



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.1 OF 2019**

**IN THE MATTER OF THE ESTATE OF IBRAHIM KIMAMO MUNGE (DECEASED)**

**BEATRICE MURINGI KARIUKI.....APPLICANT/OBJECTOR**

**-VERSUS-**

**RUTH WANJIKU MUTAHI.....1<sup>ST</sup>PETITIONER/RESPONDENT**

**JOSEPH MUTAHI KARIUKI.....2<sup>ND</sup>PETITIONER/RESPONDENT**

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

Ibrahim Kimamo Munge (the deceased) died intestate on 15/8/1974 at Tumaini Location Mawingo, Nyandarua County. He was survived by:

***(1) Ruth Wanjiku Mutahi wife to Joseph Mutahi Kimamo – deceased son;***

***(2) Beatrice Muringi Kariuki, daughter.***

As per the chief's letter dated 15/4/2009 and filed in SPM's Court Nyahururu with the petition, the family agreed that Ruth Wanjiku Mutahi and Joseph Mutahi Kariuki son, to Beatrice Muringi would file Succession Proceedings which they did.

Grant was issued to both Ruth Wanjiku Mutahi and Joseph Mutahi Kariuki on 23/6/2009 and was confirmed on 3/2/2010.

On 18/4/2013, Beatrice Muringi filed a summons for revocation or annulment of grant issued to the petitioner/respondents on 3/2/2010. The objector/applicant also sought an order to restrain the petitioners/respondents from distributing the deceased's estate and that the certificate of confirmation be cancelled. The grounds upon which the application is premised are that the S.P.M.'s Court did not have jurisdiction to hear and determine the cause because the deceased's estate was worth over Kshs.100,000/=; that the petitioners did not disclose to the court that the beneficiaries of the estate had not agreed on the mode of distribution and that the estate was distributed unfairly and in a discriminatory manner.

In her affidavit in support of the application, the objector stated that the deceased's estate comprises of Plot No.663 Mawingo Salient which measures 10 acres whose value was much more than Kshs.100,000/=; that the grant was confirmed in her absence and she expected that they would share the land equally, that is, her and Ruth to get 3.5 acres each and three acres to go to purchasers.

On 29/5/2014, the parties agreed to proceed by way of viva voce evidence and each party filed witness statements. The objector testified first as PW1. She adopted her statement filed in court on 14/12/2015. On jurisdiction of this court, it was her view that in 2011, an acre of land would have cost about Kshs.25,000/= hence the subordinate court lacked jurisdiction to hear and determine the Succession Cause. She also told the court that they sold part of the land to Gabriel Mburu to help offset the Settlement Trustee Fund (SFT) Loan, one acre to George Muringi and the balance of 7 acres is to be shared between the two beneficiaries equally.

The petitioners filed replying affidavits dated 30/10/2013 opposing the summons and also filed witnesses statements dated 15/2/2018 and submissions on 26/9/2019 respectively.

According to the 1<sup>st</sup> petitioner, the summons for revocation of grant is an afterthought and an abuse of the court process; that before her husband, Joseph Mutahi Kimamo died in 2002, he had entered into an agreement with his sister PW1, dated 1/11/1999, before the Chief of Tumaini Location whereby they agreed that the objector would inherit Plot.668 that belonged to their mother Milkah Wahito Kimamo and get only one acre from Plot 663, which could go to PW1's son, the 2<sup>nd</sup> petitioner, Joseph Mutahi Kariuki; that the 2<sup>nd</sup> petitioner is the objector's son who represented the objector in the Succession proceedings and had she not been truthful, she would not have allowed the 2<sup>nd</sup> petitioner to petition the court with her. DW1 admitted that an acre of land cost Kshs.150,000/= in 2009. She admitted that she did not include PW1 in the Succession proceedings in the subordinate court as beneficiary nor was she present during confirmation of grant; that she

sold an acre of land to clear the SFT Loan, another ½ acre to one Mary and that the objector on her part sold 2 acres.

DW2, George Kiarie, a friend and neighbor to the deceased at first stated that both Plots 663 and 668 belonged to the deceased but later changed in cross examination when he stated that Plot 668 belonged to the deceased's wife. His view is that as a married woman, the objector (PW1) is not entitled to inherit from the deceased's estate.

The 2<sup>nd</sup> petitioner/respondent (DW3) filed a replying affidavit and a statement that he adopted in his testimony. He admitted to having been endorsed as one of the administrators of the deceased's estate; that after the cause was filed, the 1<sup>st</sup> petitioner prepared the application for confirmation of grant and they agreed on how the land was to be shared between the objector (PW1) and the 1<sup>st</sup> petitioner. He attended court and confirmed that the distribution was as per the affidavit in support only to learn later that the agreed consent had not been filed; that the 1<sup>st</sup> petitioner had replaced the first page of the affidavit with another document. He denied having signed anywhere that the 1<sup>st</sup> petitioner was to inherit all the deceased's property.

Mr. Nderitu Komu, counsel for the objector filed submissions in support of the applicant's case.

On the question of whether the SPM's court had jurisdiction, counsel submitted that even the petitioner admitted that one acre would have cost more than Kshs.100,000/= in 2009 and hence the court lacked jurisdiction to determine the matter.

As to who the objector's interest was considered, counsel submitted that, the deceased having left two children, the applicant and Joseph Gitahi Kimamo, (1<sup>st</sup> petitioner's husband), Section 38 of the Law of Succession Act applied and they should have shared the estate, that is Plot.663 equally; that although the 1<sup>st</sup> Petitioner alleged that the objector had been given Plot.668 by her mother, there is no evidence to show that the said land belonged to the deceased. Counsel relied on the decision of **Re: Estate of Francis Mwangi (deceased) 2018 eKLR** in which Section 38 Law of Succession was said to consider the principle of equity in distribution of a deceased's estate.

In **Re: Estate of Joyce Kanjiru Njiru (2017) eKLR** which cited **Christine Wangari Gichigi v Elizabeth Wanjira Evans & 11 others [2014] eKLR**, where the court held that under Section 38, one only needed to prove that they are children of the deceased in order to benefit.

Frank Mwangi & Co. Advocates, counsel for the 1<sup>st</sup> petitioner/respondent filed submissions on 26/9/2019. On the question of jurisdiction of the SPM's court, counsel submitted that a valuation report should have been availed by the objector as proof of jurisdiction and reliance was made on the case of **Re: Estate of Mutungi Mbutii (2008) eKLR** where the court held that he who alleges that the land valued more than Kshs.100,000/= had to prove it.

Whether the deceased's estate was fairly distributed, counsel submitted that the parties had agreed on how to share their parents' property by the objector getting Plot 668 and the deceased brother getting Plot 663 except for one acre. Counsel relied on the agreement allegedly signed by the parties before the chief.

Whether the confirmation was done in secret; it was submitted that the 2<sup>nd</sup> petitioner represented the objector; that the 2<sup>nd</sup> petitioner is not truthful in alleging that the confirmed grant is different from what they agreed upon.

I have considered the application, evidence of all the parties and submissions of counsel. There are only two issues that require determination:

- (1) Whether the SPM's court had jurisdiction to deal with this matter;***
- (2) What comprises the deceased's estate;***
- (3) Whether the distribution of the deceased's estate was fair.***

The jurisdiction of the subordinate courts in Succession matters is provided for under Section 48 of the Law of Succession Act. Before the amendment to the said Section by Act No.26/2015, jurisdiction of the magistrate's court was, any estate whose gross value did not exceed Kshs.100,000/=. Act No.26/2015 brought the magistrate's courts jurisdiction in tandem with Section 7(1) of the Magistrate's Courts Act, 2015.

Succession Cause PM's NKR.42/2009 was filed on 16/4/2009 and the affidavit sworn by the petitioners indicated that the value of the estate was estimated at Kshs.100,000/=.

The letter from SFT dated 10/12/2003 indicated that Plot 663 measured 3.9 HA (about 9.637 acres). The applicant has alleged that an acre cost more than Kshs.100,000/= in 2009 and since the land was over 9 acres, the SPM's court did not have jurisdiction to entertain the cause. The objector did not have the land valued because that was the surest way of ascertaining the value of the land. I do agree with the finding of Justice Gitari in the **Re: Estate of Mutungi Mbutii** when she said that where the value of the property is in issue, the party raising it must tender a valuation report to assist the court to determine the issue. He who alleges must prove and indeed it is the duty of the objector to prove the value of the land. However, DW1 also admitted that in 2009, an acre of land was worth Kshs.150,000/=. DW2 also stated that in 2010, he sold an acre of land at Kshs.150,000/=. If land was going for over Kshs.100,000/= in 2009 or 2010, 9 acres would have been sold for much more, that is, over Kshs.900,000/=. Although a valuation report would have been more precise, I believe that the value can be proved in other ways like by admission of the parties like in this case. I find that an admission by DW1 and DW2, as to the value of the deceased's estate was well over Kshs.100,000/= and the PM's court that heard the matter did not have jurisdiction to determine it.

On the second issue on distribution, there is no doubt that the deceased's estate only comprised one property, that is, 663 Mawingo/Salient.

That is what is the subject of the distribution in this matter. DW2's evidence that Plot 668 belonged to the deceased or to his wife was not proved by any evidence.

According to DW1, Plot 668 belonged to the objector's mother and the objector had entered into an agreement with her late husband that the applicant takes Plot 668 and one acre of Plot 663. DW1 purported to rely on an agreement dated 1/11/1999.

I have seen the said agreement. It was made before Assistant Chief Kanyiru Sub-location but the said Assistant Chief was never called as a witness. It seems there were witnesses to the said agreement but none was called to prove the veracity of the said agreement. Besides, the agreement did not specify what land the objector would get after forfeiting her claim to Plot 663. If needed the Plot 668 belonged to the objector's mother Milkah, there was no evidence to link the said land to Milkah and no evidence that any Succession was done in respect of the said Milkah's estate. DW2 who claimed to have known about the land gave contradictory evidence as to who Plot 668 belonged to. The 1<sup>st</sup> petitioner has failed to prove that Plot 668 exists or that it belonged to her mother-in-law Milkah or that the applicant took over the said land.

No doubt the 2<sup>nd</sup> petitioner is the objector's son and was the 1<sup>st</sup> petitioner co-administrator. The objector had been mentioned in the petition as a beneficiary. I have seen the court's record of 3/2/2010 when grant was confirmed. Both petitioners were present but the objector was not present. No explanation was given to the court nor did the court enquire why the beneficiary was not before the court. The court then recorded "**Petitioner: We have agreed on the mode of distribution.**"

It is not clear which petitioner spoke. The court then recorded that parties had agreed. Unless for good reason, all beneficiaries must be before the court at confirmation of grant to confirm whether or not they agree with the mode of distribution. It is obvious that the applicant was not invited to attend court at confirmation to give her input, as to whether she agreed with the mode of distribution or not.

Since the 1<sup>st</sup> petitioner and the objector were the only surviving heirs of the deceased's estate, distribution should have been done under Section 38 of the Law of Succession Act which provides for distribution where the intestate is survived by a child or children but no spouse.

Both the objector and the 1<sup>st</sup> petitioner have admitted to have disposed of part of part of the land before confirmation. PW1 told the court that she sold an acre of land to Mburu to offset the loan to SFT and that Mwicigi should also be given one acre of land. DW1 said that her deceased husband had sold an acre of land to Mwicigi while the objector sold 2 acres to Kamau and Gabriel Mburu. DW1 also said that she sold one acre to offset a loan with SFT and another ½ an acre to one Mary. What the objector and 1<sup>st</sup> petitioner did amounts to intermeddling with the deceased's estate because they had no capacity to sell the land without a confirmed grant. This court just wonders how the objector could have sold two acres of Plot 663 when it had been agreed with 1<sup>st</sup> petitioner's husband that the said land belonged to Joseph Mutahi Kimani, the 1<sup>st</sup> petitioner's husband. In my view, the sales go to confirm that no other property existed that the deceased's children had shared. It seems that the objector and 1<sup>st</sup> petitioner had agreed on the sales made to 3<sup>rd</sup> parties.

#### **How the estate should be distributed?**

Article 27(4) of the Constitution prohibits any form of discrimination on account race, sex, marital status, social origin, colour, age, e.t.c. Section 29 of the Law of Succession Act describes dependants of the deceased as children and it does not draw a difference between male or female children and so whether girl or boy, married or unmarried, all are equal when it comes to distribution of a deceased's estate. I agree with the decision of J. Gikonyo in the matter of Estate of M'Ngarithi M'miriti alias Paul M'Ngarithi M'Miriti (deceased) [2017] eKLR, regarding discrimination of daughters in inheritance, the court said:

***"From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African Society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the Constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when Rono v Rono [2008] 1 KLR 803 delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases – and the number is rising by the day as courts implement the Constitution – which states categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the Constitution. More specifically, I am content to cite the proclamation by the Court of Appeal in the case of Stephen Gitonga M'Murithi v Faith Ngiramurithi [2015] eKLR that:"***

In the end, I find that since the PM's Court, had no jurisdiction to hear this matter, the proceedings before the subordinate court were null and void and the grant issued therein on 3/2/2010 is hereby revoked and cancelled.

The objector and 1<sup>st</sup> petitioner are hereby appointed administrators of the deceased's estate. In light of my judgment above, the deceased's estate will be distributed a fresh under Section 38 Law of Succession Act, and Plot 663 Mawingo Salient will be shared equally between the objector and the 1<sup>st</sup> petitioner.

In the end, the court makes the following orders:

**(1) The SPM's court lacked jurisdiction to hear and determine this cause;**

**(2) The deceased's estate comprises of Nyandarua/Mawingo Salient/663 measuring 3.9 HA (9.637 acres);**

*(3) The grant issued to the 1<sup>st</sup> and 2<sup>nd</sup> petitioner on 3/2/2010 is hereby revoked and certificate cancelled;*

*(4) Fresh grant is issued to the 1<sup>st</sup> petitioner and the objector;*

*(5) The 1<sup>st</sup> petitioner and objector will share the deceased's estate equally, that is, 4.8 acres each;*

*(6) Each party may then transfer to the 3<sup>rd</sup> parties whatever they have sold to them from their respective portions;*

*(7) A Government Surveyor do within 90 days, survey the land and distribute the land equally;*

*(8) This being a family dispute, each party do bear their own costs;*

**Dated, Signed and Delivered** at NYAHURURU this 19<sup>th</sup> day of May, 2020.

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Eric – Court Assistant

Counsel absent though notified