



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 9 OF 1990**

**IN THE MATTER OF THE ESTATE OF M'MUNGANIA MUTEMA**

**(DECEASED)**

**FELIX MUTHURI MUNGANIA.....PETITIONER**

**-VS-**

**MBERIA M'MUNGANIA.....OBJECTOR**

**J U D G M E N T**

1. **M'MUNGANIA MUTEMA (“the deceased”)** died in the year 1968. On 24<sup>th</sup> January, 1990, **Felix Muthuri Mungania (“the petitioner”)** petitioned for letters of administration of the estate intestate. The grant was issued on 7<sup>th</sup> December, 1990 and confirmed on 27<sup>th</sup> February, 1992 with the estate property known as **ABOGETA/UPPER-CHURE/526**, the only property constituting the estate of the deceased, being wholly distributed to the petitioner.
2. On 3<sup>rd</sup> October, 1994, **Mberia M'Mungania (“the Objector”)** lodged a Summons for the revocation of the grant. He contended that the Petitioner filed this Cause fraudulently by making of a false statement and/or concealment from the Court of something material to the case that is, he did not disclose that he had other brothers.
3. On 2<sup>nd</sup> July, 2007, the grant confirmed on 12<sup>th</sup> February 1992 was revoked and the objector was directed to file a protest to distribution, which he did contending that the estate property should be distributed equally between him and the petitioner.
4. The protestor's case was heard by Emukule J while Kasango J heard and concluded the petitioner's case on 31<sup>st</sup> May, 2011. From that date, the matter remained in limbo until 26<sup>th</sup> September, 2018 when Counsels for the parties urged that I should write the judgment based on the material on record. In this regard, it should be noted that this court did not see any of the witnesses testify.
5. The protest was heard through oral testimonies whereby both the protestor and the petitioner testified and called witnesses. At the hearing, the objector (**OW1**) told the court that he objected to the petitioner getting plot **Abogeta/U.Chure/526** because that property was left to both him and the petitioner by the deceased. That the deceased had subdivided that property equally between him and the petitioner in the presence of clan elders. That he and the petitioner have continued to live with their families on the property and the court should protect his rightful inheritance.
6. **OW2 Mwamba Itiria**, a nephew of the deceased, told the court that the deceased had three pieces of land. That he had distributed the said parcels of land to his three sons; M'Magiri who settled at a special area and was to share with his brother Muthuri (the petitioner), **Abogeta/U.Chure/347** was given to Mwirichia to share with the objector while **Abogeta/U.Chure/526** was to be shared between the objector and the petitioner.
7. In his testimony, the petitioner (**DW1**) told the court that he was the son of the deceased. That the deceased had two wives and 8 children as follows: -

**1<sup>st</sup> House**

- a) Munyange- Wife
- b) Kaimuri
- c) M'Mwirichia

d) Karuru

e) M'Rimberia (the objector)

### **2nd House**

a) Njiru- wife

b) Stephen M'Magiri

c) Felix Muthuri (petitioner)

d) Murungi (deceased)

e) Kanyua

8. That before he died, the deceased had shared his land between the two houses whereby **Abogeta/U.Chure/347** was given to Mwirichia to share with the objector. That Mwirichia did not oblige which led the objector to file **Meru H.C Civil Suit No. 126 of 1988** where it was ordered that Mwirichia give the Objector 2 acres out of the 5.20 acres. The petitioner produced the proceedings and judgement in that suit. He told the court that the objector was to move out of his parcel of land after getting the 2 acres but he did not. He produced the green card as proof of the fact that the objector had gotten the 2 acres out of **Abogeta/U.Chure/347**.

9. **DW2, Moffat Magambo Mbwiria** was the chief of Igoki Location. He stated that he knew the deceased and in his capacity as Chief, he was invited to resolve disputes of the deceased's family in 1988. That the objector was demanding his share from Mwirichia which he was given. That however, the objector did not move to his share given to him. He denied that **Abogeta/U.Chure/526** is divided into two equal shares as alleged by the objector.

10. **DW3 Misheck M'ithinji** was the cousin of the deceased. He testified that the deceased had two parcels of land that is **Abogeta/U.Chure/526** and **Abogeta/U.Chure/347**. That the deceased had divided his properties according to the two houses whereby Mwirichia and the objector were to share **Abogeta/U.Chure/347** while the petitioner was to remain on **Abogeta/U.Chure/526** which was 2 acres.

11. The Counsels for the parties filed their respective submissions which this court has considered. The issues for determination are; ***what properties constitute the estate of the deceased? did the deceased share his properties? how should the estate be distributed?***

12. From the record, the deceased had two wives who had four children each. The record shows that the deceased had two properties **Abogeta/U.Chure/347** and **Abogeta/U.Chure/526**. The testimonies of the witnesses show that one of his children M'Magiri settled on a special area and that property was in his name. He seems to have gathered that land for himself. The evidence also shows that the deceased directed one of his sons from the first house Mwirichia to go and settle on **Abogeta/U.Chure/347** which belonged to the deceased although in the name of Mwirichia.

13. The witnesses were in agreement that the deceased lived with his two wives and children on **Abogeta/U.Chure/526**. It is from that property that every member of the deceased seem to have moved to their respective properties, that is M'Magiri and Mwirichia.

14. From the proceedings and judgment in **Meru H.C Civil Suit No. 126 of 1988**, it is clear that the deceased had settled his family before he died. He directed that Mwirichia and the objector settle in **Abogeta/U.Chure/347**. It is on that basis that the court ordered Mwirichia to cede to the objector 2 acres out of that property which measured 5.20 acres.

15. On the foregoing, I am satisfied that the deceased owned two properties, **Abogeta/U.Chure/347** and **Abogeta/U.Chure/526**. That the deceased settled or gave directions on how his family was to live on the said two properties. However, the only property that constitutes the estate of the deceased and is subject to these proceedings is **Abogeta/U.Chure/526**.

16. The last issue is, how should **Abogeta/U.Chure/526** be distributed? While the petitioner proposed that the property should be wholly distributed to him, the objector contended that it should be divided equally between him and the petitioner.

17. The deceased died in 1968 before the commencement of the **Law of Succession Act, Cap 160 Laws of Kenya ("the Act")** which came into operation on 1<sup>st</sup> July, 1981. **Section 2 of the Act** provides: -

***"(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.***

***(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act. ... "***

18. In this regard, the succession of the deceased in this matter would be in accordance with the custom that he was subject to, to wit, the Meru custom.

19. According to *Eugene Cotran, Restatement of African Law: 2 Kenya II Law of Succession, (Sweet & Maxwell, 1969)* at page 35, the estate of a polygamous Meru man was divided equally between the houses. Each house keeps that land which was allocated to it during the husband's lifetime.

20. The testimony of the witnesses was that the properties were divided between the two houses of the deceased with the sons identifying their portion of inheritance. This is evidenced by the claim of the objector in the Meru H.C Civil Suit No. 126 of 1988. The law governing this succession, i.e the Meru customs, rightfully provides that the objector inherits Abogeta/U.Chure/347 and the protestor inherits Abogeta/U.Chure/526 as they are from different houses.

21. The foregoing notwithstanding, the testimonies of the objector and his witnesses in the Meru H.C Civil Suit No. 126 of 1988 was very clear, that the objector's inheritance was 2 acres in Abogeta/U.Chure/347 while the petitioner was to be left on Abogeta/U.Chure/526. The objector's and OW2's turn around in their testimony in this matter just shows how untruthful they were to court. They are bound by the positions they had taken in the earlier suit, Meru H.C Civil Suit No. 126 of 1988. Truth does not change with time. The objector seemed to change positions to suit his own interest and circumstances.

22. In any event, in this case, it would appear that the Meru custom lined itself with the constitutional principle of non discrimination and equality. The objector got 2 acres while the petitioner is left with 2 acres.

23. Accordingly, I am satisfied that the intention of the deceased was that the children of his first wife, Mwirichia and the objector, do occupy and live on Abogeta/U.Chure/347 while the petitioner was to be left on Abogeta/U.Chure/526. That created some equity.

24. Accordingly, the estate of the deceased, that is, Abogeta/U.Chure/526 is to be held wholly by the petitioner. The objector is to move to his share of inheritance that is 2 acres in Abogeta/U.Chure/347.

25. Since the grant herein was revoked in 2007, I issue a fresh grant to the petitioner, Felix Muthuri Mungania, and confirm the same whereby Abogeta/U-Chure/526 is wholly distributed to him.

26. This being a family matter, I will make no orders as to costs.

It is so decreed.

**DATED and DELIVERED this 8<sup>th</sup> day of November, 2018.**

**A. MABEYA**

**JUDGE**