



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 130 OF 2010

IN THE MATTER OF THE ESTATE OF JAPHET MATHIU MUNGANIA (DECEASED)

THOMAS RIUNGU MATHEW.....PROTESTOR

VERSUS

SAMUEL GICHUNGE MATHEW.....1ST RESPONDENT

HELLEN NJIRU KIRIGIA.....2ND RESPONDENT

J U D G M E N T

1. **JAPHET MATHIU MUNGANIA ('the deceased')** died on 12th November, 2007. He left the following surviving him:-

1st House

- a) Tabitha Regeria Japheth - widow (deceased)
- b) Samuel Gitonga - son
- c) Thomas Riungu - son
- d) Monicah Muthuri - daughter
- e) Ephraim Kathuri - son
- f) Late John Mbaya - son
- g) Zacharia Riungu - son
- h) Ruth Muriungi - daughter
- i) Stanley Kirimi - son
- j) Alexander Gitonga - son

2nd House

- a) Catherine Kajira - widow
- b) Charles Muriuki - son
- c) Kenneth Koome - son

- d) Beatrice Mwendwa - daughter
- e) Magdalene Kajuju - daughter
- f) Zipporah Karwira - daughter

2. Since the second house has settled by the deceased during his lifetime, it is only the 1st house which has an issue. Regarding, the deceased's assets they were listed as **Abothuguchi/Githongo/ 1556, 1558 and 1559**.

3. On 18th January, 2013, Thomas Riungu Mathew, Samuel Gichunge Mathew and Hellen Njiru Kirigia were issued with the grant of letters of administration intestate. On 18th August 2015, Samuel Gichunge, the 2nd administrator, applied for the confirmation of the grant wherein he gave his proposal on the mode of distribution.

4. This was met by a protest from **Thomas Riungu Mathew (“the protestor”)** He contended that during his lifetime, the deceased subdivided his parcel **Abothuguchi/Githongo/31** into eight portions comprising of **parcel numbers 1554, 1555, 1556, 1557, 1558, 1559, 1560 and 1561**. He shared them amongst his seven sons and left **parcel No. 1560** for himself. That the deceased thereafter subdivided his aforesaid **parcel No.1560** into **Nos. 3461 and 3462** which he transferred to the Full Gospel Church and him, respectively. That the deceased did not allocate any land for the daughters as per the Meru Customs.

5. The matter was heard through *viva voce* evidence whereby the witnesses adopted their witness statements on which they were cross-examined. **PW1 Thomas Riungu Mathiu** adopted his protest dated 24th June, 2017 and statement dated 24th October, 2017 as his evidence. He added that his father obtained the land control board consent on 20th March, 2007 to transfer to him **plot No. 1560** so that he may add to it to **Plot No. 1561**. This is because his share was smaller than what the deceased had given to all his sons. The combination of the two parcels was registered as **L. R. Abothuguchi/Githongo/3417** in the name of the deceased. The same had since been subdivided further to Nos. 3461 and 3462 in the names of Full Gospel Church and himself respectively.

6. **PW2 Zakaria Muriungi** and **PW3 Ephraim Kathuri Mathiu**, both sons of the deceased, supported the evidence of **PW1**. They confirmed that **Ruth Mwari** lives on **Plot No. 1560** with her children. That the clan had resolved that **Ruth Mwari** and **Monica Kinanu**, both daughters of the deceased, live on the said plot which was against the wishes of the deceased. While **PW2** stated that he signed the consent by force, **PW2** denied ever signing the consent to confirmation.

7. On their part, the respondents called three witnesses. **RW1 Samuel Gichunge Mathiu** confirmed the allocations given by the deceased with regard to the eight subdivisions of **Abothuguchi/Githongo/31**. However, **Plot No. 1560** which the deceased had retained for himself was to be distributed to the Full Gospel Church, Githongo and the balance to **Ruth Mwari** and **Monica Kinanu**. He denied the allegations of fraud levelled against him by the protestor regarding the alleged disappearance of documents at the lands office.

8. **RW2 Gerald Mbwiria Kirigia**, a surveyor told the court that he did the mutation and division of the deceased's original **parcel no. 31**. That the deceased divided his land in 1992 to everybody but left **Plot No. 1560** which he held for his daughters.

9. **RW3 Ruth Mwari Mathiu** told the court that she is unmarried but has children. That she lives at their home in the house which her father and mother left behind. She denied that the deceased consolidated **plot nos. 1560 and 1561** as contended by **PW1**.

10. The parties were directed to file and exchange their written submissions but only the 1st administrator who filed his. The court has carefully considered the evidence on record and the said submissions.

11. The issue for determination is how the estate of the deceased should be distributed. The general rule is that, where a deceased dies intestate and has left behind children with no spouse, his estate is to be distributed in accordance with **section 38 of the Law of Succession Act**.

12. In the present case, the deceased died intestate and left behind his children to whom his estate is to be shared. However, it is clear that all his beneficiaries were provided for during his lifetime except the two daughters, the late **John Mbaya** However, although the protestor was given a share he his complaining that his share was less and that the deceased added him what he had retained for himself

13. On 20th November, 2018, a consent was recorded settling the issue touching on the estate of the late **John Mbaya**. His survivors were to share equally **L.R. No. Abothuguchi/Githongo/1556**. That left the matter of the two sisters and the protestor and **L.R. No. Abothuguchi/Githongo/1558, 1559, 1560 and 1561** as the properties that require to be settled.

14. From the outset, it should be recognised that in the present constitutional dispensation, equality among children is emphasized notwithstanding the gender, marital, financial or any other status of a child of a deceased. The contention that the Meru custom should be upheld and thereby disinherited the two daughters of the deceased cannot hold.

15. In **Mwongera Mugambi Rinturi & another v Josphine Kaarika & 2 others [2015] eKLR**, the Court of Appeal held that:-

“That much was clear from Mr. Kioga’s resort to Meru Customary Law which stipulated, as captured by Dr E. Cotran in his Restatement of African Law: Vol 2 Laws of Succession at p30;

“Daughters receive no share of the estate. In the absence of sons, the heirs are the nearest paternal relatives of the deceased,

namely father, full brothers, half-brothers and paternal uncles”.

With the greatest respect, such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny; not least because it is plainly discriminatory of itself and in its effect. It is anachronistic and misplaced notwithstanding that it was the norm for a vast majority of Kenya’s communities. This Court has long accepted that a child is a child none being lesser on account of gender or the circumstance of his or her birth. Each has a share without shame or fear in the parents’ inheritance and may boldly approach to claim it. What RONO –VS- RONO (Supra) decided about the prohibition of discrimination on grounds of sex under the retired Constitution applies with yet greater force under the current progressive Constitution of Kenya, 2010.”

16. The petitioner’s case was that, in 2007, the deceased combined **plot nos. 1560 and 1561** to create **plot No. 3417**. That the reason for the combination was to increase his portion which was smaller (0.60 acres) as compared to the shares given to his brothers. He contended that the deceased filed the necessary documents at the lands office but the 2nd administrator had them misplaced. That it was through the intervention of the CID Meru that the documents were traced and registered in 2017.

17. These allegations were denied by the 2nd administrator. He contended that at no point did the deceased sought to have the two parcels combined. According to him, the deceased’s intention was that **L.R. No. 1560** be shared amongst his daughters after Full Gospel Church is given its share.

18. I have looked at copies of the green cards produced as **PExh1 to 5**. They show that the register for the two titles was closed and the consolidation of the two effected on 11th August 2017 during the pendency of these proceedings. **PW1** alleged that the deceased initiated the consolidation in 2007. However, he failed to produce evidence to that effect. Further, there was no evidence to show that the documents were presented at the lands office in 2007 and only discovered in 2017 with the help of the Meru DCI. Nothing would have been easier than to produce a report from the DCI Meru to that effect together with the application form for registration and the day book number from the lands office to buttress that allegation.

19. **PW1**’s demeanor was suspect. When asked who was in occupation of **plot no. 1560** he evaded to answer. He was accused of having evicted his sister **Ruth Mwari** from **plot no. 1560** only that the clan intervened.

20. From the evidence on record, I am satisfied that the deceased catered for all his children, the protestor included. Although he was given a smaller share of 0.6 acres, it was explained that it was because the deceased had educated him more than the others. This is a fact the protestor did not dispute. Further, there is no evidence to show that he ever protested to the deceased when the latter was alive as to why he got a smaller share. I did not believe the testimony of the protestor as well as his witnesses. It was self-serving.

21. The daughters of the deceased were not given any land. The deceased remained with **plot no. 1560** most likely for them. Indeed, when **Ruth Mwari** returned home, as it is alleged she was living within the trading centre, she started living with her parents on the said **plot no. 1560** where she continues to live to-date.

22. Accordingly, I find the protest to be without merit. I dismiss the same and make the following orders:-

- a) the protest is hereby dismissed;
- b) the consolidation of **plot nos. 1560 and 1561** and the resultant subdivisions is hereby cancelled;
- c) the estate of the deceased is to be distributed as proposed by the petitioner in paragraph 4 of his supporting affidavit sworn on 18th August, 2015;
- d) this being a family matter, I will make no order as to costs.

It is so decreed.

DATED and **DELIVERED** at Meru this 16th day of May, 2019.

A. MABEYA

JUDGE