a deceased person arbitrarily such as the one propagated by the Petitioner is not only illegal but unconstitutional.

13. Further, I did not find the Petitioner to be truthful. His testimony was full of contradictions. In form No. P & A 5, he indicated that he was a grandson of the deceased and the only one surviving him as all the named children of the deceased were dead. He later admitted that that was false. He stated in his affidavit that his entitlement to inherit the property of the deceased was based on the fact that he had buried the deceased. However, he admitted in court that neither was he the one who buried the deceased nor was he the deceased's grandson. That he only buried the widows of the deceased. He swore that the deceased died in 1968, yet in court he stated that he was bequeathed by deceased in 1960 and that the deceased died in 1965! With such contradictions, the Petitioner cannot be believed at all.

14. Accordingly, under section 39 of the Act, this court finds that since there was no dispute whatsoever that the Applicant was a daughter of the deceased and she was the only living, the Applicant is the beneficiary of the estate of the deceased. Being the only beneficiary of the estate of the deceased, the Applicant is entitled to inherit the entire estate.

15. Accordingly, I make the following orders:-

a) the application is allowed. The grant issued to the Petitioner is hereby revoked and all other consequential orders set aside.

b) the property known as LR Magumoni/Mwonge/415 is distributed to Philis Ciatharaka Kirimo wholly.

c) costs to the Applicant in any event.

It is so decreed.

**DATED and delivered at Chuka this 13<sup>th</sup> day of December, 2016.**

**A.MABEYA**

**JUDGE**

Judgment read and delivered in open court in the presence of Applicant only. All parties had notice.

**A.MABEYA**

**JUDGE**

**13/12/2016**