



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Succession Cause 150 of 2001

IN THE MATTER OF THE ESTATE OF M'IMATHIU M'ANGARE (DECEASED)

REBECCA KITHIRA MATHIU PETITIONER
VERSUS
GERVASIO GATOBU MATHIRU 1ST RESPONDENT
JEREMIAH NKUUBI MATHIU 2ND RESPONDENT
GEOFFREY MUGAMBI 3RD RESPONDENT
CECILIA KINYA MATHIU 4TH RESPONDENT
JERICA KANANU MATHIU 5TH RESPONDENT

JUDGMENT

The deceased of this estate died on 25th December 2000. His wife Rebecca Kithira Mathiu, (petitioner) petitioned for grant of proving to oral will. That oral will, now reduced in writing was annexed to the petition. It should however be noted that the oral will is in the Meru language and there is no English translation filed in this matter. The petitioner did, however, during the course of this action, file affidavits setting out the contents of that oral will and that is what will guide this court as it considers whether indeed there was an oral will. The existence of that oral will was disputed most passionately by Njabasi Gatobu Mathiu (Gatobu) and Jeremiah Nkuubi Mathiu (Jeremiah). The matter was set down for hearing by way of *viva voce* evidence. The evidence of Gatobu, Jeremiah and their witness Ernest Kiumba was received by Justice Ouko. I took over the matter from the said Judge because he was transferred out of Meru court. The petitioner did not avail witnesses to confirm that the deceased left an oral will. DW3 Maurice Mwenda (Mwenda) intimated of a meeting called by the deceased, his father, where 33 clan members were in attendance and which meeting was chaired by the assistant chief. He did not however go further to indicate if the deceased had given his oral will. I find on a balance of probability the petitioner failed to prove that the deceased had left an oral will. I will therefore proceed on the basis that the deceased died intestate. The deceased died leaving the following properties:-

1. *Kiirua/Naari/351*
2. *Nyaki/Nkabune/797*
3. *Nyaki/Nkabune/205*
4. *Nyaki/Nkabune/796*
5. *Nyaki/Nkabune/795*
6. *Nyaki/Nkabune/794*
7. *Nyaki/Nkabune/192*
8. *Plot Kathurine Market No. 14A*

Those who survived the deceased are:-

1. *Rebecca Kithira Mathiu – widow*
2. *Gervasio Gatobu – son*
3. *Maurice Mwenda Mathiu – son*
4. *Jeremiah Nkuubi – son*
5. *Solomon Kiriinya – son*
6. *Genesio Mbaabu – son*
7. *Duncan Muthomi – son*

8. *Stephen Mwiti – son*
9. *Geoffrey Mugambi – son*
10. *Margret Kuri – daughter married*
11. *Cecilia Kinya – daughter not married*
12. *Jerica Kananu – daughter not married*
13. *Rosemary Kibobori – daughter not married*

It is agreed by the parties that parcel number 795 belongs to Genesio Mbaabu. Parcel number 794 belongs to Gatobu. Parcel number 192 belongs to Geoffrey Mugambi. The controversies relate to parcel number *Naari 351*, parcel number *Nkabune 797 and Nkabune 796*. I have considered the evidence adduced and the affidavit on record. I will not reproduce the evidence in this judgment but I will say that there was no sufficient proof that the deceased intended to give Mwenda less acreage than his other brothers. Gatobu, Jeremiah and their witness Ernest said that Mwenda fought with the deceased in his lifetime and as a result the deceased had at first said he would disinherit Mwenda. Gatobu went further to say that the deceased filed a case against Mwenda in relation to that fight but there was no evidence before court of such a case. I also find that there is no sufficient credible evidence to prove that the deceased had given one acre of land to the son of Gatobu called Festus. It should be noted that Jeremiah in evidence said that that one acre which Gatobu alleges was given to Festus his son is now cultivated by Gatobu. That, in my view, shows that there was no gift given to Festus of that one acre by the deceased. There was no evidence to indicate when this gift if at all was given by the deceased. One gets the clear impression that it is Gatobu's attempt to get an extra one acre from the deceased estate. Gatobu told the court that Festus was 18 years old when the deceased gave him the one acre. He further said that at the time he gave evidence Gatobu was 32 years old. The question then that arises is, why did Festus fail to attend court to claim his gift? In the end I find that there is no evidence of such a gift being given by the deceased. There is also no evidence that Rosemary Kibobori was given parcel number 797 by the deceased. In her evidence she merely stated that she was left there on that parcel by the deceased when he died. One of the houses on that parcel of land belonged to the deceased. There is also no evidence that the children of Rosemary were taken care of by the deceased. In respect of parcel number *Igoki/Muteithia/Block 101, (Timau)*. I do not believe that Jeremiah purchased it from the deceased as he alleged. There was certainly no documents to support the same. If indeed the deceased had sold that parcel of land to Jeremiah and with the deceased having so many children, one would have expected that if the land was sold to Jeremiah he would have prepared a document in that regard in order to protect Jeremiah from claims by his siblings. Jeremiah in respect of his claim that he purchased the Timau property stated thus:-

“The dad (the deceased) sold my cattle and gave me the land at Timau.”

His witness contradicted him somehow when he stated:-

“The land at Timau the deceased said that Jeremiah had sold his cows and gave the proceeds to deceased to buy the land at Timau.”

So, one wonders, did the deceased sell Jeremiah's cows then gave Jeremiah the Timau property or did the deceased sell Jeremiah's cows to enable him purchase the Timau property? I find that the evidence to support the allegation that Jeremiah bought the Timau land from the deceased is not credible and is inconsistent. It is always desirable for beneficiaries where the deceased has died intestate to sit and agree on what each one will inherit. It is sometimes an arduous task for beneficiaries to ask the court which is far removed from their family situation to decide what each beneficiary should inherit. However, if beneficiaries like in this case are unable to agree there is no option other than the court in using the evidence presented to it to make the decision. As I stated before, the main contentions are:-

1. *Should Jeremiah get ½ an acre on parcel number Naari 351?*
2. *Should Festus get one acre out of parcel number Naari 351?*
3. *Should Mwenda get 2 acres of land from the deceased estate?*
4. *Should Rosemary get parcel number 797?*

Having considered the evidence on record, I will endeavour to resolve those controversies. Bearing in mind the evidence before court, I believe that the deceased gave Jeremiah the Timau property in his lifetime which gift will be taken into account during this distribution. See Section 42 of the Law of Succession Act. The land at Timau is 5 acres. The other sons of the deceased will get from the estate property two acres each except Mwenda who will get a little less. For that reason, Jeremiah will not get any further property of the deceased other than that which was given to him by the deceased in his lifetime. As said before, there is no evidence to support the claim that Festus was given one acre by the deceased. There is no evidence that the deceased intended Mwenda to get less acreage than his brothers. And there is no evidence that the deceased gave Rosemary parcel number 497 in his lifetime. Once the beneficiaries fail to agree on who inherits what, they have to be content with the possibility of the discomfort of having to move from where they live since the decision is left to the court. Doing the best I can do, from the evidence presented before me, I order that the grant hereof be confirmed as follows:-

1. *Parcel number Kiirua/Naari/351 to be inherited by Solomon Kiriinya, 2 acres, Stephen Mwiti, 2 acres, Duncan Muthomi, 2 acres and Rebecca Mathiu to get the balance which she shall hold for her lifetime thereafter it shall be shared equally between Cecilia Kinya Mathiu and Jerica Kananu Mathiu.*
2. *Parcel Number Nyaki/Nkabune/795 to go to Jenesis Mbaabu absolutely.*
3. *Parcel number Nyaki/Nkabune/794 to go to Gervasio Gatobu absolutely.*
4. *Parcel number Nyaki/Nkabune/192 to go to Geoffrey Mugambi absolutely.*
5. *Plot number Kathurine Market number 14A to go to Rebecca Mathiu absolutely.*
6. *Parcel number Nyaki/Nkabune/796 to go to Rosemary Kibobori absolutely.*
7. *Parcels number Nyaki/Nkabune/797 and Nyaki/Nkabune/205 to go to Maurice Mwenda Mathiu absolutely.*
8. *All the shares belonging to the deceased to go to Rebecca Kithirika Mathiu absolutely.*
9. *There shall be no orders as to costs.*

Dated and delivered at Meru this 28th day of May 2010.

MARY KASANGO
JUDGE