



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Succession Cause 364 of 2000**

***IN THE MATTER OF THE ESTATE OF ZAKARIA MURIITHI KIMONDO (DECEASED)***

***BETWEEN***

**JESSEE WAHOME MURIITHI.....PETITIONER**

***AND***

**STEPHEN KIMONDO MURIITHI.....PROTESTOR**

**J U D G M E N T**

The petitioner herein petitioned this court for the grant of Letters of Administration for the estate of his deceased father, one **Zakaria Muriithi Kimondo**. In the affidavit in support of the petition for Letters of Administration intestate filed in court on 4<sup>th</sup> October, 2000 alongside the petition, the petitioner deponed that the deceased passed on, on 30<sup>th</sup> December, 2007. That the deceased died intestate and left him and his brother, **Stephen Kimondo Muriithi**, hereinafter referred to as “*the Protestor*” as his sole survivors. That the assets of the deceased were made up of the following land parcels:-

Ø **LR NO.CHINGA/KIAGUTHU/376**

Ø **LR NO.CHINGA/KIAGUTHU/367**

Ø **MAIROINI A PLOT NO.8.**

The grant was eventually issued on 9<sup>th</sup> July, 2001 in favour of the petitioner. On 26<sup>th</sup> April, 2002, the petitioner moved the court for the confirmation of the same and proposed that all the aforesaid assets of his deceased father be inherited by himself solely and to the exclusion of his elder brother, the protestor. The protestor would hear none of it. On 21<sup>st</sup> February, 2003, he filed an affidavit of protest claiming a right to inherit a portion of his father’s estate.

On 23<sup>rd</sup> March, 2004, the court directed that the matter be disposed off by way of viva voce evidence. The hearing commenced before **Justice Okwengu** on 23<sup>rd</sup> May, 2006. The said Judge heard the evidence of the petitioner and his three witnesses. She also presided over the evidence of the protestor and one witness. Thereafter the learned Judge was transferred from the station. A choice had therefore to be made whether the cause should be heard de novo before me or proceeds from where **Justice Okwengu** had left. It was unanimously agreed between the parties that the cause proceeds from where **Justice Okwengu** had left and that proceedings so far be typed and availed to the parties. Accordingly an order to that effect was made on 27<sup>th</sup> May, 2007.

The row pitting the petitioner against the protestor as can be gathered from the pleadings filed herein and evidence tendered appears to be this; the deceased had a total of six children, four daughters and two boys. The daughters are **Tabitha Wangari, Mariam Wanja, Serah Muchungu and Leah Wanjiku**. They are all happily married and have renounced their claim and or interest in the estate of the deceased. The two sons are the petitioner and protestor. It is the petitioner's case that the protestor was given by their deceased father in 1955 land parcel **No.LOC.14/KIRU/414** measuring 21.2 acres as a gift *intervivos*. The protestor had since subdivided the parcel of land and distributed it among his sons. The said parcel of land was registered in the protestor's name during the land demarcation and registration in 1966. The deceased also gave the petitioner land parcel **No.CHINGA/KIAGUTHU/376** measuring 6.4 acres which parcel of land is still registered in the name of the deceased though. As for **CHINGA/KIAGUTHU/367** measuring 2.6 acres, it is the contention of the petitioner that he purchased the same in 1963 for Ksh.700/= through his deceased father. That he is the one who gave the deceased the money to buy the land from the deceased step brother, **Paul Munene Kimondo**. He further gave evidence that land parcel **LOC.14/KIRU/414** belonged to the deceased who had inherited a portion thereof from the petitioner's and protestor's grandfather; one **Kimondo Kariuwa**. Thereafter the deceased bought other parcels of land in 1946 and paid 21 goats. All these transactions were recorded in a book which was tendered in evidence. The case of the petitioner is that since the protestor had benefited by being given by the deceased in his life time land parcel **No.LOC.14/KIRU/414** he should equally be allowed to inherit exclusively the other two parcels of land – **No.CHINGA/KIAGUTHU/376 and 367**. However for **plot No.8 Mairoini**, he proposed that the same be shared equally between them.

The petitioner's witnesses backed his claim. For instance, PW2 **John Munge Paul** testified that the petitioner had built a house on **CHINGA/KIAGUTHU/376** and had lived and cultivated the same exclusively since 1958. He also confirmed that the protestor had been given by the deceased **LOC.14/KIRU/414** and had been living there since 1955. He confirmed that **CHINGA/KIAGUTHU/367** was bought by the deceased from his step brother, **Munene Kimondo** but the purchase price was paid by the petitioner. He went on to testify that the brothers lived happily ever after until 4 years ago when the protestor began to demand **CHINGA/KIAGUTHU/367**. There was an attempt to resolve the dispute through the family dispute resolution mechanism but to no avail. Even the intervention of the local Chief would not break the stalemate.

The petitioner's 3<sup>rd</sup> witness was **Nemesios Muriithi Kimondo**, a step brother of the deceased. His father, **Paul Munene Kimondo** was the owner of **CHINGA/KIAGUTHU/367** which he later sold to the deceased when he decided to emigrate to Olkalou in Nyandarua District. The letter inviting the deceased to buy the land for Ksh.700/= and which was authored by the witness on the instructions of his father was tendered in evidence. The sale agreement for the land between his father and the deceased was recorded in the deceased book which as already stated was tendered in evidence. He confirmed that it was the petitioner who paid the purchase price. The lad was then aged 20 years at the time.

The petitioner's last witness was **Julius Mboyo Munyoro**. He testified that the deceased was his uncle. The deceased owned up to him that he had given his elder son, the protestor **LOC.14/KIRU/414** located in Murang'a District measuring 21.2 acres and had also given his young son, the petitioner the two parcels of land **CHINGA/KIAGUTHU/376 and 367**. The deceased preferred that his two sons live separately for the sake of peace and harmony. Since 1955 the two brothers had lived in their respective parcels of land. He was also aware that the deceased had bought **CHINGA/KIAGUTHU/367** from his step brother **Paul Munene Kimondo**. That was the case for the petitioner. How about the protestor?

The protestor conceded that he resides in Murang'a on **LOC.14/KIRU/414** also known as Ngoe farm. He admitted that the said land initially belonged to his deceased father. By then it was approximately 3 to 4 acres only. He testified that he later used his own personal resources to acquire 18 extra acres which were consolidated with the land he initially got from his father making a total of 21.2 acres. That whereas **CHINGA/KIAGUTHU/376** belonged to the deceased, **CHINGA/KIAGUTHU/367** was bought by the deceased from **Paul Munene Kimondo** with money he had given him totaling Ksh.3,000/= . That the deceased then registered the land in the name of his grandson **Mureithi Kimondo** who is the son of the protestor. He denied that the petitioner bought the said parcel of land. The petitioner had just come from Tanzania and did not have any money. The

protestor had no objection to the petitioner retaining **CHINGA/KIAGUTHU/376**. However since the petitioner was bent on depriving him even the parcel of land that he had bought, he now felt that **CHINGA/KIAGUTHU/376** should be subdivided between them. He similarly had no objection to the sharing equally the plot at Mairoini. As for the book in which the deceased recorded his land transaction, it was the view of the protestor that the petitioner had interfered with it.

The protestor then called his wife, **Bernice Wanjiru** to back up his claim. However I note from the record of proceedings that **Justice Okwengu** had observed as follows:

“.....It is noted that the following;

1. **Bernice Wanjiru**
2. **Serah Muchungu**
3. **Mariamua Wanja**
4. **Lucy Nyambura Wanjohi**

**were in court during the hearing of the petitioner’s case. Their evidence will be taken with caution as the court notes that their evidence has been compromised by their presence inside court.....”**

I will bear this abundant caution as I consider the evidence of this witness. She testified that the petitioner was her brother in law. She stated that **CHINGA/KIAGUTHU/367** previously belonged to **Paul Munene** who sold it to the protestor through her deceased father in law. She was the one who paid on behalf of the protestor, the purchase price of Ksh.1,100/= . That the petitioner was present when she made the payment and he was asked to record the transaction by the deceased. Next day **Paul Munene** and the deceased went to the lands office in Nyeri. The deceased later came back and told her that the land was now theirs. The land was registered in the name of her son **Mureithi Kimondo**. As for the land in Murang’a, she testified that the land was initially about 3 – 4 acres when given to them by the deceased. Thereafter the witness and her husband, the protestor went into a land buying spree ending up with an extra 18 acres which they consolidated into **LOC.14/KIRU/414**. She testified further that she was actually the one who was being sent by the protestor buy these pieces of land. She maintained that the petitioner did not have any piece of land which he bought.

The protestor’s last witness was **Serah Muchungu Wanjohi**. This too is one of the witnesses who were present in court when the petitioner and the protestor testified. The abundant caution will again be observed with regard to her testimony. She is a sister to the combatants. She testified that **CHINGA/KIANGUTHU/367** belongs to the protestor though it is registered in his son’s name. That their deceased father had been approached by **Paul Munene Kimondo** to buy the said land but he declined saying that the land could be bought by his children. This is then how the protestor came into the picture. She was aware that the protestor bought the land and not the petitioner. She was also aware that the deceased had a parcel of land in Murang’a which he gave to the protestor. She also stated that the petitioner had been given a parcel of land by the deceased at Gatarakwa but had no details. That when the land at Murang’a was given to the protestor it measured no more than 4 acres. The protestor thereafter started buying other portions of land and which were later consolidated into the parcel of land earlier given to the protestor by the deceased. She proposed that the estate of the deceased be distributed as follows:

- (i) **Chinga/Kiaguthi/367 should be given to the protestor as he bought it.**
- (ii) **Chinga/Kiaguthu/376 should be shared equally between the petitioner and protestor.**
- (iii) **Loc.14/Kiru/414 should be retained by the protestor as it is not part of the deceased’s estate.**
- (iv) **Kieni land should be retained by the petitioner as it was given to him by the deceased.**

That then marked the close of the protestor's case.

What then are the issues for determination in this dispute? To my mind they are essentially four:-

**(i) Whether or not the protestor was given land parcel Loc.14/Kiru/414 by the deceased as a gift inter vivos and therefore not entitled to a share of the remaining portion of the estate of the deceased.**

**(ii) Whether land parcel Chinga/Kiaguthu/**

**367 was purchased through the deceased by either the petitioner or protestor and whether it is part of the estate of the deceased liable to distribution.**

**(iii) How should the estate be distributed.**

**(iv) Costs.**

As to the first issue, it is common ground that the deceased gave the protestor the said parcel of land or part of it in his lifetime. It was therefore a gift inter vivos which must be taken into account when it comes to the distribution of the deceased's estate. The protestor and his two witnesses concede that much that indeed the deceased gave the parcel of land to the protestor. Similarly the petitioner and his witnesses concede that much. However what they are unable to agree on is the acreage. To the protestor and his witnesses the deceased only gave the protestor 3 to 4 acres of the said land. The other 18 acres or so were purchased by the protestor through his own resources. According to his testimony which was supported by his wife DW2, and sister DW3 the 18 acres were bought in small pieces from various people by the two and were later consolidated with the 3 to 4 acres given to them by the deceased to make the current 21.2 acres now known as **LOC.14/KIRU/414**.

However, according to the petitioner and his witnesses, the protestor was given by the deceased the entire parcel of land as a gift inter vivos. The deceased gave him the said parcel of land in or about 1955 after he had been released from detention. That parcel of land was registered in the protestor's name during land demarcation and registration in 1966. The petitioner went on to state that the deceased bought other portions of land for 21 goats which were later consolidated and became **LOC.14/KIRU/414**. Those transactions were captured in a book kept by the deceased and which was tendered in evidence. They also maintained an in particular PW4, that it was the deliberate intention of the deceased to have his two sons live separately for peace and tranquility to prevail in their lifetimes.

So between these two versions of events, which is believable and credible. Much really depends on the credibility and weight to be attached on the evidence adduced. As already stated, the evidence of DW2 and 3 has to be treated with abundant caution. They were in court when the petitioner, his witnesses and protestor testified. Invariably their evidence was compromised and may have been deliberately tailored to assist the protestor. Further these two witnesses are closely related to the protestor. One is the wife and the other is a sister. That being the case, their evidence is most likely to be self-serving depending on their relationship with the protestor. Much as she testified that her relationship with her brothers (*petitioner and protestor*) was cordial, I did sense as I heard her testimony palpable undercurrents suggesting that all was not well between her and the petitioner. Counsel for the protestor has submitted that DW3 being a daughter to the deceased placed her at central position and without any pointer that she is biased, then her evidence should carry the day. I do not entirely agree with these submissions. The protestor had other three sisters who could have testified on his behalf. Why did he settle only on this one to testify on his behalf alone? Perhaps they have a special relationship. She may have a soft spot for her elder brother as opposed to the petitioner hence the need to treat her evidence aforesaid with caution.

As regards the petitioner, there is unchallenged evidence that this **LOC.14/KIRU/414** initially belonged to their grandfather, **Kimondo Kiriwa**. The deceased inherited a portion of it. There also evidence that was not seriously challenged by the protestor that the deceased bought extra portions in 1946 for 21 goats. These sale transactions by the deceased in respect of the parcel of land were recorded in his book which was tendered in evidence. The protestor and his witnesses did not seriously challenge this

evidence. They were contend with claiming that after the deceased passed on the petitioner took away all the documents related to the deceased's property. According to **Mr. Wagiita**, nobody can tell whether those records produced in court were the originals and whether they are a documented account of the deceased's property. Much as the petitioner may have retained the documents pertaining to the deceased estate, that is not sufficient reason for one to disbelieve or doubt their authenticity. It was upto to the protestor to bring some evidence that would seriously cast doubt as to the authenticity of those documents. He could have called a document examiner or handwriting expert for instance. He did not. In the absence of such evidence I will have no basis to doubt the authenticity of the "*big book*". In any event, besides the big book, there was also evidence of PW2 who testified that the protestor was given by the deceased the subject parcel of land and had lived thereon since 1955. There was also evidence of PW4 to the same effect. These witnesses are not closely related to the petitioner as the protestor and his witnesses. Infact PW3 was the son of **Paul Munene Kimondo** who was a step brother of the deceased whereas PW4 knew the deceased as an elder uncle. They were thus cousins to both the petitioner and protestor. They are more likely to be independent in their testimony as compared to protestor's witnesses. Afterall they stood to gain nothing by falsely testifying against the protestor and in favour of the petitioner. I note further that though the protestor and his wife claimed that they bought several pieces of land that were later consolidated into **LOC.14/KIRU/414**, they were unable to prove that fact by any other tangible evidence. For instance one would have expected that the two would have summoned as witnesses the vendors who sold them the small pieces of land or some of them and or produce other evidence, documentary or otherwise to substantiate their claim. For instance where were the sale agreements? If at all!

Taking all the foregoing into account, I am inclined to believe the evidence of the petitioner and his witnesses. Accordingly the answer to issue number one above is that yes, **LOC.14/KIRU/414** was given to the protestor as a gift *intervivos* and which must be taken into account when it comes to the distribution of the estate of the deceased. The said parcel of land measures 21.2 acres compared to about 9 acres comprised in **CHINGA/KIAGUTHU/376** and **367**.

With regard to the 2<sup>nd</sup> issue, the answer again lies on the credibility to be attached to the witnesses who testified on this issue. Both the petitioner and protestor claim to have bought **CHINGA/KIAGUTHU/367** with their own resources through their deceased father. According to the petitioner, he bought it for Ksh.700/= in 1963 which amount the petitioner gave to his father for purposes of buying the land parcel from his step brother **Paul Munene Kimondo** who was relocating to Olkalou in Nyandarua District. At that time the petitioner was doing business of selling tobacco in Musoma, Tanzania. He was then a bachelor aged 28 years old and once the land was bought it was registered in the deceased's name. This evidence of the petitioner was supported in material particulars by PW3. He testified that his father aforesaid wrote letters tendered in evidence offering to sell his aforesaid land to the deceased for Ksh.700/=. Indeed he confirmed that he was the one who authored the said letters on the instructions of his father. An agreement was reached and was recorded in the "*big book*". The agreement apparently was drawn by the petitioner on the instructions of the deceased and was signed by the deceased and the witness's father in the presence of the petitioner. He went on to testify that the agreed purchase price was paid in denomination of Ksh.20/=. The story of the petitioner over the subject piece of land received further boost from the evidence of PW4 who stated that the deceased who was an elder uncle had confided into him that he had given his elder son his land in Murang'a and intended his younger son to inherit the lands in Nyeri. He was however also aware that the deceased bought this parcel of land from his step brother. The testimony of these witnesses was not seriously challenged in cross-examination.

On his part, the protestor stated that the suit premises were bought by the deceased from his step brother with money he had given to him. He testified that he gave his wife (DW2) Ksh.40/= to give the deceased being the purchase price. The vendor refused to accept the amount as it was too little. The protestor then instructed his wife to get some more money from a friend who gave her Ksh.1,000/=. It was actually a debt owned to them by this friend. Next day the petitioner gave the deceased Ksh.1,000/= and later Ksh.2,000/= making a total of Ksh.3,000/= to pass over to the vendor as the purchase price. Later the deal went through. However according to the wife in her earlier testimony, the purchase price was Ksh.400/=. That the protestor left her with ksh.400/= which he took to the deceased who in turn gave it

to the vendor. The vendor refused saying that the money was not enough. He demanded Ksh.1,100/=. The wife then went to look for Ksh.700/= from **Kabutu Macharia** at Kiriaini. This friend gave her the money. She took the money to the vendor and in the presence of an old man called **Kimaru**, the deceased asked the petitioner to write down the agreement and amount paid. To her therefore the suit premises were purchased at Ksh.1,100/= and not Ksh.3,000/= as claimed by her husband, the protestor. Next day the vendor and deceased went to the lands office in Nyeri and when the deceased came back he declared to her that the land was theirs and had registered it in her son's name, **Mureithi Kimondo**. On the same issue of the registration of the suit premises in the name of their son, the protestor initially testified that: ".....**My father told me that he had registered the land in his own name....**" Immediately thereafter he told the court, ".....**My father actually registered the land in the name of my son Mureithi Kimondo....**" These contradictions in the evidence the protestor and his wife are telling. How is it possible that they are unable to agree on the purchase price? And in whose name and suit premises was registered. Someone or all of them are not being candid here! It is instructive that all through the transaction, neither the protestor nor his wife ever suggested that the suit premises upon transfer should be registered in their son's name aforesaid. So on what basis would have the deceased decided to register the land in their son's name. I cannot think of any. That evidence can only be termed as false. In any event the son's full names are **Isaac Muriithi Kimondo**. However the certificate of title is in the name of **Muriithi S/O Kimondo**. According to the PW2, her son was baptized when he was a baby. Accordingly if the intention of the deceased as purveyed by the protestor and his wife was to register the suit premises in the name of his grandson nothing would have been easier than to register the same in the correct names of his grandson **Isaac Muriithi Kimondo** rather than as **Muriithi S/O Kimondo** which are indeed his own names, to avert any future controversy. From the evidence on record the deceased was a person given to meticulous keeping of records. If that had been the intention it would have been reflected in his records as well and or he could have told the vendor, the petitioner and PW3 who were present during the transaction. In any event, it is evident that the said **Isaac Muriithi Kimondo** was a toddler. He was born in 1963. The land was bought around about this time. He may hardly have been a year old. In those circumstances I doubt whether at that age he was competent to be registered as a proprietor of the suit premises even if those were his grandfather's wishes. It is also instructive that though this dispute involved a piece of land allegedly registered in his name as aforesaid, the said **Isaac Muriithi Kimondo** did not see the need to defend his interest by testifying. Ordinarily one would have expected that he would be the first to shout from the roof top that the suit premises should not be touched as it belonged to him. His failure to testify though his mother had promised that he would, raises lingering questions. Is it possible perhaps that his evidence would have run counter to the testimony of his parents and in effect advance the petitioner's case? That possibility cannot be wholly excluded. His evidence may thus have been adverse.

On the issue of the names, it was the submission of **Mr. Wagita** that the confusion in names is brought about by the practice in Kikuyu to name the first born sons after his grandfather. However this submission is not supported by any evidence. In any event it is apparent on record that nobody had ever asked the deceased to register the suit premises in the names of **Isaac Muiithi Kimondo**. I doubt whether the deceased would have acted *suo moto*. Finally and as correctly submitted by **Mr. Muguku**, if the suit premises were registered in the name of the son of the protestor is it part of the estate of the deceased. Can this issue be properly adjudicated upon in these proceedings or in an independent suit filed by the son who is now a grown up aged 47 years.

In support their son's claim to the suit premises, the protestor and his wife called in aid the testimony of DW3, sister and sister in law respectively. However she was never present during the negotiations nor when the purchase price was paid by whomsoever. Her evidence is therefore unreliable as is hearsay.

On the evidence laid before me, I am not satisfied that the protestor and his wife purchased the suit premises through the deceased. I am inclined to believe the evidence both oral and documentary of the petitioner and his witnesses on the issue.

Based on the foregoing issue number 3 should not be difficult to tackle. Just as the deceased gave the protestor **LOC.14/KIRU/414** as a gist intervivos, he also did the same to the petitioner in respect of **CHINGA/KIAGUTHU/376**. Both the protestor, his wife and petitioner agree that though DW3 stated

that just like the protestor, the deceased had given the petitioner some other land at Gatarakwa, she was unable to give particulars of the said parcel of land. It is indeed surprising that of all the witnesses who testified in this case it is only her who knew of a purported parcel of land given to the petitioner in Gatarakwa. Were it true I am certain it would not have escaped the attention of the protestor and his wife. I do not think therefore that such parcel of land exists. If it were so, what would have been easier than to obtain the records from the lands office. It is on record that the protestor in his evidence had stated that he had no objection to the petitioner retaining the bigger portion i.e. **CHINGA/KIAGUTHU/376** measuring 6.4 acres but since he wants to deprive him of one he had bought – **CHINGA/KIAGUTHU/367**, the bigger land should be subdivided between them. Again as correctly pointed out by **Mr. Muguku**, it would appear that the protestor change of heart is informed more by malice and vengeance than anything else. I would in the premises hold that **CHINGA/KIAGUTHU/376** was given to the petitioner by the deceased as a gift *intervivos* though by the time of his death he had not transferred and registered the same in the name of the petitioner.

As regards the plot at **Mairo-ini 'A' plot No.8 (shop)**, both the protestor and petitioner are in agreement that the same be shared among them equally.

In conclusion therefore the distribution of the estate should be as follows:-

- (i) LR NO.CHINGA/KIAGUTHU/376 to the petitioner being gift *intervivos***
- (ii) LR NO.CHINGA/KIAGUTHU/367 to the petitioner as he had purchased it with his own resources.**
- (iii) Mairo-ini 'A' Plot No.8 (shop) to be shared equally between the petitioner and protestor.**

As this is a case where a brother is pitted against a brother, I will not make an order as to costs lest I exacerbate the already volatile relationship. The grant of Letters of Administration issued to the petitioner on 9<sup>th</sup> July, 2001 shall be confirmed in those terms.

*Dated and delivered at Nyeri this 9<sup>th</sup> day of October, 2008.*

**M.S.A. MAKHANDIA**

**JUDGE**