



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Succession Cause 1880 of 1998**

**IN THE MATTER OF THE ESTATE OF EDITH MUMBI MBIRU – (DECEASED)**

**RULING**

This cause is intertwined with other two matters.

The father of the present Administrator namely Fredrick Mari Mbiru died on 14<sup>th</sup> September, 1989 and the petition for Letters of Representation intestate was filed by the widow (the deceased in present cause) and the Objector Moses Njoroge Mbiri filed a summons for revocation dated 28<sup>th</sup> November, 2002.

The said Objector Moses Njoroge Mbiri also filed the summons for revocation in the first cause i.e. P & A No.979/1989 which was dated 4<sup>th</sup> September, 2006. But the Certificate for Confirmation was issued to the two Petitioners on 27<sup>th</sup> September, 1991 wherein the two properties namely Komothai/Kiratina/6 and Komothai/Lari/T.81 were registered in their names as proprietors in common in equal shares. The summons of revocation in the said cause was not heard and one of the Administrators/beneficiary i.e. Edith Murubi Mbiru died on 18<sup>th</sup> January, 1998 and Fredrick Mare Mbiru filed petition for letters of representation filed on 17<sup>th</sup> September, 1998.

These two causes and the summons for revocation were not heard. In the meantime a civil suit No.393 of 2003 was filed by the Administrator against the objector seeking for order interalia for declaration that the Defendant (objector herein) is unlawfully trespassing on L.R. No.Komothai/Kiratina/6 (one of the estate properties herein).

On 18<sup>th</sup> July, 2006 the aforesaid High court case and P&A.1880/98 were consolidated by consent. It was also agreed that the basic issue to determine is how much portion of the estate properly the objector is entitled to inherit.

Thereafter on 7<sup>th</sup> February, 2007 it was further directed that the first succession cause i.e. H.C. Succession Cause No.979 of 1989 be heard together with the present succession cause.

The matters were not heard until 21<sup>st</sup> April, 2008 when the same came before this court, and the matters were heard.

The objector in his examination in chief relied on his affidavit sworn on 28<sup>th</sup> November, 2002.

According to him he is a son of the two deceased persons namely Mbiru Mare and Edith Mumbi Mbiru.

He stated that he was adopted by them and they educated him upto secondary school and after his marriage he named his two children after them as per Kikuyu customary law. He further averred that the deceased mother gave him a piece (portion) of land in L.R. No. Komothai/Kiratina/6. He further stated that after the death of Mbiru Mare the said land was registered in joint names of the mother and the Administrator. In the funeral of the mother, according to him, he was acknowledged as a second male child of the deceased. But his relation with the Administrator deteriorated after the death of the mother and he lodged a caution on the said property lest the Administrator would register the whole land in his names, but despite that the land was so transferred.

After that he filed a case in Land Dispute Tribunal whose award was in his favour and the Administrator filed a case being Misc. H.C. No.824 of 2002 and thereafter he could trace the present Succession Cause and filed the Objection.

With these facts he claims that he is an equal beneficiary of the estate with the Administrator and is not entitled only to a portion given to him.

It is on record that the Objector was given a portion by the deceased mother during her life time and which is acknowledged by the Administrator during the hearing of these proceedings . Although in the petition as well as in the summons for confirmation the objector's name or the fact that there was a gift intervivos were not mentioned. To that extent, one can say that there was a concealment of a material fact on the part of the Administrator in the Estate cause of the mother. However, the matter does not stop there, which it would have, if the objector was satisfied with that portion. His case is that he is a son of the two deceased persons and is entitled to half the share of the estate properties at least  $\frac{3}{4}$  acre plus the main house.

In his evidence, he has stated that he is living in the main house on the suit property which was the issue in a criminal case. The learned Magistrate found that it was a case of civil nature and acquitted the objector under Section 210 of the Criminal Procedure code. Hence the Administrator had filed H.C.C.S. No.393/03 against the Objector as regards his occupation of the property. It is also on record that the award of Land Dispute Tribunal giving him 3 acres has been quashed by the High court in Misc. C.A. No.824/2002 vide its order dated 3<sup>rd</sup> December, 2002.

In his evidence, he has also agreed that a man came later to claim him as a son in 1979 and the court ruled that it was his choice to live with whom, the person who was his biological father or the deceased persons, as he was over 18 years of age. He chose to stay with the deceased as he had been looked after by them.

He agreed in cross-examination that before the death, the deceased in present cause showed him a portion to cultivate and he was living in another home during the life time of the deceased mother. He cultivated that portion by planting coffee. Thereafter he moved out of the property as he was doing casual job and jua kali jobs and rented a premises. He also agreed that the deceased mother was living in the stone house till her death in 1998. He entered the property in the year 2002 and went to live in the said stone house in the year 2003. He said he decided to open that house (not breaking it open) after the administrator and himself did not agree on distribution as his proposal to give him one acre was not acceptable to him. He said after the Land Tribunal gave him 3 acres and thereafter he started cultivating thereon and the house was on that portion. He added that the stone house was built by the Deceased mother and the Administrator did not contribute to build it.

He relied on the obituary read at funeral ceremony of the deceased mother wherein it is mentioned: namely;

“During the time of Emergency she was given a child to look after as his mother had died at his birth and his father was in detention. The child born in 1956 is Moses Njoroge. He was bought up like their own child, went to school, married and belong fully.”

Thus he claims that he was part of the family and should be accepted as a son along with the

Administrator.

According to the Administrator's evidence the objector was brought on his birth to his sister Wanjiru for help. She was working as a Social Research Assistant with a Dutch lady and was a known person in the locality. She took over the child as other children homes like Thomas Bernardo and Red cross were overcrowded with orphan children during emergency. Beatrice also had her own child and accepted to look after both the children. The objector's father came back on his release from detention. His name was Waweru Kiarie. He requested that till he finds his living, the child should be looked after by the family. As the deceased mother looked after many such children, she agreed to do so. On his finishing school the father came back to claim him. I have mentioned hereinbefore the result of his claim. According to him, the objector refused to go. The Objector used to leave the house when he got job or to go to his brother but would return eventually. He has a family land at Kibichoi. He stressed that the family was not involved in the marriage of the Objector, which fact was not questioned. But the mother gave him a place to cultivate and fenced the same and told the objector that he could build his house thereon if he intended to do so.

He agreed that the mother's wish to give him the portion (fenced and shown to him) as well as a portion to the son of his sister and a church, will be honoured by him.

After death, he told the objector that he would give him that portion as shown by the deceased mother, but he complained that it was not enough and that she did not love him enough. As stated by the objector, he moved out from the land after a month of the death. He testified about the objector opening the stone house and started living there. He was accosted by a mob when he went to inquire. He forced open the main house in August, 2002. He stressed that the main house was built by him in 1988 – 89 when he was working with the bank. He named the Architects and contractors. He spent around half a million shilling. He also added that he had used the house from 1998 to August, 2002 when the Objectors forcibly took its possession. His furniture and belongings are still in that house.

He had proposed that he is ready to give the objector portion shown by his mother which now extends to the river and admeasures 1.1. acres. He demands the house in vacant possession. He further testified that his offer of 5 acres plot in place of 1.1. acres was also turned down by the objector.

He stated, in his cross-examination that there were about 6 to 7 foster children who were looked after by his mother. But agreed that apart from his nephew and the objector all left the property after they found their way and got married.

The second witness for the Administrator was his sister who relied on her affidavit sworn on 27<sup>th</sup> January, 2003. She produced the book by Greet Kershaw entitled "Mau Mau from below" which is dedicated to the children of *Mbari ya Igi and Theita*. She confirmed the evidence of the Administrator as regards the taking over the Objector under her care and added that the deceased used to look after many orphans, who have named their children after her. She specified that the Objector was not found by them abandoned but was brought to her and her author employer. She assisted the objector by breast feeding him as she had a small child.

That is the evidence before me. On the basis thereof it is contended by the learned counsel for the objector that the grant was obtained by concealment of material fact i.e. he being the adopted son of the deceased person. He relied on the definition of the child in Section 3 of the Laws of Succession Act which stipulates:

"Reference in this Act to 'child' or children shall include a child conceived but not yet born (as long as that child is subsequently born alive) and in relation to a female person, a child born to her out of wedlock and in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility."

According to him it was Mbiru Mari who has looked after him and assumed responsibility for him, educated and gave him his name.

However, I would pause here and note that he is seeking revocation of the grant made in the estate of Edith Mumbi Mari who in turn was a co-administratrix of the estate of Mumbi Mari who predeceased her. The present Administrator was also a co-administrator of the deceased father. The objector has not asked for revocation of the estate of Mbiru Mari whose child he is now claiming to be. He also relied on the eulogy at the funeral of Edith the deceased mother. In eulogy it is stated that she brought the objector up as her own child. There is no mention that it was her deceased husband who had accepted him as his own child and had assumed his responsibility. It was also the deceased mother who had carved out a piece of land for him, and not the deceased father. The summons for revocation in the estate of the deceased father was filed as late as 4<sup>th</sup> September, 2006.

In view of the aforesaid fact, the definition of child shall not support the case of the objector.

It was also relied that under Section 29(b) of the Act he is a 'dependent' of the deceased. He relies on the words "children whom the deceased had taken into his family as his own" appearing in the said section. It is also noteworthy that it is not his case that he was being maintained by the deceased father immediately prior to his death.

It is also not his case that he was maintained by the deceased prior to her death but it is his case that he was an adopted son of the deceased and relies squarely on the eulogy and the fact that he was brought up and educated by the deceased mother.

He has however not controverted the evidence from the Administrator that no one from the family was involved in his marriage and that all the children who were similarly brought up by the deceased by the deceased mother also gave the names of the deceased to their children.

He has also not controverted the evidence that he has another land at his biological father's place and keeps relations with his brother from his biological father.

He agreed that he was given a portion of land by the deceased mother and that he come back on the land after her death, first started to live in a store and then moved in the main house, and he did not state he has at all contributed to build it. Though he denied that Administrator contributed to its construction, the Administrator gave evidence to show how he contributed in constructing the same.

The Administrator has also shown in H.C.C.S. 393 of 2003 that the Land Dispute case No.11 of 2002 was quashed under order of certiorari and prohibition vide an order dated 3<sup>rd</sup> December, 2002 in Misc. Civil Application No.824/02. It was as a result of the award of Land Dispute Tribunal that the objector is occupying 3 acres of land which he now claims along with the main house.

On the other hand, the case of the Administrator is that the objector was handed over to his sister who had been doing social services along with a Dutch lady Greet Kershow who had stayed with natives during Mau Mau movement. The book was produced and in its acknowledgement, she has specifically acknowledged Mbiru Mare for help and also has given special thanks to his sister Beatrice Njuguna and has described Beatrice as her right-hand when she was working as an aid worker during Mau mau emergency. Beatrice gave evidence and stated that she took over the care of the objector along with her son when his mother died on birth and father was detained. She left both of them under the care of her deceased mother when she moved out and got married. The deceased mother thereafter looked after them and as they both did not move out gave them some portions during her life time so that they could maintain themselves. This portion did not satisfy the objector and he walked out of the land later to come back and took over the store and also the main house. The Administrator contended that the generosity of his mother is now being exploited by the objector. It is also on the record that many orphan children benefited from her generosity and had moved out showing their appreciation by adopting the names of the deceased and giving their names also to their children. It is also on record that the Administrator is a Banker and the objector is doing casual works, who is younger to the Administrator by many years. His contention that the objector was calling him as an uncle till the death of his mother has not been denied by the objector.

I have spent many anxious hours on this matter. The wordings of eulogy, could be a tribute to the warmth and generosity of the deceased mother but could that be taken as an equal position to a son? After careful consideration and the evidence adduced before the court, I would hesitate to accept the contention of the objector. Accepting his version shall tantamount to deter many a generous families who would hesitate to provide shelter, and education to needy children.

Even if I am wrong in finding as aforesaid, I would find that the deceased has shown her wishes by sharing her property inter vivos and this court cannot interfere with the wishes of a deceased person. The Objector claims his equal share which under the circumstances of this case cannot be granted in absence of further facts as regards his needs etc.

I thus reject the objector's claim that he was an adopted son of the deceased. However, by saying so I do frown at the non-disclosure of the fact of inter vivos gift by the deceased mother to the Objector at the time of filing this petition. As the Administrator has recanted and has offered larger piece than the one given by the deceased, I shall not completely revoke the certificate of grant, but shall direct that a rectified grant be issued by distribution of the estate as under:

1. The Objector Moses Njoroge Mbiru be transferred 13 acres from the land known as Komothai/Kiratina/6.
2. 0.5 acres be given to Presbyterian Church of East Africa.
3. The District Surveyor to survey the land for sub-division.
4. Moses Njoroge Mbiru to hand over vacant possession of the main house to the Administrator Fredrick M. Mbiru forthwith.
5. The Administrator pays costs of the Objector.

Dated and signed at Nairobi this 18<sup>th</sup> day of November, 2008.

**K.H. RAWAL**

**JUDGE**

**18.11.08**