



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 182 OF 1994**

**IN THE MATTER OF THE ESTATE OF GIKUNDA M'RIKANYA (DECEASED)**

**GLADYS KATHUNI.....PETITIONER**

**VS**

**GIKUNDA RINKANYA.....OBJECTOR**

**JUDGMENT**

[1] **GIKUNDA M'RIKANYA** ("the deceased") to whom this Succession Cause relates died in 1964. The petitioner petitioned for letters of administration intestate where it was stated that the deceased was survived by:

- a) Gladys Kathuni - **Mother**
- b) Japhet Kiriimi - **Brother**
- c) Thomas Kimathi - **Brother**
- d) Joseph Kinoti - **Brother**
- e) Lucy Tirindi - **Sister (Married)**
- f) Esther Kanyamu - **Sister (Married)**
- g) Catherine Kairigu - **Sister (Married)**

His asset was listed as **Abogeta/U-Chure/576 (hereinafter 'the Suit Land')**.

[2] The petitioner was issued with the grant of letters of administration intestate on 6<sup>th</sup> December 1994 which was confirmed on 5<sup>th</sup> June 1995. An objection was raised through chamber summons dated 31<sup>st</sup> July 1995 brought under **Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules** where the applicant seeks revocation and or annulment of the said grant.

[3] The objector argued that the cause was filed secretly and by means of untrue allegations. He claimed that the property sought to be distributed is his. Thus, as he is still alive no administration of his estate is possible. The petitioner opposed the objection through her replying affidavits.

[4] This matter was convened by way of *viva voce* evidence. **DW1 Gikunda Rinkanya** testified that he is Gikunda Rinkanya alias Jackson Ikiara, the son of Ikiara M'Torobi. His father had two brothers Rinkanya and M'Mugambi. Rinkanya was married to the petitioner and gave birth to Mugambi and Lucy Tirindi but had no child called Gikunda Rinkanya. He avowed that he did not take the name of the petitioner's son neither is he aware of any of her son by that name. He was even reported to the police and charged for false information to the police and registrar of persons in Meru Criminal Case No. 670 of 1977 of which he was acquitted.

[5] The green card and title deed obtained for the Suit Land states that he is the registered owner of which he used to live in and has built on the land as it was given to him by his father during demarcation. Later the petitioner and her children chased him away. At the moment it is the petitioner who lives on the Suit Land as she entered around 1970s when she moved from Plot No. 194 where they all were living before demarcation.

[6] **DW2 Philis Kajuju M.Rwito** sister of objector's father, M'Ikiara, stated that she is not aware of any child of Gladys called Gikunda. In the family of Kanyua Chobi there is no other Gikunda other than Gikunda Rinkanya. That her father Kanyua Chobi had gathered two parcels of land, one is where Gladys lives and the other is where Mugambi lives. The land at Kathungugi was sub-divided between Mugambi and Gikunda. It was Kanyua Chobi who gave it to Ikiara and Ikiara gave it to his son Gikunda and that is the land which Gladys occupies and has lived there for over 40 years. But Gladys and her children with Rinkanya were not given any land.

[7] **DW3 Igoki Kiara Kanyua** mother of the objector stated that when the objector was born he gave him the name Gikunda. He was named after Kanyua Chobi his grandfather. She testified that after the death of Rinkanya, Gladys was inherited by Ikiara. They were all living in the Suit Land but she left with her children apart from Gikunda to a parcel called Tugua which Shiaru her husband bought. That it is not true that her family has ganged up to take Gladys' land. The latter was supposed to go to another parcel of land which she donated out. She stressed that Gladys was never given the Suit Land by her father-in-law but she gave out the land at Kiraine where she should have stayed.

[8] At the close of the objector's case, the petitioner gave a sworn testimony and called four witnesses. **PW1 Gladys Kathuni M'Rinkanya** stated that her husband was Rinkanya Kanyua Chobi with whom she had four children. At the time of her husband's death her father-in-law Kanyua Chobi had not given her husband land so 6.41 acres was given to his namesake Gikunda, her son with Rinkanya. She buried him at Kathuguchi where M'Mugambi's family is living on as they were all living there at that time. She averred that she did not have a son called Mugambi as alleged. But after her husband's death she got other children in her husband's house and continued to live there.

[9] When she got married to Rinkanya she found Ikiara living in his own house in their father's land. The land was subsequently registered in the name of M'Mugambi and Ikiara moved away to the land in Tugua. She lived with her father in law's land after her husband's death. After gathering she moved to a place she was shown at Kathuguchi the same parcel of land given to Gikunda and that is where she lives up to date. Ikiara moved to Tagua and M'Mugambi lives where Kanyua Chobi lived and where they were all living. She declared that she knows the objector who is the son of her husband's brother Ikiara and is called Jackson Gikunda Ikiara and not Gikunda Rinkanya. She is not aware that his father gave him the name Rinkanya neither does she know why he calls himself so.

[10] **PW3 Lucy Tirindi M'Rinkanya** stated that the deceased was her brother and petitioner is her mother. That the objector is called Gikunda Ikiara and not Gikunda M'Rinkanya. She declared that she was born in the land of M'Mugambi but moved to their land after subdivision. Her grandfather Kanyua Nchobi subdivided his land and gave it to his children, M'Rinkanya, M'Ikiara and M'Mugambi. M'Ikiara left to Tugua and M'Rinkanya to Kathagu and have never left. M'Ikiara has never lived on their land but has only been demanding it because he is called Gikunda but he is not their Gikunda. He is Gikunda M'Ikiara and also called Jackson Gikunda M'Ikiara.

[11] **PW4 Francis Kabubu** stated that the petitioner is his uncle's wife as M'Mugambi was his father. He stated that Kanyua Nchobi had three sons of which he distributed land to and the Suit Land was given to M'Rinkanya's first born son Gikunda M'Rinkanya who was a small boy at the time. The land was not registered in the mother's name because customary law did not allow women to inherit. The deceased was buried on plot No. 194 because that is where they were living and had not yet moved out of the land. After adjudication Kanyua Nchobi gave M'Ikiara No. 240 measuring 7 ½ acres, M' Mugambi his father No. 194 measuring 6 acres and M'Rikanya No. 574 measuring 6 acres. Jackson Gikunda lives on plot No. 240. It is a lie when the objector says that he is Gikunda M'Rinkanya. In 1977 the objector went to the registrar and registered himself as Gikunda M'Rinkanya in order to take the Suit Land.

[12] **PW5 Albert Namu Mutwiri** assistant EO in Meru Court produced two files. First, Meru CMCC No. 583 of 1980 between Ikunda Rinkanya v Japhet kirmi, Catherine Kairigo and Gladys Kathuni. Second, Succession Cause No. 274 of 2001 in respect to the estate of M'Ikiara Kanyua Nchobi. The petitioner is Igoki Kiara and Objector is Gikunda Rinkanya.

[13] This matter was canvassed by way of written submissions. The objector submitted by reiterating what he had stated of which this court has taken due consideration.

## **ANALYSIS AND DETERMINATION**

[14] The issue for determination is the ascertainment of the estate property, beneficiaries and distribution of the estate.

[15] The cardinal mandate of Probate and administration court is ascertainment of the estate property, identification of the rightful beneficiaries and distribution of the estate of the deceased. The deceased herein is Gikunda M'Rinkanya who died in 1964. But, the objector seems to be saying that he is Gikunda Rinkanya and the owner of the suit property. Obviously, you cannot distribute property of a living person through succession cause. Succession law only governs estates of deceased persons. Act. But what does the evidence portend?

[16] This cause relates to the estate of Gikunda Rinkanya who is said to have died in 1964. However, the objector objected and stated that he is the said Gikunda Rinkanya and his estate should not be distributed as he is alive. The petitioner, on the other hand, stated that the objector registered himself in 1977 and acquired the identity of his deceased son with the intention of defrauding their family of the Suit Land.

[17] The identity of Gikunda Rinkanya was in issue in Meru Criminal Case No. 670 of 1997 but the objector was acquitted. According to the judgment delivered the prosecution evidence left a lot of doubt which was resolved in favour of the accused. His true identity still lingered; and on 7<sup>th</sup> October 1996 the court directed the Attorney General to carry out an investigation to establish the proper identity of the objector and whether the petitioner had a son, who has since died, by the name of Gikunda M'Rinkanya whose estate the petitioner seeks to administer. A report was presented and the court ordered that the report was not conclusive which led to the cause being determined on merit.

[18] The objector, **DW1**, told the court that he called himself Gikunda Rinkanya alias Jackson Ikiara even though it is not in his ID but he is known by those names. He confirmed that he is baptized by the name Jackson but does not use it. His mother **DW3** affirmed and declared that she has always called her son Jackson Gikunda Ikiara and does not know how he came to be called Gikunda Rinkanya.

[19] Secondly, the Suit Land is said to be family land as the objector pleaded that he got it from his father Ikiara who was given by Kanyua Chobi. Surprisingly, when **DW1** was charged in the criminal case one of the witnesses was Kanyua Chobi. From the proceedings of Cr. Case No. 670/77 Kanyua Ncobi who was PW3 told the court that he had a piece of land which he divided into three pieces that is 7 acres, 6 acres and 6 acres respectively and gave his sons their separate pieces. His son M'Rinkanya had died so he gave Ikunda 6 acres before he died. The said share was fenced by his mother who caused the land to be registered in Ikunda's name.

[20] Thirdly, the objector stated that he has lived on the Suit Land until he was chased away. He also said that he has no claim on Plot No. 240. This is lie, for the record of Succession Cause No. 274 of 2001 which relates to the estate of M'Ikiara Kanyachobi, his father, shows that he expressed his interest in wanting a share as he has lived there since 1978. **DW1** told the court that if he possesses the Suit Land the petitioner and her family will be left without any land.

[21] The evidence of the petitioner and her witnesses was credible. From the evidence, PW1 was married to M'Rinkanya, one of the sons of Kanyua Ncobi. She gave birth to four children including a son called Gikunda Rinkanya. Kanyua Ncobi had three sons namely; M'Ikiara, M'Mugambi and M'Rinkanya. After adjudication Kanyua Ncobi gave M'Ikiara Parcel No. 240 measuring 7 ½ acres, M' Mugambi Parcel No. 194 measuring 6 acres and M'Rikanya Parcel No. 576 measuring 6 acres. Te latter was given to Gikuda s/o Rinkanya because his father M'Rinkanya had died. Jackson Gikunda lives on plot No. 240. It bears repeating that when **DW1** was charged in the criminal case one of the witnesses was Kanyua Chobi. From the proceedings of Cr. Case No. 670/77 Kanyua Ncobi who was PW3 told the court that he had a piece of land which he divided it into three pieces that is 7 acres, 6 acres and 6 acres respectively and gave his sons their separate pieces. His son M'Rinkanya had died so he gave Ikunda 6 acres before he died. He stated that the share of M'Rinkanya was fenced by his mother, that is the petitioner, who caused the land to be registered in Ikunda's name, the son of M'Rinkanya. The evidence by PW4 that the petitioner being a woman would not have been registered as owner of land as Kimeru custom did not allow it makes a lot of sense and explains why the land was registered in the name of a minor.

[22] I also find the evidence by DW4 to be credible when he stated that in 1977 the objector registered himself as Gikunda Rinkanya in order to take the Suit Land. The mother of the objector stated that his son is not called Gikunda Rinkanya but Jackson Gikunda Ikiara and she never called him Gikunda Rinkanya as M'Rinkanya was brother to his father M'Ikiara. It is therefore ominous when the objector says that he is Gikunda M'Rinkanya.

#### **What documents say**

[23] The documents produced especially PEX.1- Green card for ABOGETA/UPPER-CHURE/576- the suit land herein show that on 9.9.63, the proprietor was Gikunda s/o Rinkanya- deceased. On 7.3.77 Land Certificate was issued. On 2.5.78 a caution was registered by Gladys Kathuni claiming beneficial interest. This supports the evidence by the petitioner that the suit land was registered in the name of her son with M'Rinkanya called Gikunda s/o Rinkanya. It bears repeating that the objector is not the son of M'Rinkanya but M'Ikiara. The records I have referred to carry information and entries as far back as 1963 and they cannot lie. There are other documents; PEX.2, 4 and 5 which show that other lands belonging to Kanyua Ncobi were given to Ikiara and M'Mugambi. Surprisingly, DEX.2 (objector's exhibit) supports the position taken by the petitioner. I have seen a title deed i.e. DEX.3 but the title was issued on 7.3.1977. This title bears the identity card number for the objector. This also renders support to the claim by the petitioner and her witnesses that the objector sought registration in 1977 in the name of Gikunda Rinkanya in order to masquerade as Gikunda Rinkanya and take the suit land. He did not prove that he is the Gikunda s/o Rinkanya who was registered as proprietor of the suit land on 9.9.63. From these records the Gikunda who was registered in 1963 was Gikunda s/o Rinkanya and not Gikunda s/o Ikiara.

[24] Accordingly, it is clear that the objector is not one and the same person as Gikunda s/o Rinkanya. The deceased is Gikunda s/o Rinkanya and the Suit Land is registered in his name hence estate property. The said land was for the family of M'Rinkanya. In spite of the petitioner's failure to providing any birth or death certificates or any record of some sort, it is perceptible from the behavior of the objector that his intentions is to swindle the petitioner and her family of land which was meant for M'Rinkanya's family, son of Kanyua Chobi. Kanyua Chobi himself in his evidence before court in the criminal case explained that he gave the Suit Land to Ikunda, son of Rinkanya who is deceased. What's more the fact that the objector changed his name from the one given to him during baptism illustrates ill motive and shrewdness.

[25] Consequently, I find that the application by the objector not to have merit and is dismissed. In addition, the petitioner is awarded costs.

**Dated and delivered in open court at Meru this 16<sup>th</sup> May 2019**

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**F. GIKONYO**

**JUDGE**

In presence of

Kaberia for Mukango for objector

Kimaita for Kithaka for Petitioner

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**F. GIKONYO**

**JUDGE**