



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 226 OF 2014

In The Matter Of The Estate Of Marete Naibara Alias I'marete Naibara (Deceased)

FRANCIS KIUNGA M' MARETE.....PETITIONER

-VS-

VERONICA KAGWIRIA.....OBJECTOR

CYPRIAN MUTIGA M'IKAO....INTERESTED PARTY

JUDGMENT

[1] The deceased herein *Nkiunga Kirichu Ncebere* died on 26<sup>th</sup> December 1965. As per the letter of the Chief he left behind the following survivors; *Marita Kinanu M'Marete (widow), Dorcas Andrew, Julian Angelo, Francis Kiunga, Benjamin Kiamenyi M' I'Marete*

[2] He also left behind the following assets; *NYAKI/NKABUNE/124 (2.63HA) & NYAKI/ MULATHANKARI/506 (0.08HA)*

[3] The petition for letters of Administration filed on 26<sup>th</sup> May 2014 was allegedly with consent of all the beneficiaries. It also listed *Marita Kinanu M'Marete (widow), Dorcas Andrew, Julian Angelo, Francis Kiunga, Benjamin Kiamenyi M' I'Marete, Joan Kagwiria Nguantai, Virginia Karoki and Veronica Kagwiria* as beneficiaries of the estate. The petition was gazette on 28<sup>th</sup> July 2014 and letters of administration were issued to the petitioner on 24<sup>th</sup> September 2014.

[4] The petitioner filed Summons for Confirmation of grant on 8<sup>th</sup> April 2015. He sought to divide the estate as hereunder;

*NYAKI/ MULATHANKARI/506 (0.08HA) - to Benjamin Kaimenyi*

*NYAKI/NKABUNE/124 (2.63HA) - to Dorcas Andrew (1.24), Julian Angelo (1.24), Benjamin Kaimenyi (1.24), Francis Kiunga (2.44)*

**Objection and protest**

[5] The objector, *Veronica Kagwiria*, filed objection proceedings on 9<sup>th</sup> June 2015 and averred that the petitioner secretly filed the petition, concealed material facts and that he never sought consent from the beneficiaries as averred. She also averred that she is a daughter of the deceased and that the mode of distribution prejudiced the widows of her brothers. She proposed that the estate should be divided equally amongst all beneficiaries of the estate.

[6] *Nanis Kanyiri Anjeru* also filed a protest on behalf of the estate of Anjeru Thiuru. She averred that the deceased had the following daughters: Veronica Kagwiria, Elizabeth Ntinyai, Virginia Kagwiria and Joan Kagwira. His sons were: Benjamin Kaimenyi, Francis Kiunga & Andrew Gitonga (deceased). She deposed further that the petitioner is holding another parcel in trust of the family. She proposed that the estate of the deceased should be distributed as follows;

*NYAKI/MULATHANKARI/506(0.08HA)-to go to the daughters &NYAKI/NKABUNE/124 (2.63HA) - to the sons.*

[7] *Elizabeth Ntinyari* also filed a protest dated 23<sup>rd</sup> March 2016 stating that the deceased was survived by eight (8) children. She also stated that the petition was filed secretly and that the estate should be divided equally. She also stated as was averred by Veronica Kagwiria in her affidavit dated 18<sup>th</sup> March 2016 that Julia Angelo Marete is now deceased but Survived by four (4) children.

[8] *Janaro Gitobu Gitonga* a son to Andrew Gitonga also made an affidavit dated 18<sup>th</sup> March 2016 claiming that Andrew Gitonga was given

a Parcel in NYAKI/NKABINE/124 measuring 1.24 acres and the half (1/2) of the said portion was transferred to him; thereon he has he has built a house.

[9] **Cyprian Mutiga M'Ikao** filed an application claiming to be a son of Pete M' Ikiao M' NAIBARA, a brother of the deceased and that the deceased was registered as owner of NYAKI/NYAKUBE/124 which was family land, thus, held it in trust for his father. He stated that his father filed a suit **in Meru Cmcc No. 412 of 1993 Pete M' Ikiao M' Naibara vs. Martha Kinanu M' Imarete** (wife of the deceased) where it was decreed that the father was entitled to 1.675Ha (3.5acres). He annexed a copy of the judgment dated 3<sup>rd</sup> March 1994 by S.A. Wammayi (C.M.) and decree issued in the year 1994.

[10] **Eustace Kamandi** also claimed a share by virtue of having a leasehold interest issued to him by the petitioner. But, wise counsel for Eustace Kamandi intimated that they shall seek their remedy at the Environment and Land Court.

[11] The petitioner, in his mode of distribution of 14<sup>th</sup> February 2017 proposed the estate to be distributes as hereunder;

**NYAKI/MULATHANKARI/506(0.08HA) -to Benjamin Kaimenyi- WHOLE**

**NYAKI/NKABUNE/124 (2.63HA) TO;**

**Francis Kiunga I' Marete**

**Estate of Veronicah Karoki**

**Joan Kagwiria Guantai EQUALLY**

**VeronicahKagwiria**

**Elizabeth Ntinyari**

**Estate of Andrew Gitonga**

**Estate of AnjeruThiuru**

[12] The objector also filed an affidavit dated 8<sup>th</sup> March 2017 claiming a share in Nyaki/Mulathankari/506. She also claimed that the land was ancestral land and that they lived in the land since childhood and that she has built a house there. She attached a photo of the house to affirm this position. The petitioner however averred that the position of the objector is not the true position and that it is Benjamin Kaimenyi who has made considerable development in Nyaki/ Mulathanki/506.

[13] Only the petitioner filed submissions disputing the position of the interested party and also submitted that the judgment in **Meru Cmcc Civil case No. 412 of 1993 Peter M' Ikiao M' Naibara vs. Martha Kinanu M'Imarete**. cannot be enforced because it has passed the 12 year timeline for enforcing a judgment. He relied on the provisions of Section 4 of the Limitation of Actions Act.

## **ANALYSIS AND DETERMINATION**

### **Issues**

[14] Three issues emerge, namely:

- 1. Trust**
- 2. Enforcement of a judgment on land after 12 years; and**
- 3. Distribution of the estate.**

### **Claim of trust**

[15] In **Jack Gitari Mieri v Kaari Muriithi& another [2016] eKLR** the court explained the jurisdiction of the Court with regard to trust and liabilities of the estate thus;

***I doubt if the jurisdiction of a family court will extend to ascertaining whether or not a deceased held some property in trust unless such a trust has already been established, decreed or is admitted. The family court can only inquire into such a trust if the same is claimed as a liability of the estate and not otherwise. Such a matter, should be litigated elsewhere and presented to the family court as a declared or as an established right.***

[16] Therefore the claim of trust by Cyprian is not for this court to determine.

## Enforcement of judgment after 12 years

[17] The interested parties staked a claim on the basis of the judgment issued in the year 1994 by the trial Court in *Meru Cmcc No. 412 of 1993 Pete M' Ikiao M' Naibara vs. Martha Kinanu M' Imarete* granting *Peter Ikiao M' Naibara* 1.675Ha (3.5acres). A period of 12 years has passed since the time the judgment was delivered. Should it even be treated as a liability of the estate? What does the law say about these two matters?

[18] Section 37(1) of the Civil Procedure Act provides;

**“37. (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.”**

[17] In *Re Estate of Barrack Deya Okul (Deceased)* [2018] eKLR the Court held;

**“.....27. My clear understanding of this requirement is that once a Petitioner is notified of the existence of a liability (debt) by a creditor or once the Petitioner comes to learn of an existing proven liability (debt) owed by the estate, it is mandatory to include such a liability or debt as required above.**

**28. A decree against a deceased person, in the absence of a variation, setting aside or otherwise being stayed is in my view a proven liability against the estate of the deceased. It must be included in the list of liabilities in form 5 alluded to above.**

**29. Such a debt shall, as provided for in Section 86 of the Law of Succession Act, be paid before any legacy. For emphasis, that section provides;**

**“Section 86: Debts of every description enforceable at Law and owed by or out of an estate shall be paid before any legacy”**

**I have no doubt in my mind that a decree of Court against a deceased person is a debt enforceable at Law.....**

**32. Whereas it is correct as stated by counsel for the Petitioners that execution of a decree against a personal representative should follow the procedure under Section 37(1) of the Civil Procedure Act, that in my view does not preclude a personal representative listing a decree as a liability (if decree is not challenged) and paying out such a decree as a debt within the meaning of Section 83(d) of the Law of Succession Act.....”**

[18] In *Jack Gitari Mieri v Kaari Muriithi & another* [2016] Eklr the court explained the jurisdiction of the Court with regard liabilities of the estate held;

***I doubt if the jurisdiction of a family court will extend to ascertaining whether or not a deceased held some property in trust unless such a trust has already been established, decreed or is admitted. The family court can only inquire into such a trust if the same is claimed as a liability of the estate and not otherwise. Such a matter, should be litigated elsewhere and presented to the family court as a declared or as an established right.***

[20] In this case the administrator is totally different from the defendant in the judgment. Questions would abound on the enforcement of the judgment against the administrator in this cause. that notwithstanding, careful examination of the provisions on execution of a decree within the limits of the law of Succession Act and the civil procedure rules show that; the decree held by the interested party is well past the 12 year limit for execution of decrees. **Section 4 (4) of the Limitation of Actions Act** provides;

**(4) An action may not be brought upon a judgment after the end of twelve years**

**from the date on which the judgment was delivered, or (where the judgment or a**

**subsequent order directs any payment of money or the delivery of any property**

**to be made at a certain date or at recurring periods) the date of the default in**

**making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due. [emphasis mine]**

[21] The decree being relied upon to establish a claim in these proceedings was issued to the father of the interested party and was issued in the year 1994. It bears repeating that many questions abound. The judgment herein was against the wife of the deceased. Nothing shows that she was duly appointed personal representative of the deceased for purposes of that suit. The suit land is in the name of the deceased. And to crown it, the 12 years limitation period lapsed in the year 2006. It has now been 25 years since the judgment was delivered. No execution against the defendant or this estate has been sought. The interested party has not shown any justifiable reason why the decree has not been enforceable during the lifetime of the deceased's wife and or within the period provided in law. The interested party had the opportunity of taking out citation proceedings and call upon persons entitled to take out letters of administration to accept or refuse grant. Given the provisions of Section 4 of the limitation of Actions Act I find that the claim by the interested party is statute barred and cannot be included in

the list of debts owing to the deceased in these proceedings. I dismiss the claim.

**Distribution**

[22] I can now delve into distribution of the estate property. The claims of trust being raised by Cyprian are not for this court to determine. Doubtless, therefore, the beneficiaries of the estate of the deceased are;

- 1. Francis Kiunga M' Marete**
- 2. Estate of Veronicah Karoki,**
- 3. Joan Kagwiria Guantai,**
- 4. Veronicah Kagwiria**
- 5. Elizabeth Ntinyari,**
- 6. Estate of Andrew Gitonga,**
- 7. Estate of Anjeru Thiuru.**

[23] I have analyzed the different modes of distribution proposed by the petitioner and the objectors. The deceased herein died prior to the enactment of the Law of Succession Act. But the beneficiaries appreciate the developments of the Law of succession that there should be no discrimination against the daughter of the estate. They therefore sought to include the daughters of the estate as beneficiaries. I have also considered the averments by Veronica Kagwira that she has made developments in Nyaki/Mulathanki/506 and the fact that Benjamin Kaimenyi has also made considerable developments in the said property. I therefore find that the petitioners mode of distribution to be reasonable and justifiable and I shall therefore adopt the same.

[24] Reasons whereof I order that the estate of the deceased shall be distributed as hereunder;

- 1. NYAKI/MULATHANKARI/506 (0.08HA) -to Benjamin Kaimenyi- WHOLE**
- 2. NYAKI/NKABUNE/124 (2.63HA) shall be shared equally amongst;**

- Francis Kiunga M' Marete**
- Estate of Veronicah Karoki**
- Joan Kagwiria Guantai**
- Veronicah Kagwiria**
- Elizabeth Ntinyari**
- Estate of Andrew Gitonga**
- Estate of Anjeru Thiuru**

[25] The grant is confirmed in the foregoing terms. This being a succession cause, I order each party to bear own costs.

*Dated signed and delivered in open court at Meru this 28<sup>th</sup> day of January, 2019*

.....

**F. GIKONYO**

**JUDGE**

*In presence of*

M/S Wanjohi for Muthomi for application

Mrs. Wanjohi for Mrs Ntarangwi for Respondent

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**F. GIKONYO**

**JUDGE**