



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE 137 OF 2009**

**IN THE MATTER OF ESTATE OF M'MARETE M'RIMBERIA -DECEASED**

**GLADYS MWARI.....APPLICANT**

**VERSUS**

**JULIUS MBAYA.....1<sup>ST</sup> ADMINISTRATOR/RESPONDENT**

**TABITHA KAROKI.....2<sup>ND</sup> ADMINISTRATOR/RESPONDENT**

**RULING**

Grant of Letters of Administration intestate to the estate of the late M'Marete M'Rimberia was made to Julius Mbaya and Tabitha Karoki Muruthi on 8<sup>th</sup> April 2010. From the Letter dated 12.8.2008 written by Chief of Ntugi Location, Julius Mbaya is 1<sup>st</sup> son to the deceased whereas Tabitha Marete is 2<sup>nd</sup> wife to the deceased.

Application for confirmation is shown to have been signed by Moses Karoki although the affidavit in support of application appears in the names of Julius Mbaya and Tabitha Karoki. The deponent of the supporting affidavit is also Moses Karoki who appears as a beneficiary in the chief's letter.

On 3<sup>rd</sup> June 2015 court record shows the petitioner was present in person and grant was confirmed distributing the estate as follows:-

1. L.R. Kibirichia/Kibirichia/2445 to
  - a. Jacob Kirinya Nairito – 2.00 acres
  - b. William Mutuma Kimathi – Balance?
2. L.R. Kibirichia/Kibirichia/1964
  - a. Erick Mwirigi Mbayah and Moses Kinyua M'Marete to share equally.

Jacob Kirinya Nairuti does not appear in the chief's letter as a beneficiary and it is not explained in the supporting affidavit how his name finds itself in the affidavit as a beneficiary. Erick Mwirigi is also not in the list as a beneficiary and there is no explanation how the estate is distributed to him.

From the chiefs letter there are 14 beneficiaries but the affidavit in support of the confirmation and distribution shows that 2 beneficiaries and 2 strangers have benefited from the entire estate. There are no affidavits from the other beneficiaries renouncing their rights.

The affidavit relied upon in distribution is actually defective because it was signed by a person other than the deponents. An affidavit cannot be signed on behalf of the deponent because it consists of facts which only the deponent can claim knowledge of.

Prior to confirmation of grant herein, William Mutuma Kimathi entered into an agreement with Jacob Kirinya Nairuti for sale of 2 acres of land out of LR Kibirichia/Kibirichia/2445 at a consideration of Kshs 2,800,000/=. Deposit of Kshs 600,000/= was paid to the vendor and the balance was to be paid after confirmation of grant. Julius Mbaya the Administrator is shown to have witnessed the agreement in the presence of Joel Mutuma advocate.

An agreement dated 17.11.2016 annexed to affidavit in Reply to application for revocation but unattested shows that William Mutuma

Kimathi used purchase price received from the sale of LR 2445 to purchase L.R. Abothuguchi/Gaitu/3195 on behalf of the beneficiaries of the estate of the deceased person herein. The said agreement doesn't show that the beneficiaries have any stake in the alleged land. It is shown that the agreement is executed in the presence of authorized licensed and Registered court process server one Koome B. Kaithu.

Martha Wanja Jeremiah in her statement signed on 25<sup>th</sup> July 2018 confirms that the applicant to application for revocation was not involved in the proceedings herein or the family meetings where it was alleged that it was agreed the estate property be sold and a bigger land bought for the beneficiaries. Jennifer Karambu in her statement filed on 25.7.2018 also confirmed that the applicant was not present at family meeting where it was decided that the estate property be sold to 3<sup>rd</sup> parties and proceeds used to buy a bigger land for the beneficiaries out of the deceased persons 11 children. It is shown that Julius Mbaya who was the Administrator has since died. Mary also died and Gladys Mwari in her statement has shown that she was survived by 3 daughters. Rachel Kinya the daughter to the deceased also passed on and is survived by 4 daughters and 2 sons. Lucy Kagwiria is also deceased and survived by one daughter and 5 sons. The surviving children of the deceased person's deceased daughters have not been shown to have been involved in the petition at all and the estate has not been distributed to them.

From the evidence of the applicant Gladys Mwari it appears that Julius Mbaya benefited inter vivos from the estate of the deceased as he was given land No. 1965 Kibirichia. She said that in 2015 they discussed that William Mutuma, her brother's son should hold LR 2445 on behalf of their mother's household but didn't agree that it should be sold for purchase of a bigger portion. She said that she didn't attend family meetings held on 11<sup>th</sup> August 2009. That her sister Naomi didn't also attend. She said the parcels of land in her father's name are LR 1964, 1965, 2444 and 2445. She said LR 2445 was transferred on 7.11.2016 after she had made application for revocation. She said her and her sisters were not provided for. Julius Mbaya confirmed that L.R. 2445 was supposed to go to household of Margaret Kathure according to the deceased person's wishes and the family agreed to sell 2 acres out of it and proceeds to be used to buy a bigger land for the children of Margaret. He confirmed the applicant was not present when the agreement was reached. He said he accompanied William Mutuma, Kathambi and Nkirote to the parcel of land bought subsequent to disposing 2 acres of land out of LR 2445. He said that LR 1964 is registered in the name of Erick Mwirigi, his son and Moses Kinyua the son of the deceased and Tabitha. He said LR 2445 was sold at 2.8 Million. He said LR 1964 is 3 acres. He said he did sign the consent to petition, confirmation and distribution on behalf of Gladys.

William Mutuma said that his grandmother's household was given LR 2445 which is 3 acres and his aunts authorized him to sell the entire portion but he sold on 2 acres. He said he spoke to the applicant and land was sold with consent. He said that in 2016 the applicant and other aunts attended his mother's funeral and by then the hotel which is put up by purchaser was under construction. He said he spoke to applicant when she filed application for revocation to have matter settled out of court. He said the applicant benefited inter vivos from the deceased. He said that his father Stephen Kimathi had 3 children. He said that during confirmation his mother was still alive and he told the court he had 2 sisters. He said LR 2445 is still in the name of the deceased. He said his father had 7 sisters but none of them countersigned the sale agreement.

From the evidence on record the issues for determination are whether:-

- a) Consent was obtained from the beneficiaries when Julius Mbaya and Tabitha petitioned for Letters of Administration
- b) Whether consent to confirmation was obtained from beneficiaries.
- c) Whether sale of Kibirichia/2445 was legal.
- d) Whether all beneficiaries were provided for and if not whether the said beneficiaries renounced their rights to the estate.

The Administrator Julius Mbaya admitted he signed on behalf of the applicant after she allegedly talked to him on phone and gave him the green light to go on with succession cause. Apart from Martha Wanja and Jennifer Karambu none of the other beneficiaries testified as having given consent to Julius Mbaya to petition for Letters of Administration. The surviving widow of the deceased was left out in the distribution. The Administrator claims that he was obligated by his father to take care of Tabitha Marete, his father's 3<sup>rd</sup> wife and her young son and for that reason he had land meant for Tabitha and her son in the names of his son and Moses Kinyua the only child of Tabitha Marete. The administrator didn't show how much resources he applied on the upkeep of Moses Kinyua which would entitle the said Moses Kinyua to be indebted to him. There was no agreement between him and his father to the effect that he was to make good the resources he used from Moses Kinyua inheritance. In that case I do find that LR Kibirichia/Kibirichia/1964 should be inherited by Moses Kinyua M'Marete and Tabitha Marete. The Land Registrar shall therefore effect the said registration as ordered by the court. The land to be shared equally between the 2 Moses and Tabitha find it in their hearts to gift Erick Mwirigi the son of Julius Mbaya their share so after the Administration of the estate has been completed. Erick Mwirigi should get inheritance from his father who benefited inter vivos from the deceased.

It is also not in dispute that LR. Kibirichia/Kibirichia/2445 was due to the house of applicant's mother as per the wishes of the deceased and this is confirmed by the applicant and Julius Mbaya. The applicant said it was agreed that William Mutuma was to hold in trust LR. 2445 on behalf of the household of applicant's mother. Applicant denied that she was involved in the decision to sell LR 2445 and there is nothing to show she consented or that anyone else consented to the sale of the parcel of land. The sale to Jacob Kiriinya was done prior to confirmation of the grant to Julius Mbaya. The application for confirmation is signed by Moses Karoki instead of Julius Mbaya and Tabitha Marete.

This court finds that grounds for revocation of grant made to Julius Mbaya and Tabitha Karoki Marete have been established. However in consideration of the age of the cause, the grant shall remain in the names of the same Administrators but the distribution shall be reviewed in the following term.

1. LR. Kibirichia/Kibirichia/1964 shall be distributed to:-

- a) Moses Kinyua – 1.5 acres

b) Tabitha Karoki Marete – 1.50 acres

2. LR Kibirichia/Kibirichia/2445 to be distributed to:-

1. Family of late Stephen Kimathi
2. Gladys Mwari
3. Jeniffer Karambu
4. Mary Karimi (survivors) – Deceased
5. Salome Kanini
6. Rachel Kinya (Survivor) – Deceased
7. Lucy Kagwiria (Survivor) – Deceased.
8. Naomi Kanyua

The distribution should be equal amongst the beneficiaries or their survivors unless otherwise agreed because so far there was supposed to be an out of court settlement which has not been filed.

The issue of 3<sup>rd</sup> party having constructed a hotel on suitland would be subject of litigation in another court to claim from those who received purchase price. The 3<sup>rd</sup> party says in the sale agreement that he bought what William Mutuma Kimathi was entitled to from LR 2445 once succession cause has been finalized. It is indicated that William Mutuma Kimathi's expected share in the estate is 2 acres.

That is false because LR 2445 was said to be 3 acres to be shared amongst 8 beneficiaries. There is nothing to show William Mutuma Kimathi received the purchase price or any part of it. The costs of the application shall be borne by Julius Mbaya and William Mutuma. What was due to William Mutuma's father was to be shared amongst his children and therefore William Mutuma's share in it is very minimal.

**HON. A.ONG'INJO**

**JUDGE**

**RULING SIGNED, DELIVERED AND DATED THIS 23<sup>RD</sup> OF JANUARY 2019.**

**In the presence of:**

C/A: Kinoti

Applicant: - Mr Kithinji Advocate for Applicant

Respondent: - Mr. Mutuma Advocate for Administration

**Mr. Mutuma**

We pray to be supplied with copies of ruling. I also pray for 14 days stay in case parties want to pursue an appeal through another advocate.

**Order**

Copies of ruling to be supplied to counsel upon payment of copying charges. Stay of execution for 14 days granted.

**HON. A.ONG'INJO**

**JUDGE**