



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Succession Cause 89 of 1986

**IN THE MATTER OF THE ESTATE OF M’KIRERA M’NGUKU...DECEASED
M’MBIJIWE M’KIRERA.....PETITIONER**

VERSUS

JOSEPH MWORIA M’KIRERA.....OBJECTOR

JUDGMENT

1. The dispute before me relates to the distribution of the estate of M’Kirera M’Nguku viz Land Parcel number Abothuguchi/Kithirune/245 which measures 1.62 hectares. When the letters of administration to the estate were granted to M’Mbijiwe M’Kirera, he sought to confirm the same by an application dated 23.3.1988 but which was filed only on 10.8.1988. In the supporting Affidavit he proposed that he should be allowed to inherit 2.5 Acres while his step-brother, Joseph Mworira M’Kirera should inherit 1.5 acres out of the above parcel of land. By an order dated 25.11.1998, his application aforesaid was allowed by Hon. Ombonya, P.M. On 25.11.1998 Joseph Mworira M’Kirera sought to annul the grant issued to his step-brother and Onyancha J. on 29.11.2004 allowed that Summons and the court advised both parties to reconcile and have both of them appointed as administrators of the estate and ended with this rider;

“.... Only the issue of shares for distribution [should] be decided by the court if no consent would be forthcoming from the parties.”

Parties indeed agreed to the suggestion by court and the matter of distribution came for hearing before me on 13.11.2006.

2. The evidence for Joseph Mworira M’Kirera was that because only he and his step-brother have an interest in the estate, the land should be divided equally between the two of them. He conceded however that his father had allowed him in his lifetime to occupy only 1 acre of the land but he did not measure it or fence it but only knew the size using his eyesight.

3. M’Mbijiwe M’Kirera in his evidence said that he occupies 2 ½ acres of the deceased’s land while his step-brother occupies 1 ½ acres. He explained the disparity by saying that his step-mother left with all her children in the 1960’s and Joseph Mworira M’Kirera only returned in the 1970s to be circumcised and then went away again until the 1980s when he returned together with his wife and the deceased showed him where to live on his land. He produced minutes of a meeting held by the clan prior to the filing of the instant cause. His stand then and now is that he retains his 2 ½ acres and his stepbrother should retain his 1 ½ acres of land.

4. In support of the case for M’Mbijiwe, Joel Gichuru produced the minutes of the Muriithia clan

meeting held on 13.7.1996 to discuss the present dispute. He was secretary of the clan and the decision taken was that Joseph Mworira would be given $\frac{1}{4}$ acre more over and above his $1\frac{1}{2}$ acres.

5. For me since it is agreed that what really is in issue is whether Joseph Mworira should get more land than the $1\frac{1}{2}$ acres he has been offered, I am alive to the fact that the deceased died in 1984 and therefore the Law of Succession Act would apply to the distribution. It is also an uncontested fact that only the contestants now before me are entitled to the estate and it would have been the easiest thing to say that the land should be divided equally and the matter would end there but I have seen the minutes for the Mutiriithia clan meeting held on 13.7.1996. Both parties attended and called more witnesses than they did in this court and the clan then decided as follows:-

“After a prolonged discussion it was accepted that M’Kirera had partitioned his land to his sons according to his will. They also accepted that the extension which was increased by M’Kirimania should be genuine and should be honoured by both parties.

Therefore M’Mbijiwe and Mworira were told to proceed with Succession Case and thereafter have their shamba partitioned officially by the survey of Kenya

The decision of the clan was to the effect that Mworira should get $1\frac{1}{2}$ acres plus $\frac{1}{4}$ acre making in total $1\frac{3}{4}$ acre while his brother would then retain $2\frac{1}{4}$ the difference being only $\frac{1}{2}$ acre. The clan reached its decision based on the history of the family and what the deceased had done prior to his death. It cannot be denied because it is admitted by Mworira that it is M’Mbijiwe who has been helping his father all the while even as Mworira was elsewhere with his estranged mother. It cannot be denied what the deceased gave Mworira in his lifetime because he said so himself (Mworira) and the clan in evidence confirmed it. The clan however, could not explain through Joel Gichuru why they gave Mworira $\frac{1}{4}$ acre if their intention was to honour the wishes of the deceased because if truly those were his wishes why then break the same wishes in a bid to grant them?

7. Having so said, I must still contend with the provision of the Law of Succession Act. S. 42 of the Act provides as follows:-

“Where-

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 of section 35 that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

8. This section applies to the instant case for reasons that the deceased and without making any formal transfer had effectively given each of the disputants a share of his land. It must be taken by this court that those bequests are only the starting point. S.38 of the Act then provides as follows:-

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”.

9. It has been agreed that in fact only the contestants are entitled to the estate and the fact is that the deceased died intestate in spite of the elders award reproduced above. This court would have been quite willing to go by that award but the law cannot allow it and it is beholden to the law and not the convenience of parties.

10. It is therefore my final decision and because that is the law as I know it and in spite of facts that would otherwise have favoured M’Mbijiwe, that the land known as Abothuguchi/Kithirune/245 be divided equally between M’Mbijiwe M’Kirera and Joseph Mworira M’Kirera and a certificate of confirmation of

Grant be issued in those terms for further action by the two who are also co-administrators.

11. Let each party bear its costs as none has wholly succeeded.

12. Orders accordingly.

Dated delivered and signed at Meru this 13th day of March 2007

ISAAC LENAOLA

JUDGE

In presence of

N/A Advocate for the Petitioner

Mr. M. Kariuki Advocate for the Objector

ISAAC LENAOLA

JUDGE