



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 232 OF 2010**

**In The Matter of the Estate of M'arimi M'mbui (Deceased)**

**MARY NTINYARI M'ARIMI.....1<sup>ST</sup> APPLICANT**

**BEATRICE KANANU M'ARIMI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**ANDREW MUTETHIA M'ARIMI.....1<sup>ST</sup> RESPONDENT**

**GABRIEL MUTUA.....2<sup>ND</sup> RESPONDENT**

**JOSES KINIA MUGAMBI.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

[1] **M'ARIMI M'MBUI (Deceased)** to whom this succession cause relates, died on 31<sup>st</sup> May 2003. He was survived by:

- 1. Mathew Mung'ieria Arimi – Son**
- 2. Andrew Mureithi – Son**
- 3. Germano Murithi – Son**
- 4. Julius Mutuguti – Son**
- 5. Emilio Muthomi – Son**
- 6. Charles Kiogora – Son**
- 7. Mary Ntinyari – Daughter**
- 8. Beatrice Kananu – Daughter**

His estate comprises of land parcel **No NTIMA/NTAKIRA/2416**.

**Preliminaries**

[2] On 18<sup>th</sup> May 2011 Mary Kasango J. revoked the grant made to Mathew Mung'ieria Arimi on 26<sup>th</sup> October, 2010 and ordered a grant to be issued in joint names of Mary Ntinyari M'Arimi and Charles Kiogora. The judge also ordered an inhibition to be registered against parcel **NO. NTIMA/NTAKIRA/2416**. The grant was issued to the two on that same day. On 13<sup>th</sup> June 2011 an application for the confirmation of the grant of administration intestate was made.

[3] On 27<sup>th</sup> May 2011, Mathew Mung'ieria applied for a review of judgment based on the ground that he did not respond to the allegations of forgery of the signature of Mary and other beneficiaries in the consent. On 26<sup>th</sup> July 2013 Mathew Mung'ieria applied for rectification of confirmation of the grant. Mathew died on 8<sup>th</sup> September 2016 and limited grant of letters of administration ad litem in respect of his estate were issued to Tarasila Nkatha Mutea and John Mwitii Mathew.

## Applicants' Claim

[4] The applicants justified their claim vide evidence produced by their witnesses and submissions submitted dated 6<sup>th</sup> February 2018 and further submissions dated 26<sup>th</sup> February 2018. The applicants are daughters of the deceased. Their claim is that the portion of land that was meant for them is the one that was sold to the purchasers herein. They asserted that **Gabriel Mutua** and **Jose Kibia Mugambia** purchased land from some of the beneficiaries after death of the deceased. They stated that Gabriel testified that he bought land  $\frac{1}{4}$  acre from Germane Murithi M'Arimi, Emilio Muthomi M'arimi and Julius Mutuguti M'Arimi. He agreed that he never bought any land from the deceased. That Jose also testified to that effect. However, the 3<sup>rd</sup> Respondent in his submissions asserted that he bought land from the deceased and annexed an agreement. The applicants took out an objection; that he cannot produce or introduce evidence through submissions. They argued that none of these people bought land from the deceased and are thus strangers to the estate. The applicants seek that the estate be divided equally amongst the children as stipulated by Section 38 of the Law of Succession Act. Except, Charles Kiogora M'Arimi stated that he was given his share of the estate while the deceased was still alive. He therefore did not need any other share in the estate.

## Respondents Claim

[5] The Respondents also called witnesses and filed submissions in support of their case. The 1<sup>st</sup> Respondent testified as **OW1, Mathew Mungiria Arimi**, and stated that he does not agree with the applicants' mode of distribution and that the land ought to be divided as per his father's wishes that is, equally amongst his sons only; for the deceased did not give any land to the daughters as they were married. He said that his father shared the land in accordance with Kimeru custom where daughters get nothing. He further stated that his father left a curse on the land. But again, he said that his father said that in case the daughters come back, the sons should give them a house to live in as they wait to go back to their husbands. Surprisingly, though, he said in cross-examination that there is a portion that was given to the three sons which can be given to the daughters. **OW4, Robert Ntarangi**, testified that there is a portion of land which the deceased left for her daughters in case they divorce. The said portion was left under the care of the eldest son, i.e. OW1. He said that this is what he heard the deceased saying.

[6] The 1<sup>st</sup> Respondent claimed that he has not intermeddled with the estate of the deceased and that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents bought part of shares that belong to the three sons. He asserts that the applicants committed a cognizable offence as per section 52 of the Succession Act by willfully or recklessly making a false statement of which Hon Lady Justice Kasango relied upon to make a judgment that the 1<sup>st</sup> respondent had sold or intermeddled with the estate. Thus, it should to be distributed as follows:

1. Germano Murithi      sold jointly to purchaser Jose Kibia  
  
    Emilio Muthomi       $\frac{1}{4}$  acre
2. Germano Murithi      sold jointly to purchaser Nicholas  
  
    Julius Mutuguti      Mutuma  $\frac{1}{8}$  acre  
  
    Emilio Muthomi
3. Germano Murithi      sold jointly to purchaser Gabriel  $\frac{1}{4}$  acre  
  
    Julius Mutuguti  
  
    Emilio Muthomi

## Remaining Portion/ Share

4. Andrew Mutethia      - 0.10 Acres
5. Andrew Mutethia      - 0.22 Acres
6. Julius Mutuguti      - 0.22 Acres
7. Mathew Mungiria  
  
    Germano Murithi      joint equal – 0.35 Acres  
  
    Emilio Muthomi  
  
    Beatrice Kananu  
  
    Mary Ntinyari

8. Emilio Muthomi - 0.08 Acres
9. Germano Murithi - 0.08 Acres
10. Mathew Mungiria - balance

[7] The 2<sup>nd</sup> respondent stated that the 1<sup>st</sup> respondent did not intermeddle with the estate and that his application for confirmation be validated. He testified as OW2 and stated that he bought i/4 acre of land from Geremano Gichunge on 19<sup>th</sup> October, 2009. He did not have any concern about the sharing of the estate. What he cared about was his ¼ acre which he says he bought and should be recognized. He confirmed that he did not buy any land from the deceased.

[8] The 3<sup>rd</sup> respondent claimed in his submissions that he bought land from the deceased and his two sons vide an agreement dated 20<sup>th</sup> March 2003. But he testified as OW3 and stated that he bought land from Jeremano and Emilio in 2009. They are entitled to a share as provided for by Section 93 of the Law of Succession Act. He denies violating any part of Section 45 of the said Act.

[9] OW5, Andrew Mutethia stated that the purchasers herein bought land after the deceased had died.

#### ANALYSIS AND DETERMINATION

[10] There are two issues that emerge from the facts of this case, namely;

1. Whether the applicants, being daughters, are entitled to a share in the estate of the deceased;
2. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have a claim over the estate? And,
3. How should the estate be distributed?

[11] I will, however, invert the order and begin with issue 2 to establish whether these two purchasers are beneficially entitled to the estate of the deceased. In cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares. See section 81 of the Law of Succession Act. Dependants are entitled to a share in the estate of the deceased. Dependant is defined under Section 29 of CAP 160 as below;

#### **29. Meaning of dependant**

*For the purposes of this Part, “dependant” means*

*(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*

*(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and*

*(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.*

[12] The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are certainly not dependants of the deceased in the sense of the law. They, however, claim purchaser’s interest as a basis of entitlement in the estate. They have invoked Section 93 of the Law of Succession Act to reinforce their claim. The section states:

*“(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.*

*(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.”*

[13] Application of this section 93 of the Law of Succession Act was made clear by the Court of Appeal in the case of **Jecinta Wanja Kamau V Rosemary Wanjiru Wanyoike & Another**[2013]eKLR that:-

*“Before the appellant could seek protection as a purchaser under Section 93 of the Act she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser. In any case, and as provided by Section 82 (b) (II) of the Act, it would have been illegal for Beatrice Njeri Magondu to sell the land before the confirmation of the grant.”*

[14] Again, in **Adrian Nyamu Kiugu vs. Elizabeth Karimi Kiugu and Anor** [2014] eKLR it was stated:

***“Whereas the above section states that a transfer by person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act, I am of the considered view that such transaction can only be relied upon where the legal representative is entitled to grant of representation but not where one is not and where one has obtained the grant fraudulently.***

[15] More case law: **In re Estate of Salim Islam Saadan (Deceased) [2016] eKLR** it was stated:

***“Section 93(1) protects transfers made to a purchaser by a person to whom representation has been granted. This section however does not protect and validate transfers by a person by whom representation was obtained fraudulently. The Respondent herein obtained the Grant fraudulently leading to the revocation of the same by this Court. Consequently the protection in Section 93(1) is not available to the Respondent and the Interested Party.”***

[16] Therefore, section 93 of the Law of Succession Act protects transfers by the representative who is entitled to grant of representation. I have seen the agreement purportedly made on 20<sup>th</sup> March 2003 for sale of 3/8 acre from land parcel No. NTIMA/NTAKIRA/2416 between the 3<sup>rd</sup> Respondent on the one hand, and Germano Gichunge and Emilio Muthomi M’Arima on the other. The agreement was introduced through submissions; which in law is not authorized medium for production of evidence. This is new evidence and is not admissible for the other party was not afforded an opportunity to test the evidence. One curious thing, the 3<sup>rd</sup> Respondent stated in his oral evidence that he bought land from Jeremano and Emilio in 2009. In cross-examination, he repeated this and stated categorically that Emilio sold him the land and that the land belonged to the deceased. With the evidence before me, the said agreement is contrived to suit his changed version of things. In any case the agreement is inadmissible.

[17] Even if I were to go by the story of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that they bought the land before the deceased passed away, they would face new legal hitches. First, the documents filed show that they bought the land from Germano Gichunge Emilio Muthomi M’Arima and Julius Mutuguti. These persons are not the deceased to whom these proceedings relate. Second, the land subject of sale was in the name of the deceased. Third, the deceased was alive. Therefore, the purported vendors were not owners of the property; the deceased was and still alive. A person who has no property rights cannot transfer any to another person. The agreements will not pass the test. There is nothing to show that the land was sold by the deceased.

[18] This court being guided by the provisions of CAP 160. The suit land is estate property and evidence show that it was sold by beneficiaries of the deceased before confirmation of grant. Such acquisitions of estate property, I have said and I will repeat, are unlawful and are not protected under article 40 of the Constitution. See the claw-back provision of article 40(6) of the Constitution. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were fully aware that they were buying estate property and should have known that section 82 of the Law of Succession Act prohibits sale or transfer of immovable property of a deceased person before confirmation. Therefore, transfers herein must adhere to the Act for it to gain validity and protection under Section 93 of the Law of Succession Act. The transfers herein were not by a legal representative of the deceased. Therefore, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have no claim over the estate of the deceased.

## **Distribution**

[19] How should the estate be distributed? The deceased was survived by his children and according to Section 38 of CAP 160:

***“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”***

[20] The claim by the 1<sup>st</sup> Respondent that the deceased shared his land to all his children is false as the daughters have not been provided for. Again, I see patriarchal disposition here when he claimed that their father shared his property to sons only and left out the daughters as per Kimeru culture. This is something that the Constitution loathes. I have expressed the spirit of the Constitution on these demented patriarchal tendencies in many cases. In the circumstances, I order that the estate property shall be divided equally among the following children of the deceased, namely;

***1. Mathew Mung’iiria Arimi – Son***

***2. Andrew Mureithi – Son***

***3. Germano Murithi – Son***

***4. Julius Mutuguti – Son***

***5. Emilio Muthomi – Son***

***6. Mary Ntinyari – Daughter***

***7. Beatrice Kananu – Daughter***

The share of Mathew Mung’iiria shall go to his widow and children equally under the principle of representation. Charles Kiogora stated that he received his share from his father when he was still alive and so he has no claim in the estate. That is an act of pure fidelity to the law to avoid double portion. See section 28 and 42 of the Law of Succession Act. This being a succession cause, I order each party to bear own

costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 30<sup>th</sup> day of May, 2018.

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**F. GIKONYO**

**JUDGE**

In the presence of:

Mr. Mutuma advocate for Applicants

Applicants – present

1<sup>st</sup> Respondent – present

Gabriel Mutua

3<sup>rd</sup> respondent absent

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**F. GIKONYO**

**JUDGE**