



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 197 OF 1997**

**IN THE MATTER OF THE ESTATE OF M' TWERANDU M' MURUNGI (DECEASED)**

**M'RUKARIA M' TWERANDU.....PETITIONER**

**VERSUS**

**LEONARD KIMEU MWANTHI.....OBJECTOR**

**RULING**

**Turning of tables**

1. Of the cases I have seen, this has interesting turns. To understand this statement, I will give a detailed account of the history of the case.
2. **Mtwerandu M' Murungi** (the deceased herein) died on 20/09/1989. **M'Rukaria M'Twerandu** (the petitioner herein) petitioned for letters of administration on 31/07/1997 listing fifteen beneficiaries and one asset i.e. **Ntima/Igoki/3183**. The petitioner was issued with a grant for letters of administration on 21/01/1998. He subsequently filed for summons for confirmation of grant and the same was confirmed on 21/05/1998.
3. The objector herein filed objection proceedings on 6/7/1998. He stated that he owned **Ntima/Igoki/3183** in common with the deceased and that he bought ½ an acre from the deceased. He asked the court to revoke the grant and further hold that he is entitled to 1 ½ an acre from the estate of the deceased. He also prayed for an order of inhibition over Ntima/Igoki/3183.
4. On 4<sup>th</sup> July 2012 **Kasanga Mulwa J.** dismissed the application by the objector. In his determination he held;

**“Normally one administers the estate of the deceased whether realty or personal. There is no way the grant of letters of administration of the petitioner can endanger a registered interest in land. If indeed the applicant is registered in common with the deceased then the petitioner shall only administer that part of the land that belongs to the deceased.**

**And if the applicant has a claim against the estate then it is contrary to his interest that the grant be annulled because in essence there will be nobody to claim against. However, to protect the interest of the applicant. I hereby order that an inhibition be placed on L.r. No. Ntima Igoki/3183 until the applicant brings a proper claim against the estate.”**
5. Following the Ruling dated 4/7/2002 the objector lodged a case in **Meru Civil Case No. 119 of 2003 Dr. Leonard Kimeu Mwanthi versus M'Rukaria M' Twerandu M' Irungu** seeking a permanent injunction over 1 ½ acres in Ntima/Igoki/3183, partitioning of Ntima/Igoki/3183 and transfer thereof. The court in Meru Cmcc No. 119 of 2003 dismissed the objector's suit and held;

**“It has not been shown or demonstrated by the plaintiff that such consent (Under Section 6 & 7 of the Land Control Act Cap 302).....was obtained within the stipulated period of six (6) months from the date of Sale.....It follows therefore that the entire Sale transaction between the defendant's late father and the plaintiff became a nullity. This court cannot enforce a nullity. It follows therefore that the only resolve now open to the plaintiff is for him to claim from the estate of the defendants late father a refund of any monies paid to the defendants late father as consideration.”**
- 6 Subsequently the petitioner filed application dated 16/08/2010 seeking this court to discharge the inhibition and caution placed on Ntima/Igoki/3183. This court considered the application and on 19/11/2010, Lessit J allowed it.
7. Aggrieved by the decision made by Lessit J on 19/11/2010 the objector filed an appeal in **Civil Appeal No. 28 of 2011**. The appeal was heard and eventually dismissed on 10/12/2013. The court of appeal held as follows;

**“We have noted that the appellants application for revocation of grant was dismissed; he was not claiming as a beneficiary of the deceased estate but as an owner of a defined and registered portion of land. The civil claim was also dismissed, considering the matter had been in court for many years, we are satisfied that the judge properly exercised her discretion and made the orders that she made.”**

8. On 10/12/2010 the petitioner filed an application seeking the court to rectify the title in Ntima/Igoki/3183 to only read the name of the deceased. He also sought the dispensation of the production of the title. This court considered and allowed the application through its ruling dated 5/09/2016. In allowing the application this court held as follows;

**“The Respondents appeal was dismissed by the court of appeal on 10<sup>th</sup> December 2013. Similarly the Respondents claim that he owned the property together with the Deceased was determined in a civil suit filed for that purpose; it was dismissed. The final judgement of the trial court on that issue has not been overturned or set aside or varied or reviewed- in short it stands and is decisive on the ownership claims being put further by the Respondent on the estate property. Accordingly, I do not think the Respondent could have any further claim over this land especially within this cause; the property is therefore, the estate property which should be administered in accordance with the confirmed grant herein. Fraud has been argued especially on how the Respondent got himself registered in the land. But considering all factors, justice of this case has been revealed by the facts of the case. In absence of any other material, the Respondent is merely an intermeddler in the estate of the property and is a stumbling block to the implementation of the confirmed grant herein.”**

9. The objector has now filed application dated 17<sup>th</sup> December 2018 based on Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. He seeks the following Orders;

**1. That the Orders made in the Ruling dated and delivered on 5/9/2016 be set aside and the petitioner/respondents summons dated 10/12/2010 be dismissed with costs to the objector/applicant.**

**2. That the land Registrar, Meru be directed to cancel all the subdivisions resulting in L.r. No. Ntima/Igoki/3183 and reinstate the objector/applicant Leonard Kimeu Mwanthi and M'twerandu M'Iriungi as co-registered owners of L.r. NTIMA/Igoki/3183 Just as they were before delivery of the ruling dated 5/09/2016.**

10. The application was supported by the sworn affidavit of **Leonard Kimeu Mwanthi** and predicated on the grounds that before the delivery of the subject ruling the applicant had lodged an appeal in **Meru ELC Appeal No. 92 of 2010 Dr. Leonard Kimeu Mwanthi VERSUS Rukaria M'Itwerandu M'irindu**. That the applicant won the Elc Appeal and that judgement has not been challenged. That the applicant supplied evidence of his said appeal, but it was not considered. That the petitioner subdivided the subject parcel of land into several portions. That the applicant risks to lose his portion of the said land which is very prime in Kinoru Area. The applicant submitted that the application is not time barred and he sought reference to paragraphs 1,2,6 & 8 of the decision of the court of appeal in Civil Appeal No. 28 of 2011. He stated that the Respondents Preliminary objection to the application are purely factual in nature, they are not supported by averments sworn in an affidavit hence it does not have any evidential garb.

11/. The Respondent raised six grounds in their preliminary objection dated 5<sup>th</sup> November 2018 i.e.;

**i. The application is similar to his earlier application dated 6/7/1998and determined by the court on 4/7/2002 by Hon. Kasanga Mulwa and a subsequent judgement of Lessit J DATED 19/11/2010.**

**ii. That the application is overtaken by events on account of the Court of Appeal judgement in Civil case No. 28 of 2011 dated 10<sup>th</sup> December 2012.**

**iii. That the application offends other dependants and 3<sup>rd</sup> party rights to property as enshrined in the constitution.**

**iv. That there has been long continuous litigation over the suit land with the petitioner being the victor and allowing the estate to be shared as ordered until the instant application.**

**v. That the application is time barred on account there were no orders preventing the respondent as an administrator to discharge his duty under the estate.**

**vi. That the application cannot be sustained on account that the estate has been shared out.**

12. The respondent also filed submissions restating the preliminary objection

#### **Analysis and Determination**

13. Tables have turned. The Applicant is now a holder of a decree pronouncing him to be the owner of 1 ½ acres in **L.R. Ntima/Igoki/3183**. The court also directed he be so registered. See the specific orders in the decision of ELC in MERU ELC CIVIL APPEAL NO 92 OF 2010 that;

**i. The judgement delivered on 29/7/2010 in Meru Court Civil Case No. 119 of 2003, the decree thereof and all consequential orders are hereby set aside.**

ii. An order be and is hereby issued for the partition of Ntima/Igoki/3183 whereby the appellant is to be registered as the owner of 1 ½ acres of that land. The remainder of the land is to be registered in the names of the persons appearing in the confirmed grant.

iii. The executive officer of this court be and is hereby authorized to sign all the documents which are necessary to effect the judgement of this court.

iv. A permanent injunction be and is hereby issued restraining the respondent from interfering with the appellants portion of land Ntima/Igoki/3183 which is 1 ½ acres.

v. The appellant is awarded costs of the suit in the lower court and in the Elc Court.

14. The turn of events put all at cross-roads. I do not therefore wish to treat this case under Preliminary objection raised, for the points raised are riddled in factual dispositions. Needless to state that points raised require intense and thorough interrogation by the court.

15. The Applicant wasted a lot of time pursuing his claim through these succession proceedings instead of pursuing his appeal. Nevertheless, now the question of ownership has been determined in ELC Appeal No. 92 of 2010. The said decision is in force. I only hope this will be the final judgment on the issue. Be that as it may, the decree ought to be given effect by this court. I am however alive to the fact that the land has been transferred to 3<sup>rd</sup> parties; and this has been admitted by the applicant from the search records attached in support of the application i.e. Ntima/ Igoki/9605 transferred to one Dorothy Muthoni Ikiara. That notwithstanding, the right of the applicant must be enforced. On hindsight, had the applicant invoked rule 41 of the Probate and Administration Rules perhaps the disputed portion would have been set aside to abide by the determination of ELC: and things would have been different. This little procedure provided in rule 41 serves real practical objective. But that is water under the bridge.

16. On giving effect of such decree, see **Musyoka J In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR** that:

**“With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.**

**Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”**

17. Now, as boldly as the court pronounced itself before on the basis of facts prevailing at the time, so also shall it pronounce itself here. I note the decree in ELC Appeal No. 92 of 2010 is clear and self-executing. I need only to formally give it effect in these proceedings. Accordingly, I review earlier order declaring the entire portion herein to be the estate property. I now declare that in accordance with the decision of ELC above which declared 1 ½ acres in **L.R.No. Ntima/Igoki/1383** to belong to the Applicant, the balance thereof is what constitutes the estate property to be shared amongst the beneficiaries stated in the grant. It is so ordered.

**Dated, signed and delivered in open court this 27<sup>th</sup> day of February, 2020**

-----  
**F. GIKONYO**

**JUDGE**

**In presence**

Ogoti for applicant

Ogoti Holding brief for Mulunga for petitioner

Leonard present

Carlpeters for Leonard – absent

Murango for objector – absent

-----  
**F. GIKONYO**

**JUDGE**