



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 400 OF 2015**

**FORMERLY SPM CHUKA SUCC. CAUSE NO.13 OF 2012**

**IN THE MATTER OF THE ESTATE OF THE LATE MUCHEKE NKOMANGO....DECEASED**

**DAVID GITARI MUCHEKE.....PETITIONER**

**VERSUS**

**CATHERINE CIANDURU MUGO.....CAVEATOR**

**MARGARET CIANDURU MUCHEKE.....PROTESTOR**

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

1. Mucheke Nkomango (hereinafter “the deceased”) was married to two wives, Mikui Mucheke (1<sup>st</sup> wife) and Margaret Mucheke (2<sup>nd</sup> wife) hereinafter (“the Protestor”). He was blessed with five (5) children being Mugo Mucheke (deceased), Margaret Ntabi, Madrin Ciamati, David Gitari (“the Petitioner”) and Nancy Marigu. The first three children were born to the deceased’s first wife whilst the last two were born to the 2<sup>nd</sup> wife who is the Protestor herein.
2. On 5<sup>th</sup> June, 2008, the deceased passed on whereby the Petitioner petitioned for grant of Letters of Administration which were granted to him on 7<sup>th</sup> December, 2011. On 13<sup>th</sup> February, 2012, Catherine Cianduru Mugo, the widow of Mugo Mucheke filed a Caveat and later on 27<sup>th</sup> June, 2012 followed the same with an application for the Petitioner to show cause why the said grant should not be confirmed and the shares of the beneficiaries determined. Pursuant thereto, the Petitioner applied for the confirmation of grant on 27<sup>th</sup> June, 2012. In that Application, he made several proposals on how he wished the estate of the deceased to be distributed. Further on 8<sup>th</sup> August, 2012, she filed an Affidavit of Protest to the said proposed confirmation. On 23<sup>rd</sup> August, 2012, the Protestor, who was said to be aged over 90 years at the time of the hearing, also filed a Protest to the said proposed distribution. She gave her own version of how she wished to see the estate shared out. On 18<sup>th</sup> July, 2013, Margaret Ntabi Kiberenge, a daughter to the deceased also filed an Affidavit of Protest in which she seemed to support the case of the Caveator.
3. Both the application by the Caveator, the protest and the confirmation were heard through viva voce evidence. The Protestor was allowed to appear through an intermediary, one Dickson Mwenda Gitari. Her case was that she was the widow of the deceased and therefore ranked in priority to administer the estate; that the Petitioner was her son who had been given 6 acres by the deceased being Magumoni/Mukuuni/1021 (hereinafter “Plot No. 1021”) which he had however sold and was now virtually landless. That the Petitioner was a drunkard and not suitable to administer the estate. (herein “Plot No. 1022”) She therefore proposed that Magumoni/Mukuuni/1022 be shared between herself, Dickson Mwenda Gitari, the Petitioner and

- the Caveator. On cross-examination she confirmed that as at the time plot No.1021 was sold, it belonged to the Petitioner and not the deceased. She denied that the deceased's property was to be divided into two between his two (2) wives; she denied that Mugo Mucheke, the deceased's eldest son was also give 6 Acres at the time the Petitioner was given his. She proposed that the Caveator be allocated 4 Acres as the widow of the deceased's eldest son. She admitted that during the deceased's life time, both her, the deceased and the Petitioner used to live in Plot No.1021 but after the demise of the deceased, she moved to Magumoni/Mukuuni/1023 (hereinafter "Plot No. 1023) where the Petitioner was now staying after having disposed off plot No. 1021.
4. P2 W1 Margaret Ntabi Kaberenge told the Court that she was the daughter of the deceased through the latter's first wife; that the deceased died having subdivided the land to his sons into equal portions. That he gave plot No.1021 to the Petitioner and Plot No. 1022 to her brother Mugo Mucheke now (deceased). She told the court that for that reason the unshared property Plot No. 1023 should be divided between the two houses whereby one portion should be held by the Protestor for herself and in trust for her biological daughter one Nancy Marigu and the other half to Margaret Ntabi Kiberenge and her sister one Medrine Ciamati. She contended that the grant should be confirmed in favour of the Protestor and the Caveator. On cross-examination, she stated that she was present when the deceased divided his property into half in favour of his two (2) wives. She stated that she was happily married to one Kiberenge Nkembo.
  5. P3 W1 Catherine Cianduru told the court that she was a daughter in law to the deceased by virtue of being married to his son, the late Mugo Mucheke, She opposed the proposed distribution on the basis that it was unfair; she proposed that she be allocated the whole of plot No.1022 and plot No. 1023 be held by the Protestor for her own and for the benefit of P2 W1, Medrine Ciamati and Nancy Marigu. She contended that the Petitioner and her husband were each given their shares whilst the deceased was still alive; that the Petitioner had sold his share and had petitioned for the grant of letters herein in order to get a share of her husband's rightful share. She has six children whom she wants to take care of using her late husband's share.
  6. On being cross-examined, she told the court that after being bequeathed their respective portions by their deceased father, the Petitioner was faster in obtaining his title whilst her husband passed on before he could obtain a title for his portion being plot No.1022. She admitted that the Protestor was entitled to administer the estate since she was the widow of both the deceased. That the deceased sold one acre each of his own property for the benefit of both the Petitioner and her late husband, respectively. According to her, the deceased called a land Surveyor and two elders who are now deceased when he did the subdivision of his land amongst his two sons. She concluded that after the division, the Petitioner went to live in Plot No. 1021 and her husband moved to plot No. 1022 whilst the Protestor and the deceased continued to live in Plot No. 1023.
  7. R1W1 David Gitari Mucheke, the Petitioner told the court that he wanted to distribute the property that was solely owned by his father; that the sale of his property had nothing to do with the deceased's estate; that in his proposal his two sons Elikana and Dickson were to inherit 0.50 Acres while he was to inherit from both plot Nos.1022 and 1023 respectively. He told the court that he was given plot No. 1021 in the early 1990s and immediately thereafter, got a title thereafter, that none of his siblings got any land from the deceased; that his deceased brother Mugo Mucheke was only given one acre which was sold for the benefit of his children. He confirmed that he and the deceased were living in plot No.1021 since 1978. That his deceased brother went to live in plot No.1022 where he was buried after passing on and his widow, the Caveator herein, continue to live there todate. That the deceased was buried in Plot No. 1023. According to him, it would be unfair to give the Caveator a bigger portion than the rest of the beneficiaries.
  8. From the foregoing the issues that fall for determination are; is the Petitioner a proper person to administer the estate of the deceased? If not, who should be appointed? Did the deceased share his land amongst his sons? If so how, and if not, how should the estate be distributed?
  9. It is not contested that the deceased was polygamous. He had two (2) wives one Mikui Mucheke (1<sup>st</sup> wife) and the Protestor (2<sup>nd</sup> wife). That the two (2) wives, bore the deceased five (5) children, two (2) sons and three (3) daughters. Two of the daughters, Medrine Ciamati and Nancy Marigu did not make any claim to the estate of the deceased. From the evidence on record, it is not in dispute that during his lifetime the deceased did give his son from the second wife (the Protestor), who is the Petitioner herein six (6) Acres of land which was Plot No. 1021 which he has since

- subdivided and sold the same. He sorely enjoyed the proceeds therefrom. It was also agreed that when the deceased died, his remains were interred in Plot No. 1023 where the Protestor has since been living. Finally, it is not disputed that when the Petitioner was given his portion of six (6) Acres he moved to live therein while the deceased's elder son the late Mugo Mucheke moved to live in Plot No.1022 where his remains were interred. To date his widow (the Caveator) and the children continue to live on that property.
10. On the first issue, the Protestor contended that the Petitioner, who is her son, cannot be trusted to administer the estate as he had failed to administer his own property which he had sold; that he had applied for the grant surreptitiously without informing her yet she had priority in so applying; that he was a habitual drunkard and cannot be relied upon. The Petitioner did not deny or address these allegations. He was contended to state that the property he had sold was his own personal property which had nothing to do with the estate. That as the son of the deceased, he had the right to distribute his late father's undistributed estate.
  11. I saw the Petitioner testify. He did not deny that he was a habitual drunkard or that he had sold all his land and was virtually landless. He testified that he had in his confirmation proposed to allocate himself portions of land in both Plot Nos. 1022 and 1023, respectively. He also never denied that he had not informed or involved the other beneficiaries of the estate of the deceased when he first petitioned for the grant. I further note from form No. P& A 5, that he had only disclosed Plot No.1023 as the only asset of the deceased. He had left out Plot No. 1022 from that list only to spring it out at the confirmation stage. What was he upto? He knew that the said property was still in the name of the deceased, yet he had excluded it from the assets of the deceased. For the foregoing reasons, this court does not trust the Petitioner as being honest and capable of effectively administering the estate of the deceased. In accordance with the law.
  12. I saw the Protestor and the Caveator testify, the Protestor is the widow of the deceased and stands in priority to everyone else in the administration of the estate of her late husband. She presented her intermediary Dickson Mwenda Gitari who seemed to me to be alert and capable of standing in for the Protestor. Further, the deceased had two houses. The first house was represented by the widow of the late Mugo Mucheke, Catherine Cianduru Mugo and Margaret Ntabi Kiberenge. The latter is happily married outside the deceased's homestead. In my view, the deceased having been polygamous, both houses must be represented in the administration of the estate. Accordingly, I appoint the Protestor through her intermediary Dickson Mwenda Gitari and Catherine Cianduru Mugo to be Co-Petitioners with the Petitioner David Gitari Muceke.
  13. On the second issue, there is conflicting evidence on whether the deceased had divided his land amongst his sons or two (2) wives for that matter. Margaret Ntabi testified that the deceased had divided his land between his two wives. Catherine Cianduru Mugo testified that the deceased had divided his land between his two (2) sons, the Petitioner and the late Mugo Mucheke, while he retained Plot No. 1023 for himself. On the other hand, the Protestor and the Petitioner denied that the deceased had divided the land between either his two houses or the sons. They maintained that only the Petitioner had been given 6 acres.
  14. I have already analysed the evidence of all the witnesses. This court did not believe the testimonies of the Petitioner and the Protestor on this issue. The Petitioner was not only evasive but was also not truthful. Initially he had left property Plot No.1022 from the list of the deceased assets; he was evasive as to where his step brother (Mugo) was living after he, the Petitioner was given by his father six (6) Acres of land and moved to live thereon. He grudgingly admitted that as a fact, Mugo went to live in plot No. 1022 when he, the Petitioner, moved to plot No. 1021. As if that is not enough, in his proposed distribution, he seeks to distribute 7.5 acres in Plot No. 1022 while the testimonies of all the other witnesses showed that plot No. 1022 measures 6 Acres or thereabout. Where will the rest of the land be availed from to make 7.5 acres?
  15. As regards the testimony of the Protestor that the deceased had not shared his land, the same cannot stand in light of the rest of the established evidence. The deceased was an African who had a polygamous family. Each house had a son. Would it be rational that he would give the younger son from his second house 6 acres before settling his eldest son from his first wife? There is nothing on record to show that he did or would have done so. Secondly, it was agreed that when the Petitioner was given his 6 acres in Plot No. 1021, he moved to live therein whilst Mugo Mucheke, the deceased's other son moved to live in plot No.1022 whose size was as nearly of the size as that of plot No. 1021 which the Petitioner had been given. It was also not in dispute that

upon his death, Mugo Mucheke was buried in plot No. 1022 and his family has continued to live therein to date. Upon his death, the deceased was neither buried in plot No. 1022 nor 1021 but in plot No. 1023 measuring 2.8 Acres. Finally, when the Petitioner first came to court and petitioned for Letters of Administration on 17<sup>th</sup> October, 2011, he excluded Plot No. 1022 from the list of assets of the deceased estate. All the foregoing in my view, point towards one thing, that the deceased had shared his land amongst his two sons, Magumoni/Mukuuni/1022 to Mugo Mucheke and Magumoni/Mukuuni/1021 to the Petitioner. That is why the deceased neither occupied any of the plots nor was buried in either. Further, that is why the Petitioner lived in his own plot as did the late Mugo Mucheke and finally, that is why the Petitioner may have excluded plot No. 1022 from the list of the deceased's assets.

16. Further, the evidence of the Caveator and Margaret Ntabi remained unshaken to the effect that, the deceased had called a surveyor and two (2) elders and divided his land into two portions for his two sons; that Mugo Mucheke died before he could obtain a title to his land. It should be remembered that even though Mugo Mucheke predeceased his father, the latter did not either move Mugo Mucheke's family from where they had been settled by Mugo nor did he allow anyone else to occupy the same. He himself continued to live in plot No. 1023 where he was finally buried when he died. I therefore find and hold that; the deceased shared his land between his two sons; Mugo Mucheke taking Plot No. 1022 and David Gitari Mucheke Plot No. 1021. Accordingly Magumoni/Mukuuni/1022. It had been alienated by the deceased himself during his lifetime.
17. I have taken into consideration that the parties were in agreement that the deceased sold two portions of his land for the benefit of Children of both Mugo Mucheke and the Petitioner, herein. I am not in agreement with the testimony of Margaret Ntabi Kiberenge that plot No. 1023 is to be divided between the two houses. Under Section 42 of the Law of Succession Act, Cap 160 of the Laws of Kenya, each beneficiary is taken to be a unit and must be considered during distribution and not houses. After the division of the land between his sons, there is no evidence that Margaret Ntabi opposed the cause taken by his father.
18. As regards Dickson Mwenda Gitari, he did not establish his right to inherit as a dependent. If he wishes he can inherit from the Testator on behalf of whom he appeared as an intermediary. As regards Margaret Ntabi Kiberenge, she admitted that she was already married well before the deceased passed on. That she is comfortable wherever she is married as are her other sisters. However, minded that the Court must be equitable, and for the reason that all that any beneficiary and dependent may have obtained during the lifetime of the deceased has to be considered, I will have this in mind when effecting distribution.
19. Accordingly, although Magumoni/Mukuuni/1022 seem to have been given to Mugo Mucheke by the deceased the same way Magumoni/Mukuuni/1021 had been shared out to the Petitioner by the deceased during his lifetime. Mugo Mucheke did not take steps to have the same registered in his name. The deceased left out his other children (daughters) when sharing the land out. Taking into consideration the foregoing, and for the interest of justice I distribute the estate as follows:-

**a. LR Magumoni/Mukuuni/1022**

- i. Catherine Cianduru Mugo - 6 Acres
- ii. Margaret Ntabi Kiberenge - 0.50 Acres

**b. LR Magumoni/Mukuuni/1023**

- i. Margaret Cianduru Mucheke through
  - ii. Dickson Mwenda Gitari - 2.3 Acres
- ii. David Gitari Mucheke - 0.50 Acres

The grant issued on 7<sup>th</sup> December, 2011 be re-issued in the names of the three (3) Administrators as appointed by this court and same be confirmed accordingly.

**DATED and delivered at Chuka this 20<sup>th</sup> day of November, 2015**

**A. MABEYA**

**JUDGE**