



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 346 OF 2013**

**IN THE MATTER OF THE ESTATE OF THE LATE STANLEY MATHENGE RURIGA Alias MATHENGE RURIGA  
DECEASED**

**AND**

**BERISINA WAMBURA MATHENGE.....PETITIONER**

**RULING**

1. This matter relates to the estate of the deceased Stanley Mathenge Ruriga Alias Mathenge Ruriga deceased who died intestate on 15/1/1974. Temporary Letters of Administration were issued to the Petitioner Berisina Wambura Mathenge and confirmed on 28/6/13. He net estate comprised in Kiine/Kibingoti/Nguguine/269 devolved to the Petitioner, whole share.

2. An application for the revocation of the grant was filed on 24/08/2017 by Raeli Wanjiru Ruriga Alias Raeli Wanjiku Ruriga who claims that the grant was obtained by means of untrue allegation of fact essential in a point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. That the grant was obtained fraudulently by the making of a false statement or by the concealment from court of something material to the case. She was also seeking an order of injunction restraining the respondent from interfering with the applicants peaceful and quiet possession and use of half share of the subject land parcel pending hearing and determination of the application. The prayer was granted in the interim. The applicant was also seeking an order that the title No. Kiine/Kibingoti/269 issued to Berisina Wambura Mathenge and Raeli Wanjiru Ruriga in equal shares.

3. The application is supported by the affidavit of Raeli Wanjiru Ruriga (to be referred to as the applicant) sworn in August 2017, the date is not clear. Her claim is that the Respondent Berisina Wambura Mathenge applied for the grant without her knowledge. She further depones that she is a neighbour of the respondent and that she owns half share of the estate, a fact which she concealed from this court. The applicant further claims that she lived on the estate from 1922 when she got married to Ruriga Wathome who was the father of deceased herein Mathenge Ruriga. She was a co-wife of Mary Wakiini Ruriga who was the mother of the deceased. The Ruriga Wathome caused the deceased to be registered as he was the only son of the deceased and he would hold the estate in trust for her co-wife, herself and the respective children. That respondent would only be entitled to inherit the share apportioned to her late husband.

4. The respondent on the other hand contends that the deceased had only one wife that is herself and their four children. That the registration of the deceased was done in 1960 and no suit has ever been filed for determination of whether any trust existed or not. That the petitioner who stays with her daughter at Kiaragana area is too old and almost senile and unable to express herself, the summons is filed by other Interested persons who do not wish to come out in the open. That the applicant has never occupied the half share of the land.

The applicant appeared in court on 17/10/2017 and the court noted that she is quite elderly. The court observed that she is quite elderly and was unable to testify. The identity card showed that she was born on 1/1/1902. The parties agreed to proceed by way of written submissions.

5. For the applicant it was submitted that the grant was obtained through misrepresentation of facts and fraud. She also failed to disclose material facts.

6. For the respondent, it was submitted that the respondent is the only wife of the deceased. That no suit was filed during the lifetime of the deceased to determine whether a trust existed or not.

7. I have considered that application. The claim by the applicant is based on trust. This is how the trust is said to exist.

Husband to Mary Wakini Ruriga Raeli Wanjiru Ruriga Alias Rae li Wanjiru Ruriga

Stanley Mathenge Ruriga S/o Ruriga Wathome (Deceased herein)

Berisa Wambura Mathenge -(wife to deceased)

The deceased was the registered owner to whom these succession proceedings relate. The two wives of the deceased Ruriga Wathome never claimed land from Stanley Mathenge Ruriga during his lifetime. The deceased Stanley Ruriga was registered in 1960 in a first registration after land demarcation. The certificate of official search which was annexed to the application of letters of administration shows that the deceased Mathenge Ruriga was registered as the absolute proprietor under. ***The Registered Land Act, Cap 300*** now repealed. No trust was registered against the title.

8. The petitioner had also filed a Chief's letter dated 23/4/2014 which shows that the deceased left behind his wife Berisina Wambura Mahenge and that there was no objection to her filing the succession. These facts establish that the deceased is the registered owner of the land. Where the trust is not registered against the title, it is upon the person pleading that there was a trust to prove it. It becomes a matter of evidence. The applicant bears the burden to prove the existence of trust. This is based on the well known principle of evidence that he who alleges a fact bears the burden to prove. The evidence of the applicant that she is a step-mother of the deceased tends to prove that the deceased was registered in trust. However, this is not supported by the Chief's letter on record. There is also a dispute as to whether she lives on the land as the respondent has deposed that the applicant does not live on the land but lives at Kiaragana area with her daughter. Owing to her advanced age, the applicant could not be cross-examined to establish this fact. Evidence to prove that the applicant lives on the land is insufficient.

9. What has not come out clearly is whether the deceased was the only child of his father who the applicant claims was her husband as no other person has come forward to claim that the deceased was registered in trust. The applicant herself has not stated that she has children. The affidavit of the appellant was sworn in August 2017. In her state it is doubtful whether she made the averments in the affidavit. My view is that the existence of a trust has not been proved on a balance of probabilities.

10. If I were to say there was such a trust, then, the court would have to consider her position with regard to the estate of the deceased. The deceased passed away on 15/01/1974. Under section 2(2) of the Law of Succession Act, it is provided that:-

***“The estate of a person dying before the commencement of this Act, are subject to the written laws and customs applying at the date of death, but nevertheless the administrator of their estate shall commence and proceed so far as possible in accordance with this Act.”***

***2(1) States that the Act shall apply to estates of deceased person dying after the commencement of this Act.***

The above provision shows that the applicable law is the customary law. Under the Kikuyu customary law which is the law applicable to the estate, the applicant would have a life interest. The estate if the deceased had two wives would be distributed to the two houses. Married daughters would not inherit and unmarried daughters would get a share. It would seem therefore that what the applicant would be entitled to is a life interest. Evidence is scanty or lacking as to whether the applicant has sons who are entitled to the estate. My view is that if indeed the deceased was registered in trust which I have said has not been proved the applicant would only be entitled to a life interest. This was stated in the case of ***Mbathi –vs- Mbathi (1976) KLR 120 and Re-statement of African Law and Law of Succession by Eugene Conran***. I find that the applicant has not proved the existence of a trust. It is also not proved that the applicant has been occupying half share of the land. The Chief letter which was filed with the petitioner does not mention her anywhere and there were two clan elders who signed to confirm the Chief's letter.

11. This is a Succession matter where the grant has been confirmed. The deceased was registered in 1960. No suit was filed before he died to determine whether any trust existed or not. The issue of whether a trust existed or not is a matter which must be determined in a separate suit. The ***Law of succession Act*** deals with matters of probate and intestate succession. This is clearly stated in the preamble which states:

***“An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of the deceased persons, and for purposes connected therewith and incidental thereto.”***

Issues of ownership of land and declaration of trust are matters which do not fall under the preamble and must be filed as separate suits. Though the applicant claim to be entitled to a share, her claim is based on trust since she is not a widow of the deceased and does not fit in the definition of a dependant under ***Section 29 of the Law of Succession Act***. The High Court has variously held that a party claiming a under trust must file a substantive suit. In Nakuru H. C. Succession Cause No. 488/201. In the matter of estate of the ***Late Jonathan Kinyua Waititu***. The Court stated:-

*To reaffirm this legal position, I again take refuge in the decision in H. C. Succession Cause No. 864 of 1996 (2015) eKLR where the court held that:-*

***“Even if there was material establishing that there was such a trust I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”***

*Consequently and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land on the alleged trust.*

Similarly, Justice Limo in Kerugoya H. C. Succession Cause No. 90/2013 Elijah Gachoki and Another –v- Stanley Mugo Kariuki & Another stated:

***“It is also important to note that the Law of Succession Act Cap 160 Laws of Kenya really deals with intestate and testamentary succession and administration of deceased persons. The architectural design of the Act is not meant to deal with disputes related to land and in this regard I agree with the 2<sup>nd</sup> respondent that such disputes whether based on trust or contractual obligations should be left to the Environment and Land Court which by law is seized with the jurisdiction and constitutionally mandated to deal with such disputes under Article 162(2) of the Constitution”.***

As submitted by the counsel for the respondent, it has not been stated as to why it has taken her so long to bring the claims and more so why he did not file the claim during the lifetime of the deceased. The issue of trust is a matter that is supported by evidence. Thus the applicant has not proved and her allegations are not sufficient. She did not call any evidence to support her claim. The deceased was registered in 1960 and died in 1974. The applicant ought to have called evidence to support her allegation.

12. As regard the allegation that the petitioner concealed some facts fraudulently I have this to say. The petitioner obtained a chief's letter which I have referred to earlier. She filed this cause in court and it was gazette as required vide Gazette Notice No. 9271 of 6/7/2012. The purpose of the Chief letter is to ensure that the right party files succession and the Gazettment is to publicise and draw the attention of the Interested Parties that a succession Cause has been filed for all the Interested Parties to note and file objections if need be. The Petitioner followed this process. The deceased was her husband. The Law of **Succession Act** gives her priority to inherit the estate unless the contrary is proved. Having gone through the process and that the deceased was her husband and was the registered proprietor of the land, there is no proof that she fraudulently concealed material facts that the applicant was her mother in law. The applicant has not discharged the burden to prove that she was indeed the petitioner's step-mother-in-law. **Section 76 of the Law of Succession Act** provides for the grounds upon which the court may order revocation or annulment of grant. The applicant has not established grounds to warrant this court to order the revocation of the grant. The application is not made in good faith. She has come too late when she cannot be accommodated in this Succession Cause. The existence of trust must be determined in a substantive suit with cogent evidence being adduced.

13. In conclusion I find that:

- 1) The applicant has not proved the existence of trust which would warrant this court to revoke or annul a grant.
- 2) There is no prove that the respondent concealed material facts. In the circumstances I find that the application is without merits and is dismissed with costs.

**Dated at Kerugoya this 31<sup>st</sup> day of July 2018.**

**L. W. GITARI**

**JUDGE**