



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO.E074 OF 2021**

**IN THE MATTER OF THE ESTATE OF M'MUGAMBI M'MBIRO-DECEASED**

**ALBERT MUTHOMI.....1<sup>ST</sup> APPELLANT**

**GEORGE KIMATHI.....2<sup>ND</sup> APPELLANT**

**JOHN MICHENI.....3<sup>RD</sup> APPELLANT**

**AND**

**GRACE KANANU MUGAMBI.....RESPONDENT**

**(Being an appeal from the judgment and decree in Nkubu Succession Cause No. 88 OF 2017 by Hon. E.M.Ayuka (SRM) of Hon. E.M.Ayuka (SRM) on 27.05.2021)**

**JUDGMENT**

**Background**

1. **M'Mugambi M'Mbiro** (Deceased) died on the 01<sup>st</sup> June, 2013. Deceased was survived by the following:

- 1) **Esther Gaiti M'Mugambi**
- 2) **Charles Muthuri Mugambi**
- 3) **Mercy Nthuni Gichuru**
- 4) **Elias Njogu**
- 5) **Agnes Ntuii Josphat**
- 6) **George Kimathi Mugambi**
- 7) **Douglas Mwirigi**
- 8) **John Micheni Mugambi**

9) **Joseph Kinoti**

10) **Grace Kinanu Mugambi**

11) **Albert Muthomi Mugambi**

2. The evidence on record reveals that prior to his death, the deceased caused his land parcel **LR ABOGETA/L-CHURE/504** to be partitioned into 6 equal parts which he proposed to allocate as follows:

- 1) **LR ABOGETA/L-CHURE/1442 registered in the name of deceased but proposed to be given to Douglas Mwirigi**
- 2) **LR ABOGETA/L-CHURE/1443 to George Kimathi Mugambi**
- 3) **LR ABOGETA/L-CHURE/1444 registered in the name of deceased but proposed to be given to Elias Njogu**
- 4) **LR ABOGETA/L-CHURE/1445 – registered in the name of deceased**
- 5) **LR ABOGETA/L-CHURE/1447 to John Micheni Mugambi**
- 6) **LR ABOGETA/L-CHURE/1448 registered in the name of deceased but proposed to be given to Joseph Kinoti**

3. The evidence on record also revealed that Charles Muthuri Mugambi got **LR ABOGETA/L-CHURE/683** and Albert Muthomi M'Mugambi **LR ABOGETA/L-CHURE/682** which was their father's share from their grandfather.

4. The evidence on record additionally reveals that deceased did not make any provision for one of his sons Albert Muthomi Mugambi and the four daughters Esther Gaiti M'Mugambi, Mercy Nthuni Gichuru, Agnes Ntuii Josphat and Grace Kinanu Mugambi

5. Grace Kinanu Mugambi by her affidavit dated 01<sup>st</sup> March, 2019 proposed that the estate of the deceased be apportioned as follows:

- 1) **LR ABOGETA/L-CHURE/1442 to Douglas Mwirigi**
- 2) **LR ABOGETA/L-CHURE/1443 to George Kimathi Mugambi**
- 3) **LR ABOGETA/L-CHURE/1444 to Elias Njogu**
- 4) **LR ABOGETA/L-CHURE/1445 – to Esther Gaiti M'Mugambi, Mercy Nthuni Gichuru, Agnes Ntuii Josphat and Grace Kinanu Mugambi**
- 5) **LR ABOGETA/L-CHURE/1447 to John Micheni Mugambi**
- 6) **LR ABOGETA/L-CHURE/1448 to Joseph Kinoti**

6. By a ruling dated 27.05.2021, the learned trial magistrate in dismissing the protest and rejected the evidence that Albert Muthomi Mugambi bought **LR ABOGETA/L-CHURE/682** from Lydia Gatiria and ruled that it was an inheritance of deceased from his father which was directly transferred to Albert Muthomi Mugambi and he was therefore not entitled to any additional share.

7. The Court also ruled that the deceased having made provision for all his sons, **LR ABOGETA/L-CHURE/1445** be apportioned to the deceased's daughters Esther Gaiti M'Mugambi, Mercy Nthuni Gichuru, Agnes Ntuii Josphat and Grace Kinanu Mugambi who had not been provided for.

8. Being dissatisfied with the trial court's judgment, Albert Muthomi Mugambi, George Kimathi Mugambi and John Micheni Mugambi have appealed mainly on the ground that Albert Muthomi Mugambi was denied his rightful share of his father's estate.

**Analysis and Determination**

9. I have considered the appeal in the light of the evidence on record and submissions on behalf of the parties.

10. The issue is whether Appellant proved his claim on the balance of probabilities. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

**“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”**

11. The question as to what amounts to proof on a balance of probabilities was discussed by **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 as follows:

**“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”**

12. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

**“Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -**

**“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”**

13. From the evidence on record, I find that the Appellant could not have purchased land from Lydia Gatiria for the reason that she did not own any. I therefore find that the trial magistrate's verdict that Albert Muthomi Mugambi did not buy **LR ABOGETA/L-CHURE/682** but that the same was an inheritance of deceased from his father which was directly transferred to the said Albert who for that reason was not entitled to any additional share was well founded on law and facts.

14. I also find that the trial magistrate appropriately upheld the deceased's wishes concerning provision for his other sons and correctly applied the law in apportioning the residue of the estate comprised in **LR ABOGETA/L-CHURE/1445** to the deceased's daughters Esther Gaiti M'Mugambi, Mercy Nthuni Gichuru, Agnes Ntuii Josphat and Grace Kinanu Mugambi who had not been provided for.

15. From the foregoing analysis, I have come to the conclusion that this appeal has no merit and the same is dismissed with costs to the Respondent

**DELIVERED IN MERU THIS 24TH DAY OF FEBRUARY, 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Court Assistant - Kinoti**

**For Appellant - N/A for Mmboos Mutunga & Co. Advocates**

**For Respondent - Mr. Mwirigi for Mwirigi Kaburu & Co. Advocates**



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