



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCC CAUSE NO. 271 OF 1994

In The Matter Of The Estate Of M'mwari Kithima (Deceased)

JAMES MIRITI M'MAINGI..... PETITIONER

Versus

JENNIFER NGITO KIRIMA.....INTERESTED PARTY

JUDGMENT

1. **M'MWARI KITTHIMA ("the deceased")** died intestate on 15th June 1984. On 21st September 1994, James Miriti Maingi petitioned for letters of administration which were granted. He cited Land Parcel **NKUENE/ L.MIKUMBUNE/ 274** measuring 2.762 Ha as only asset of the deceased. A letter by the chief of Mikumbune Location dated 11th August 1994 listed John Gikunda and James Miriti M'Maingi as his only dependants.

2. On 10th November 2009 Jennifer Ngito Kirima, applied for revocation of grant and orders of inhibition on **L.R NKUENE/ L MIKUMBUNE/ 274**. The grounds cited were that the grant was: issued to a stranger; obtained fraudulently; by means of untrue allegations; and left out lawful beneficiaries. In her supporting affidavit dated 10th November 2009 and supplementary affidavit she averred inter alia that the deceased had six daughters;

- a) **Jennifer Ngito Kirima**
- b) **Grace Muthoni Mutonga**
- c) **Florence Mwari**
- d) **Sarafina Mucece**
- e) **Lydia Ncoro**
- f) **Jenicio Kanyamu (deceased)**

3. Further, she stated that after the demise of their father they continued to cultivate their land but were not in a hurry to file a succession cause since there was no dispute. However, when they decided to file, they found out that the petitioner had fraudulently and in secret obtained letters of administration and a certificate of confirmation of grant issued to him (marked JKM3) on 20th May 1996. She claimed that the petitioner herein has no relations with the deceased family, was not adopted by the deceased and was not therefore a dependant of the deceased. They reported the matter to the district commissioner who advised them to file a complaint with the land disputes tribunal. The tribunal found that the petitioner was not entitled to the estate (Marked JNK 4). They learnt however that the Land Disputes Tribunal has no jurisdiction on the matter.

4. According to the applicant, the petitioner entered into the parcel in 1980 after he approached their father seeking a temporary place to stay and cultivate. He cultivates on 3 acres while Jennifer Ngito and her sisters use the rest. When their father died the petitioner refused to relocate to his other land at NKUENE/MIKUMBUNE. Due to the fact that the petitioner was living near their father he was able to acquire his ID, bank account pass book and a burial permit through a chief who was interdicted due to corruption claims.

5. In his replying affidavit dated 9th February 2010 and further replying affidavit dated 29th March 2010 James Miriti M'Maingi stated that he lived on the suit land since 1973 and the deceased had adopted him as his son, since he did not have a son. He performed all the rituals on adoption. The petitioner stated further that the deceased built a house for him on the said land, paid dowry on his behalf and before his death bequeathed the said land to him. Thereafter he called his daughters and informed them that he was leaving the land to him and they were free

to go home and cultivate with the petitioner's consent. Additionally, he argued that there were people who wanted to buy the piece of land and they are pushing the applicant into getting it.

6. He continued; that the chief of the area who was aware of the facts gave him a burial permit and a letter to file a succession. He contended that he alone buried the deceased and the applicant did not attend the funeral. According to him, the succession cause was applied for openly and gazzeted but the applicant did not file any objection. He also challenged the decision by the tribunal vide HC Misc Appl. No. 47 of 2009.

7. The petitioner sated further that he has cultivated, has zero grazing cattle, connected piped water and his children also have their houses on the disputed piece of land. He claimed that the deceased died 25 years ago and neither the applicant nor her sisters have attempted to evict him.

8. This application was heard vide *viva voce* evidence. **OW1 Jennifer Ngito Kirima**, reiterated what she averred in her affidavits. She however informed the court that the review the petitioner claims he applied for was quashed. She stated that Miriti only farms on one acre. They asked him to move from their deceased property after his death but he reused saying that daughters could never inherit. She said that the only reason they did not file a suit is because of the lack of money and it was the same reason they did not give their father a deserved funeral. She also denied that their father called them to inform them that he had gifted the land to the petitioner.

9. **OW2 Lydia Nchoro** supported the testimony by Jennifer Ngito and added that she was the one who was taking care of the deceased before his death because she was married nearer home and she was the one who discovered that her father had passed on. She said that, during the deceased lifetime he had asked the petitioner not to build any structures since he was not there to stay. The petitioner was already married before he came to live on the deceased's land and it is not true that their father paid dowry for him.

10. **OW3 Julius Mwambia** testified and told the court that Jennifer Ngito was his mother and that the deceased was his grandfather. He recalls that the deceased lived alone and that it was his aunt that used to care for him. When the deceased died he dug his grave and buried him and on that day all his aunties and cousins were present.

11. **PW1 M'Imayara M'Ituota** testified and told the court that he knew the deceased on the basis that he was his village mate. That the deceased only had girls and according to meru custom property of a person with girls only was inherited by the brother or step brothers of the deceased. He witnessed a ceremony where the petitioner slaughtered a goat for the deceased and thereafter he was given the suit land. He further told the court that he knew the father of the petitioner called koruru and that the father of the deceased was called kithima who were brothers. According to him the petitioner should inherit the suit land because he is the deceased's name sake and he took care of him until he died.

12. **PW2 James Miriti M'Maingi** testified and adopted in evidence the affidavits he swore on 9th February 2010 and 29th March 2010. Additionally, he admitted that his father had land but did not know the size. He agreed with John Gikunda that since he was adopted he would not claim land from his father.

13. **PW3 Bernard Muthia Mariene** testified and adopted his affidavit dated 29th March in evidence. He averred that he has been a resident of Mikumbune area even before he became chief in 1993. That he has never been interdicted, suspended nor dismissed from his job. He retired normally as indicated by the letter of retirement (marked BMM3). He knew the deceased before his death and knew the petitioner as the adopted son of the deceased. After the death of the deceased the petitioner came for a letter to file the succession cause and he visited the land to ascertain that he was entitled to the land and also consulted the elders on the same. He denied that he was bribed to write the letter and the burial permit was issued before he became chief. He also knew that the deceased had daughters who were married and none was living at home at the time of the deceased's death.

ANALYSIS AND DETERMINATION

14. Upon careful consideration of the applications, affidavits, submissions and the record, the following emerge as the issues for determination by this court;

1. *Whether the petitioner is an adopted son of the deceased*
2. *How should L.R NKUENE/ L MIKUMBUNE/ 274 be distributed*

Adopted son

15. The petitioner in his affidavits as well as oral submissions claimed that he was adopted by the deceased through an adoption ceremony of Meru custom where he slaughtered a goat for the deceased. He called **PW1** in support and testified to have attended the said ceremony. However, the applicant denied those claims and stated that their father neither invited them for such a ceremony nor inform them of his intention to adopt the petitioner. The petitioner claims that the deceased adopted him because he had no sons and he wanted him to inherit his land. According to *The Law of Succession by Eugene Cotran* at pg 34, in Meru customary law women were not allowed to inherit land. But of significance is that the deceased herein died in 1984 which was after the enactment of the Law of Succession Act chapter 160 Laws of Kenya. There is new dawn; discrimination of daughters in inheritance is completely prohibited by the Constitution. It never was sanctioned by the retired Constitution or cap 160. See **Rono vs. Rono**. He therefore has the burden of showing he was an adopted son of the deceased within the meaning of child under Section 3(2) of the Law of Succession Act to wit:-

“(2) References 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.”

16. I wish to learn more whether such adoption of an adult for purposes of disinheriting the daughters of the deceased should receive validation by the courts of this era of non-discrimination on the basis of gender or status. See article 27 of the Constitution. That aside, the petitioner has not proved that he is a child of the deceased by reason of informal adoption. He did not lay succinct evidence before court to show that the deceased expressly recognized or accepted him as his adopted child or voluntarily assumed permanent responsibility over him. He only provided scanty details of a goat he allegedly slaughtered for the deceased. He did not provide details of the ceremony, how it was conducted and the significance of the ceremony. Evidence has it that he was already married when he was invited to cultivate the land of the deceased. It was his own evidence that the deceased told him that should his daughters come back or wish to cultivate the land they should seek for his permission. That is not consistent with the claim that the deceased bequeathed the land to him absolutely. Therefore I find that the Petitioner is not an adopted son of the deceased for purposes of the law of Succession Act.

Distribution

17. On distribution, this court shall be guided by Section 38 of the Law of Succession Act which provides;

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

18. Although the petitioner is not an adopted son of the deceased, I note that the deceased allowed him to till part of his land. And, also that the petitioner and his children have lived on the disputed piece of land for many years. In the circumstances, it would be an injustice to chase him away from land. The applicants also recognized these facts and in their submissions and proposed to give him 1 acre. This is quite fair. I so find.

19. Consequently, I make the following orders:-

- 1) **The grant of letters of administration be issued to the petitioner is hereby revoked;**
- 2) **A new one shall be issued to both the petitioner and the applicant as joint administrators of the estate of the deceased.**
- 3) **The estate shall be distributed as follows;**

NKUENE/ L.MIKUMBUNE/ 274

- I. James Miriti M’Maingi - 1 Acre**
- II. Jennifer Ngito Kirima - 1.16 Acres**
- III. Grace Muthoni Mutonga - 1.16 Acres**
- IV. Florence Mwari - 1.16 Acres**
- V. Sarafina Mucece - 1.16 Acres**
- VI. Lydia Ncoro - 1.16 Acres**

- 4) **The grant issued herein is confirmed in the foregoing terms.**
- 5) **In the circumstances of the case, I order each party to bear own costs.**

Dated, signed and delivered in open court this 21st day of January, 2019

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F. GIKONYO

JUDGE

In presence of

Rimita for interested party

Mwirigi for E.G Mwangi for

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F. GIKONYO

JUDGE