



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 299 OF 1997

IN THE MATTER OF M'MWITHIRWA THIURU (DECEASED)

GEORGE MWENDA KIMATHI.....PETITIONER

VERSUS

STEPHEN KIRIMI RUTERE.....1ST OBJECTOR

CAROLINE NCHABIRA M'MWITHIRWA.....2ND OBJECTOR

FLORENCE GAITI SAMUEL.....3RD OBJECTOR

J U D G M E N T

1. **M'Mwithirwa Thiuru** died intestate on 26th January, 1996. On 13th November 1997, **George Mwenda Kimathi** ("the petitioner") petitioned for the letters of administration intestate and listed the assets of the estate as follows: -

- a) **L.R NO. LOWER CHURE/765**
- b) **L.R NO. LOWER CHURE/794**
- c) **L.R NO. LOWER CHURE/795**

2. On 24th June 1999, **Stephen Kiriimi Rutere** filed an objection stating that the deceased had sold to him **L.R No ABOGETA/L-CHURE 765** in 1975. That before the deceased could transfer the property to him, the petitioner placed a caution on the property. That thereafter, the 1st Objector together with the deceased had sued the Petitioner in CMCC NO. 858 of 1994 for the removal of the caution.

3. On 8th March 2016, **Caroline Nchabira M'Mwithirwa and Florence Gaiti Samuel** filed an objection alleging that the petition had been filed fraudulently; that they are the biological children of the deceased whereas the petitioner was only a grandchild. That they therefore take priority in the administration of the deceased's estate.

4. On 23rd May 2017, the court appointed both the petitioner and the 2nd Objector as joint administrators of the estate. On 23rd May, 2017, the petitioner filed an application for confirmation giving his own mode of distribution. Instead of filing a protest thereto, on 31st October, 2017, **Caroline Nchambira M'Mwithirwa** filed her own application for confirmation and gave her own mode of distribution different from that of the petitioner. The court treated the application by Caroline as a protest to the proposal by the Petitioner.

5. The parties informed the court that the beneficiaries were agreed, the assets of the deceased were agreed upon, that the only issue was that of distribution. They therefore urged the court to distribute the estate based on the material on record.

6. I have considered the proposed modes of distribution proposed by both the Petitioner and the 2nd Objector. I have also considered the claim by the 1st objector. While the 2nd objector agrees to the claim by the 1st objector, **Stephen Kiriimi Rutere**, the petitioner is not in agreement.

7. The issue therefore that falls for determination is, ***how should the estate of the deceased be distributed.***

8. I have seen the agreements entered into between the deceased and the 1st objector. They were so entered in 1975 and 1977, respectively. They were for the sale of a total of 5 acres by the deceased to the 1st objector from the estate. From the evidence on record, I am satisfied that this related to what was later referred to as **Abogeta/Chure/765** that measures approximately 2.02 ha.

9. The uncontroverted evidence on record is that, after the deceased sold the 1st objector the 5 acres from his larger property then measuring about 18 acres, he put the 1st objector in possession thereof. The 1st objector has continued to occupy that portion openly and against the title of the deceased for now close to 43 years. That he has extensively developed that portion and has been in exclusive possession thereof.

10. It is clear that both the deceased and the 1st objector had sued the petitioner in **Meru CMCC No. 858 of 1994** before the deceased died. The said suit was not meant to establish any right on the part of the 1st objector over **Abogeta/Chure/765**, but the removal of a caution placed on it by the petitioner. The petitioner has not controverted any of the averments made by the 1st objector regarding his purchase of a total of 5 acres from the deceased.

11. In view of the foregoing, I am satisfied that the 1st objector had purchased from the deceased in 1975 and 1977, respectively a total of 5 acres from the estate property. That the said property was **Abogeta/L-Chure/765**. Accordingly, the 1st objector was a creditor of the estate to the extent of 5 acres, which constitute **Abogeta/L-Chure/765**. That property is not available for distribution to the beneficiaries of the deceased but to the 1st objector only. It is not necessary to set it aside under **Rule 41 (3) of the Probate and Administration Rules**. That will be a mere technicality that is curable under **Article 159 (2) (d) of the Constitution of Kenya**.

12. As regards the rest of the estate, that is **Abogeta/L-Chure/795 and Abogeta/L-Chure/794**, it is not in doubt that the deceased was polygamous. He had two wives who constituted two houses as follows:-

a) 1st House

a) Rebecca Mujwa - **Wife (deceased)**

b) Florence Gaiti Samwel - **Daughter**

c) Godwin Kimathi - **Son (deceased)**

Survived by- Juliet Mbuthu Kimathi - **wife**

George Mwenda Kimathi - **son**

Rose Gakii - **daughter**

Irene Kagwiria - **daughter**

Dancun Mbae - **son**

b) 2nd House

a) Mandalina Kathunu M'Muthirwa - **wife (deceased)**

b) Caroline Nchabira M'Muthirwa - **daughter**

13. The deceased was polygamous. In this regard, his estate ought to distribute according to the provisions of **Section 40 (1) of the Act** which provide that the estate is to be distributed equally, each child forming a single unit. The deceased had only three children surviving him, **Florence Gaiti Samuel, Caroline Nchabira and Godwin Kimathi (represented by his wife and children)**. The court was not informed how the parties occupy the estate property presently. The court will therefore have no other choice but to distribute the same in accordance with the law but blindly.

14. The free estate of the estate constitute two properties, namely **Abogeta/L-Chure/795 and Abogeta/L-Chure/794**, measuring 2.48 ha and 0.607 ha respectively. In this regard, the estate of the deceased will be distributed as follows:-

a) ABOGETA/LOWER CHURE/794

Caroline Nchabira M'Mwirithia

b) ABOGETA/LOWER CHURE/795

i) Juliet Mbuthu Kimathi

George Mwenda Kimathi

Rose Gakii

Irene Kagwiria

Duncan Mbae - 1.089 Jointly and equally

ii) Florence Gaiti Samuel - 0.999ha

iii) Caroline Nchabira M'Mwithirwa - 0.392 ha

c) **ABOGETA/LOWER CHURE/765**

Stephen Kirimi Rutere

15. This being a family matter, I make no order as to costs.

SIGNED at Meru me:-

A. MABEYA

JUDGE

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

F.K. GIKONYO

JUDGE