



SUCCESSION

- A party cannot inherit deceased's estate through a third party.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 485 OF 2007

IN THE MATTER OF THE ESTATE OF JOSHUA KATHURIMA MATHIU (DECEASED)

JOHN MWIRIGI MATHIU 1ST PETITIONER
ZAKAYO GIKUNDA KITHINJI 2ND PETITIONER

VERSUS

KAUMBUTHI MATHIU APPLICANT

RULING

The deceased in this cause Joshua Kathurima Mathiu (Joshua) died on 2nd August 2006. When he died, he was survived by Mathiu M'Itimitu alias Mathiu M'Ibutu (Mathiu) his father, John Mathiu (John) his brother and Zakayo Gikunda Kithinji (Zakayo) his brother. The petitioners in this cause were John and Zakayo. The only asset disclosed by the petitioners when they petitioned for grant of letters of administration intestate was the death gratuity held by the Public Trustees in Embu. The grant issued to the petitioners on 21st May 2008 was confirmed on 17th October 2008 whereby the court ordered the death gratuity be divided half of it going to the deceased father, Mathiu and each of the deceased brothers John and Zakayo getting a quarter each. This court ruling relates to a summons dated 4th January 2011 filed by Kaumbuthi Mathiu (Kaumbuthi). He deponed in his affidavit in support of that application that he was a step brother to the deceased Joshua whilst the petitioners were brothers to the deceased. It is clear that both the petitioners and Kaumbuthi share the same father Mathiu. Their father Mathiu died on 28th September 2008. Kaumbuthi deponed that Joshua the deceased owned in his lifetime parcel number *Abothuguchi/Katheri/2087* (suit property). During the lifetime of their father Mathiu, Kaumbuthi deponed that their said father gave him one acre of that suit property. On being given, Kaumbuthi deponed that he took possession began to utilize it and fenced the one acre. The property however remained registered in the name of the deceased Joshua. He stated that lately he had found out that John and Zakayo had filed this succession secretly. He also found that they were in the process of seeking to amend the grant to include the suit property as an asset of the deceased. Kaumbuthi deponed that the petitioners had filed the succession cause without considering his entitlement to the one acre of the suit property. On the argument that Mathiu the father of the parties in this action was entitled to have share of the suit property cannot in law be sustained because Mathiu did not while he was alive obtain any share in that property. The

property to date remains registered in the name of the deceased Joshua. The Law of Succession Act Cap 160 by its preamble shows that the Act would be operative in the administration of the estate of the deceased. That preamble is in the following terms:-

“An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto.”

From that preamble, it becomes clear that the claim by Kaumbuthi that he is entitled to get the share of the suit property which was earmarked for Mathiu their father must fail. Kaumbuthi’s claim to inherit that which Mathiu would have inherited fails because in reality, Mathiu did not inherit that land in his lifetime and because he did not own it, he cannot pass it on to another person. Section 39 of the Law of Succession Act gives indication of those who are entitled to inherit the deceased estate when the deceased lives no spouse or children surviving him. That section provides as follows:-

“39. (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority –

(a) father; or if dead

(b) Mother; or if dead

(c) Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the state, and be paid into the Consolidated Fund.”

From that section as rightly argued by John and Zakayo, Kaumbuthi has no priority over them to inherit the suit property. The priority to inheritance by that section is given to the brothers of Joshua the deceased, that is, John and Zakayo. The prayer number 2 in the summons dated 4th January 2011 seeking prohibition orders is in my view a kin to an injunction application. Kaumbuthi was under obligation to show to the court that he had a *prima facie* case with a probability of success. In my view, the fact that his claim lies in his understanding that he can inherit that which Mathiu his father would have inherited and in view of the law cited above, Kaumbuthi has failed to shown a *prima facie* case with probability of success. Additionally, Kaumbuthi cannot claim that he will suffer irreparable injuries which cannot be compensated with damages. Having failed to satisfy those two principles, I find that the prayer of inhibition cannot succeed and is rejected. Prayer number 2 of the summons dated 4th January 2011 is dismissed with costs to the petitioners. The order of inhibition over parcel number Abothuguchi/Katheri/2087 issued on 27th January 2011 is hereby vacated.

Dated, signed and delivered at Meru this 17th day of March 2011.

MARY KASANGO
JUDGE