



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 289 OF 2003

In The Matter Of The Estate Of Saverio Chabari Gachiu (Deceased)

MIRITI CHABARI PETITIONER

VS

GLADYS NYAI CHABARI RESPONDENT

ROSEMARY MUCECE ... INTERESTED PARTY

JUDGMENT

1. **ZAVERIO CHABARI GACIU (“the deceased)** to whom this Succession Cause relates, died on 28th November 1978. Through the Chief’s letter of introduction dated 7th August 2003 he stated that the deceased was survived by the following:

First House

1. Ncoro Chabari - Wife (deceased)
2. Karimi Clement - Daughter Married

Second House

1. Mwaromo Chabari - Wife (deceased)
2. Ncoro Munyua - Daughter Married
3. Mbae Chabari - Son (deceased)
4. Munyange Kwiriga - Daughter Married

Third House

1. Kanugu Chabari - Wife (has no children and she remarried)

Fourth House

1. Nyai Chabari - Wife
2. Miriti Chabari - Son
3. Mucece Mukindia - Daughter Married

The petitioner in the petition stated that the deceased had the following assets: Land Parcel No. ABOGETA/U-CHURE/239 and Land Parcel No. ABOGETA/ L. CHURE/606. The petitioner was issued with the grant of letters of administration intestate on 24th November 2003.

2. On 27th May 2005 he filed summons for confirmation of grant. Gladys Nyai Chabari vide her replying affidavit sworn on 8th February

2006 opposed the way the distribution was made by the petitioner. She accused the petitioner of omitting some of the beneficiaries from the estate of the deceased. The omitted beneficiaries included **Kinyua Chabari** (son), **Jacinta Kajuju** and **Charity Wanja** daughters of the deceased who are married. She also stated that the petitioner has sold out the estate to strangers. She suggested that the estate be distributed as follows:

ABOGETA/U-CHURE/239 measuring 4 ½ ACRES

- a) Gladys Nyai - Balance
- b) Kinyua Chabari - 3 Acres

ABOGETA/ L- CHURE/606

- a) Miriti Chabari - Whole

3. On 11th July 2005 grant letters of administration intestate were issued to Miriti Chabari and Gladys Nyai Chabari. Kinyua Chabari in his further replying affidavit sworn on 25th March 2006 supported the mode of distribution suggested by Gladys who is his mother. He averred that his mother and him have settled in Abogeta/U-Chure 239 and have constructed houses while the petitioner lives on land parcel No. Abogeta/L-Chure/606. He deposed further that the petitioner has interfered with his developments on land parcel No. Abogeta/L-Chure/606 where there are 200 coffee trees and 300 banana stumps of which the petitioner has denied him access. The petitioner has further interfered with the estate by selling out the land to the church known as KPCK and one Emily Kiacia Mbui with intention of defrauding the beneficiaries.

4. The petitioner in his further supporting affidavit sworn on 2nd February 2007 deposed that the respondent lied as some of the children are not the children of the deceased especially **Kinyua Chabari**, **Jacinta Kajuju**, **Charity Wanja** and **Murithi (deceased)**. The four are fathered by one M'Irambu from whom they should get a share. He asserted that the bona fide beneficiaries of the deceased are: **Gladys Chabari** (widow), **Miriti Chabari** (son), **Karimi Clement** (daughter married), **Ncoro Munyua** (daughter married) and **William Mbae** (son deceased). For him he proposes that the estate be distributed as follows:

ABOGETA/U-CHURE/239 measuring 4 ½ ACRES

- a) Gladys Nyai jointly with Kinyua Chabari - 1 acre
- b) Miriti Chabari - balance

ABOGETA/ L- CHURE/606

- a) Miriti Chabari - Whole

5. The respondent filed an application by way of chamber summons dated 27th September 2011 pursuant to **Section 76 (a), (b), (c), (d) (ii) of CAP 160 Laws of Kenya and Rule 44 of the Probate and Administration Rules and all other enabling provisions of the law**. She sought among other orders that the Honorable Court be pleased to revoke and/or annul the grant issued on the 24th November 2003 to Miriti Chabari and to be granted leave to file objection proceedings and cross petition out of time. The grounds upon which her application is based on are in the application and her supporting affidavit sworn on 27th September 2011. She reiterated what she had stated earlier. This application was opposed vide the replying affidavit of Miriti Chabari sworn on 23rd March 2012.

6. This matter was canvassed by way of written submissions. The petitioner submitted that before the deceased died he shared out his estate. Regarding Abogeta/L-Chure/606 he gave Mbae William 3 acres and him 3 acres. Concerning P/No. Abogeta/U-Chure/239 he was to get 4 acres and William was given the balance of 4 acres. His brother William was given his inheritance by their father prior to his death. He affirmed that he has already given his mother Gladys the 1 acre which she expressed should be given to Kinyua Chabari.

7. The Interested Party who holds limited grant of letters of administration *ad litem* with regard to the estate of Gladys Nyai Chabari, submitted that before the deceased died he had divided his property among his beneficiaries whom some had already processed their titles. The 2nd house got land parcel Abogeta/U-Chure/239 measuring 4 ½ acres and Abogeta/L-Chure/606 measuring 3 acres. Upon getting their share from their father, the 2nd house agreed that the petitioner herein should relocate to land parcel Abogeta/L-Chure/606 where he lives to date. Gladys and the rest of the petitioner's siblings were left in land parcel Abogeta/U-Chure/239 which they have intensively developed.

8. It was claimed that the petitioner filed the cause secretly where he sought to distribute the two parcels of land to himself and his sons. He began to threaten their mother and his siblings claiming that they are not children of the deceased apart from her. Since he claims so he ought to prove for he who alleges must prove. They cited Section 107 of Evidence Act CAP 80 of the Laws of Kenya and the case of **Sebastiano Mugo M'rewa v Peter Kaumbuthu M'rewa [2016] eKLR**.

ANALYSIS AND DETERMINATION

9. Upon careful perusal of the applications, affidavits, submissions and the record, I note that, first and foremost, the application that the respondent's application dated 27th September 2011 related to revocation and or annulment of the grant issued to the petitioner on 24th November 2003. Thereafter, a new grant was issued on 11th February 2005 to the petitioner and respondent as joint administrators of the

estate. Thus the application has been overtaken by events and is dismissed so that confusion on its fate is avoided. However, it seems that the respondent is now deceased. In normal circumstances the powers of administration would vest in the surviving administrator. But, given the circumstance of this case and in the best interest of all the beneficiaries, I exercise my discretion under section 66 of the Act and hereby appoint Kinyua Chabari as joint administrator. Accordingly a fresh grant shall be issued in the names of the petitioner and Kinyua Chabari. It is so ordered. Therefore, outstanding issue for determination before this court is distribution of the estate of the deceased.

Distribution

10. Before distributing the estate, the court must ascertain the estate and the rightful beneficiaries thereof. The respondent, mother of the petitioner, affirmed that the petitioner left out his siblings **Kinyua Chabari, Jacinta Kajuju, Charity Wanja and Murithi (deceased)**. The petitioner stated that his said siblings are fathered by one M'Irambu and not the deceased. He stated that the matter was tabled before the clan elders and in their finding they were convinced that Gladys had three husbands and had left the deceased along time and got remarried.

11. I have gone through the proceedings of the meeting the family held on 19th August 2005. The respondent stated that she did leave the deceased and came back. However, it is not certain who M'Irambu was to her. Furthermore, the paternity of the children was not quite established. In the Chief's letter of introduction he stated that Nyai separated from the deceased in 1954 but later joined him in 1967. From the place she was from she came back with the following children: Kajuju, Kinyua, Murithi (deceased) and Wanja. It was claimed that in the deceased's will he requested his biological son Miriti Chabari to give a certain measure of land to his half brother Kinyua.

12. This court being a court of law it decides cases on the evidence placed before it. The petitioner alleges that his siblings have a different father and according to the law he who alleges must prove. See **Section 107 of the Evidence Act**. Apart from the proceedings and Chief's letter the petitioner has not provided this court with any evidence to show that his siblings apart from the Interested Party are not children of the deceased. There is no evidence to show that when his father separated with the deceased his siblings had not been born. Consequently, the allegations made by the petitioner do not therefore hold sway. They are rightful beneficiaries of the estate of the deceased.

Assets of deceased

13. Concerning the assets of the deceased, parties agree that the estate comprise in land parcel Abogeta/U-Chure/239 measuring 3.096Ha and Abogeta/L-Chure/606 measuring 3 Acres. P/NO. 239 measures 3.096 Ha, which is approximately 7.65 acres; but the parties seem to be distributing only 4 ½ acres of the parcel. This begs the question; what about the other acres. Are the parties not distributing it because it is being held by William as alleged by the petitioner or by the 2nd house as stated by the Interested Party or was the parcel of land sold as alleged by the respondent? Regarding P/No. 606 measures 1.22Ha, which is 3 Acres; it is a subdivision of P/No. 454. According to the petitioner the deceased gave him and his brother William 3 acres each. Since this parcel was part of subdivision is the other part the one held by William?

14. This issue raises more questions than answers. However, I note that the deceased died in 1978 which is quite a long time ago and both parties have stated that the deceased divided his estate and shared it partially. Perhaps this explains the seeming lacunae as the deceased made certain inter vivos settlements in favour of some beneficiaries. In law, such gifts inter vivos are never part of the estate, except they are taken into account in determining the ultimate entitlement of the donee under section 42 of the Law of Succession Act. Of significance also is that the dispute is only amongst members of the fourth house. No other beneficiary has raised any concern or put forth a claim on the lands in dispute. Therefore, I will decide the case on the basis of the material before me.

Distribution

15. The petitioner has proposed the estate to be distributed as follows:

ABOGETA/U-CHURE/239 measuring 4 ½ ACRES

a) Gladys Nyai jointly with Kinyua Chabari - 1 acre

b) Miriti Chabari - balance

ABOGETA/ L- CHURE/606

a) Miriti Chabari - Whole

16. The respondent suggested that the estate be distributed as follows:

ABOGETA/U-CHURE/239 measuring 4 ½ ACRES

a) Gladys Nyai - Balance

b) Kinyua Chabari - 3 Acres

ABOGETA/ L- CHURE/606

a) Miriti Chabari - Whole

17. Both parties agree that Miriti Chabari should get No. 606 whole. I grant him. In light thereof, I find that Miriti is being selfish by giving his mother and brother only one acre yet he has the whole of No. 606. Accordingly, and as Gladys and Kinyua expressed satisfaction if they receive No. 239, I so grant them. Consequently, the estate of the deceased shall be distributed as follows:

ABOGETA/U-CHURE/239 measuring 4 ½ ACRES

a) The estate of Gladys Nyai

ABOGETA/ L- CHURE/606

b) Miriti Chabari - Whole

18. As these proceedings involve close family members, I order each party to bear own costs. It is so ordered.

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

F. GIKONYO

JUDGE

IN PRESENCE OF

Mwiti for M/S Aketch for objector

M/s Kiome for petitioner – absent

F. GIKONYO

JUDGE