



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. SUCCESSION CAUSE NO. 37 OF 2017

IN THE MATTER OF THE ESTATE OF M'NTHATHAI M'NTUKA alias ELIPHAS NTHATHAI M'NTUKA alias M'ATHATHAI M'ATHUKA- (DECEASED)

AND

PHERISTER CIANGAI MUTEGI.....ADMINISTRATIX/APPLICANT

VERSUS

KEN MUCHIRI NJOKA.....1ST PROTESTOR

KENNETH MUGAMBI NJOKA.....2ND PROTESTOR

J U D G E M E N T

1. The deceased in this cause died on 18th March 2011 at Chuka Hospital resident at Kinoru. Going by the petition for letters of administration herein, the deceased died intestate leaving the following dependants surviving him namely:-

- i. Pherister Ciangai Mutegi (widow/petitioner)
- ii. Clifford Mwiathi Nthathai
- iii. Elystone Mugambi Nthathai
- iv. Onesmus Kaaria Nthathai
- v. Kenneth Mutwiri Nthathai
- vi. Josephine Kaimuri Mutegi
- vii. Kathomi Mutegi
- viii. Lucy Kambura Mutegi

2. The only asset listed as comprising the estate is that property known as L.R. Magumoni/Mukuuni/1759 which measures approximately 1.76 Ha.

3. The Petitioner, Pherister Ciangai Mutegi, was appointed the administratrix of the estate of the deceased by this court on 29th November 2017. On 19th December 2017, the appointed administratrix vide Summons for Confirmation of Grant dated 14th December 2017 moved this court for confirmation of the said grant proposing to have the estate distributed as follows:-

L.R. MAGUMONI/MUKUUNI/1759

- i. Pherister Ciangai Mutegi - 1.25 acres
- ii. Onesmus Kaari - 0.619 acres

iii. Morris Mwenda - 0.619 acres

Robert Kinyua

(iv) Kaimuri Mutegi - 0.619 acres

(v) Kathomi Mutegi - 0.619 acres

(vi) Lucy Kambura Mutegi - 0.619 acres

4. The Summons for Confirmation of grant dated 14th December, 2017 was opposed by Ken Muchiri Njoka and Kenneth Mugambi Njoka who filed an affidavit of protest via affidavit sworn on 2nd February, 2018. In summary, the protestors claim that the person indicated as the deceased in this cause was actually known as Mutegi Nthathai who is also deceased and that prior to his demise, he fraudulently altered his name to reflect or to read M'Nthathai M'Athuka which was his late father's name in order to convert his estate to be his. The protestors claim that they are children of Elias Njoka Mugo (deceased) who was a brother to Mutegi Nthathai (deceased). They have further averred that the estate of their grandfather initially comprised L.R. No MAGUMONI/MUKUUNI/562 which measured around 6.97 ha (17.22 acres). They have averred that the said estate was a subject of a Land Disputes Tribunal who deliberated upon the case and made a decision that was adopted in Chuka Resident Magistrate's Court Land Case No.33 of 2000.

5. According to the protestors the Tribunal decided that the subject matter (MAGUMONI/MUKUUNI/562) was to be divided as follows:-

a) Elias Njoka Mugo - 8 acres

b) Mutegi Nthathai - 8 acres

c) Ciancici Nthathai (widow) of Nthathai M'Athuka) - 1.95 acres

6. The protestors allege that the late Mutegi Nthathai appealed against the decision of the tribunal but the appeal abated upon his demise.

7. The protestors have averred that due to the wrangles over the land, both their parents were murdered forcing their maternal grandfather to move the L.D.T (Land Dispute Tribunal) on their behalf as they were still young at the time. They have exhibited the proceedings of Mugumoni Land Disputes Tribunal and the decision adopted in court vide Chuka Resident Magistrate's Court land case No. 33 of 2000.

8. The Petitioner administratrix at the hearing of the protest denied knowledge of the protestors. It was her evidence that her husband was known as Nthatha Nthuka though she conceded that he was also known as Mutegi. She however denied that her late husband altered his name to reflect his father's name stating that his father in law died in 1950s before adjudication and in her opinion, her husband had no reason to alter his name.

9. The Petitioner further denied being a party to a case registered in Land Dispute Tribunals and contended that the award was time barred by dint of **Section 4(1)** of the **Limitation Act Cap 22 Laws of Kenya**. She also pleaded ignorance of the murder of the protestors' parents. She however under cross examination admitted that her late husband was charged with the murder of the protestors' mother known as Elosy Kanyua and that she attended the case at the Land Disputes Tribunal on behalf of her husband who then was in prison custody.

10. The Petitioner also changed tune under cross-examination and admitted that Elias Ngai Mugo, the protestors' late father was indeed a brother to her late husband Nthathai Mutegi. She however insisted that the allegations contained in the Land Dispute Tribunal's proceedings were lies as in her contention, her late husband did not alter his name.

11. The petitioner further told this court that her father in law had instructed her late husband to take the land in a restitution because he had Tuberculosis and that he also gave Ngai (protestor's father) a share of land. She further conceded that Ciancici was her mother in law.

12. The Petitioner has justified her proposed mode of distribution stating that the beneficiaries she has named are the only dependants to the estate of the deceased therein.

13. On the other hand, the protestors as observed above maintained that the deceased- Mutegi Nthathai fraudulently altered his name to read M'Nthathai M'Athuka to allegedly acquire his father's land to the exclusion of the others. They have faulted the petitioner herein for perpetrating the fraudulent deeds of her late husband which in their view saw the original parcel subdivided into 8 portions before they were disposed to third parties leaving only L. R. Magumoni/Mukuuni/1759.

14. Kenneth Mugambi Njoka (DW1) testified in this court and stated that his late father was murdered in 1997 while their mother was also murdered in 1998 allegedly by their uncle Elphas Mutegi (deceased) over a dispute over land. He stated that though he was aged 6 years old, then, he vividly remembered how his mother was killed and their house set ablaze by Mutegi and his son.

15. The protestors insisted that the estate belonged to their grandfather and that their late father was given 8 acres by the Land Dispute Tribunal who found that Eliphias Mutegi had altered his National Identity Card to reflect his father's name M'Nthathai M'Nthuka. Kenneth Mugambi Njoka further stated that the late Mutegi Nthathai began selling part of the estate in dispute even as the case was going on at the Tribunal and that though they were young they tried to stop the sales by writing letters to the Area District Officer.

16. Kenneth Murithi Litira (DW2) the Area Chief Mukuuni Location, summoned to testify by this court, testified and supported the

protestors' case. He told this court that he knew the family well. He stated that the protestors were sons of the late Eliphias Njoka Nthathai who was murdered. He further added that he had information that Mutegi tried to forge his father's name with a view to inheriting the entire estate. He further added

that he knew the land parcel was subdivided into 3 portions among;

- i. Mutegi
- ii. Njoka and
- iii. their mother.

He added that the subdivision happened in 1980 and though he was not sure about parcel numbers, he knew that parcel No.1759 belonged to the late Njoka who was a brother of Mutegi (deceased). It was his evidence that Mutegi later altered his Identity Card to read Nthathai Ntuka but according to him correct name was Mutegi Nthathai.

17. Hellen Mikui (DW3) also testified in this court and stated that her late father's name was Nthatha Nthuka and that they were 7 children in total and gave the names as follows namely:

- i. Juliet Kabindi
- ii. Hellen Mikui
- iii. Lenity Munario
- iv. Elias K. Ngai
- v. Fuodnence Maitha
- vi. Eliphias Mutegi
- vii. Njoka Mugo

18. She further insisted that the deceased person in this proceedings is not her late father but Eliphias Mutegi her brother who fraudulently altered his name in order to deprive his siblings.

19. Edward Kithinji (PW4), the Assistant Chief of Kinoru Sub-Location where the deceased hailed from also came and testified stating that he wrote an introductory letter to the petitioner herein on the strength of the Identity Card shown to him which reflected the name of the deceased a person he had known for 10 years. He however stated that he knew little about a land dispute and not was he aware that the deceased had altered his name for ulterior motive. He further stated that he knew little about the family and could not tell who the brothers to the deceased were. He however knew the petitioner as the widow to the deceased herein.

20. Analysis and Determination

This cause has raised interesting twists and turns that could as well be fodder for a horror movie. The reason why I say so is that after hearing the witnesses testify in this cause and going through the documents filed I am left wondering at the extent at which some people are prepared to go to perpetrate and perpetuate greed or covetousness.

21. The estate in this cause comprise that property known as Magumoni/Mukuuni/1759. The certificate of official search filed with the petition for letters of administration indicates that the property was registered on 7th July 2005 in the name of M'Athathai M'Nthuka and he is described as the "**deceased**". The deceased in this cause as seen from Death Certificate No.059004 again filed with the petition for letters of administration shows the name of the deceased as "**Eliphias Nthathai M'Nthuka**" and that he died on 18th March 2011. The details appearing on the official search in regard to the registered owner on the face of it, even without going further, shows that the owner of the property comprising the estate herein and the deceased in this cause are two different persons.

22. The petition for letters of administration filed vide ***Runyenjes Senior Principal Magistrate's Court No. 121 of 2011*** indicates the estate to belong to Nthathai M'Nthuka but when the lower court issued notice to be published at the Kenya Gazette, it introduced alias names "**M'Nthathai M'Ntuka**" alias "**Eliphias Nthathai Nthuka**" and while it is unclear how the alias names were introduced, it is apparent that the introduction of alias names was improper and irregular.

23. This court has also noted that the name of the deceased as per the copy of the Identity Card is Nthathai M'Thuka. The first name Eliphias is omitted on the Identity card but somehow the name surfaces on the Death Certificate.

24. The protestors have testified that the deceased in this cause was called Mutegi a fact that the petitioner herself admits. So why, and where did the name "**Mutegi**" vanished to when the deceased obtained his Identity card on 5th December 1996 when he got registered and obtained his Identity Card?. The claims by the protestors that the deceased herein, Eliphias Mutegi Nthathai, altered this name in order to

perpetrate a fraud, that is, by unlawfully and irregularly acquiring what lawfully belonged to his father appear to carry some weight. I have arrived on this conclusion on the strength of evidence tendered by the Area Chief, Kenneth Murithi Litira (DW2) who unlike the Assistant Chief Edward Kithinji (DW4) appeared to know the family of the late M'Nthathai M'Nthuka well. His testimony that the late Eliphas Mutegi Nthathai faked his Identity Card to reflect his late father's name was corroborated by Hellen Mikui (DW3) who is now the only surviving child of the late M'Nthathai M'Nthuka. She therefore knew her late father well and her siblings.

25. I have also considered the affidavit of the late Elias J. Ngai Nthathai (now deceased) which was sworn on 17th May 2018 which affidavit clearly lends credence to the protestor's case. Though the deponent unfortunately died before coming to court to testify on the contents of his affidavit, the contents of his said affidavit nevertheless supports the assertions by the protestors and their witnesses that that the late Eliphas Mutegi altered his National Identify Card to read M'Athathai M'Nthuka with the sole purpose of disinheriting his siblings which he partly succeeded because the evidence tendered shows that he subdivided L.R No. MAGUMONI/MUKUUNI/562 and sold resultant subdivisions to 3rd parties leaving parcel No. MAGUMONI/MUKUUNI/1759 as the only property remaining on the strength of that impugned Identity Card .

26. This court has considered the evidence tendered by the petitioner. Observing her in court while testifying I noted that she was quite evasive particularly when put to task in regard to existence of a case that involved her husband at the Lands Disputes Tribunal and the evidence tendered in the proceedings thereat which clearly revealed the machinations used by her late husband Mutegi Nthathai. She at first denied knowledge of his late brother in law Njoka Mugo and his wife ELOSY KANYUA (who was allegedly murdered by her late husband). This is what she told this court in one instance;

" I do not know Elosy I have never known her..... my husband did not tell me who she was."

In the other instance she went on to state;

" It is true my husband was jailed for murder. He had killed Thungutha's daughter..... it was alleged he killed Ellosy. I used to attend the murder case in Meru High Court. I do not know how long he was jailed....."

27. The same witness, after denying knowledge of the late Elias Njoka as her brother in law when put to task under cross-examination in regard to the affidavit. She had sworn on 20th November 2017, became evasive but her paragraph 8 of the said affidavit clearly showed that she knew her brothers in law well besides her mother in law known as Ciancici yet in her evidence in court she completely denied knowing them. That in my estimation shows that either the petitioner was unreliable as a witness or was trying to conceal material facts. This court finds that either way, the petitioner as a witness was not credible or consistent. When she denied knowing Hellen Mikui (DW3) as her sister in law, she could not hide the visible demeanor of discomfort as she responded to the questions put to her during cross-examination. What she stated on oath on 20th November, 2017 particularly under paragraph 8 contrast sharply with the averments contained in her affidavit sworn on 13th July 2018 particularly under paragraph 9 (vii). The inconsistencies are so pronounced that the only conclusion one can make is that she was trying in vain to hide some material facts.

28. This court has keenly looked at the copy of the Lands Registration Certificate commonly referred to as the Green Card exhibited by the first protestor in his affidavit sworn on 2nd February, 2018. The copy of the Green Card indicates that the original parcel No. Magumoni/Mukuuni/562 was 1st registered on 21st February 1966 and the owner is clearly indicated as **M'ATHATHAI M'NTHUKA**. That parcel was later subdivided by the petitioner's husband into parcels Nos. 1752-1759. That fact is uncontested.

29. A look at the proceedings of Land Dispute Tribunal proceedings shows that the elders found that Mutegi Nthathai altered his Identity Card so that his name matched that of his father. Indeed though it is true that the jurisdiction of the Tribunal may have been wanting, it is patently clear that they were not far from establishing the truth. Otherwise why would Eliphas Mutegi alias Nthathai M'Thuka have an Identity Card issued to him on 6th December, 1996 when his age indicated he was 48 years old?. Why would he leave out Eliphas and Mutegi when he was clearly known by those names? It is this court's finding that the allegation of alteration of the name by Eliphas Mutegi has been established and proved to the required standard in law. It is quite clearly that had investigations been carried out before he died, he was most likely to be found culpable of a criminal offence(s).

30. I also note from the court proceedings in **Chuka Resident Magistrate's Court Land Case No.33 of 2000** that the decision of Land Dispute Tribunal was adopted to the effect that one Thungutha Mbogo (protestor's maternal grandfather) was to hold 8 acres of estate in trust for protestors who were still minors then. The adoption order was made on 14th June 2001 and attempts to overturn the same vide appeal turned futile when the appellant died and no one took up the matter leading to the abatement of the appeal. Although this court finds the jurisdiction of the Land Dispute Tribunal to deal with the estate of a deceased person questionable, I find that the decision was never set aside but fundamentally I find that the parcel comprising the estate herein cannot be described as **"free property"** of Nthathai M'Nthuka alias Elphas alias Mutegi by dint of Section 3 of the Law of Succession Act. He certainly was not the registered owner of that parcel of land known as MAGUMONI/MUKUUNI/1759 because the title of that property as per the certificate of official search was issued to M'Athathai M' Nthuka on 7th July 2005 by which date the said owner was clearly indicated as **"deceased"**. It is clear that on 7th July 2005 Eliphas Nthathai was alive and could not have been the same M'Athathai M'Nthaka who by that time was long dead. It is true that while Eliphas Mutegi Nthathai may have succeeded in killing his late brother's wife Elosy Kanyua and burying her and/or could have had a hand in the killing of his brother Njoka and burying him, he could not succeed in killing and burying his rights over the estate of their father. Those rights survived him by law and are rights in *rem* through the protestors herein. Those rights cannot be extinguished under **Section 4(b) of Limitations Act** as contended by the Petitioner because the rights did not emanate from the decision of the Land Disputes Tribunal *per se*. They emanated from his right to inherit his late father's land as per the provisions of **Section 29(a) of Law of Succession Act**. The protest filed herein is a protest filed pursuant to the provision of Law of Succession Act and not an action brought on the basis of a decision of Land Disputes Tribunal and adopted by the lower court. I have in any event held that the Land Dispute Tribunal really had no jurisdiction to deal with an estate of a deceased person.

31. The petitioner in her evidence conceded that her father in law was called M'Thuka and going by the evidence of Hellen Miuki, it is quite

apparent that M'Athathai M'Nthuka and Nthathai Nthuka alias Eliphas Mutegi are two distinct and different persons. In fact the Death Certificate of Eliphas Nthathai shows that he was 63 years old when he died on 18th March 2011 which means that he was born in 1949. The copy of the Green Card as I have observed above shows that the original or mother title No. Magumoni/Mukuuni/562 shows that the parcel was first registered on 21st February 1966 which means that the said Eliphas Mutegi was 17 years old and therefore still a minor could not have possibly been M'Athathai M'Athuka reflected on the Green Card as the owner of the said parcel. This clearly shows that whichever way one looks at the documents tendered in evidence in this cause, the undeniable fact is that fraud was perpetrated by the said Eliphas Mutegi Nthathai in the subdivision of parcel No. Magumoni/Mukuuni/562 which resulted to inter alia Magumoni/Mukuuni/1759 which comprises the estate herein.

In conclusion, this court finds that parcel No. Magumoni/Mukuuni/1159 does not form the estate of Nthathai M'Nthuka alias Eliphas Nthuka alias Mutegi. The true actual registered owner was M'Athathai M'Nthuka who was already dead as of 2005 when the parcel was registered. Therefore the actions of the petitioner to list the estate as belonging to her late husband is both untenable and unsustainable. There is no estate belonging to the deceased in this cause to administer. That property known as Mukuuni/1759 shall remain into the name of **M'ATHATHAI M'NTHUKA** pending the proper petition for letters of administration to properly administer the estate in accordance with the law. To this end I give liberty to Hellen Mikui, who is the only surviving child to the deceased person to move this court accordingly.

32. In order to meet the ends of justice, I am inclined to make the following order under **Section 47 of Law of Succession Act and Rule 73** of Probate and Administration Rules;

i. The protestors herein shall pending, the filing and determination of petition for letters of administration of the estate of M'Athathai M'Nthuka, temporarily be given possession of 2 acres of that parcel No. Magumoni/Mukuuni/1759 and in particular where their parents house was situated before it was set ablaze.

ii. I direct the OCS (Chuka Police Station) to provide security to the District or County Survey who hereby directed to go and curve out 2 acres of the aforesaid parcel and give temporary occupation to the protestors who shall jointly utilize the portion until the determination of the succession cause to be filed by the said Hellen Mikui or in default the protestors themselves.

iii. I do not usually order for costs but I am inclined to award costs to the protestors in the interest of justice as against the petitioner.

Dated, signed and delivered at Chuka this 13th day of June, 2019.

R K. LIMO

JUDGE

13/6/2019

Judgment signed, dated and delivered in the presence of Murithi for Protestors and the Petitioner in person.

R.K. LIMO

JUDGE

13/6/2019