



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.607 OF 2013

In the Matter of the Estate of Chabari Mwenda (Deceased)

JAMES NJERU CHABARI.....PETITIONER

Versus

ALEXANDER KABURU.....PROTESTOR

JUDGMENT

Protest: Petitioner beat-up the deceased

[1] On 3rd March 2015, the court directed that the protest and distribution of the estate herein be determined by way of viva voce evidence. Pursuant to those directions parties adduced evidence in this matter.

Protestor's case

[2] According to the Protestor who gave evidence on 1st December 2015, the Petitioner, who is his brother, has never called him to discuss this cause. He accused the Petitioner of filing this cause at Chuka without the knowledge of other beneficiaries. He testified that, On 18th September 1993, their late father had shared out his lands before his death. He complained that the Petitioner has changed all that distribution. He stated that, according to the sharing by the deceased, he and his late brother called BenardMurungi were to share land number 796. The deceased also shared land parcel number 435 into four portions; each of the three brothers was given a share while he reserved one share for his(deceased) use. He stated that elders were present during the sharing by the deceased of his assets. He produced a letter dated 18th September 1993 to support this claim.

[3] The Protestor claimed that the Petitioner used to beat his father (deceased) and that is why he gave him little share. The Chief was summoned by the court to shed light on these allegations. Retired Senior Chief Rufustestified on 20th July 2016 and 16th August 2016. He stated that after talking to the people familiar with the incidents complained about, he established that the quarrel between the deceased and the Petitioner was over mangoes which the Petitioner had plucked without the deceased's permissions. But, the Petitioner had been warned by the deceased not sell and he did not sell the mangoes. He stated that the Petitioner did not beat his father as alleged by the Protestor. He also stated that the deceased had two parcels of land; one at NorthMugumango and another at South Mugumango. According to him, the protestor was given the land at South Mugumango whilst the deceased subdivided the one at North Mugumango into four pieces; and gave each of his three sons a portion and reserved one portion for his

use. In his testimony, the dispute between these two sons is on the portion which the deceased had reserved for himself as he had not distributed it. The chief said that he was aware that the petitioner had purchased another land elsewhere but which he was assisted by the deceased to purchase. He also talked of the other son called Bernard who he said did not know well and who also died without getting married.

[4] The protestor called another witness named Japheth Kirunja Joseck who is a nephew to the deceased. He confirmed that he was in a meeting where the deceased in Meru tradition shared his properties in 1993 to his three sons. He also left one portion for his use. He also stated that subsequently, the deceased took one portion away from the Petitioner because he was ungrateful and lacked respect to the deceased. The portion was given to Alexander- the protestor. He said that he respects the word of the deceased and should not be changed at all.

Petitioner's case

[5] The Petitioner testified. He told the court that his father indeed subdivided his two pieces of land namely 796 and 435 into four portions. He said the subdivision was to enable them to cultivate these lands. But, he later purchased his own land and moved out of the estate property. During his absence, the protestor influenced the deceased to the extent that the deceased told the petitioner that he has no land in 796. He did not quarrel with that decision as the deceased told him that his land is in 435. It is upon these talks with the deceased that the Petitioner embarked on obtaining his title in 435. The Petitioner insisted that he informed his brother of the succession cause at Chuka which he told him would help them to obtain formal titles to their inheritance as opposed to the existing Kimeru boundaries demarcated by planting of "mukungugu". According to the Petitioner, the protestor refused to cooperate. He then caused his summoning to the chief but in vain. After all these efforts, the Petitioner stated that he had no choice but to file a succession cause at Chuka. But the protestor filed objections thereto. He did not end his testimony before stating that the letter by his father says that the coffee on the land belonged to him and Murungi, now deceased. He therefore asked the court to rule fairly and order equal distribution of the estate.

DETERMINATION

Feuding parties

[6] The two parties herein have taken diametrically opposed stances as to how the estate should be distributed. From their demeanor and disposition in court, they harbor bitterness and hatred to each other. But, they brought their frustrations at the altar of justice; that constitutes the business of the law to resolve disputes for parties using only the lens of law; not sympathy; not emotions; not hatred but the law. I will so proceed.

[7] The evidence before the court is that the deceased had three children namely; (1) James Njeru; (2) Alexander Kaburu; and (3) Bernard Murungi. Bernard Muringi is now deceased. Parties have informed this court today the 22nd day of February 2017 that their deceased brother one Benrard Murungi did not marry and did not have any children. Accordingly, I will distribute the estate to the two living children of the deceased.

[8] From the evidence, the deceased owned and left behind two properties to wit: (1) MWIMBI/S.MUGUMANGO/796; and (2) MWIMBI/N.MUGUMANGU/435. Accordingly, these are the estate properties for purposes of this succession cause. The only point of disagreement between these parties is distribution of the estate. The protestor argued that he was given parcel No 435 by his father but with instructions to give a quarter ($\frac{1}{4}$) acre to Bernard Murungi. According to him, the Petitioner was not to get anything in that land because his father had bought him another land at Kaaria Koomo Sub-location measuring 3 $\frac{1}{2}$ acres. He averred that he has developed parcel No 435, has always lived on that land and depends on it for his livelihood. He accused the Petitioner of using this cause to allocate himself the said parcel of land. He also testified that during his lifetime, the deceased subdivided parcel No 796 into four portions; one for James; one for Alexander; one for Bernard; and one for the deceased. On the other hand, the Petitioner seem to suggest that these lands be distributed equally although in his filings before Chuka

court he had suggested that he gets 0.92 acres in 435, Bernard gets 0.46 acres in 435 and 0.46 acres in 796, and Alexander gets 0.92 acres in 796.

[9] I have evaluated the facts of and evidence in this case. I have also perused the letter dated 18th September 1993. The letter alludes to subdivision of deceased properties. But, the letter is not signed and I may not rely on it as evidence. However, evidence by both parties as well as by the two witnesses who testified, confirmed that the deceased subdivided parcel number 796 into four portions; each of the three sons getting a portion and one was reserved for the deceased's use. There is evidence that the deceased demarcated the boundaries of the four portions by planting 'mukungugu'. There is a sense of equality in the distribution of 796 by the deceased. The only problem- and this came out from the evidence by the chief- is the portion which the deceased had reserved for himself. The said portion is invariably amenable to distribution. Accordingly, therefore, this is an ideal case to order that parcel number 796 be shared equally amongst the two sons of the deceased. There is no evidence whatsoever which would prevent equal sharing on the basis of cadastral or physical planning inhibitions. Accordingly, I order that parcel number 796 shall be shared equally between the Petitioner and the Protestor.

[10] I now turn to parcel number 435. The protestor argued that he was given this land by his father with instructions that he will give Bernard Murungi ¼ acre. He said that the Petitioner was not to get anything out of the said land because; (1) the deceased had bought 3 ¼ acres for the Petitioner; and (2) the Petitioner had been beating the deceased. The chief was called to shed light on these issues. He stated that he is aware that the Petitioner bought another land but was assisted by the deceased to purchase it. But, he did not however state the manner of assistance. The chief also testified to the effect that he is not aware of the Petitioner beating his deceased father although he stated that at some point the deceased was angry with the Petitioner over mangoes which the Petitioner had harvested without his permission. I leave the veracity or otherwise of these allegations to the conscience of the Petitioner. That notwithstanding, the evidence adduced before the court does not bring conviction upon the court that the deceased distributed parcel number 435 during his lifetime to Alexander. None of the witnesses who were present in the letter dated 18th September 1993 was called. The evidence produced is not also cogent enough to support the allegation that the deceased had purchased land for the Petitioner. I should think that I should not therefore take into account that fact in this distribution. Accordingly, as the deceased left no surviving spouse but two living children, I will apply and follow after the principle of equality enshrined in section 38 of the Law of Succession. Accordingly, I order that parcel number 435 shall be divided equally between the petitioner and the protestor. Except, however, as Alexander stated that he lives on that land, the subdivision will take into account the existing buildings constructed by him. In the upshot distribution will as follows:-

(1) L.R NO. MWIMBI/S. MUGUMANGO796

(a) James Njeru Chabari and

(b) Alexander Kaburu.....in equal shares

(2) L.R NO. MWIMBI/N. MUGUMANGO 435

(a) James Njeru Chabari and

(b) Alexander Kaburu.....in equal shares

I confirm the grant to the Petitioner and the Protestor in the above terms.

Dated, signed and delivered in open court at Meru this 22nd day of February 2017.

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F. GIKONYO

JUDGE

In the presence of:

Petitioner – present

Protestor – present

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F. GIKONYO

JUDGE