



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 248 OF 2003

IN THE MATTER OF THE ESTATE OF M'MUGAMBI M'IMANYARA (DECEASED)

M'MBOGORI M'MUGAMBI

JUSTUS MBAYA M'MUGAMBI.....PETITIONERS

VS

GEOFFREY MUGAMBI

FREDRICK MWORIA.....OBJECTORS

AND

MARTIN MWENDA.....1ST PROTESTOR

NICHOLAS MUGAMBI.....2ND PROTESTOR

JANE WORUU MUGAMBI..... 3RD PROTESTOR

RULING

[1] **M'MUGAMBI M'IMANYARA ("the deceased)** to whom this Succession Cause relates died on 14th October, 1985. Through the chief's letter of introduction dated 18th July 2003 it was stated that the deceased was survived by his 11 sons: **M'Mbogori M'Mugambi, Muthuri M'Mugambi, Samuel M'Ikiara M'Mugambi, Fredrick Mworia, Justus Mbaya, Stanley Ntiritu M'Mugambi, Geoffrey Mugambi, Joseph Meme Mugambi** (deceased), **Richard Muthee Mugambi, David Kinuu** and **Julius Kimaita**. The petitioners petitioned for the letters of administration where they stated the deceased's asset as ABOTHUGUCHI/KITHIRUNE/1363 measuring 18 acres.

[2] On 17th September, 2003 the petitioners were issued with the grant of letters of administration intestate. An objection and cross-petition dated 15th October 2003 was raised by the objectors. Thereafter, two protests were filed vide affidavit of protest by Janet Woruu Mugambi and Stanley Ntiritu M'Mugambi sworn on 15th April 2009 and 16th April 2009 respectively. Stanley however withdrew his protest.

[3] Nevertheless, Jane deponed that the petitioners have their own pieces of land but have an intention of grabbing her portion which of 3 acres which was left to her by her father even though still in his name. That the petitioners have not indicated that before the death of the deceased he had sub-divided his only remaining land to his landless children because the deceased had registered some of his portions of land to the petitioner during adjudication. Thus, the petitioners will not administer the estate fairly. On 26th October 2009 the court was informed of the death of the 1st petitioner. It revoked the granted and issued a fresh grant to be issued jointly in the names of Justus Mbaya Mugambi and Fredrick Kibiti Mworia.

[4] Subsequently Fredrick sought to have the grant confirmed vide his application dated 10th November 2009 on the basis of the distribution laid down in his affidavit sworn on 16th November 2009. He deponed that the deceased had four wives and during the adjudication period he registered various parcels of land in the names of his 1st sons of each house except his mother's house because they had differed at that time.

[5] The first house of Sarah M'Mugambi, the deceased gave M'Mbogori Mugambi 7.70 Acres (*Abothuguchi/Kithirune/352 green card*

'FKMII'). The second house of Ciokigundi M'Mugambi he gave Justus Mbaya 4.61 Ha (*Abothuguchi/Kithirune/123 green card 'FKMIII'*). The third house of Rebecca Mugambi he gave Stanley Ntiritu 3.92 Ha (*Abothuguchi/Kithirune/1125green card 'MKMIV'*).

[6] Him and his brother Geoffrey Mugambi bought 2 Acres and 4 Acres respectively from the deceased in 1978 and their brother Justus Mbaya bought 0.44 Ha (*sale agreements 'FKM VII and VIII' and green card 'FKM IX'*). Though Justus Mbaya was given by the deceased Nturukuma/13 comprising of 2 acres and Plot No. 1530 at Nturukuma. Consequently, the remaining estate should be shared among the children of his mother's house Ruth Mugambi and the 4th house of Muthoni Mugambi whose son is Richard Muthee Mugambi.

[7] The estate be shared 5 acres each to him, Geoffrey Mugambi and Richard Muthee and the balance be given to Jane Woruu Mugambi who is divorced. The deceased had already moved the Land Control Board for purposes of sub-dividing and transferring it to him and his other siblings (*'FKMI'*). The deceased had also deponed so in a written will before an advocate (*'FKM X'*).

[8] This was opposed vide the affidavit of protest against confirmation of grant sworn by Justus Mbaya on 8th December 2009. He affirmed that he and M'Mbogori Mugambi obtained their parcels of land on their own and the same is not land held in trust for any other person. That the plots within Nturukuma were acquired by him without his father's assistance. He asserted that the purported agreements and will are of no relevance and was declared of no consequence in litigation involving his siblings and the deceased (*'JMMII'*). He proposed that the estate be distributed as follows:

Land Parcel No. Abothuguchi/Kithirune/1363 measuring 7.68 Ha:

1. Justus Mbaya M'Mugambi - 1 ½ Acres
2. David Kinuu M'Mugambi - 2 Acres
3. Muthuri M'Mugambi - 2 Acres
4. Erick Mugambi & Brothers - 2 Acres
5. Murithi Kirimi Mbogori - 1 ½ acres
6. Martin Muriuki Mugambi - 2 Acres
7. Richard Muthee Mugambi - 2 ½ Acres
8. Fredrick K Mworua Mugambi - 1 ½ Acres
9. Geoffrey Mugambi - 1 ½ Acres
10. Samuel M'Ikiara M'Mugambi - 1 ½ Acres

[9] In his reply to the protest Fredrick Mworua in his further affidavit sworn on 8th January 2010 opposed all the contentions made and avowed that Justus Mbaya did not disclose how he arrived at the mode of distribution. Furthermore, Justus got 2 acre plot and a commercial plot from the co-operative coffee share which used to belong to the deceased when the deceased sold to him the coffee farm at Kaguma known as ABOTHUGUCHI/KITHIRUNE/1215 (*'FKM1 and 11'*).

[10] The protestors filed their protest vide the affidavit of protest of Martin Mwenda sworn on 3rd November 2010 where they contested to the petitioner's mode of distribution. They deponed that they are grandchildren of the deceased and used to live and cultivate on a portion on the deceased's estate. After his death they were forcibly evicted by the 2nd petitioner, David Kinuu and Joseph Meeme of which David Kinuu utilizes their portion. Consequently, they have no permanent place of abode as they survive as casual laborers.

[11] This matter was heard vide *viva voce* evidence. **PW1 Geoffrey Mugambi** reiterated what he had been earlier been stated. He stated that his father, the deceased, had 5 wives and 15 children are:

1. Ruth M'Mugambi

- a) Samuel M'Kiara
- b) Evangline Ntimi
- c) Fredrick K. Mworua
- d) Geoffrey Mugambi

2. Sara M'Mugambi

- a) M'Mbogori M'Mugambi

b) Muthuri M'Mugambi

3. Ciokiguudu M'Mugambi

a) Justus Mbaya Mugambi

b) Joseph Meme Mugambi

c) David Kinuu Mugambi

4. Muthoni M'Mugambi

a) Richard Mugambi

5. Rebecca M'Mugambi

a) Stanley Ntiritu

b) Catherine Kathuni

c) Hellen Mkuene

d) Jane Wooru

e) Julius Kimaita Mugambi

[12] He avowed that the petitioner was not the proper person to petition for the grant because their interest had been catered for during the deceased's lifetime. The deceased distributed his assets as per his houses. He catered for the house of Sarah M'Mugambi through M'Mbogori M'Mugambi, house number three of Ciokiguudu M'Mugambi through Mbaya Mugambi and the house number five through Ntiriti M'Mugambi of which they were to cater for their brothers in those houses.

[13] However, the first and fourth houses were not catered for. When the deceased was in his last days he gave the land to his daughter Jane Wooni, the protestor. By the time the deceased was dying he had indicated how he wished his estate to be shared. Land at Abothuguchi/Kithirune/1215 measuring 0.44 Ha and Nanyuki/Mariara/Block 8 measuring 0.09 Ha belonged to the deceased but are now under the name of the Justus Mbaya. In respect of settlement scheme Ntirimiti/74 measuring 2.7 HA is in the name of Muthuri M'Mugambi of which the land never belonged to the deceased at any one time

[14] **PW2 Fredrick K. Mworia** he stated that he agreed with the evidence stated by **PW1** and ascertained that he does not agree with the court's judgment as the decision was overturned by the court of appeal for the courts did not deny him his right of inheritance. He stated that the initial proprietor of land Abothucughi/Kithirune/1215, Matura/Nturuma/13 and Mutura/Nturuma/1530 was the deceased. Today the properties are registered in the name of Justus Mbaya. He affirmed that the deceased did not transfer the said properties to him for he did so fraudulently. Determination of the court of appeal has not been implemented. The land dispute tribunal proceedings were not challenging the court of appeal decision. The petitioners in this court refused to have order of court of appeal executed. The land that was decided should be given to his brothers by the court of appeal he is satisfied with the 5 acres. As for his deceased's brothers children they are entitled to their father's share.

[15] **PW3 Stanley M'Mugambi** he stated that the deceased called him together with Ayub M'Muindia in a year he cannot recall and told them how he wanted his land to be shared out. He told them he had shared his land amongst his houses that each of the first son of each house was to be registered to hold the land as joint owner and trustee for his siblings. The deceased gave the first born of each house the land during the adjudication process respect to three houses. But the deceased later gave the children of the house of Ruth and Muthoni their portion and they went to the Land Control Board consent was given, transferred to them and title deeds issued. Jane Wooru is supposed to get land from a portion of land the deceased left in his name which is 3 acres and the only land left in the name of the deceased.

[16] **PW4 Elijah Mbaya M'Ringera** he told the court that his sister is married by Stanly Ntiritu who is now deceased. He affirmed that Sarah's house, Ciokugunda's house and Rebecca's house had been catered for. But the other two houses of Ruth and Muthoni were not. That the deceased before his death gave Richard Muthee 5 acres, Fredrick Mworia and Geoffrey Mugambi get 5 acres each. The remaining 3 acres should be for Jane Wooru. The deceased loved Wooru because she was attending to the deceased.

[17] **PW5 Jane Wooru Mugambi** agreed with the evidence presented in court and prayed that the same be adopted by the court. She stated that she does not reside there as she was chased away.

[18] At the close of the objector's case the petitioner gave a sworn testimony. **Justus Mbaya Mugambi** stated that the objectors were not provided for during the lifetime of the deceased as well as he. He does not agree with the objectors' mode of distribution. That the deceased had parcel No. 97 which he divided it and transferred three portions to his three brothers. That is Samuel Mugambi, Fredrick Mworia and Geoffrey Mugambi and he gave them No. 1360, 1361 and 1362 respectively. Then the deceased remained with No. 1363 measuring 18 acres. Thus they should not be given land because they were already given.

[19] He proposes that 2 ½ acres to be reserved for his sisters in the event that anyone of them has to come back home from their matrimonial

homes. His brothers M'Mbogori Joseph Meme and Julius Kimaita's entitlement in the estate should be given to their children. None of his brothers bought land from the deceased for they were given. The evidence adduced by them is false. The land he stays on was not given by his father during adjudication. Geoffrey and Fredrick have been using their 5 acres and have established their homes in their portions.

[20] With regard to land parcel No. 1215 was sold to him by the deceased and that the deceased had no shares with the co-operative.

[21] The issue of determination before this court is how the estate of the deceased herein is to be distributed. To be able to establish two things first, that is who are the beneficiaries and what comprises part of his estate.

[22] Concerning the beneficiaries it is not in dispute that the deceased had five wives, eleven sons and four daughters. As well as the fact that his estate comprises of ABOTHUGUCHI/KITHIRUNE/1363

[23] Although, ABOTHUGUCHI/KITHIRUNE/1363 was part of Civil Case No. 60 of 1984. The plaintiffs in the case were David Kinuu M'Mugambi, Joseph Meeme Mugambi, Julius Kimaita and Muthuri M'Mugambi who had sued the deceased, Geoffrey Mugambi and Fredrick K. Mworria for disentitlement of family land which comprises of ABOTHUGUCHI/KITHIRUNE/1363.

[24] The judgment stated that Abothuguchi/Kithirune/ 97 measuring 24 acres were held by the deceased in trust for himself and each of his children. Members of the clan who had responsible sons were allowed to give the names of their children whom they would like the clan to give land directly. Thus, the deceased gave the names of his three sons who were then given land. They were

- a) M'Mbogori M'Mugambi – Land parcel Abothuguchi/Kithirine/352 (7 Acres)
- b) Justus Mbayya - Land parcel abothuguchi/Kithirine/123 (4.61HA)
- c) Stanley Ntiriti - Land parcel No. Abothuguchi/Kithirine/125(3.92 HA)

The court held that the land was not given to the them by their father but it acknowledged that they had indeed be catered for.

[25] The deceased then subdivided parcel Abothuguchi/Kithirune/ 97 into four portions which are Nos. 1360, 1361, 1362 and 1363. He then allocated them as follows:

- a) Samuel M'Kiara - Land parcel No. 1360 (2 Acres)
- b) Fredrick Mworria Mugambi - Land parcel No. 1361 (2 Acres)
- c) Geoffrey Mugambi - Land Parcel No. 1362 (2 Acres)
- d) The deceased - Land Parcel No. 1363 (18 Acres)

The deceased then further subdivided Land Parcel No. 1363 into four portions where he distributed it as follows:

- a) Fredrick Mworria - Land Parcel No. 1624 (5 Acres)
- b) Geoffrey Mugambi - Land Parcel No. 1625 (5 Acres)
- c) Richard Mugambi - Land Parcel No. 1626 (5 Acres)
- d) The deceased - Land Parcel No. 1627 (3 Acres)

[26] The arguments raised by the objectors were raised as well in before the court. They sought to support the distribution above on the grounds that the deceased left a will. This argument was disregarded and the learned judge S. O. Oguk J held that:

“For reason given, I disregard the WILL of the deceased dated 20th January, 1983 (Exhibit 1) and hold that as far as possible, the famly land registered in his name as land parcel number ABOTHUGUCHI/KITHIRUNE/1363 should be distributed equally amongst all his sons. He was holding this land in trust for himself and the rest of his family. Although he has now sub-divided the said land secretly and transferred or was in the process of transferring portions thereof to some of his chosen sons, equity will still follow them and hold that they are holding these portions of land as trustees for the other brothers who were not provided for by their father (the 1st Defendant)

Doing the best I can in the circumstances of this case, I hold that the 3rd Defendant, Fredrick K. MWORIA who is holding or was given a portion of family land parcel number ABOTHUGUCHI/KITHIRUNE/1624 measuring 5 acres by the 1st Defendant, is holding this land to the extent of 2 acres as a trustee for the 1st Plaintiff, DAVID KINUU M'MUGAMBI. The interest of the said FREDRICK K. MWORIA on this land in my judgment is only limited to 3 acres and he should transfer the 2 acres thereof to DAVID KINUU M'MUGAMBI.

Similarly, I hold that GEOFFREY MUGAMBI who is holding or was given a portion of the family land, parcel number

ABOTHUGUCHI/KITHIRUNE/625 measuring 5 acres hold this land to the extent of 2 acres as a trustee of 2nd plaintiff, JOSEPH MEME MUGAMBI. His interest in this land in must Judgment is limited to only 3 acres and he should transfer 2 acres thereof to JOSEPH MEME MUGAMBI.

I further hold and declare that the 1st Defendant, M'MUGAMBI M'IMANYARA (bow deceased), who held the portion of the family land, parcel Number ABOTHUGUCHI/KITHIRUNE/1627, measuring approximately 3 acres in his name, holds the said parcel of land as a trustee for each of his sons, JULIUS KIMAITA and MUTHURI MUGAMBI (3rd & 4th Plaintiffs) to the extent of 1 ½ acres for each of them. This parcel of land shall be sub-divided into two portions of 1 ½ each and transferred to each of the 3rd and 4th Plaintiffs.

Each of the 2nd and 3rd Defendants are ordered to sign all necessary documents of transfer to confer title to the 2 acres of land awarded to the 1st and 2nd Plaintiffs in respect of the portions of the land they are holding. Should they or any of them refuse to do so, which I do not think is likely, to happen, then I empower and authorize the Executive Officer of this Court to sign all such documents on their behalf and also on their behalf of the 1st Defendant (now deceased).

For the avoidance of doubt, I state that land parcel number ABOTHUGUCHI/KITHIRUNE/1626 measuring 5 acres which was given to RICHARD M'MUGAMBI, is not affected by this Judgment as he was never a part to this suit and the said portion of land was not one of the parcels of land upon which the Plaintiffs' prayer was based. ”

[27] The defendants in the case appealed in Civil Appeal No. 153 of 1989 at the Court of Appeal at Nyeri which upheld the decision of the High Court.

[28] This decision has not been implemented. The objectors do not refute that this case was in court and reached the Court of Appeal but they are of the view that the judgment had nothing to do with this succession cause because it was a different matter. According to PW2 he testified that he did not agree with the judgment which was overturned by the Court of Appeal. Furthermore, judgment of the court is neither final nor bonding. It should be noted that court orders are orders that should be taken with the utmost seriousness and not to be taken lightly. In the case of Kenya Tea Growers Association Vs Francis Atwoli and 5 Others [2012] eKLR Lenaola J cited the case of Clarke and Others Vs Chadburn & Others [1985] 1All E.R (PC), 211 in which the court observed that:

“I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed, willful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal....even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.”

It is clear that the both the objectors and petitioners seem to have ignored the orders of the court made in Civil Case No. 60 of 1984 and upheld in Civil Appeal No. 153 of 1989. This is because the court already distributed the estate property, ABOTHUGUCHI/KITHIRUNE/1363, of which the parties seem to seek to redistribute again in their own favour disguising it under the umbrella of a succession cause. I acknowledge that the objectors in their submissions seek to distribute the estate according to the judgment that was given by the court. Though that was not their intention when they were arguing their case. This court cannot go ahead and distribute ABOTHUGUCHI/KITHIRUNE/1363 as it does not exist for it has already been distributed. Parties should ensure that they comply with the court order that was issued for their disobedience may be termed illegal.

[29] In addition, the objectors asserted that certain lands in the possession of the Justus Mbaya were originally belonging to the deceased. This was to affirm their stand that Justus should not get a share. It has already been established that the subject matter of this cause has already been distributed of which the objectors are in agreement of vide their submissions.

[30] Accordingly, I am of the view that this cause ought to be dismissed as there is no asset that belongs to the deceased that needs to be distributed.

HON. A.ONG'INJO

JUDGE

RULING DELIVERED, DATED AND SIGNED IN COURT ON THE DAY OF 14th FEBRUARY 2019

In the presence of:-

C/A

Mr. Ringera Advocate for petitioner

Ms Kngu holding brief for Mr Kariuki for 1st and 2nd protester

Mr Ngugi advocate holding brief for Mbaabu Advocate for Objectors.

HON. A.ONG'INJO

JUDGE

Court

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HON. A.ONG'INJO

JUDGE