



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 583 OF 2013

IN THE MATTER OF THE ESTATE OF FRANCIS MARETE M'MURUNGI (DECEASED)

PAUL MWIRIGI MARETE.....PETITIONER

VERSUS

JAMES MURIUNGI MARETE.....1ST OBJECTOR

HELLEN KAGWIRIA MURIUKI.....2ND OBJECTOR

J U D G M E N T

1. Francis Marete M'Murungi (*the deceased*) died on 18th December 1999. As per the letter of the chief from Mboroga Location the deceased was survived by the following:-

- a) Esther Naitore Kigundu - daughter
- b) Sabella Kanorio Mutuma - daughter
- c) Paul Mwirigi Marete - son
- d) Gilbert Kirimi Marete - son
- e) Susan Mware Marete - daughter
- f) Felix Muruwa Johana - grandson
- g) Dancan Mwenda Mugambi - grandson

The deceased left behind the property known as **Kibirichia/Kibirichia/527** as the only property forming his estate.

2. On 30th October 2013, **Paul Mwirigi Marete (the petitioner)** petitioned for letters of administration intestate. This was followed by an objection dated 23rd December, 2013 by **James Muriungi Marete (1st objector)** and **Hellen Kagwiria Muriuki (2nd objector)**.

3. The objectors contended that they were beneficiaries of the estate, being son and daughter respectively, of the deceased yet they had not been listed in the list of beneficiaries. They alleged that the petitioner had

intermeddled with the estate of the deceased by selling part of the estate to Kiiru Full Gospel Church of Kenya.

4. Nevertheless, the grant of letters of administration was issued to the petitioner on 15th January, 2014 and he applied for confirmation on 1st December, 2016. He proposed to distribute the estate as follows: -

L.R. No. KIBIRICHA/KIBIRICHA/527 (4.45 ha)

- a) **Esther Naitore Kigundu** - **50ft by 100ft**
- b) **Sabella Kanorio** - **50ft by 100ft.**
- c) **Susan Mwari** - **1.25 acres**
- d) **Representatives of the Estate of Stephen Mugambi Marete**
 - i) **Dancun Mwenda** - **1.37 Acres**
 - ii) **Doris Gatwiri**
Alex Mugambi (minor) - 0.89Acres equally with Doris Gatwiri holding the share on behalf of Alex Mugambi
- e) **Representatives of Jonah Kinoti Marete**
 - i) **Felix Muruwa Jonah 2.265 Acres**
 - ii) **Lenah Nkirote** - **2.265 Acres equally**
- f) **Paul Mwirigi Marete** - **2.265 Acres**
- g) **Gilbert Kirimi Marete** - **2.265 Acres**
- h) **Full Gospel Church of Kenya, Kiiru** - **0.25 acres**

5. The 1st objector protested against the said mode of distribution and proposed that while the shares of the rest of the beneficiaries remain as proposed by the petitioner, he should be included and be given the same share as **Paul Mwirigi and Gilbert Kirimi** of **1.812 acres**.

6. The protest was heard by way of viva voce evidence. The parties and their witnesses filed affidavit evidence on which they were cross-examined save for Esther Naitore Kigundu who did not appear. She was said to be old and ailing.

7. **PW1** was the 1st objector. He stated that he was the ‘adopted son’ of the deceased since he had given him his surname. That the deceased took care of him from a tender age since his mother had given birth to him when she was a minor and she was taken back to school. He was only informed that Esther Naitore was his mother when he was aged 14-15yrs and in class 6.

8. He further testified that it was the deceased who educated him and when he was age, started a tailoring business for him. That he only moved away from the deceased’s home when he wanted to expand his business. That it was the deceased who took him for his wedding ceremony as per custom christened ‘Ruracio’ a fete that would only befit a father.

9. His testimony was supported by **PW2 Charity Kariuki Mitine**, a sister in law to the deceased. She told the court that Esther Naitore gave birth to the objector when she was a minor. She left the objector

under the care of the deceased at a tender age of 6 months and went back to school. That since the 1st objector did not have a father, her sister ‘adopted’ him. She further testified that it was the deceased who took Pw1 to school. That she was living with the deceased and only left his residence in 1967.

10. **PW3 Harriet Kajuju Mbijiwe** was a sister to the deceased. She supported the testimonies of **PW1 and 2**.

11. **RW1** was the petitioner. He testified that the objector was brought up in the deceased’s homestead. He was aware that his Birth Certificate and National Identification Card bore the name of the deceased. He explained that the deceased put his name in the birth certificate because at the time, the name of a woman, Esther Naitore could not be used. That the objector was born in the year 1971 and left the deceased’s home when he was 18 years old.

12. The 2nd objector neither filed any independent protest nor did she appear to testify. The petitioner and 1st objector filed their respective submissions which the court has carefully considered. The issue for determination is whether the 1st objector was a child of the deceased under **section 3 (2) of the Law of Succession Act (the Act)**.

13. It was the 1st objector’s case that he was an adopted child of the deceased. On the other hand, the petitioner contended

that the 1st objector was but a child of one of the beneficiaries and was therefore not entitled to an independent share.

14. The 1st objector relied on **section 3 (2) of the Act**. That section provides:-

“references in this Act to “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, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or infact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

15. The 1st objector and his witnesses testified that he was an ‘adopted son’ of the deceased by virtue of his dependence to the deceased. That the deceased took care of him, educated him, started a business for him and even paid *ruracio* for him. On the other hand, the petitioner admitted that the 1st objector was taken care of by the deceased but as a child of one of the daughters of the deceased. That after he became of age, the 1st objector moved away from home and went and established his home at Isiolo.

16. In **James Munene Mugo v John Chomba & Another [2015] eKLR** the court had an opportunity of considering the application of **section3 (2) of the Act**. The court stated:-

“.....The petitioner was accepted by the deceased as a child of his own upon whom he assumed permanent responsibility. He is a male child as provided by the said provision. From the evidence of the applicants, he was adopted by their father in 1974 at the tender age of 7 years. His mother was alive and it is said she left the child and went to stay in Embu never to return again. The deceased took the young boy to school and met all his education and other expenses. The deceased stayed with the child until the death of the deceased which was 20 years after adoption in 1994. At that time the petitioner was about 37 years. He had been shown a place to live and to cultivate. It was not disputed that upon the death of the deceased, his three sons including the petitioner shared his livestock and other movable assets equally.

I come to the conclusion that the petitioner being an adopted child is a child of the deceased herein for purposes of succession as provided by the law.....”

17. A reading of **section 3 (2) of the Act** and the above case will show that, for a male person to be considered to have accepted one as his child, it must be shown that such male person must have “*expressly recognized or in fact accepted as a child of his own or he has voluntarily assumed permanent responsibility*”.

18. In the present case, it is not in dispute that the 1st objector was born of a daughter of the deceased. She was at the time a minor. She left him at the care and custody of the deceased while she went back to school. The deceased took care of the 1st objector until he was of age when he helped him start a business to fend for himself. The deceased put his own name in the birth certificate of the 1st objector. With all these, can it be said that the deceased had recognized or in fact accepted the 1st objector as his own or had voluntarily assumed permanent responsibility?

19. In order to answer that question, there are several matters that the court need to examine. It is a fact that the 1st objector was a grandson of the deceased. He was born to a daughter who was also a minor and whose circumstances forced her to leave the 1st objector under the care of her father. She had to return to school after giving birth to the 1st objector. In the circumstances, the deceased had no alternative but to accept and take care of the 1st objector.

20. As regards his education, there was conflicting evidence as to who was responsible. The 1st objector stated that it was the deceased. The petitioner stated that he knew that as an untrained teacher, the 1st objector’s mother used to give the deceased money for the 1st objector’s education.

21. The 1st objector’s own mother Esther Naitore swore an affidavit on 24th July, 2018 which is on record. Although she did not testify, a fact this court bears in mind and therefore refers to it with a lot of caution as she was not cross-examined on it, she swore that she used to give money to the deceased for the education of the 1st objector from her employment as a teacher. She also refuted the testimony of the 1st objector that it is the deceased who paid his dowry. She stated that it was her and her husband who organised the 1st objector’s wedding and paid his dowry. It is notable that although this affidavit was served upon the 1st objector before trial, he never responded to it nor did he refer to its contents during his trial. He never challenged its contents.

22. From the evidence on record, I am satisfied that the 1st objector had proved that; he depended on the deceased for his upbringing; throughout his childhood, he resided at the residence of the deceased; his biological mother lacked the means to take care of him during his childhood; while taking care of the 1st objector, the deceased put his name in his birth certificate.

23. However, it would seem that after the 1st objector became of age, the deceased empowered him by opening a business for him. After the business expanded, the 1st objector moved away from the home of the deceased and went to Isiolo where he established himself. There was no evidence that the deceased established or built a house for the 1st objector on the estate property. He never even showed him any portion thereof to cultivate.

24. The petitioner submitted that on the authority of **E.M.M vs. I.G.M. & Another [2014] eKLR and Re Estate of M’Muthamia Mwendwa (deceased) [2016] eKLR**, there was no evidence that the deceased had taken the 1st objector as his own child and that he was not a dependant in law.

25. This court’s view is that, the deceased took care of the 1st objector as he would be expected to due to the circumstances he found himself in. His minor daughter gave birth to the 1st objector while in school. In order for her to continue with her studies, someone had to take care of the 1st objector and the deceased had no alternative but to step in and fill that gap.

26. As for the 1st objector’s education, there was no conclusive evidence that the deceased was the one

who exclusively catered for it. The 1st objector's mother chipped in. The 1st objector did not refute her allegations that she is the one who educated him. The deceased may have done what he did as a grandfather of the 1st objector. He never did anything more than would be required of a grandfather whose minor daughter had been put in the family way prematurely. After the 1st objector was of age, he empowered him and let him go from his residence. He never built him a house or show him where to cultivate on his land as he would have been expected if he had voluntarily taken him as his one child.

As at the time he died, the 1st objector was not dependent on the deceased.

27. In view of the foregoing, this court's finding is that there was no evidence that the deceased had taken the 1st objector as his child in terms of **section 3(2) of the Act** neither was he a dependant of the deceased under **section 29 of the Act**. The deceased was forced to take care of the 1st objector and when he was of age, he let him go. The case of **In Re Estate of J.C.G (deceased) [2018] eKLR** is not applicable to the case before court.

28. The 1st objector can only inherit through his mother Esther Naitore under the provisions of **section 42 of the Act**.

29. Accordingly, the protest is hereby dismissed and the grant is confirmed in terms of paragraph 4 above.

30. This being a family matter, I will not make any order as to costs.

SIGNED at Meru

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 6th day of December, 2018.

F.K. GIKONYO

JUDGE