



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 248 OF 2017

IN THE MATTER OF THE ESATE OF M'AMUTU M' KARAIGUA (DECEASED)

JOSEPH MWENDA M'AMUTU.....1<sup>ST</sup> APPLICANT

TABITHA GACHIGO M'AMUTU.....2<sup>ND</sup> APPLICANT

LUCV NYEGERA M' AMUTU.....3<sup>RD</sup> APPLICANT

STELLA KINANU M'AMUTU.....4<sup>TH</sup> APPLICANT

GLADYS MUNGANGE M'AMUTU.....5<sup>TH</sup> APPLICANT

-VS-

JAMES MWORIA M'AMUTU.....RESPONDENT

### JUDGMENT

1. The Application before me is dated 30<sup>th</sup> January 2018 and is expressed to be brought under section 47 and 76 of the Law of Succession Act and Rules 43 and 73 of the Probate and Administration Rules. The Applicant seeks an order for rectification of the grant of distribution of the estate to provide a  $\frac{1}{4}$  (quarter) of an acre for the widow of the deceased and daughters who were left out. They also ask the court to make any other order as shall be in the interest of justice in this matter.

2. The Application is supported by the grounds in the application and the affidavit of Joseph Mwenda M'Amutu. More specifically, it was averred:-

**a. That the daughters and widow of the estate were inadvertently left out of the distribution of the estate. Yet, the widow has been living in the house left by the deceased with him and the daughters.**

**b. That the other sons of the deceased had abandoned the deceased who needed to be provided for.**

**c. Lastly that the sons are already allocated and planning to sell their respective shares to third parties an occurrence that shall leave the widow landless and destitute.**

3. The Respondent filed an Affidavit dated 17<sup>th</sup> October 2018 and averred:-

**a. That the estates comprises two parcels of land i.e. L,R, No. Abothuguchi/ Katheri/195 and Abothuguchi/ Katheri/1082. However, it is not clear in the application from which parcel the applicant wishes the  $\frac{1}{4}$  acre to be excised.**

**b. That the application is an afterthought to delay the implementation of the grant issued on 12<sup>th</sup> May 2008 and**

**c. That the Administrator has not obtained a valid consent from the parties.**

**d. Further that all the applicants were present when the grant was confirmed and they signed a consent.**

## Submissions

[4] On 25<sup>th</sup> September 2018 the Court directed parties to file written submissions to the Application. Both parties have filed their written Submissions. The Applicant restated the Grounds in their application but also submitted that the estate of the deceased is still intact and no subdivisions has been done and therefore this Honourable ought to revoke the grant on distribution and have the estate distributed equally among the children of the deceased. He aligned himself with the decision in **Succession Cause No. 2229 of 2010 In the matter of the Estate of Elizabeth Wanjiku Munge (deceased)**

[5] The Respondent restated the Grounds averred in the Relying affidavit but also submitted that the widows and daughters have no interest in the estate since they only present the case for one widow whereas the deceased had other wives. He also stated that the applicant did not have consent from the daughters and that four (4) sons of the deceased and other daughters did not receive from the estate of the deceased as had been agreed in the family meeting.

## ANALYSIS AND DETERMINATION

### Preliminary Matters

[6] The application herein is entitled: "SUMMONS FOR RECTIFICATION OF THE GRANT". It is however made under section 47 and 76 of the Law of Succession Act, article 159 of the Constitution, Rules 43 and 73 of the Probate and Administration Rules. It seeks rectification of grant and any other order as is in the interest of justice. Therefore despite the anomaly in the title of the application, the substance thereof as well as the arguments presented relate to revocation of grant and re-distribution of the estate of the deceased. I will therefore deal with the said application as such and grant appropriate orders as shall be in the interest of justice.

[7] Another small issue; I note also that the Applicants herein appointed the firm of GIKUNDA ANAMPIU & Co. Advocates to act for them in these proceedings. The supporting affidavit is sworn by the 1<sup>st</sup> Applicant only. Although there is no indication that the other Applicants granted the 1<sup>st</sup> Applicant authority to swear on their behalf, however the supporting affidavit is written in a plural form and uses the prefix 'we' and makes reference to other applicants. In light of article 159(2) (d) of the Constitution, courts should not place undue emphasis on such technicalities. The application is therefore competent and properly before me. I will therefore consider the application on merit.

### Substantive issues

[8] Back to the main. The Deceased herein died on 6<sup>th</sup> January 1984 and as per the letter of the introduction by the Area Chief, location dated 7<sup>th</sup> July 2006 the deceased left behind the following dependants:-

**Elizabeth Wanja M'Ambutu (1<sup>st</sup> wife, deceased), Margaret Mbuthu John, Harriet Ngautani M' Matiri, David Magambo M'Ambutu, Gichuru M'Ambutu, Charity Kithira John, Rebecca Kaimuru M' Ambutu (2<sup>nd</sup> wife, deceased), Wilfred M' Rinteri M' Ambutu (deceased), Tabitha Karambu, Jerica Mwari Isaac, Samson Kimaita M' Ambutu, Tabitha Gachigo M' Ambutu (3<sup>rd</sup> wife), Stella Kinanu Elijah, Gladys Munyange Murunga, James Mworira M' Ambutu, John Kirimi M' Ambutu, Hellen Kanja Nanga (deceased), Lucy Nyegera Murithi, Silas Mugambi M' Ambutu, Peter Kaimenyi M' Ambutu, Stephen Kiogora M' Ambutu. Joseph Mwenda M' Ambutu**

[9] The petitioner petitioned for letters of Administration on 9/07/2007 to which he attached the consent to making of a grant of administration by persons of equal or lesser priority signed by sixteen(16) of the beneficiaries that included the applicants herein. The cause was gazette on 17<sup>th</sup> August 2007. Letters of Administration were issued on 20th September 2007. The petitioner filed summons for confirmation of grant on 1/4/2008 allegedly with the consent of the sixteen (16) beneficiaries which also included the applicants. The summons sought to divide the estate of the deceased equally amongst **James Mworira M'Ambutu, John Kirimi M'Ambutu, Silas Mugambi M'Ambutu, Peter Kaimenyi M'Ambutu, Stephen Kiogora M'Ambutu, Joseph Mwenda M'Ambutu & David Guanta IM'Ikaria.**

[10] The summons was heard on 6.5.2006 and all the beneficiaries were present in Court. The grant was therefore confirmed by Emukule.J. A Certificate of grant was issued on 12<sup>th</sup> May 2008.

It appears that a dispute arose specifically when some of the beneficiaries realized that they are being displaced from their respective portions of land. This Court on 20th April 2016 gave Orders stopping the issuance of titles to land Parcel No. Abothuguchi/ Katheri/195 i.e. 4011, 4012, 4013, 4014, 4014 and 4016. The Court also delivered a ruling on 5<sup>th</sup> October 2017 and ordered inhibition to be registered on the suit premises, the mutations forms that carry the sketch maps not to be used for the purposes of registration herein and that the parties to agree on the subdivision of the land in accordance with the grant. And if they fail to agree then they make known the concerns to the surveyor.

[11] From the affidavits of the parties there is a revelation that they have failed to agree on the subdivision of the properties. There is an indication that Abothuguchi/ Katheri/1082 has already been sold to 3<sup>RD</sup> Parties a fact that has not been disputed. The estate/suit property that therefore remains and which is the subject of this decision is Abothuguchi/ Katheri/195.

[12] The affidavit in support of application at paragraph 5 stated that the widow and daughters of the deceased would be comfortable if granted ¼ an acre in the estate. This portion does not in any way benefit the 1<sup>st</sup> Applicant. I am glad to note that the 1<sup>st</sup> applicant is the administrator of the estate and has taken steps to right his wrongs.

### Of widow and daughters

[13] From the record, the daughters, the widow and some of the sons of the estate have not been provided for in the estate. There is no any portion of land in the estate that was assigned to them. The certificate shows only sons were given shares in the estate. That notwithstanding, the court is perturbed by the fact that they were present during the hearing of the confirmation of Grant. None raised any objection to confirmation of grant. It is said that they signed consent to confirmation of grant. It may be claimed and this is reasonably inferred here that the widow and daughters of the deceased cannot claim *non est factum* as they signed the consent while in possession of full faculties. But I ask whether the fact that in Ameru community widows and daughters do not inherit land a relevant factor?

[14] In such heavily laden patriarchal society at the time, women could be said to have been under a fundamental misapprehension about the substance and purport of the document they signed in succession causes. Consent in such matters should always be informed and voluntary decision by the person signing. Even if the widow and daughters of the deceased were adults in full possession of their faculties, the fact that there was restriction or denial of right to inherit is sufficient or fundamental incapacitation to make an informed decision in form of consent to distribution. In such scenario, at the time, they were under a mistaken belief that they are not entitled to inheritance and so they would merely sign consent form as a matter of satisfying a legal requirement rather than making a decision to renounce their right to inherit. They did not conscientiously disinherit self. This reality is the brutal truth about discrimination of women in many African societies including Ameru. I do not think in such circumstances, the widow and daughters of the deceased could be said to have expressed free will given the character or effect of the consent to forego their rights. See the House of Lords in *Gallie –v- Lee* [1971] AC 1004.

[15] They cannot even be said to have been careless in the matter. A fair assessment; upon the realization that they will now be evicted, they sought remedy. These things explain why they have come after over ten (10) years after confirmation of grant. Nonetheless, the Law of Succession Act also allows a party to apply for the revocation and/or rectification of grant at any time after the grant is confirmed.

[16] It is therefore a potent concern that the daughters and widow herein live on the estate property but no land was assigned to them. Therefore, they face a high likelihood of being evicted from where they reside and in effect be left landless and homeless. I have stated that in Ameru tradition, daughters and widows never used to inherit land, and this practice may be responsible for their being disinherited. This is discrimination and injustice is being occasioned. It is sad that sons received their shares and abandoned the widow and their sisters.

[17] In cases such as this one, section 40 of the Law of Succession Act would apply. The principle of equality will also come to bear. But the applicant stated that the daughters and widow claim for ¼ an acre of the estate; this is justifiable and selfless. However the Respondents wanted to introduce some confusion by stating that there are two estate properties and it has not been indicated where the ¼ acre will be excised. I have already observed and determined that, from the affidavits of the parties there is a revelation that Abothuguchi/ Katheri/1082 has already been sold to 3<sup>rd</sup> Parties- a fact that has not been disputed. The estate/suit property that therefore remains and which is the subject of this decision is Abothuguchi/ Katheri/195.

[18] Accordingly, I order that the widow and daughters shall be provided for in the estate ¼ of an acre. The said ¼ acre shall be excised from **ABOTHUGUCHI/ KATHERI/195**. The balance shall be shared out by the persons appearing in, on the basis of the ratio derived from the initial sharing stated in the certificate of confirmation herein. Other than the sharing of Lr No 195 all the other entries in the earlier certificate shall remain as is. An amended Certificate of Confirmation of Grant shall be issued accordingly.

[19] This being a succession cause, I order each party to bear own costs.

**Dated, signed and delivered in open court this 20<sup>th</sup> Day of February, 2019**

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**F. GIKONYO**

**JUDGE**

In presence of

1<sup>st</sup> and 3<sup>rd</sup> applicants – present

Respondent – present

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**F. GIKONYO**

**JUDGE**