



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Succession Cause 527 of 2004**

**IN THE ESTATE OF M'MAKATHIMO MIRURI (DECEASED)**

**M'ARIMI MAKATHIMO ..... PETITIONER**

**JUDGMENT**

Grant of letters of administration intestate in respect of the estate of M'Makathimo Miruri (Deceased) was issued to the petitioner, M'Arimi M'Makathimo on 4<sup>th</sup> May 2005. He applied for the confirmation of the grant on 18<sup>th</sup> November 2005. That application elicited two protests from Phyllis Karambu (Phyllis) and Emily Kajuju Mwangera (Emily). The former is the deceased person's daughter while the latter is the daughter of Peter Mwangera, one of the sons of the deceased, who is also now deceased.

Parties, vide consent letter dated 21<sup>st</sup> August 2007, agreed that they file affidavits proposing distribution. This judgment is therefore based on those affidavits. The petitioner's affidavit was filed on 2<sup>nd</sup> November, 2007, Phyllis filed hers on 6<sup>th</sup> November 2007 while Emily filed her affidavit on 12<sup>th</sup> November 2007. The deceased was survived by two sons and a daughter, namely the petitioner (son), Phyllis (unmarried daughter) and Peter Mwangera alias Mwangera Nahashon (son) – now deceased. Peter Mwangera is survived by five dependants, his first born son, Benson Muthiri, having passed away. Emily is therefore the eldest in that family. Similarly, Peter Mwangera's widow also died after his death.

The deceased left behind two parcels of land, L.R. No. Nkuene/Kathera/1090 and L.R. Nkuene/Kathera/834. While the petitioner and Phyllis insist that apart from the above two properties, the deceased also left L.R. No. Nkuene/Kathera/788 which was registered in the name of the Peter Mwangera, Emily on her part, is categorical that L.R. Nkuene/Kathera/788 was purchased by her father (Peter Mwangera).

In her affidavit on the purposed distribution Phyllis suggests that all the three parcels of land be registered in their (petitioner, Phyllis and Emily) joint names and each of them to continue utilizing their separate distinct portions as they do presently, that is, the petitioner to occupy and use Nkuene/Kathera/834, Phyllis, Nkuene/Kathera/1090 and Emily Nkuene/Kathera/788. According to Phyllis, it was the desire of the deceased that all the dependants would share in his estate. With regard to Nkuene/Kathera/788, Emily has stated in her affidavit proposing distribution that Nkuene/Kathera/788 was purchased by her father, Peter Mwangera and is therefore not available for distribution. She has suggested that Nkuene/Kathera/1090 and Nkuene/Kathera/834 be distributed equally. But in the same breath, she has proposed that Nkuene/Kathera/1090 should be given to her in trust for her siblings while Phyllis gets 1 ½ acres of Nkuene/Kathera/834. That leaves approximately another 1 ½ acres to the petitioner. The petitioner on the other hand has averred that he occupies Nkuene/Kathera/1090 where he has constructed a house. He also farms both Nkuene/Kathera/1090 and Nkuene/Kathera/834. That

Phyllis resides and farms Nkuene/kathera/788. He therefore proposes that Phyllis inherits one (1) acre from Nkuene/Kathera/1090, while he (the petitioner) retains the balance of 1.965 acres. Standing on Nkuene/Kathera/1090 is a big house and eight (8) rooms.

He has proposed that Emily inherits five (5) rooms for herself and her siblings while three (3) rooms attached to the main house be retained by him (the petitioner). He also proposed to inherit Nkuene/Kathera/834.

Clearly, the first issue for determination is whether Nkuene/Kathera/788 belonged to the deceased. I have already stated that both Phyllis and the petitioner have insisted that Peter Mwongera was registered to hold the same in trust. From the pleadings it is clear that the petitioner is the eldest son of the deceased, being 60 years at the time the petition was lodged. Phyllis has given her age as 52 years in 2006 while, according to Peter Mwongera's death certificate he was 35 years in 1992, making him 49 years in 2006, hence the youngest in the family. He was born in 1957. According to a copy of a green card annexed to Phyllis' affidavit dated 16<sup>th</sup> March 2006, LR No. Nkuene/Kathera/788 was registered in the name of Peter Mwongera on 3<sup>rd</sup> April 1963.

If, as I have found, Peter Mwongera was born in 1957, then Nkuene/Kathera/788 was registered in his name when he was only 8 years. There is also affidavit evidence that Phyllis farms and resides on that land and as a matter of fact she has placed a caution on the property. The property is registered under the Registered Land Act, Cap 300 (L.O.K.). It is presently in the name of Mwari Joyce, the widow of Peter Mwongera, (also deceased) to whom it was apparently transferred on 9<sup>th</sup> January 2001. While sections 27 and 28 of the Registered Land Act confers on the registered proprietor absolute and indefeasible right, subject only to overriding interests outlined in section 30 of that Act, the case of **Mbui Makangu V. Gerald Mutwiri Mbui**, Civil Appeal No. 281 of 2000, which extensively considered previous decisions on this subject, has finally put beyond any doubt that trusts arising from customary law claims are covered by the proviso to section 28 of the Act. The court in that case stated:-

***“We have also examined other authorities and we think it cannot be argued too strongly that the proper view of the qualification or proviso to section 28 is that trusts arising from customary law claims are not excluded in the proviso. Such claims may stem from the possession and occupation of part of the registered land which although strictly it may to be an overriding interest under section 30(9) it nonetheless gives rise to a trust which is capable of protection under the Act.”***

Although the parties have not used the word trust in their pleadings, the averments by the petitioner and Phyllis that Nkuene/kathera/788 belonged to the deceased although registered in the name of Peter Mwongera, in my view, suggests that their understanding of the arrangement was that the property would be available for distribution to the dependants of the deceased.

It is not controverted that Phyllis resides on this parcel of land. Emily asserts that her father, the later Peter Mwongera acquired the land through a purchase but no evidence has been annexed to confirm this. It is not clear, for instance, when and from who the land was purchased. There is no explanation why Phyllis lives on that land. I am alive to the inadequacy of relying on affidavit evidence but from that evidence I am satisfied that Nkuene/Kathera/788 was a family land registered in the name of the late Peter Mwongera to hold in trust for the family. It is therefore available for distribution together with the other two properties.

I turn now to consider the distribution. The petitioner's proposal constitutes the lion's share. It is not clear to me why that is so. Probably he considers himself a senior member of the family, the only son left or the number of children he has.

Section 3(2) of the Law of Succession Act defines the word “child” without drawing any distinction between male or female child. Secondly, the deceased died in 1988. The Law of Succession Act came into operation by Gazette Notice No. 93 of 1981. The distribution of the deceased person's estate must be considered under the Law of Succession Act. If the Act does not discriminate against the children of the

deceased, then the most ideal and fair situation is to distribute the net estate to the beneficiaries equally. But as was held in **Mary Rono V. Jane Rono and William Rono**, Civil Appeal No. 66 of 2002 (Per Omolo, JA) the court seized of a matter such as the one before me has a discretion in distributing the estate of a deceased person, which discretion, depending on a number of factors, including but not limited to the number of children in each house. The distribution should be equitable.

In this matter, there is only one house with three beneficiaries and three parcels of land. The three parcels measure as follows:-

- (i) Nkuene/Kathera/1090 – 2.965 Acres
- (ii) Nkuene/kathera/834 – 3.459 Acres
- (iii) Nkuene/Kathera/788 – 2.964 Acres

It is clear that on Nkuene/kathera/1090 stands a big house and eight rooms. There is also evidence that there were tea bushes on both Nkuene/kathera/1090 and 834.

Taking everything into account, I come to the conclusion that the most equitable distribution of the estate of the deceased be as follows:-

- (a) Nkuene/Kathera/1090 together with the main house, three rooms and tea bushes to the petitioner;
- (b) Nkuene/kathera/834 together with tea bushes to Phyllis – absolutely, and
- (c) Nkuene/Kathera/788 and five rooms on Nkuene/Kathera/1090 to Emily to hold in trust for herself and all her siblings.

Orders accordingly.

As this is a family matter, each party shall bear own costs.

Dated and delivered at Meru this 15th day of February 2008.

**W. OUKO**

**JUDGE**