



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 303 OF 2004

IN THE MATTER OF THE ESTATE OF KAURA KAURA (DECEASED)

SAMUEL KABERIA.....PETITIONER

VERSUS

HELLEN NAMUNYA.....OBJECTOR

J U D G M E N T

1. **Kaura Kaura (“the deceased”)** died intestate on 1st February 1994. On 20th July, 2005, **Samuel Kaberia (“the petitioner”)** petitioned for grant of letters of administration intestate in his capacity as a son to the deceased. He listed **LR Ithima/Antuambui/2008** as the only asset of the estate. The grant was issued on 18th January, 2005.

2. Vide a Motion on Notice dated 12th August, 2005, **Helen Namunya (“the objector”)**, objected to the petitioner being issued the grant on the grounds that; the petitioner had left out some of the properties and beneficiaries of the deceased; that the deceased had left a will, that the petitioner was not a dependent of the deceased and that the objector was a daughter of the deceased and therefore the one entitled to take the grant of letters of administration.

3. The application was determined by way of *viva voce* evidence. The objector testified as **OW1** and called 3 witnesses. She told the court that her father had four children, herself, **Silas M’Turume (deceased)**, **Triphosa Kaumo (PW3)** and **Samuel Kaberia**. It was her testimony that, in his lifetime, the deceased had divided his land amongst his children whereby, she, **PW3** and **M’Turume** were given 1 acre each while the petitioner was given 2 acres which he later sold to **Erastus Kobia**.

4. The objector further testified that she was the one in occupation of **Ithima/Antuambui/2008** which had been given to her blood brother **Silas M’Turume**. That she was the one who had developed the same by planting Miraa, coffee, Napier grass and peas. That the petitioner had no house on the said property as he was living on his own land away from that property.

5. **OW2, Erastus Kobia M’Tamwari** told the court that in 1980, he purchased from the petitioner **LR Athiru/Antuambui/3996** which the latter had been given by the deceased. That he obtained title therefor on 2nd January, 1992. That he had purchased the said property and got title thereto during the lifetime of the deceased.

6. **OW3, Victoria Gichunge** testified that **Ithima/Antuambui/ 2008** was being cultivated by the objector and the late **Silas M’Turume**. As a committee member of the Antuambui Adjudication Section, she knew that the deceased gave land to the petitioner which he sold to **OW2**.

7. **OW4 Gerald Kithia Thirare**, the chief of Antuambui location stated that **L.R. Ithima/Antuambui/2008** is in his location. That it is the objector who has been living thereon. That she had developed the same but had moved away because of repeated harassment by the petitioner. He was aware that the deceased had divided his land amongst his children with the petitioner selling his portion to **OW2**. His sister from the same house, **PW3** was given one acre and the objector one acre.

8. He further told the court that their brother, **Silas M’Eruri** (deceased) was mentally challenged and as a result, he did not marry nor have any children. That the property the subject of this dispute was meant for him and his mother who was also deceased. He also recalled that the Objector’s daughter was buried on the said piece of land. The deceased lived at Athiru Rugine location with the mother of the petitioner.

9. **PW1 William Kaberia Zakaria**, assistant chief of Rugine location told the court that **Ithima/Antuambui/2008** belonged to the deceased and before he died, it was **Silas M’Eruri** who was occupying it. He was aware that the petitioner had been charged in a criminal case because he had interfered with the objector’s use and occupation of **Ithima/Antuambui/2008**.

10. **PW2 Agnes Kathai** told the court that she is the wife to the petitioner who died in March, 2018. That **Ithima/Antuambui/2008** belonged to her husband's mother but still in the name of the deceased. She admitted that her husband had been given **LR No. Ithima/Antuambui/3996** by the deceased but had sold it.

11. **PW3 Triphosa Kaumo**, a sister to the petitioner, stated that the subject property had been given to the petitioner but was being occupied by the objector. That she and the petitioner had sold their portions of land given by the deceased. **PW4 Zakayo Iruki**, a cousin to the petitioner and the objector confirmed that the land was under the occupation of the objector.

12. The parties filed their respective submissions which the court has carefully considered alongside the evidence on record. The issues for determination are; ***whether the deceased left a will, whether the deceased had divided his land and give it to his children, whether the grant should be revoked and how the estate of the deceased should be distributed.***

13. One of the grounds upon which the objection was raised was that the deceased left a will. That he did not die intestate. In their testimonies, none of the witnesses, including the objector, alluded to the existence of any will. There was no evidence that the deceased made any will, written or oral. Accordingly, the deceased died intestate and the petitioner was right in applying for letters of administration intestate.

14. The next issue is whether the grant issued to the petitioner should be revoked. I should, however, point out here that the original petitioner died while this Cause was still pending. His wife **Agnes Kathai Samuel** took over from him on 26th September, 2018.

15. **Section 76 of the Law of Succession Act, Cap 160 of the Laws of Kenya ("the Act")** sets out the circumstances under which a grant may be revoked. These include circumstances where the proceedings are defective in substance. In the present case, the objector alleged that she was not involved in the bringing of this Cause. The petitioner did not dispute that fact. The objector is the elder sister of the petitioner. She also has the right to have applied for the grant.

16. In view of the foregoing, under **Rule 26 of the Probate and Administration Rules**, it was imperative that the petitioner should have obtained the consent of the objector. In so far as he did not comply with that *rule* and seeing from the application for confirmation that he had proposed to distribute the whole property to himself, the grant cannot stand. Accordingly, the grant is hereby revoked.

17. The next issue is whether the deceased had divided his land during his lifetime and how the estate should be distributed. All the witnesses were in agreement that the deceased had divided his land to his children during his lifetime. It came out clearly that each of the four children of the deceased was given his or her own portion. While the petitioner, got 2 acres and the others an acre each, he and his sister **Truphosa Kaumo** sold their portions. On the other hand, the objector and her brother **Silas M'Eruri (deceased)** retained theirs.

18. **In the matter of the Estate of M'Mugwika M'Maitethia (Deceased) [2018] eKLR**, the court held:-

"When a claim for gift inter vivos is made in a probate and administration cause, it is only for the purposes of bringing such property into account in determining the share of the net estate finally accruing to the child, grandchild or house which benefited from the gift from the deceased. It is not per se a determination of the ownership of the said property. In any event, in law, such property is not estate property but of the donee. See section 28 and 42 of the Law of Succession Act ..."

19. It is not in dispute that the deceased was polygamous. He had 2 wives and four children. Each wife had 2 children. The objector and the late **Silas M'Eruri aka M'Turume** belonged to the first wife. On the other hand, the petitioner and **Truphosa Kaumo (PW3)** belonged to the second house. During his lifetime, the deceased gave gift *inter vivos* to all his children and settled them accordingly. He gave the petitioner 2 acres which he sold. He gave **PW3**, the objector and the late **Silas M'Eruri** 1 acre each. While **PW3** sold her 1 acre, the objector and **Silas M'Eruri** retained their shares.

20. The evidence on record is that the deceased settled his 1st wife with her two children and were living on the property in dispute while the deceased continued to live with his 2nd wife at Rugine. The property in dispute was meant for the late **Silas M'Eruri**. It was alleged, and not denied that the said **Silas M'Eruri** was mentally challenged. He did not marry and he therefore died without leaving any child or wife behind.

21. In this regard, although the subject property is still in the name of the deceased, he had gifted it out to **Silas M'Eruri** during his lifetime. It cannot be said to be available for distribution to his children. It will belong to the estate of **Silas M'Eruri**.

22. I have considered that the petitioner got 2 acres from the deceased. That is a bigger share as compared to the others. If the subject property was to be distributed, of course having already gotten a bigger share, it would be taken into account. The others having gotten less, it would be distributed to them so as to bring equality. Since **Truphosa Kaumo** stated that she was not claiming anything, it goes without say that the property should be distributed to the objector.

23. In any event, the late **Silas M'Eruri** was said to be mentally challenged. He was under the care of the objector who was his sister from the same mother. The objector has been in possession of the subject property and has developed it over the years. In all fairness, she qualifies as the person entitled to take what legally belonged to the said **Silas M'Eruri**.

24. Accordingly, the application is meritorious and I allow the same and make the following orders: -

a) The grant issued to the petitioner herein on 19th January, 2005 be and is hereby revoked.

b) A fresh grant hereby issues to the objector, **Helen Namunya** forthwith and is hereby confirmed forthwith and the estate

comprising of **Athima/Antuambui/2008** distributed to **Helen Namunya** wholly.

d) This being a family matter, I propose to make no orders as to costs.

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

A. MABEYA

JUDGE