



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 110 OF 1999

IN THE MATTER OF THE ESTATE OF M'MWIRICHIA NDERI (DECEASED)

DAVID MURERWA M'MWIRICHIA.....ADMINISTRATOR (DECEASED)

VERSUS

NANIS MUNYANGE MWORIA.....INTERESTED PARTY

AND

CAROLINE MAKENA MURERWA.....1ST APPLICANT

BETTY KAGENDO MURERWA.....2ND APPLICANT

MARGARET GAUKU MWOBODIA.....3RD APPLICANT

J U D G M E N T

1. **M'MWIRICHIA NDERI** ('the deceased') died on 6/10/97. According to the Chief's letter of 30/11/98, the deceased was survived by **Elizabeth Nyoroka M'Mwirichia** (wife), **David Murerwa M'Mwirichia** (son), **Mworia M'Mwirichia** (son – deceased), **Kirai M'Mwirichia** (son – deceased) and **Margaret Gauku** (daughter). His assets were listed as:

- a) **Land parcel No. Abothuguchi/Katheri/1229**
- b) **Land parcel No. Mbugi-o-ngai 6110 and**
- c) **Money in bank at Barclays Bank of Kenya A/C No. 5257206.**

2. On 29/4/99, the late **David Murerwa M'Mwirichia** petitioned for grant of letters of administration intestate which was issued to him on 8/12/1999 and confirmed on 25/07/2000 as follows: -

a) **L.P. Abothuguchi/Katheri/1229**

- 1) **David Murerwa M'Mwirichia**
- 2) **Nanis Munyange Mworia -Equal shares**

b) **L.P. Mbugi – O Ngai 6110**

- 1) **David Murerwa M'Mwirichia**
- 2) **Nanis Munyange Mworia - Equal Shares**

c) **AC No. 5257206 - Barclays Bank, Meru Branch**

Elizabeth Nyoroka M'Mwirichia

3. On 11/2/19, **Nanis Munyange Mworja** “the interested party” lodged a Summons dated 11/02/19 under *section 66 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules* for orders that, she be appointed administrator of the estate, security be provided during the subdivision of **Abothuguchi/Katheri/1229** and for the production of the original title deed to be dispensed with.
4. The application was grounded upon the supporting affidavit of **Nanis Munyange Mworja**, wife of Mworja M’Mwirichia, sworn on 11/02/19. She stated that since the initial administrator was deceased, she should be appointed as the administrator of the estate and that since the children of **David Murerwa**, the deceased administrator, had vowed to resist subdivision it would be impossible to implement the grant. Besides, the original title deed of the said land parcel could not be traced.
5. The application was opposed by **Margaret Gauku Mwobobia**, **Betty Kagendo Murerwa** and **Carol Makena** (hereinafter “the applicants”) through their replying affidavit sworn on 8/3/19.
6. The applicants also filed a summons dated 8/3/19 for revocation or annulment of grant pursuant to *section 76 (b) (c) (e), Rules 44 (1) and 73 of the Probate and Administration Rules*. In that application, they sought for the revocation of the grant dated 6/12/99 and confirmed on 24/7/2000. They contended that **Margaret Gauku Mwobobia** was daughter of the deceased while **Betty Kagendo Murerwa** and **Caroline Makena** were daughters of **David Murerwa**.
7. They contended that the cause was filed secretly; that the wife and daughter of the deceased were never served with this Cause; their consent was never sought; and that the grant was obtained fraudulently by the making of a false statement and or concealment from the court of material facts. They prayed that the distribution be set aside and all the beneficiaries be provided for.
8. The application was opposed by the interested party vide her replying affidavit sworn on 8/4/19. She deposed that the deceased’s wife and the 3rd applicant were aware of the cause. That her mother in law had been provided for with the money in the bank. That the deceased divided **Abothuguchi/Katheri/1229** many years before his death in the presence of clan elders. As for parcel No. **MBUGI-O- NGAI 6610**, the 3rd applicant and her husband had illegally and fraudulently sold it.
9. The Court directed that the two applications be consolidated and be heard through *viva voce* evidence. On 23/09/19 by consent of the parties, the grant issued on 6/12/99 was revoked due to the demise of the original petitioner. A fresh grant was issued to **Nanis Munyange Mworja** and **Margaret Gauku Mwobobia**. The witnesses filed their affidavits which they relied on at the trial and were cross-examined on the same.
10. **PW1 M’Nthaka M’Iratu** told the Court that he is an immediate neighbor of the deceased and cousin. His testimony in Court contradicted what he had stated in his affidavit evidence sworn on 28/8/19. The totality of his testimony was that before his demise, the deceased had called elders, **Marko Kithinji**, **Stephen Kithinji** and **Stephen Nguru**, and divided **Abothuguchi/Katheri/1229** into two between his sons, **David Murerwa** and **Mworja M’Mwirichia**. That the deceased never left anything for himself whereby he and his wife, ended up using Murerwa’s portion.
11. **PW2 Margaret Gauku** stated that she is a daughter of the deceased; that she came to know about this Cause when she received an application by the Interested Party. She was not agreeable to the mode of distribution as she and her mother had not been provided for. She stated that she was not aware of the money in the bank. She acknowledged that the estate property was divided into two equal shares but that she did not know who put up the boundaries. She was not aware that her father had called elders who divided the land between his two sons.
12. **RW1 Nanis Munyange Mworja** testified that she and the late **David Murerwa** had followed how the deceased had divided the estate land. That the deceased called elders and divided his land into two and did not leave anything for himself. That at the time, both the deceased and his wife were living at Kathiranga on the land belonging to a **Mr. Kinoti**. The widow only came to the estate land after she had become very old and was unable to feed for herself. The money in the bank was withdrawn by the widow. The 3rd applicant was not given anything by the deceased and she did not complain to him when he was alive.
13. **RW2 Stephen Nguru M’Mugwika** recalled that in 1995, the deceased called him among other people to witness him share out his land among his children. He shared **Abothuguchi/Katheri/1229** equally amongst David Murerwa and the interested party. As for **Segera/Segera/Block 2/6110** it was sold by the deceased and his widow. At the time of the deceased’s death, he was living on Kinoti Matago’s land with his wife.
14. **RW3 Mariko Kithinji M’Ikirima** and **RW4 Stephen Kithinji** corroborated the evidence of **RW2** as they were both present when the deceased distributed his land between his two sons. The deceased’s widow has never had a portion for herself.
15. The Court has considered both the evidence on record and the submissions of the applicants. The issue for determination is; *the grant having been revoked, how should the estate of the deceased be distributed?*
16. It must be recalled that, the estate had been distributed and the grant confirmed on 25th July, 2000. However, the same was never effected for reasons that the deceased petitioner, **David Murerwa** and the interested party could not agree on the costs of sub-division. Indeed, the interested party had filed an application dated 25/2/02 seeking that the Executive Officer of this Court do execute the necessary documents to effect the grant. In a rejoinder to that application, the deceased petitioner swore that he had not refused to effect the grant, only that the interested party had not paid him the costs of the Cause and the sub-division. Unfortunately, **David Murerwa** passed on before the said application could be determined.
18. To begin with, *section 38 of the Law of Succession Act, Cap 160 of The Laws of Kenya* provides for equal distribution of the deceased’s property in case of intestacy. In **Stephen Gitonga M’Murithi v Faith Ngira Murithi [2015] eKLR**, the Court of Appeal was emphatic on this principal of equality when it comes to distribution of the deceased’s estate amongst his/her beneficiaries. In this regard, there is no male

or female, neither married nor unmarried. All children are equal when it comes to inheritance from a deceased parent.

19. In the present case, the deceased had four children, 3 sons and a daughter. One son died leaving no wife or children but one of them, **Mworja** left the interested party and children. The other son who survived the deceased **David Murerwa** was the administrator of the estate but died before he could distribute the same. The 3rd applicant, the daughter of the deceased was married in 1967. She was neither involved in this Cause when the same was filed nor at confirmation.

20. The applicants' case is that since the daughter and the widow of the deceased were not provided for nor involved in the Cause, the earlier distribution should be discarded and the estate be re-distributed equally. On the other hand, the position of the interested party was that; the deceased had divided his property between his two sons while he was alive and the distribution of 25/7/00 was in accordance therewith. That the same should not be disturbed.

21. It is not in dispute that the 3rd applicant was not involved in the lodgment of the Cause as well as the confirmation thereof. It is also not in dispute that the widow of the deceased was provided for as she was given monies in the bank account. There was no evidence that was led to show how much the money was or whether she had withdrawn and used the same. She was said to be too old and senile to attend Court. That she was over 100 years.

22. To my mind, the real issue here is, whether the deceased had divided his property during his lifetime and if so, whether the same amounted to a gift to the two sons.

23. The evidence of **PW1, RW1, RW2, RW3** and **RW4** was clear. In 1995, the deceased, then living in **Kathiranga**, called elders who included **RW2, RW3** and **RW4** and divided **Abothuguchi/Katheri/1229** into two equal portions amongst his two sons. He left the two sons occupy and use the same to his and his wife's exclusion. He went back to live at **Kathiranga** in the land of **Kinoti** until he died. It is then that he was buried at **Abothuguchi/Katheri/1229** at the portion of **David Murerwa** and where the widow stays to-date. The said evidence remained undisputed and unchallenged.

24. In **In re Estate of The Late Gedion Manthi Nzioka (Deceased) [2015] eKLR**, Nyamweya J held: -

“For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 32 to 51.”

25. The deceased divided his land as aforesaid after the 3rd applicant had been married for 28 years. The 3rd applicant stated that although she saw a boundary on the property and the two brothers living on their separate portions, she did not know that the deceased had divided the property between the two. The deceased lived for two years after such division before he died. The 3rd applicant did not complain to him why he had not given her a portion.

26. Further to the foregoing, while the deceased died in 1997, a fact well known to the 3rd applicant, she has been contented until after 22 years to claim that she was not taken care of. She knew 22 years ago that her father was dead and he had left property behind. She knew that as daughter, she was entitled to inherit from him, if at all. Why did she not either lodge a claim with her brothers or apply for succession herself?

27. The only irresistible conclusion is that; the 3rd applicant was aware that her father had divided his property between his two sons and she was content with that fact. She never asked him for any portion during his lifetime. She also did not ask for anything for 22 years of his death until after the 3rd applicant came to court with her application to be appointed an administrator. It is when the widow has now senile and cannot even state what her husband had done 24 years ago that the 3rd applicant is coming to court.

28. The 3rd applicant cannot allege that she was not aware of the division of the property between her two brothers by the deceased during his lifetime nor the existence of this Cause. I saw her testify. She struck me as a witness who is not at ease with the truth and honesty. She told the Court that she is married far away from the estate property where it takes her an hour by a motor bike to reach. It turned out that her village is within the same locality of Imenti Central.

29. The applicant's cited the case of **In re Estate of Tuerandu Mungania (Deceased) [2018] eKLR**, for the proposition that where a deceased shows his people a place to cultivate on his land during his lifetime, it does not amount to gift. That the said property is still available to be distributed under the intestacy rules after the demise of the deceased.

30. That decision is not applicable here. In that case, the deceased only showed his 3 wives a place to cultivate each with her own children. The date of such giving and the sizes was not proved. Further, there was no evidence that in that case the deceased had involved any elders. In the present case however, the evidence was clear that the deceased called elders on a day in 1995 when he told them of his intentions. They helped him in demarcating the land for the two sons. He never occupied any part thereof until he died. Further, in adherence to what the deceased had done, his wife only came to live on a portion belonging to one of the sons to-date. Clearly, the deceased in this case was clear on what his intentions were, that the land known as **Abothuguchi/Katheri/1229** be held by his two sons in equal shares.

31. I will here reiterate what the Court stated in **In re Estate of M'Tuerandu M'Itunga (Deceased) [2019] eKLR**, thus:-

“In my view, when a father or mother divides his/her land amongst his children and stays for a very long time, such that a generation passes while the said children continue to have exclusive use and occupation thereof with defined boundaries and continue developing the same, it will be unjust to disrupt such set up after the demise of the patriarch or matriarch. There need be certainty in social set up. The requirement for the distribution of the deceased’s property under the law after the deceased’s demise did not contemplate such a scenario in my view. This I why section 40 of the Act provide that at the time of distribution the shares given during the lifetime of the deceased be taken into consideration”.

32. In the present case, the widow of the deceased who was said to have been present when the deceased divided his property to his two children never questioned him. The 3rd applicant who had been married by then for 28 years did not question that fact for the two years the deceased lived after the said division. She also did not question that set up for 22 years after the deceased’s demise. The distribution that was done on 25/7/00 stuck to what the deceased did in 1995. To my mind, it is too late in the day now to disrupt that set up. The deceased’s intentions were that **Abothuguchi/ Katheri/1229** be divided between his sons equally and he effected them during his lifetime.

33. It was clear that the other property **Mbugi – O – Ngai 6110** had been disposed off by or with the knowledge of the widow and the 3rd applicant. No orders can be made in respect thereof.

34. Accordingly, the Summons dated 8/3/19 is hereby dismissed. For reasons set out above, I allow the Summons dated 1/2/19 on the following terms: -

a) the grant issued to Nanis Munyange Mworia and Margaret Gauku Mwobobia on 23/9/19 be and is hereby revoked.

b) a fresh grant issues to Nanis Munyange Mworia and Caroline Makena Murerwa as joint administratrix of the estate of the late M’Mwirichia Nderi.

c) the fresh grant issued in b) above is confirmed as follows:

a) Abothuguchi/Katheri/1229

i) Nanis Munyange Mworia - 0.5 Ha

ii) Caroline Makena Murerwa

Betty Kagendo Murerwa - 0.5 Ha (Equally with Elizabeth Nyoroka M’Mwirichia having a life interest thereon)

b) Barclays Bank Ac. No. 5257206, Meru Branch

Elizabeth Nyoroka M’Mwirichia

36. This being a family matter, I will make no order as to costs.

DATED AND DELIVERED AT MERU THIS 31ST DAY OF OCTOBER, 2019.

A. MABEYA

JUDGE