



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 639 OF 2011

IN THE MATTER OF THE ESTATE OF KABURUKI KIRUJA Alias KABURUKI M'KIRUJA

M'ANAMPIU KABURUKI.....PETITIONER/RESPONDENT

VERSUS

GERALD KINYURU KABURU.....OBJECTOR/APPLICANT

R U L I N G

1. This is a ruling on the Summons dated 17/10/2019 brought by the objector under **section 74 of the Law of Succession Act, Cap 160, and Rule 43 of the Probate and Administration Rules**. The summons seeks that the grant issued on 3/7/2019 be rectified as it had erroneously omitted him. He sought that the property known as **Abothuguchi/Kariene/1617** be shared equally among the three sons of the deceased.
2. In the supporting affidavit, he swore that this Court had found as a matter of fact vide its ruling of 2/5/19, that the property should be shared equally under **section 38 of the Law of Succession Act**.
3. The application was opposed vide the replying affidavit of the petitioner, **M'Anampiu Kaburuki** sworn on 15/11/2019. He contended that there was no error in the grant as confirmed. That the property had been properly distributed to him and **Angelo Kaburuki** alone. That the objector did not take care of the deceased at the time of his ailment and he never attended his burial for his own reasons. For that reason, the petitioner prayed that the application be dismissed but in the event the Court was willing to distribute anything to the objector, he be given only 0.5 ha.
4. The Counsels for the respective parties indicated that they will rely on their respective client's affidavits. I have carefully considered the affidavits on record and the entire record.
5. The grant was first confirmed on 5/2/2013. It was later rectified on 27/5/2014. The objector contested the rectification on the grounds that the shares were given in acres instead of hectares. At the time, he produced a search certificate showing that the property known as **Abothuguchi/Kariene/2617** measures 3.15 ha and not 3.15 acres as per the search certificate produced and relied on by the petitioner.
6. Vide this Court's ruling of 2/5/19, the Land Registrar was directed to file a fresh search certificate or copy of the records to verify the correct acreage. Pursuant thereto, a certified copy of the records was produced in Court on 18/6/2019 which showed that the correct acreage was as contended by the objector, ie 3.15 ha and not 3.15 acres.
7. It is then that the Court ordered that the said property be distributed in accordance with **section 38 of the Law of Succession Act** and distributed the same to **M'Anampiu Kaburuki and Angelo Kaburuki** only. Obviously, that must have been an oversight or error on the part of the Court. In its ruling of 2/5/19, the Court had properly identified the sons of the deceased as being three, the objector included.
8. Accordingly, the application by the objector has merit. The contentions by the petitioner have no merit. If the deceased had been fed up by the objector for not taking care of him, nothing would have been easier than to will his property while alive and leave the objector out. Having not done so, he intended that at his demise, his property be subject to the intestacy rules.
9. The estate had two properties, **Abothuguchi/Kariene/2617** and **Abothuguchi/Igane/970**. The latter property was distributed to the petitioner and the objector equally each of them getting 0.537 acres. **Angelo Kaburuki** did not benefit from the said property. Obviously, he cannot get an equal share in **Abothuguchi/Kariene/2617** as the other two. He must be compensated for that portion they got in the other property if the equality principle set out in **section 38 of the Law of Succession Act** is to apply.
10. Accordingly, the application is allowed, the grant is now rectified and the property known as **Abothuguchi/Kariene/2617** distributed as follows:-

- a) M'Anampiu Kaburuki - 1 ha
- b) Angelo Kaburuki - 1.15 ha
- c) Gerald Kinyari Kaburu - 1 ha

It is so ordered.

DATED and DELIVERED at Meru this 30th day of January, 2020.

A. MABEYA

JUDGE