



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT MERU**

Succession Cause 9 of 2003

IN THE MATTER OF THE ESTATE OF M'AMURU M'ARACHI (DECEASED)

PRISCILLA KATHAMBI M'AMARU PETITIONER

VERSUS

JUDITH IGOKI PROTESTOR

JUDGMENT

The deceased estate consisted of two properties namely Abothuguchi/Kariene/572 which shall herein after be called Kariene property and Abothuguchi Makandune/789 which shall herein after be called Makandune. The petitioner Priscilla Kathambi was the deceased's 1st wife. The protestor Judith Igoki was the 2nd wife. The petitioner in her summons for confirmation proposed the distribution of the Kariene to be equally shared amongst the deceased sons. In respect of Makandune property, she proposed that it be distributed to her wholly. In response to that proposal, the protestor filed a protest by the affidavit in protest, she deponed that the Makandune property should be shared equally between her and the petitioner. The protest was heard by oral evidence. The protestor in evidence stated that the Makandune property is 3 acres. It is the Makandune property that she wanted it be shared between her and the petitioner. In her evidence, she changed her position from time to time. After having said that Makandune should be shared between her and the first wife, she later stated that if the petitioner was to get the Makandune property, she should be given the Kariene property. On being cross examined, she said that when she got married to the deceased, she found the petitioner already married. The petitioner had 3 children. The petitioner subsequently got four more children with the deceased. She was blessed with 2 children with the deceased. When she got married, she found the Kariene property having coffee. This coffee, she said, was planted by the deceased. She was asked whether she had used the coffee proceeds to buy a property in Timau and she denied that she owns a property at Timau. She further stated that she purchased Makandune property together with the petitioner. She however could not recall the date it was purchased. She said that it was purchased for Kshs. 900,000. This amount, she said, was paid at once. She confirmed that the petitioner currently resides on that property. She again changed her position by saying that the Makandune property was purchased by her, the petitioner and the deceased. She however confirmed that it was registered in the deceased name. She said that the petitioner had resided on that parcel of land for about 20 years. In respect of the Kariene property she said that it was not subdivided during the lifetime of the deceased amongst his children. She however for the first time in cross examination stated:-

“It was when they tried to evict me that the land was sub divided before the police. That is about 8 years ago. The area chief brought the police.”

Further, she stated that the deceased had summoned the assistant chief and had informed him that should he die, it ought to be noted that he had 2 parcels of land. That the two parcels of land were to be sub divided equally between the 3 sons. This is yet another position that the protestor took in respect of distribution of this estate. She did however confirm that she had never been on Makandune property. She also confirmed that she knew the petitioner had constructed a house there. On further cross examination, she said that the deceased had purchased using the coffee proceeds another property at Nkando. She said that the property at Nkando was owned by the deceased and she denied that she had been requested by the deceased to move to that land. In total she said the deceased owned 3 pieces of land. As stated before, the protestor did change her position often and she eventually stated that the deceased had told her that each son was to get one acre. They were to get 1 acre even from Makandune property. PWII was the daughter of the protestor. The court will not place much reliance on her evidence because she sat in court throughout when the protestor gave evidence. She too in evidence said that the deceased, who is her father, had 3 properties one at Kariene, Makandune and Nkando. In her proposal, she said that the property should be divided between the sons and the remainder to be given to the deceased wives. She on being cross examined was not able to put a date as to when the deceased gave her those instructions. She said that the deceased did not state how the Nkando property was to be shared since it was less than two acres. She later said that that property was to be sold and the proceeds were to be shared amongst the sons. Although she was not married, she said that she was not given land but she owned her own land in Nanyuki. She denied later that the deceased had shared out his land amongst his sons in his lifetime. When she was questioned about the land she owns at Nanyuki, she denied that the same was bought with her mother's coffee proceeds. She was unable to give the title number of that land. PWIII was the son of the protestor. His testimony does not assist the court because he simply requested that the property be sub divided amongst the beneficiaries. Priscilla the petitioner in her evidence said that she was over 90 years old having been born in the age group of Kaburu. She confirmed that the deceased is her husband and she has 7 children with him and she also confirmed that the protestor was a 2nd wife and that she had 2 children. That the deceased came to their home with the protestor as the 2nd wife and because she begun to suffer deprivation of her property which she had developed when the protestor came to their home she decided to purchase another piece of land from the proceeds of the coffee. That is the Makandune property which she confirms is 3 acres. She said that an agreement was written when she was purchasing the land between her and the seller. On being questioned why she registered that land in the deceased name she said:-

“The land I bought is in the deceased name because I put his name since we were not divorced. My husband was alive and I said I had to include my husband, I could not leave him out even though when I bought it I was alone.”

She said that the protestor had never lived at Makandune nor has she visited there. The protestor she said with her coffee proceeds had purchased a property at Nkando. That property is used by the protestor's grandson. The petitioner then said that the deceased had shared out the Kariene property before his death amongst his children. That the format he used to share out the land was what she adopted in the affidavit in support of confirmation of grant. DWII was the person who sold the Makandune property to the petitioner. This was in 1972. He sold the property for Kshs. 6,000/=. Petitioner paid him the first instalment of Kshs. 500 the balance was paid by instalment. When they entered into that transaction, the petitioner was accompanied by her son. He said that the land borders his and that the petitioner almost resides in the same compound as he does. In all that time that the petitioner has been on that land, he had never seen the deceased. That he only saw him when the deceased made a party when one of his daughters was getting married. He stated that although it was the petitioner who purchased the land, it was registered in the deceased name. DWIII was a retired chief. He resides in Makandune location. He was a chief of that area. He had known the petitioner since she was a resident of that area. He said that she moved there around 1980 and he was aware that the petitioner had purchased the land from Mugira, DWII. He got to know about the transaction because Mugira is related to him. When he would visit Mugira, he would see the petitioner there. He noted that the petitioner lived alone. In considering the evidence adduced, I found that the protestor's case had several contradictions. There is a time that the

protestor said that the petitioner did not move to Makandune property. She also said that Makandune property was purchased by her and the petitioner. When DWII gave evidence she did not put that question to him. At another time, the protestor said that the Makandune property was purchased by the deceased. The protestor stated that the retired chief had been told by the deceased that all the properties were to be shared amongst his sons. It is not clear whether that retired chief was DWIII. If not, no evidence was adduced to corroborate the petitioner's statement. In any case, protestor did not cross examine DWIII on that issue. I have considered the evidence adduced before court and in my view, the protestor's evidence and even her witness evidence was inconsistent and cannot be relied upon by the court. It should be noted that when the protestor filed the affidavit of protest, she did not disclose the existence of a third property in the name of the deceased. It is only when under cross examination she admitted that a 3rd property existed at Nkando. On the whole, the just distribution of the deceased estate is as proposed by the petitioner. The petitioner in her ripe age of 90 came across as an honest and reliable witness. Her case was that she was intimidated by the deceased 2nd wife and hence she looked for another property where she could live independently. Her evidence was supported by DWII and DWIII. I believe it is because of her age, she being of a generation which believes that a woman cannot be registered as an owner, that she had the Makandune property registered in the deceased name. Having heard her narrate her evidence, I believe it will be unjust to deprive her of her property that she purchased by her own means. She is entitled to retain the Makandune property. The protestor on the other hand purchased another property in Nkando and she will retain that property. I therefore hereby order that a confirm grant be issued in the following terms:-

(i) ABOTHUGUCHI/KARIENE 572

(a) JOHANA MUNENE – 1 ACRE

(b) FRANCIS GUANTAI – 1 ACRE

(c) SILAS MUGAMBI – 1.21 ACRES

(ii) ABOTHUGUCHI MAKANDUNE/789

(a) PRISCILLA KATHAMBI M'AMURU - Whole

(iii) There shall be no orders as to costs

Dated and delivered at Meru this 5th day of November 2009.

MARY KASANGO

JUDGE