



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 305 OF 2004

IN THE ESTATE OF M'ETIRIKIA NTHAKA (DECEASED)

STANLEY GITONGA M'ETRIKIA.....PETITIONER

VERSUS

CESARY KARARU M'ETIRIKIA.....APPLICANT

RULING

1. Before the Court is a Summons for revocation of grant dated 16th July 2010. The Applicant claims that the Petitioner, in collusion with a number of purchasers fraudulently and without consent of the Applicant and other beneficiaries petitioned and distributed the estate unfairly. He claims that the Petitioner misrepresented facts, made false statements of fact and concealed material facts relevant in this succession cause hence misleading the Court to arrive at an unfair mode of distribution.

2. Parties filed their respective responses to the application and the matter was also heard by way of viva voce evidence.

The Applicant's Case

3. The application is premised on the grounds on the face of it and it is supported by the Applicants' affidavit sworn on 16th July 2010. During hearing, the Applicant called 3 witnesses. The Applicant (OW1) was the first witness. He said that before his demise, the deceased had called all of them and said that his land was to be given to sons alone as the daughters had been married. That Stanley Gitonga was to get 2.16 acres, Joseph Eruki was to get 2.06 acres, he, Cesary Kararu was to get 1.16 acres, Christopher Ekethu was to get 1.56 acres and Isaac Muriungi was to get 1.18 acres. That the deceased even went to the land board to seek consent to subdivide the property. That he came to court when the matter came up for confirmation but they were however not informed of the shares that they were having and that Isaac Muriungi refused and that when he discovered what he had been given, he protested. That at no time had they ever sat as a family to agree to sell the land to strangers. During cross-examination, he said he is not aware of having signed any sale agreement by the family in favour of Siberia Makena or George M'Igweta. He said that Siberia bought land from Gitonga. He said that he contributed Ksh 10,000/= towards the succession cause and Stanley gave the rest of the money. He said that he only signed for Stanley to be given money by Siberia but not to sell any land. He also said that he had borrowed Ksh 55,000/= from Mr. Igweta for treatment but not for sale of land and that he was going to refund the money.

4. OW2 was Isaac Muriungi. His evidence was similar to that of OW1. He however said that they had agreed that after they got their shares, each of them was to contribute 0.10 acres from their respective portions to give Siberia because she contributed to the cost of filing the cause and that she was to pay the monies through Stanley Gitonga. He however said that they never agreed to sell 1.47 acres to Siberia. Although he admits to signing an agreement in the offices of Mr. B. G. Kariuki, he said that the contents of the agreement marked as OExh 1 are not correct. He said that Siberia gave the Petitioner money but he doesn't know how much it was. He confirmed receiving Ksh 10,000/= from Siberia. He said that Kubai is his cousin but they never agreed that he would get a portion. He also said that he does not know Eliud Mutwiri other than he is a neighbour. He also said that he does not know George M'Munyi. During further cross-examination, he said that they had sold to Siberia 0.40 acres for about Ksh 160,000/=.

5. OW3 was M'maana M'mwereria Nabea who has married Sabina Munjiru, a sister to the deceased. He said that each of the deceased children was to get 2 acres.

The Applicant's Submissions

6. The Applicant also filed submissions dated 12th April 2021. He submits that he is an illiterate together with his witness brothers and that the Petitioner took advantage of their illiteracy to deprive them of their inheritance. He urges that one of the beneficiaries and witnesses, Isaac Muriungi M'etrikia had not given his consent as evinced by Form 38 in support of the Petition which shows that he did not sign. He further urges that some beneficiaries, the Applicant and his witness brother were not present on 3rd July 2009, the date of confirmation of grant and that those present were the Petitioner and a troop of strangers to whom he distributed the estate to the detriment of the real

beneficiaries.

7. He further submits that whereas the Applicant and his other sibling are entitled to at least 1.16 acres of the estate, the Petitioner gave them a meagre fraction i.e 0.3 acres and 0.20 acres respectively instead of 1.16 acres whilst distributing the estate to several other alleged purchasers. In his supporting affidavit, the Applicant claims that his father had allocated to him during his lifetime 1.16 acres which he was occupying and has extensively developed.

8. He urges that *Siberia Makena M'Imaria, Francis Kubai M'Erura, Eliud Mutwiri Meeme and George M'Igweta M'Munyi* are strangers and not beneficiaries to the estate and it is not clear under what circumstances they were included in the distribution of the estate.

9. He urges that despite the Petitioner's averments that they had all agreed to sell a small portion to raise fees to file the succession matter, it seems that not a single point was reduced from his share. He further urges that this purported agreement was not produced before the Court and that in any event, the Petitioner was at a loss trying to justify what his share in the estate is and why there is contradiction on the same.

10. He urges that not a single purchaser gave evidence on the allegation that they had so purchased any portion of the estate and that although they filed statements and affidavits none of them showed up to give evidence. However on his part, himself together with his brother gave uncontroverted evidence to show that the Petitioner schemed to deprive them of their inheritance and that he even supplemented the evidence with minutes and decision of elders on how the estate ought to be distributed.

11. He urges that the grant be revoked and that he be appointed the Administrator, any transaction in relation to LR NJIA/KIEGOI/254 be revoked and the parcel be redistributed among the children of the deceased.

12. He urges that the purported purchasers forcefully and unlawfully entered into the estate, evicted the Applicant and his witness brother and from part of their share, took occupation under the supervision of the Petitioner. He urges that this was an illegal act of trespass as well as intermeddling and they should be ordered to vacate the property and that owing to previous threats, the Court should order the OCS to supervise the implementation of the grant. He also urges that the Court makes an order removing and/or vacating any inhibition, restriction or caution against the register of L.R NO. NJIA/KIEGOI/254.

The Petitioner/Respondent's Case

13. The Petitioner opposes the application. During hearing, the Petitioner was PW1 who stated that their deceased father left 7.14 acres forming the suit property to them. That they agreed on how to distribute it and they got someone to finance the cause who was Siberia Makena and that they sold to her 1.67 acres for Ksh 462,000/=. That they all signed the agreement marked MF11 which shows that it was a sale for 1.47 acres for Ksh 441,000/=. That they then added her 0.20 acres and she paid them all the money. During cross-examination, he said that OW2 did not sign any consent and that he did not sign form 38 and neither was he present at the time of confirmation. That OW2 was to get 0.9 acres as he had a separate property given to him by the deceased. He said that he sold 0.2 acres from his 1.8 acre share to Siberia. He said that out of the 1.47 acres, he contributed 0.2 acres, Isaac contributed 0.7 acres and Cesary contributed 0.2 acres, Christopher 0.2 acres and Margaret 0.2 acres. That out of the 7.14 acres, he was entitled to 1.80 acres, Isaac and Cesary 0.9 acres, Christopher 1.70 acres and Margaret 1.8 acres. That although Isaac and Cesary were originally entitled to 1.16 acres each, Cesary sold to Mutwiri 0.2 acres, and he gave 0.2 acres to Siberia and he sold 0.2 acres to George. He later said that Cesary sold to Siberia 0.10 acres and in total, he sold 0.5 acres. Concerning the monies received by Siberia, he said that he has not adduced any evidence to show that the monies were received but they used to collect the monies while together. He first said that the money was divided equally but later changed and said it was not divided equally. He said that it is not true that the sale was to be after distribution. He said that he did not inform the Court that those he was distributing the land to were purchasers and not beneficiaries.

14. He confirmed that he gave himself 1.62 shares yet he ought to have been left with 1.30 acres. He said that he added to himself 0.32 acres because he had incurred expenses.

Petitioner's Submissions

15. He filed submissions dated 26th April 2021. He submits that the Applicant's submissions are misplaced and does not attract any of the provisions of Section 76 of the Law of Succession Act. He submits further that there is no evidence that the proceedings leading to the issuance of the grant were defective in form and substance nor were they obtained fraudulently and neither are there false allegations of facts or law that led to the making of the grant. He relies on the case of *Augustine Johnstone Moi Kirigia v Catherine Muthoni Isumali Kirimi (2017) eKLR*. He further submits that the Court's discretion cannot be challenged by way of an application for revocation but by an appeal as was held in the case of *In re Estate of Joseph Macharia Ngarioko (Deceased) (2019) eKLR*. He urges that the application has been brought in bad faith and should be dismissed.

Purchasers' Case

16. Tied to the Petitioner's response and submissions are those of the alleged purchasers. On record is a replying affidavit and a further replying affidavit sworn by Siberia Makenna on 22nd March 2018 and 13th December 2012 respectively. She claims that by an agreement in writing dated 13th February 2009, she bought a 1.67 acre parcel of land from the heirs of the deceased and they all signed the said agreement which she has annexed as SMM1. She claims that she paid the full purchase price and met all the expenses of the succession cause including surveyors and registration fees and that she consequently got her share which is registered in her name, NJIA/KIEGOI/1665 for which she took actual and quiet possession of and has planted 1,000 tea bushes, 60 banana stems, 1,000 mikima trees, 50 cinder trees, nappier grass and she also cultivates seasonal crops such as maize, beans and a house.

17. There is also on record statements from the other purchasers being the statement of George M'Munyi M'Igweta dated 30th August 2018

stating that he bought 0.15 acres from Cesary Kararu M'etrika; Statement of Eliud Mutwiri Meme dated 30th August 2018 stating that he bought 0.16 acres from Cesary Kararu, Christopher Mpekethu and Stanley Gitonga; Statement of Francis Kubai dated 17th May 2018 indicating that he bought 0.20 acres from Jacob Kobia Laibuni who had bought the same from Isaac Muriungi.

18. None of these purchasers however attended Court for hearing.

Determination

19. On 3rd July 2009, the grant was confirmed and the suit property, NJIA/KIEGOI/254 was to be distributed as follows: -

- i) Kararu M'etrikia 0.30 acres***
- ii) Christopher Mpekethu 1.05 acres***
- iii) Isaac Muriungi 0.20 acres***
- iv) Stanley Gitonga M'etrikia 1.62 acres***
- v) Margaret Mwathimba 1.50 acres***
- vi) Siberia Makena M'imaria 1.67 acres***
- vii) Francis Kubai M'eruura 0.20 acres***
- viii) Eliud Mutwiri Meeme 0.40 acres***
- ix) George M'Igweta M'munyi 0.20 acres***

20. The Applicants seek revocation of this grant. This Court has to determine whether the Applicants have met the threshold for revocation and if so, redistribute the estate. The law providing for revocation grants is Section 76 of the Law of Succession Act, Cap 160 of the Laws of Kenya. It provides as follows: -

76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) That the proceedings to obtain the grant were defective in substance;***
- (b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the Court of something material to the case;***
- (c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***
- (d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either—***
 - i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the Court order or allow: or***
 - ii) To proceed diligently with the administration of the estate; or***
 - iii) To produce to the Court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***
- (e) That the grant has become useless and inoperative through subsequent circumstances.***

21. The main reasons why the Applicant is seeking revocation of grant are as follows: -

- i) That one of the beneficiaries and witnesses, Isaac Muriungi M'etrikia had not given his consent as evinced by Form 38 in support of the Petition which shows that he did not sign.***
- ii) That the distribution was unfair as his brother Isaac Muriungi and him were supposed to get 1.16 acres each but they only got a meagre fraction of 0.2 acres and 0.3 acres respectively.***

iii) That the property was allocated to strangers namely Siberia Makena M'Imaria, Francis Kubai M'Erura, Eliud Mutwiri Meeme and George M'Igweta M'Munyi.

iv) That his brother and himself were not present on 3rd July 2009, the date of confirmation of grant.

22. From the face of it, these appear to be adequate grounds for revocation as they speak to elements of concealment and fraud. Parties are in agreement that OW2, Isaac Muriungi did not give his consent to the mode of distribution and he did not sign Form 38. This Court has perused the said form and confirms the Isaac Muriungi did not sign the same. It is also claimed that OW2, Isaac was not in Court on 3rd July 2009 when the grant herein was confirmed. The Petitioner is on record as admitting that he failed to disclose to the Court that some of the persons listed in the grant are not beneficiaries. He also admitted that OW2 was not in Court during confirmation of grant. These are indeed material issues which this Court finds persuasive enough to warrant an order for revocation.

23. Concerning the 4 persons who the Applicants claim to be strangers, i.e. *Siberia Makena M'Imaria, Francis Kubai M'Erura, Eliud Mutwiri Meeme and George M'Igweta M'Munyi*, this Court has analyzed the evidence with respect to each of their shares.

Siberia Makena M'Imaria

24. Parties have different positions on the role of Siberia Makena in these proceedings. The Petitioner claims that it was agreed that Siberia would finance the instant succession cause and she would be sold to 1.67 acres of land. He annexed a sale agreement showing that 1.47 acres had been sold to Siberia for Ksh 441,000/=. This is the agreement dated 13th February 2009. He claims that they added her 0.20 acres. According to OW1, they never agreed to sell any land to Siberia and that if there was any such agreement then it was Gitonga who was to sell his land to Siberia. He however confirmed that he signed for Stanley to be given money by Siberia. He said that he financed Ksh 10,000/= and the rest of the money was paid by Stanley. According to OW2, they had agreed that after getting their respective shares, each would give 0.1 acres to Siberia as she financed the succession cause. He however maintained that they didn't agree to sell to her 1.47 acres. He says that he remembers signing an agreement. He says that he doesn't remember how much Siberia gave.

25. There are contradicting versions to this issue. This Court is however not satisfied that the Applicants successfully challenged the validity of this sale agreement. There are thumbprints appearing against their names in the agreement. Although the Petitioner claims that the said Siberia was added 0.2 acres, he has not annexed any evidence to support this claim. It is trite that he who alleges must prove. In fact, the provisions of Section 3 (3) of the Law of Contract Act require that agreements for sale of land must be in writing. This Court has however seen the search document showing that an entry was made in the lands registry on 7th July 2010 indicating that Siberia had been registered as owner of 0.675Ha of the suit property which is an equivalent of 1.67 acres. This implies that the 0.2 acres was indeed added to her.

26. One thing is clear, that Siberia Makenna financed this succession cause. It is indeed wanting that she did not appear during hearing to support her claim, but the parties themselves have admitted that she contributed to the filing of the case. It is not clear as to the amount received from Siberia that went into financing the agreement. No one gives a clear indication on this matter. Not even the Petitioner who seems to have taken the lead in negotiations with Siberia. However, there is on record a sale agreement by which Siberia was given 1.47 acres and she paid some amount for this. This is a matter for accounting by the Administrator as is required of him by law.

27. An issue that arises is the legality of this transaction. The Law of Succession Act prohibits the transfer of any of the deceased property before a grant has been confirmed. This is the hallmark of Section 45 of the Law of Succession Act which provides for intermeddling. Intermeddling is an offence attracting criminal sanction and penalty. Section 45 of the Law of Succession Act provides as follows: -

45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

(a) Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

28. This Court cannot be seen to be sanctioning offences and violations of the law. However, this Court is also alive to the peculiar nature of this case. It appears that all parties, both the Petitioner and the Applicants had in the beginning gotten into some form of consensus to obtain financing of the succession cause from Siberia. It is argued that this transaction was necessary to allow for the facilitation of the succession matter. It is not in dispute that indeed money changed hands and that there was some form of agreement. Although OW1 claims that he didn't sign this agreement, OW2 confirms that he signed some agreement and the agreement itself contains the names of all the beneficiaries as the purchasers.

29. There are indeed processes which a party seeking to transfer a deceased's property before confirmation of grant is issued is permitted to make. This is would be done by way of an application for *partial confirmation of grant* to allow them to sell a portion of the deceased's property. The Petitioner and his brothers would essentially have argued that their pursuit of funds to finance the Succession cause could not wait for final confirmation of grant. Partial confirmations have previously been issued by the High Court including in the case of ***In re The Matter Of The Estate Of Michael Kimando Mwangi (Deceased) Succession Cause No. 550 of 2015 [2016] eKLR***. The Petitioner and his

brothers ought to have done this. This Court is nonetheless aware of the possibility that they may not have had the funds to even move the Court in this way and this is part of the reason that the Court will not entirely fault them for entering into the sale agreement with Siberia before confirmation of grant.

30. There were some arguments as to whether the properties to be transferred to Siberia were to be done before or after the grant was confirmed. The Court is however concerned with what actually happened as opposed to what had been agreed. The sale agreement was entered into before the confirmed grant was made. The sale was however not completed until after the succession matter had been concluded. The search on record shows that the property was registered in Siberia's name on 7th July 2007. At the time of getting into the agreement, a total of Ksh 279,000/= had been paid and there was a balance of Ksh 162,000/=.

31. This Court finds that there was a form of intermeddling in that no such sale agreement ought to have been entered into in the first place. However, parties herein were all aware of this arrangement. Furthermore, the property was not transferred before the confirmed grant was issued. It was transferred later. In deciding what portions to allocate the said Siberia, this Court will consider all the above.

Francis Kubai M'Erura

32. Francis Kubai was allocated 0.2 acres. He did not come to Court to support his claim. None of the parties claimed that he had any interests in the deceased estate and no agreement was ever adduced to support his claim. This Court finds that he was not entitled to any share.

Eliud Mutwiri Meeme

33. Eliud Mutwiri was issued with 0.4 acres. He claims that he was a bonafide purchaser of the share he got and that he was sold to the land by Cesary Kararu, Christopher Mpekethu and Stanley Gitonga. It is interesting that the very applicants who claim that Eliud is a stranger are the same one who are said to have participated in the sale of property to Eliud. The Petitioner on his part claimed that OW1, Cesary had sold 0.2 acres to Mutwiri. Eliud did not attend hearing of the matter to give oral testimony and no agreement was ever adduced in support of his claim. This Court finds that Eliud was not entitled to any share.

George M'Igweta M'Munyi

34. George Igweta got 0.2 acres. OW1 testified that he had borrowed Ksh 55,000/= from Igweta for treatment and that he was going to refund this amount. OW2 said that he doesn't know Igweta. The Petitioner claimed that Cesary had sold 0.2 acres to Igweta. In his statement filed in Court on 12th May 2017, the Petitioner claimed that he got sick and the beneficiaries agreed to sell 0.2 acres to finance his treatment. There is on record a sale agreement dated 3rd March 2009 by which George M'Igweta bought 0.15 acres from the Applicant, Cesary Kararu. In his statement, M'Igweta also claims to have bought 0.15 acres. This Court finds that in the circumstances of the case, the said M'Igweta is entitled to what is indicated in this sale agreement which is also what he claims in his statement. Much as the vendor in the sale agreement was OW1 alone, this Court finds that this deduction from the estate is to be borne equally amongst all other beneficiaries as it appears they agreed to sell this portion for purposes of obtaining funds for treatment for one of them. This was a family affair.

Petitioner's Share

35. During hearing, the Petitioner admitted that though he had given himself 1.62 acres, he ought to have gotten 1.30 acres. He said that he added himself because he had incurred expenses. He did not however indicate how this came to be.

CONCLUSION

36. This Court has observed that the Petitioner was indeed untruthful. His averments were self-implicating and he in fact admitted to have concealed material facts. Key among these was the fact that there were certain persons, who not being beneficiaries, had been included in the proposed schedule of distribution. This Court does not find much reason to believe him, save that some of his averments correspond to what the Applicants have stated.

37. This is however not to say that the Applicants are totally innocent. Although OW2 did not sign Form 38 and he was not present during confirmation of grant, he was aware of the arrangements on financing the Succession Cause as all the beneficiaries signed the sale agreement with Siberia Makenna. It appears that the beneficiaries have had their own internal wrangles and it is somewhat manifesting in these proceedings. This Court must however add that were the financial constraints faced by the Petitioner and his brothers so pressing that they could not get an alternative source of funding to file this succession cause, they ought to have approached the Court by way of application to be allowed to deal with the property. This would have been the prudent thing to do. However, for the reasons stated in an earlier part of this Ruling, this Court will not entirely disenfranchise the purchasers whose portions are supported by way of evidence.

38. The other purchasers who were listed as beneficiaries in the confirmed grant but did not produce any supporting evidence in support of their claims being **Francis Kubai M'Erura** and **Eliud Mutwiri Meeme** are at liberty to pursue the respective beneficiaries who sold to them their said shares.

39. This Court finds that the Applicants have laid a proper basis for upsetting the order for confirmation of grant. Parties alluded to the fact that certain beneficiaries had gotten parcels of land elsewhere during the life time of the deceased. The details of these purported gift *inter vivos* were however not disclosed. There would, therefore, be no proper basis to allocate the heirs different sizes of the estate property as contemplated under Section 42 of the Law of Succession Act.

ORDERS

40. In the end, this Court makes the following orders:

1. That the Confirmed Grant of Letters of Administration issued herein on 3rd July 2009 is revoked.

2. That the deceased's property namely NJIA/KIEGOI/254 be distributed as follows: -

(i) Siberia Makena M'imaria to retain 1.67 acres.

(ii) George M'Igweta M'munyi to get 0.15 acres.

(iii) The remaining portion of the property be distributed equally among the deceased's five (5) heirs being Kararu M'etrikia, Christopher Mpekethu, Isaac Muriungi, Stanley Gitonga M'etrikia and Margaret Mwathimba.

Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF JUNE, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Thangicia M. David & Co. Advocates for the Objector/Applicant

M/S B. G. Kariuki & Co. Advocates for the Petitioner/Respondent.