



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 638 OF 2009**

**IN THE MATTER OF THE ESTATE OF THE LATE M'MURIANKI M'MUGWIKA (DECEASED)**

**JOHNSON RWIGI.....PETITIONER**

**Versus**

**MARY IGOKI MUTUARUCHIU.....PROTESTOR**

**JUDGMENT**

**1. M'MURIANKI M'MUGWIKA ("the deceased")** died intestate on 29<sup>th</sup> September 2008. On 19<sup>th</sup> May 2009 Johnson Rwiggi petitioned for Letters of administration which was granted to him on 10<sup>th</sup> August 2009. He listed the following as the dependants of the deceased;

- a. Jemima Muthoni - Wife
- b. Rebecca Mukwanjagi - Wife
- c. Johnson Rwiggi - Son
- d. Mary Gakiiru - Daughter
- e. Fides Kaari - Daughter
- f. Moses Mutembei - Son
- g. Jacinta Nkuene - Daughter
- h. Agnes Karimi - Daughter
- i. Ignatius Kimathi - Son
- j. Jessica Kawira - Daughter
- k. Gedeon Murithi - Son

2. On 30<sup>th</sup> August 2017 he applied for confirmation of grant and proposed the estate to be distributed as follows;

**I. IGOJI/KINORO/2079 – JOHNSON RWIGI AS A WHOLE**

**II. IGOJI/KINORO/2081 – JOHNSON RWIGI AS A WHOLE**

**III. IGOJI/KINORO/1738 – GEDEON MURITHI WHOLE**

**IV. IGOJI/KINORO/1043 – JOINTLY HELD BY JEMIMA MUTHONI, REBECCA MUKWANJAGI, JOHNSON RWIGI, MARY GAKIIRU, FIDES KAARI, MOSES MUTEMBEI, JACINTA NKUENE, AGNES KARIMI, IGNATIUS KIMATHI, GEDEON MURITHI.**

V. IGOJI/KINORO/1950 –JOHNSON RWIGI WHOLE

VI. IGOJI/KINORO/1948 - JOHNSON RWIGI WHOLE

VII. IGOJI/KINORO/1947 – JOHNSON RWIGI WHOLE

VIII. IGOJI/KINORO/ 1951 TO BE SHARED AS FOLLOWS

JOHNSON RWIGI – 0.40 HA

THE BALANCE JOINTLY OWNED BY;

REBECCA MUKWANJAGI

JEMIMA MUTHONI

MARY GAKIIRU

FIDES KAARI

JACINTA NKUENE

AGNES KARIMI

GEDION MURITHI – IN TRUST FOR AND IN THE INTEREST OF KENLOY KIBIA, ROGERS MUGAMBI,  
BONFACE NGUYO, BRIAN KOOME

IX. PLOT NO 8 ‘A’ KAURUNE – KINORO MARKET TO JOHNSON RWIGI

3. On 26<sup>th</sup> September 2017, Mary Igoki Mutuaruciu filed an objection stating that the deceased had sold to her IGOJI/KINORO/ 1043. She took quiet possession and constructed 3 semi-permanent houses, planted bananas and seasonal crops. In his replying affidavit Johnson Rwigu refuted the objector’s claims. He averred that the deceased reported the loss of the said title at Kinoro police station on 27<sup>th</sup> January 2004.

4. However, on 16<sup>th</sup> January 2018 vide summons she applied for stay of proceedings on the following grounds;

a. The applicant claims to have become entitled to the whole of LR. IGOJI/KINORO/1043 by adverse possession and have filed **Meru ELC No. 324/17 (O.S)**

b. L.R No. IGOJI/KINORO/1043 may become a trust property in favor of the applicant against the estate of the deceased herein

c. In the event that the court in Meru ELC No. 324/17 (O.S) finds the suit land has become trust property and should be registered in the name of the applicant the same will not be available to be distributed as part of the net estate of the deceased.

d. No other estate or substantial estate is disclosed as net estate of the deceased herein for distribution other than LR. No. IGOJI/KINORO/1043

e. In the event that the distribution is allowed by this honorable court it may assist the estate share trust property whose trust is in favor of the applicant and not the estate thereby rendering Meru ELC No. 324/17 (O.S) nugatory.

In their submissions the protestors supported their application by citing the decisions in **Harman Singh & others V. Mistri 1971 E.A 122** and **Motokov V. Auto Garage Ltd and others (1970) E.A 249.**

5. In a ruling this honorable court directed the EO, Meru Law Courts to visit the land and record the development of the land and whether the applicant and or any other person reside on the land. In his report the EO, Mr. Kariuki Njuki observed that there were three houses which the applicant said she built in 1989. One of the houses is occupied by the applicant’s sons Charles Murimi and Henry Mugendi and the other two houses are leased to Kinyua and Mwitii who are butchers in Kinoro Shopping Centre. There were banana plantations on the land which the applicant claims that she planted. His conclusion was that the applicant was in actual possession of the land.

#### ANALYSIS AND DETERMINATION

6. I have carefully perused through the applications, affidavits, submissions and the record. The significant issue herein is:

**i. Whether I should stay these proceedings until the determination of Meru ELC No. 324/17 (O.S)?**

7. On this subject, I will tap from the decision in **re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR** that;

**“The Law of Succession Act, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.”**

Matters relating to ownership of the property are conferred to the Environmental and Land court. Therefore this court has no jurisdiction.

8. But when such dispute arise in these proceedings before confirmation, the law has designed the procedure of dealing with the dispute in rule 41(3) of the Probate and administration Rules which states that:-

**(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.**

9. I have already stated that the claims by the applicant herein relate to ownership of land over which this court has no jurisdiction. The question falls within the jurisdiction of ELC. Accordingly, it is a question or dispute which cannot be determined in these proceedings. And as per the rule, the court should prior to confirming the grant, by order appropriate and set aside the particular property comprising the dispute to abide the determination of the question in proceedings under the ELC statute and procedures, in this case, MERU ELC No. 324/17 (O.S). I must however caution that the court should determine whether the claim is bona fide or whether the claim raises a bona fide triable issue which should be subjected to rule 41(3) above. No all claims or mere claims which would warrant the invoking of rule 41(3). In this case, the claimant and her family have been in possession of the land for a considerable period of time and have developed the land. See EO'S report. Looking at the nature of the proceedings in ELC, her claim raises bona fide issue that is worthy a trial before ELC.

10. But before I close, I should state that my view is that courts should be slow to issue stay of proceedings in a succession cause and instead apply rule 41(3) of the Probate and Administration Rules. I will give ample reasons for this view. I should think that the nature of succession proceedings is that the estate of the deceased should always be under active and efficient administration. A stay of proceedings militates against that objective. Courts should also be guided by the stringent threshold for stay of proceedings as enunciated in *Halsburys Laws of England* 4th Edition, Vol 37 pages 330-332 that:-

**“The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue.”**

11. I take the view therefore that only in clear cases where proceedings in succession cause beyond reasonable doubt should not be allowed to continue that stay of proceedings should be imposed. For instance, where the property in dispute is the only estate property, once the property is set aside for determination elsewhere, it would be futile to continue with such proceedings. A stay would serve both substantive and procedural justice in such case..

12. Bearing this in mind, I find that it would be unfair to stay this proceeding because only part of the deceased properties is in dispute. Therefore relying on Rule 41 (3) of the Probate and Administration rules I order that **LR. IGOJI/KINORO/1043** is hereby set aside to abide by the determination in **Meru ELC No. 324/17 (O.S)**. The rest of the estate shall be distributed as agreed amongst the dependants as follows;

**I. IGOJI/KINORO/2079 – JOHNSON RWIGI AS A WHOLE**

**II. IGOJI/KINORO/2081 – JOHNSON RWIGI AS A WHOLE**

**III. IGOJI/KINORO/1738 – GEDEON MURITHI WHOLE**

**IV. IGOJI/KINORO/1950 – JOHNSON RWIGI WHOLE**

**VI. IGOJI/KINORO/1948 - JOHNSON RWIGI WHOLE**

**VII. IGOJI/KINORO/1947 – JOHNSON RWIGI WHOLE**

**VIII. IGOJI/KINORO/ 1951 TO BE SHARED AS FOLLOWS;**

**JOHNSON RWIGI – 0.40 HA**

**BALANCE BE OWNED IN COMMON BY**

**REBECCA MUKWANJAGI**

**JEMIMA MUTHONI**

MARY GAKIIRU

FIDES KAARI

JACINTA NKUENE

AGNES KARIMI

GEDION MURITHI – IN TRUST FOR AND IN THE INTEREST OF KENLOY KIBIA, ROGERS MUGAMBI,  
BONFACE NGUYO, BRIAN KOOME

**IX. PLOT NO 8 'A' KAURUNE – KINORO MARKET TO JOHNSON RWIGI**

The grant is confirmed to the extent of and in respect of the above properties.

Dated, signed and delivered in open court at Meru this 24<sup>th</sup> day of January, 2019

.....

**F. GIKONYO**

**JUDGE**

In presence of:-

Mwarania for protestors

Munene for petitioner

.....

**F. GIKONYO**

**JUDGE**