



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
FAMILY DIVISION
SUCCESSION CAUSE NUMBER 485 OF 2004
IN THE MATTER OF THE ESTATE OF M'IKIUGU M'MKINDIA (DECEASED)
BETWEEN
JUSTUS KAIRIGO M'IKIUGU.....PETITIONER
AND
GEOFFREY RIUNGU.....OBJECTOR
CORAM: LADY JUSTICE RUTH O VG N. SITATI
JUDGMENT

The Applications:

1. On 12th November, 2018 Stanley Ndereba M'Ikiugu filed a summons for confirmation of grant of Letters of Administration Intestate under *Section 7 of the Law of Succession Act, Cap 160 Laws of Kenya* for orders:-

- i. THAT the grant of letters of Administration made to JUSTUS KIARIGO M'IKIUGU be now confirmed.**
- ii. THAT the estate of the deceased be distributed as per paragraph 5 of the Supporting Affidavit.**
- iii. THAT the costs of this application be in the cause.**

1. The summons was supported by the Petitioner's Affidavit dated 11th November, 2018. At paragraph 7 of the said Affidavit the Petitioner's proposed distribution of the deceased's estate is as follows:-

- a. LAND PARCEL NO. ABOTHUGUCHI/KATHERI/382
 - i. Geoffrey Riungu M'Ikiugu and Jackson Kiambi M'Ikiugu in equal shares.
- b. LAND PARCEL ONTULILI/BLOCK 1/KATHERI/757
 - i. Geoffrey Riungu M'Ikiugu.
- c. LAND PARCEL ABOTHOGUCHI/KATHERI/202 to be shared equally among:-
 - i. Stanley Ndereba M'Ikiugu.
 - ii. Justus Kairigo M'Ikiugu.
 - iii. Silas Kaimenyi M'Ikiugu.

2. The consent to the above proposed distribution was signed by Jackson Kiambi, Joseph Gitonga M'Ikiugu and Silas Kaimenyi M'Ikiugu.

The following persons did not sign the consent:- Geoffrey Riungu, Stanley Ndereba M'Ikiugu and Mary Nkuene M'Ikiugu.

3. In a FURTHER AFFIDAVIT IN PROTEST by Geoffrey Riungu dated 14th December, 2018. The said Geoffrey Riungu deposes at paragraph 7 thereof thus:-

“THAT I want this court to distribute this property in accordance to the ruling on distribution of the Hon. Justice ISAAC LENAOLA, J of the 17th October, 2007 annexed and marked 'GR2.”

4. At paragraph 8 of the Affidavit in Protest, the Protestor proposed that land parcel ABOTHOGUCHI/KATHERI/202 should be shared equally among the following:-

- a. Geoffrey Riungu.
- b. Stanley Ndereba M'Ikiugu.
- c. Silas Kaimenyi.
- d. Onesmus Mutuma.

5. The Protestor also proposed that land parcel ABOTHOGUCHI /KATHERI/382 be shared equally between himself and Jackson Kiambi M'Ikiugu. The Protestor deposed that land parcel ONTULILI/ BLOCK 1/KATHERI/757 does not form part of the deceased's estate.

Background and brief facts:

6. M'Ikiugu M'mukindia (the deceased) died on 3rd September, 2002 and thereafter, Justus Kairigo M'Ikiugu, a son to the deceased (hereinafter 'the Petitioner'), petitioned for a Grant Letters of Administration intestate on 4th November, 2011. In the said petition, the Petitioner listed the following people to have survived the deceased:

- a. **Martha M'Ikugu – Widow.**
- b. **Geoffrey Riungu – Son.**
- c. **Jackson Kiambi – Son.**
- d. **Justus Kairigo – Son.**
- e. **Stanley Ndereba M'Ikiugu – Son.**
- f. **Joseph Gitonga M'Ikiugu – Son.**
- g. **Mary Nkuene M'Ikiugu – Daughter.**
- h. **Silas Kaimenyi M'Ikiugu – Son.**

7. The Petitioner further listed the following properties as assets of the deceased:

- a. land Parcel Number ONTULILI/ONTULILI/BLOCK 1/KATHERI/757.
- b. Land Parcel Number ABOTHUGUCHI/KATHERI/382.
- c. Land Parcel Number ABOTHUGUCHI/KATHERI/202.

8. The Petitioner then filed an application by way of Chamber Summons dated 12th November, 2004 seeking an order of inhibition on land parcel number ONTULILI/ONTULILI/BLOCK 1/KATHERI/757 from being transferred to Geoffrey Riungu, (hereinafter 'the Objector') pending the administration of the estate.

9. In his reply dated 8th April, 2005, the Objector stated inter alia that he was the legitimate owner of the suit property having acquired it through **Meru CMCC No. 457 of 1992** vide judgment and order of 21st October, 1998 which was confirmed on appeal in **HCA No. 107 of 1998** in a judgment dated 4th July, 2002. The Objector added that the suit property does not form part of the estate as he acquired it from the deceased by way of purchase and that he was yet to execute the said orders of the court in his favour. This court had initially ordered on 20th December, 2004 that “the status quo remains” pending an inter parties hearing of the said application.

10. The Objector then filed another application by way of Notice Motion dated 15th July, 2005, seeking *inter alia* that the said orders of the court dated 20th December, 2004 be discharged claiming that the Petitioner had failed to fix the said application dated 12th December, 2004

for hearing and thus paralyzed execution of the orders made in **Meru CMCC NO. 457 of 1992**. This court, in a ruling dated 8th February, 2006 dismissed the Objector's application and further ordered that the Petitioner's application be fixed for hearing within the next thirty (30) days of the court's ruling and that in default, then the status quo orders issued by the court on 20th December, 2004 would stand discharged.

11. On 21st June, 2006 Mary Nkuene and Onesmus Mutuma, filed an Application by way of Chamber Summons seeking *inter alia* orders that the Petitioner, and two others, Silas Kaimenyi and Stanley Ndereba be restrained from interfering with Onesmus Mutuma's use of land parcel number ABOTHUGUCHIKA/KATHERI/202. In her supporting affidavit of the said application sworn on 21st June, 2006, Mary Nkuene stated *inter alia* that the deceased was her father and that the said Onesmus Mutuma is her son who had been living with the deceased in his home. Mary Nkuene further deponed that the deceased left Onesmus Mutuma on the said land parcel number ABOTHUGUCHI/KATHERI/202 which Onesmus Mutuma was occupying with the Petitioner and the said Silas Kaimenyi and Stanley Ndereba. Mary Nkuene added that the deceased stated before he died that Onesmus was to be given 1 acre of the said piece of land and that she was also entitled to a share of the deceased's property.

12. In his reply sworn on 26th July, 2006, the Petitioner stated *inter alia* that Mary Nkuene was indeed his sister but she had been married a long time ago and had no property on the land that is subject in this cause. He further denied that the deceased ever gave Onesmus Mutuma land during his lifetime and that Onesmus had no interest in the estate of the deceased. The petitioner further denied that Onesmus Mutuma had been chased from the said land parcel number ABOTHUGUCHI/KATHERI/202 adding that Onesmus used to reside in the deceased's house before he voluntarily left.

13. On 21st May, 2007, this court ordered that the Petitioner and Mary Nkuene be appointed as joint administrators and that parties do consider the issue of distribution before the grant of letters of administration could be confirmed. The petitioner and Mary Nkuene filed respective affidavits stating their proposed mode of distribution of the estate.

14. In a ruling of this court dated 17th October, 2007, the issue of distribution was decided at length with the court holding that land parcel number ABOTHUGUCHI/KATHERI/382 had no dispute and that the deceased had prior to his death determined that it should be equally shared between the Objector and Jackson Kiambi M'Ikiugu. Regarding land parcel number ONTULILI/ONTULILI/BLOCK 1/KATHERI/757, this court confirmed the decisions in **Meru CMCC No. 457 of 1992** and **Meru HCA 107 of 1998** effectively granting the said parcel to the Objector. On onesmus Mutuma's claim to the estate, this court noted that he was a dependant pursuant to **Section 26 of the Law of Succession Act** having lived with the deceased for most of his life and was entitled to reasonable provision of the estate. This court ordered that he be given 1 (one) acre out of land parcel number ABOTHUGUCHI/KATHERI/202 with Martha M'Ikiugu, the petitioner, Stanley Ndereba M'Ikiugu and Silas Kaimenyi M'Ikiugu similarly getting 1 (one) acre out of the same property.

15. This court further ordered that the grant of letters of administration be confirmed in the said terms upon a suitable application being made by the administrator in the usual manner.

16. On 2nd November, 2007, the Petitioner filed yet another application by way of Chamber Summons seeking *inter alia* that this court's ruling on distribution dated 17th October, 2007 be reviewed and that Onesmus Mutuma's proposed share of 1 acre be rescinded and the said land parcel number ABOTHUGUCHI/KATHERI/202 be shared equally amongst the other beneficiaries entitled to it. The petitioner cited the reasons that there had been discovery of a new and important matter and that it was necessary that the acreage of land parcel number ABOTHUGUCHI/KATHERI/202 be ascertained and distributed accordingly. In his supporting affidavit sworn on even date, the petitioner stated *inter alia* that the deceased had allocated Mary Nkuene land parcel number SEGERA/SEGERA BLOCK 2/1426 situated in Laikipia District and that Onesmus Mutuma should not get any portion of the deceased's estate in view of the said discovery. In a reply to the said application sworn by Mary Nkuene on 21st April, 2008, she stated *inter alia* that the said land parcel number SEGERA/SEGERA BLOCK 2/1426 is owned by her absolutely having purchased the same with her own funds which the deceased bought on her behalf. Mary Nkuene added that the said parcel of land does not form part of the estate of the deceased and was not a gift from the deceased. Mary Nkuene further stated that one acre out of land parcel number ABOTHUGUCHI/KATHERI/202 was given to her son Onesmus Mutuma as a gift from the deceased because Onesmus Mutuma used to live with the deceased. Mary Nkuene added that the Petitioner's application had not satisfied the conditions for review under order XLIV Rule 1 of Cap 21 as there was no discovery of new material since the Petitioner knew all along that the said parcel of land was in existence and belonged to her.

17. In a ruling of this court dated 3rd June, 2006, it was ordered that the acreage of land parcel number ABOTHUGUCHI/KATHERI/202 be ascertained by the district surveyor, Imenti North within 21 days of the court's order. The District Surveyor filed his report in court on 9th September, 2008 and stated that the said parcel of land measured approximately 2.06 Hectares.

18. On 15th June, 2009 the Petitioner filed an application stating that the deceased wife, Martha M'Ikiugu had since died and sought that her share in land parcel number ABOTHUGUCHI/KATHERI/202 be shared equally among Stanley Ndereba M'Ikiugu, the Petitioner and Silas Kaimenyi. In reply to the said application, the objector deponed in his affidavit sworn on 14th September 2009 that the said Martha M'Ikiugu had left a Will which should guide the issue of re-distribution of her share in land parcel number ABOTHUGUCHI/KATHERI/202. The said Will provided *inter alia*, that her share be given to the Objector.

19. On 28th September, 2015, Stanley Ndereba Kiugu filed an application by way of Chamber Summons seeking *inter alia* that the Petitioner be substituted with him owing to the fact that the Petitioner had since died on 3rd November, 2014.

20. On 7th December, 2015, a Grant of letters of administration was made to the said Stanley Ndereba M'Ikiugu (hereinafter "the administrator").

Issues for Determination

a) Whether land parcel number ONTULILI/ONTULILI/BLOCK 1/KATHERI/757 forms part of the estate of the deceased.

b) How should land parcel number ABOTHUGUCHI/KATHERI/202 be distributed?

Whether land parcel number ONTULILI/ONTULILI/BLOCK 1/KATHERI/757 forms part of the estate of the deceased

1. The Objector stated that land parcel number ONTULILI/ONTULILI/BLOCK 1/KATHERI/757 does not form part of the estate of the deceased and as such should not be listed as one of the properties of the estate that is up for distribution. It should be noted that this court had already stated that the said property should be given to the Objector by dint of the decisions in *Meru CMCC No. 457 of 1992* and *Meru HCA 107 of 1998*. This fact has been acknowledged by the administrator and other beneficiaries and is indicated in the application for confirmation of grant. I am therefore in agreement with the Objector's argument that the said Court decisions entitled him to transfer the said property to himself from the deceased without reference to these proceedings.

2. Section 3(1) of the Law of Succession Act defines “free property” as:

“in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.”

3. It is therefore clear that any property which the deceased was not legally competent freely to dispose during his lifetime, and in respect of which his interest had been terminated by his death cannot form part of his estate and cannot be the subject of an application for confirmation of grant. (see *Odunga J in In the Estate of Job Ndunda Muthike (Deceased) [2018] eKLR*).

4. The question here is whether the deceased could have freely disposed of land parcel number ONTULILI/ONTULILI/BLOCK 1/KATHERI/757 during his lifetime. The answer is in the negative for the reason that there was an adverse court order against his proprietary interest in the said parcel of land which was in favour of the Objector. Consequently, the deceased could not have legally and competently disposed of that parcel of land because his rights to that parcel of land was taken away by the decision of the court in *Meru CMCC No. 457 of 1992* which was confirmed by the court in *Meru HCA 107 of 1998* on appeal. There is no record of any appeal against the High Court judgment. Thus, I am in agreement with the Objector that the said land parcel number ONTULILI/ONTULILI/BLOCK 1/KATHERI/757 cannot form part of the estate of the deceased and therefore cannot be the subject of the administrator's application for confirmation of grant.

How should land parcel number ABOTHUGUCHI/KATHERI/202 be distributed?

5. The beneficiaries are in agreement on the distribution of other properties of the estate save for land parcel number ABOTHUGUCHI/KATHERI/202 whose distribution has been contested by the Petitioner/Administrator, Mary Nkuene and the Objector.

6. As stated before, the Petitioner sought a review of this court's orders relating to the said parcel owing to alleged discovery of new information to the effect that the deceased had allocated Mary Nkuene land parcel number SEGERA/SEGERA BLOCK 2/1426 situated in Laikipia District thus Onesmus Mutuma should not receive any share in the said land parcel number ABOTHUGUCHI/KATHERI/202.

7. The power of this court to review an order made in succession proceedings is drawn from Rule 63 of the Probate and Administration Rules which imports various Orders of the Civil Procedure Rules including Order 45, formerly Order XLIV. In an application for review, an applicant must establish; the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced at the time when the order or decree was passed, or that there was an error or mistake apparent on the fact of the record or, there is any other sufficient reason. In addition, the application must be made timeously or without unreasonable delay. (see *A. Mabeya J in Jane Kagige Geoffrey & another -vs- Wallace Ireri Njeru & 2 others [2016] eKLR*.)

8. The question of whether the application for review was made timeously or without unreasonable delay is dependent on the peculiar circumstances of each case. In *Betty Maitha Duncan -vs- Gilbert Muriuki Muriuki Chabari & another [2016] eKLR*, *Gikonyo J* found a delay of 4 years to be unreasonable. In that case, the application was made by a person who was a party in the subject proceedings as well. He had waited for (4) four years before approaching the court for the orders of review.

9. In this case, the Petitioner made the application for review on 2nd November, 2007, which was less than a month or a few days after the ruling of this court on 17th October, 2007. It is clear that the application was timeously made and there can be no question as to whether there was an unreasonable delay. The Certificate of Official Search (“JKM 1”) on record shows that the search was conducted on 25th October, 2007, which was almost immediately after this court's ruling. The petitioner had stated in his affidavit in support of the application for review that in his other affidavit for the proposed distribution sworn on 20th June, 2007, he indicated that Mary Nkuene had been allocated “land parcel number 1426 measuring 3.2 acres within DOI area of Laikipia District” but he did not know the exact property number. It would appear the Petitioner knew that Mary Nkuene had been allocated some land by the deceased but he was not sure of the property details of the said piece of land. On a balance of

probability, I find that the petitioner did not have knowledge of the property details that was allocated to Mary Nkuene and that had this court had knowledge of the Laikipia property, then the decision on the mode of distribution would have been different without a doubt. I note that in Mary Nkuene's affidavit on her proposed mode of distribution sworn on 1st June, 2007, she did not mention anything about land parcel number SEGERA/SEGERA BLOCK 2/1426 and quite deliberately so. It is my humble view that Mary Nkuene intended to conceal that information from the court, facts and details of which were within her knowledge. Any person who seeks the court's aid must do so with clean hands in line with the maxim that 'he who comes to equity must come with clean hands.' (see the *Court of Appeal in Kawaljeet Singh Rekhi -vs- Peter Wainaina Kamau & 2 others [2016] eKLR*).

10. I therefore find that Mary Nkuene did not act in good faith and her concealment of the details of ownership of the said land parcel number SEGERA/SEGERA BLOCK 1/1426 smacks of ill-motive and mischief designed to acquire additional benefits from the estate of the deceased to the detriment of other beneficiaries.

11. I am thus in agreement with the Petitioner that Mary Nkuene's son, Onesmus Mutuma cannot acquire a benefit from land parcel number ABOTHUGUCHI/KATHERI/202 due to his mother's dishonesty. Onesmus stands to benefit from his mother's property being land parcel number SEGERA/SEGERA BLOCK 2/1426 and in any case, children inherit from their parents first before inheriting from their grandparents (see *re-estate of Joyce Kanjir Njiru (deceased) [2017] eKLR, Gitari J* and *Estate of Veronica Njoki Wakagoto (deceased) [2013] eKLR, W. Musyoka J.*)

12. I also find that the Will that was annexed by the Objector which was left by Martha M'Ikiugu and dated 8th November, 2007 has not been contested and thus the same is presumed to be valid. As per the said Will, Martha M'Ikiugu's share in land parcel number ABOTHUGUCHI/KATHERI/202 is to be given to the Objector and I so find.

Conclusion and Determination

13. In conclusion, I find that land parcel number ONTULILI/ONTULILI/BLOCK 1/KATHERI/757 does not form part of the estate of the deceased and therefore cannot be the subject of the administrator's application for confirmation of grant in these proceedings. This is because of a subsisting court order in *Meru CMCC No. 457 of 1992* and *subsequent Meru HCCA No. 107 of 1998* which deprived the deceased of his interest in the said property thus he could not legally and competently dispose of the same even during his lifetime. The said property can thus not be termed as free property of the deceased capable of being subjected to succession proceedings.

14. It is also my finding that Mary Nkuene deliberately concealed information from this court of the fact that the deceased had allocated land parcel number SEGERA/SEGERA BLOCK 2/1426 to her during his lifetime. I hold that the said concealment was intended to improperly confer an additional benefit to her son Onesmus Mutuma to the detriment of other beneficiaries. In this regard, I find the Petitioner's application dated 2nd November 2007 for review merited as the court was deprived of vital information to enable it make a just determination, which information was discovered by the Petitioner immediately after this court's ruling on 17th October 2007.

15. Rule 73 of the Probate and Administration rules preserves the inherent power of this court. It reads:-

“Nothing in this rule shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court.”

16. The Law of Succession Act spells out the jurisdiction of the High court in the administration of estates in these terms:-

“The High court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient....”

17. In answering the question of how land parcel number ABOTHUGUCHI/KATHERI/202 should be distributed in light of the district Surveyor's report aforementioned which stated that the said property measures approximately 2.06Ha which equates to approximately 5.09acres, as well as the provisions of the law, I find that the same should be distributed equally between the Objector, the administrator and Silas Kiamenyi.

18. In light of the forgoing, I make the following final orders that:-

a. The summons for Confirmation of Grant dated 11th November 2018 and filed on 12th November 2018 be and is hereby allowed and the Certificate of Grant of Letters of administration dated 7th December 2015 be confirmed as follows:-

i. Land parcel number ABOTHUGUCHI/KATHERI/382 be shared equally between Geoffrey Riungu M'Ikiugu and Jackson Kiambi M'Ikiugu

ii. Land Parcel number ABOTHUGUCHI/KATHERI/202 be shared equally between Stanley Ndereba M'Ikiugu, Geoffrey Riungu M'Ikiugu and Silas Kaimenyi M'Ikiugu

b. Geoffrey Riungu M'Ikiugu be at liberty to discharge the orders in *Meru CMCC no. 457 of 1992* in respect of land number ONTULILI/ONTULILI/BLOCK 1/KATHERI/757 and that the Meru Lands Registrar ensures compliance of the same within 30 days of the date of this judgment, for litigation must come to an end.

c. As this is a family matter, each party shall bear their own costs.

19. It is so ordered.

Judgment written and signed at Kapenguria

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Meru on this 24th day of July 2019

F. GIKONYO

JUDGE

In the Presence of

Ringera for Petitioner Kirimi holding brief

Ms Nelima for Ms Kiome for Protestor

Mwenda - Court Assistant