



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 5 OF 1996**

**IN THE MATTER OF THE ESTATE OF BORO MIRA (DECEASED)**

**JUDGMENT**

1. Boro Mira, the deceased herein, died on 19<sup>th</sup> September 1993, and a petition for representation to his estate was filed by James Ng'ang'a Boro, on 3<sup>rd</sup> January 1996. Before representation could be granted in accordance with the petition, Abigael Kanyi Kang'ethe, filed an objection to the said petition, on grounds that the application was founded on false statements and concealment of things material to the case. She filed another application seeking injunctive orders against delineation of property pending hearing and determination of the objection proceedings. The injunctive orders were granted by the court in a ruling that was delivered on 2<sup>nd</sup> October 1996. A grant of representation was eventually made on 31<sup>st</sup> January 2014 to James Ng'ang'a Boro and Abigael Kanyi Kang'ethe, hereinafter referred as the administrator and the administratrix, respectively, taking the form of a grant of letters of administration intestate.

2. The said appointment of administrators apparently provoked the filing of the application dated 16<sup>th</sup> May 2014, by Samuel Njenga Gathunguri, James Njuguna Mungai, Lucy Wanjiku Kamau, Patrick Ngigi Kamau and Charles Kiago Wabaria, claiming, *inter alia*, that they were creditors of the estate, having bought various parcels of land demarcated from Kiambaa/Thimbigua/2165. Similar applications were filed on 16<sup>th</sup> December 2014, 9<sup>th</sup> December 2016 and 5<sup>th</sup> July 2018 by Kariuki Kiore, Lucy Wawira Njagi and Damaris Wakonyo Kairu respectively. I shall refer to these parties as the applicants.

3. The matter proceeded by way of oral and affidavit evidence.

4. After considering the filings herein and the oral testimonies recorded by the court, the issues for determination that I have identified are:

- a) whether the deceased held a portion of Kiambaa/Thimbigua/2165 in trust for Kahenya Mira, the father of the administratrix;
- b) whether the applicants are entitled to portions of Kiambaa/Thimbigua/2165; and
- c) how should Kiambaa/Thimbigua/2165 be distributed.

5. I will first consider the issue as to whether the deceased held a portion of Kiambaa/Thimbigua/2165 in trust for Kahenya Mira, the father of the administratrix. The administratrix's case has always been that the deceased held Kiambaa/Thimbigua/2165 in trust for one Kahenya Mira, who was her father and the deceased's brother. The administratrix submitted that the suit property was ancestral land originally owned by one Woike, who was the father of Mira Woike, the father to the deceased and Kahenya Mira. The administratrix further submitted that during the demarcation period, the deceased was placed in charge of distribution of the said property since he was the most learned amongst his siblings and that the suit property was registered in his name but a half of it was held by him on behalf of his brother, Kahenya. The administratrix added that the families of the deceased and the said Kahenya had lived in the suit property for a long period of time with the understanding that the deceased was holding the suit property in trust for Kahenya. In her testimony as PW1, the administratrix testified that she could not recall the year her father, Kahenya died or where he was buried. The administratrix submitted that she was hospitalized for a long period of time thereafter and that the deceased sold a plot that was being occupied by Kahenya. The deceased then moved the administratrix and his family to the suit property where they have been residing to date, together with the deceased's family.

6. The administratrix testified that her husband, who had been living with her on the suit property, was buried there when he died in 2001. She further submitted that the suit property was initially known as Kiambaa/Thimbigua/1438 but changed to Kiambaa/Thimbigua/2165 when the deceased sold a portion to her on a willing buyer willing seller basis, but she added that that did not take away her right to claim their rightful share of the suit property and that in any case, it was the deceased who was selling his part of the suit property. In her testimony, the administratrix stated that one of her daughters bought the portion from the deceased but she could not recall which daughter bought it and that she was never issued with any title document for the said portion. The administratrix submitted that her pursuit of her father's share of the suit property began in the 1980s when she placed a caution on the suit property and obtained a grant of representation over her father's estate, which was confirmed, and where she claimed a portion of the suit property. The administratrix added that she filed a case with the

Karuri Lands Dispute Tribunal, which was ruled in her favour, that the suit property should be shared equally between her and the survivors of the estate of the deceased. The administratrix stated that that decision was upheld on appeal by the Provincial Appeals Committee, which was adopted as an order of the court on 21<sup>st</sup> October 2005, and that no further appeal was lodged by the administrator thereafter. She added that the order by the land disputes tribunal for the subdivision of the suit property was based on the finding that a customary trust existed which was recognized by the relevant land legislation.

7. Leah Gakuo Nyathira, testified as PW2, and stated that she was a daughter of the administratrix, and corroborated the administratrix's testimony, that they were currently living in the suit property, together with the family of the deceased. She denied that the deceased had initially bought the land, arguing that the same was obtained during the demarcation period. She added that the deceased was registered as the owner as Kahenya had since died after the demarcation. She stated that at the time when the deceased was being registered as the owner of the suit property, they were already living there and that they never had any disputes on the suit property as they all understood that the suit property was being held by the deceased in trust for all of them. She stated that when Kahenya and his wife died, the administratrix also fell ill, and it was the deceased who took care of them. She stated that it was only after the deceased's death that disputes started. She testified that they had bought half an acre of the suit property which was excised and they got a title for it. She testified that the land dispute was originally forwarded to the Karuri Chief's office where it was decided that the land be divided equally between Kahenya and the deceased, but then subdivision was not done. She corroborated the administratrix's testimony that the matter was then forwarded to the District Land Tribunal, where it was decided that the property be shared between the family of the deceased herein and the family of Kahenya.

8. On his part, the administrator testified that he was born in 1948 and had lived on the suit property all his life. He was in agreement with the administratrix that the suit property was originally registered as Kiambaa/Thimbigua/1438 but was later changed to Kiambaa/Thimbigua/2165 in 1977. He contended that the deceased bought the suit property, together with other properties, which were demarcated and subsequently consolidated. However, he stated that he did not have evidence of any of the said purchases, but said that the deceased had told him about it. He added that the administratrix bought a portion of Kiambaa/Thimbigua/1438 from the deceased. He further testified that the said Kahenya was a stepbrother of the deceased and that when he died, he was buried in a public cemetery in Karuri and not in the suit property. He stated that Kahenya was never married, had no children and had no home of his own as he used to live with the deceased. He further stated that he did not know whose child the administratrix was, adding that he was not told how the administratrix was related to the deceased. Interestingly, he also said that the deceased gave the administratrix land to put up a house. He further testified that the document that was put in evidence, as P. Exhibit 7, showed that elders had decided that the administratrix should buy a portion of the deceased's land, which she did by paying Kshs. 20,000.00, as the administratrix had been required to leave the deceased's land. He stated that the administratrix was not present at the meeting where elders decided that. He added that the dispute was forwarded to the Land Registrar where it was found that the administratrix was not entitled to a share of the estate land. He stated that he was invited to attend the hearing at the Karuri land tribunal but he did not attend as he had another case before this court. He stated that he was not a party to the Karuri Land Tribunal case and that he appealed the decision at the Nyeri Provincial Tribunal which upheld the decision of the Karuri tribunal. He stated that he was not aware that the decision of the Karuri Land Tribunal was adopted as an order of the court in Kiambu CMC Land Case No. 10 of 2005 as he was never served with a copy of the decree. He admitted that he had never filed any case to challenge the decree on the awards by the land tribunals. He added that the decision of the Chief was not placed before the tribunal during the hearing. He later admitted that the administratrix was a daughter of Kahenya, who was his uncle, but then denied that the administratrix was entitled to a share of the suit property.

9. The Supreme Court of Kenya, in *Isack M'Inanga Kiebia vs. Isaaya Theuri M'Lintari & another* [2018] eKLR, stated:

*"... we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.*

*Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:*

- 1. The land in question was before registration, family, clan or group land*
- 2. The claimant belongs to such family, clan, or group*
- 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.*
- 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.*
- 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.*

*We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in *Obiero v.**

*Opiyo and Esiroyo v. Esiroyo. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.*

*In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that "to prove a trust in land; one need not be in actual physical possession and occupation of the land." A customary trust falls within the ambit of the proviso to Section 28 of the Registered Land Act, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered Land Act."*

(Also see *In re Estate of Samwel Obite Getabu (Deceased)* [2019] eKLR)

10. In the instant case, the administratrix contended that the suit property was registered in the name of the deceased during the demarcation period but on behalf of his brothers. The administratrix was able to give a detailed account of the lineage and relationships of the family and how the deceased came about the suit property. I must admit that for her age, the administratrix's evidence was quite firm and unshaken, especially in respect of the names of members of the family and knowledge thereof. I have no doubt that she was a daughter of Kahenya, who was a brother of the deceased, something which the administrator even admitted in his testimony. By the administrator's own admission, Kahenya used to live with the deceased in the suit property and there was no indication that he left at any time prior to his death. The administrator had stated that the deceased had purchased the suit property but admitted that he had no evidence to that effect and, therefore, that assertion should fail for want of proof.

11. Going by *Isack M'Inanga Kiebia vs. Isaaya Theuri M'Lintari & another* (supra), on the elements that qualify a claimant as a trustee, and the evidence before me, I find that the administratrix has been able to prove, on a balance of probability, that her father, Kahenya, was a beneficiary of and the deceased a trustee with respect to the said property. The property was registered in the name of the deceased on behalf of the larger Woike family, which included the administratrix's father. It was said that the property could have been registered in the name of the administratrix's father, save that the deceased was much more 'learned' and 'exposed' at the time. Kahenya, being a brother of the deceased, and the administratrix, being a niece of the deceased, makes their relationship not so remote or tenuous as to make the administratrix's claim idle or adventurous. I note that the claim is against the estate. It is my conclusion that the deceased held a portion of Kiambaa/Thimbigua/2165 in trust for Kahenya Mira, the father of the administratrix.

12. I now turn to the issue as to whether the applicants are entitled to portions of Kiambaa/Thimbigua/2165. It was common knowledge that portions of the suit property had been sold to third parties by some family members of the deceased. PW2 testified that the sons of the deceased sold some portions of the suit property to third parties who had already taken up possession thereof. PW2 added that they had no problem with the said third parties who bought portions of the suit property because, in any case, they bought the portions due to the deceased and not on the side due to Kahenya. The administrator testified that he and his brother had been selling portions of the suit property, and that the deceased had also sold a portion of the suit property. The administrator stated that he sold one acre to Damaris Wakonyo Kairu, whereas his brother, Miring'u, had sold three acres. He admitted that it was him who had sold the bulk of the estate property. He added that these proceedings had not started by the time he was selling to Damaris Kairu. He added that Samuel Njenga Gathunguri, Lucy Wanjiku Kamau, Patrick Ngigi Kamau and Charles Kiago Wabaria bought land from his brothers, whereas Stephen Kamau bought a portion from the deceased. He further stated that all those people were in occupation of the portions that they had bought, saying that they had since developed the land. Charles Kiago Wabare testified that he had bought a portion of the estate property, adding that Patrick Ngigi Kamau, Lucy Wanjiku Kamau, Samuel Njenga Gathunguri and Stephen Kamau had all bought portions of it. He stated that he was the only one who resided on the land, while the rest only cultivated the land. Sale agreements of the said transactions were produced as evidence.

13. The Law of Succession Act, Cap 160, Laws of Kenya, applies to the estate of the deceased, both substantively and on matters of procedure, by virtue of section 2 thereof the deceased. He died after the Act came into force. According to the said Act, the estate of a deceased person can only be handled by a person who has been authorized to deal with estate property. Section 79 vests the assets of the estate of a deceased person on the executor of the will, should the deceased have had died testate, and administrators, where the deceased died intestate. That then clothes the personal representative with the powers set out in section 82 of the Act, and imposes upon him the duties set out in section 83 of the Act. A person who does not hold a grant of representation intermeddles with the assets should he deal with them. That is outlawed by section 45 of the Act.

14. For avoidance of doubt, I do hereby set out verbatim the provisions that I have referred to above. Section 45(1) of the Law of Succession Act, provides as follows:

*"(1). Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person."*

15. Section 79 of the Law of Succession Act provides that:

*"Property of deceased to vest in personal representative"*

*The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."*

16. The powers set out in section 82 include that to sell estate property. For avoidance of doubt, estate property can only be sold by a personal representative or by any other person with the leave or authority of the court. Sale by personal representatives is limited in the manner provided in section 82, and where such personal representatives wish to sell property outside those powers, they must obtain leave of court. Crucially, immovable property cannot be sold before confirmation of a grant of representation. Section 82(b)(ii) of the Law of Succession Act, is relevant, it provides that:

*“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers – to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:*

*Provided that –*

*(i) ...*

*(ii) No immovable property shall be sold before confirmation of the grant...”*

17. In *Benson Mutuma Muriungi vs. CEO Kenya Police Sacco & Another* [2016] eKLR, the court observed that:

*“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, \*distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”*

*See also the case of Machakos High Court Civil Case No. 95 Of 2001 John Kasyoki Kieti vs. Tabitha Nzivulu Kieti & another it was held that doing anything affecting the estate of a deceased person amounts to intermeddling. In the case cited, the court considered commencing a suit on behalf of the estate before obtaining a grant of representation to be an act of intermeddling with the estate. Again, consider the case of Gitau and Two Others -Vs- Wandai and Five Others (1989) KLR 231 where it was held that entering into an agreement to sell estate property before getting a grant or without such a grant is an act of intermeddling.”*

18. In *In re Estate of Jaswant Singh Boor Singh Dhanjal (Deceased)* [2016] eKLR, it was said that:

*“In the cited case of Peter Ombui Nyangoto v. Elizabeth Matundura & Another [2013] eKLR, in which the property of the deceased therein was transferred before a grant was issued, the Court of Appeal opined:*

*“The second respondent's active consent in the transaction that ended in complete violation of the Law of Succession Act did not and cannot make that transaction legal. It remains illegal and all who participated and/or could have participated in such illegality would still have taken part in an illegal activity.”*

*Likewise, in the instant case, the Settlement Agreement which purported to deal with the assets of the estate of the deceased before grant was issued was in complete violation of the law of Succession Act and the acquiescence of the Applicant did not and cannot make it legal ... The Law of Succession Act jealously guards and protects estates of deceased persons and has made very specific and clear provisions as to how such estates are to be dealt with. Any dealings with the estate of the deceased person herein without the Grant of representation were not only void but illegal.”*

19. From the provisions of the Law of Succession Act and the case law cited above, the administrator and his brothers had no legal authority to sell or dispose of estate property in any way. They were not personal representatives of the deceased at the material time and even if they were, their no grant had not been confirmed allowing them to dispose of the estate property by entering into sale agreements with the applicants. Similarly, I find the applicants complicit in of the unlawful agreements for the purchase of estate property. I find that the applicants were fully aware that the property they were purchasing belonged to a dead person and that the administrator and his brothers had no legal authority to sell portions of the it to them, but, that notwithstanding, they still went ahead to bind themselves in the void agreements. I will excuse Stephen Kamau, who bought a portion of the property from the deceased because he may not have been aware that the deceased held the suit property in trust for his family in as much as the same was registered in the deceased's name, but I shall take it that the deceased disposed of the portion of land to which he was entitled.

20. In a nutshell, none of the applicants, save for Stephen Kamau, have any good title. Their agreements are void and sterile, and have no legal effect at all with respect to these probate proceedings. The upshot is that the applicants, that is to say Samuel Njenga Gathunguri, Lucy Wanjiku Kamau, Patrick Ngigi Kamau, Charles Kiago Wabaria, Stephen Kamau, Damaris Wakonyo Kairu, Kariuki Kiore and Lucy Wawira Njagi are not entitled to any share of any portion of the estate of the deceased.

21. Next, I will consider how Kiambaa/Thimbigua/2165 should be distributed. It is not lost to the court that there is an existing court order in Kiambu Land Case No. 10 of 2005, dated 21<sup>st</sup> October 2005, which, from the evidence and testimony on record, is yet to be discharged or set aside by way of an appeal or review. The contention by the administrator that he was never aware of or served with the proceedings of the Karuri District Land Tribunal or the court order that adopted the tribunal's award is neither here nor there. The administrator, in his own testimony, stated that he was served with a notice to attend the hearings but then could not attend because he said he had another case in court. Moreover, the administrator must have been aware of the ruling of the Karuri District Land Tribunal and that is why he challenged the same on appeal at the Provincial Tribunal, which upheld the decision of the District Land Tribunal, meaning that the decision of the District Land Tribunal, which was adopted as an order of the subordinate court stood as it was. The administrator cannot play deaf or blind to that order just because he did not like the outcome. Once a court order is made in a suit the same remains valid until it is set aside on revised or on appeal. The said order was to the effect that the subject property was to be shared equally between the administratrix and heirs of the

deceased.

22. The Court of Appeal, in *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government vs. Miguna Miguna & 4 others* [2018] eKLR, stated as follows, with regard to obedience of court orders:

*“When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”*

23. In *Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others* Civil Application No. Nai. 247 of 2006, the Court of Appeal held that judicial power in Kenya vests in the courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed, and that it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a court of law.

24. In *B. vs. Attorney General* [2004] 1 KLR 431, it was said that:

*“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”*

25. The order of the subordinate court that awarded a portion of the subject property to the administratrix cannot just be ignored when it comes to the distribution of the estate of the deceased herein. As per the said order, the deceased's heirs were entitled to only half of the suit property whereas the administratrix was entitled to the other half. The copy of title of the suit property on record indicates that the suit property measures 11.175 acres. This would mean that the property that is up for distribution between the beneficiaries of the deceased is approximately 5.5875 acres with the administratrix getting the other 5.5875 acres of the subject property.

25. In conclusion, I find that the deceased held the suit property in trust for his family, which included, Kahenya Mira, the administratrix's father. I find that the applicants, who bought portions of the estate property, have no good title over those portions as the sellers, the deceased's children, had no legal authority to transact on the subject property as they were not the deceased's personal representatives, and even if they were, their no grant had not been confirmed. It is my further finding that there is an existing court order, dated 21<sup>st</sup> October 2005, that is yet to be discharged, which established the issue of ownership of the suit property as between the administratrix and the estate of the deceased. In the said order, the administratrix was to get 5.5875 acres whereas the beneficiaries of the deceased were to get 5.5875 acres.

27. Rule 73 of the Probate and Administration Rules saves the inherent power of this court. It reads: -

*“Nothing in this rule shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.”*

28. The Law of Succession Act, at section 47, spells out the jurisdiction of the High Court in the administration of estates in these terms:

*“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient...”*

29. I am cognizant of the fact that this is an old case, spanning close to twenty-three years, and that the parties are elderly and sickly. That being the case, I proceed to make the following orders, bearing that in mind:

**(a) that the Land Registrar, Kiambu District Land Registry, is hereby directed to cause Kiambaa/Thimbigua/2165 to be subdivided into two equal portions, pursuant to the order in Kiambu CMC Land Case No. 10 of 2005, dated 21<sup>st</sup> October 2005;**

**(b) that after the subdivision, one portion measuring 5.5875 acres shall be registered in the name of Abigael Kanyi Kang'ethe, while the other shall be registered in the name or names of the administrators of the estate of the deceased herein;**

**(c) that the administrators shall thereafter file a summons for confirmation of their grant, setting out the mode of distribution of the 5.5875 acres of Kiambaa/Thimbigua/2165 that shall be due to the estate as between the survivors of the deceased or the beneficiaries of the estate;**

**(d) that each party shall bear their own costs;**

**(e) that as the estate comprises of assets that are exclusively situated within Kiambu County, I hereby order that this cause be transferred to the High Court of Kenya at Kiambu for finalization; and**

**(f) that any party aggrieved by the orders that I have made in this judgement shall be at liberty to move the Court of Appeal**

appropriately within twenty-eight (28) days.

DATED AND SIGNED AT KAKAMGEA THIS 15<sup>TH</sup> DAY OF OCTOBER 2019

W MUSYOKA

JUDGE

DELIVERED DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER 2019

A.O. MUCHELULE

JUDGE