



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE 56 OF 2001

**IN THE MATTER OF THE ESTATE OF M'MUKINDIA M'KUGIA ALIAS MUKINDIA
M'KUGIADECEASED**

MBUI MUKINDIA.....PETITIONER

V E R S U S

NKANATA MUKINDIA.....OBJECTOR

LAW OF SUCCESSION

**Intestate estate – previous benefits to be brought into account s.42 Law of Succession Act (cap 160
Las of Kenya)**

**Net Intestate estate to be divided equally among the intestate's children – s.38, Law of Succession
Act.**

J U D G M E N T

1. The Parties

The Petitioner and the Objector are brothers the sons of the late M'Mukindia M'Kugia alias Mukindia S/O M'Kugia who is said to have died in the year 1965. In addition to the Petitioner and the Objector, the late M'Mukindia M'Kugia alias Mukindia S/O M'Kugia had another son. He was called Ndegwa Mukindia, deceased as of the time of the commencement of this cause.

1. The Dispute

The Petitioner applied for, and was granted Letters of Administration intestate on 11th April 2001 which he sought to be confirmed by an application dated 17th October 2001. The Grant was not confirmed because his brother the objector filed Objection proceedings on 19th February 2002, that the Petition or filed the cause secretly without reference to them, and proceeded to file a Cross-Petition on 28th March 2002.

Following the Objection and Cross-Petition, the dispute was by an order made the Hon. Mr. Justice Kasanga Mulwa by consent on 3rd June 2002 referred to arbitration of the Chief Igoki Location as Chairman and four (4) elders two to be appointed by each party, and that the award to be filed within 90 days. The arbitration was duly long to duly long titled and took evidence from both the Petitioners and Objectors witnesses. The award was signed by the Chairman and the two elders for the objector. The elders for the Petitioner declined to sign the award- which was in favour of the objector. Kasanga Mulwa J. ordered that the matter be heard and determined by the court.

2. The Evidence

(a) The Petitioner's Case

The Petitioner testified before Lenaola J. and called three other witnesses. The entire cause concerns the inheritance of one parcel of land, title No. **ABOGETA/U.CHURE/434** (the suit land) which was registered in the name of the deceased, M'Kugia.

The Petitioner's claim is that he bought the suit land from one M'Arithi M'Mukindia at the price of sum of Ksh.900/- but that the land was registered in the name of the Petitioner's and objector's father. The excuse given by the Petitioner for registration of the land in his father's name was to overcome a rule on demarcation which allegedly prohibited any person from owning more than one parcel of land within the same locality.

The Petitioner's line of evidence was supported by the alleged seller, M'Arithi M'Mwirichia who testified that he was paid sh.900/- by the petitioner in the presence of the Petitioner's deceased brother M'Ndegwa M'Mukindia and a neighbor called M'Rinkanya. Dead men tell no tales, but Jackson M'Rinkanya testified in support of the Petitioner, and so did one Mary M'Ndegwa, the widow of the Petitioner's and Objector's deceased brother M'Ndegwa M'Mukindia. The testimony was what she heard from or was informed by her late husband. It is basically

hearsay.

(b) The Objectors Evidence

Apart from his own evidence, the Objector called one witness in support of his claim that the suit land was ancestral land and was not purchased by the Petitioner. The Objector's testimony was that before their father died, he had given each of his sons their own pieces of land and he himself retained with the suit land. He denied any knowledge of any one called M'Arithi M'Mwirichia and denied that the said M'Arithi M'Mukindia ever owned the suit land. He called him a liar.

Objector testified that he had always known that the subject land was being utilized by the Petitioner with the permission of the other members of his family. The Objector dismissed the evidence of his sister in law Mary M'Ndegwa, and conceded that the suit land being ancestral land she would, be entitled to her husband's portion, and said that she had been coached what to say in court. He denied the existence of any rule against registration of several parcels of land.

A cousin of both the Petitioner and Objector, Erastus M'Mugambi testified that he was grown up when M'Mukindia M'Kagia sub-divided his land and he himself remained in the suit land. He had never heard of the Petitioner purchasing the suit land. The Petitioner had only been utilizing the suit land, it was not his beneficially.

3. Analysis of Evidence

The evidence of the Petitioner and his witnesses is diametrically opposed to that of the Objector. The Petitioner's evidence is that he bought the suit land for Ksh.900/- from one M'Arithi M'Mwirichia among the people who witnessed the sale was on Jackson M'Rinkanya and his late brother N'Ndegwa M'Mukindia, whose widow Mary M'Ndegwa reiterated that line on information from her late husband.

The Objector's evidence and that of their (Petitioner's and Objector's) cousin) Erastus M'Mugambi was that the land was ancestral land, and it was being utilized by the Petitioner with the understanding and permission of his brothers of the late M'Ndegwa and the Objector.

With two opposing views, the issue really becomes, who is to be believed, the Petitioner or the Objector. This being a civil matter, the proof of either party's claim is on the balance of probability.

In his regard, I was not a little surprised by the submission by Mithega & Co Advocates that "**there was a valid land sale agreement**". The law of contract then, and now, was that any agreement relating to land must be evidenced by a memorandum in writing. (see Law of Contract Act, Cap 23, Laws of Kenya, s.3) How can there be a valid agreement for sale land without some parchment of paper showing who the parties were. It is not for lack of literacy, these claims were being recorded by literate men and women, how could the seller (M'Arithi Mukindia) and the buyer (the petitioner) have failed to remember such a basic and rudimentary matter when there were plenty of committee men recording claims? The Petitioner's claim to validity of the sale and purchaser fails on that ground alone.

I will not go into claims that old men were not being allowed to stake claims and have land registered in their names, or that there was a rule prohibiting claim registration of more than one parcel of land. I have scoured over both the Land Adjudication Act (Cap. 284), and the land consolidation Act (Cap 283) and have not discovered any mention on reference to such rule. I think the rule is an invention of the fertile figment of the Petitioner's mind and that of his witnesses.

The more probable and plausible position is that of the Objector, the youngest son of the late M'Mukindia M'Kugia alias Mukindia s/o Kugia, that before demarcation the deceased settled his sons on separate parcels of land the Petitioner was given Plot No. 129, the late Ndegwa plot No. 353 and the Objector Plot No. 187 and that Plot No. 434 was retained by the old man himself. As I understand the African common law, or for that matter the Ameru nation's common law, an African man does not allocate all his land or cows and remains without any for himself. He retains his favoured bull or ox and milk cow and a portion of land. I did not hear or read any evidence by the Petitioner of where the late M'Mukindia M'Kugia was supposed to live his last years. There was also absolutely no evidence that the late M'Kugia held plot 434 in trust for the Petitioner. So on the balance, the Petitioner's claim to the absolute ownership of plot No. 434 is without basis.

4. The Distribution

Having arrived at the conclusion that the Petitioner's claim is without basis, the next conclusion must be that the suit land was owned beneficially by the Petitioner's and Objector's father and the old M'Kugia having died intestate, the rules of distribution of an intestate's net estate apply. Those rules are sections 42 and 38 of the Law of Succession Act. Section 42(a) provides that where an intestate has, during his life time or by will, paid, given or settled any property to the benefit of a child, grandchild or house that property shall be taken into account in determining the share of the net intestate finally accruing to the child, grandchild or house.

Section 38 on the other hand provides that where an intestate has left a surviving child or children but no spouse, the net intestate shall.....devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

In this matter the late M'Mukindia M'Kugia had settled various properties upon his children, the Petitioner the Objector and the late M'Ndegwa M'Mukindia. Those properties remain with those children or sons, or their descendants and spouses, like in the case of M'Ndegwa with his wife Mary M'Ndegwa and her children, provided she does not remarry in which event her life interest terminates under section 35(1) (b) of the Law of Succession Act.

However the net intestate estate, that is to say, the suit land is subject to sub-division equally under section 38 of the Act to each of the surviving children.

That being the position in law, I find and hold that the suit land that is Title Number **ABOTHUGUCHI/U.CHURE/434**, being the deceased's M'Mukinida s/o Kugia net intestate estate shall be divided equally among his surviving children with the share of M'Ndegwa M'Mukindia to be given to his children (if any) or his wife in trust for his children, if not adults.

There shall be orders accordingly.

Dated Delivered and signed at Meru this 31st day of July 2009.

ANYARA EMUKULE

JUDGE