



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 479 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE M' TUAMWARI M' IKUNYUA (DECEASED)

MARY KARIMI.....1<sup>ST</sup> PETITIONER

JANET NKAIRO.....2<sup>ND</sup> PETITIONER

VERSUS

WKI.....OBJECTOR

JUDGMENT

1. **M'Tuamwari M' Ikunyua**, (*the deceased herein*) died on 30/9/2000. **Mary Kirimi** petitioned for letters of Administration on 6/10/2009. As per the letter of introduction by the Area Chief Ntima Location the deceased left the following dependants; **Janet Nkairo (wife), Monica Nthangi M' Ikaria, Rael Mwendwa, Isabera Muccheche, Charity Muthuri, Dorcas Kuri, Mary Karimi and Ann Kanorio IKunyua**.
2. The petitioner also listed the following assets as the estate of the deceased i.e. **L.r. No. Ntima/Igoki/3481, L.r.No.Kirimara/Kithithina/block/1/137, L.r.No.Abothuguchi/ Gaitu/ 775**.
3. **WKI** (*the objector herein*) filed a notice of objection on 22/2/2010 stating he is an adopted son of the deceased and ranks in equal priority to the petitioners (making reference to Mary Karimi and Janet Nkairo) who are wives of the deceased. That the petitioner filed the petition secretly without his permission.
4. **Janet Nkairo passed on 6/5/2013**. On 3/11/2015 both parties consented to **Samson Matumbi IKunyua** (a grandson to the deceased) to be appointed as an administrator of the deceased. He filed a further affidavit in support of the earlier filed summons for confirmation of grant dated 7/10/2010 by the petitioner. He maintained the same mode of distribution albeit stating the following beneficiaries are now deceased i.e. **Charity Muthiri and Mary Karimi**.
5. On 24<sup>th</sup> April 2017 the objector filed an application seeking reasonable provisions. The same was adopted as a protest on 19/7/2017. He averred that he had been left out in the estate of the deceased and that goons had demolished his house.
6. The matter proceeded for hearing on multiple dated commencing 13/11/2018. Parties also consented to the adoption of the statement of **Silas Kinari**, Senior Chief Ntima Location and his letter dated 30/7/2009 and that of **Mwiti Kingai** Assistant Chief Kinoru Sub-location.
7. **OB1 WK** testified that he was born in the year 1974 and adopted by the deceased in the year 1976. He told the court that he was brought up by the deceased, his wife and daughters and disputes only arose after the demise of the deceased.
8. He testified that he schooled at [Particulars Withheld] Primary School and [Particulars Withheld] Secondary School and the deceased paid for all his educational needs. That the deceased also took part in his initiation ceremony and built him a house only for it to be demolished on 07/07/2013 by rowdy youth organised by the administrator herein. That was issued with a national identity card on 12/06/1997 and it bore the last name of the deceased. That he was married when the deceased herein was still alive and has two children who have adopted the names of the deceased and wife to the deceased.
9. He stated that he is a dependant of the estate of the deceased and the Area chief erred in not listing him as such despite his full knowledge of this fact. It was also his testimony that he is not a biological son of **M'Itonga Nkure (now deceased)** as alleged by **Mary Kathuku**.
10. He however conceded that he was given a share of the estate of M'Itonga Nkure but stated that he was granted the share due to his close

relations with the deceased since the year 2008.

11. In cross-examination he testified that he got his first identity card in the year 1992 and the one issued in the year 1997 was a subsequent one. He stated that he did not have any documents to prove that the deceased paid for his education at [Particulars Withheld] Primary School nor did he recall of a traditional adoption ceremony being undertaken. He told the court that he did not know his biological parent but denied that Cecilia (a step-sister to the deceased) was his mother.

12. It was also his testimony in re-examination that he enquired from Janet Nakiro why he was being disinherited and she informed him that he should follow the law.

13. **OB2 John Nkonge** testified that he is familiar with the family of the deceased and the objector herein. That the objector studied in [Particulars Withheld] Primary school for two terms and within that time he was the head teacher. That the deceased paid for his school fees and school related expenses. Taken to task as to the names of the first born sons and last born son of the deceased he stated that he could not remember their names. He also did not present records to prove he is/was a teacher or that the objector schooled at CCM Primary school.

14. **OB3 Festus Mwirigi** testified that they schooled together with the objector at [Particulars Withheld] Primary School from standard 1. That at the time the deceased used to pay school fess for the objector. He stated that they are neighbours with the family of the deceased and he is familiar to the family though he could not identify them by their names. He also did not present records from [Particulars Withheld] Primary School.

15. **Pw1 Samson Matubi Ikunyua** the administrator herein and a grandson to the deceased testified that the objector is not a son of the deceased. He stated that the objector was a son to M'Itonga Nkure and that he gained a part of his estate in **Succession Cause No. 282 of 2017 In the matter of the estate of M'Itonga Nkure**. He stated that the deceased shared part of his estate and gave out respective titles during his lifetime hence inclined to his proposed mode of distribution.

16. **Pw2 Mary Kathuku** testified that he is a neighbour to the family of the M'Itonga Nkure. That he knows for a fact that the objector is a son of the late M'Itonga Nkure. That the objector was born in Muruine village. That she was also present when the estate of M'Itonga Nkure subdivided the land belonging to him. That the objector used to cultivate the same.

#### **Analysis and Determination**

17. I have considered the evidence on record and the submission of the parties. The main issues for determination is **whether the objector is a dependant of the estate and how the estate should be distributed**

#### **Dependants of the Estate.**

18. Section 29 of the L.S.A. provides who the dependants of the estate of a deceased person are by stating that:

##### **“29. Meaning of dependant**

**For the purposes of this Part, "dependant" means—**

**(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

**(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**

**(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”**

19. In **re Estate of the Late Annelies Anna Graff [2019] eKLR** the Court elaborated the meaning of dependant as enshrined in Section 29 of the law of Succession Act when it held as follows;

**“Section 29(a) creates a special category of dependants who are dependants due to their relationship to a deceased. Here the wife, wives, former wife or wives and the children of the deceased are automatic dependants and it is immaterial whether or not they were being maintained by the deceased immediately prior to his death. The next category found in Section 29(b) can only be dependants if they were being maintained by the deceased immediately prior to his death. Not all the parents, step-parents, grand-parents, grand-children, step-children, children whom the deceased had taken into his family as his own, brothers, sisters, half-brothers and half-sisters of a deceased are dependants of the deceased person. Maintenance by the deceased prior to his death has to be established before a member of this group becomes a dependant. Section 29(c) provides that a husband of a deceased is a dependant if he was being maintained by the wife immediately prior to the date of her death.”**

20. **Section 3 of the Law of Succession Act** also makes references to a child and states that a "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom

he has voluntarily assumed permanent responsibility.

21. Looking at the facts of this case the objector has laid emphasis on certain facts. First, that he was adopted under the Meru Customary Law and taken in as a member of the family. He however conceded that no ceremony was undertaken towards that end. Second, that the deceased paid his school fees in both Kinoru Primary School and CCM Primary School. He did not present any records to prove this allegation. He also called a witness from [Particulars Withheld] Primary school where he stayed only for two terms in class six (6). Third, that his ID card bears the name of the deceased as his last name. Whereas his current identity card carries the name of the deceased, this was not the first identity card but second the first one having been obtained in 1992 without the name of the deceased. Such is part of his agenda to install self as dependant of the deceased.

22. I have also looked at the letter from Area Chief Silas Kirianki of Ntima Location dated 30/7/2019 and that of the Assistant Chief kinoru Sub-location dated 21/8/2012. The letter dated 30/7/2019 list all the beneficiaries of the estate of the deceased. The letter dated 21/8/2012 only seeks to set out that the objector was a son of the deceased. The latter does not accord with Section 46 of the Law of Succession Act on duties of officers of government in relation to protection of the estate of the deceased. The section states as follows;

**46. Duties of officers in relation to protection, etc., of deceased's property**

**(1) Whenever it becomes known to any police officer or administrative officer that any person has died, he shall, unless aware that a report has already been made, forthwith report the fact of the death to the sub-chief of the sub-location or to the chief or administrative officer of the area where the deceased had his last known place of residence.**

**(2) Any person to whom a report is made under subsection (1) shall—**

**(a) at the request of any person who appears to have a legitimate interest in the estate of the deceased; or**

**(b) if no application for representation in respect of the estate has been made within one month after the date of the death of the deceased, forthwith proceed to the last known place of residence of the deceased, and take all necessary steps for the protection of his free property found there, for ascertainment of his other free properties (if any), for ascertainment of all persons appearing to have any legitimate interest in succession to or administration of his estate, and for the guidance of prospective executors or administrators as to formalities and duties:**

23. The Area Chief of Ntima Location, where the deceased was domiciled wrote a statement dated 30/10/2019 dismissing the letter dated 30/9/2013 and stated that all the family members were present when he wrote the same. He stated that the same was true reflection of the knowledge he dad of the family of the deceased.

24. In light of the above, the letter dated 30/7/2009 is the true reflection of the dependants of the deceased.

25. I have also considered the proceedings in Succession Cause No. 282 of 2017 In the matter of the estate M'Itonga Nkure. The petition for letters of administration lists the objector as a son of the deceased. The objector also signed consent to making a grant of administration in the said cause. This corroborated the statement of **Mary Thuku** that the objector was son of M'Itonga Nkure. It seems the objector is out to reap from this estate yet he reaped from his father's estate.

26. Peculiar also is the fact that **Janet Nkairo**, wife of the deceased never sought to acknowledge the objector as a son and/or dependant of the deceased during his lifetime. There is also no records or evidence as pertains to [Particulars Withheld] Secondary School on the objector's secondary education. It is therefore my finding that there is no credible evidence to prove that the objector was a dependant of the deceased immediately prior to this death.

**Distribution of the Estate**

27. Following the foregoing finding, the deceased herein left behind seven daughters three of whom have passed on. The estate of the deceased ought therefore to be distributed in line with section 38 of the Law of succession Act. The same provides as follows;

**Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children**

28. I have considered the proposed mode of distribution made by the administrator of the estate. None of the beneficiaries have objected to the mode of distribution and I find it has taken into account the provisions of section 38 of the Law of Succession Act and I hereby adopt it as the basis for distribution of this estate as follows;

**(a) L.R. ABOTHUGUCHI/GAITU/775**

**To Samson Matumbi Ikunyua                      WHOLE**

**(b) L.R.KIRIMARA/ KITHITHINA BLOCK 1/137**

**(i) Isabella Muccheche                      - 3/5**

(ii) Florence Muthoni Njoroge share 2/5

(iii) Susan Wangui Njoroge equally

(iv) Nancy Wacuru Njoroge

(c) L.R. NTIMA/IGOKI/5882

(i) Samson Matumbi Ikunyua – 0.25 Acre

(ii) Frank Gitonga Ikunyua (son of Kanario Ikunyua .....BALANCE

(d) L.R. NTIMA/ IGOKI/5169

Samson Matumbi Ikunyua - Whole

(e) L.R.NTIMA/IGOKI/3481 to share equally amongst-;

i. Kelvin Murithi Ikunyua

ii. Susan Wangui Njoroge

iii. Nancy Wacuru Njoroge

iv. Florence Muthoni Njoroge

f) L.R NO. NTIMA/IGOKI/3476

i. Samson Matumbi Ikunyua - Whole

The grant herein is confirmed in the foregoing terms.

**Dated signed and delivered at Meru this 5<sup>th</sup> day of December, 2019**

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**F. GIKONYO**

**JUDGE**

**In presence of**

Basilio for petitioner

M.G Kaume for protestor – Mwanzia holding brief

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**F. GIKONYO**

**JUDGE**