

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 153 of 2005

SUCCESSION LAW

- **Where a party intermeddles with deceased property he is answerable to the administrator of deceased estate**

ELIJAH MURIUKI M'IKIUGU PETITIONER

VERSUS

PAUL MARANGU M'IKIUGU PROTESTER

JUDGMENT

Elijah Muriuki M'Ikiugu petitioned for grant of letters of administration in respect of his estate. Grant was issued on 12th July 2005. Unknown to him his brother called Paul Marangu M'Ikiugu had also petitioned for grant of letters of administration in High Court Succession Case No. 305 of 2005. When the matter appeared before court on 2nd Oct. 2006 the court ordered that a joint grant be issued to both of them. Elijah filed for confirmation of grant by his summons dated 20th February 2006. Paul filed an affidavit of protest against the mode of distribution suggested by Elijah. That protest was the subject of a hearing before me. In support of his case, Paul stated that Elijah otherwise known as Muriuki wa Elijah M'Ikiugu was his brother. Paul said he was born in 1941. Muriuki on the other hand was born in 1962. That the deceased herein was married to one wife with whom they had five children. The first born who is now deceased was Karimi. Paul was the second born. Jacinta Karwirwa was the 3rd born. She is married. He did not indicate the order of birth of his other siblings. He stated that their deceased father had parcel No. Kibirichia/549. It was 24 acres in total. He subdivided it in his lifetime into 6 portions. That was parcel Nos. 2258 to 2266. He produced the green card in respect of those parcels of land. Those portions, he said, were still in the deceased's names. However, in respect of parcel No. 2258, it reflected the name of Job Muriuki Gatea. That registration in Gatea's name was done on 20th July 1995 after the deceased's death. Paul stated that he was not aware who transferred that portion to Gatea. Paul said that he occupies the deceased land together with 4 of his sons and three daughters. He has built on that land and cultivates the same. He had occupied ½ of the deceased land even during the lifetime of the deceased. He said that there is a road in the middle of those parcels of land and that he occupies the left side. He stated that he occupies parcels No. 2263, 2264, 2265 and 2266. The other parcels of land he left for Elijah. That Elijah does not occupy those parcels of land but instead rents them out. He stated that he did not agree with the proposal of Elijah that he only gets parcel No. 2262. On being asked whether he was a son of the deceased, he retorted by saying that he had never at any time had the allegation that he was not the son of the deceased. He said that the deceased was the one who circumcised him as his son and also paid dowry for him. He said that the deceased had not indicated that he should get less land than Elijah. His witness M'Rimberia PW2 stated that the deceased was his uncle. That the deceased confided with him in his lifetime. They were close with the deceased according to him. The deceased first wanted to divide his land between his two sons Paul and Elijah and between himself. The sons however failed to provide the money for the subdivision of the land. He confirmed that Paul was the only one occupying the deceased land. His occupation of that land was in accordance with the wishes of the deceased. Elijah on the other hand was renting his portions of deceased's land. That he, Elijah, was renting a house elsewhere. This witness confirmed that the protester was a son of the deceased. PW3 stated that he had

known the deceased to have two sons, that is, Paul and Elijah. He said that he was a clan member and in his capacity he had heard that the deceased was renting out his land leaving the family with no land to cultivate. As a result, the deceased wife complained. This witness together with the chairman of the clan and a senior chief approached the deceased and persuaded him not to sell his land. As a result of that meeting, the deceased divided his land equally between the two sons for them to cultivate. He confirmed that Paul was living on the deceased land together with his children. He also confirmed that Paul occupies the upper portion whilst Muriuki occupies the lower portion. He denied that there was ever any discussion relating to Paul not being a son of the deceased. PW4 confirmed the evidence given by the other witnesses to the effect that Paul was occupying the upper side of the deceased land whilst Elijah was occupying the lower side. He too denied the allegations that Paul was not a son of the deceased. Elijah in support of his case stated that the deceased had in his lifetime subdivided his land and had sold one portion. He confirmed that he had in his custody the title to parcel No. 2260. That the deceased had given his children an area to cultivate and had allowed them to build only temporary buildings. The deceased had sold parcel No. 2258 so that he could raise money to pay for his hospitalization. On being cross examined, he stated that the deceased had signed the transfer of parcel No. 2258 during his lifetime although the purchaser took title after the death of the deceased. He denied that Paul was cultivating half of the land. He stated that his portion was being cultivated by his sister Lucy. That she however, was chased away by Paul. She, Lucy, was married but her husband had passed away. That the other sisters were also all married. DW2 was his sister Lucy. She stated that Paul was not their real brother. On being questioned on who was older whether it was Karimi, or Paul, this witness adamantly refused to answer that question but after the court adjourned for a short while, she confirmed that Karimi was the first born followed by Paul. This witness said that it was the deceased and their mother who told them that Paul was not the son of the deceased. DW3 was Job Muriuki Gatea. He said that he purchased 2 acres from the deceased in 1993 for Kshs. 60,000/=. He paid Kshs. 30,000/= when they entered into the agreement for sale. He paid the balance of Kshs. 30,000/= when the deceased was transferring his land to him. The land that he purchased was parcel No. 2258. He accepted under cross examination that he obtained title 6 months after the deceased had died. He was unable to prove payment to the deceased of the balance of the purchase price Kshs. 30,000/=. Another daughter of the deceased Jacinta Karwirwa also stated that Paul was her step brother, that it was the deceased who told her so. That the deceased in his lifetime had given his daughters two acres. That was the evidence that was received by this court. Elijah, by the evidence that he called, wished for the court to find that Paul was not a son of the deceased and that he could only inherit 1.8 acres of the deceased's land. He however stated that it was the deceased in his lifetime had given Paul 0.81 ha. of land. On his part, Elijah, distributed to himself of the deceased's property 6.19 ha. His sister Jacinta and Lucy, he also distributed to them 0.81 ha. each. The evidence before court, in support of the petitioner's case was very contradictory on the issue of whether or not Paul was a son of the deceased. The impression the court got in hearing and observing the petitioners and witnesses was that they had by persuasion or otherwise agreed to fabricate the allegation about the parentage of Paul. Their evidence was not credible. I wholly reject it. I reject it the more because it is not believable that a wife who had had a child out of wedlock would admit to the same to her own children. This is particularly when one considers that she first bore Karimi, before allegedly bearing Paul out of wedlock. On the whole, I reject the petitioner's evidence on that issue. I reject it the more because in the affidavit dated 21st April 2005 filed by Elijah in this cause, where he stated that chief was reluctant to issue him with a letter, he stated as follows:-

“That prior to his demise, the deceased called for a clan meeting on 24th day of November 1992 at his home whereof it was agreed that each of his two sons namely, ELIJAH MURIUKI M’IKIUGU and PAUL MARANGU M’IKIUGU get 2 acres of land from land parcel KIBIRICHIA/549 and the remainder thereof to be distributed according to the deceased’s wishes.

In that very initial affidavit Elijah, as it can be seen, described Paul as the son of the deceased. The allegation that Paul was not a son of the deceased only came to the fore when Elijah was seeking the distribution which received the protest of Paul. That only goes to show that Elijah fabricated evidence relating to the parentage of Paul. The other issues that I need to consider in this judgment is whether or not Gatea was rightly registered as the owner of parcel No. 2258. Gatea was registered as an owner of that parcel of land on 20th July 1995. The deceased died on 10th January 1995. It therefore follows that Gatea was registered as an owner of that parcel after the death of the deceased. At that time, it is clear

that the court had not issued a grant in respect of the deceased estate. It therefore follows that Gatea undoubtedly intermeddled with the deceased property. Section 45(1) (b) provides that where there has been such intermeddling the intermeddler is answerable to the rightful executors or administrators. Transfer into Gatea's name of that parcel of land could only have been carried out by personal representatives of the deceased. At that point in time, none had been appointed. When put to task he was unable to prove full payment of the purchase price to the deceased. The court therefore will order the cancellation of the transfer of that parcel of land into Gatea's name. The parcel will revert to the deceased's name. The judgment of this court is as follows:-

1.The court does hereby order the cancellation of the transfer of Kibirichia/2258 effected on 20th July 1995 into the name of Job Muriuki Gatea. The Land Registrar is ordered to have that parcel revert into the name of M'Ikiugu M'Twerandu. In so doing, the Land Registrar shall dispense with the need of production of the original title of that parcel of land.

2.The court orders that parcel No. Kibirichia/2263, 2264, 2265 and 2266 be distributed to Paul Marangu M'Ikiugu

3The court orders that parcels No. 2258, 2259, 2260, 2261 and 2262 be distributed to Elijah Muriuki M'Ikiugu.

4. There shall be no orders as to costs.

Dated and delivered at Meru this 23rd day of July 2009.

MARY KASANGO

JUDGE