



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 220 OF 2015**

**IN THE MATTER OF THE ESTATE OF**

**MURIUKI S/O GAKENYE alias MURIUKI GAKENYE**

**AND**

**GLADYS NGONYO MURIUKI.....APPICANT**

**VERSUS**

**GRACE WAMUYU MURIUKI.....RESPONDENT**

**RULING**

1. The application is dated the 20/07/2020 and is premised under the provisions of Rules 49, 63 and 73 of the Probate and Administration Rules, Order 45 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 2A and 3A of the Civil Procedure Act and all enabling provisions of the law; the applicant seeks the following orders;

(i) The applicant **GLADYS NGONYO MURIUKI** be allowed to appoint the beneficiary herein **GRACE WAMUYU MURIUKI** as her survivor;

(ii) The Honorable Court be pleased to review the judgment and subsequent Certificate of Confirmation of Grant made on the 18/10/2018 to remove and/or waive the life interest registered against 3.44 acres of **Konyu/Baricho/201** now **Konyu/Baricho/5094**;

(iii) The Applicant **GLADYS NGONYO MURIUKI** be allowed to transfer the property **Konyu/Baricho/201** to **GRACE WAMUYU MURIUKI**;

(iv) The costs of the application be in the cause.

2. The applicant relied on the grounds on the face of the application and on the Supporting Affidavit made by the applicant and is dated the 17/07/2020;

3. Directions were given on the 28/09/2020 and the applicant was directed to serve the beneficiary and to canvass the application by filing and exchanging written submissions; both parties filed and exchanged their written submissions; hereunder is a summary of the applicants' and beneficiaries submissions;

**APPLICANT'S CASE**

4. The applicant submitted that from the mode of distribution passed by the court she now owns the larger portion measuring 3.44 acres of the deceased's interest in **Konyu/Baricho/201**; the portion was transmitted to her and is now registered in her name as parcel number **Konyu/Baricho/5094**; and she holds a life interest therein;

5. That despite the ruling of the court the parties who were deemed as strangers, are still intent in claiming and forcefully asserting themselves as stakeholders of the applicant's portion of the property; and the life interest she holds over the land operates as a restraint to the transfer of the property;

6. So as to safeguard her daughter Grace Wamuyu Muriuki's interest in the property the applicant wishes to terminate her life interest in the

property through the exercise of her power of appointment; and seeks intervention by the court;

7. She humbly prayed that the life interest registered against the title be waived and the Certificate of Confirmation of the Grant be rectified accordingly.

8. Case law relied on **InRe. Estate of Jolly Jimmy Githieya (Deceased) NrbHCSuccession Cause No.442 of 2010; In Re. Estate of Justus NguyoWaititu alias Justus NguyoWaitutu (Deceased) (2019)eKLR.**

### **BENEFICIARY'S CASE**

9. The beneficiary associated herself with the applicant's submissions and further added that due to the applicants advanced age she is in no position to deal with the invaders/strangers who despite there being a judgment, are still claiming that they have a stake in the property and have forcefully taken occupation and are carrying out activities in the form of construction of permanent buildings, farming and picking of coffee on the applicants portion of land;

10. Through such actions both the applicant and herself have been totally denied the right to use the land parcel No. Konyu/Baricho/5094 and have been put to great loss; and she too seeks the courts intervention to bring to an end the current and foreseeable and future injustice.

### **ISSUES FOR DETERMINATION**

11. After taking into consideration the submissions made by the applicant the only issue this court finds for determination is;

(i) Whether the application for power of appointment has merit; whether this is a suitable case for review and rectification of the Order issued on 18/10/2018;

### **ANALYSIS**

**Whether the application for power of appointment has merit; whether this is a suitable case for review and rectification of the Order issued on 18/10/2018;**

12. The application is brought under the provisions of Rules 49, 63 and 73 of the Probate and Administration Rules, Order 45 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 2A and 3A of the Civil Procedure Act and all enabling provisions of the law; the applicant seeks for the review of the judgment and subsequent Certificate of Confirmation of the Grant;

13. The circumstances under which the applicant seeks the changes is that her life interest has generated a lot of impunity; that despite there being a judgment that deemed certain parties as strangers/invadersthe very same persons still claim that they have a stake in the property and have forcefully taken occupation and are carrying out activities in the form of construction of permanent buildings, farming and picking of coffee;

14. The applicant who is said to be of advanced age has no strength or energy to forestall the actions of these strangers who are interfering with her interest in the land and have totally denied her the right to utilize the land parcel No. Konyu/Baricho/5094 and she has been put to great loss; she now seeks the courts intervention to bring to an end to the current injustice;

15. The interest the applicant has in the parcel of land is a life interest and this operates as a restraint as she is unable to transfer the land to her adopted daughter which is the only method that can safeguard the property from invasion by the strangers and this will also protect her daughter from being disinherited in the event of the applicant's demise;

16. The applicant states that the beneficiary herein is a child whom the deceased and herself had taken into their family as their own; therefore, being a dependant within the context of Section 29 of the Act is entitled to benefit from the property of the deceased;

17. The applicant also states that she is of advanced age and has no energy and strength to engage and battle with the strangers;

18. This court has perused the court record and the annexures in support of the invasion activities in the form of construction being carried out by other parties;and appreciates the predicament the applicant is facing and finds that the only way to forestall these invaders is by allowing her to exercise her power of appointment; this will enable her to transfer her interest to the beneficiary whom she acknowledges to be her sole beneficiary;

19. The applicable law is found at Section 35(2) of the Law of Succession Act; this section allows the surviving spouse who has a life interest to exercise her power of appointmentwhich then enables her to pass on all or any part of her net interest by way of gift to any of her surviving children or child;

20. In this instance, the sole beneficiary is in agreement with the applicant and there being no other known impediment stopping the applicant from taking this course of action this court will allow the application and will permit her to exercise her power of appointment; this court is also satisfied that this a suitable case for review and rectification of the Order issued on 18/01/2018 which will enable the applicant to transfer her interest to the beneficiary;

### **FINDINGS AND DETERMINATION**

21. In the light of the forgoing this court makes the following findings and determinations;

(i) The application is found to have merit and it is hereby allowed;

(ii) The applicant is hereby allowed to exercise her power of appointment;

(iii) The Certificate of Confirmation of Grant dated the 18/10/2018 is hereby reviewed and rectified; the life interest registered against **KONYU/BARICHO/5094** (formerly **KONYU/BARICHO/201**) is hereby lifted;

**(iv) GLADYS NGONYO MURIUKI** is at liberty to transfer **KONYU/BARICHO/5094**(formerly **KONYU/BARICHO/201**) to **GRACE WAMUYU MURIUKI**;

(v) Parties at liberty to apply.

(vi) There shall be no order as to costs.

It is so Ordered.

**Dated, Signed and Delivered Electronically at Nyeri this 11<sup>th</sup> day of February,2021.**

**HON.A. MSHILA**

**JUDGE**