



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT CHUKA
SUCCESSION CAUSE NO. 719 OF 2015
(FORMERLY EMBU SUCCESSION CAUSE NO. 173 OF 2002)
IN THE MATTER OF THE ESTATE OF THE LATE MIERI GICHONGE (DECEASED)
AND
JACK GITARI MIERI.....PETITIONER
- VERSUS -
KAARI MURIITHI.....1ST OBJECTOR
BONIFACE RUGENDO.....2ND OBJECTOR

J U D G M E N T

1. On 3rd January, 1998, M'Mieri M'Gichunge "*the deceased*" did at Gitareni sub-location aged 90 years. On 24th August, 1999 his son, Jack Gitari Mieru "*the Petitioner*" petitioned for grant of Letters of Administration Intestate. In form No. P& A 5, he disclosed those surviving the deceased as follows:-

- | | | |
|------------------------|---|----------|
| a. Gladys Ciamatumu | - | wife |
| b. Jack Gitari Mieri | - | son |
| c. Margaret Ciamuru | - | daughter |
| d. Priscilla Mutegi | - | daughter |
| e. Evelyn Kagendo | - | daughter |
| f. Mary Kageni | - | daughter |
| g. Evangeline Ntuntuni | - | daughter |
| h. Juliet Ciamwari | - | daughter |

Property LR No. Karingani/Gitareni/1774 ("*Plot No. 1774*") was disclosed as the asset that comprised the

estate.

2. This was met by an Answer to Petition and a Cross-Petition by the 1st Objector, Kaari Murithi alleging that she as wife of Mbuba Mieri and her children Bernice Kendi Mbuba and Martin Mwiathi Mbuba had been excluded from the list of beneficiaries. On 17th May, 2000, Boniface Rugendo Kiganka (now deceased) also lodged an objection on the basis that plot No. 1774 belonged to his grandmother and was to be given to his father who had since died.

3. The matter was first heard before the Embu Principal Magistrate's Court before being transferred to the Embu High Court to then this court on 29th October, 2015. The Objection was heard by way of viva voce evidence whereby the parties testified and called their respective witnesses. This court only recorded the evidence of the Petitioner and his witnesses.

4 Kaari Murithi (O₁W₁) "*the 1st Objector*", told the court that the deceased was her father in law having been married to his eldest son Elias Mbuba Mieri in 1982. That her husband died in 1985 leaving her with two children. That the Petitioner was given LR No. Karingani/Gitareni/1775 ("*plot No. 1775*") and that plot No.1774 was meant for her late husband. In cross-examination, she said that the Petitioner chased her away from their home in 1989 but nevertheless the deceased used to visit her in her home and told her that plot No. 1774 was to be registered in the name of her son once he reached 18 years. She denied having been re-married.

5. Mbaki Gichangi (O₁W₂) told the court that he was younger brother to the deceased. That the Petitioner had secretly lodged this Succession Cause. That there had been no family meeting to discuss about the estate of the deceased. Samuel Ndwiga Ithakamundi (O₁W₃) told the court that he was the chairman of the clan of both the Petitioner and Objector. He testified that under the Chuka customs, it is the son of the 1st Objector who was supposed to inherit plot No. 1774 as his father had passed on. That while the Petitioner had been given land by the deceased none had been given to the late husband of the 1st Objector.

6. Boniface Rugendo (O₂W₁), the 2nd Objector told the court that LR No. Karingani/Gitareni/241 (from which plot Nos. 1774 and 1775 were created) was family land and it belonged to his father who gave it to the deceased in 1965 to be subdivided amongst the family members. That because his father fell ill at the time, the deceased did not subdivide it as required. He produced as O₂ Exh1, 2 and 3 documents showing a dispute that had been lodged with the Karingani Land Disputes Committee dated 7th July, 1965 and a plaint in Embu RMCC No. 43 of 1994 wherein his late father Reba Mwiru had sued the deceased. In the 1965 dispute, the parties agreed to withdraw the dispute while the 1994 case was never determined. He told the court that his father died in 1997 whilst the deceased died the following year. That the deceased gave part of this land secretly in 1994. O₂W₁ produced as O₂ Exh 4 copies of the green card for plot Nos. 1774 and 1774 to prove his allegations. Titus Injiema (O₂W₂) said he was an uncle to both the Petitioner and the 2nd Objector. That the deceased and Reba Mwiru had agreed to settle the land dispute in 1965 as they were brothers.

7. Jack Gitari Mieri (PW₁), the Petitioner, told the court that the deceased was his father. He recalled that on 4th December, 1997 the deceased called on family meeting in which he fully distributed plot No. 1774. That he gave his wife two (2) acres, the Petitioner one (1) acres, all the daughters one (1) acre each and one (1) acre to be divided equally amongst his two grandsons by his late son, the husband of the 1st Objector. He denied having chased away the Objector from their home. That because she had been married elsewhere and given birth to three (3) other children, she was no longer a member of the deceased's family. He objected to her having been appointed a Co- administrator by **Justice Vitalis Juma**. As regards, the 2nd Objector, the Petitioner disputed that there was any relationship between his family and that of the Objector and insisted that the deceased did not hold any land in trust for the family of the 2nd Objector. In cross-examination, he told the court that it was an oversight that he had not included the two children of his late brother as beneficiaries when he filed the Petition for the grant. He admitted that the deceased had given him plot No. 1775 by the deceased during his lifetime.

8. Priscilla Mutegi (PW₂) and Mary Kageni (PW₃) told the court that they are daughters of the deceased. They recalled a family meeting held in 1997 wherein the deceased willed his plot No. 1774. That he gave the children of their late brother one (1) acre each. Ignatius Kaburi (PW₄) told the court that he was a close family friend of the deceased. He recalled that on 12th December, 1997 he attended a family meeting of the deceased where the latter willed his property as the Petitioner had told the court. In cross-examination, he stated that he was only one called to the meeting of 12th December, 1997 and he did not know why the deceased did not call either his brothers or fellow elders to that meeting. Gladys Samuel (PW₆) told the court that she is the widow of the deceased. That she could not recall either her age nor the names of her children. That the deceased settled his children by giving each two (2) acres. She was stood down for being unable to comprehend the proceedings and for the reason that the person who was handling her in court was trying to tell her what to tell the court. PW₇ was Fredrick Mbaka Mukarako who told the court the he was a nephew to the deceased. That on 12th December, 1997 he attended a family meeting where the deceased willed his property equally to all his children.

9. The court called the two (2) sons of the late Elias Mbuba, Kendi Mbuba told the court that the deceased was her grandfather who died while she was in high school. She wished to claim a share in the estate. Martin Mwiathi Mbuba told the court that he was a grandson of the deceased. That he wanted 10 acres of land for the estate of his late father the way the Petitioner had benefited from his late grandfather.

10. Having considered the evidence on record I consider the following to be the issues that fall for determination.

- a. is the 2nd Objector entitled to a share in the estate of the deceased?
- b. is the 1st Objector or her children entitled to the entire plot No. 1774 on behalf of the late Elias Mbuba?
- c. did the deceased make an oral will or did he die intestate?
- d. how should the estate be distributed?

11. Leonard Mutegi Kiganka is the son of the original 2nd Objector, Boniface Rugendo, who sadly passed on while this succession cause was still pending. He was substituted as 2nd Objector on 15th December, 2014. The case for the 2nd Objector was that Plot No. 1774 was part of the family land which the deceased was given by their father to divide among his brothers. That in 1965, the deceased divided that land amongst others but failed to give a share to his brother, Kiganka Mwiru, the father of Boniface Rugendo. The 2nd Objector produced O₂ Exh 1 which showed that a land dispute No. 16 of 65 had been lodged with the Upper Gitareni Land Committee. However, the same was withdrawn by Riba Mweru after the deceased had agreed that the land in dispute belonged to Riba Mweru. Further, he produced a plaint in Embu **RMCC No. 43 of 1994 M'Riba Mwiru .v. M'Ieri M'Gichunge** claiming half of Karingani/Gitareni/241, the original title from which plot Nos. 1774 and 1775, respectively emanated. It was the 2nd Objector's case therefore that the deceased having failed to transfer the half share in Karingani/Gitareni/241 to his father Kiganka Mwiru, plot No. 1774 measuring 10 acres was held by the deceased in trust for the 2nd Objector. On his part the Petitioner denied any relationship between the family of the 2nd Objector and that of the deceased. He stated that Riba Mwiru had failed in his lifetime to establish any right to the property owned by the deceased.

12. It is clear from the record, that there was a dispute regarding some land between Riba Mweru and the deceased in 1965. The dispute was withdrawn when the deceased admitted that the land in dispute truly belonged to the said Riba Mwiru. Looking at O₂ Exh 1, one cannot tell which property was in dispute. It will be speculative to hold that the land referred thereto was Karingani/Gitareni/241 or any other property. There was no evidence that was produced to enable the court discern the property that was the subject of the dispute. A court of law depends and relies on cogent and specific evidence and not speculation.

13. As regards the plaint in Embu RMCC No. 40 of 1994, there was no judgment to indicate the outcome of that suit. That being the case, it cannot be said that the 2nd Objector has established that either through O2 Exh 1 or O2 Exh 3, his family had an interest or right on plot No.1774 capable of being adjudicated upon by a family court.

14. If I understood the 2nd Objector's case properly, his claim was that the deceased held half share in Karingani/Gitareni/241, in favour of his (2nd Objector's) father. To my mind, that is an unascertained interest. There is no evidence that a court of competent jurisdiction has ever pronounced or made a finding to the effect that the deceased held Karingani/Gitareni/241 or the subdivisions arising therefrom, in trust for any other person. In my view, what the 2nd Objector's father should have done between 1965 and 1994, when he is said to have died, was to lodge a claim in the civil court to establish the alleged trust held by the deceased. This he failed to do. Further, the 2nd Objector should likewise have lodged such a claim before or even after the demise of his father or the deceased. Once such an interest was established before a competent court, he would then have had a locus to claim from the estate of the deceased. It has been held time and again that the jurisdiction of a family court in a succession matter is to determine who the beneficiaries of an estate are (under sections 26 to 42 of the Law of Succession Act- "*the Act*"), what properties comprise the estate of the deceased and the mode of distribution thereof. See **Francis Musyoki Kilonzo & Anor .v. Vincent Mutua Mutiso [2013] eKLR and Chuka HC SUCC.No. 660 of 2015 Re Estate of Zakaria Nthiga Matumo** (UR).

15. In this regard, I doubt if the jurisdiction of a family court will extend to ascertaining whether or not a deceased held some property in trust unless such a trust has already been established, decreed or is admitted. The family court can only inquire into such a trust if the same is claimed as a liability of the estate and not otherwise. Such a matter, should be litigated elsewhere and presented to the family court as a declared or as an established right. In this regard, the objection by the 2nd Objector lacks merit. He did not establish that there was any trust or that he is entitled to share in the estate of the deceased and his claim is therefore dismissed.

16. The next issue is whether the 1st Objector is entitled to the entire plot No. 1774. She told the court that the deceased had only two (2) sons, Elias Mbuba her late husband and the Petitioner. That the deceased had a property Karingani/Gitarene/241 measuring 21 acres. That he had in 1994 subdivided that land into two, plot No.1775 and plot No.1774, respectively. That he gave the Petitioner plot No. 1775 and plot No. 1774 was meant for her late husband through his children. The Petitioner denied this fact and told the court that the deceased had willed away plot No.1774 to all his children and the widow.

17. Elias Mbuba died in 1985. He left behind the 1st objector and two children, Kendi Mbuba and Martin Mwiathi. By the time Elias Mbuba died, the deceased had not divided his property. As at the time this matter was being tried, neither the 1st Objector nor any other person had taken out Letters of Administration for the estate of her late husband. The 1st Objector cannot therefore claim on behalf of her late husband because he predeceased the deceased. She could have claimed on behalf of his estate but as already stated, she had not yet taken out letters of administration for his estate. Her claim therefore lacks merit and is hereby rejected.

18. The next issue is whether the deceased made a will. The Petitioner testified that by an oral will made in December, 1997, the deceased distributed plot No.1774 to the widow, all his daughters, the Petitioner and the two (2) children of the late Elias Mbuba. He told the court that this was on 4th December, 1997 at a family meeting in which some of the deceased's children and PW4 and PW6 attended. That apart from giving the widow two (2) acres, the rest of plot No.1774 was divided equally amongst the children of the deceased. Of course the deceased was perfectly entitled to make an oral will, if he so wished.

19. Sections 8, 9 and 10 of the Act provides:-

"8. A will may be made orally or in writing.

9(1) No oral will shall be valid unless:-

a. *it is made before two or more witnesses; and*

b. *the testator dies within a period of three months from the date of making the will:*

.....

10. *If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness".*

20. The question is whether the oral will allegedly made by the deceased satisfies the foregoing requirements. The oral will is said to have been made in December, 1997. The deceased died on 8th January, 1998, barely a month later. The same is said to have been made in the presence of the children of the deceased, the widow and two other persons who were not members of the family of the deceased. In my view, this satisfies the provisions of the section 9(1) (a) and (b) of the Act.

21. However, even after satisfying those two requirements, the court is enjoined by section 10 of the Act to consider if there is any conflict in the evidence of the witnesses regarding the making of such a will. In the present case, there appears to be several contradictions in the testimonies of the witnesses. The first conflict is on the date of the oral will. While the Petitioner told the court that the oral will was made at a family meeting held on 4th December, 1997, PW₄ and PW₆ told the court that the meeting was held on 12th December, 1997. PW₂, PW₃ and PW₅ did not tell the court the exact date the oral will was allegedly made although they alleged to have been in attendance. Secondly, when it came to who was present at the alleged meeting the Petitioner indicated that PW₄ and PW₆ were the two outsiders present and named them. PW₂ said there were two (2) outsiders but did not give their name. However, PW₆ told the court that he was the only outsider whilst the rest were family members of the deceased. Finally, on the shares, PW₁, whilst PW₄ and PW₆ agreed on the shares distributed to the children, PW₂ and PW₃ seemed to suggest that each was given one (1) acre including the children of Elias Mbuba. On her part, PW₅ was categorical that her husband gave her two sons two (2) acres each.

22. With the foregoing contradictions which were apparent at the trial, this court finds it difficult to believe that an oral will was made by the deceased. The court keenly watched the Petitioner's witnesses. The court found it difficult to believe them. They seemed to have either been coached on what to tell the court and to insist on some family meeting having been held where some oral will was made by the deceased or to falsely insist on some will in order to disinherit the estate of the late Elias Mbuba. The court noted the following:-

(a) the Petitioner had a deeply rooted hatred and spite for the 1st Objector which clearly played out in court during his testimony and cross-examination;

(b) he told the court that when he first lodged the Succession Cause, he failed to include the children of his late brother out of an oversight. Later, he tried to explain that the failure to include them was because they were still minors. The question that begs is if there was an oral will by the deceased in which the two children were specifically given one (1) acre to share, how could the Petitioner forget them?

(c) PW₇ who was introduced as a purported independent witness told the court that he was a nephew of the deceased and that he had lived with him since 1949 until the deceased's demise in 1998. That he also attended the alleged meeting of 12th December, 1997. When asked by the court who the children of the deceased were he was unable to name them all. He was also unable to remember the year when the eldest son of the deceased, Elias Mbuba died. It is inconceivable that someone who had lived with the deceased's family for over forty (40) years could not remember the names of the people he allegedly grew up with, leave alone when the eldest child in that family died but will purport to succinctly remember the 12th of December 1997 and what was discussed thereat;

(d) finally, PW5 the widow of the deceased was brought to confirm that she was given two (2) acres by the deceased. Instead she kept telling the court that the deceased gave her two sons two (2) acres each. The court stood her down when it became clear that the person who was holding her in court was trying to influence her on what to tell the court.

23. In view of the foregoing, this court makes a finding that no oral will was proved to have been made by the deceased. The deceased died intestate.

24. The foregoing being the case, how should the estate of the deceased be distributed. Section 42 of the Act provides:-

"42. Where

a. an intestate has, during the lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

b. property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house."

25. In the present case, there was evidence that during his lifetime, the deceased had gifted the Petitioner the property known as Karingani/Gitareni/1775 measuring 4.35 Ha (Approximately 10.744 acres). By dint of section 42 aforesaid, this has to be taken into consideration when distributing the estate. There was no dispute that the persons whose names are set out in paragraph 1 of this Judgment are the beneficiaries of the estate of the deceased. There was also no dispute that the children of the late Elias Mbuba were dependants of the deceased until their mother was driven out of the deceased's home in 1989 by the Petitioner. This court did not find any credible evidence that the 1st Objector moved away from the deceased's home when she was married to another man. Due to the open hatred and animosity that openly played itself out in court by the Petitioner towards the 1st Objector, this court believes her assertion that she was driven out from the home of her late husband at the instance of the Petitioner. Accordingly, the children of the late Elias Mbuba are dependants of the deceased and are entitled to inherit the share that is due to his estate.

26. The testimonies of witnesses was that all the daughters of the deceased were happily married. It was clear that all the daughters would be contented if each received one (1) acre from the estate. Indeed those who testified told the court as much. It is also not in dispute that the widow of the deceased is still alive. Under section 35 of the Act, she retains a life interest over the net intestate estate of the deceased. On the authority of **Justus Thiora Kiugu .v. Others & Joyce Nkatha Kiugu & Others [2016] eKLR** wherein the Court of Appeal held that the net intestate estate of a deceased can only be distributed to the children where they are in agreement, I make the following findings:-

a. all the children of the deceased were agreeable that each receives one (1) acre from plot No. 1774;

b. that although the Petitioner had already received from the deceased 10.74 acres by way of plot No. 1775 which is greater than the estate itself and may not be entitled to any further share; be allocated 1 acre;

c. the widow gets life interest on two (2) acres in the estate; and to hold the same in trust for Kendi Mbuba and Martin Mwiathi;

d. the children of the late Elias get one (1) acre jointly.

27. In view of the foregoing, and on the ground that the widow is so old and is said to be over 90 years or more as the court saw her in court, this court is inclined to grant a life interest to the widow on two (2) acres for her own use and to hold the same in trust for her two- (2) grand children, Kendi Mbuba and

Martin Mwiathi whilst the rest of the estate is shared out between the children of the deceased as they had agreed, that is at one (1) acre each. In this regard, the estate is distributed as follows:-

LR NO. KARINGANI/GITARENI/1774

- | | | |
|------------------------|---|-----------------|
| a. Margaret Ciamuru | - | 1 acre |
| b. Priscilla Mutegi | - | 1 acre |
| c. Evengeline Ntuntuni | - | 1 acre |
| d. Mary Kageni | - | 1 acre |
| e. Evelyn Kagendo | - | 1 acre |
| f. Juliet Ciamwari | - | 1 acre |
| g. Kendi Mbuba | | |
| Martin Mwiathi | - | 1 acre- jointly |
| h) Agnes Ciamatumu | | - 2 acres |

Life interest thereon and in trust for Kendi Mbuba and Martin Mwiathi in equal shares.

28. As regards the protestation from the Petitioner on the joint administration with the 1st Objector that was ordered on 3rd June, 2002, by **Juma J**, that order has never been appealed against or set aside and it therefore remains.

29. Accordingly, the Objection of the 2nd Objector is dismissed. The Objection by of the 1st Objector is hereby allowed and the estate is distributed in terms of paragraph 27 above. This being a family dispute this court makes no order as to costs.

It is so decreed.

DATED and delivered at Chuka this 3rd day of November, 2016.

A.MABEYA

JUDGE