



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 3 OF 1985**

**IN THE MATTER OF THE ESTATE OF DAVID M'MWIREBUA BARETHI Alias MWIREBUA MBARETHI**

**GRACE MUKORUGURU.....1<sup>ST</sup> PETITIONER**

**JEDIEL MUTHURI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**GLADYS KAROKI MWIREBUA..... INTERESTED PARTY**

**PROMINAH KAROKI**

**ANN MWARI MWIREBU....INTERESTED PARTIES/BENEFICIARIES**

**RULING**

**DAUDI MWIREBUA Alias DAVID M'MWIREBUA BARETHI Alias MWIREBUA MBARETHI ("the deceased") died on 5<sup>th</sup> July, 1982 at Meru leaving behind the following as beneficiaries:-**

- a) Grace Mukoruguru M'mwirabua - Widow
- b) James Kiramana - son
- c) Joyce Kinya Marangu - daughter
- d) Fredah Nturibi - daughter
- e) Rebecca Kithira - daughter
- f) Anna Mwari - daughter
- g) Jediel Muthuri - son
- h) Gladys Karoki - daughter
- i) Walter Mbaya - son
- j) Jane Kathambi - daughter
- k) Franklin Mwiti - son

2. In his letter of introduction to the court dated 21<sup>st</sup> August, 1985, the Chief of Ntima Location indicated that the deceased left the following properties as his estate:-

- a) Land Parcel No. Ntima/Igoki/775 - 1.21 ha
- b) Land Parcel No. Nyaki/Mulathankari/276 - 0.56 ha

c) Land Parcel No. Kiirua/Ruiri/60 - 10.68ha

d) Land Parcel No. Kiegoi/Kinyanka/498 - 1.1 ha

3. On 26<sup>th</sup> August, 1985, **Grace Mukoruguru M'Mwirebua** petitioned before the Principal Magistrate's Court, Meru for the grant of Letters of Administration Intestate for the estate of the deceased. However, when the grant was issued on 9<sup>th</sup> May, 1986, it was issued to her and James Kirimara jointly.

4. On 28<sup>th</sup> October, 1988, the said **Grace Mukoruguru M'Mwirebua** applied for the confirmation of that grant. In her application, she prayed that **"All the assets of the deceased to be of use to the applicant"**. However, since she did not disclose the properties in the application, the same was rejected.

5. On 1<sup>st</sup> December, 1988, she filed another application for confirmation and prayed that all the assets be registered in her name jointly with **Jediel Muthuri** in trust for all other beneficiaries of the estate. The grant was confirmed whereby it was ordered that all the properties be distributed to the two **"jointly as trustees of the other members of the family"**. Grace Mukoruguru died in 2009 leaving **Jediel Muthuri** the sole trustee of the estate property.

6. The matter then proceeded before this court under the same Succession Cause number when the **Gladys Karoki ("the applicant")** filed two applications seeking to inhibit the titles constituting the estate on 25<sup>th</sup> August, 2015 and 14<sup>th</sup> September, 2016, respectively.

7. When the parties appeared before me on 13<sup>th</sup> March, 2017 for the hearing of the said application, it was agreed by consent that the said applications be marked as settled and the administrator/trustee do file within 14 days, Search Certificates for the 4 properties that constituted the estate.

8. On 5<sup>th</sup> April, 2017 when the matter came up for mention to confirm compliance, the sole trustee had not complied with the order of filing the searches and for reasons on record, the court ordered that the trustees appear in court on 10<sup>th</sup> May, 2017 with the searches. They trustees failed to appear in court and on 13<sup>th</sup> June, 2017, the court granted the applicant leave to apply for the revocation of the grant.

9. The applicant filed her application for revocation of grant on 8<sup>th</sup> November, 2017 wherein she also sought an order that she should be appointed the administrator. Directions were made that the same be determined by way of affidavits and submissions.

10. In her application, the applicant alleged that she is a daughter of the deceased; that the family had agreed in 1986 that the estate property be registered in the joint names of the widow and **Jediel Muthuri (hereinafter "the trustee")**. She also alleged that the trustees had failed in their duties as they had engaged in sub-dividing and disposing the properties. That they had also taken loans on the said properties to the prejudice of the other beneficiaries.

11. She further alleged that inquiries made on the position of the trust property had fallen on deaf ears. That no inventory of the estate had been made or given. That the trustees had failed in their duty under the law. In Further Affidavit annexed to the submissions, the applicant sought that the estate properties be distributed equally.

12. In his Replying Affidavit filed on 4<sup>th</sup> April, 2018, the trustee denied the allegations of the applicant and state; that there are 10 beneficiaries and the applicant was not representing the interests of any of them, that the grant was confirmed 33 years ago while the widow died in 2009 and yet the applicant had never raised any claim during that period.

13. In his submissions in support of the application, Mr. Wamache, Learned Counsel for the applicant submitted that the trustees had started disposing off the estate and taking loans without notice to or consent of the beneficiaries. That under **Section 76 (d) (ii), (iii) and (e) of the Law of Succession Act (hereinafter "the Act")**, the grant should be revoked. That from the evidence tendered, the trustees were in breach of their duties under **section 83 of the Act**. Counsel therefore urged that the application should be allowed.

He further contended that the entire estate is somehow distributed; that the beneficiaries had indicated that they were not interested and that if 14. the orders sought were granted, there will be huge losses as the lands were in the names of 3<sup>rd</sup> parties who are innocent. That the bank will be affected as it was unaware of these proceedings. He concluded that the application did not meet the threshold of revoking the grant.

15. On her part, Mrs. Kaume, Learned Counsel for the Trustee submitted that; the applicant was not clear as to what she wanted whether it is the substitution of the administrator or revocation of the grant; that no reasons had been advanced for the revocation of the grant; that the applicant had not notified the other beneficiaries of the application as they will be affected by the orders sought. That the applicant had taken too long to make the present application.

16. With greatest respect to Counsel for the Trustee, the majority of the submissions constituted evidence from the bar. It was alleged in the submissions that the estate had been distributed and the beneficiaries taken possession and developed their plots; that some beneficiaries had put up commercial buildings on the estate property amounting to over KShs.100 million; that some estate properties had been transferred to the **"2<sup>nd</sup> and 4<sup>th</sup> interested party"**. Further, it was alleged that the Trustee as well as other beneficiaries had not been served with this courts' processes.

17. The court has carefully considered the affidavits on record and the submissions of Counsel. The issues for determination are **whether the Trustee has carried out his duties as mandated; whether the grant should be revoked in the circumstances; what orders should be made.**

18. To begin with, the Trustee was neither a Co-petitioner nor Co-administrator. The record shows that there was only one petitioner and administrator that was appointed by the court. That was **Grace Mukoruguru** who it now transpires passed on in 2009 and there has never been any substitution. The Trustee was appointed a Co-Trustee with the aforesaid administrator to hold the estate property for the benefit of the rest of the beneficiaries.

19. The applicant alleged that the Trustee had failed as the remaining Trustee; that he had indulged in a disposal spree, selling portions of the estate and taking loans from banks to the detriment of the other beneficiaries. That the other beneficiaries had not benefited from the proceeds of these loans. That he had acted contrary to what is required of him under the law and to distribute the estate to the beneficiaries as per their wishes.

20. The applicant did not produce any sale agreements or transfers to back up her claim that some estate properties had been disposed of. The only evidence she produced was copies of the green cards for the estate properties which clearly showed that the estate properties had been used as collateral to obtain loans. She swore that the proceeds of those loans never benefited the beneficiaries.

21. In his Replying Affidavit, the Trustee did not make any specific denial of all these allegations levelled against him. He only stated that the applicant was not representing the wishes of the others; that the *"the entire estate is somehow distributed"* without offering any evidence. That the lands were in the names of 3<sup>rd</sup> parties.

22. I have already stated that the Trustee was neither a petitioner nor an administrator of the estate of the deceased. He was only appointed a Co-Trustee at confirmation. His duties therefore are in terms of his appointment. The record shows that the court ordered that the estate property *"be distributed to Grace Mukoruguru M'Wirebua and Jediel Muthuri jointly as trustees for the other members of the family"*.

23. My view is that what the court did was to create a trust in the estate property. That both Grace Mukoruguru and Jediel Muthuri were to hold the property for the benefit of the rest of the beneficiaries. There was no indication whether that trust property was to be distributed to the beneficiaries and if so when and how. What is clear is that the property was to be held in trust and for the benefit of the beneficiaries. The question therefore is, has that property been held for the benefit of the beneficiaries?

24. Under **section 107 of the Evidence Act Cap 80 Laws of Kenya**, the burden is on him who alleges to prove the allegations made. In the instant case, although the applicant did not produce evidence of sale of portions of the trust property, the Trustee admitted in his affidavit that; some properties are in the names of some beneficiaries and other 3<sup>rd</sup> parties. He never produced any evidence to show that the transfer to those other beneficiaries and 3<sup>rd</sup> parties, whom he did not name, had been sanctioned by all the beneficiaries or was for their benefit in terms of the order appointing him as such.

25. The applicant was able to prove through the copies of the green cards that; several loans had been taken on the security of the trust property and that some of those properties had been sub-divided. She alleged that this was without the consent of the beneficiaries, a fact which the Trustee did not deny.

26. Further, on 13<sup>th</sup> March, 2017, this court directed that the Trustees file copies of the green card for the trust properties in court. This they failed to do. Further, on 5<sup>th</sup> April, 2017, the court directed that the Trustees appear in court on 10<sup>th</sup> May, 2017 with the said copies of green cards. However, the trustee failed to do so leading to the withdrawal of his Advocates, Messrs J. G. Gitanga and Company from acting on his behalf.

27. From the foregoing, I am satisfied that the Trustee has not acted bona fides. He has breached the terms of his appointment as such and is not worthy to continue acting as a Trustee. Accordingly, I order that he is removed from acting as such Trustee.

28. The next question is whether the grant should be revoked. I agree with the submissions of Mrs. Kaume that, the question is not the revocation of the grant but removal of the Trustee and substitution of the administrator. Since I have removed the Trustee, what remains is for the rest of the family to decide whether the property should continue to be held as trust property or it be distributed to the individual beneficiaries.

29. Pending such a decision, since the administrator of the estate died in 2009 and has since not been substituted, it is imperative that she be substituted forthwith to avoid the estate/trust property falling into waste. Under **section 66 of the Law of Succession Act**, I accordingly appoint the Interested Party, Gladys Karoki Mwirebua as the administrator.

30. It would seem that many beneficiaries have long died without having enjoyed any fruits from the trust property. As already stated, it is for the beneficiaries to decide whether the property should remain as such, trust property, or should be immediately distributed. If it is to remain trust property, let them propose a Co-Trustee who would administer the property with Gladys Karoki Mwirebua, who is the court appointed.

31. Accordingly, the application is allowed as follows:

a) Jediel Muthuri is removed as a Trustee of the properties known as **Title Nos. Ntima/Igoki/775, Nyaki/Mulathankari/276, Kiirua/Ruiri/60 and Kiegoi/Kinyanka/498** and all the sub-divisions arising therefrom.

b) Gladys Karoki Mwirebua is hereby appointed the administrator of the estate property pending the decision of the family whether the property should remain trust property or be distributed.

c) Jediel Muthuri is directed to prepare and file in court within 30 days a detailed on how he and the deceased Co-Trustee had managed the trust. This to include details of the income received from the said properties and how it was expended.

d) Jediel Muthuri to surrender forthwith to Gladys Karoki Mwirebua all the trust properties including but not limited to the original titles thereto within 30 days of the date hereof.

e) This matter to be mentioned within 60 days of the date hereof for purposes of appointing either a Co-Trustee proposed by the family or receiving the decision to distribute the trust property.

f) This being a family matter, there is to be no order as to costs.

**DATED and DELIVERED at Meru this 21st day of February 2019**

**A. MABEYA**

**JUDGE**