



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 586 OF 2008

IN THE MATTER OF THE ESTATE OF M'MUKIRA M'ARIMI (DECEASED)

JANET NKIROTE PETITIONER

VERSUS

GODFREY KIRIMA 1ST INTERESTED/PARTY

PETER MWENDA 2ND INTERESTED/PARTY

AND

GEDION KIAMBI 1ST OBJECTOR

M'MBIJIWE KIBITI 2ND OBJECTOR

NKUTA NKANATA 3RD OBJECTOR

JELIKA MUKIRI 4TH OBJECTOR

HARRIET MWENDWA 5TH OBJECTOR

J U D G M E N T

1. This Succession Cause relates to the estate of the late **M'Mukira M'Arimi ("the deceased")** who died on 6th November, 2006. He left behind a widow and three children. These are, **Janet Nkirote, Peter Mwendwa, Jeniffer Mwari and Godfrey Kirima**. The deceased also left seven properties under his name.
2. On 15th December, 2008, the widow, **Janet Nkirote ("the petitioner")**, petitioned for letters of administration which was issued to her on 10th February, 2009. Pursuant thereto, on 9th September, 2009, she applied for confirmation of the grant. She proposed to distribute the estate wholly to herself save for a ¼ acre in **Ntima/Ntakira/3902** to **Andrew Mutua** and another quarter in **Ntima/Ntakira/691** to **Silas Murega Mutari and Julius Kinoti**.
3. On 6th January, 2010, **Gedion Kiambi, M'Mbijiwe Kibiti, Nguta M'Nkanata, Jerica Mukiri, Joel Gitobu and Harriet Mwendwa ("the objectors")**, applied for the revocation of the grant. The grounds were, *inter alia*, that **L.R No. Ntima/Ntakira/691** belonged to their father who was a brother to the deceased and that they had been in occupation thereof to-date. That the petitioner did not consult them when lodging the succession cause.
4. Additionally, on 28th October, 2009 the interested parties applied for the revocation of the grant on the grounds that, as children of the deceased, the petitioner had failed to involve them in the filing of the cause. That she had also excluded them from the distribution of the estate.
5. However, on 17th December, 2009 the petitioner and her children, the interested parties, settled the application dated 28th October, 2009. In the consent filed on 17th September, 2013, the mother and children sought to distribute the disputed **L.R. No. Ntima/Ntakira/691** to **Silas Murega Mutari and Julius Kinoti (¼ acre)** and the balance to the interested parties, jointly.
6. Meanwhile, the objection by the objectors was heard by way of viva voce evidence. **OW1 Gedion Kiambi Kanata** told the court that

during adjudication, his father **M’Nkanata M’Arim** sent the deceased to record his claim on **L.R. Ntima/Ntakira/691**, However, the deceased put his name as owner thereof. That his father cautioned the title before he died. That ever since he was born he had not seen, the deceased work or live on that land. The land was occupied by his father and mother who were later buried thereon after their demise. That he was the one currently occupying the land with his wife and children.

7. **Alexander M’Munika**, a 75 year old cousin of the deceased testified that, the deceased’s father had given each of his 3 children land. That the disputed land belonged to the father of the objectors. He admitted in cross-examination that all he said was hearsay. **OW3 Geoffrey Kimbiti Mbijiwe**, the eldest son of **M’Nkanata M’Arim** reiterated the testimony of **OW1** and stated that, there were 7 houses on **L.R. Ntima/Ntakira/691** all belonging to the children of his late father and not the deceased.

8. **OW4 Fredrick Mugambi M’Mwongo**, a 70-year-old nephew of the deceased told the court that his grandfather had three children, his father (M’Mwongo), the deceased and the father of the objectors. That the grandfather gave each of his said children own land. That at the time the father of the objectors was working in Timau. He therefore sent the deceased to gather the disputed land for him but he instead registered it in his name. However, the deceased and his family has never occupied the same. That before his father M’Mwongo died, he had summoned both the deceased and the father of the objectors in an attempt to settle the dispute between the two.

9. **PW1 Janet Nkirote**, the petitioner testified that the objector’s father was not related to the deceased. That the objectors father was only allowed by the deceased to live on the subject property because his wife was sick and the property was near Meru General Hospital. She admitted that both the father and mother of the objectors were buried on the disputed property. She stated that she did not know who **Silas Murega and Julius Kinoti** were. She further admitted that it was the 1st Objector who was in occupation of the subject property.

10. The petitioner submitted that this being a succession matter, the duty of the court is to ascertain the estate and the beneficiaries. That there was no dispute as to the ownership of **Ntima/Ntakira/691**. That although the petitioner stated that she did not know **Silas Murega and Julius Kinoti**, there was no dispute that the parties had agreed that they be given a ¼ acre on the disputed land.

11. On their part submitted, the objectors that the evidence offered had proved the existence of a trust whereby, the deceased was registered as the proprietor of **Ntima/Ntakira/691** in trust for the father of the objectors. The cases of **Nyeri CA No. 320 of 2013, Zipporah Wanjiru Mwangi vs. Zipporah Wanjiru Njoroje, Kanyi v. Muthiora [1984] KLR 712** and **Mwangi & Another v. Mwangi [1986] KLR 328** were cited in reliance of those submissions.

12. Having carefully considered the depositions and evidence on record and the submissions of learned counsel, the issues for determination are; *whether there was any relationship between the deceased and the objectors, whether this court has jurisdiction to determine the dispute in respect of Ntima/Ntakira/691 as claimed by the objectors, whether there was any trust in respect of Ntima/Ntakira/691 and how the estate should be distributed.*

13. This matter first commenced before Makau J who took the entire evidence of the objectors and part of the petitioner’s evidence. I only recorded part of the petitioner’s testimony.

14. On the first issue, it was the objectors’ case that the deceased was their uncle. That they were children of one **M’Nkanata M’Arim** who was a brother to the deceased. The petitioner denied there being any relationship between the deceased and the father of the objectors. According to her, the father of the deceased was doing manual labour within the village and was working for the deceased brother, one M’Mwongo but later came to live on the deceased’s disputed land with the latter’s permission.

15. All the witnesses for the objectors were in agreement that **M’Arim M’Ikiara**, the father of the deceased had 3 sons, the deceased, **M’Mwongo M’Arim** and **M’Nkanata M’Arim**. That the objector’s were children of **M’Nkanata M’Arim**. The petitioner admitted that when she was married, the father of the deceased **M’Arim M’Ikiara** was alive. He was living with the deceased, **M’Mwongo and M’Nkanata M’Arim** on his property plot no. 568 at Kiorone which was later given to the deceased and where she lives to-date.

16. **OW4 Fredrick Mugambi M’Mwongo** told the court that he was a son to **M’Mwongo M’Arim** a brother to the deceased. His testimony remained firm that his grandfather had three sons. That his father (M’Mwongo), the deceased and **M’Nkanata M’Arim** were brothers of the same father and same mother, **Syomeru**. **OW4** was an independent witness. He stood to gain nothing from the testimony he gave. His evidence was neither impeached nor challenged. He remained firm as to the relationship between the deceased, his father and the father of the objectors. I believed his testimony as opposed to that of the petitioner which seemed to be was wholly self-serving.

17. Accordingly, I hold that the deceased was related to the father of the objectors as they were brothers of the same father and same mother. The objectors are nephews of the deceased.

18. The next issue is whether this court has jurisdiction to determine the dispute relating to **Ntima/Ntakira/691** as made by the objectors. The petitioner’s position, which is correct in law, is that a family court is not a forum for settling land disputes. That its jurisdiction is only limited to identifying the estate of a deceased, the beneficiaries and distributing the estate accordingly. The objectors contended that they were claiming the existence of a trust and that this court has jurisdiction to entertain the same.

19. As already stated, the objectors admit that they are not children of the deceased. Their claim is that, the deceased held **Ntima/Ntakira/691** in trust for their father, **M’Nkanata M’Arim**.

20. In **Zipporah Wanjiru Mwangi v. Zipporah Wanjiru Njoroje [2017] eKLR**, the Court of Appeal held:-

“In succession proceedings where, as here, existence of a trust is alleged in respect of land claimed to be family land, it is appropriate to the court to give directions as to the procedure to be followed. ...

Where, as here, the issue (of trust) arises in succession proceedings whether the land is family land and therefore is subject to trust or whether it is owned absolutely by the deceased and therefore is not subject to distribution, the court hearing the succession proceedings has jurisdiction to determine the issue and to give appropriate directions on the hearing. This is in line with the jurisdiction vested in the High Court by Article 165(3) (a) of the Constitution and Section 47 of the Law of Succession Act, Cap 160”.

21. On the basis of the foregoing and the objectors having claimed the existence of a trust, I hold that this court has jurisdiction to determine the objectors’ claim in these proceedings.

22. The next issue is whether there was any trust proved in this case. In **Gichuhi v. Gichuhi [1982] EA 285**, it was held that the party relying on the existence of a trust must prove through evidence the existence and creation of such trust.

23. In the case of **Ayoub v. Standard Bank of S.A [1963] EA 619**, the Privy Council quoted **Cook v. Fountain [1676] 36 ER 984 at 987** where it was held:-

‘So the trust if there be any, must either be implied by the law, or presumed by the court. There is one good, general, infallible rule that goes to both these kind of trust. It is such a general rule as never deceives; a general rule to which there is no exception, and that is this, the law never implies, the court never presumes a trust, but in a case of absolute necessity”.

24. In view of the foregoing, a trust will not be implied or presumed unless it is to give effect to the intention of the parties. Before a trust can be implied, the intention of the parties to create a trust must clearly be determined and established. In the present case, it was upon the objectors to prove the existence of a trust.

25. The evidence on record shows that the objectors’ grandfather, **M’Arimi M’Ikiara** had 3 sons, the deceased, **M’Mwongo** and **M’Nkanata**, the Objectors’ father. He distributed three different properties to his said 3 sons. The deceased was given land at Kioroni, **M’Mwongo** was given land near Irinda Secondary School while **M’Nkanata** was given land at Magondu near Kathita, which is **Ntima/Ntakira/691**.

26. It was the objectors’ contention that when the time for registration came, the deceased caused **Ntima/Ntakira/691** to be registered in his name instead of his brother, **M’Nkanata M’Arimi** who was at the time working away from home. That when **M’Nkanata M’Arimi** returned home, and discovered what the deceased had done, he lodged a caveat on the property in 1978 and lodged a complaint with the Land Dispute Tribunal. Unfortunately, both died before the dispute could be settled.

27. The petitioner denied the allegation that her husband had wrongly registered himself as owner of **Ntima/Ntakira/691**. She told the court that the deceased had purchased the said property from one **M’Miri**. She never called him to testify or give reason why he did not appear to testify on that fact. She also stated in her affidavit sworn on 10th March, 2011 that she was to call witnesses to prove that the objectors’ father was not related to the deceased but called none.

28. I saw the petitioner testify. She struck me as one who would lie through her teeth to get what she wants. When she applied for confirmation, she attempted to disinherit her own two sons, the interested parties whilst she included strangers, **Andrew Mutua, Silas Murega Mutari and Julius Kinoti**, as beneficiaries and purported to distribute part of the estate to them.

29. During her testimony, in order to buttress her holier than though attitude that the objectors were strangers, she swore that she could not either inform them of these proceedings because they were strangers. That she had not included any stranger in the distribution. She even stated that she did not know who **Silas Murega and Julius Kinoti** were, yet she had shared to them a portion of **Ntima/Ntakira/691**.

30. As if her aforesaid antics were not enough, when her two sons confronted her with an application to revoke the grant, she hatched a fraud with them. She purported to enter into a “Consent” dated 17th December, 2009 which was filed on 17th September, 2013 whereby she purported to distribute **Ntima/Ntakira/691** to her said two sons and the aforesaid **Silas Murega and Julius Kinoti**, who are total strangers to the estate.

31. The petitioner admitted that when she was married, she found the deceased living with his two other brothers in the land owned by her father in law at Kioroni; that in 1978 **M’Nkanata M’Arimi** cautioned **Ntima/Ntakira/691** claiming the same to be his; that he lodged a complaint against her husband with the Land Dispute Tribunal which was yet to be settled before he and the deceased died. She further admitted that when the wife of **M’Nkanata M’Arimi** died, she was buried on **Ntima/Ntakira/691**. There is no evidence to show that the deceased protested to the said burial.

32. It was further proved that after **M’Nkanata M’Arimi** died, he was also buried on that property. That **M’Nkanata M’Arimi** and his family has occupied the said property and worked on it since the time it was given to him by their father. That the deceased has never occupied or cultivated the said land. That **M’Mwongo**, the elder brother of the deceased and **M’Nkanata M’Arimi** had called the two to try and sort out the issue of the deceased having wrongfully registered himself as owner of **Ntima/Ntakira/691**.

33. In view of the foregoing and the totality of the evidence on record, I am satisfied that, the deceased had wrongfully caused **Ntima/Ntakira/691** to be registered in his name. That he held it in trust for **M’Nkanata M’Arimi** to whom it belonged. That **Ntima/Ntakira/691** does not form part of the estate of the deceased. This is why during his lifetime, he never attempted in anyway whatsoever to either claim it, or attempt to remove the objectors’ family from the occupation thereof.

34. Accordingly, the beneficiaries of the deceased are **Janet Nkirote, Peter Mwenda M’Mukira, Godfrey Kirima and Jeniffer Mwari**. The deceased’s estate constitute **Ntima/Ntakira/3028, 3029, 3030, 3031 and Ntima/Ntakira/3902** only.

35. Having found the petitioner to be dishonest, I will not allow her to continue to be the sole administrator. I will revoke the grant issued to her and issue a fresh one jointly with one of the sons, **Peter Mwenda Gerrard**. Since the beneficiaries had agreed on how to distribute the estate in the consent of 17th December, 2009, albeit with the intention to defraud the objectors of **Ntima/Ntakira/691**, I will not disturb their said agreement to the extent that it involves the beneficiaries alone.

36. Accordingly, the objection is hereby allowed with orders as follows: -

a) The property known as **Ntima/Ntakira/691** does not belong to the deceased but the estate of the late **M’Nkanata M’Arim** and its distribution can only be dealt with in the matter of his estate.

b) The register in respect of **Ntima/Ntakira/691** be corrected and be noted in the name of the estate of **M’Nkanata M’Arim**.

c) The grant issued to **Janet Nkirote** on 10th February, 2009 is hereby revoked and a fresh grant hereby issued to **Janet Nkirote and Peter Mwenda Gerrard** as joint administrators.

d) The consent dated 17th December, 2009 and filed in court on 17th September, 2013 is hereby nullified and set aside and is of no effect to the extent that it relates to **L.R. Ntima/Ntakira/691** and the strangers to the estate.

e) The grant herein issued to **Jane Nkirote and Peter Mwenda Gerrard** is hereby confirmed as follows:-

i) **L.R. Ntima/Ntakira/3902**

Jane Nkirote and Jeniffer Mwari - jointly

ii) **L.R. Ntima/Ntakira/3028**

Peter Mwenda Gerrard - whole

iii) **L.R. Ntima/Ntakira/3029**

Peter Mwenda Gerrard

Godfrey Kirima Arimi - jointly

iv) **L.R. Ntima/Ntakira/3030**

Godfrey Kirima Arimi - whole

v) **L.R. Ntima/Ntakira/3031**

Godfrey Kirima Arimi

f) The objectors to pursue the distribution of **Ntima/Ntakira/691** in a separate Succession Cause in the matter of the late **M’Nkanata M’Arim**.

37. Since the petitioner commenced these proceedings with the intention of defrauding the objectors, she will bear the objectors’ costs for the objection.

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

A. MABEYA

JUDGE