



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 3 OF 1978**

**IN THE MATTER OF THE ESTATE OF MARETE KIUNGA ALIAS MARETE S/O KIUNGA (DECEASED)**

**JUDITH KAROKI MARETE.....1<sup>ST</sup> APPLICANT**

**GLADYS CHEGE KATHURIMA.....2<sup>ND</sup> APPLICANT**

**-VS-**

**JULIUS MUTHURI MARETE .....RESPONDENT**

**JUDGMENT**

1. The deceased herein **Marete Kiunga** died on 4<sup>th</sup> June 1961. As per the letter of the Chief Upper Abothuguchi Location dated 22nd April 1974 he left behind the following survivors; **Julius Muthuri M' Marete**. He also left behind the following assets; **Abothuguchi/Kithirune/177 & Abothuguchi/ Kithirine/1207**.
2. The petitioner herein filed for the issuance of a certificate of Succession and as the only son of the estate of the deceased. The same was allowed and the estate of the deceased was solely transmitted to him vide Certificate of Succession dated 11<sup>th</sup> April 1978.
3. The objectors filed the Application dated 15<sup>th</sup> September 2015 praying for Orders;
  - a. Spent
  - b. Spent
  - c. That this Honourable Court be pleased to review the Order dated 11<sup>th</sup> April 1978 transferring the land parcels numbers Abothuguchi/Kithirine/177 and 1207 to the respondent/petitioner herein Julius Muthuri M' Marete.
  - d. That this Honourable court be pleased to order the rectification of the register in respect to land Registration No. Abothuguchi/ Kithirine/2907 which is the subdivision of land registration No. Abothuguchi/ Kithirine/177 by cancelling this title and the land reverting back into the name of the deceased herein Marete s/o Kiunga so that this Honourable Court can distribute this parcel to its rightful beneficiaries.
4. In the proceedings on 16<sup>th</sup> September 2015, it was averred that they are daughters of the deceased and that the petitioner secretly filed the petition, concealed material facts and that he never sought consent from the beneficiaries as averred. They also averred that the petitioner chased them away from Abothuguchi/ 2907 and has since subdivided Abothuguchi/Kithirine/177 into Abothuguchi/Kithirine/2906 & Abothuguchi/Kithirine/2907.
5. They also prayed for inhibitory Orders on the estate of the deceased. This Honourable Court on 14<sup>th</sup> October 2015 placed inhibitory orders on Land Parcel No. Abothuguchi/ Kithirine/ 2907.
6. The petitioner also filed an application dated 17<sup>th</sup> August 2016 seeking the discharge of the Orders dated 12<sup>th</sup> October 2015 and the lifting of the caution placed on L.r. No. Abothuguchi/2907. The petitioner also sought to dispense with one (1) acre out of L.r. No. Abothuguchi/ Kithirine/2907 (measuring 16 Acres) for the benefit of his grandchildren who had been chased away from school.
7. This honourable court however through its Ruling dated 12<sup>th</sup> October 2017 found that the petitioner had not exhibited resounding conviction to warrant the removal of the inhibitory Orders and therefore dismissed its application in its entirety.

8. Parties were to then proceed to file their respective statement and the objector's application was to be heard via viva voce evidence.

### **Viva Voce Evidence**

9. Judith Karoki Marete was the first to testify and she relied on her statement dated 30/5/2016, which restated the grounds in their application, as her evidence in chief. She averred that at the time this cause was being filed she was unmarried and was still residing at her fathers (deceased) estate. That she was not listed as one of the beneficiaries nor was she made aware of the filing of this cause. She averred that the land in Abothuguchi/Kathirine/177 was inherited by her father and during that time her father's sisters were not given any piece of the estate. She however stated that she is not aware that under Meru Customs Daughters are not supposed to inherit land and to this end she insisted that it was her father's estate hence she ought to be given a share.

10. In re-examination she stated that the petitioner has since sold the land in Abothuguchi/ Kathurine/177 but has not shared any proceeds.

11. Ow2 Gladys Chege also restated the testimony of Ow1 but also averred that his Son Wilson was adopted by her elder sister Charity Regaria who was granted land by the deceased and the same was equally granted to his son, Wilson. She therefore opposed averment by the petitioner's counsel that his son, Wilson was given land by the deceased. She also claimed that she has been cultivating the land even after being married and that it is only after they asked the petitioner about the titles that trouble started between her and the petitioner.

12. The petitioner testified that he informed everyone before he filed this succession, that this can evidently be seen in the letter by the District Magistrate which summoned everyone through the assistant Area chief before he was issued with the Certificate of Succession. He denied that he ever chased away the objectors from the estate of the deceased but averred that the objectors were married and therefore live in their husbands parcels of land. That the 2<sup>nd</sup> Objector asked him to grant his son, Winston Gachanga a parcel of land and granted him 2 acres of land.

13. In cross-examination he admitted to have taken the whole portion of the estate of the deceased and that he had sold Abothuguchi/ Kathiriene/1207 and has since subdivided 177 to 2606 & 2907 and that he wanted to sell the land for the benefit of his grandchildren. He denied being aware of the land in Nyanyuki and the averments that he had chased the petitioners away from the land.

14. His statement was supported by the admitted statements of Japheth M'Ikiugu, Andrew Mbaya M' Murithi & Winson Gitonga. Japheth M' Ikugu averred that he was the Area Chief of Kithirune Location from 1961 and 1983. That on 24/1978 he received a letter asking him to summon relatives of the deceased herein from the District Magistrate which he did by summoning, Judith Karoki Marete, Gladys Chege, Jenifer Ntimi (deceased), and Charity Regeria (deceased). That at that time the objectors herein were already married but they attended and served the members lunch at the briefing meeting in the year 1978 hence they were fully aware of the succession cause.

15. Andrew Mbaya M' Murithi stated that he is a brother to Naftali Kimathi (deceased) who was the husband to the 1<sup>st</sup> objector. He stated that his late brother lived with the 1<sup>st</sup> objector and after his demise the objector has since resided in the land granted to her by her late brother in Ntharangwe within Kibiricha.

16. Winston Gitonga averred that he is a son to Gladys Ncege and that she used to stay with Charity Regeri (deceased). That her mother had requested the petitioner to grant him land in the estate which he did by granting him two (2). He denied Gladys Chege's allegation that he tilled on the land or that she was chased away by the petitioner in the year 2015.

### **Analysis and Determination**

17. The deceased herein died intestate and before commencement of the Law of Succession Act. The applicant's herein are daughters of the deceased whereas the petitioner herein is the sole son of the deceased. The objector's main claim to the estate is for a share of the deceased estate.

18. The status of the estate is as follows; Abothuguchi/ Kithirine/ 1207 was issued to the deceased on 3.4.1963 and later on transferred to Julius Muthuri M' Marete on 12<sup>th</sup> May 1978 and later to Jacob Murithi Mwiti. As of Abothuguchi/ Kithirine/ 177 the same was equally issued to the deceased on 3.4. 1963 transferred to Julius Murithi M' Marete on 12.5.1978 and later on closed for subdivision on 10<sup>th</sup> December 2007.

19. First it is clear that under Kimeru Custom's daughters of the Estate were not allowed to inherit land. This position is documented in **Restatement of African Law, The Law of Succession, Eugene Contran, Sweet & Maxwell 1969 pg. 30**. The Cause herein was equally instituted on the basis of Section 120 of the Land Registration Act. The applicability of the section 120 was held in **Karanja Kariuki v Kariuki [1983] KLR** as hereunder;

**Customary succession to land in the areas where the land is registered is however the subject of a process dealt with in sections 120 and 121 of the registered land Act and that is what happened here. The registrar was told and satisfied himself, That Simon Kariuki Kirigi owned his Kiambaa land and that he died intestate so he applied to the African Court for determination of their heirs and the court had to decide who was entitled to it, according to the customary law applicable to the deceased proprietor.**

**If that were the end of the matter, then I agree that the African Court should have held that the brothers who were alive on 9 November 24, 1964) the day after Simon Kariuki died) were entitled to equal shares.....**

20. This position was eloquently discussed by Musyoka. J. In **Re Estate of Nduati Mbuthia (Deceased) [2015] eKLR** where the judge explained the legal regime of Succession Proceedings initiated in the 1960s and 1970s as hereunder;

31. There are several judicial determinations on Section 120(2) of the Registered Land Act. The Court of Appeal in *Karanja Kariuki vs. Kariuki* (1983)KLR 209, for example, stated that customary succession to land in areas where land was registered under the Registered Land Act were subject to the process set out in Sections 120 and 121 of the said Act. The process being that the land registrar upon being informed of the death of the proprietor of the land and that he had died intestate, applied to the relevant court to determine the matter on who was entitled to the law according to the Customary Law applicable to the deceased proprietor. The High Court had stated similarly previously in *Mbuthi vs. Mbuthi* (1976)KLR 120, (1976-80) 1 KLR 145, adding that the provision in Section 120 of the Registered Land Act did not preclude the taking out of letters of administration. Other pronouncements on Section 120 of the said Act are to be found in *Simiyu vs. Watambamala* (1985) KLR 852, *Njoroge vs. Mbiti* (1986) KLR 519 and *Gathiba vs. Gathiba* (E&L) 356.....”

21. I have looked at the proceedings. By letter dated 24<sup>th</sup> April 1974 the District Officer North- Imenti Division confirmed that the estate of the deceased was subject to Kimeru Customs. The letter of the District Magistrate Meru dated 24<sup>th</sup> January 1978 summoned the following i.e. Julius Murithi, Julia Kareia (Wife) M’ Kirinia Kiunga ( Brother) M’inoti Gatoro ( Clan Elder), Daniel Nkoroi (Clan Elder), Assistant Chief Japheth M’ Ikiunga. The matter was scheduled for hearing on 9<sup>th</sup> March 1978 when all the persons listed appeared, and by the Consent of the parties the Court held that;

**“With the Consent of the whole of the clan elders the land in Abothuguchi/177 and 1207 are granted to Julius Muthuri”**

22. The Certificate of Succession was granted on 11<sup>th</sup> April 1978. What then is the import of the Certificate of Succession. The import of the same has also been explained in **In Re Estate of Nduati Mbuthia (Deceased) [2015] eKLR** where the learned judge held;

**Was the certificate of succession issued under Section 120 of the Registered Land Act equivalent to a grant of representation? I think not. A grant of representation appoints a personal representative and vests the person so appointed with powers to administer the estate of the deceased with the mandate to eventually distribute it. The certificate of succession envisaged in Section 120 of the Registered Land Act did not appoint a personal representative and the same did not constitute the person named therein as proprietor or the administrator of the estate of the deceased. In holding so I have cognizance of the remarks by Harris J. in Mbuthi vs. Mbuthi that the provision in Section 120 of the Registered Land Act did not bar the taking out of letters of administration.**

23. As to the jurisdiction of this Honourable Court the same was held is found in Article 165 of the Constitution and In **MbuthiVs Mbuthi[1976-80] KLR** held;

**Although, as with section 10 of the Magistrate’s Court, I do not consider that the effect of section 120 of the Registered Land Act is to oust the jurisdiction of this Court, I am satisfied that the intention of the latter section is that the determination of the heirs of a deceased proprietor of land registered under the Act who was subject to customary law should be dealt with in the first instance by the appropriate Court, which in this case is the Magistrate’s Court with the right of appeal, on questions of law to this court.**

24. The Respondent stated that this Court lacks jurisdiction and has relied in the authority held In **Re Estate of Nduati Mbuthia (Deceased) [2015] eKLR**. The case is distinguishable, for the applicant therein sought to revoke the grant in the Succession cause whilst the applicant herein seeks a review of the Orders issued on 11<sup>th</sup> April 1978. This court is competent to determine such request.

25. Having so determined, the proceedings to obtain the Certificate of Succession were instituted under the applicable law at the time. As I have highlighted above that was the prerequisite procedure. The Assistant Chief Kithirine Location at the time has averred to being present in the proceedings.

26. However the daughters of the deceased were not involved and were thus discriminated against in the distribution of the estate. I find footing in the decision made in the decision in**Re Estate of Nduati Mbuthia (Deceased) [2015] eKLR**

**24. Under the Kikuyu Customary Law of intestacy, succession is patrilineal. Devolution is in favour of the male relatives of the deceased. Where a male deceased person is survived by a widow and male and female children, the land devolves upon the sons with the widow being entitled to life interest. Daughters are not entitled to inherit, they play their part in the family or clan in which they married, but it is permissible for daughters who attain the age of marriage but never marry to inherit from their parents. Where the deceased person has daughters only and the said daughters are all married, the property will pass to his brothers or their sons, with the widow having life interest.**

**25. The position stated in paragraph 24 here above is no doubt discriminatory in favour of men and against women. This was however sanctioned by Section 82(4) of the old Constitution. Section 82(1) of the said Constitution states that “... no law shall make any provision that is discriminatory either of itself or in its effect.” Section 82(4) of the said Constitution make a number of exceptions to Section 82(1); it states that:**

**“... Subsection (1) shall not apply to any law so far as that law makes provision ... (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.”**

**26. The coming into operation of the new Constitution, 2010, has radically changed the position, for the new law has outlawed discrimination in all its forms. Article 10 of the Constitution, 2010, states the national values and principles. Article 10(2)(b) includes human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, among the said values and principles. Article 27 of the Constitution, 2010, states the principle on equality before the law and the right to equal protection and equal benefit of the law. It also states that men and women**

**have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. There is also Article 2(4) of the Constitution, 2010, which states that any law, including customary law, which is inconsistent with the Constitution, 2010, is void to the extent of the inconsistency.**

27. It is not in dispute that the petitioner has since sold 5.31 Acres of the estate of the deceased and granted Winston Gitonga 2 acres of the estate. In doing this he never sought to distribute part of the parcel to the daughters of the estate who with the new constitution dispensation and in line with section 2 (2) of the Law of Succession Act ought to be entitled. The applicants have also shown their entitlement by stating that after the demise of the deceased they tilled the land in. They also averred that they were chased away from the deceased estate by the petitioner. They lastly stated that they wish to be granted 3 acres each from the estate.

28. I therefore do find merit in the Applicants application dated 15<sup>th</sup> September 2015 and I move to rectify the certificate of Succession issued to the petitioner herein to the extent that the applicant's herein are also entitled to a share of the estate.

29. The upshot of the judgement is that the register of land in respect to Registration in L.R No. Abothuguchi. Kithiruine/2907 which is a subdivision of Land Registration No. Abothuguchi/ Kithirune/177 be cancelled and the land shall revert back into the name of the deceased herein MARETE S/O KIUNGA.

30. I also do find that since the deceased herein died intestate the said property ought to be divided equally among the beneficiaries of the estate and in line with section 38 of the Law of Succession Act.

31. Reasons whereof as nothing prevents it, I issue a grant of letters of administration to the petitioner and Judith Karoki Marete. I also direct that the estate in Abothuguchi/Kithiruine/177 shall be divided equally amongst the beneficiaries herein i.e. **Judith Karoki Marete, Gladys Nchece Kathurima Julius Muthuri Marete & Estate of Charity Regeria [Deceased]**

**Dated, signed and delivered in open court at Meru this 12<sup>th</sup> day of February, 2019.**

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**F. GIKONYO**

**JUDGE**

In presence of

Kariuki for Mutegi for protestor

Mburugu for petitioner - absent

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**F. GIKONYO**

**JUDGE**