



## SUCCESSION

### • **Distribution**

#### ● **What the constitution says of culture**

**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU  
SUCCESSION CAUSE NO. 217 OF 2000**

**IN THE MATTER OF THE ESTATE OF IMANYARA KUNYIA  
(DECEASED)**

**JAPHET MWAKI MBOROKI ..... PETITIONER  
- VERSUS -  
JENIFFER NAITORE MBOROKI ..... OBJECTOR**

### JUDGMENT

The deceased died intestate. Japhet Mwaki Mboroki petitioned for grant of letters of administration intestate. He stated in that petition that the deceased was survived by him and his brother Isaya Mwenda Mboroki who is of unsound mind. It later transpired that Mwenda is a drug addict but not of unsound mind. The petitioner was objected to by two people. The first objection was by Jeniffer Naitore Mboroki. It is dated 23<sup>rd</sup> March, 2001. Naitore is the mother of the petitioner. The 2<sup>nd</sup> objection was filed by Abram Kirimi Mbogori and is dated 8<sup>th</sup> July, 2002. This judgment relates to the proceedings of those two objections. Naitore in her objection stated that the deceased whom she called her father in law had directed her to be the administrator of his estate. She did not indicate who was to inherit the deceased only property *NKUENE/UKUU/389*. In evidence she stated contrary to what was in her objection that the deceased was not her father-in-law. Rather she stated that her late husband Mboroki was the son of the brother of the deceased. She stated that the deceased had two daughters who have since died. Those daughters were called Harriet Kajuju and Josphine Ruguru. She confirmed that the petitioner was her son and her co-objector Abram was the son of Harriet Kajuju the daughter of the deceased. It therefore follows that Abram is the grandson of the deceased. Naitore stated that the petitioner is the one in occupation of the deceased property. She said that he does not allow them on the land but did not elaborate in what way he stops them from entering the land. Later in evidence she said in contradiction to her previous testimony:-

***“He has not built there. He leases the land for cultivation.”***

She said that according to her it is Abram the grand son of the deceased who should inherit the deceased property. On cross examination she stated that the petitioner was the name sake of the deceased. On being questioned further she refused to state how long the petitioner had been in occupation of the deceased land. She also refused to state where Abram lives. She then stated in respect of Abram

***“He was brought up on that land. Abram lived on the deceased land. He was cultivating the land with his mother then he went to Mitunguu.”***

PW2 was Abram Kirimi Mbogori he confirmed that his mother was Harriet Kajuju the daughter of the deceased. He said that he and his mother used to cultivate the suit property until he got employment elsewhere where he bought land. He also said that he is the namesake of the deceased and since he was a grandson of the deceased it is him who should inherit the deceased property. On being cross-examined he confirmed that his father who seems to be still alive had 4 acres of land of which he had given Abram 2 acres. He confirmed that he does not utilize the suit property which is about 2 acres because of threats. He too did not elaborate where the threats were coming from He finally stated that the suit property was left to him by his grandfather.

PW3 had sat in court and PW1 & 2 gave evidence. His evidence therefore shall not carry the same weight as the evidence of the other witnesses. When he gave evidence he was unable to remember the deceased wife's name. He said that he was related to the deceased but did not give details of that relationship. He was also unable to give full names of one of the deceased's daughter. He said Harriet Kajuju had two children, Kirimi and Melo. He said that his land was next to the suit property. Contrary to what PW1 said this witness stated that it was PW1 who has been in occupation of the suit property. According to him, the deceased property should be inherited by the grandson Abram. As PW3 gave evidence Naitore PW1 began to interfere with his testimony by suggesting the answers he should give that led the court to order Naitore to be placed in the court cells until the end of court's proceedings.

The petitioner stated in evidence that the deceased was his namesake. He said that before he petitioned for grant in this cause there was a meeting at the D.O.'s with the clan members and his mother PW1. It was decided in that meeting that the deceased property be divided between the petitioner and his brother Isaya. That decision according to him was reached because it was in accordance with the wishes of the deceased. He said that Abram did not attend that meeting because he was not concerned or did not care for the deceased property. The petitioner said that it was the elders of the clan who indicated that the deceased wished for the petitioner and his brother to inherit that land. The petitioner further said that he did inform his mother before filing this succession cause. He said that after informing her of the same she suggested that they sell the land to Abram.

DW2 was a nephew of the deceased. He confirmed that it is the petitioner who lives on the deceased land. He said that the deceased before death had said that the land was to go to the petitioner. He said that it was through an oral will he made his wishes known. He however confirmed that he took notes when the deceased was making that oral will. Those notes were left with the deceased. He further said that the deceased wanted the petitioner to inherit his land because he was his namesake. Further that when the deceased made his oral will Naitore, the mother of the petitioner, was present. This witness said that PW2 was not at all related to the deceased. According to him, Abram the son of Kajuju lives with his father on his father's land. According to the Kimeru custom he said that a son of a deceased married daughter such as Abram could not inherit from his grandfather that is the father of his mother. The reason for that custom he said was because such a son was supposed to inherit his own father's land. He said the deceased reason for giving his land to the petitioner was because he was his namesake which was in accordance with Kimeru custom.

Learned counsel Mr. B.G.Kariuki submitted that in view of the provision of Section 2(1) of the law succession the Kimeru customs could not apply. Section 2 (1) provides:

<p><i>“Except as otherwise expressly provided in this Act shall constitute the law of Kenya in respect of intestate or testamentary succession to the estate</i></p>	<p><i>Act or any other written law, the provisions of and shall have universal application to, of deceased persons dying after the administration of estates of those persons.”</i></p>
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The provisions of that section should however be considered in the light of Article 11(2)(a) That Article in the constitution provides:-

<p><i>The state shall promote all forms of national and traditional celebrations, science, communication, and other cultural heritage;</i></p>	<p><i>cultural expression through literature, the arts, information, mass media, publications, libraries and</i></p>
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The spirit of that article is that culture shall be promoted and encouraged to be practiced in the lives of all Kenyans. DW2 stated that he was knowledgeable of the Kimeru culture. According to that culture a grandson born of a married daughter cannot inherit his grandfather's property that is the property of his mother's father. Abram therefore cannot according to that custom inherit the deceased property. Abram did confirm that he had inherited his father's property. It should be noted that Abram and PW1 conceded that it was the petitioner who occupies the deceased property. The petitioner stated that Abram had no interest in inheriting the deceased property. The fact that Abram filed his objection on 5<sup>th</sup> July, 2002 when this cause was filed on 27<sup>th</sup> September, 2000 is an indication of that disinterest. As I received evidence in this case I formed the opinion that Abram in objecting in this cause may be representing the interest of PW1 who seemed very interested in this estate. I found the petitioner to be a more reliable witness and I believed him. His evidence is supported by that of DW2. The parties in this cause addressed themselves not only on the issue of who should have the grant in this matter but also address themselves on the issue of distribution. For that reason, I grant the following the following orders in this judgment;

1. ***A grant of letters of administration intestate shall be issued to Japhet Mwaki Mboroki***
2. ***That grant shall be confirmed in respect of parcel No. NKUENE/UKUU/389 as follows:-***
  - (a) ***Isaya Mwenda Mboroki shall have a life interest of half of that property. Thereafter his portion shall go to Japhet Mwaki Mboroki.***
  - (b) ***The other remaining part of that property shall go to Japhet Mmwaki Mboroki absolutely.***
3. ***There shall no orders as to costs.***

Dated and delivered at Meru this 22<sup>nd</sup> day of October, 2010.

**MARY KASANGO**  
**JUDGE**