



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT CHUKA
SUCCESSION CAUSE NO. 57 OF 2015
(FORMERLY SPM'S CHUKA SUCC. CAUSE NO. 110 OF 2014 AS CONSOLIDATED
WITH SUCC. CAUSE NO. 113 OF 2014)
IN THE MATTER OF THE ESTATE OF M'IRUBIA MWITA alias M'IRUBIA
M'MWITA.....DECEASED
PASKWALE MUTEGI NTHIIRI.....APPLICANT
VERSUS
M'NDEREBA M'IRUBIA.....PETITIONER

J U D G M E N T

1. This is a judgment relating to the estate of the late M'Irubia Muita who died on 19th December, 1989 aged 84 years (hereinafter "the deceased"). According to the record, at the time of his demise he had the following six (6) children:-

- a. Mary Ciakeni
- b. Agnes Ciambaka
- c. M'Ndereba M'Irubia
- d. Silvana Cianchege
- e. Ciliaca Cianthuni, and
- f. Patriciah Ciambuba

2. On 5th May, 2014, Paskwale Mutegi Nthiiri (hereinafter 'the Petitioner') a grandson to the deceased petitioned for letters of administration in Chuka SPM Succession Cause No. 110 of 2014. In that Petition, he named the survivors to the deceased as himself, Daniel Mbaka Charles, Sylviana Cianchege Njeru and Egidia Muthoni Mugambi. A grant was issued on 10th September, 2014 and was confirmed on 22nd April, 2015 whereby the only asset of the estate, Karingani/Muiru/72 was shared between the Petitioner (1.38 acres), Daniel Mbaka Charles (1.28 Acres) and Lawrence Murangiri Njagi (0.10 acres).

3. On 7th May, 2014 M’Ndereba M’ Irubia also petitioned for letters of administration for the same estate in **Chuka SPM Succession Cause No. 113 of 2014.** In the Petition, he cited the beneficiaries as himself, Ciliaca Cianthuni Njeru, Patriciah Ciabuba Nyamu and Ciambaka Agnes M’Nthaka.. The grant was issued on 1st September, 2014 and confirmed on 12th August, 2015. At the confirmation the only property aforesaid forming the then estate was distributed as follows:-

- a. M’Ndereba M’Irubia - 1.25 Acres
- b. Paskwale Mutegi - 1.00 Acres
- c. Ciambaka Agnes - 0.25 Acres
- d. Patriciah Ciambuba - 0.25 Acres
- e. Ciliaka Cianthuni -0.25 Acres

4. By an order of this court, the two succession matters were transferred to this Court. Later, they were consolidated on 30th September, 2015 under the current file with **Succession Cause No.110 of 2014** being the head file. In the meantime, the court suspended the certificates of confirmation issued in those causes. Pursuant thereto, on 18th October, 2015, the Petitioner took out a Summons for the revocation of the grant made in Chuka **SPMC Succession Cause No. 113 of 2014.** The grounds for revocation were that; the Petitioner had lived in Karingani/Muiru/72 (hereinafter “the suit property”) for over 50 years; that the Respondent had applied for the grant secretly; that the Respondent had concealed material facts and had failed to disclose all the beneficiaries of the estate and that the lower court did not have pecuniary jurisdiction to entertain the matter. The Petitioner reiterated these grounds in his Supporting Affidavit sworn on 14th October, 2014. In his Replying Affidavit in opposition sworn on 19th October, 2015, the Respondent swore that he was the only surviving son of the deceased; that his other siblings were Agnes Ciambaka, Patricia Ciambuba and Ciliaka Cianthuni; that he was the only person entitled to apply for the grant under Section 29 of the Law of Succession Act; that it is the Petitioner who had secretly petitioned for a grant of letters of administration in Chuka SPMC Succession Cause No. 110 of 2014; that the Petitioner was using unprocedural means to disinherit the children of the deceased their rightful share in the estate and that the grant made to the Petitioner should be nullified.

5. The Summons was determined by way of viva voce evidence and each side called witnesses. The Petitioner (PW1) told the court that he is the son of Silvana Cianchege, a daughter to the deceased; that in 1986, the deceased allocated him and Daniel Mbaka (PW3) one acre each out of the 2.85 acres of the suit property; that the deceased instructed his wife (PW1’s grandmother) to use the remaining 0.85 acres during her lifetime; that if she did not need it, she should have the same divided between PW1 and PW3; that the deceased’s wife caused one Titus Karunguru to divide the said 0.85 acres equally between PW1 and PW2 before she died. That the two have continued to use that land for 26 years now. PW1 told the court that the Respondent had been given his own 5 acres separately. He testified that the Respondent secretly applied for a grant in **Succ. Cause No. 113 of 2014** and included his married sisters as the beneficiaries. PW1 prayed that the grant obtained in **Succ. Cause No. 113 of 2014** be revoked. In cross-examination, he named the people who were present when the deceased gave him and PW3 the suit property.

6. PW2 was Mbwani Nthanga aged over 90 years. Although looking frail and tired he exhibited sharpness of mind and firmness in his testimony. He told the court that he knew the deceased well. He recalled that at one time the deceased called him to a meeting at his home. That the meeting was attended by one Titus, Eugenio, Aaron, the Respondent and the wife of the deceased. That at that meeting, the deceased told those present that because he was sickly, he wanted to give PW1 and PW3 land as they would suffer in the event he, the deceased died. That although PW3 was a son of the Respondent, the Respondent and his wife hated him. That in view thereof, the deceased had two acres demarcated from the suit property each for PW1 and PW3, respectively. That the deceased told his wife to give the balance of the property to the two if she got sickly. PW2 further testified that what will happen if when asked any

of his daughters returned the deceased was emphatic that they should be returned to the homes where they had been married. PW2 stated that he was later informed by Titus that at the direction of the deceased's wife, Titus had extended the portions of PW1 and PW3 to cover the entire suit property in terms of the directions of the deceased.

7. PW3 was Daniel Mbaka. He told the court that he is a son of the Respondent. That in 1985, his grandfather, the deceased called him and the Petitioner and gave them the suit property. That at the time he was still in school. That the deceased left him and PW1 in the hands of their uncle Titus Karunguru who divided the land between them equally. PW4, Eugenio Rugendo Karunguru told the court that he was a step-son to the deceased. He recalled that the deceased had once sent him to call Mbwani Nthanga (PW2) to a meeting at which the deceased gave land to the Petitioner and PW3. That at the meeting, the deceased insisted that his daughters should be returned to where they had been married in the event they returned to his home. On his part PW5, M'Ngereni Mathaiya told the court that he is the chairman of "Njoguni Ithi Mbugi" to which the parties herein belong. He recalled how the chief of Kathereri location referred the dispute between the Petitioner and the Respondent to the clan. That after the clan had listened to the parties, it decided in favour of the Petitioner and PW3 in accordance with the wishes of the deceased.

8. In his defence PW1, M'Ndereba M'Iruba told the court that the deceased had only six (6) children whose names are set out at the beginning of this Judgment. That the deceased only had the suit property to his name out of which he gave the Petitioner and PW3 one (1) acre each. That the deceased remained with one acre which was left in trust for the deceased's children. That he filed **Succession Cause No. 113 of 2014** when the Petitioner had conspired with his mother Silvana Cianchege and filed a Succession Cause. He proposed that the estate be distributed as follows; that the Petitioner and PW3 be given an acre each while the rest is to be shared among the children of the deceased. He denied in cross-examination that his mother had any land left to her by the deceased. That he included the Petitioner in **Succession Cause No. 113 of 2014** because the Petitioner had already filed **Succession Cause No. 110 of 2014**. That he had not complained about the Petitioner's occupation of the suit property in the past because an opportunity to do so had not yet arisen. That now that opportunity had arisen.

9. On their part RW2 (Patriciah Ciabuba), RW3 (Ciliaca Cianthuni) and RW4 Ciambaka Agnes told the court that they are all daughters of the deceased. That all are married and were married at the time of the demise of the deceased. They recalled that on a date and year they could not recall, the deceased called them and gave to the Petitioner and PW3 one (1) acre each from the suit property. That the remaining one (1) acre was to belong to them (the deceased's daughters). They told the court that after the demise of the deceased, their mother remained under the care of the Petitioner and that the Petitioner was the one who was then utilizing the said one (1) acre. That the Petitioner had continued to date to utilize the said portion. They concluded that they had not challenged the Petitioner's occupation of the suit property in the past because an opportunity to do so had not yet arisen, but that such an opportunity had now presented itself.

10. That then was the cases of the respective parties. Having considered the Affidavits on record, the testimonies of the parties and their witnesses and the record in its entirety, the issues for determination in my view are as follows:-

- a. who are the beneficiaries of the estate of the deceased?
- b. whether there was any asset of the estate that was left behind to be distributed to beneficiaries.
- c. whether there are any grounds to nullify the grant made to the Respondent in **Chuka PMCC Succession Cause No.113 of 2014?**

11. On the first issue on who is the beneficiary of the estate of the deceased, both the Petitioner and the Respondent gave different names as the beneficiaries in their Petitions. Those named as beneficiaries by the Petitioner in his Petition (**Succ. Cause No.110 of 2014**) are Paskwale Mutegi Nthiiri, Daniel Mbaka Charles, Sylviana Cianchege Njeru and Egidia Muthoni Mugambi. When it came to distribution, the suit

property was distributed to Paskwale Mutegi and Daniel Mbaka only. These two are grand children of the deceased. Sylvana Cianchege Njeru was a daughter of the deceased and mother of the Petitioner while Daniel Mbaka is the son of the Respondent. On the other hand, the Respondent set out in his Petition his name and his witnesses (RW2, RW3 and RW4) as the beneficiaries of the estate. On confirmation, however, he included the name of the Petitioner as one of the beneficiaries and had one (1) acre distributed to him.

12. From the foregoing, it is clear that both the Petitioner and Respondent were not honest before the lower court as to who the true beneficiaries of the estate of the deceased were. In my view, the real beneficiaries of the estate of a deceased person are those who are named as such by the deceased either through a will or by advancement as well as those who are directly and immediately related to the deceased. The latter will include the spouses(s), the children of the deceased and other dependants falling under section 29 of the Law of Succession Act. On the right to share in the estate, priority is in the degree of consanguinity as set out under Section 39 (1) of the Act.

13. At the trial, it came to light that the deceased's wife died two years after the demise of the deceased. That the deceased left six (6) children surviving him. These were:-

- a. Mary Ciakieni
- b. Agnes Ciambaka
- c. M'Ndereba M'Iruba
- d. Ciliaca Cianthuni
- e. Patricia Ciabuba
- f. Sylivana Cianchege

14. In addition, it came out in evidence that two (2) of the deceased's grandchildren namely, Paskwale Mutegi and Daniel Mbaka were dependants of the deceased. They not only depended on him during his lifetime, but he also gave them one (1) acre each from the suit property during his life. In view of the foregoing, I take the view that the said six (6) children and the two grandsons of the deceased were the beneficiaries who should have been identified in Forms P & A 5 in the Petitions filed by the parties in these proceedings. However, as it were both the Petitioner and the Respondent for their own selfish reasons did not do so.

15. The next issue is whether there was any asset available for distribution and if so to who. The evidence on record is clear that the deceased had only one asset, Karingani/Muiru/72 measuring approximately 1.3 ha. That in the year 1986, while still alive, the deceased demarcated 2 acres thereof and gave them to the Petitioner and Pw3. All the witnesses who testified confirmed this fact. The only dispute was how the balance of approximately 1.2 acres was dealt with by the deceased. The deceased had earlier on settled the Respondent on five (5) acres of land.

16. The Respondent's case as supported by his sisters (RW2, RW3, and RW4) was that, the deceased set aside the balance of the suit property measuring approximately one (1) acre, for his daughters. That the portion was left in the hands of the Respondent to administer and ultimately divide the same to them. On the other hand, the Petitioner's case was that the deceased left that portion to his wife with instructions that the same be given to the Petitioner and PW3 if and when the deceased's wife was no longer able to use the same. That consequently, before she died, the deceased's wife caused the same to be divided equally between the Petitioner and PW1 by one Titus Karunguru. This evidence was firmly supported by PW2, Mbwani Nthanga, amongst other witnesses for the Petitioner.

17. I saw PW2 testify in court. He was an extremely old man though with very sharp memory. He firmly testified that; the deceased called a meeting where he demarcated two (2) acres out of the suit property

and gave them to the Petitioner and PW3; that the balance was to be held by the deceased's wife; that he directed Titus Karunguru to extend the boundaries of the Petitioner and PW3 to cover the entire land if and when the deceased's wife fell ill. He recalled that he later on he learnt from Titus Karunguru that on the instructions of the deceased's wife, Titus had extended he boundaries of the portions given to the Petitioner and PW3 to cover the entire suit property in terms of the directions given by the deceased. This testimony was also supported by PW5 M'Ngereni Mathaiya, the chairman of the "Njoguni Ithi Mbungi" clan to which the parties belong. That witness told the court that when the dispute was referred to the clan for adjudication, the clan found that the entire land had been given to the Petitioner and PW3 as per the instructions of the deceased.

18. On the issue of the position of the suit property, I believed the testimonies of PW1, PW2 and PW5. As regards the Respondent and his witnesses, their testimonies were wanting. They contended that the balance of 1.2 acres of the suit property was left to the Respondent to administer; that the same was not left behind by the deceased to their mother yet they admitted that their mother continued to live on that portion. That at the time, she was under the care of the Petitioner and that the Petitioner was the one in actual occupation and use thereof. Since the demise of deceased in 1989 until 2014, approximately 25 years later, that property has been under the use and occupation of the Petitioner. During the lifetime of his mother or anytime thereafter neither the Respondent or his witnesses took possession of the suit property. If the Respondent was the one appointed as the administrator by the deceased for the benefit of the daughters, why didn't he or any of his said sisters stake a claim, or occupy the property after the demise of their father? They waited until 20 years later long after the Petitioner and PW3 had occupied, fully settled and to made use thereof to raise their claim. According to the Respondent and his witnesses, this was the ripe time to raise the claim. They were unable to explain the reason for the delay. This court's view is that, the failure by the Respondent and his sisters to lay a claim on that portion of the property for that long was because they knew that the deceased had left it to his wife with instructions to pass it over to the Petitioners and PW3. That is why there was no complaint against the Petitioner and PW3 on their use and occupation thereof for over 20 years.

19. Further, if the deceased wish was that the balance of the portion of land of 1.20 acres of the suit property was for his daughters, then it is clear that neither the Respondent nor RW2, RW3 and RW4 intended to effect the same through **Succession Cause No. 113 of 2014**. In that Cause, the Respondent did not include the name of either Mary Ciakieni or Silvana Ciancege as beneficiaries in Form No. P& A5, yet they were also daughters of the deceased. The allegation that the latter was excluded because she refused to surrender her identity card is not satisfactory as an identity card is not a requirement for one to appear as a beneficiary in Form No. P & A 5. In addition, when it came to distribution, the Respondent was allocated 1.25 acres while RW2, RW3, and RW4 were each allocated 0.75 acres. That does not envince the alleged intention of the deceased of reserving the 1.20 acres to his daughters!

20. Accordingly, from the foregoing, I am satisfied that the estate of the deceased comprised of one property, Karingani/Muiri/72. This property however, had been given to the Petitioner and PW3 by the deceased during his life time. He gave them two (2) acres (one (1) each) in 1986, then the balance was to be allocated to them by Titus Karunguru on the direction of the wife of the deceased if and when she did not have any use for it. The evidence shows that the wife of the deceased surrendered that portion to the two before she passed on. In this regard, I hold that the only asset of the deceased was not available for distribution as the same had been fully given and or advanced by the deceased during his lifetime and none of the beneficiaries challenged the decision of the deceased during his lifetime.

21. On the issue of whether the grant made in favour of the Respondent in **Succession Cause No.113 of 2014**, should be revoked, the same is to be answered in the affirmative. Firstly, it is clear that the same was not filed in good faith. In his evidence in chief; the Respondent stated:-

“Then Paskwalle conspired with his mother, Silvana Cianchege and brought the Succession Cause. I also filed my own Succession Cause.”

I have looked at the two files. Whilst **Succession Cause No. 110 of 2014** was filed on 5th May, 2014, **Succession Cause No. 113 of 2014** was filed on 7th May,2014, barely two days later. The Respondent

must have therefore filed **Succession Cause No.113 of 2014** to counter the Petitioner's **Succ. Cause No.110/2014**. That was wrong. If he was acting in good faith, the Respondent should have filed an objection in Succession Cause No. 110 of 2014 instead of filing a completely new Cause for the same estate.

22. Secondly, it is clear from the evidence on record that everybody including the Respondent knew that PW3, Daniel Mbaka had been given one (1) acre from the suit property by the deceased in 1986. He was therefore a full beneficiary and his name had to appear in both form No. P & A 5 as well as in the confirmation list. However, the Respondent omitted the name of PW3 altogether and on distribution the Respondent purported to take 1.25 acres out of the suit property. The Respondent did this notwithstanding that the deceased had already give him his own share of five (5) acres. This is clearly against the wishes of the deceased as was contained in the testimony of PW2 that the deceased knew that the Respondent hated PW3 and if the deceased did not give him anything, PW3 will suffer upon the demise of the deceased.

23. Finally, the **Succession Cause No. 113 of 2014** did not include all the beneficiaries of the deceased. The names of Mary Ciakieni and Silvana Ciancege were missing. This is in addition to the failure to disclose that both the Petitioner and PW3 were also beneficiaries.

24. As regards the contention that the lower court did not have jurisdiction to preside over the matter, there was no evidence that was led to prove that allegation. The same was not proved and it is hereby rejected. As regards the Respondent's claim that **PMCC Succ. Cause No.110 of 2014** was meant to disinherit the children of the deceased, I find that there was no evidence that was led to prove that fact. In any event, I have already found that the suit property was not available to distribution as the same had clearly been advanced to the Petitioner and PW3 by the deceased during his lifetime.

25. In view of the foregoing, the Summons for revocation succeeds. The grant issued to M'Ndereba M'Iruba in **Succession Cause No. 113 of 2014** is hereby revoked Any and all actions done in pursuance thereof are hereby nullified and declared void.. This being a family dispute, each party is to bear his own costs of the Cause.

It is so decreed.

DATED and Delivered at Chuka this 9th day of March, 2016.

A. MABEYA

JUDGE

Judgment read in open court in the presence of Respondent.

A.MABEYA

JUDGE

9/3/2016