



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 706 OF 2012**

**IN THE MATTER OF THE ESTATE OF FREDRICK NJERU ZAKAYO (DECEASED)**

**MOSES BUNDI NJERU.....PETITIONER**

**VERSUS**

**JOAN KAGENDO NJERU.....OBJECTOR**

**JOAN NJERU LAZARO.....APPLICANT**

**PAUL MUGENDI.....1<sup>ST</sup> INTERESTED PARTY**

**DR. GEOFFREY MUCEE.....2<sup>ND</sup> INTERESTED PARTY**

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

1. **FREDRICK NJERU ZAKAYO (“the deceased”)** died on 2<sup>nd</sup> April, 1989. On 1<sup>st</sup> November, 2012 the Chief of Murugi West Location wrote a letter of introduction where he introduced the petitioner as a son of the deceased and the objector as a daughter.

2. In the said letter of introduction, it was shown that the deceased was survived by the following: -

- a) **Joyce Ciangai Moses** - wife
- b) **Joan Kagendo Njeru** - daughter
- c) **Godwin Mutugi Njeru** - son
- d) **Gabriel Muthuri Njeru** - son
- e) **Moses Bundi Njeru** - son
- f) **Chris Kamundi Njeru** - son

3. The letter disclosed that the deceased’s estate comprised of **L.R. No. Tunyai South “A”/35**. However, it later transpired that the deceased also owned other properties as follows: -

- a) **L.R. Mwimbi/Murugi/1337-(2.45 ha)**
- b) **Property at Wiru -Acreage not disclosed**
- c) **Plot at Kianjagi -Acreage not disclosed**
- d) **Motor Vehicle Reg. No. KZD 837, Isuzu Mini Bus**
- e) **Motor Vehicle Reg. No. KZR 584, Isuzu Mini Bus**

**f) Motor Vehicle Reg, No. KUM 091, Land Rover**

4. The petitioner petitioned for grant of letters of administration which was issued to him on 12<sup>th</sup> February, 2013. The same was confirmed on 30<sup>th</sup> July, 2014 with **L.R. No. South Tharaka/Tunyai "A"/35** which is the only property the petitioner had disclosed, being distributed equally amongst the four sons of the deceased.

5. Vide an application dated 5<sup>th</sup> April, 2016, the petitioner applied for the rectification of the certificate of confirmation of grant dated 5<sup>th</sup> April 2016. In that application, he stated that there was an omission of their cousin, **John Njeru Lazaro**, who had been living on the estate for 20 years. He proposed that the certificate be rectified as follows:-

- a) Moses Bundi Njeru - 7.25 Acres
- b) Gabriel Muthuri Njeru - 7.25 Acres
- c) Chris Kamundi Njeru - 7.25 Acres
- d) Godwin Mutugi Njeru - 7.25 Acres
- e) John Njeru Lazaro - 3.0 Acres

6. On 14<sup>th</sup> February, 2018, **John Njeru Lazaro** applied to be provided for as a dependent of the deceased. He stated that the deceased put him in possession of the estate property to take care of it and promised him that he would get a part of it. That he thereupon entered and settled on a portion thereof. He developed the same and continue to-date to cultivate the portion he has been occupying. That if given 3 acres as suggested by the petitioner in the application for rectification of grant, he would be satisfied.

7. On 20<sup>th</sup> April, 2017, **Joan Kagando Njeru (the objector)** lodged a summons under **sections 48, 76 of the Law of Succession Act (the Act) and Rule 44(1) Probate and Administration Rules**. In that summons, she sought for the revocation of the grant and to be appointed as the executor of the deceased's written will.

8. The grounds upon which the application was made were that; the grant was obtained and confirmed fraudulently by concealment of information material to the case; the petitioner secretly filed the petition without disclosing to her of his intentions and without seeking her consent; the petitioner had omitted her from the estate yet the deceased had left a will dated 22<sup>nd</sup> January, 1987 wherein her mother Sylvia Karimi Njeru was bequeathed a share.

9. The petitioner opposed the application vide his affidavit sworn on 18<sup>th</sup> May, 2017. He stated that the estate had already been distributed to the beneficiaries and the land sub-divided. That his brother sold subdivision No. 3976 to Paul Mugendi and he himself has already transferred his portion of subdivision No. 3940 to Geoffrey Mucee.

10. He further swore that the applicant was all along aware of this Cause but chose not to participate as she did not wish to have a share in the estate. While admitting that the deceased had married the objector's mother, denied that the objector was but the objector was not a daughter of the deceased. That this is why she was not included in the deceased's alleged will. He stated that, the two vehicles left behind by the deceased, KZR 837 and KZD 835 together with household goods and bank accounts had already been shared between the two widows. He concluded that the applicant should inherit her mother's property and not the deceased.

11. On 29<sup>th</sup> May 2018, the two applications by the applicant and the objector were consolidated and ordered to be determined through *viva voce* evidence.

12. **OW1 Joan Kagando Njeru** adopted her affidavit of 25<sup>th</sup> April 2017, and the statements dated 30<sup>th</sup> January, 2010 and 26<sup>th</sup> May, 2018 as her evidence. She produced her list of documents dated 1<sup>st</sup> February 2018 and 24<sup>th</sup> May 2018 as **OExh.1 (1-15) and OExh.2 (1-7)**, respectively.

13. Her case was that she did not know why her father left her out of the will but it was not because she was not his biological daughter. She never lived on the Tharaka land but she used to visit and her mother had built a house on that land. She lived in Kianjagi land where the deceased was buried and where her step brothers were currently living.

14. **OW2 John Njeru Lazaro** relied on his witness statement dated 4<sup>th</sup> October 2017 and affidavit made on 15<sup>th</sup> February, 2018. He reiterated that he had been in occupation of 20 acres out of the 40 acres of the estate property but he would be satisfied with the 3 acres. He had constructed thereon a shop, hotel, butchery and a store for foodstuffs.

15. **PW1 Moses Bundi Njeru** relied on his affidavit sworn on 18<sup>th</sup> May 2017. He stated that he did not know of any relationship between him and the objector even though she uses the deceased's name and the chief included her name in his letter of introduction. That during distribution, he informed her about the cause of which she did not want to be involved neither did she attend family meetings. That she was therefore not entitled to a share in the estate. That if the will is effected, the applicant would not get anything from the estate. That after a meeting with the elders, it had been agreed that the objector gets 1 acre and Lazaro 2 acres.

16. He further testified that the land in Kianjagi where he and his brothers were living was not part of the estate as it was bought by the deceased and did not have title. The deceased also had land parcel **Mwimbi/Murugi/1337** measuring about 6 to 7 acres. He did not include it

in the estate as it had no issues as compared to **South Tharaka/Tunyai "A"/35**. That he was not aware that he was required to include all the properties in the succession cause.

17. **PW2 Elias Ntwiga Kirika**, the deceased's younger brother, testified that the deceased properties included **Tunyai "A"/35**, another in **Weru and Kianjagi**. He stated that the objector was not born by the deceased and that the deceased did not take care of her. He confirmed that the deceased wrote a will which he saw and read. According to him, the applicant was supposed to inherit what was due to her mother.

18. **PW1 Naftali Mutegi** testified under a power of attorney given to him by his brother **Paul Mugendi Muteria**. He relied on his affidavit sworn on 28<sup>th</sup> August, 2018 and reiterated that Paul Mugendi Muteria was an innocent purchaser from the estate.

19. **IPW1 was Dr. Geoffrey Mucee**. He relied on his affidavit sworn on 16<sup>th</sup> January 2018 and produced his documents as **IPEXh.1-7**. He stated that by the time he was entering into the sale agreement, he was not aware that objector had protested to the distribution of the estate.

20. The parties filed their written submissions which the court has carefully considered. The issues for determination are: ***whether the objector is a daughter of the deceased, whether there was a valid will and how the estate of the deceased should be distributed.***

21. From the record, the petition documents that include the chief's letter of introduction, the objector was recognized as the daughter of the deceased. The petitioner's own mother who had initially filed **Succession Cause No. 34 of 1991** to succeed the deceased's estate indicated that the objector was a daughter of the deceased.

22. **OW2** testified that the objector was the deceased's daughter. A marriage certificate was produced which showed that the objector's mother was married by the deceased in church in 1966. She explained the error that was in her identity card as to her date of birth which the court was satisfied with. She also produced copies of lovely letters addressed to her by the deceased during his lifetime.

23. To my mind, her being left out of the Will is not *per se* an indication that she was not a child of the deceased. I did not believe the testimonies of **PW1 and PW2**. The court could tell that they were telling lies as they tried to defend and justify the actions taken by the petitioner. On the other hand, the testimonies of **OW1 and OW2** was consistent and believable. **OW1** could not approbate and reprobate at the same time. He had himself relied on the letter of introduction by the Chief to lodge the petition. He could not at the same time disclaim it to the extent that it referred to the objector as a daughter of the deceased.

24. Even if the objector was not a biological child of the deceased, there was ample evidence to show that he had willingly taken her as his own child. That after marrying her mother, he took her to be his own child, provided for her, educated her well and made her tour the world over where he was working as a diplomat. The letters exchanged between the objector and the deceased attest to a relationship of father/daughter. This fits well with the definition of a "child" under **section 3 of the Act**. Accordingly, I hold that the objector was a daughter of the deceased.

25. On the second issue, **section 3 of the Act** defines a will as follows: -

***"will" means the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II, and includes a codicil".***

26. For a will to be considered as valid, the court has to be guided by the provisions of **sections 5, 7 and 11 of the Act**. A written will should have been signed by the testator and attested by two competent witnesses. In this case, the objector produced a will dated 22<sup>nd</sup> January 1987 which has complied with these two requirements. Further, **PW2** admitted that the deceased had written a will. I note however, that none of those who attested the will was called to testify on it and no reason for that failure was given.

27. According to that document, the deceased stated that his land at Tunyai, Wiru and plot at Kianjagi plus his vehicles and or other property should be inherited by Mutugi Njeru, Muthuri Njeru, Bundi Njeru, Kamundi Njeru, Joyce C. Njeru and Slyvia K. Njeru.

28. In her submissions, the objector submitted that the estate should be distributed equally amongst the children as per the provisions of **Section 38 of CAP 160**. In the alternative, she submitted that the Will should be validated. On his part, the petitioner maintained that the way he had distributed the estate was the fairest.

29. Normally, an estate of a deceased is to be distributed among his or her beneficiaries. In this case however, there are third parties. Apart from the objector, there is **John Njeru Zakayo**, nephew to the deceased who claims to have been a dependent. There are also two interested parties who have purchased a total of 24 acres from the estate. I will deal with the claim of each separately.

30. As regards the objector, I have already made a finding that she was a daughter of the deceased. She is entitled to an equal share in the estate as her step-brothers. Whether one applies **section 38 or section 40 of the act**, the result is the same as both widows of the deceased are already deceased. Accordingly, I will apply the provisions of **section 40 of the Act** in distributing the net estate.

31. As regards the applicant, the evidence on record shows that after acquiring the property known as **South Tharaka/ Tunyai 'A'/35** measuring 42 acres, the deceased put the applicant thereon. The applicant was taking care of it while eking a livelihood therefrom. The applicant has continued to depend on that land to-date. As at the date of the demise of the deceased, the applicant was dependent on him because, he was eking out a living from the deceased's property. He testified that the deceased had promised that he would ultimately give him a portion therefrom for his work.

32. There was no evidence that the applicant was being paid for his services other than depending on that land. I am satisfied that the applicant satisfies the provisions of **section 29 of the Act**, that he was a dependent of the deceased. In an earlier application which the

petitioner withdrew, the petitioner himself had recognized this fact and had proposed to give him 3 acres. I will award him that as his share.

33. As regards the interested parties, there was evidence to show that on 30<sup>th</sup> July, 2014, the grant was confirmed in favor of the petitioner and **South Tharaka/Tunyai 'A'/35** distributed to the petitioner and all his brothers equally. On 28<sup>th</sup> January, 2016, the petitioner and his brothers sold to the 2<sup>nd</sup> interested party 10 acres from that property for Kshs.3,300,000/-. The 2<sup>nd</sup> interested party testified that he did not know of the objector's claim until after title no. **South Tharaka/Tunya 'A'/3940** was registered in his name and that of his wife. It turned out that **South Tharaka/Tunyai 'A'/3940** measures approximately 11 acres.

34. As regards the 1<sup>st</sup> interested party, he produced a sale agreement which showed that on 29<sup>th</sup> February, 2016, he purchased a total of 7.25 acres from the petitioner and his brothers **South Tharaka/Tunya 'A'/35**. He produced the Land Control Consent for the transaction. In his testimony, the petitioner told the court that what they had sold to the 1<sup>st</sup> interested party was 13 acres.

35. On the basis of the foregoing evidence, I am convinced that the interested parties were innocent purchasers for value. They did not have notice of any claim against the estate or any defect in the title of the petitioner and his brothers since the Certificate of confirmation of grant clearly showed that they were entitled to 10.5 acres each in South **Tharaka/Tunya 'A'/3940**. They may not have known that the petitioner had excluded the objector from distribution.

36. **Section 93 of the Act** was intended to protect innocent purchasers such as the interested parties notwithstanding the revocation of the grant. All such a purchaser has to show is that, the seller was a lawful holder of a grant, that the purchaser innocently purchased the property for value without notice of any defect on the title of the seller.

37. Accordingly, the interested parties are entitled to keep the titles and the areas which they purchased. As regards the 2<sup>nd</sup> interested party, his title number **South Tharaka/Tunya 'A'/3940** will remain intact. While the 1<sup>st</sup> interested party will hold onto his 13 acres

38. The evidence on record shows that the deceased's estate had the following immoveable properties:-

a) **South Tharaka/Tunyai 'A'/35 - 42 acres**

b) **L.R. Mwimbi/Murugi/1337 - 6.05 acres**

c) **Property at Wiru (No acreage was given)**

d) **Plot at Kianjagi (No acreage was given)**

39. The known acreage of the estate therefore is 48 acres. If 3 acres due to the applicant is removed, the balance that is distributable to the 5 children of the deceased will be 45 acres.

40. If that is divided between the five beneficiaries, each will be entitled to 9 acres each. According to the petitioner, the four brothers are already occupying 7 acres where they live. They will also be entitled to take the Wiru and Kianjagi plots once they find the title numbers thereto. In this regard, I will distribute to the objector 10 acres from **South Tharaka/Tunyai 'A'/35** as she will not benefit from the other properties. The balance thereof will be divided equally amongst the 4 brothers who have already benefited from the total acreage sold to the interested party.

41. As regards the motor vehicles, these seem to have already been distributed to the widows who have since passed on.

42. Accordingly, I make the following orders:

a) The grant of letters of administration intestate issued to the petitioner on 12<sup>th</sup> February, 2013 and confirmed on 30<sup>th</sup> July, 2014 is hereby revoked.

b) A fresh grant of letters of administration intestate is hereby issued to Moses Bundi Njeru and Joan Kagendo Njeru as joint administrators.

c) The grant is confirmed and the estate will be distributed as follows:

**L. R MWIMBI/MURUGI/1337**

a) Moses Bundi Njeru b) Gabriel Muthuri Njeru & c) Chris Kamundi Njeru - to be shared equally

d) Godwin Mutugi Njeru

**L.R. NO. SOUTH THARAKA/TUNYAI 'A'/35**

a) Dr. Geoffrey Mucee - 4.43Ha

South Tharaka/Tunyai "A"/3940

Subdivision Nos. 3977, 3978, 3979, 3980, 3975 and 3976 be and are hereby consolidated and reverted back to the name of the deceased and distributed as follows:

- a) Paul Mugendi - 13 Acres
- b) John Njeru Zakayo - 3 Acres
- c) Joan Kagendo - 10 Acres
- d) Moses Bundi Njeru, e) Gabriel Muthuri Njeru & f) Chris Kamundi Njeru - balance to share equally
- g) Godwin Mutugi Njeru

**PROPERTY AT WIRU**

- a) Moses Bundi Njeru b) Gabriel Muthuri Njeru & c) Chris Kamundi Njeru - to be shared equally
- d) Godwin Mutugi Njeru

**PROPERTY AT KIANJAGI**

- a) Moses Bundi Njeru b) Gabriel Muthuri Njeru & c) Chris Kamundi Njeru - to be shared equally
- d) Godwin Mutugi Njeru

**SIGNED at Meru me: -**

**A. MABEYA**

**JUDGE**

**DATED and DELIVERED this 6<sup>th</sup> day of December, 2018.**

**F. GIKONYO**

**JUDGE**