



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO.39 OF 2015

(FORMERLY CHUKA PM SUCCESSION CAUSE NO 14 OF 2013)

IN THE MATTER OF THE ESTATE OF BURINI MUCHIRI.....DECEASED

KABURI BURINI.....PETITIONER

VERSUS

NJERU BURINI MUCHIRI.....1ST CAVEATOR

MUTEGI BURINI.....2ND CAVEATOR

NKONGE JOSECK.....PROTESTOR

J U D G M E N T

1. On 25th August, 2011, Burini Muchiri (hereinafter “the deceased”) died and left behind the property known as Mwimbi/Chogoria/5031 as his estate. By a letter dated 23rd January, 2013 from Japhet N. Mukindia, the Chief of Chogoria Location, the following were disclosed as being those surviving him, Kaburi Burini (widow), the daughters being Muthoni Muriuki, Karimi Burini, Gatune Kinyua and Nkinga Burini. The sons were disclosed as Njeru Burini, Mutegi Burini, Mbaabu Burini and Kimathi Burini. In the same letter, Nkongge Joseck was disclosed as a purchaser.
2. Pursuant thereto, on 12th September, 2014, Kaburi Burini petitioned for letters of administration wherein she disclosed herself, Njeru Burini and Mbaabu Burini as the only beneficiaries of the estate of the deceased. On 22nd August, 2013, a Grant of Letters of Administration Intestate was issued to her. On 6th August, 2015, she applied for confirmation of the grant and proposed to distribute the estate as follows:-
 - a. Erick Muchunku Kanampio - 0.26 acres
 - b. Njeru Burini Muchiri - 0.36 acres

She also filed a consent that was executed by Mercy Muthoni Ephantus, Judith Nkinga Burini, Njeru Burini Muchiri and Mutegi Burini.

3. On 20th October, 2015, Nkongge Joseck (hereinafter “the protestor”) filed an Affidavit of Protest and he named himself, Mutegi Burini and Njeru Burini Muchiri as caveators. In the said Affidavit, he contended that the petitioner had left out most of the dependants; that the deceased had agreed that the property be distributed with him getting 0.30 acres of the estate property in

terms of an application for confirmation dated 4th August, 2014 which was allegedly secretly withdrawn. That the petitioner had now included a new dependant in the application for confirmation and that the intention of the petitioner was to disinherit the beneficiaries. In response, the petitioner filed a Replying Affidavit on 10th February, 2016. In the said Affidavit, she denied having agreed to sell 0.30 acres to the protestor. That she had withdrawn the application of 12th September, 2014 after she had realized that the protestor had fraudulently inserted his name as a beneficiary of 0.30 acres at the Chief's meeting when she was bedridden due sickness. She challenged the Protestor to produce a sale agreement for the alleged sale of the said 0.30 acres. She contended that her sons filed a protest after realizing that the protestor had inserted his name in the Chief's letter and intended to inherit 0.30 acres. She prayed that the court do confirm the grant as per her proposed distribution.

4. At the hearing, the protestor adopted his Affidavit of protest and told the court that the petitioner and her sons had accepted at the Chief's office that she was to support her lodge the Succession Cause in exchange for 0.30 acres of land in the estate. That the petitioner later fell ill and he became apprehensive that the sons will distribute the land to one Musunku.
5. David Gitonga Mwiandi (PW2) testified for the protestor. He told the court that about three (3) years ago, he was called by the Protestor to go and see the Petitioner at her home. That he and the Protestor met the petitioner alone. That the Petitioner and the protestor agreed that the protestor finances the lodging of the current Succession Cause. He left them as they went to the Chief. He later learnt that the Chief had issued a letter of introduction. PW3 was Justus Njagi Kinyamu. He told the court that he was the sub-area of the petitioner. That in 2013 the petitioner called for him to go and witness an agreement between the petitioner and the protestor. That the petitioner and the protestor agreed that the petitioner would sell the protestor 0.30 acres of land at a consideration of Kshs100,000/- to enable the petitioner present succession cause for her late husband; that he signed the agreement as a witness of the petitioner and left; that those present in the meeting were the petitioner, Njeru Burini, Mbaabu Burini, the Assistant Chief Chogoria Sub-location and a Surveyor by the name Lucy. He did not know what happened thereafter.
6. When it came to the petitioner, the court had dispensed with her attendance because of her frail condition. Even after adjourning the matter, she had not recovered by the time the matter resumed and the court had to hear her son who had lodged a caveat but appointed an intermediary for the petitioner. However, since the court was unable to comprehend the testimony of Njeru Burini as far as the case of the petitioner was concerned, the court discharged him as an intermediary, adopted the petitioner's Replying Affidavit sworn on 10th February, 2016 and ordered that Njeru Burini do present his own case as a caveator.
7. Njeru Burini told the court that the property the subject of the Succession Cause was given to him by the deceased; that the petitioner and her children were left on a property left by deceased which had a case with the C.I.D. He denied having signed any agreement allowing the sale of 0.30 acres to the protestor. He told the court that his sisters Muthoni Muriuki and Nkinga Burini were entitled to inherit. RW₂ Mutegi Burini was the second caveator. He told the court that he had no interest in the property and supported the proposed distribution.
8. Muthoni Muriuki (CW₁) disclaimed any interest in the estate. CW₂ Nkinga Burini told the court that she wished to inherit from her deceased father; that she was the one taking care of the ailing petitioner on the estate property; that Muchunku had been sold some portion by the deceased where he was currently living which was adjacent to where she and the petitioner were living. She denied the protestor's claim. CW₃ Erick Musunku Kanampio told the court that the 0.26 acres that the Petitioner had indicated in the application for confirmation, had been sold to him by Njeru Burini and Mutegi Burini in 2014. That portion was different from the one sold to him by the deceased before his demise.
9. I have considered the pleadings and the Affidavits on record. I have also considered the testimonies of the witnesses. The issues that fall for determination are; Who are the beneficiaries of the estate of the deceased? What is the position of the claim by the protestor and that of Muchunku Kanampio? and, How should the estate be distributed?
10. On the first issue as to who is the beneficiary of the deceased; the letter of the Chief of Chogoria Location dated 23rd January, 2013 set out eleven (11) people as those who survived the deceased. The names of those people are set out in paragraph 1 of this judgment. They included the widow,

the daughters and the sons of the deceased. The protestor also appeared as a purchaser. Under the provisions of the Law of Succession Act, Chapter 160 of the Laws of Kenya those who are legally entitled to an estate of the deceased are; a widow or widower, a child and any dependent of the deceased. Any other person who has a claim against the estate can only appear as a creditor and not a beneficiary. It follows therefore since the protestor's claim was that of a purchaser, the name of Nkonge Joseck should have been noted as a creditor and not a survivor. In this regard, I hold that those entitled as survivors cum beneficiaries of the estate of the deceased are the widow and the children of the deceased. This is in terms of Sections 29, 40 and 41 of the Law of Succession Act, Cap 160 of the Law of Kenya (hereinafter "the Act")

11. The second issue is what is the position of the claim by Nkonge Joseck (Protestor) and Eric Musunku Kanampio. The evidence on record is that when the petitioner wanted to institute the current succession cause, she approached the protestor for financial assistance. The protestor alleged that he financed the institution of this proceedings, for which he was entitled to 0.30 acres of land in the estate. On the part of Eric Musunku Kanampio, he told the court that he was sold 0.26 acres in the estate property by Njeru Burini and Mutegi Burini in 2014. That the said portion was to be separate and distinct from the one earlier on sold to him by the deceased during his lifetime.
12. On her part the petitioner denied the claim by the protestor. In her Replying Affidavit sworn on 10th February, 2016 she denied that she had agreed to sell 0.30 acres of land to the protestor and challenged him to produce the alleged agreement. She however insisted that the grant should be confirmed as per her proposed distribution in which she had offered Eric Musunku Kanampio 0.26 acres. In this regard, she seemed to admit the claim by Eric Musunku Kanampio.
13. Section 45 of the Act provides that:-

"1). Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

2). Any person who contravenes the provisions of this Section shall-

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deduction any payment made in the due course of administration"

14. In the case of **Muriuki Musa Hassan .V. Rose Kanyua and 4 others [2014] eKLR**, the court held that the purpose of this provision is to protect the free property of the deceased. That such property should not be interfered with until after confirmation. In the present case, both Nkonge Joseck and Eric Musunku Kanampio admit that they purported to purchase or to obtain an interest in the estate from the petitioner and Njeru Burini and Mutegi Burini after the demise of the deceased. Obviously that was clear intermeddling with the estate of the deceased. As regards the claim by Nkonge Joseck, Njeru Burini, Mutegi Burini, the petitioner and Nkinga Burini have disputed his claim. Firstly, the protestor did not produce the agreement that he allegedly signed with the petitioner for the sale of property of 0.30 acre to him. This is so despite PW3, the protestor's own witnesses, having told the court that he attended a meeting where an agreement was executed by the two (2) and copies released to both. Secondly, the protestor did not tell the court what the consideration was for the alleged sale of 0.30 acres in the estate property. He never produced any evidence that he had paid or whether the consideration had passed. As regards Eric Musunku Kanampio, there was no evidence to show that there was any sale agreement for the sale of 0.26 acres in the estate property. He never disclosed what the consideration for the same was and whether he had paid the said consideration. Further, there was no evidence that was produced to show that either the estate or all the beneficiaries of the estate of the deceased had approved

and/or benefited from his actions.

15. In view of the foregoing, I hold that the actions of both the protestor and Eric Mushunku Kanampio were in breach of Section 45 of the Law of Succession Act. Their actions were tantamount to intermeddling with the estate of the deceased. Their actions were completely at variance with the circumstances in the case of **Morris Mwiti Mburugu .v. Denis Kimathi M'Mburugu [2016] eKLR**

where the actions of the interested party were for the benefit of both the estate of the deceased as well as the beneficiaries. Whilst in the **Morris Mwiti Mburugu** case, all the beneficiaries were involved, supported and benefited from, the actions of the interested party therein in the present case, only a few individuals seem to have been involved in the impugned actions. The actions of both the protestor and Eric Musunku Kanampiu are strenuously opposed by the majority of the beneficiaries. In any event, they have not shown any monies they may have paid to the estate which may have benefited the beneficiaries. They have other avenues of claiming their monies they paid, if any, but not to claim a share in the estate. They have no right to claim anything from the estate. Their claims are hereby rejected.

16. The final issue is, how should the estate be distributed. According to the petitioner, and Mutegi Burini, Eric Musunku should be given 0.26 acres. As already held, the claim by Musunku has been rejected by the court. According to Njeru Burini, the entire property should be given to him as the deceased had given it to him during his life time. The evidence given by this witness was shaky. The court discharged him from being an intermediary of the petitioner as he seemed to be very unsure of himself. Infact he seemed to be very unsure if not under some influence when he was testifying. In any event, his evidence was opposed by the petitioner and CW3 Nkinga Burini. Mutegi Burini had no problem with the proposed distribution. In view of the foregoing, I find that all the beneficiaries of the estate save for Nkinga Burini and Njeru Burini disclaimed their interest in the estate property.
17. Accordingly, since the petitioner seemed to be very sick and needs to be taken care of, I will distribute a portion to her together with CW3 Nkinga Burini who is taking care of her. Accordingly, the distribution will be as follows:-

LR Mwimbi/Chogoria/5031

a. Nkinga Burini - 0.26 acres

Kaburi Burini

b. Njeru Burini Muchiri -0.36 acres

It is so decreed

DATED and Delivered at Chuka this 12th day of May, 2016.

A.MABEYA

JUDGE

Judgment read and delivered in open court in the presence of all the parties.

A.MABEYA

JUDGE

12/5/2016