



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 113 OF 2004

SOLOMON KIRIMI KIRIGIA.....PETITIONER

-VS-

FERDINARD GATOBU MBUI.....OBJECTOR

REAH MWARI.....OBJECTOR

JUDGMENT

1. This succession cause relates to the estate of **Mbui Mutunyi alias M'Mbui Mutunyi ("the deceased")**. The deceased was survived by the following children; **Jennifer Karimi, Gladys Nduru, Salome Tirindi, Pauline Karoki, Ferdinard Gatobu, Reah Mwari, Geoffrey Riungu, Solomon Kirimi, Nannis Kanyari and Timothy Mbwiria**. He left **Nkuene/U-Mikumbune/351 (2.99 ha)** and **Nkuene/Nkumari/642 (0.25 ha)** as the only properties forming his estate.

2. On 31st May, 2004, **Solomon Karimi Kirigia ("the Petitioner")** applied for letters of administration for the estate. Which were issued to him and **Ferdinand Gatobu Mbui ("the 1st Objector")**, on 5th June, 2006.

3. By a Summons for confirmation of grant dated 31st October, 2016, the 1st objector proposed to distribute the estate of the deceased as follows:-

a) Nkuene/Upper-Mikumbune/351 (7.38 acres)

Ferdinand Gatobu.....2.063 acres

Beatrice Mbwiria.....1.063 acres

Patrick Muriungi.....1.063 acres

Geoffrey Riungu.....1.063 acres

Nanis Kanyari.....1.063 acres

Solomon Kirimi.....1.063 acres

b) Nkuene/Nkumari/642 (0.83 acres)

Jennifer Karimi

Gladys Nduru

Salome Tirindi

Maritha Karoki M' Rukaria

4. The Petitioner protested to this mode of distribution contending, inter alia, that prior to his demise, the deceased had expressed his wishes on how his estate should be shared. That the deceased had obtained Land Control Board Consent to share out **Land Parcel No. Nkuene/ U-Mikumbune/351** as follows:-

a) Beatrice Tirindi Mbwiria - 0.68 ha

b) Ferdinand Gatobu Mbui - 0.95 ha

c) Geoffrey Riungu Mbui - 0.68 ha

d) Solomon Kirimi - 0.68 ha

5. He contended that the deceased died before he could affect the transfer the shares to the respective beneficiaries. That since there were two of his sisters who were not married, they should get the whole of **LR. No. Nkuene/Nkumari/642** and an additional of 0.27 ha from the petitioner's share in **LR. No. Nkuene/ U-Mikumbune/351**.

6. The Protest was ordered to be determined by way of oral evidence whereby the parties relied on their respective affidavits on which they were cross-examined.

7. **PW1 Solomon Kirimi** testified that the deceased had called the elders and sub divided **Plot No. 351** between his sons and that the family had gone to the Land Control Board for subdivision. That, the consent was granted and the 1st objector was given a larger share as per the deceased's wishes. He produced the original copy of the application for Consent of the South Imenti Land Control Board for the subdivision and the Consent thereto dated 17th December, 1982 and 6th January, 1983, respectively.

8. **RW1 Ferdinand Gatobu Mbui** relied on his affidavit sworn on 31st October, 2016 in support of the application for confirmation of grant and testified that; he had proposed to get a bigger share as he had bought part of the property; that during his lifetime the deceased had given him that portion. He admitted that the deceased and the family had gone to the Land Control Board for the subdivision of **LR. No. Nkuene/Mikumbune/351**.

9. **IP1 Paulina Karoki** testified that she was a daughter of the deceased and was claiming a share of the deceased's estate. She supported the mode of distribution proposed by the 1st objector.

10. It was submitted for the petitioner that the deceased had impliedly expressed his wishes and desire on how the estate should be distributed. That all the beneficiaries had signed the relevant application for the subdivision as proposed by the deceased. That the property was to be shared in terms of paragraph 6 of the protest; that all the beneficiaries to **LR. No. Nkuene/U-Mikumbune/351** had taken their respective portions prior to 1982 and continued to occupy the same as per the deceased's wishes and had made enormous developments on their respective portions.

11. For the objector, it was submitted that the petitioner had acknowledged that the 1st objector should get a bigger portion. That since not all the beneficiaries of the deceased had been catered for, the portion of **LR. No. Nkuene/U-Mikumbune/351** that was unoccupied could be redistributed to them.

12. I have carefully considered the affidavits of the respective parties and the evidence on record. The issues for determination are; ***did the deceased settle any part of his estate before his demise; how should the estate be distributed?***

13. **PW1** testified that the deceased had subdivided **Plot No.351** among his sons before his demise. That the deceased had gone to the relevant Land Control Board for the subdivision of that property whereby the 1st objector was given a larger share. However, the deceased passed on before titles could be issued to the beneficiaries. He produced the application for the Consent of the South Imenti Land Control Board and the consent thereto as **PEXh.1**.

14. In his affidavits, **RW1** had denied the authenticity of **PEXh.1** on the ground that in 1982, the deceased could not have included the name of Beatrice Tirindi Mbwiria as her husband (a son of the deceased) was still alive. However, it was explained by the petitioner that the husband of Beatrice was at the time living in Nairobi and the deceased decided that Beatrice represent him on the issue of the division of land. Further, both **RW1 and IPW1** admitted in their evidence that, the deceased had actually subdivided **LR. No. Nkuene/U-Mikumbune/351** amongst his sons way back before 1982 in terms of the application for the Land Board Consent produced as **PEXh.1**. That the entire family had attended the Land Control Board to effect the said subdivision.

15. From the evidence on record, I am satisfied that the deceased had, prior to his demise, settled all his sons on **LR. No. Nkuene/U-Mikumbune/351**. That he had shown each of the sons his respective portion where they had settled and have developed their respective portions. That property is not available for distribution.

16. **Section 42 of the Law of Succession Act CAP 160 of the Laws of Kenya** provides that in distributing an estate of a deceased, the court has to take into consideration the provision made by a deceased during his lifetime.

17. That being the case, the only property that is available for distribution is **LR. No. Nkuene/Nkumari/642** measuring 0.25 ha. The parties were in agreement that this property should be distributed to the daughters of the deceased. The other married daughters did not stake a claim in the estate. I am aware that they are entitled to a share of the estate unless they renounce their interest which they did not. Accordingly, **LR. No. Nkuene/Nkumari/642** should be distributed to the daughters equally.

17. Accordingly, the estate will be distributed as follows:-

A) LR. No. Nkuene/U-Mikumbune/351

- a) Beatrice Tirindi Mbwiria - 0.68 ha
- b) Ferdinand Gatobu Mbui - 0.95 ha
- c) Geoffrey Riungu Mbui - 0.68 ha
- d) Solomon Kirimi - 0.68 ha

B) LR. No. Nkuene/Nkumari/642

- a) Jennifer Karimi
- b) Gladys Nduru
- c) Salome Tirindi
- d) Pauline Karoki
- e) Patrick Muriungi
- f) Nannis Kanyari

To be held jointly in undivided shares.

DATED and DELIVERED at Meru this 7th day of June, 2018.

A. MABEYA

JUDGE