



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**SUCCESSION CAUSE NO. 196 OF 1998**  
**JULIUS KIMATHI MUGAMBI LEGAL**  
**REPRESENTATIVE OF ANITA KATHURE.....PETITIONER/APPLICANT**  
**VERSUS**  
**ZIPPORAH KARAMBU.....1<sup>ST</sup> OBJECTOR/RESPONDENT**  
**DAVID RECHE.....2<sup>ND</sup> OBJECTOR/RESPONDENT**  
**JULIUS GIKUNDA.....3<sup>RD</sup> OBJECTOR/RESPONDENT**  
**NATHAN MATHENGE.....4<sup>TH</sup> OBEJCTOR/RESPONDENT**

**J U D G M E N T**

1. The objectors through a notice of motion dated 27<sup>th</sup> November, 2013 pursuant to Section 73 of the Probate and Administration Rules seeks that the share of Martin Gitonga from the deceased estate herein be allocated to David Reche. The application is based on the grounds on the face of the application and affidavit in support by Mr. David Reche dated 27<sup>th</sup> October, 2013.
2. That Julius Kimathi Mugambi who described himself as a legal representative of the petitioner filed a replying affidavit dated 14/1/2014 in opposition to the objector's application.
3. That during pre-trial conference court directed that the objector's application dated 27<sup>th</sup> November, 2013 be determined by way of viva voce evidence.
4. The 2<sup>nd</sup> objector gave evidence and called 3 witnesses whereas the petitioner gave evidence and called one witness.

**OBJECTORS CASE**

5. Ow1 David Reche prayed that he be allocated the share of the late Martin Gitonga of 0.97 acres from L. R. Ntima/Ntakira/1753 which is in the name of Stephen Mugambi Nkirima, the deceased. He urged that the land had been distributed by court vide its judgment dated 3<sup>rd</sup> December, 2009 in HCSC 196/1998. He contended that Martin Gitonga is his son and that he died in 2012 at Daadab at North Eastern Province while on duty as a Police Officer. He relied on Baptism card exhibit OI(a), Birth

Certificate OI(b), Chief's letter OI(c) and Death Certificate OI(d) in support of his assertion that the deceased was his son. He further produced limited grant of letters of Administration in Meru HCMISC. Application No. 612 of 2012 as exhibit 2.

6. On being cross-examined OW1 testified that the deceased was not his biological son and that his mother was Teresia Karwirwa his elder sister. He admitted that in court's judgment in this cause Martin Gitonga was given 0.97 acres and though OW1 has 3 children none was given. He admitted his sisters are 3 and only two are married and none was given any share from the deceased estate. He gave the names of his sisters as DELEVINA KANANA and JANET NTINYARI. He contended that his mother gave Martin Gitonga her share. He testified that he does not want Martin's share to go to his sisters but to him alone. He admitted when he got exhibit 2 he did inform his sisters that he got the deceased dues or gratuity alone of Kshs.95,000/- and insurance money Kshs.390,000/ using chief's letter. He urged that as he educated Martin Gitonga he is entitled to his properties. During cross-examination he testified that he brought up Martin Gitonga since he was 3 months old and he is as such entitled to his share.

7. OW2 Janet Ntinyari, sister to OW1 and aunt to Martin Gitonga testified that Martin Gitonga was son to her sister one Stella Karwirwa(deceased). She contended that OW1 should get Martin Gitonga's share of land because their mother's wish was that the same be given to OW1. He averred that Martin Gitonga's mother died about 8 years ago and that Martin Gitonga since his childhood he was brought up by OW1 jointly with her mother late Zipporah Karambu. She confirmed that the parents of M. Gitonga to be as per exhibit OI(a). She added that David Reche(OW1) and Alice Kiunga educated Martin Gitonga. She also referred to exhibit OI(b) and OI(c) and confirmed David Reche and Alice Kiunga to be parents of Martin Gitonga.

8. On cross-examination OW2 admitted that exhibits (a),(b),(c) and (d) and exhibit 2 were purposely prepared by the applicant so as to get the benefits of Martin Gitonga(deceased). She further admitted that their father had left an oral will over the distribution of his land leaving the balance of their land to their mother Zipporah Karambu but none for his daughters. She further stated that the land left to their mother was given to Martin Gitonga by court. She gave the reason for such allocation as Stella had died leaving a son and all deceased daughters agreed. She testified that David Reche was given 1 acre. OW2 contended during re-examination that David Reche and Alice Kiunga had adopted Martin Gitonga as their son.

9. OW3 Julia Karimi, sister in -law to OW1 testified that Martin Gitonga was son to her sister in-law. She testified that she knows David Reche and Alice Kiunga as parents of Martin Gitonga and as such she stated she has no objection to them getting the share of Martin Gitonga. She added David Reche brought Martin Gitonga up and educated him since standard one. That he had adopted him as his son. She testified she does not know his biological father. She testified that she is aware of the documents produced by OW1 and that they showed David Reche as father to Martin Gitonga.

10. During cross-examination OW3 confirmed that in court's judgment she was awarded 1 acre of land as share of her late husband Julius Gikundi and that OW1 got 1 acre also and the balance went to Martin Gitonga. She added Martin Gitonga was given his share separately as he was a son of their sister Stella Karimi.

11. OW4 Nathan Mathenge brother to OW1 testified that Martin Gitonga was son of his sister the late Stella Karwirwa. He confirmed Martin Gitonga had been given land by their mother Zipporah Karambu and that Martin Gitonga had been brought up by David Reche since he was 3 months old after his mother left him with David Reche. He proposed Martin Gitonga's share to go to David Reche.

12. During cross-examination OW4 testified that his father's wish was that each of his 4 sons to get 1 acre and balance to go to Martin Gitonga, which court gave to Martin Gitonga.

### **PETITIONER'S CASE**

13. Pw1 Julius Kimathi Mugambi, testified that he is the legal representative of Anita Kathure Mugambi,

the initial petitioner in this cause. He testified that court heard them and delivered judgment distributing land parcel Ntima/Ntakira/1753. That each of his 3 uncles got 1 acre;PW1 1 acre on behalf of his late father Stephen Mugambi Kirima and balance was to be registered in the name of his grandmother but before registration , Zipporah Karambu passed on. That OW1 applied for substitution and Zipporah Karambu was substituted with Martin Gitonga, PW1's cousin. He testified that the deceased had said balance of his land be registered in the name of PW1's grandmother, however the court made an order that the balance be registered in the name of Martin Gitonga, who is now deceased. He testified he learnt from Delevina Kanana that the share that was to go to his grandmother was intended for her to hold in trust for the deceased daughters namely Stella Karwirwa, Janet and Delevina Kanana. He urges that Martin Gitonga's share should go to the deceased daughters and if they are not interested the same should go to all the beneficiaries namely: - David Reche, Nathan Mathenge, Julius Gikundi, and Julius Kimathi Mugambi.

14. During cross-examination PW1 testified that the court shared the land amongst the deceased four beneficiaries and Martin Gitonga got his share by virtue of the said judgment. He agreed that his grandmother is not mentioned in the judgment nor was her share mentioned nor his aunties or sisters. He admitted that Nathan Mathenge, Janet Ntinyari, Julia Kirimi Gikundi; all his aunties and family members had said and agreed that Martin Gitonga's share should go to David Reche.

15. PW2 Delevina Kanana, Sister to OW1 testified that the deceased had 4 sons and 4 daughters. She testified that Anita Kathure, wife to the deceased had petitioned for the grant of letters of administration. She testified the deceased in this cause wished his land to be shared amongst his sons so that he gets 1 acre and balance to be registered in her mother's name to hold in trust for her daughters and that during surveying the same be registered in the name of Stella Karwirwa, herself and Janet Ntinyari. That Stella Karwirwa died leaving a young child, one Gitonga who was placed under care of their mother before David Reche assumed that responsibility. That Stella educated Martin Gitonga upto Form II before David Reche took over. She testified after their mother died in a family meeting they all agreed their mother's share should go to Martin Gitonga. She contends that since Martin Gitonga is deceased the land should go back to the deceased daughters namely herself and Janet. She contended that her brothers have their lands and David Reche uses another land of their father at Ntima/Ntakira/762 which land is yet to be subjected to succession process.

16. During cross-examination PW2 testified she has no evidence of existence of Ntima/Ntakira/762. She testified that she is not aware that Martin Gitonga was given his share in court's judgment in this cause. She agreed that the land was shared by court and not by them. She testified she is married at Nthimbiri. She further testified that all other family members have agreed that the land should go to David Reche but she has disagreed. She further testified that she did not appeal against the court's judgment.

### **ISSUES FOR DETERMINATION**

17. Having carefully considered the objectors application, affidavit in support, replying affidavit, oral evidence adduced by both the objectors and the petitioners and parties counsel's written submissions, the issue for consideration can be summarized as follows:-

***1. Whether court in its judgment dated 3<sup>rd</sup> December, 2009 distributed the deceased estate and whether Martin Gitonga(deceased) was awarded any share from the deceased estate.***

***2. If Martin Gitonga(deceased) was awarded share from the deceased estate herein who is his dependant and/or who should get his share?***

***WHETHER COURT IN ITS JUDGMENT DATED 3<sup>RD</sup> DECEMBER, 2009 DISTRIBUTED THE DECEASED ESTATE AND WHETHER MARTIN GITONGA (DECEASED) WAS AWARDED ANY SHARE FROM THE DECEASED ESTATE.***

18. This honourable court by its judgment dated 3<sup>rd</sup> December, 2009 identified the deceased beneficiaries as David Reche M'Ikirima, Julia Karimi Gikunda(wife of late Julius Gikunda), Julius Kimathi Mugambi,

Nathan Mathenge, Martin Gitonga; Joseph Mwititi Mugambi, Patrick Mwenda, Angelica Nkirote and Rebecca Makandi and distributed the estate as per its judgment. Martin Gitonga was considered amongst the deceased beneficiaries and was awarded the portion now subject of this dispute measuring(0.97 acres).

19. The petitioner herein was catered for. The deceased daughters namely Janet Ntinyari and Delevina Kanana do not appear in the court's judgment. None of them has challenged the court's judgment since it was delivered. Janet Ntinyari gave evidence for objectors as OW2 and clearly stated that she has no objection to Mr. David Reche getting Martin Gitonga(deceased) share. PW2 Delevina Kanana prays that Martin Gitonga's share goes back to the deceased daughters namely herself and Janet Ntinyari to share.

20. The court's judgment is not subject of review before me nor can I sit on an appeal over a decision of court of parallel jurisdiction nor deal with issues which have not been pleaded before this court. The deceased daughters have not filed any formal application as Mr. David Reche has done for consideration.

21. I therefore find and hold the court in its judgment dated 3<sup>rd</sup> December, 2009 distributed the deceased estate herein and that Martin Gitonga was awarded a share thereof.

***IF MARTIN GITONGA (DECEASED) WAS AWARDED SHARE FROM THE DECEASED ESTATE HEREIN WHO IS HIS DEPENDANT AND/OR WHO SHOULD GET HIS SHARE?***

22. I have already found from the court's judgment that Martin Gitonga was awarded a share of land from the deceased estate.

23. The objector OW1 claims that he is entitled to the deceased share by virtue of being father to the deceased. The evidence from OW1, OW2, OW3 and OW4 is that when Stella Karwirwa mother to Martin Gitonga left him Mr. David Reche, though not the biological father to Martin Gitonga, he took Martin Gitonga as his child. He provided for him, educated him and saw him through his life upto the time of his death. The petitioner and his witness do not deny that Martin Gitonga was cared for by David Reche though they do not agree as from what age or time.

24. The certificate of Baptism of Martin Gitonga, certificate of Birth and Chief's letter clearly show David Reche and his wife as parents of the deceased Martin Gitonga. The petitioner and his witness stated they do not know the biological father of Martin Gitonga. There is sufficient evidence from the objectors and their witnesses that the 2<sup>nd</sup> objector and his wife voluntarily assumed permanent responsibility over Martin Gitonga since he was 3 months old upto the time of his death. The documents produced documents to show that the 2<sup>nd</sup> objector and his wife were assumed parents of Martin Gitonga. That Martin Gitonga recognized the two as his parents and even he had obtained documents referring to the two as his parents. The family members referred to 2<sup>nd</sup> objector as father to Martin Gitonga. The 2<sup>nd</sup> objector was presumed father to Martin Gitonga a fact which the petitioner and his witness did not dislodge.

25. The law of Succession Act(Cap.160) defines child under Section 3(2) and (3) as follows:-

***(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.***

Under the Black's Law Dictionary one can be a presumed father to a child. Presumed father is defined as follows:-

***"the man presumed to be the father of a child for any of several reasons(1) .....(3) because The man welcomed the child to his home and held out the child as his own.(underlining***

mine)

26. The dependant under **Section 29(a) and (b)** of the Law of Succession Act is defined as follows:-

***“29. For the purposes of this Part, “dependant” means (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death; (b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and (c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.(underlining mine)***

27. The deceased’s share should go to his dependant. The petitioner and Delevina Kanana are the only people from the family claiming that Martin Gitonga’s share should go to deceased’s daughters in default whereof to all deceased beneficiaries(sons and a daughter in-law).

28. I have considered the entire evidence and do not believe the evidence of the petitioner and his witness. I find it incredible whereas I find the evidence of the objectors consistent truthful and I believe it.

29. I find that the dependants of Martin Gitonga to be David Reche and his wife. The petitioner and his witness are not dependants to Martin Gitonga nor are they entitle to Martin Gitonga’s share.

30. In view of the conclusion I have already come to I find merits in the 2<sup>nd</sup> objector’s application. I will allow the same and order as follows:-

***i. That Martin Gitonga’s share as captured in this court’s judgment dated 3<sup>rd</sup> December, 2009 be and is hereby awarded David Reche, the 2<sup>nd</sup> objector herein.***

***ii. That each party do bear its own costs as the objectors and petitioner are related.***

**DATED, SIGNED AND DELIVERED AT MERU THIS 12<sup>TH</sup> DAY OF MARCH, 2015.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

1. Mr. Kaimenyi for objectors
2. Mr. B. G. Kariuki for the petitioner

**J. A. MAKAU**

**JUDGE**

