



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 224 OF 2015

IN THE MATTER OF THE ESTATE OF M'THIRIKA MBURIRE

AND

JOYCE MBINYU MBAKAPETITIONER /APPLICANT

VERSUS

JOHN MUTEGI MBURIRE.....RESPONDENT/PROTESTOR

J U D G M E N T

1. This cause relates to the estate of the late M'Thirika Mburire (deceased) who died on 24th December, 1995 domiciled at Kabuboni Location. According to the petition for letters of administration presented to this court, the deceased was polygamous and died intestate leaving the following dependants surviving him namely;

(A) 1st house - Martha Ciankui (deceased)

- (i) Janet Ciambuti Mugo
- (ii) Teresia Ciakanyakini (deceased)
- (iii) Joyce Mbinyu Mbaka
- (iv) Juliesta Ciakathia Nyaga
- (v) Mary Ciagitari Kirimo

(B) 2nd house

- (i) Jane Ciangai (deceased)
- (ii) Ephantus Nyaga
- (iii) Peter Mbuba
- (iv) Royd Gitari (deceased)
- (v) Hellen Ciambaka
- (vi) Lucy Ciakuthi &
- (vii) Loise Murugi

2. The petitioner, Joyce Mbinyu Mbaka was appointed the administratrix of the estate of on 8th March 2016. The properties listed as forming the estate in this cause are as follows namely:

- (a) L.R. No. Karingani/Gitarene/1251 - 0.41 ha or 1.01 acres
- (b) L.R. No. Karingani/Gitarene/539 measuring approximately- 1.4. ha or 3.5 acres and
- (c) L.R. No. Magumoni/Mwonge/536 measuring Approximately 2.13 ha or 5.25 acres.

3. The petitioner/administratrix moved this court for the confirmation of the said grant vide Summons for Confirmation of Grant dated 31st August, 2016 proposing that the estate be distributed as follows:-

(A) Land parcel No. Karingani/Gitarene/1251

Lucy Ciakuthii Rugendo - whole

(B) Land Parcel No. Magumoni/Mwonge/536

- (i) John Mutegi Mburire - 0.304 ha
- (ii) Mary Ciagitari Kirimo - 0.304 ha
- (iii) Juliesta Ciakathia Nyaga - 0.304 ha
- (iv) Janet Ciambuti Mugo - 0.304 ha
- (v) Joyce Mbinyu Mbaka - 0.304 ha
- (vi) Jane Kathomi Gitari - 0.152 ha
- (vii) Annifer Mwende Karimi - 0.152 ha
- (viii) Charles Njoka Julius Mugo - 0.304 ha- to hold in trust of Zeverino Gitari Mugo, Albert Kithinji Mugo, Isack Mutembei Mugo, Paul Murithi Mugo and John Miriti Mugo.

(C) L.R NO. Karingani/ Gitarene/539

- (i) Ephantus Nyaga Mburire - 0.35 ha
- (ii) Hellen Ciambaka - 0.35 ha
- (iii) Loise Murugi Mwangi - 0.35 ha
- (iv) Lenity Muthoni Mbuba - 0.35 ha -

to hold in trust of Robert Mugendi Mbuba, James Mwenda Mbuba, Phonela Murugi Mbuba, Jane Mbuba and Eddy Karani Mbuba

4. John Mutegi Mburire, one of the beneficiaries/dependants in this cause disagreed with the above proposal and filed an affidavit of protest sworn on 19th September, 2016. His main bone of contention is that the deceased had made an oral will prior to his demise and had given suggestions on how he wanted his estate distributed and in fact distributed it as follows:-

(A) Karingani/Ndagani/1251- 1 acre

- (i) Joyce Mbinyu Mbaka to hold in trust for herself and all the daughters of the deceased namely Hellen ciambaka, Lucy Ciakuthii, Loise Murugi, Mary Ciagitari Kirimo, Juliesta Ciakathia Nyaga and Janet Ciambaka Mugo.

(B) L.R No. Magumoni/Mwonge/536

- (i) Ephantus Nyaga Mburire - 2.625 acres
- (ii) John Mutegi Mburire - 2.625 acres

(C) L.R No. Karingani/Gitarene/539

- (i) Lenity Muthoni Mbuba - To hold in trust for her benefit and that of Robert Mugendi Mbuba, James Mwenda Mbuba, Phonela Murugi Mbuba, Jane Kathure Mbuba and Eddy Karani Mbuba.

5. The protestor's contention that the deceased made an oral will prior to his demise was supported by Fredrick Njoka Mbuba who swore an affidavit on 17th October, 2016. He has deposed that the deceased made an oral will on 28th September, 1995 in his presence and that of Ephantus Nyaga Mburire. John Mutegi Mburire, the late Peter Mbuba Mburire, Martha Ciankui, Festus Mutegi Muga and Evelyn Ntatua.
6. The administratrix filed a response to the allegation of the existence of an oral will deponing that the deceased was suffering from some mental illness from 1993 to 1995 and could not have been in a position to make an oral will as according to her he was not well collected and aware of his surroundings or even recognize people.
7. This court directed that the protest be heard through viva voce evidence. The first witness to testify was Samuel Mwaniki (PW1), the County Registrar of Deaths and Births. He told this court that he issued a Death Certificate in respect to M'Thirika Mburire, the deceased herein on 12th August, 2018 after being satisfied that the deceased died at home on 24th December, 1995. He relied on a letter dated 12th August, 2015 from the Area Chief one David M'Ithara. He clarified that the Area Chief came and signed the Register in his office to confirm the demise of the deceased at home before he issued the Death Certificate.
8. Robert Muchiri Simon (PW2) testified on behalf of the Hospital Administrator, Chuka County Referral Hospital and confirmed to this court that as per the Hospital records from 7th December, 1995 to 28th December, 1995 the name of the deceased does not feature which in view showed that the deceased body was not kept at their facility in the period under reference (7th December, 1995 to 28th December, 1995).
9. The protestor (John Mutegi Mburire) (PW3) on the other hand testified that he was a son to the deceased herein and that the petitioner is his step sister. According to him, the deceased died on 16th December, 1995 at home in Kabuboni Location and that he was buried on 23rd December, 1995. He reiterated the contents in his affidavit sworn on 19th September, 2016 which in summary was that the deceased was polygamous having married two wives with the 1st wife- Martha Ciankui having 5 children one of whom is deceased and the 2nd wife Jane Ciangai (his mother) having 7 children two of whom are deceased. He further told this court that his late father had 3 properties he had listed in his affidavit and added that parcel No. Karingani/Gitarene/2314 belonged to Joyce Mbinyu Mbaka, the petitioner herein having gotten the same with the assistance of their late father.
10. The protestor further testified that the deceased herein died testate as he had made an oral will on 28th September 1995. He denied suggestion that he had mental sickness at the time of making the oral will. He named the witnesses to the oral will as Ephantus Nyaga, Elias Mbuba Njoka, Mutegi Kanga, Evalyne Tatu among others. According to him the deceased clearly told them that parcel No. Magumoni/Mwonge/536 was to be utilized by Martha Ciankui (widow- deceased) and that in the event Martha became unable to utilize the parcel, the parcel would go to her and Ephantus Nyaga in equal shares. He further added that parcel No.Karingani/Gitarene/539 was given to Peter Mbuba Mburire (deceased) where he had been occupying until his death besides the two parcels, the protestor told this court that the deceased gave Karingani/Gitarene/1251 to Joyce Mbinyu Mbaka but added that the parcel would cater for any daughter of the deceased who would come back home from where they are married.
11. The protestor also added that he has already developed his portion of parcel No.536 by constructing a permanent house among other developments. He added that his late father did not suddenly die as he had been sick for almost a year and that his sickness had nothing to do with his mental state but that he had problems to do with bones and prostate. He conceded that his late father left out his cows and money in bank account in his oral will.
12. The protestor's position on the oral will was supported and/or corroborated by the evidence of Ephantus Mburire Nyaga (PW2). He reiterated that the deceased was in good health when he made an oral will on 28th September, 1995. He also stated that he was called from Mombasa where he was working to come and witness the wishes of his late father. He further stated that the wishes of his late father was made known to all the family members on 24th December, 1995 after the burial of their late father.
13. The existence of an oral will was further supported by two other witnesses Fredrick Njoka Mbuba (PW3) who stated that he shares a common boundary with the deceased and was present on 28th September, 1995 when the deceased made the oral will and Mutegi Kanga (PW4) who confirmed that he was a neighbour of the deceased herein and was present on 28th September, 1995 when the deceased made the oral will.
14. On the other hand the petitioner herein, Joyce Mbinyu (DW1) testified that the deceased herein by 28th September 1995 was crippled and ailing. She added that her late father at that time was mentally unstable and could not have made any will. She accused the protestor for being hostile to her and destroying her crops in parcel No.536 where she was utilizing two acres before chasing her away. He further added that her 2 brothers never used to stay in but only moved in when her mother died adding that she was chased in 2015. She insisted that her late father died on 24th December,1995 and that his body was taken to the mortuary by Peter Mbuba and Elias Mbuba. She denied that she lied to the Registrar of Births and Deaths that the deceased died on 24th December, 2015.
15. The Petitioner further added that his late father started getting ill from 1991 and that it was the protestor who used to take him to hospital and that it was him who kept medical documents showing what afflicted the deceased. He insisted that his late father used to be mentally sick and could even relief himself even in presence of people, a problem that began in 1992 according to her. She further added that her late father was confined to a wheel chair which was bought to him by the protestor, John Mutegi.
16. The petitioner's position was supported/corroborated by Dorres Karimi (DW2) who testified that the deceased was her father in law in the sense that she was married to Loyd Gitari (deceased) a late son of the deceased herein. She added that her husband died on 17th December, 1993. She accused theprotestor for destroying her house after she was transferred to Marimanti Girls Secondary School. She accused the sons of the deceased (Mutegi and Ephantus Nyaga) for scheming to lock out all female beneficiaries from the estate stating that Mutegi forcefully took over the coffee trees she had planted on the estate and has been picking them for his benefit after stopping her from collecting the proceeds from coffee society. She further added that she chose to concentrate inbringing up her two young children Jane Gathoni and

Anne Mwende. When pressed under cross-examination regarding the birth certificates, she told this court that she had not processed them yet. She further added that the deceased had given her late husband documents (titles) in respect of the properties forming the estate and that when his husband died she handed over the titles to Ephantus Nyaga because she thought at the time that Ephantus Nyaga could take care of the family given that both the father in law and her mother in law were both ailing at the time. She further contested the existence of the will on the ground that the protestor and Ephantus Nyaga used to be away most of the time and that it was the petitioner who used to be with the deceased often times.

17. This court has considered the evidence tendered both orally in court and the affidavits filed. The only issue for determination in this cause is if the deceased died testate in view of the existence of an oral will or he whether he died intestate.

I have considered the written submissions made by both counsels Mr. I.C Mugo for the protestor and Kijaru Njeru for the petitioner.

18. On the question of whether the deceased died intestate or testate, is that while the protestor and Ephantus insist that the deceased had made an oral will prior his demise, the petitioner holds that there was no such will because she used to stay with the deceased. The provisions of **Section 9(1)** of the **Law of Succession Act** provides guidelines on what constitutes a valid oral will and it states as follows:-

"No oral will shall be valid unless-

(a) it is made before two or more competent witnesses; and

(b) the testator dies within a period of 3 months from the date of making the will."

19. The evidence adduced by the protestor indicates that the deceased made the alleged oral will in the presence of two witnesses Fredrick Njoka Mbuba (PW3) and Mutegi Kanga (PW4). There are conflicting evidence however on when the deceased actually died. The petitioner holds that the deceased died on 24th December, 1995 as per the Death Certificate while the protestor and his witnesses insisted that he died on 16th December, 1995. This court was unable to find out the basis of such conflicting information. The Registrar of Deaths and Births summoned by this court testified that the deceased as per the records provided by the Area Chief, one Mr. David M. Ithara indicated clearly that the deceased died on 24th December, 1995. The Hospital administrator from Chuka Hospital another independent witness summoned to clarify issues testified that the body of the deceased was not kept in Chuka Hospital Mortuary as per their records. The protector's witnesses Fredrick Njoka Mbuba (PW3) told this court that he took the body of the deceased to Hospital Mortuary on 16th December, 1995 because his sons were away at the time. So if PW3 took the body to the mortuary on 16th December, 1995 why did the Hospital deny having records of the same? The protestor has submitted that it really does not matter whether the deceased died on 16th December, 1995 or 24th December, 1995 because both date do not affect the validity of the oral will because both dates fell within the prescribe 90 days period. This court finds the argument valid because it is legally sound. However taking the entire evidence in totality, one would be justified begin to ask questions on the credibility of witnesses of either side because the deceased must have obviously died once on a given date. This court applying the scales of probabilities, finds that the deceased most probably died on 24th December, 1995 as captured in the Death Certificate and the information provided to the Registrar of Deaths and Births and records by local administration. There is no evidence tendered to show that the Registrar or the local chief from where the deceased was domiciled had any motive to mislead this court. But as I have observed above the date of death in this cause really does not affect the validity of the oral will.

20. Generally, the law (**Section 5 Law of Succession Act**) presumes that a person is capable of making a will unless it is proved that at the time of making the will the person making the will is in such a state of mind, whether arising from mental or physical illness, drunkenness or any other cause did not know that he was doing or saying. **Subsection (4)** of the provision places the burden of proof to the person of alleging that the person was mentally unsound.

21. In this cause, the petitioner has attacked the existence of the oral will on two grounds;

(i) That the deceased was mentally sick and could not have made the will.

(ii) That she was always with the deceased taking care of him and did not hear of an occasion where he allegedly made the will.

22. To begin with the contention that the deceased at the time of making the will suffered from mental incapacity, was that this court finds that the petitioner has not discharged the burden of proof. The petitioner has alleged that the deceased was mostly confined to a wheel chair but inability to walk in my view cannot infer that a person is of unsound mind. There are many people who are unable to walk or even confined to beds but their memories could be razor sharp. The petitioner did not adduce any medical evidence to show that the deceased suffered from any mental illness or call witnesses to prove that at the time of making the alleged will he was not aware of his surroundings in the sense that he could relief himself anyhowly as alleged. The contention that deceased lacked capacity therefore is unsupported by evidence tendered.

23. The critical question posed in this cause in my view is whether the deceased did infact make an oral will on 28th September 1995 as advanced by the protestors and his witnesses. This court has pondered over this question at some length given that both sides in this cause strongly held divergent views. I have looked at the law regarding the validity of oral wills as observed above and the evidence tendered by both parties in this cause.

The protestor presented two attesting witnesses PW3 Fredrick Njoka Mbuba and PW4- Mutegi Kanga both of who stated categorically that they were present when the deceased made the oral will. It is only unfortunate that when they testified, the Petitioner's could for unknown reason was unavailable to perhaps cross exercise them to test the veracity of their attestation of the alleged oral will of deceased. That notwithstanding the attention of this court has been drawn on some details which casts doubts about the existence of the oral will. The Petitioner's counsel has contended that the deceased could not have been that legally smart to give his wife "**life interest**" on parcel No. L.R

No. Magumoni/Mwonge/536. This sincerely is something that cannot be ignored taking into consideration the circumstances and the evidence tendered in this cause.

24. There are some facts that caught my attention during the trial of the protest herein that really weighted my thoughts against the existence of the oral will. The evidence tendered by Dores Karimi (DW2) who stated that she was a widow to one of the late sons of the deceased known as Loyd Gitari (deceased). That witness gave vivid details about what transpired before and after the deceased in this cause died. Although she stated that her husband (the late Loyd Gitari) predeceased the deceased in this cause because he passed on on 17th December, 1993, she stated that she had two children (daughters) with the deceased. I have keenly considered the evidence of Mburire Ephantus Nyaga (PW2) who conceded that her late brother Loyd Gitari was married. This is what he told this court:

"Gitari had a wife. I do not know her name. I do not know if she has children but I have heard that she has a child of my late brother."

25. The protestor, John Mutege Mburire (PW2) on the other hand during cross-examination had this to say regarding his late brother Loyd Gitari;

"Loyd Gitari was my brother. He is deceased. He has two children Gathomi and Mwende. He did not have a wife. I know Doris Karimi. She has a child with my late brother."

26. It is succinctly clear from the evidence tendered by Dorris Karimi (DW2) and the admissions/concession made by both the protestor and Ephantus Nyaga that Dorris Karimi lived with the late Loyd Gitari as husband and wife. Whether dowry was paid or not and whether any cultural or customary formalities were carried out is another issue which I do not find it relevant to go into at this stage but looking at the details on how she described even where she used to live prior to the alleged eviction, one would tell without a shadow of doubt that she was speaking the truth. I watched her demeanor in court and listened to her state how she was forced out her home within the estate when she was transferred to a school in Marimanti. Her evidence that she chose to concentrate in bringing up her young children rather than put up a fight with his brothers in law in my view appeared genuine and reasonable. This was a young widow with two young children facing hostility from her brothers in law soon after losing her husband. She had to deal with the loss of her husband and a transfer to school far off from a place she called home.

27. The other important fact came to light is the reason informing the deceased locking out his late son from inheritance. There was no evidence, not even a suggestion that the deceased and the late Loyd Gitari had perhaps differed such that the deceased could not consider him fit enough to get atleast something for his grandchildren. This is especially so given that in the African setting/context, a person is not considered dead if he has children and the deceased must have been fully aware of the same given the evidence tendered in this cause.

28. It must be noted that courts must be careful when dealing with oral Wills particularly where some beneficiaries like in this cause have been disinherited. This is necessary in order to discourage unscrupulous persons scheming with assistance of unsavoury attesting witnesses to disinherit other siblings or beneficiaries in a Succession Cause. This is not to say that this court found anything unsavoury about the attesting witnesses in this cause. Far from it but I have considered the circumstances in this cause. There is the conflicting issue of when the deceased actually died and the fact that from the alleged minutes of the family meeting of 24th December, 1995, there is no mention of an oral will. Why would such a critical and important issue be omitted if it really existed and was well known at the time? The only plausible inference drawn from the omission is that probably the oral will did not exist.

29. There is no dispute that the deceased was polygamous and that the alleged will favoured only the sons save for Loyd Gitari. The petitioner and Dorris Karimi opined that the protestor and Ephantus Nyaga are against the daughters. Looking at the contents of the alleged oral will and the position taken by the protestor one would clearly see a veneer of discrimination on grounds of gender. The basis of this discernment are:

(i) The petitioner alleges that after their late father and mother passed on the protestor went and destroyed her properties on 31st July, 2015 and chased her away from the estate. She reported the matter to the police and though she later withdrew the complaint, it was apparent that the matter still weighed heavily on her emotions because she broke down in court as she narrated the ordeal she underwent at the hands of the protestor. This fact was conceded by Ephantus Nyaga (PW2) during cross-examination when he stated as follows:-

"She (meaning Joyce Mbinyu) cultivated it (parcel No. Magumoni/Mwonge/536) until 2015. I know there was a dispute she had with Mutege. There was no destruction of crops. I know there was a case taken up by the police regarding destruction of crops."

It was therefore evident that the protestor unlawfully and forcefully evicted the petitioner from where she occupied and utilized in the estate and perhaps schemed on how he could get her away from that parcel. It is also apparent that the protestor had not constructed a house in the estate and only did so in 2016 after forcefully evicting the petitioner from the estate.

(ii) Secondly, it is apparent that Doris Karimi was equally forcefully evicted and not catered for in the distribution on account that she did not live long with Loyd Gitari and was only blessed with two children who are both daughters. She told this court that when she was transferred to Marimanti Girls Secondary School, she left her home within the estate due to distance and when she came back for holidays she found her home had been demolished and her only 2 cows taken away. She suspected the protestor to be behind it but took no action as she chose to concentrate on bringing up her two daughters.

30. From the above account it is the finding of this court that the protestor perhaps acting in cahoots or with the blessings of his brother and ally forcefully evicted both the petitioner and his sister in law Doris Karimi from the estate and the question posed is why would he do that if he knew that there was an oral will that favoured him? The behaviour of the protestor towards her own sister and sister in law whom he

knew had a child of his own brother, in my view is characteristics of of creed and impunity with false beliefs of entitlement. That is one of the factors that casts doubts about the protestor's credibility and his witnesses on the alleged existence of the oral will. This court finds that based on the above and the evidence tendered before me, it is more probable that the deceased in this cause died intestate. This court also finds that even if I was to find that the deceased died testate, this court would have resorted to the provisions of **Sections 28** of **Law of Succession Act** in order to provide for those beneficiaries left out of the alleged oral will but owing to my above findings that issue is purely academic now.

31. Having made the above observations, there is no content that the deceased left behind the following dependants:

- (i) Janet Ciambuti Mugo
- (ii) Teresa Ciakanyakini (deceased)- predeceased- (deceased)
- (iii) Joyce Mbinyu
- (iv) Juliesta Ciakathia Nyaga
- (v) Mary Ciagitari Kirimo (deceased)
- (vi) Ephantus Nyaga Mburire
- (vii) John Mutegi Mburire
- (viii) Peter Mbuba (deceased)
- (ix) Loyd Gitari (deceased)
- (x) Hellen Ciambaka
- (xi) Lucy Ciakuthi Rugendo and
- (xii) Loise Murugi

The evidence tendered shows that Teresa Ciakanyakini and Mary Ciagitari are both deceased and were married. There is no evidence that their children were dependants to the deceased within the meaning of **Section 29(b)** of **Law of Succession Act**. I am however satisfied that Dores Karimi and her 2 children Jane Gathoni and Anne Mwendu are dependants of the deceased and so to Lenity Muthoni Mbuba and her children Robert Mugendi, James Mwenda, Phonela Murugi, Jane Kathure and Eddy Karani.

32. The deceased was polygamous and died with one spouse surviving him. However that spouse Martha Ciankui is now deceased. The estate in this cause shall therefore be distributed in accordance with the provisions of **Section 38** of the **Law of Succession Act**. The properties comprising the estate are as follows;

- (a) L.R. Karingani/Ndagani/1251 -1 acre
- (b) L.R. No. Magumoni/Mwonge/536 - 5.25 acres
- (c) L.R. No. Karingani/Gitarene/539 -3.50 acres

Total 9.75 acres

The dependants entitled to a share of the estate are as follows:

- (i) Janet Ciambuti
- (ii) Joyce Mbinyu
- (iii) Juliesta Ciakathia Nyaga
- (iv) Ephantus Nyaga Mburire
- (v) John Mutegi Mburire
- (vi) Lenity Muthoni Mbuba and her children
- (vii) Doris Karimi and her children

(viii) Eliphas Nyaga Mburire

(ix) Hellen Ciambaka

(x) Lucy Ciakuthi Rugendo and

(xi) Loise Murugi

The above number of units shows that each unit (dependant) would get approximately 0.97 acres or thereabout. This court in distributing the estate takes into consideration as much as possible where the beneficiaries have developed.

In conclusion therefore the grant issued to the administratrix herein on 8th March 2016 is confirmed as per the following mode of distribution;

(A) L.R. Karingani/Gitarene/539 - 3.5 acres

(i) Lenity Muthoni Mbuba to hold 0.975 acres for her benefit and in trust for Robert Mugendi Mbuba, James Mwenda Mbuba, Phonela Murugi Mbuba, Jane Kathure Mbuba and Eddy Karani Mbuba

(ii) Hellen Ciambaka - 0.975 acres

(iii) Loise Murugi - 0.975 acres

(iv) Julieta Ciakathia Nyaga - 0.5 acres

(B) L.R Magumoni/Mwonge/536 - 5.25 acres

(i) John Mutegi Mburire - 0.975 acres

(ii) Joyce Mbinyu Mbaka - 0.975 acres

(iii) Ephantus Nyaga Mburire - 0.975 acres

(iv) Janet Ciambuti Mugo - 0.975 acres

(v) Dorris Karimi - 0.975 acres

to hold it for her benefit and in trust for Jane Gathoni and Anne Mwende .

(vi) Lucy Ciakuthi Rugendo - 0.37 acres

(C) L.R. No. Karingani/Magumoni/Ndagani/1251- 1 acre

(i) Julieta Ciakathia Nyaga - 0.47 acres

(ii) Lucy Ciakuthi Rugendo - 0.6 acres

I will make no order as to costs so each party shall bear own costs.

Dated, signed and delivered at Chuka this 23rd day of January, 2019.

R.K. LIMO

JUDGE

22/1/2019

Judgment signed, dated and delivered in the presence of Mugo for protestor and Kaaria holding brief for Kijaru for Petitioner.

R.K. LIMO

JUDGE

