



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 440 OF 2015**

**IN THE MATTER OF: THE ESTATES OF CHACHA MWITA MURIMI alias CHACHA**

**MWITA MWIRIMI (DECEASED PERSON (NO.1))**

**AND**

**MURIMI MWITA MURIMI (DECEASED PERSON (NO.2))**

**AND**

**IN THE MATTER OF: APPLICATION FOR CONFIRMATION OF GRANT OF LETTERS OF  
ADMINISTRATION**

**AND**

**IN THE MATTER OF: THE LAW OF SUCCESSION ACT, CHAPTER 160, LAWS OF KENYA**

**BETWEEN**

**JOHN MWITA MURIMI**

**JOSEPH MWITA MURIMI**

**NYAMOHANGA MARWA MWITA.....OBJECTORS/APPLICANTS**

**VERSUS**

**MWIKABE CHACHA MWITA**

**JULIUS MAGIGE MURIMI.....PETITIONERS/RESPONDENTS**

**JUDGMENT**

These succession proceedings relate to the estates of **Chacha Mwita Murimi alias Chacha Mwita Mwirimi and Murimi Mwita Murimi (Both Deceased)**. The subject in dispute is **Land Parcel Number Bugumbe/Mabera/324 measuring 108.5 Ha (the suit property)**.

The objector/applicants filed summons for confirmation of grant dated 16/4/2018 which is for consideration before this court. It was agreed between the parties that the confirmation of grant will proceed via written submissions. Both parties complied.

The objectors submitted on two issues for determination.; Whether the objectors have the locus to lodge the summons for confirmation dated 16/4/2018 and whether the schedule of distribution of the capital assets of the deceased persons is in line with the provisions of the Law of Succession Act.

On the first issue, it was submitted that Section 71 of the Law of Succession Act (**LSA**) provides for confirmation of grants; that the law states that if the court is satisfied that the grant was made in accordance with the law, then it should proceed to confirm it; that in case of

intestacy, the applicant must ensure that they have disclosed the respective identities of the beneficiaries before the grant can be confirmed. The objectors submitted that in the instant case, the grant of letters of administration was issued to the 1<sup>st</sup> and 2<sup>nd</sup> objectors together with the petitioners herein; that vide a ruling of 11/10/2017, the court directed that the administrators appointed would apply for confirmation of grant issued on the said date; that no objection has since been lodged to impeach the capacity of the objectors thus the grant was rightly made to the objectors to administer the estate of the deceased persons. The objectors submitted that they have the locus standi to lodge the summons for confirmation of grant dated 16/4/2018.

On the second issue, the objectors submitted that the applicable law on distribution of the estate is Part V of the LSA. The objectors gave a brief history of the suit land; that the deceased persons were sons of one Mwitwa Murimi (Deceased); that the deceased persons in this matter and the objectors are brothers; that it has been established by the objectors that their deceased father established homes for his three wives before the adjudication process; that the deceased persons were later registered as proprietors whereby they were to hold the land in trust for the family of one **Mwitwa Murimi**.

It was submitted that the petitioners, objectors and other beneficiaries have already established their respective homesteads on the land and the lands have been demarcated; that Section 40 of the LSA provides that where an intestate is polygamous, the distribution of the estate should be in accordance with Sections 35-38 of the LSA, and in this instance, between the three houses/wives married to Mwitwa Murimi (Deceased); that in the schedule of distribution, they have proposed equal distribution of the capital asset into three houses. The objectors referred the court to Part 9 (d) of the consent order in Kisii Succession Cause No. 215 of 2005 which was to the effect that the objectors were in occupation of respective portions of the subject property. To further buttress their position, the objectors relied on the findings in **Re: Estate of John Musambayi Katumanga (Deceased) (2014) eKLR** in which it was held that the Spirit of part V of Law of Succession Act is to distribute the deceaseds' estate equally amongst all children of the deceased.

In conclusion, the objector urged the court to find that the ruling/order of 11/10/2017 has not been varied; that the schedule of distribution of the property lodged in court on 2/5/2018 is in line with Part V of the LSA and the proposed distribution is fair and equal; that the court should allow the summons for confirmation of grant dated 16/4/2018.

The petitioner/respondents hold a different view in their submissions dated 19/10/2021. They submitted that the proprietors of the suit parcel of land were the deceased persons herein together with two other people namely Panyako Mwitwa and Mtongori Mwitwa. The petitioner contend that the proposed mode of distribution has proceeded on the assumption that the entire suit property is available for distribution and yet it is only a portion of it that is due for distribution; that if the court was to proceed as proposed, then it would dispossess the two proprietors in common who are still alive.

The petitioners further submitted that in the ruling of 11/10/2019 by Mrima J, the evidence that was tendered by the said objectors is that they are not sons/widows/direct beneficiaries of the estate of the deceased persons; that their contention is that the deceased persons were holding the suit property in trust for them and issues of trust cannot be adjudicated in a succession cause as was held by **Ougo J in Asitai Mabeya Mogaka (deceased) (unreported)**. The petitioners submitted that this summons for confirmation of grant and more particularly the mode of distribution should be disallowed because the objectors included themselves and their families as beneficiaries yet they are not entitled to the estate at this stage.

The petitioners further submitted that it is only the beneficiaries of the two deceased persons herein who are entitled to half of the suit property since the other two proprietors in common are alive. The petitioners proposed that they should be registered for their respective deceased person as holding interests in trust for themselves and their respective beneficiaries in their mother's household i.e. **Julius Magige Murimi** to hold in trust for himself and the following:- **Gati Nyamohanga Mwitwa, Nyamohanga Murimi, Carren Achieng Murimi, Magige J Murimi, Mangiti Joseph, Sabastian Chacha Murimi, John Mogosi Murimi, Christopher Nsato Murimi, Johnson Chacha Murimi, Peter Marahu Chacha, Murimi Mwitwa Samwel and George Mwitwa Murimi**

Whereas the other half of 18.5 HA to be registered in the name of **Mwikwabe Chacha Mwitwa** to hold for and on behalf of **Robi Chacha, Mary Bungusa Chacha, Johnson Nkoya Murimi, John Nyabange Chacha and Nyamasegera George Samwel**.

I have taken time to consider the summons for confirmation of grant and the objection thereto.

The uncontested fact is that the suit property, **L.R. NO. Bugumbe/Mabera/324 measuring approximately 108.5HA** was owned by the family patriarch Murimi Mwitwa (Deceased). It is also not in dispute that the subject land. Bugumbe / Mabera / 324 was registered in the names of four of the eldest children of the late. Murimi Mwitwa namely:-

i) Chacha Mwitwa Murimi (Deceased)

ii) Murimi Mwitwa (deceased)

iii) Panyako Mwitwa

iv) Motongari Mwitwa to hold, in trust for the rest of the family members including the wives and children. It is also not in dispute that, of the four children of the deceased who were registered jointly, two are deceased while two others are still alive. From the pleadings and the submissions, the two warring factions seem to differ on the true identities of the beneficiaries of the estate of the deceased persons, and the fact that the suit property is held in trust for the beneficiaries. The other issues is the share due to the beneficiaries of the deceased persons.

From the foregone, the two issues for determination are: -

**i. Who are the true beneficiaries of the estate of the deceased persons?**

**ii. Whether this court has jurisdiction to determine the existence of an alleged trust.**

The objectors' proposed schedule of distribution in the summons for confirmation dated 16/4/2018, is for the entire suit property and is as follows: -

**i. 36.17 Ha to be registered in the name of Julius Magige Murimi (the 2<sup>nd</sup> petitioner) on behalf of himself and Peter Panyako Mwita, Motongori Mwita, Johnstone Chacha Murimi and Nyanokwe Mwita Murimi (beneficiaries of the 1<sup>st</sup> house).**

**ii. 36.17 Ha to be registered in the name of Mwikwabe Chacha Mwita (the 1<sup>st</sup> petitioner) to hold in trust for himself and Mwikwabe Chacha Mwita, Nyamohanga Marwa Mwita, Samwel Rioba Marwa and Sophia Nchagwa (beneficiaries of the 2<sup>nd</sup> house).**

**iii. 36.17Ha to be registered in the name of John Mwita Murimi (the 1<sup>st</sup> objector) to hold in trust for himself and John Mwita Murimi, Joseph Mwita Murimi, Nchagwa Mwita Murimi, Christine Matinde Mwita (beneficiaries of the 3<sup>rd</sup> house).**

The petitioners submitted that only half of the suit property should be distributed as the other half is being held by Panyako Mwita and Motongori Mwita who are still alive. The petitioners proposed distribution of the other half to a different set of beneficiaries as follows: -

**i. 18.5 Ha Julius Magige Murimi to hold in trust for himself and the following; Gati Nyamohanga Mwita, Nyamohanga Murimi, Carren Achieng Murimi, Magige J Murimi, Mangiti Joseph, Sabastian Chacha Murimi, John Mogosi Murimi, Christopher Nsato Murimi, Johnson Chacha Murimi, Peter Marahu Chacha, Murimi Mwita Samwel and George Mwita Murimi.**

**ii. 18.5 Ha to be registered in the name of Mwikwabe Chacha Mwita to hold for and on behalf of Robi Chacha, Mary Bungusa Chacha, Johnson Nkoya Murimi, John Nyabange Chacha and Nyamasegera George Samwel.**

On the true of identity of the beneficiaries, the objectors submitted that Mwita Murimi was married to three wives and was survived by the following persons: -

**i. Chacha Mwita Murimi - son (Deceased).**

**ii. Murimi Mwita Murimi - son (Deceased).**

**iii. John Mwita Murimi - son.**

**iv. Joseph Mwita Murimi - son.**

**v. Marwa Mwita - son (Deceased).**

It is their further submission that the late Mwita Murimi died before demarcation of the suit land was completed and the land was registered in the names of Chacha Mwita Murimi and Murimi Mwita Murimi the deceased persons herein.

The objector further listed the survivors of the deceased persons the subject of these succession proceedings as follows: -

**1. Chacha Mwita Murimi - Deceased**

**Robi Chacha Mwita - Widow.**

**Mary Bugusa Chacha - Widow.**

**Jackson Nkoya Murimi - Son.**

**Mwikabe Chacha - Son.**

**Rioba Chacha - Son.**

**John Nyabange Chacha - Son.**

**2. Murimi Mwita Murimi - Deceased.**

**Gati Nyamohanga Mwita - Widow.**

**Nyamohanga Murimi - Widow.**

**Caren Achieng Murimi - Widow.**

**Mangiti Joseph - Son.**

**Julius Magige Murimi - Son.**

**Magige J. Murimi - Son.**

**Sabastian Chacha Murimi - Son.**

**John Mogosi Murimi - Son.**

**Christopher Nsato Murimi - Son.**

**Johnstone Chacha Murimi - Son.**

**Peter Marahu Chacha - Son.**

**Murimi Mwita Samwel - Son.**

**Geroge Mwita Murimi - Son.**

In their proposed schedule of distribution, the objectors introduced the name of John Mwita Murimi who was the son of the deceased patriarch Mwita Murimi from the third house to be a beneficiary of the estate of the deceased.

The petitioners objected to the proposed schedule of distribution since the other co-owners of the suit property that is Panyako Mwita and Mtongori Mwita are still alive. They submitted that if the court would go ahead with the proposed schedule of distribution, then it would disinherit the two other co-owners.

In order to understand the position of the two other co-owners of the suit property with the deceased persons, I refer to the witness statement of Mtongori Mwita dated 6/3/2015 filed in Succession Cause No. 658 of 2009. Mtongori Mwita stated that he is the step - brother of Murimi Mwita Murimi (Deceased) with whom he co-owned the property, together with Chacha Mwita Murimi (Deceased) and Panyako Mwita. This fact was repeated in the witness testimony of John Mwita Murimi in the proceedings before Mrima J as evidenced in paragraph 7 of the ruling dated and delivered on 11/10/2017 as follows: -

**“John adopted the contents of his affidavit and reiterated that the dispute before Court had a history which he traced to the times of his late father Mwita Murimi. That, their father initially owned a parcel of land that was unadjudicated where all his father’s four wives lived thereon until when their father died sometimes in 1965. That, on the demise of their father and during the demarcation and adjudication process sometimes in 1973 four of John’s elder brothers namely Chacha Mwita, Murimi Mwita, Panyako Mwita and Mtongori Mwita registered themselves as owners of their father’s land on behalf of all wives to the deceased as well as their other siblings...”**

Further to the above, I also make reference to the objection dated 9/4/2015 which was filed by John Mwita Murimi, Joseph Mwita Murimi and Nyamohanga Marwa Mwita. The 1<sup>st</sup> objector (John Mwita Murimi) submitted that his father, the late Mwita Murimi was married to four wives namely: - **Matinde Mwita, Robi Nyantetere Mwita, Robi Chacha Mwita and Nyambogai Mwita** all deceased. The houses were comprised as follows: -

**a. 1<sup>st</sup> House**

**Matinde Mwita - wife (Deceased) who had one daughter who died.**

**b. 2<sup>nd</sup> House**

**Robi Nyantetere Mwita - (Deceased)**

**Chacha Mwita Murimi - (Deceased).**

**Murimi Mwita Murimi - (Deceased).**

**Gati Mwita Murimi - (Deceased).**

**Nyanokwe Mwita Murimi.**

**Panyako Mwita Murimi.**

**Mutongori Mwita Murimi.**

**c. 3<sup>rd</sup> House**

**Robi Mwita Chacha - wife (Deceased) who was blessed with two children who are both deceased.**

**d. 4<sup>th</sup> House**

**Nyambogai Mwita - wife (Deceased).**

**Joseph Mwita Murimi.**

**John Mwita Murimi.**

**Mwikwabe Mwita (Deceased).**

**Murimi Mwita (Deceased).**

**Nchagwa Mwita.**

**Matinde Mwita.**

From what is before this court, it seems that the objectors deliberately concealed the fact that the patriarch Mwita Murimi had four wives but not three wives as is being submitted by them. They deliberately omitted Panyako Mwita Murimi and Motongori Mwita Murimi who belong to the 2<sup>nd</sup> house from the list of Mwita Murimi's sons. If indeed the deceased persons herein were registered as trustees of the land which belonged to the patriarch Mwita Murimi, wouldn't the land also factor in Panyako Mwita Murimi and Motongori Mwita Murimi as sons of the patriarch from the 2<sup>nd</sup> house?

The Certificate of Official Search dated 17/11/2003 annexed as "JMM1" to the affidavit of John Mwita Murimi shows that the suit property is held by four proprietors namely: **Chacha Mwita Murimi (Deceased), Mwirimi Mwita (Deceased), Panyako Mwita and Motongori Mwita** who were all brothers from the second houses.

The succession proceedings before me, it then goes without saying, only touch on the beneficiaries who rank in priority in the estates of **Chacha Mwita Murimi alias Chacha Mwita Mwirimi (Deceased) and Murimi Mwita Murimi (Deceased)**. The beneficiaries of each house are as follows: -

**i. Chacha Mwita Murimi alias Chacha Mwita Mwirimi - Deceased**

**a. Robi Chacha Mwita - Widow.**

**b. Mary Bugusa Chacha - Widow.**

**c. Jackson Nkoya Murimi - Son.**

**d. Mwikabe Chacha - Son.**

**e. Rioba Chacha - Son.**

**f. John Nyabange Chacha - Son.**

**ii. Murimi Mwita Murimi - Deceased.**

**Gati Nyamohanga Mwita - Widow.**

**Nyamohanga Murimi - Widow.**

**Caren Achieng Murimi - Widow.**

**Mangiti Joseph - Son.**

**Julius Magige Murimi - Son.**

**Magige J. Murimi - Son.**

**Sabastian Chacha Murimi - Son.**

**John Mogosi Murimi - Son.**

**Christopher Nsato Murimi - Son.**

**Johnstone Chacha Murimi - Son.**

**Peter Marahu Chacha - Son.**

**Murimi Mwita Samwel - Son.**

**Geroge Mwita Murimi - Son.**

The first issue is thus settled.

Turning to the second issue, I have taken time to read, appreciate and understand the ruling of Mrima J dated and delivered on 11/10/2017. In its final orders, the court directed that since the estate of the deceased persons comprised only one suit property, a single Grant of Letters of Administration shall be issued in both estates in the names of Mwikwabe Chacha Mwita, Julius Magige Murimi, John Mwita Murimi and Joseph Mwita Murimi.

Pursuant to the said orders, John Mwita Murimi and Joseph Mwita Murimi applied for a confirmation of the joint grant via summons dated 16/4/2018 which is still the subject of contention before this court. In a second ruling dated and delivered on 23/11/2018, Mrima J considered whether this court had the jurisdiction to determine the issue of trust as was raised in the summons; and in paragraph 5 of the ruling he observed:

**“It is not in dispute that the issue of trust is not settled. The parties herein have taken rival and firm positions. The duty of the Succession Court is principally to protect the estates of the deceased persons which it has jurisdiction over and to oversee the transmission of those estates to the lawful beneficiaries...However, if a dispute arises on the ownership of the land subject of the succession proceedings and/or declaration of trusts over the land in issues, then such a dispute transcends the jurisdiction of the Succession Court courtesy of Article 165 (5) of the Constitution, Section 13 of the Environment and Land Court Act, No. 19 of 2011 among other relevant legal provisions...”**

The learned Judge ordered that there be a stay of further proceedings in this succession cause until the issue of ownership and/or declaration of trust over the suit property is heard and determined by the Environment and Land Court.

Similarly, in the submissions of both parties, the issue of whether the land was held in trust is still in contention. The objectors' position is that the suit land belonged to the patriarch Mwita Murimi (deceased) and the deceased persons who are subject to these proceedings were sons to Mwita Murimi but they held the land in trust for the family of Mwita Murimi. The proposal by the objectors is that only the three households of Mwita Murimi should be entitled to the suit property.

The petitioners are of the view that the suit property was co-owned by four people being, the two deceased persons herein, Panyako Mwita and Mtongori Mwita who are still alive. Therefore, the only land available for distribution is half of the suit property and not the whole of it.

It cannot be denied that there is still the thorny issue of the land being held in trust and ownership of the suit property. The objectors have not made an attempt to explain to this court why on the face of the Certificate of Official Search, which they have produced themselves, the names of Panyako Mwita and Mtongori Mwita appear as co-owners of the suit property with the deceased persons, yet they have proposed a schedule of distribution of the suit property to the exclusion of the two, Panyako Mwita and Mtongori Mwita.

It seems that the parties did not pursue the issue of the ownership of the suit property and the alleged trust in the Environment and Land Court as directed by J. Mrima. They have left it to this court to decide how to distribute the property while the issue of the alleged trust remains unresolved.

Much has been said about jurisdiction of a court. Jurisdiction as we know it, is the lifeline handed down to an adjudication forum to hear and determine disputes. The jurisdiction of a court, tribunal or any other dispute resolution fora must be ascertained and determined at the first instance, because any decision made without jurisdiction is a nullity. The question of jurisdiction ought to be raised at the earliest opportune moment by either party or even by the court itself *suo moto*. I buttress this point from the much-celebrated case of **Owners of the Motor Vehicle “Lillian S” vs Caltex Oil Limited (1989) KLR** where the learned Nyarangi J held: -

**“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

He goes on to say::

**“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”**

I need not emphasise that the duty of a Succession Court is to protect estates of the deceased person, and oversee the transmission of the estate to the lawful beneficiaries. Where there is a dispute on the ownership of the property of the deceased person like in this instance, the issue of ownership and trust can only be ventilated before the Environment and Land Court.

With the pending issue of an alleged trust yet to be resolved, this court’s hands are tied. I cannot proceed with the distribution of the estate of the deceased persons. Once again, I direct that the parties pursue the dispute on the alleged trust before the Environment and Land Court. Alternatively, in line with and in the spirit of Article 159 (2) (c) of the Constitution of Kenya, and in order to seek closure to this long-standing dispute which has been the subject of litigation for the past eighteen years beginning with Migori SRMCC Succession Cause No. 386 of 2004, parties are at liberty to attempt an out of court settlement on the issue of the alleged trust through mediation or arbitration with the help of their counsel.

In the end, I make the following orders:-

- i. The proceedings in this succession cause and in particular Summons for Confirmation dated 16/4/2018 are stayed pending the determination of the issue of ownership and/or alleged trust in respect of Land Parcel No. Bugumbe/Mabera/342 in the Land and Environment Land Court.**
- ii. In the alternative, parties are at liberty to pursue an alternative dispute resolution mechanism and file a joint report before this court within 60 days from today, which report shall be adopted as an order of the court.**
- iii. For avoidance of doubt, status quo be maintained.**
- iv. Upon compliance, parties to fix a mention date for further directions.**

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 31ST DAY OF MARCH, 2022.**

**R. WENDOH**

**JUDGE**

**Judgement delivered in the presence of**

Mr. Odero holding brief for Ms. Ochwal for the Objectors/Applicants.

Ms. Okota holding brief for Mr. Soire for the Petitioners/Respondents.

Evelyn Nyauke Court Assistant.