



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MERU**

**SUCCESSION CASUE NO.2 OF 2019**

**IN THE MATTER OF THE ESTATE OF M'IBUTU M'IMAITA(DECEASED)**

**JAPHETH GUANTAI F IBUTU.....1<sup>ST</sup> ADMINISTRATOR**

**ISMAIL KABURU M'IBUTU.....2<sup>ND</sup> ADMINISTRATOR**

**VERSUS**

**STEPHEN KIMONYE.....PETITIONER**

**RULING**

1. By summons under certificate of urgency dated 21/7/ 2020 pursuant to Section 47 of the Law of Succession Act, the 1<sup>st</sup> administrator seeks an order that the petitioner does vacate land parcel No. **ABOTHUGUCHI/GITHONGO/4639** and occupy his land parcel No. **ABOTHUGUCHI/GITHONGO/4641**, and in default he be forcefully evicted.
2. The application is premised on the grounds that the 3 beneficiaries had built their homes on **ABOTHUGUCHI/GITHONGO/476**, which was subdivided equally into **ABOTHUGUCHI/GITHONGO/4639, 4640** and **4641**. In his supporting affidavit sworn on even date, the 1<sup>st</sup> administrator avers that they all agreed to move into their respective parcels, save for the petitioner who continues to be adamant, despite persistent talks to do so. He goes on to state that the said subdivision was influenced by the way each had built their houses on the ground. He now wishes to have the petitioner forcefully evicted from his land. He has exhibited a title deed to prove that he is the registered owner of **ABOTHUGUCHI/GITHONGO/4639**.
3. The 1<sup>st</sup> administrator swore a further supporting affidavit on 16/9/2020 reiterating his averments in his application. The 2<sup>nd</sup> administrator equally swore a further supporting affidavit on even date in full support of the 1<sup>st</sup> administrator's application.
4. The petitioner vehemently opposed the application through his replying and a 1<sup>st</sup> further replying and a 2<sup>nd</sup> further affidavits sworn on 1/9/2020 and 24/9/2020. He still laments that **ABOTHUGUCHI/GITHONGO/476** was his bequest from the deceased herein and faults the trial court for making a finding to the contrary. In his view, the deceased had during his lifetime given the 1<sup>st</sup> and 2<sup>nd</sup> administrators land elsewhere. He urges the court to allow him to stay on the land as he has built his matrimonial home there. In fact, he faults the court for having denied him his bequest a fact which aggrieved him as a consequence of which he challenged the decision Nyeri Court of Appeal No 103 of 2019. He further faults the court for having dispensed with the production of his title over the land at the point of subdivision without recourse to him and in failing to appreciate the wishes of the deceased which gave to him the land. In essence, the petitioner resists the title of the two administrators and rubbishes their titles issued pursuant to the judgment of the court dated 29.06.2019.
5. Directions were taken on 17/9/2020 that the application be canvassed by way of written submissions, which were respectively filed on 23/2/2021 and 22/10/2020. In the submissions, the 1<sup>st</sup> administrator accused the petitioner of utilizing both **ABOTHUGUCHI/GITHONGO/4639** and **4641**, to his detriment. He submitted that it was just that the application be allowed to ensure that justice is done to him. He cited the case of **Martha Wanjiku Waweru v Mary Wambui Waweru (2007) eKLR** to fortify his submissions that the wishes of an individual in his lifetime need be respected.
6. The petitioner in reiterating his position that the application ought to be dismissed cited the case of **Samuel Maina Mwangi & 2 others v Muthoni Kagiri (2013) eKLR** in for the proposition of the law that the court should take into account gifts and settlement made during the life of the deceased. Essentially, the petitioner re-urges the application that revoked his grant and ordered the equal sharing of the land between the three siblings. The submissions say very little why the registered proprietary rights of the administrators needs to be sidestepped.
7. The application is premised on the provisions of Section 47 of the Law of Succession Act which reserves the inherent powers of the court. These provisions give wide discretion to the court as to the orders it can make, including eviction orders if the circumstances of the case warrant it.

8. I find no dispute that this matter has already been finalized and administration completed by final transmissions. Evidence has been adduced that after subdivision of **ABOTHUGUCHI/GITHONGO/476** into **ABOTHUGUCHI/GITHONGO/4639, 4640 and 4641**, the 1<sup>st</sup> and 2<sup>nd</sup> administrators were issued with their respective title deeds with that the 1<sup>st</sup> administrator being issued with title to **ABOTHUGUCHI/GITHONGO/4639**. The record also reveals that **ABOTHUGUCHI/GITHONGO/4640** is registered in the name of the 2<sup>nd</sup> administrator. The petitioner does not deny but admits that he is occupying both parcels, as he wrongly believes that he was bequeathed **ABOTHUGUCHI/GITHONGO/476** by the deceased. He seems insistent on the rights acquired to the title pursuant to the revoked grant. Having acquire registration by a process the court found wanting, the petitioner must be prepared to accept due process that court orders need obedience even as one pursues a challenge against such orders. His right is not in disregard to the orders of this court. May be he may seek advise on how to pursue protection in the appeal. For now, the property he occupies is vested upon the administrator and there is no plausible reason to keep the administrator away from the fruits of his litigation and right to property thereby acquired. I therefore find that the petitioner is in unlawful and tortious occupation of **ABOTHUGUCHI/GITHONGO/4639**.

**9. Being in such unlawful occupation, I direct that he moves out peacefully and gives vacant possession thereof to the registered owner within 60 days from today. For avoidance of doubt, if he shall not have vacated by the 16/12/2021, he shall be forcefully evicted by a court bailiff in the presence of the area Officer Commanding the local police station who shall ensure that public order is maintained.**

**10. I find the application is meritorious and allow the same with an order that each party bears own costs.**

**DATED SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 15TH DAY OF OCTOBER, 2021**

**PATRICK J.O OTIENO**

**JUDGE**

**IN PRESENCE OF**

**MS. MURITHI FOR MUTEGI FOR APPLICANT**

**PETITIONER IS IN PERSON**

**PATRICK J.O OTIENO JUDGE**