



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 736 OF 2015

(FORMERLY MERU SUCCESSION CAUSE NO. 212 OF 1995)

IN THE MATTER OF THE ESTATE OF ITUNGA KIMOTHO (DECEASED)

M'MUNGIRIRIA ITUNGA.....ADMINISTRATOR (NOW DECEASED)

M'NYIRI TIGANIA.....OBJECTOR (NOW DECEASED)

MARGARET CIANKUI MBUA alias MARGARET CIANKUI M'NYIRI.....APPLICANT

- VERSUS -

JOSPHINE NDAGONI.....RESPONDENT

J U D G M E N T

1. Itunga Kimotho, "*the deceased*," died on 18th June, 1980 aged 92 years. According to the letter dated 1st March, 1995 by the local chief, the deceased was survived by two sons, namely; M'Mungiriria Itunga and Ndagoni Itunga who are now both said to be deceased. On 2nd August, 1995, M'Mungiriria Itunga petitioned for Letters of Administration Intestate for the estate of the deceased. He named himself and Ndagoni Itunga as the only survivors of the deceased and LR No. Magumoni/Mukuuni/34 as the only asset of the estate. The grant was issued to him on 9th October, 1995 which was confirmed on 17th March, 1997 and the estate distributed as follows:-

a) M'Mungiriria Itunga-0.34 acres

b) Erastus Nthiga-2 acres

c) Eric Mucioka-2 acres

d) John Ndagoni

Mwanza Ndagoni-3 acres

e) Bedford Ngai-1 acre

2. On 10th March, 1998, one M'Nyiri Tigania filed an application for the review of the orders of 17th March, 1997. However, a notice of withdrawal of that application was filed on 31st May, 2006. Nothing was heard on the estate until 14th August, 2013 when Margaret Ciankui Mbuba ("*the Applicant*") filed an application for the revocation of the said grant. She also sought that a fresh grant be issued to her and

Josphine Ndagoni ("*the Respondent*") jointly and that the estate be distributed into two between them, one portion for her to hold for herself and for the benefit of her children and the other portion be held by the Respondent for herself and on behalf of the five persons to whom the estate had originally been distributed to. The application was supported by her Affidavit sworn on 8th August, 2013 wherein she swore that the estate of the deceased had two (2) households represented by the late M'Mungiriria Itunga and the other one by M'Nyiri Tigania also deceased.

3. Although directions were given that the application for revocation be determined by way of viva voce evidence, on 14th July, 2016 Mr. Ithiga and Mr. Kijaru, learned Counsels representing the respective parties informed the court that they had agreed between them that they make submissions based on the Affidavits that had already been filed by the parties and their respective witnesses. The court acceded to that request and will therefore determine the said application on the basis of the Affidavit evidence submitted by the parties without having had the advantage of having had their veracity tested through cross examination.

4. According to the Applicant, the late Itunga Kimotho had two house holds represented by M'Mungiriria and M'Nyiri Tigania; that the Chuka Law Courts had in September, 2009 directed that the dispute between the two be handled by the High Court; that the Succession Cause for the estate of the deceased was lodged fraudulently as it was contrary to the order of **Oguk J** made in the Meru HCCC No. 147 of 1988; that the dispute relating to plot No. 34 had been severally arbitrated by the clan elders and the Land Dispute Tribunal whereby it had been ordered that the land be divided into two, between herself and the Respondent; that she and her children had lived on the estate land all her lifetime and it is where the remains of her husband M'Nyiri Tigania were interred and that the property had since reverted back to the name of the deceased.

The Applicant called two witnesses in support of her case.

5. Justin Rugendo M'Ireri told the court that he was the chairman of Wathini Clan which was the custodian of plot No. 34; that the said property was registered in 1966 in the name of the deceased for his sons, M'Nyiri Tigania and Ndagoni Itunga in equal shares; that the deceased had other lands which he gave out to M'Mungiriria Itunga, Murithi Maara, Rugendo Mutua, Mwigania Mugambia and Rugane Tigania. That plot No. 34 was presently occupied by the families of the Applicant and the Respondent. On his part, Rugane Tigania swore that he is the son of the deceased who had divided his properties to his sons as named above by Justine Rugendo M'Ireri before he died. That when Ndagoni Itunga attempted to evict M'Nyiri the clan resisted and ordered that the property belonged to them equally. That M'Mungiriria was neither authorised by the family to file the succession cause nor was he buried in plot No. 34.

6. The Respondent opposed the application and also called three (3) witnesses to support her case. She swore that she is the wife of the late Ndagoni Itunga; that since Ndagoni Itunga was mentally challenged M'Mungiriria Itunga commenced these proceedings on his behalf. That he divided the land between her four children namely; Erastus Nthiga, Elias Ndagoni, Erick Musyoka Elias, John Ndagoni, and Mwanza Ndagoni; that she is not a beneficiary of the estate; that the Applicant is neither a blood relative of the deceased nor a dependant. That the decree issued in Chuka LDT Case No. 44 of 2005 was of no consequence as it was issued by a lower court without jurisdiction. That the Applicant should have claimed during the pendency of the succession cause as her late husband had objected to the same. That the property was divided amongst dependants and titles issued to them in 1997.

7. Beford Ngai Mungiriria swore that he was a son to M'Mungiriria (the Petitioner) and therefore a grandson to the deceased. That the deceased had only one wife one Susana Nkima with whom he sired only three (3) children, the Petitioner, Ndagoni Itunga and Faith Ciangai. That the deceased had two properties wherein he settled his two sons, M'Mungiriria Itunga on Magumoni/Mukuuni/52 and Ndagoni Itunga on Magumoni/Mukuuni/34, respectively. That the husband of the Applicant one M'Nyiri Tigania took advantage of the hiatus that was caused by the deceased in his moving to plot No. 52, that he and his family moved to occupy a portion of plot No. 34 measuring approximately 1/8 of an acre. That his father had petitioned for the succession in this matter because Ndagoni Itunga was mentally challenged. He denied that his father had petitioned for the grant secretly as alleged since the husband of the Applicant

had objected but withdrew the objection. Johnson Gitonga Kimathi a son to the Respondent swore an Affidavit reiterating most of what Bedford Ngai Mungiriria had told the court. In addition, he denied any relationship between his family and that of the Applicant.

8. On his part Rugendo Mutua Mari swore that he was registered as owner of Magumoni/Mukuuni/264 in 1966 which he inherited from his grandfather M'Maara Nkondi and he shares a common boundary with plot No. 34 that belonged to the deceased. That the Applicant's family used to live on an adjacent land owned by one Mwigania Mugambia Kimui but when the latter sold the portion occupied by the Applicant's family, they moved to a corner of plot No. 34. He denied any blood relation between the Applicant's husband and the deceased. He denied being a son of the deceased as alleged by Rugane Tigania.

9. In support of the Applicant's case Mr. Nthiga learned Counsel submitted that the petition was filed in breach of the order of **Oguk J** made in Meru HCCC.No.147 of 1988; that failure to disclose the existence of that order amounted to a concealment of material fact; that there was no medical evidence of Ndagoni Itunga's mental incapacity; that the Applicant's family lives on plot No.34 whereon her husband is buried; that the court should consider the decree issued in Chuka Principal Magistrates Court in LDT Case No.44 of 2005 and the Chief's letter of 22nd July,2016. Counsel referred the court to the cases of **In re Estate of Erastus Muriungi Ngaruthi (Deceased) 2015 eKLR** and **In re Estate of Sospeter Mutegi Njagi alias Mairobi Njagi Chuka HC. Succ Cause No. 12 of 2016 (UR)** in support of his submissions. Counsel urged that the application be allowed.

10. Mr. Kijaru learned Counsel for the Respondent submitted that the application being made approximately 17 years after confirmation was in breach of section 4 (4) of the Limitation of Actions Act; he cited the case of the **National Bank of Kenya Ltd .v. Devji Bhimji Sanghani & Anor [2016] eKLR** in support of the submission; that the application was fatally defective as it was being made by way of chamber summons that is unknown in the law of succession. Counsel cited the decision of **Mary Kaari Micheni .v. Micheni Mbiuki & Others Chuka HC.CA No.1 of 2016 (UR)** in support of this proposition. Mr. Kijaru submitted that; the Applicant had not proved her relationship with the deceased; that the witnesses of the Applicant had lied as to the Applicant's relationship to the deceased; that under sections 32 to 42 of the Law of Succession Act, the Applicant had no locus standi to bring the present proceedings. He cited the case of **In re Estate of Murathe Mwaria (Deceased) [2004] eKLR** in support of those propositions. To Mr. Kijaru, the Applicant was at best a trespasser in the estate property. He argued that the order by **Oguk J** in Meru HCCC NO. 147 of 1988 meant that the issue of representation of the estate had to be sorted out in a Succession Cause and did not determine any rights over the estate of the deceased. That on the strength of the **Mary Kaari Micheni Case**(supra), the proper court to determine the Applicant's claim is the land court. He observed that the decision in the Chuka LDT Case No. 44 of 2005 was made per incuriam as it was by a subordinate Court while the succession had been determined by the High Court. Counsel urged the court to dismiss the application with costs.

11. I have carefully considered all the Affidavits on record, the submissions of learned Counsel and the authorities relied on. I have also considered the issues submitted by learned counsel. In my view, the following are the issues that fall for determination in this matter:-

- a) was the petition made in disregard to the order of **Oguk J** in Meru HCCC No. 147 of 1988?
- b) what is the effect of the decree made in Chuka SPMC LDT No. 44 of 2005?
- c) is the application time barred or incurably defective?
- d) is the applicant a beneficiary or dependant entitled to the estate of the deceased?
- e) what order as to costs?

12. The Applicant contended that the petition was filed and prosecuted in breach of the order made on 9th June, 1992 by **Oguk J** which decreed that the property be shared by the two. That in the premises, the

petition was made in secret. I have looked at the proceedings of 9th June, 1992 in Meru HCCC NO. 147 of 1988. In order to understand the full effect of the subject order, it is imperative to reproduce the relevant portions thereof which reads as follows:-

"It is clear from the record that the registered proprietor of the disputed land parcel No. Magumoni/Mukuuni/34 is now deceased and the certificate of title to this land is held by one Jason who is a brother to the Defendant herein.

Clearly this is a dispute that can only be resolved by way of, a succession cause. In the circumstances, I order that this case be and is hereby dismissed with orders that the parties do proceed by way of a succession cause. (Emphasis added).

It is clear from the foregoing that nowhere in that order did the court make any finding as to the entitlement of the parties therein. The court did not rule on the rights of the respective parties to the subject matter, to wit, plot No. 34. Neither did the court rule on who was to Petition for succession nor who the beneficiaries to the estate were. In this regard, it cannot be said that the late M'Mungiriria Itunga lodged the Petition herein in breach of the order of **Oguk J** of 9th June, 1992 as alleged.

13. What is clear is that the court dismissed the case that was before it and observed that the title did not belong to Ndagoni Itunga. The court found that the property was in the name of a deceased person, Itunga Kimotho as can be seen from the Certificate of Official Search dated 10th July, 1995, and directed that the dispute be settled by way of a succession cause.

14. As regards, the allegation that the petition was lodged secretly, there is on record a summons dated 10th March 1998 seeking to set aside the confirmation orders made on 17th March, 1997. That application was lodged on the same day by the Objector, M'Nyiri Tigania, the husband of the Applicant herein. However, on 31st May, 2006, the said M'Nyiri Tigania lodged a notice of withdrawal of the said application. In this regard, I find that the petition in this matter was neither made in breach of the order of **Oguk J** of 9th June, 1992 nor was it lodged secretly as alleged by the Applicant. In this regard, the case of **In re Estate of Erastus Muriungi Ngaruthi (deceased) (supra)** is not applicable. The first issue is answered in the negative.

15. It was the Applicant's contention that since the decision of the clan members and the Land Dispute Tribunals as embodied in the decree in Chuka SPMC LDT No. 44 of 2005 reversed the steps undertaken by the Petitioner, this court should uphold it. That decision confirmed the award of the Provincial Land Disputes Tribunal dated 16th June, 2009 which cancelled title Nos. Magumoni/Mukuuni/1158, 1159, 1160, 1161 and 1162, respectively that had been issued pursuant to the confirmation of grant made on 19th March, 1997. The Magistrate's Court further ordered that the succession for the estate of the deceased be filed afresh and that the status quo be maintained until the High Court determines the issue of succession. It should be noted that the High Court in Meru had in this very Succession Cause determined the succession of the estate of the late Itunga Kimotho on 19th March, 1997. If anyone was aggrieved by that decision, what he/she should have done was either to apply for the setting aside of the confirmation orders by way of revocation as the late M'Nyiri Tigania had done vide his application of 10th March, 1998 or alternatively appealed to the Court of Appeal. A decision of a tribunal sitting somewhere in the village cannot override, overturn, review or in any way affect a binding order of this court. Only this court by way of review or the Court of Appeal in exercise of its appellate jurisdiction can overturn such an order. In my view, the Resident Magistrate's Court acted without jurisdiction in purporting to overturn the orders made by the High Court in this Cause by way of adopting the award of the Provincial Tribunal. That order was made without jurisdiction and was and still remains a nullity and of no effect as far as the confirmation of grant of 19th March, 1997 is concerned. A Magistrate's Court cannot by any imagination overturn orders made by the High Court as the learned Magistrate purported to do in that case. In this regard, that order remains still born as if it was never made. It can not be of any assistance to the Applicant as it is a nullity ab initio.

16. The next issue is whether the application is time barred by dint of section 4 (4) of the Limitation Act, or whether it is incurably defective. It was the Respondent's contention that since the order of

confirmation was made in 1997; well over 17 years before the present application was made, the application was time barred. This court did not understand Mr. Kijaru's argument on this ground. Section 4 (4) of the Limitation of Actions Act applies where one or a litigant attempts or desires to enforce an order, decree or judgment that is over twelve (12) years old. I do not think that that is the case here. If the Applicant was trying to enforce the decree of the Chuka SPMC LDT No. 44 of 2005, which I do not think is the case, that decree was issued in 2009. It is therefore within time and it cannot be said to be time barred. The order was barely four (4) years old as at the time the application was lodged. To my mind the objection on the basis of section 4 (4) of the Limitation Act was not properly taken and is rejected.

17. It was the Respondent's contention that the application was incurably defective on the basis that the application was a Chamber Summons instead of a Summons which is the procedure known under the Law of Succession Act. To my mind, an application for revocation has to be by way of Summons. Counsel for the Respondent did not tell the court the prejudice suffered by his client by the Applicant invoking the jurisdiction of this court by way of Chamber Summons instead of Summons as required under section 76 of the Act. In the case of **Mary Kaari Micheni .v. Micheni Mbiuki** (supra) relied on by Counsel for the Respondent, the Court held that the reason why the procedure adopted in that case was wrong, was because the principles applicable in the procedure adopted and those applicable in the required procedure were completely different. In the present case, it was not shown whether the procedure adopted had different principles applicable from the one required under the rules. In this regard, I hold that by merely heading the application Chamber Summons rather than "*Summons*" it does not prejudice the Respondent. To my mind therefore, under Article 159 2 (d) of the Constitution, this is merely a technical objection that does not go to the justice of the matter. The same is rejected. Issue number (c) is therefore answered in the negative.

18. The next issue is whether the Applicant is a beneficiary or dependant and therefore entitled to the estate of the deceased. Under the Act, it is clear that those entitled as beneficiary under sections 32 to 42 are the widow/widower and the children of the deceased. The entitlement also extends to the relatives upto the sixth degree of consanguinity. Under sections 26 to 29 of the Act, the dependants are also entitled to a share in the estate of a deceased person. As quite correctly put by Mr. Ithiga for the Applicant and as held in the case of **In re Estate of Sospeter Mutegi Njagi alias Mairobi Njagi** (Supra) what one has to show is that he or she was being maintained by a deceased person immediately prior to his demise for him or her to qualify as a dependant and therefore entitled to a share.

19. In the present case, the Applicant presents her case on two (2) fronts. Firstly, that she was a beneficiary by virtue of her husband being a son to the deceased and secondly, that she was a dependant by virtue of occupation of the estate land. On the first front, the Applicant alleged in her Affidavit sworn on 8th August, 2013 that the late Itunga Kimotho had two (2) households; that the two households were represented by the Petitioner, M'Mungiriria and the other by M'Nyiri Tigania, both deceased. The Applicant called two witnesses, Justin Rugendo M'Ireri and Rugane Tigania. None of the said witnesses supported the allegation that the deceased had two (2) households. They only dwelt on those whom they thought were sons and therefore, beneficiaries of the late Itunga Kimotho. In both her Affidavits of 10th March, 1998 and 31st May, 2016, the Applicant did not specify of whom these two (2) households were consisted of. It would be expected that the Applicant should have disclosed the names of the two (2) wives of the deceased and their respective children. A blanket statement that the deceased had two (2) households represented by the Objector and the Petitioner in my view, is not enough. She should have disclosed the names consisting of the alleged two households for the evidentiary burden to shift to the Respondent. It is trite that a household under section 42 is represented by a wife. In the present case, we are not told who the two wives of the late Itunga Kimotho were for there to have been two households. Under Section 107 and 108 of the Evidence Act Cap 80, Laws of Kenya it is he who alleges the existence of a fact that must prove its existence. In this case, the burden lay on the Applicant to show that the late Itunga Kimotho had two (2) households. This the Applicant has failed to discharge. The question that remains unanswered is whose mother was M'Nyiri Tigania? Who were his brothers and sisters amongst those named in the Petition? Where are they save for Rugane Tigania who swore an Affidavit on 31st May, 2016 that was denied and/or controverted by the Respondent's witnesses? These questions remain unanswered.

20. There was an allegation by Justin Rugendo M'Ireri that the Wathini clan of which he is chairman is the custodian of plot No. 34 and that plot No. 34 was registered in the name of the deceased in 1966 for his two sons M'Nyiri Tigania and Itunga Ndagoni in equal shares. Firstly, there was no evidence that was produced to prove that plot No. 34 was under the custody of the alleged Wathini clan or any other person other than the registered owner. Secondly, from the search certificate dated 10th July, 1995 that was filed together with the Petition, there is no trust whatsoever disclosed in the registration of that property. In this regard, the allegation that the deceased was registered as owner of the plot No. 34 in trust for M'Nyiri Tigania and Itunga Ndagoni in equal shares, remains just that, a mere allegation.

21. On her part, the Respondent called Bedford Ngai Mungiriria, Johnson Gitonga Kimathi and Rugendo Mutua Mari. They both denied the averments made by the witnesses of the Applicant. They told the court firmly that, Itunga Kimotho had one wife whose name they gave as Susan Nkima. That he had only three (3) children, namely Mungiriria Itunga (the Petitioner), Ndagoni Itunga and Faith Ciangai. That the deceased had two properties, Magumoni/Mukuuni/52 and 34 wherein he settled his two (2) sons Mungiriria and Ndagoni. That the latter was mentally challenged that is why the deceased did not transfer plot 34 to him but retained it in his name until he passed on whilst he had transferred plot No. 52 to his other son M'Mungiriria during his lifetime.

22. This court notes that whilst the averments in the Affidavits sworn by the Applicant and her witnesses were specifically and categorically controverted and denied by both the Respondent and her witnesses, the Applicant did not deny the averments of the Applicant and her witnesses. The evidence of the Respondent and her witness was never challenged. It remained uncontroverted. It should be noted that she specifically denied that the Applicant was in any way related to the deceased; Bedford Ngai Mungiriria not only stated who the relatives of the deceased were, but swore what the deceased's wish was as regards plot No. 34. This was not contradicted by either the Applicant or her witnesses. Finally, Rugendo Mutua Mari not only denied the averments of Rugane Tigania as regards the beneficiaries of the deceased, but he also explained how the Applicant and her family found themselves in plot No. 34. That narrative was neither disputed nor contradicted.

23. In view of the foregoing, this court's findings are as follows:-

- a) the deceased had one household of Susan Nkima. She gave birth to Mungiriria Itunga, Ndagoni Itunga and Faith Ciangai;
- b) the deceased settled his male children on Plot Nos. 52 and 34, respectively;
- c) that Ndagoni Itunga was mentally challenged and as a result the deceased did not transfer plot No. 34 to his name during his lifetime. That it is for that reason that M'Mungiriria petitioned for Letters of Administration to have the family of Ndagoni Itunga succeed plot No. 34 as had been intended by the deceased;
- d) that M'Nyiri Tigania was not a son of the deceased as contended.

24. In her Affidavit of 31st May, 2016, the Applicant contended that she was a dependent of the deceased by virtue of her having lived in the estate property to date. She contended that even the body of her deceased husband the Objector was interred on Plot 34. It is not in dispute that the Applicant and her family occupy a portion of plot No. 34. One thing is that the Applicant did not tell the court how she came to occupy that portion. She only stated that she, her late husband and children occupy a portion of plot 34. It was left to the Respondent through her witnesses, Bedford Ngai Mungiriria and Rugendo Mutua Mari to explain how the Applicant found herself on plot 34. That the Applicant's family occupied a portion of Magumoni/Mukuuni/22 belonging to one Mwigania Mugambi who sold the portion occupied by her family to another person. On such sale, the Applicant's family took advantage of the late Itunga Kimotho moving away from plot 34 to plot 52 due to old age to move to and occupy an 1/8 acre in plot No. 34. This evidence was neither denied nor disputed. It remains uncontested and the court accepts the same as the correct narration of the cause of events. If then the Applicant's interest and right over plot No. 34 emanates from this course of events, then her right cannot be enforced through a family court on a

succession cause but through an action for adverse possession in an Environment and Land Court. To that extent, the Applicant's contention of dependency is misconceived and unsustainable. The same is hereby rejected.

25. Before concluding this judgment, I consider it prudent to address one issue. The Respondent is only a widow to Itumbi Ndagoni, the son of the deceased who happened to have been entitled to the property the subject of this Succession Cause. It is her children to whom the property was distributed. Can she be then the correct Respondent? I doubt. She is neither the administrator to whom the estate was committed nor a beneficiary. The correct Respondents should have been those to whom the estate was distributed since the Petitioner is now deceased. To that extent, the orders sought could not have been issued even if the application would have succeeded.

26. Accordingly, this court finds the application to be unmeritorious and the same is dismissed with costs.

DATED and Delivered at Chuka this 6th day of October, 2016.

A.MABEYA

JUDGE

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

A.MABEYA

JUDGE

6/10/2016