



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 467 OF 2012

IN THE MATTER OF THE ESTATE OF IDAH NYAGA ALIAS IDAH MBIRO NYAGA (DECEASED)

MARTIN MURITHI NYAGA.....PETITIONER

VERSUS

LUCY KIRITO.....RESPONDENT

J U D G M E N T

1. **Idah Mbiro Nyagah** (“the deceased”), died on 2/05/2005. In the Letter of Introduction from the area Chief of Kithoka Location, the deceased left behind the following dependants, **Edward Nyagah M’Ndaka (deceased)**, **Betty Gatakaa Kariuki (married and deceased)**, **John Kibaraa Nyagah**, **Frankline Mugendi Nyagah (deceased)** and **Martin Murithi Nyaga**.
2. On 2/7/2012, **Martin Murithi Nyaga** (“the petitioner”) petitioned for letters of administration and listed the assets of the estate as **Nyaki/Kithoka/1351**, **Nyaki/Kithoka/746** and **B.C.R. PLOT NO.5 - ISIOLO**.
3. On 31/10/2012, a grant of letters of administration was issued to the petitioner. On 7/10/2013, **Lucy Kirito (“the objector”)** lodged an application for the revocation of that grant. She claimed to be a daughter in law to the deceased having being married to **Franklin Mugendi Nyaga** with whom they bore **Evans Nyaga**. That the petitioner took out letters of administration without her consent.
4. A fresh grant was issued to both the petitioner and the objector on 24/03/2014. On 23rd July, 2014, the petitioner applied for confirmation which was granted on 16/10/2014. The estate was distributed to the petitioner and **John Kibaraa Nyagah**.
5. On 29/04/2015, the objector yet again filed a Summons for revocation of the grant issued on 16/10/2014 on the ground that the grant was obtained fraudulently by the making of false statement and by concealment of something material to this Cause.
6. The parties and their witnesses filed their respective statements and affidavits on which they were cross-examined. The objector testified as **PW1**. She told the Court that she was married to **Frankline Mugendi Nyagah (now deceased)**, a son of the deceased in the year 2008. That soon thereafter, they moved to Mombasa where they lived and operated a bakery. That when they visited Meru, they would stay in the house which her husband had inherited from the deceased at Kithoka. That it was after the burial of her husband that the petitioner chased her away from the land in Kithoka. That she lodged a claim with the Njuri Ncheke who assisted her to collect her husband’s personal effects.
7. She further testified that her husband had paid dowry for her parents which was witnessed by his neighbours, **Stanley Gitobu** and **Samuel M’Mbori**. That the land in Kithoka was divided into three portions for the benefit of the three sons of the deceased, to wit, her husband, the petitioner and John Kibaara. She urged that the estate be distributed equally amongst the three sons of the deceased.
8. **PW2 Samuel Ndingu Nteere**, the Area Assistant Chief of Kithoka testified that he was a neighbour to the deceased ever since she settled at Kithoka with her family in 1977. That **Frankline Mugendi** had brought the objector home as his wife. That the deceased had informed him that she had divided her land at Kithoka into three portions. That the petitioner chased away the objector from the Kithoka property after the demise of **Frankline Mugendi**.
9. **PW3 Miriam Nkatha M’Ikamati** was the mother of the objector. She testified that the objector was married to **Frankline Mugendi**. That Gatobu had come to her home to discuss about the marriage of the objector to **Frankline Mugendi**.
10. **RW1 Martin Murithi Nyagah**, the petitioner, testified that he was the area Chief of Kithoka and that he is the one who issued the letter of introduction in this Cause. He stated that his brother, **Frankline Mugendi** had not married the objector. That the said Frankline Mugendi had relationships with five other women and had six children. He admitted that his brother had a child with the objector.

11. He further testified that during her lifetime, the deceased had divided her property into three portions. That the land in Gaitu (**Abothuguchi/ Igane/2057**) was given to **Frankline Mugendi** while the land in Kithoka was given to him and **John Kibaara Nyaga**. That **Frankline Mugendi** sold the land in Gaitu and went to develop his properties in Kilifi. That he had called a family meeting on 2/11/2011 to deliberate on the estate of the deceased but the objector did not show up. That the family meeting decided that the Kithoka land be divided into three portions granting **Frankline Mugendi's** 6 children $\frac{1}{4}$ an acre for their shelter.
12. As for the plot in Isiolo, he told the Court that it was sold by the deceased to an unknown person during her lifetime. That he had included it in the list of the assets just in case it had not been transferred.
13. **RW2 John Kibaara Nyaga** supported the testimony of the petitioner. **RW3 Joseph Gaikumi and RW4 Saberio Nyamu** testified that the deceased had distributed his estate amongst his three sons. That he gave the land in Gaitu to **Frankline Mugendi** while she gave the land in Kithoka to **John Kibaara Nyaga and Martin Murithi Nyaga**.
14. The issues for determination are *a) who the beneficiaries of the deceased are, b) what constitutes the estate of the deceased and c) how the estate of the deceased should be distributed.*
15. On the first issue, there was no dispute as to who the children and therefore rightful beneficiaries of the estate of the deceased are. The only dispute was that, the objector was not a wife of **Frankline Mugendi**, a son of the deceased.
16. *Section 3 (5) of the Law of Succession* provides as follows;
- (5) Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.*
17. The objector contended that **Frankline Mugendi** had married her under the Meru customs. She was supported by her mother and two other witnesses. However, in my view, The evidence as to payment of dowry and traditional ceremony was inadequate to prove Meru customary marriage.
18. What came out clear, was that **Frankline Mugendi** and the objector cohabited as man and wife both in Mombasa and Meru between 2008 and 2011. Their cohabitation resulted in a child by the name of **Evans Nyaga** who was born on 24/3/2010. It was the protestor's evidence that she and the said **Frankline Mugendi** ran a bakery at Mombasa. The petitioner acknowledged this fact and stated that the protestor sold lands and bakery belonging to **Frankline Mugendi** after the latter's demise. At the funeral of **Frankline Mugendi**, the objector was recognised as a wife of the deceased.
19. In **M.W.G v E.W.K [2010] eKLR**, the Court of Appeal held that: -
- “The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife..... Parliament realised that women who genuinely had been taken as wives were discriminated against merely because dowry had not been paid or that there had been no ceremony to solemnise the union and by Act No. 10 of 1981, Parliament added section 3(5) of the Law of Succession Act, Cap 160, Laws of Kenya....”.*
20. The evidence on record shows that there was not only cohabitation, it was notorious between the objector and **Frankline Mugendi**. Although the same was for a short period, **Frankline Mugendi** had evinced the intention of having taken the objector as a wife. Their cohabitation was continuous and resulted in a birth of a child. The objector cannot be said to have been just 'one of the many women' that **Frankline Mugendi** had. They lived together both in Mombasa and Kithoka as man and wife.
21. This leads the Court to the justifiable conclusion that the objector was a wife to **Frankline Mugendi** within the meaning of Section 3 (5) of the Law of Succession Act. The meeting of 2/11/2012 was self-serving. It was meant to sanitize the scheme by the petitioner and his brother **John Kibaara** of excluding the objector from the estate of the deceased. Its resolutions therefore is of no effect.
22. That being the case, I make a finding that the beneficiaries of the deceased are the petitioner (together with her son), the objector and **John Kibaara**.
23. The next issue is; what properties constitute the estate of the deceased. It was the petitioner's case that the deceased had divided herself during her lifetime. That she had given him and **John Kibaara** the Kithoka properties and **Abothuguchi/ Igane/2067** to **Frankline Mugendi**.
24. With due respect, there was no evidence to show that **Abothuguchi/Igane/2067** ever belonged to the deceased at any time. The search that was produced clearly showed that, **Frankline Mugendi** obtained interest on that property on 28/9/2010, five years after the demise of the deceased. How could he transfer it to his name yet the deceased's estate had not been administered.
25. If the deceased had divided her property as contended by the petitioner, why was the alleged family meeting of 2/11/2012 dividing the Kithoka property into three with a $\frac{1}{4}$ acre being preserved for the alleged 6 children of **Frankline Mugendi**?

26. The conclusion this Court makes is that, the deceased had not divided her properties during her lifetime. **Abothuguchi/Igane/2067** belonged to **Frankline Mugendi** independent of the deceased's estate. The estate of the deceased constitute **L.R. Nyaki/Kithoka/1351, L.R. Nyaki/Kithoka/746 and Plot No. 5, Kulamawe Isiolo.**

27. The Isiolo property has been included because the allegations of the petitioner that it had been sold during the lifetime of the deceased was not supported by any evidence. If it had been sold as alleged by the petitioner, he would not have included it in the schedule of assets of the deceased the first time he lodged this Cause.

28. The last issue is, how the estate of the deceased should be distributed. The deceased left behind children and no spouse. The estate shall therefore be distributed in line with **section 38 of the Law of Succession Act.**

29. Accordingly, I allow the application. The distribution of the estate made on 16/10/2014 was made fraudulently. The petitioner did not disclose or involve the objector who was his co-administrator. The same is hereby set aside and the grant issued to both the petitioner and the objector on 24/3/2014 confirmed as follows: -

a) Nyaki/Kithoka/1351

i) **John Kibaara Nyaga**

ii) **Martin Murithi Nyaga**

iii) **Lucy Kirito** - **Equally**

b) Nyaki/kithoka/746

i) **John Kibaara Nyaga**

ii) **Martin Murithi Nyaga**

iii) **Lucy Kirito** - **Equally**

c) Plot No. 5 Kulamawe, Isiolo

i) **John Kibaara Nyaga**

ii) **Martin Murithi Nyaga**

iii) **Lucy Kirito** - **Equally**

30. This being a family matter, I will make no order as to costs.

DATED and **DELIVERED** at Meru this 16th day of January, 2020.

A. MABEYA

JUDGE