



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 517 OF 2008

IN THE MATTER OF THE ESTATE OF GIDEON M'ARUNGU (DECEASED)

BONIFACE MUGAMBI MWITHALE (Suing as the legal representative of the estate of

TERESIA NTUNDU.....INTERESTED PARTY/APPLICANT

VERSUS

MARY MWARI.....PETITIONER/1ST RESPONDENT

PETER MICHObI KIRINGURI.....2ND RESPONDENT

WILLIAM MWITHALIE M'ARUNGU.....3RD RESPONDENT

JOSEPH GITONGA KUBAI.....4TH RESPONDENT

PHILLIP KIRIMI M'MWETI.....5TH RESPONDENT

RULING

1. By Summons under certificate of urgency dated 2/9/2019 brought under section 47 & 76 of the Law of Succession Act, Rules 44 & 73 of the Probate and Administration Rules, the applicant approached the court and sought orders, in the main; that the honourable court be pleased to revoke the confirmed grant issued on 4/5/2010 to the 1st respondent Mary Mwari and for an interim order that pending hearing and determination of the application, this honourable court be pleased to issue an order of injunction restraining the respondents by themselves or their agents or anyone acting at their behest from interfering with the interested party's/ applicant's peaceful use and occupation of the suit parcel of land ITHIMA/NTUNENE/2590 currently subdivided into parcels Nos. ITHIMA/NTUNENE/3557, 3558 and 3559.

2. The grounds upon which the application is premised are set out in the body of the application, and the supporting affidavit of Boniface Mugambi Mwithalie, the applicant and the legal representative of the estate of Teresia Ntundu, sworn on even date whose gist is that he is the son to Teresia Ntundu, who was the daughter to the deceased and the 1st respondent herein and therefore a sister to the 2nd and 3rd respondents herein. He then added that the deceased was the proprietor of land parcel No. **ITHIMA/NTUNENE/2590** which the deceased gave to him during the deceased life time, because, when orphaned, he remained under the care of the deceased. He asserted that before his demise, the deceased left the suit property to the applicant, who immediately moved in and settled there with his wife, Seresina Nkatha. His grievance is that upon the demise of the deceased, the 1st, 2nd and 3rd respondents in collusion with the 4th and 5th respondents filed this cause without his knowledge and/or consent, after which the 1st respondent was appointed as the administrator and a certificate of confirmation of grant was subsequently issued on 4/5/2010.

3. He accuses the respondents of failing to disclose to the honourable court that, he was a beneficiary of the estate of the deceased herein, by virtue of being a son to Teresia Ntundu (now deceased). Upon the grant being confirmed, in 2010, he asserts, the 1st respondent colluded with the 2nd and 3rd respondents, and fraudulently caused the suit property to be sub divided into ITHIMA/NTUNENE/ 3557, 3558 and 3559, with the intent of defeating the applicant's claim to the estate. He avers that the resultant parcels were registered in the names of the 2nd, 3rd and 1st respondents. The 2nd and 3rd respondents in further attempts to defeat his claim to the estate, fraudulently and illegally sold parcel Nos. ITHIMA/NTUNENE/3558 and 3557 to the 4th and 5th respondents respectively, as exhibited by the annexed copies of agreements dated 27/7/2011 and 30/5/2011 and thereafter, the respondents have over time tried to forcefully, illegally and maliciously evict him from the suit property, which is currently subdivided into ITHIMA/NTUNENE/3557, 3558 and 3559.

4. He further contends that he has undertaken various developments on the suit property including setting up a permanent home, planting miraa and other trees and carrying out other forms of agriculture as exhibited by the annexed photographs. He asserts being entitled to a fair share of the deceased estate, and that the actions of the respondents as outlined in his affidavit and summarized herein are designed to defeat his claim to the estate and therefore, beseeches the court to intervene in order to ensure that, the respondents do not destroy all the developments on the suit property as well as evict him and his family therefrom, as a result of which he will suffer immense loss and damage.

5. He faults and accuses the respondents for mischievously misleading the court by failure to disclose material facts and other circumstances, which would have enabled the court to administer justice and contends that the respondents stand to suffer no prejudice, loss or damage because they neither occupy nor have any developments on the suit property.

6. The application was opposed by the replying affidavits of Joseph Gitonga Kubai, the 4th respondent herein sworn 30/9/2019, and 14/02/2020 as well as that by Phillip Kirimi M'Mweti, the 5th respondent sworn on 14/2/2020. The 4th respondent states that he is the lawfully registered owner of ITHIMA/NTUNENE/3558, which he bought from William Mwathalie M'Arungu, a son to the deceased and the 3rd respondent herein, who had inherited it from his deceased father's estate as sale that was consequent to due diligence, by which he established that the certificate of confirmation of grant was issued to the 1st respondent as the deceased's widow. He asserted the rights of a purchaser for value without notice who has carried out massive developments on the land and that the applicant recently trespassed on the land and entered into a house built by the administrator just to brew trouble. He then added that the applicant did file a suit against him being Maua CMCC NO 247 of 2014 which was heard and dismissed on the merits hence he cannot now mount any sustainable claim. He denies any relationship with the applicant and urges that the application be dismissed.

7. For the 5th respondent, similar position was taken that he bought the parcel of land Known as ITHIMA/NTUNENE/3557 from the 3rd respondent as a beneficiary of the estate, through a transaction supported by the administrator, and has been in exclusive occupation and user since 2011 during which period he the applicant has never had any possession nor user. He then asserts having fully developed same by building houses, planting miraa plantation, banana plantation, nappier grass and various trees. He reiterates the assertions by the 4th respondent on how and when the applicant moved onto the land. In praying for the dismissal of the application, he contends that the law should be able to protect his interest as a *bona fide* purchaser, after the legal process was followed to the latter.

8. The 1st respondent resisted the application by the Replying Affidavit sworn on the 30th September 2019 and contended that the deceased had in fact shared out the land to his children without any share to the applicant's mother but died before transfer and that in distributing the land in the manner she did, she was merely enforcing the deceased's wishes. There is no suggestion that the 2nd and 3rd respondents filed any responses to the application but the proceedings show that both gave evidence and as DW5 and 3 respectively.

9. With the leave of the court, the applicant filed a supplementary Affidavit sworn on 31/10/2019 in which he maintains that neither he nor his mother, who is a daughter to the deceased, were involved in such arrangements and that the deceased died intestate but the distribution of the estate was done by the petitioner/1st respondent to the benefit of herself and her chosen children to his prejudice. On the fate of Maua CMCC No. 247/2014 formally Meru HC No. 132/2012, he contends that the find that the subject parcel of land was a property of the estate of the deceased, and therefore the dispute ought to be determined in the succession cause, prompting this action. In apparently alternative plea, the applicant contends that, the said Maua CMCC 247/2014 and this cause are substantially different as the plaintiff has a legitimate claim over the estate of the deceased, as shown by the annexed copy of plaint. He asserts that the 4th respondent has never been in possession of the suit property, and confirms that he is the one who has put up all the developments mentioned therein and reaffirmed that he and his family have lived on the suit property even during the lifetime of the deceased, and he has put up permanent developments including his homestead.

10. In his view, he has a legitimate claim to the estate of the deceased by virtue of being a son to Teresia Ntundu, who was a daughter to the deceased, hence his claim is true and ought to receive due consideration so that the respondents are restrained from constantly harassing and threatening him and his family in order to force him to vacate from the suit property and abandon his claim to the estate.

11. The parties on 11/11/2019 agreed to canvass the application by way of *viva voce* evidence pursuant to which directions the petitioner's side offered evidence through two (2) witnesses and adopted an affidavit as evidence without the need for cross-examination while the applicant/protester gave evidence on own behalf. It is important to record at this juncture that the parties agreed and recorded a consent to the effect that the applicant no longer seeks revocation but only seeks to be provided for. That prayer was not in the written application but must be seen to be an issue the parties have left to court for determination even though not pleaded. See *Sarah Jelangat Siele vs. Attorney General & 3 Others [2018] eKLR* where the court of Appeal held:

“It is trite that parties are bound by their pleadings and the issues for determination in a suit generally flow from the pleadings. A court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination...However, a court may base its decision on an unpleaded issue if in the course of the trial the issue has been left for the decision of the court. An issue is deemed to have been left for the court's decision when a party addresses the court and leads evidence on the issue.

12. **PW1 Mary Mwari**, the 1st respondent herein, who initially denied knowing the applicant, later admitted that he was a son to her deceased daughter namely Teresia Ntundu. She stated that the deceased was her husband and after his demise, she filed this cause which has since been finalized. She adopted her affidavit sworn on 30/9/2019 in evidence, but the said affidavit is missing from the record. The deceased had already shared out his properties to his children and herself. She won the case at Maua and saw the applicant there for the first time. She had 2 sons namely William Mwathalie and Peter Michobi and 2 daughters with the deceased. She was given land by the deceased where she buried her daughter and gave her daughter's son namely Joseph Mutuma, land near his mother's grave. She admitted that Teresia and Kananu were their daughters, but the former died leaving behind children. She also confirmed that the deceased had other children with other wives, who were all contented with the land they were given by the deceased, except the applicant, who was problematic. She stated that Teresia was not a child to her husband, but she came with her into the marriage. She had title to her land which she gave to Joseph. She

asked the court to reject the applicant's claim, because he is not entitled to any land.

13. During cross examination, she maintained that the deceased was her husband and they were blessed with 3 children namely Peter Michobi, William Mwithalie and Kananu. She stated that she came with Teresia, who was then a big girl in primary school. She later left the deceased after getting the 3 children and started working. She was given land by the deceased and gave birth to her last born while at the home of the deceased. She stated that Teresia was not married but she had her children and that the deceased did not leave a will. She stated that after the deceased gave her the title in the presence of the elders, she shared out the land to his children. She stated that she was given the land at Timau during the fight for independence. She went back to Timau after burying her husband at Lare. She gave land to Peter and William and was left with 1 acre, where the children of Teresia, that is Joseph, live. She gave him ½ acre and retained the remaining ½ acre. Peter and William were also given land by their father and that is the way the land of the deceased herein was distributed. She neither knew whether she was required to state that she had Teresia, nor indicate that Kananu was a child of the deceased. When she filed this cause, she was still living in Timau and the applicant was disturbing her over the estate of the deceased. She did not know where the applicant was living when she filed this cause and that she gave land to all her children. She sold her share of the deceased estate to raise medical fees because she was ill. Although she could not remember the name of the purchaser, she confirmed that he lives on the land she sold to him. According to her, Teresia was not entitled to a share of the deceased estate, because she gave her 1 acre. That is where she was buried and she gave her son Joseph. When she left the deceased, Kananu was still breastfeeding.

14. During re-examination, she stated that this cause was about the sons of the deceased, and the deceased (Teresia) was not a child of the deceased. That is why she was not buried on the land of the deceased, but on PW1's land.

15. The applicant testified on 1/2/2021 that he was married to Nkatha and they had 4 children namely Dickson Mutethia, Denis Mwenda, Emanuel Murangiri and Roy Munene. His mother Teresia Ntundu(deceased) was the daughter to the deceased. The petitioner/1st respondent is the mother to Teresia and wife to the deceased, while the 2nd and 3rd respondents are his uncles. The 4th and 5th respondents are neighbours to his grandparents. He adopted the averments in his affidavit sworn on 2/9/2019 and the supplementary affidavit sworn on 31/10/2019 as his evidence in chief. He stated that he had obtained letters of administration ad litem (Exh. O1), in order to pursue his mother's share of the deceased estate. He also produced the chief's letter as Exh. O2 and the death certificate as Exh. O3. He wanted the estate property to be divided equally among the four beneficiaries, and produced copy of the green card as Exh. O4 and the certificate of confirmation of grant as Exh. O5. As per the case he had filed at Maua, the court directed him to pursue his claim in this cause. He produced the proceedings in that case as Exh. O6 and the judgement as Exh. O7. He stated that he has been living on that land even before the case started and denied being involved or informed. Whereas the 1st respondent testified that his mother was born out of wedlock, Joseph Gitonga testified in Maua that Teresia was one of the children of the deceased. In Kimeru traditions, if you marry a woman with a child, the child becomes yours. The applicant, now aged 45 years, was born and brought up in the home of the deceased and the petitioner, and he was never told that his mother was not a child of that family. The deceased died while he was on the land and therefore it was wrong for the land to be divided without his involvement.

16. During cross examination, he refuted the claims by the petitioner that his mother was not a child to the deceased. He maintained that the petitioner had another land in Timau where she lives, and confirmed that he had stayed there with her when his mother died. He stated that he did not know any of his siblings and that he knew his mother was buried in Timau. He knew his mother was married in Timau but he had never gone to that home. He stated that he was referred by the Maua court to this court, although the judgement said the case was dismissed. He knew the 2 children of the deceased had a right to inherit and sell, but he ought to have been told. He did not know whether the people to whom the land was sold had titles thereto. He did not either know that the only land in the name of Mwari is L.R No.3559 measuring 0.69 Acres, or that the petitioner had given out that land to Joshua and remained with only 0.20 Acres. He knew the deceased herein was buried on the land of Joshua Gichunge. The deceased had many children and all were given land by him except the 2 in this cause and his mother. His claim was only on the subject property, which was left for the petitioner and her children. He had been charged with damage to property, yet he was the person who had planted the miraa on part of the land, while the petitioner did not carry any development on the land.

17. During re-examination, he maintained that the suit property was for the petitioner and her children, including his mother. He had claimed against the purchasers because he knew them and they had bought the land without taking his interests into account. He was on the land as they fenced it and was left in the deceased home when his mother was married. He filed a case at Maua on behalf of his mother's estate. He was not challenging his uncles' shares provided that he got his mother's share.

18. When he was questioned by the court, he stated that he started living there in 2000 and that his 2 uncles live in Timau. He stated that he has fenced the part of the land he was using and even connected water to it. The green card for L.R ITHIMA/NTUNENE/3559 was produced by consent as Exh. O8.

19. Counsel for the applicant pointed out that they would no longer be pursuing the legibility of the petitioner as the administrator, but were only interested with the issue of distribution.

20. After adoption of the two affidavits by the 4th and 5th respondents sworn on 14/2/2020 as their evidence in chief, the 5th respondent was put in the witness box for purposes of cross examination.

21. During cross examination, the 5th respondent stated that he did not know the deceased, and only knew the petitioner and her children at the time he was buying the land in 2011. Although they were living in the same location, the petitioner and her children never lived there. There were no buildings on the part of the suit property he bought. It was L.R No. ITHIMA/NTUNENE/ 3557 belonging to the 2nd respondent, which he then fenced with a barbed wire. He has not built on the part he bought because he uses it for farming. In 2020, he had pending cases with the applicant for destroying his fence, after which he made a complaint. Prior to 2020, there was only the Maua case, but there had been no other squabbles. The Maua case was filed in Meru but later transferred there in 2011.

22. During re-examination, he stated that the Maua case, which was later dismissed, had been filed by the applicant. After the said dismissal, the applicant cut his fence. He maintained that he was the proprietor of the part sold to him, having followed all procedures and no objection was raised. He used the land to plant miraa, maize and trees and the applicant had never used the land since he bought it.

23. The court on 1/2/2021 gave timelines within which to file and exchange the respective parties' submissions, which were filed on 14/6/2021 and 22/6/2021. The interested party/applicant submitted that the deceased was the 1st respondent's husband and the father to the 2nd and 3rd respondents. The 4th and 5th respondents bought portions of the suit property, which has since been sub divided, from the 2nd and 3rd respondents. The interested party, being a son to Teresia Ntundu, a child to the deceased, was disinherited. He submitted that in 2014, he was at his home, situated in the suit property, when the 4th and 5th respondents stormed into his home accompanied by the 2nd and 3rd respondents, and they sought to evict him claiming that they had bought the land, yet he had lived there for decades with his family and carried out extensive developments, even when the deceased was alive. While the interested party had rushed to court vide Maua CMCC No. 247/2014 to claim trust, he discovered that this cause had been filed without his information or consent, yet his mother was the deceased daughter. He produced the proceedings of the case at Maua, to show that the 1st respondent and the other respondents conceded that his mother was a child to the deceased. He accused the 1st - 3rd respondents for concealing from the court the fact that, the deceased had a daughter, Teresia, whose son, the interested party, was living on the suit property. As a result of the said concealment of material facts, the estate of Teresia Ntundu (and by extension her son, the interested party herein) were disinherited, since the suit property was only shared between the 1st - 3rd respondents. Thereafter, the 2nd and 3rd respondents hurriedly colluded with the 4th and 5th respondents, and sold their whole shares to them, in total disregard of the interested party's relationship with the 1st - 3rd respondents and his developments on the suit property. They then unsuccessfully sought to evict him therefrom, and after conclusion of the civil suit at Maua, the court directed him to pursue his claim here. Although the 1st respondent testified that she did not disclose that she had a daughter namely Teresia because she was born out of wedlock, the 1st respondent further stated that the said Teresia was brought up and married off by the deceased. Therefore, it would be true to say that the deceased had adopted the said Teresia as his own daughter, when he married her mother. He faulted the 1st respondent of failing to adduce documentary evidence like official search to show that she owned the land in Timau. He urged the court to find that there was fraudulent concealment of material facts during distribution, to warrant cancellation of the 1st - 3rd respondents' titles. He further urged the court to find that Teresia Ntundu (deceased) was a daughter to the deceased, and therefore a sufficient reason to have the estate redistributed equally among the 4 beneficiaries. He cited the case of **Ibrahim v Hassan & Charles Kimenyi Macharia, Interested party(2019)eKLR** in support of his submissions.

24. The petitioner/1st respondent submitted that the deceased had shared his estate equitably to his wives before his demise. Some beneficiaries came to court to be assisted to have their shares transferred to them, because the deceased had passed on before transfer. The suit property, which was left to the petitioner, by virtue of being a wife to the deceased, is the only one in issue. She maintained that she had two sons with the deceased, namely Peter Michobi Kiringuri and William Mwathalie M'Arungu. She had a daughter with another man namely Teresia Ntundu, the objector's mother, before she was married by the deceased herein. The case at Maua alluded to by interested party in his submissions, was dismissed.

25. On whether the applicant is a dependant or a beneficiary of the estate of the deceased, she submitted that applicant being a son to Teresia, who was not a daughter to the deceased, cannot legally claim to be entitled to the deceased estate. The petitioner, being the applicant's grandmother was better suited to know who Teresia's father was. She submitted that neither the applicant nor his mother could claim any part of the estate of the deceased, because that would be against the provisions of Section 29 of the Law of Succession Act. She maintained that she was justified to only share her deceased husband's estate with her 2 sons. She supported the subsequent transfers of L.R No ITHIMA/NTUNENE/3557 and 3558 by the 2nd and 3rd respondents to the 4th and 5th respondents, who took exclusive use, possession and development of their respective properties legally acquired. The 4th and 5th respondents, having bought their properties from persons who had lawfully and regularly acquired the same, and after due process, then they were protected by Section 93 of the Law of Succession Act. The petitioner was left with L.R No. ITHIMA/NTUNENE/3559 measuring 0.28 Ha, which she subsequently bequeathed to persons of her choice. She offered the applicant, who is her grandson, her property in Timau, but he declined, and he forcefully and illegally purported to occupy L.R No. ITHIMA/NTUNENE/3559, without her consent. She submitted that she used to live with the applicant in Timau, where she intended to settle him, but he declined and started suing her to claim the Ntunene land, despite her advanced age.

26. She submitted that the evidence of the applicant did not shake her testimony and that of the other respondents. She stated that the applicant had failed to prove whether his mother was a daughter to the deceased or whether she was adopted by him. She cited the provisions of Section 107 of the Evidence Act that, the burden of proof lied on the applicant, to prove his claim. She urged the court to disregard the evidence in CMCC No. 247/2014, and only adopt her evidence as adduced herein. She submitted that the applicant had not tendered any evidence to show that his mother was a child to the deceased, to warrant revocation of the grant herein, and prayed for dismissal of his application with costs.

27. On 28/9/2021, parties were called upon to highlight their submissions. Mr. Ngunjiri for the interested party submitted that, the applicant was a son to a daughter to the deceased, namely Teresia. The interested party was bringing the application on behalf of the estate of his mother. He refuted the petitioner's claim that she had given her land to Joseph, a grandson and brother to the applicant in Timau. He also refuted the petitioner's claim that she had given the interested party land in Timau, which he had declined, as shown at paragraph 21 of Exh. O6. He submitted that the only reason the interested party was being denied a share of the deceased estate was because, he is a son to a daughter. He submitted that the petitioner, the 2nd and 4th respondents had admitted in their testimonies at pages 20, 23 and 29 of Exh. O6 that, Teresia was a daughter to the deceased. He went on to state that Teresia was a daughter to the deceased, and therefore entitled to a share of the estate.

28. In rejoinder, Mr. Anampiu for the 1st respondent reiterated that they were relying on the replying affidavit sworn on 30/9/2019 and the testimonies of the other respondents. He stated that the deceased had made provision for all his children prior to his death, and that the suit property was meant for the house of the petitioner. He urged the court not to evaluate the evidence disclosed in the proceedings at Maua. According to him, the authority cited by the applicant has been stretched too far because the circumstances are distinguishable. In praying for the dismissal of the application, he urged the court to consider the evidence and find that the 1st respondent was entitled to share the suit property as she liked.

29. Mr. Ngunjiri asserted that the authority cited was relevant to this case.

Analysis and determination

30. I have anxiously considered the affidavit and oral evidence led by the parties together with the submissions on record and the authorities cited thereon. From such material, it is common place that the applicant is a grandson to the petitioner by virtue of being a son to a her daughter called Teresia Ntundu and that in bringing these proceedings, the said Teresia Ntundu was never disclosed nor her children provided for in distribution of the estate. It is also common ground that the subject land was shared out to the 1st, 2nd and 3rd respondents and further that the 2nd and 3rd respondent have since transferred their respective shares to the 4th and 5th respondents on the strength of the certificate of confirmation of grant issued by the court. Since the parties consented and agreed that the petitioner remains the administrator, stet the prayer for revocation is abandoned and that the court determines if the applicant is entitled to a share in the estate, the only issue for determination by the court must be limited to whether the applicant is entitled to a share of the estate. However, even if it was alive issue whether the applicant was to be consulted and his consent sought by the petitioner, I would find that the failure to disclose the existence of a grandson or seek his consent in applying for the grant would not justify revocation of the grant. This I say on the appreciation that being a grandchild, the applicant doesn't stand in *pari passu* with the 1st to 3rd respondents^[1]. He in fact is not a beneficiary of the estate directly but can only claim through the mother even when deceased. His claim therefore doesn't fit on the prerequisites of Section 76 of the Law of Succession Act which sets out the requirements for revocation or annulment of grant. I find no sufficient proof that the grant was procured by proceedings that were defective in substance or that it was obtained by fraudulent statement or concealment of material fact to the case.

31. On whether the applicant is a beneficiary to the estate by virtue of being a grandson, there is one uncontroverted fact of evidence on whether or not the applicant's mother was a child to the deceased. In her evidence, the petitioner was adamant that the applicant's mother was never a child of the deceased and that being so, when the applicant's mother died the petitioner opted to bury her in her own land given to her by one M'Ángaine which land he offered to the applicant but the applicant declined. That evidence was never meaningfully challenged and I do find that the applicant's mother was not a child of the deceased. That being the case, it follows that the claim of the applicant, being dependent upon the rights of his mother, cannot succeed but fails. I find that the applicant is not entitled to a share in the deceased's estate.

32. Accordingly I find no merit in the application which is ordered dismissed with no orders as to costs.

DATED SIGNED AND DELIVERED AT MERU THIS 18TH DAY OF NOVEMBER, 2021

Patrick J.O Otieno

Judge

In presence of

Mr. Anampiu for the petitioner/respondent

Mr. Ngunjiri for applicant

Patrick J.O Otieno

Judge

[1] Section 66, Law of Succession Act.