



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE 327 OF 1996

***IN THE MATTER OF THE ESTATE OF WASHINGTON MUHORO alias MUHORO
MWERI DECEASED***

AND

GERISHON GICHINGIRI MUHORO PETITIONER

VERSUS

JOSPHAT KAHUNYO MUHORO)

JACKSON KANYUIRO MUHORO)

ERASTUS GICHINGIRI MUHORO) OBJECTORS

J U D G M E N T

On 30th November 1974, one Washington Muhoro Mweri passed on. His estate at the time consisted of Land Parcel No. Kirimukuyu/Thiu/262, Plot numbers 127 Karatina town and 53 Karogoto Market. He also had some money in an account with Kenya Commercial bank Limited, Karatina branch and 450 ordinary shares in Nation Printers and Publishers Limited.

On 11th December 1996, Gerishon Gichingiri Muhoro, the Elder son of the deceased took out a petition for the grant of Letters of Administration intestate. In the Affidavit in support of the Petition he indicated that the deceased died intestate and left behind the following surviving him:

- (a) Gerishon Gichingiri Muhoro born 1939
- (b) Josephat Kahunyo Muhoro born 1943
- (c) Jackson Kanyuiro Muhoro born 1948

In an affidavit sworn at Karatina on 20th November 1996 in verification of proposed citation to accept or refuse Letters of administration, the Petitioner again deponed in paragraph 3 thereof that “my deceased father left me and my 2 brothers Josephat Kahunyo Muhoro and Jackson Kanyuiro Muhoro as his sole heirs, survivors and beneficiaries” He went on to depone in paragraph 4 thereof that on numerous occasions he had requested his said 2 brothers to team up with him in petitioning the court for letters of administration to no avail hence the citation to Josephat Kahunyo Muhoro and Jackson Kanyuiro

Muhoro.

In response, Josephat Kahunyo Muhoro on behalf of Jackson Kanyuiro Muhoro swore a replying affidavit in which in the pertinent paragraph deponed that they had refused to consent to the taking out of the letters of Administration by the Petitioner because the petitioner had excluded land parcel number Kirimukuyu/Thiu/SK6/355 measuring 3.9 acres which is part of the deceased estate but registered in the Petitioner's name in trust for himself and themselves.

On 7th January 1999, one Erastus Gichingiri Muhoro objected to the making of the grant of representation by the Petitioner claiming that he was a son of the deceased of a different house. That he together with his brothers James Kahunyo Muhoro, Paul Kihara Muhoro and Titus Ndiritu Muhoro had been omitted as heirs to the estate of the deceased in the petition.

Both the petition and the objection came before justice Juma on 10th December 2002 for hearing. However a consent order was subsequently entered in terms that Gerishon Gichingiri Muhoro, Josephat Kahunyo Muhoro and Erastus Gichingiri Muhoro were appointed joint administrators of the estate of the deceased and that the matter in dispute would be resolved by way of viva voce evidence.

By an application dated 13th November 2003, Erastus Gichingiri Muhoro sought to have the grant of letters of Administration intestate issued to them on 10th December 2002 confirmed. He proposed that LR No. Kirimukuyu/ Thiu/262 be shared equally between Gerishon Gichingiri Muhoro, Josephat Kahunyo Muhoro and Jackson Kahunyo Muhoro $\frac{1}{2}$ share whereas himself, James Kahunyo Muhoro, Paul Kihara Muhoro and Titus Ndiritu Muhoro would share equally the other $\frac{1}{2}$ share. He also proposed that plot Nos. 127 Karatina town and 53 Karogoto Market and the money in KCB, Karatina branch be shared equally as well.

Jackson Kanyuiro Muhoro and his brother Josephat Kahunyo Muhoro were not amused with the proposal. They jointly filed an affidavit of protest against confirmation of grant. They claimed that the first petitioner Gerishon Gichingiri Muhoro was not entitled to inherit any part of the deceased estate as he had already inherited land parcel number Kirimukuyu/Thiu/SK6/355 from the deceased during his lifetime. That the objectors Erastus Gichingiri Muhoro, James Kahunyo Muhoro, Paul Kihara Muhoro and Titus Ndiritu Muhoro were strangers and or impostors and therefore not entitled to inherit any part of the deceased estate.

This was the state of affairs of the estate of the deceased that came before me for resolution. Directions having already been given that the dispute herein be resolved by way of viva voce evidence, it fell upon me to hear the dispute. The protesters opted to have one among them testify and call one witness whereas the petitioner and objectors were comfortable with having only the petitioner testify on their behalf.

In his oral evidence, Josephat Kahunyo Muhoro, the 2nd Protester testified that the deceased was his father who died on 26th November 1974. He left behind land parcel Kirimukuyu/Thiu/262, plot Nos. 127 Karatina market and 53 Karogoto market. He also left behind some money in KCB, Karatina branch. Following the death, the Petitioner petitioned for the grant of the letters of administration. They were granted and later on an application for the confirmation of the same was made. He went on to testify that they objected to the confirmation of the grant on the basis that the objectors were strangers to the estate. They knew only the petitioner who was their elder brother. The objectors had never stayed with the objectors in their lifetime. Accordingly land parcel Kirimukuyu/Thiu/262 ought to be shared equally between the protestors. The Petitioner had no claim to the said parcel as he was given a parcel of land by the deceased during his lifetime. He however proposed that the plots at Karatina and Karogoto and the money in the bank should be shared equally between the two protesters and the petitioner to the exclusion of the objectors.

Under cross-examination by the petitioner, the witness denied that their late father had 3 wives. He maintained that their mother Beatrice Muthoni was the only wife of the deceased. He denied that Jedida Wairimu, the mother of the objectors was the 2nd wife of their father. He stated categorically that he did

know whether Jedida Wairimu was sent away with the objectors.

The second witness called by the Protesters was James Mugo Gacheru. He testified that the Petitioner and Protesters were brothers. That he did not know the objectors as he had not seen them. That the objectors were not step brothers of the Petitioner and Protesters. According to the witness the deceased whom he knew very well had only one wife, the mother of the Protestors and Petitioner. He opined that only the Protesters should inherit the land at Kirimukuyu equally as the Petitioner had already been given his own parcel of land by the deceased in his lifetime by way of gift inter vivos. He testified further that the petitioner never bought any land. He was given the same by the deceased when he was about 14 years. He confirmed though that Jedida Wairimu was once married to he deceased but was divorced. He remembered one occasion when Jedida brought her deceased son to be buried in the deceased land at Kirimukuyu and the deceased successfully objected and he was buried in a public cemetery.

Under cross-examination by the petitioner he conceded that the 2nd protester had married his daughter and that they were age-mates with the petitioner. That brought to a close the Protester's case.

As for the Petitioner and objectors, the petitioner testified as follows:-

That he knew the Protesters who were his brothers. That when his father passed on, he left behind the properties set out in his petition for the grant of letters of Administration. He maintained that the objectors were his stepbrothers and had left with their mother when they were toddlers in 1968. Their mother was Jedida wairimu who had been married by the deceased but the marriage had been dissolved although not customarily. He confirmed that the objectors and their mother did not attend the burial of the deceased. They only surfaced in 1996. According to the witness they are entitled as of right to the estate of the deceased as his sons. The witness went on to testify that he had his own parcel of land Kirimukuyu/Thiu/252 which he bought with his own resources from various people he could not recall. He was only claiming his inheritance with regard to Kirimukuyu/Thiu/262. He maintained that his late father had three wives, Jedida Wairimu, Wanjiru Muhoro, who is married elsewhere and his mother. He proposed that Kirimukuyu/Thiu/262 be shared equally between himself, the protesters and the objectors as they were all brothers. As for the plots at Karatina and Karogoto, he proposed that the same be shared equally between himself and the protesters as they were bought before the marriage of the Objectors' mother to their father.

Under cross-examination by the 2nd Protester, the petitioner admitted that he was not present during the burial of the deceased. He also conceded that though a brother of the objectors had passed on he was not allowed to be buried in the deceased's land. The issue was arbitrated upon by the Chief and the District officer for the area and it was resolved that since his mother had been divorced by their father, her son could not be buried in their father's land. He also conceded that he was the one who invited the objectors to join him in the petition. He also conceded that the objectors went to court seeking an order to be allowed to bury their mother in the deceased land in Nyeri PMCCC No. 405 of 2006 and the court ruled that her remains could not be buried in the deceased land.

According to the petitioner much as the objectors' mother had been divorced, the objectors were entitled to inherit from the estate of the deceased. He denied that the land he occupied was given to him by the deceased during his lifetime. He went on to admit that he has not developed Kirimukuyu/Thiu/262. Finally he stated that he bought his land in various pieces at Kshs.860/= which were later consolidated into Kirimukuyu/Thiu/252 but could not remember the persons from whom he bought the said pieces of land.

Essentially then this was the case of the Petitioner as well as the Protestors. What then are the issues for determination by this court. To my mind, they are four fold; whether the objectors were the children of the deceased, whether they are entitled to inherit from the Estate of the deceased, whether the Petitioner was given land parcel Kirimukuyu/Thiu/252 during the deceased lifetime and therefore not entitled to a share in Kirimukuyu/Thiu/262 and finally the distribution of the Estate of the deceased.

It is the objectors' case that they are the sons of the deceased. The objectors are Erastus Gichingiri

Muhoro, James Kahunyo Muhoro, Titus Ndiritu Muhoro and Paul Kihara Muhoro. They claim to be the children of the deceased having been sired through Jedida Wairimu who was a co-wife to the petitioner as well as the protesters' mother. Other than making the claim, there was no hard evidence tendered to prove the allegation. Perhaps birth certificates would have been sufficient proof. But again they may have been born when birth certificates were not in vogue. They could have called other independent witnesses to back up their claim. They did not. However, there is no denying that the deceased had for sometime been married Jedida Wairimu, the objectors' mother. Much as the Protestors vehemently denied the fact that their father had married Jedida Wairimu, on the evidence and considering the circumstances obtaining then I am prepared to accept that the objectors' mother was once married to the deceased. I cannot see how the objectors being strangers would out of nowhere stake a claim to an Estate they knew nothing about. One objector, Erastus Gichingiri Muhoro was even by consent appointed as a joint administrator of the Estate of the deceased by justice Juma on 10.12.2002 with the Petitioner and 2nd Protestor. If indeed the objectors were strangers as claimed by the Protestors, how come they consented to one of them being appointed a joint administrator! I would have expected that they would have objected to high heaven. Further there is evidence that the objectors made attempts to have the remains of their mother Jedida Wairimu buried on the deceased land. Towards this end they went to court. However although they were denied the order nonetheless I believe there that must have been a basis of that suit. It must have been based on a relation past or present between the objectors, their mother and the deceased. Certainly the objectors were not mad men who only woke up one day and decided that they should bury the remains of their mother in the land of a stranger by the name of the deceased. Why could they not have done so in another persons land? Further if they had no place to bury their mother I would imagine that they would have done so in a public cemetery where their brother had been buried previously. This was also as a result of their mother trying to have her son presumably sired by the deceased buried in the deceased land. These overtures were rebuffed when after hearing the case between deceased and the objectors' mother on the issue by the District Officer as well as the Chief of the area, they ruled that their mother having been divorced by the deceased, her son could not be buried in the deceased's land.

On the basis of the foregoing, I am prepared to hold that indeed the deceased had married the objectors' mother and they had children. However were all the objectors' aforesaid all the children of the deceased. It is noteworthy that throughout his testimony, the Petitioner never mentioned the other objectors other than Erastus Gichingiri Muhoro and James Kahunyo Muhoro. He made no mention of Paul Kihara Muhoro and Titus Ndiritu Muhoro. In fact when cross-examining the 2nd protestor he asked whether he knew that Jedida Wairimu went away with Erastus and James. Further in his evidence in Chief he only mentioned Erastus and James as his step brothers and that they went away with their mother when they were toddlers. Is it possible that the other objectors are not the children of the deceased. The possibility is not remote. I will however say no more suffice to say that the objectors were children of the deceased who went away with their mother upon their mother being divorced.

The objectors being the sons of the deceased's wife who had been divorced, are they entitled to inherit the estate of the deceased? It is noteworthy that the deceased died on 30th November 1974. This was before the promulgation of the Law of Succession Act. By virtue of section 2(2) of the Law of Succession Act, the estate of the deceased falls for distribution in accordance with the written laws as well as customs applying as at the time of death of the deceased. What was the customary law applicable at the time? It does appear to me and as suggested by PW2 that under Kikuyu Customary law, once a wife is divorced customarily and goes away with the children, the said children are not entitled to inherit the estate of their deceased father. This testimony was not challenged at all nor rebuffed by the Petitioner and or the objectors. One would have expected that because of the ramifications and effect that such evidence would have on the decision of this court, the Petitioner and the objectors would have been duty bound to counter the same. PW2 is a 72 year old man. I am certain that he is schooled in Kikuyu Customary law. The Petitioner is of the same age. He did not deny the existence of such Kikuyu custom. In modern times such custom may be flagged down for being oppressive and discriminatory. However I am hesitant to go down that route courtesy of section 2(2) of the law of succession Act. In the course of my research, I went looking for assistance from Eugene Cotran's book "Restatement of African law volume II. The law of Succession" I was not able to get his comments directly on the issue at hand. However the nearest he came to dealing with issue was when he was dealing with a widow who after the death of her husband left the homestead with the children of the marriage. The learned author

stated “..... If the widow had children by her deceased husband and she takes the children with her, they do not inherit the property of their deceased father. If, however, the children remain with their family, then they inherit his property in the ordinary way”

Applying this logic to the circumstances of this case it would appear to me that when the objectors' mother was divorced and went away with her children, she severed her and her children's links with the deceased family. They cannot therefore stake a claim to the Estate of the deceased. Had the objectors and their other siblings remained behind with the family, I have no doubt that they would have been entitled to benefit from the estate of the deceased. The evidence of complete severance of relationship between the deceased's family and the objectors and their mother is buttressed and manifested by the fact that once they left with their mother in 1968 they completely lost touch with the deceased until 1996 when out of nowhere they resurfaced to stake a claim to the Estate. This was after a period of 28 years and at the instigation of the petitioner. Further evidence that the deceased never considered them as his children can be gleaned from the fact that when one of the objectors' brother passed on and their mother attempted to have him buried in the deceased land, it was resolved between the District Officer, the chief, the deceased and members of his clan that since his mother had been divorced by the deceased's father, her son could not be buried in his piece of land. He entered up being buried in a public cemetery. Much as the Petitioner claimed that the Objectors' mother had not been divorced in accordance with Kikuyu customary law I have no doubt at all in my mind that indeed that was the case. If it were not, how come when the objectors attempted to bury their mother in the deceased's land, they were denied that right. To my mind that goes to demonstrate that the objectors' mother had longed ceased to be considered as a wife of the deceased.

The Petitioner did in his evidence admit that he was the one who invited the objectors to join in Petitioning for the grant of letters of administration. Before the Petitioner instigated them into the matter, they were comfortably ensconced in Nanyuki town. What the petitioner hoped to gain by dragging the objectors into this dispute shall forever remain a mystery. It is also instructive that neither the Petitioner nor the objectors ever attended the funeral and or burial of their deceased father. That in itself must be telling as regards the relationship between the petitioner the objectors and their father. Is there something in these proceedings that is not coming out clearly? It is also noteworthy that when the Petitioner first petitioned, he indicated himself and the protestors as the only survivors of the deceased estate. He must have known about the presence of Objectors and yet he chose to ignore them. What then galvanised him later to contact the objectors so as to join him in these proceedings. I think there was a conspiracy of sorts in the whole episode. I observed the Petitioner as he testified and he struck me as a person who has no respect for truth. He is unreliable!

In the end I hold that much as the objectors may be the children of the deceased, they are not under kikuyu customary law entitled to inherit the estate of the deceased. They completely severed their relationship with the deceased when upon their mother being divorced customarily they relocated and settled elsewhere and completely lost touch with the deceased and his family for 28 years.

Was the Petitioner given his piece of land by the deceased in his lifetime? The Protestors say yes. However the Petitioner says No. What is the evidence? According to

the protestors LR Kirimukuyu/Thiu/252 registered in the name of the Petitioner was given to him by the deceased in his lifetime. He cannot therefore claim a portion of Kirimukuyu/Thiu/262 as inheritance. They were backed in this claim by PW2. PW2 testified that the Petitioner could not have bought the land then as he was only 14 years. As for the Petitioner he claimed that he bought the land Kirimukuyu/Thiu/252 in 1955 with his own resources. That he was a businessman then and that he bought the land in small portions from various people.

My take on this based on evidence on record is that indeed the deceased gave the piece of land to the Petitioner in his lifetime. In paragraph 4 of the affidavit in support of the petition for letters of administration intestate, the petitioner has stated that he was born in 1939. In his evidence in chief he stated that he bought the subject piece

of land in 1955. That means he was only about 14 years. I doubt very much that at that age the Petitioner would have had the capacity and resources to buy the subject piece of land. He could not have been a successful businessman then. Further this was during the state of emergency and it is doubtful whether at his age he would have been in a position to buy land. He was under age. Further the petitioner never offered any evidence as to who sold him the pieces of land. All he said was that he could not recall the people from whom he bought the pieces of land that were later to form Kirimukuyu/Thiu/252. He never tendered any sale agreement regarding the subject piece of land. Neither did he call any witness to back up his claim. Neither did he show by evidence how he effected payments of Kshs.860/= to the owners the pieces of land he was buying. To me the evidence of the Petitioner regarding the purchase

of Kirimukuyu/Thiu/252 is simply incredible. I do not believe it. I have therefore come to the conclusion that the Petitioner received a share of his father's estate during the lifetime of his deceased father and is therefore not entitled to a share in Kirimukuyu/Thiu/262 on account of his inheritance. Small wonder that he has never developed this parcel of land or any portion thereof. Indeed under cross-examination by the Protester, he exclaimed "I have not developed the Kirimukuyu shamba as I have my own...."

Flowing from what I have so far stated, it should be obvious that the objectors are not entitled to a share of the deceased Estate. That the Petitioner is only entitled to a share of the Estate limited to plot numbers 127 Karatina town and 53 Karogoto, 450 shares in Nation Printers and Publishers Ltd and the money held in Kenya Commercial

bank Limited, Karatina branch. Accordingly the grant should be confirmed on the following basis:

- (i) LR No. Kirimukuyu/Thiu/262 to be shared equally between Jackson Kanyuiro Muhoro and Josephat Kahunyo Muhoro.
- (ii) Plot number 127 Karatina town to be shared equally between Jackson Kanyuiro Muhoro, Josephat Kahunyo Muhoro and Gerishon Gichingiri Muhoro.
- (iii) Plot number 53 Karogoto to be shared equally between Jackson Kanyuiro Muhoro, Josephat Kahunyo Muhoro and Gerishon Gichingiri Muhoro.
- (iv) Money in an account with Kenya Commercial bank Ltd Karatina branch, to be shared equally between Jackson Kanyuiro Muhoro, Josephat Kahunyo Muhoro and Gerishon Gichingiri Muhoro.
- (v) The value of the 450 shares in Nation Printer and Publishers Limited to be apportioned equally between Jackson Kanyuiro Muhoro, Josephat Kahunyo Muhoro and Gerishon Gichingiri Muhoro.

This being a family dispute, it is not proper nor appropriate to order costs against either of the parties. Accordingly there will be no order as to costs.

Dated and delivered at Nyeri this 26th day of March 2008

M. S. A. MAKHANDIA

JUDGE