



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 619 OF 2015**

**IN THE MATTER OF THE ESTATE OF MARTIN MIRITI MUKIRA (DECEASED)**

**JANET MWITU.....PETITIONER**

**VERSUS**

**BENJAMIN MURERWA MUTHAMIA.....PROTESTER**

**RULING**

1. Martin Miriti Mukira, the deceased, died on 1<sup>st</sup> December 2008. The Petitioner, Janet Mwituu, a widow to the deceased filed a Petition for Letters of Administration and was granted letters of administration on 30<sup>th</sup> November 2015. She thereafter filed summons for confirmation of grant dated 16<sup>th</sup> June 2018. She disclosed that two of the deceased's sons are deceased and their portions should thus go to their children and the proposed mode of distribution is therefore as follows: -

**Land Parcel No. Abothuguchi/U/Kaongo/1380 (Measuring 1.715 Ha)**

- i) Janet Mwiituu Miriti – 0.715 Ha***
- ii) Gideon Kamundi Miriti – 0.30 Ha***
- iii) Children of Simon Gitonga Miriti (Deceased Son) – 0.30 Ha jointly***
- iv) Zipporah Mwendwa Miriti – 0.10 Ha***
- v) Children of Charles Kirugi (Deceased Son – 0.3 Ha jointly***

2. It is that application which attracted the protest by the affidavit sworn on 22<sup>nd</sup> December 2016.

***The Petitioner's case***

3. The Petitioner filed a statement dated 17<sup>th</sup> March 2018 in which she urges that she is the widow of the deceased and that her children are as above named, 2 of who are deceased and 2 are alive. She denies the Protestor's claim as a purchaser and asserts that the land which she is aware was sold to the Protestor is one acre out of Land Parcel No. Abothuguchi/U/Kaongo/1379 which was already transferred to the Protestor and that the said land is distinct and separate from Land Parcel No. Abothuguchi/U/Kaongo/1380. She urges that she is not aware of any other land that the deceased sold to the Protestor or to any other person. She prays for the protest to be dismissed. She urges that neither herself nor her children were involved in the alleged sale of the subject property and that the property is matrimonial property and she ought to have been involved if there was any sale.

***The Protest***

4. By his affidavit of protest sworn on 22<sup>nd</sup> December 2016 and a witness statement dated 1<sup>st</sup> March 2019, the Protestor objects to the grant being confirmed as proposed on the basis that the Petitioner failed to disclose all the liability of the estate of the deceased. He urges that on 30<sup>th</sup> July 2008, prior to his death, the deceased had agreed to sell to him one acre out of Land Parcel No. Abothuguchi/U/Kaongo/1380 for Ksh 42,000/=, out of which amount he paid a total of Ksh 17,000/= at the time of execution of the written sale agreement with the balance becoming due after transfer. Despite the terms of the said agreement on payment of the balance, the deceased, who had started ailing asked him to top up on the purchase price, which he did and was ultimately left with a balance of only Ksh 7,300/=.

5. He added that in his written will, the deceased indicated that he, the Protestor, was among those who were to get shares of his Land Parcel No. Abothuguchi/U/Kaongo/1380 and that upon his death, he approached the deceased's family to file a succession cause so that he could get his portion but they appeared uninterested, leading him to file Meru Succession Cause No. 309 of 2015. He urges that as a reaction, the Petitioner filed the instant succession cause without his notice and that he lodged a caution on the property on 22<sup>nd</sup> October 2013 which fact was concealed by the Petitioner who exhibited a search certificate issued on 5<sup>th</sup> September 2005.

6. In his statement, he claims that upon the deceased's death, he went together with Peter Muthee Mwaja to see the deceased's widow, the Petitioner herein and that she confirmed to him that she was aware of the portion the deceased had sold to him and that he could cultivate thereon and pay the balance.

7. In support of his protest, one Peter Muthee Mwaja swore a statement dated 1<sup>st</sup> March 2019 and asserted that being a village elder of Ndaruga Sub-location in Nkandone. He states that he knew the deceased who was a member of his clan. He recalled that sometime in 2008, the deceased's wife informed him that the deceased wanted him and the Chief, Japhet Muthinga Gitura to go to his house so that he could sell to them something. Together with the Chief, they went and the deceased informed him of the sale agreement he had entered into with the Protestor but that he needed assistance because he was unable to reach the Protestor so that they could finalize the sale agreement. That while at the deceased's house, the Chief phoned the Protestor and the deceased had a chance to speak to the Protestor and thereafter, the deceased told them that he had sold to the Protestor one acre of land so that he could get funds to take care of his wife, the Petitioner, when she was sick and that now that he was ailing, they had agreed with his wife to sell another acre to the Protestor to get money for treatment. The deceased then said to them that should he pass on, the Protestor should finance the succession cause and be allocated his portion and that the balance should be shared between his son Gideon (one acre), Jonny Kirugi (one acre) and the balance to his wife and daughter Mwendwa. He urges that on a later date, the Chief called him and asked him to accompany him to the deceased's house and while there, Robert Kibunja came and gave the deceased Ksh 10,000/= which he said to have been from the Protestor. The Chief then informed the deceased that he had the will which he had taken for typing so that the deceased and his wife could sign and that he gave the deceased the will and both the deceased and his wife signed and left them with one copy as he took the other copy.

8. In further support of the protest is a statement dated 1<sup>st</sup> March 2019 filed by Robert Kibunja Kironco who confirmed that the Protestor at one time sent him Ksh 2,000/= and Ksh 10,000/= on another occasion and asked him to deliver the money to the deceased, which he did.

9. In his submissions, the Protestor urges that during hearing, the Petitioner confirmed that the identity card number and the thumb print on the will belong to her.

10. The Protestor and his witnesses all attended Court during hearing and adopted the contents of their statements as evidence in chief and were cross-examined on such evidence.

### ***Determination***

11. The single issue arising for determination is whether or not to include the Protestor as a beneficiary of one acre of Land Parcel No. Abothuguchi/U/Kaongo/1380 alongside the other beneficiaries on the basis that he is a purchaser of one acre of the suit property from the deceased.

12. He claims that the deceased had sold to him one acre of the said parcel prior to his death, and he had in fact already paid a substantial amount of the consideration by the time of the deceased's death. He has annexed an agreement for sale of land dated 30<sup>th</sup> July 2008 between him and the deceased for the sale of one acre of land of Land Parcel No. Abothuguchi/U/Kaongo/1380 for a consideration of Ksh 42,000/=. Also exhibited is a will by the deceased witnessed by the Chief and signed by the deceased's wife, the Petitioner, alongside the deceased. The will is said to have been written on 12<sup>th</sup> October 2008. In the will, the Protestor is to get  $\frac{3}{4}$  acre of the suit property. The Protestor has also attached citation papers and a caution to support his claim.

13. The Petitioner on the other hand denies that the deceased sold the one acre of the suit property to the Protestor but admitted on cross-examination that she signed the will because she thought that the Protestor already had the land. In their opening statement, the Petitioner's Counsel stated that the Petitioner's resistance to the protest is based on the sole fact that the Petitioner was not involved in the sale of the alleged one acre of the suit property to the Protestor.

14. The Petitioner's case is that the suit property was matrimonial property and if any portion thereof was to be sold, she ought to have been involved. The Court, however, considers that any challenge to the said sale on the basis of the property being matrimonial property thus requiring spousal consent before sale would be a matter within the jurisdiction of the Environment and Land Court. It may also be a matter within the jurisdiction of the High Court properly constituted as a matrimonial property Court, if there is a question on whether the property is in fact matrimonial property. The Court considers that the issue raised by the Petitioner, however valid, is not an issue to be canvassed in a succession cause.

15. With respect to the Protestor's claim that he is entitled to one acre which he bought from the deceased, the Court considers that other than the sale agreement and his averments that he paid a substantial sum of the purchase price, the only other evidence he called to prove that he paid the purchase price is the statement of Robert Kibunja, the person who was allegedly sent to deliver money to the deceased. The Court does not consider this to be sufficient evidence to confirm that the Protestor paid the portion of the purchase price he claims to have paid. It remains questionable whether the Protestor paid the purchase price as there is no documentary evidence to prove this fact.

16. To confirm that he is entitled to the one acre of the suit property as a purchaser, the Protestor has also relied on the will purportedly signed by the deceased to support his claim and the evidence of Peter Muthee Mwaja who purportedly heard the deceased state that him and his wife had made a decision to sell the suit property. The Court has taken note of the fact that the Petitioner did not challenge the authenticity of the will but merely states that she signed it thinking the property had already been transferred to the deceased. It is however questionable as to why she went ahead and executed the will which clearly showed that the Protestor was allocated  $\frac{3}{4}$  of an acre out of the

suit property. This Court considers that the above questions give rise to the question of whether or not a sale took place and if so, whether the contract can be enforced.

17. This Court considers that before the Protestor can rightfully be considered a beneficiary, he has to prove that he has an interest in the one acre he claims, by proving that indeed the sale agreement he has exhibited was effected. His is a matter of enforcement of contract intended to prove ownership of property which this Court does not have jurisdiction to entertain. Of course the validity and enforceability of the alleged contract must go to the Environment and Land.

18. The jurisdiction of this Court is limited to succession matters and this Court will thus not go into the merits of whether the contract can be enforced. **In Re Estate of G K K (Deceased) [2017] eKLR** Musyoka J, stated as follows: -

***“The primary function of a probate court is distribution of the estate of a dead person.”***

19. I respectfully agree with the decision by Musyoka J **In re Estate of Mbai Wainaina (Deceased)**, High Court Succession Cause Number 864 of 1996 [2015] eKLR, where the learned Judge held as follows with respect to claims of trust arising in succession matters: -

***“16. The applicants claim that Kiganjo/Gachika/460 was held by the deceased in trust for them, and therefore that makes them heirs to his estate.***

***17. Whether the deceased held Kiganjo/Gachika/460 in trust for the applicants is a matter of both fact and law. It is incumbent upon the applicants to establish that such trust did exist. The issue is that the applicants have provided material upon which I can conclude whether such trust existed or not. I have not seen material from what is deposed in the affidavit sworn on 17<sup>th</sup> April 2012 by John Ng’ang’a Wainaina in support of the application.***

***18. Even if there was material establishing that there was such a trust, I doubt that that would be a matter for the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declarations of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”***

20. In this case I do find that whether there was a sale of the estate property is a cause to enforce contract over land. This court lacks jurisdiction over that dispute. It ought to go before the environment and land court as a claim against the estate to be pursued against the estate through the administrators.

21. The importance of Courts respecting the limits of their jurisdiction was emphasized by the Supreme Court in **Petition No. 5 of 2015, Republic v Karisa Chengo & 2 others [2017] eKLR**, as follows: -

***“[79] It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2).”***

22. The Court will thus decline the protest and will confirm the grant as proposed by the Petitioner. In doing so, I am not dismissing the claim of title to land. I am leaving it to the competent court in that regard.

## **RENDITION**

23. Accordingly, for the reasons set out above, this Court makes the following orders: -

***i) The grant made on 30<sup>th</sup> November 2011 be and is hereby rectified with the following mode of distribution: -***

***Land Parcel No. Abothuguchi/U/Kaongo/1380 (Measuring 1.715 Ha)***

***(a) Janet Mwiitu Miriti – 0.715 Ha.***

***(b) Gideon Kamundi Miriti – 0.30 Ha.***

***(c) Children of Simon Gitonga Miriti (Deceased Son) – 0.30 Ha jointly.***

***(d) Zipporah Mwendwa Miriti – 0.10 Ha.***

***(e) Children of Charles Kirugi (Deceased Son – 0.3 Ha jointly***

*ii) There shall be no order as to costs.*

**DATED SIGNED AND DELIVERED THIS 17<sup>TH</sup> DAY OF DECEMBER 2021**

**PATRICK J.O OTIENO**

**JUDGE**

**In presence of**

**No appearance for M/S Gikunda Anampiu & Co. Advocates for the Petitioner**

**No appearance for M/S Wilson P. Mburugu & Co. Advocates for the Protestor**

**PATRICK J.O OTIENO**

**JUDGE**