



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**SUCCESSION CAUSE NO. 1493 OF 2003**

**IN THE MATTER OF THE ESTATE OF HARUN KIVINDYO KIMARI (DECEASED)**

**MARY MUTHONI KIVINDYO.....APPLICANT**

**VERSUS**

**NYAMBURA KIVINDYO.....1<sup>ST</sup> RESPONDENT**

**PETER KIVINDYO ISAI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By Chamber Summons dated 15<sup>th</sup> September 2017 and filed the same day pursuant to Order 40 rule 1 of the Civil Procedure Rules, Rules 49, 59 and 73 of the Probate and Administration Rules, the Applicant Mary Muthoni Kivindyo sought various orders against Nyambura Kivindyo (1<sup>st</sup> respondent) and Peter Kivindyo Isai(2<sup>nd</sup> Respondent) as hereunder:

**1. Spent.**

**2. That pending the hearing and determination of the Summons herein, this Honourable Court be pleased to restrain the 1<sup>st</sup> Respondent, her agents, servants or any person from in any way interfering, alienating, selling and/or any further dealing with the estate property known as Subdivision plots No. B, C, and D excised out of LR No. 219/32 (IR 95115).**

**3. That pending the hearing and determination of the Summons herein, this honourable court be pleased to order the 2<sup>nd</sup> Respondent namely Peter Kivindyo Isai to deposit in court Kshs.2,000,000 deposited in Account Number 010201500177 Sidian Bank, Kawangware Branch, paid as deposit of the purchase price of the estate property known as Subdivision plots No. B, C and D excised out of LR No. 219/32 (IR 95115).**

**4. That pending hearing and determination of Summons herein, this honourable court be pleased to order the Respondents namely Nyambura Kivindyo and Peter Kivindyo Isai to deposit in court Kshs.3,600,000 and/or any further funds received as the balance of the purchase price for the sale of the estate property known as Subdivision plots No. B, C, & D excised out of LR No. 219/32 (IR 95115).**

**5. That this honourable court be pleased to order the Respondents namely Nyambura Kivindyo and Peter Kivindyo Isai to adequately compensate the Applicant for the loss of her properties demolished and/or destroyed from the estate property known as Subdivision of Plots No. A, B, C, & D excised out of LR No. 219/32 (IR 95115).**

**6. That this honourable court be pleased to order the Respondents to adequately compensate the Applicant for the loss of rental income caused by the demolition and/or destruction of her properties from the estate known as Subdivision plots No. A, B, C & D excised out of LR No. 219/32 (IR 95115)**

**In the alternative**

**7. That this honourable court be pleased to order that the properties namely: LR No. 36/1/247 Eastleigh, LR No. Ndalani/Ndalani/ Block 1/871, 872, 873, 874, 1212, 877, 888, 666, 701, 11, 114 and Commercial Building A – Ithanga, allocated to the Respondents and the family of Robert Kivindyo (deceased) in the Certificate of Confirmation of Grant, be sold and the proceeds shared equally among the Applicant namely Mary Muthoni Kivindyo, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents namely Nyambura Kivindyo and Peter Kivindyo Isai respectively and the family of Robert Kivindyo (deceased).**

## 8. That the costs of the application be provided for.

2. The Application is premised upon grounds set out on the face of it and affidavit in support deposed by the Applicant on 15<sup>th</sup> September 2017. The gist of the application is that the 1<sup>st</sup> Respondent (her mother) who is also a co-Administrator to the estate together with her (Applicant) step brother Stephen Wambua Kivindyo disinherited her by taking part of the estate which her late father (deceased) had gifted her.

3. It is the Applicant's averment that on 14<sup>th</sup> March 2014 when the grant was confirmed, she did not attend court due to illness. That she was allocated shares in various properties among them ¼ share in LR No. 219/32 (IR 95115) which according to the grant was to be sold and proceeds shared out between all beneficiaries (11 beneficiaries).

4. It is her contention that prior to her late father's demise, he (deceased) had given her ½ share of his ¼ share in the said property as her inheritance. That during confirmation, the court was not made aware of this arrangement hence the orders for sale of the property and distribution of proceeds equally was irregular.

5. She claimed that since 2004 when she took possession of the half share of the total ¼ share entitlement to her father, she embarked on building 43 iron dwelling houses from which she derives rental income. That without notice, she learnt from her tenants on 26<sup>th</sup> June 2017 that they had been given eviction notice by the Respondents who had entered into a sale agreement with a buyer one Nancy Njeri Maina who had offered 5.6 million. That to her dismay, she learnt on 30<sup>th</sup> June 2017, that her property which had already been sub-divided into four portions particularly referred to as Plot Nos. A, B,C & D had been demolished by a buyer one Nancy Njeri.

6. She stated that as a consequence of the said demolition, she suffered substantial loss comprising of 40 iron dwelling houses worth Kshs 1.5 million, 3 soft life toilets worth Kshs114,0000 and loss of rental income for July, August and September 2018 at Kshs 129,000 per house totaling to 516,000/= making a grand total of 2,130,000/= . The Applicant expressed fears that a sum of Kshs 2,000,000 deposit having been paid to the 2<sup>nd</sup> Respondent and the balance of Kshs 3,600,000/= due for payment to the Respondents, she is likely to lose out on her share.

7. She accused her mother and siblings for deceiving her through a verbal agreement that she was to be the sole beneficiary of the Plots A, B,C&D being her mother's house's share. She therefore prayed for the sale proceeds to be deposited in court in full and that the sale transaction be stopped all together. It is her further prayer that properties known as LR 36/1/247 Eastleigh, LR No. Ndalani/Ndalani /Block 1/871, 872, 873, 874, 1212, 877, 888, 666, 701, 11, 114 and commercial building A- Ithanga allocated to the Respondents and the family, be sold and proceeds shared between her, the Respondents and the family of her late brother Robert Kivindyo.

8. In response, the 1<sup>st</sup> Respondent mother to the Applicant filed a replying affidavit sworn on 23<sup>rd</sup> October 2017 and filed on 24<sup>th</sup> October 2017 opposing the application arguing that the grant was confirmed with the Applicant's knowledge and consent and that her interest was fully catered for. She claimed that her house's share out of ¼ share in LR 219/32 (IR 95115) was sub-divided into four plots namely A,B,C&D with Plot A allocated to the Applicant and B,C&D given to the Respondents and widow to her late son Robert respectively. She denied selling Plot A which belongs to the Applicant and that in any event the Applicant who had occupied and collected rent from the said property since 2002 did not account for the rent collected for that period.

9. In her rejoinder, the Applicant filed a further affidavit sworn on 30<sup>th</sup> November 2017 basically denying the averments contained in the replying affidavit thus reiterating the contents of her supporting affidavit.

10. When the matter came for hearing before Hon. J. Ougo, on 28<sup>th</sup> September 2017, she ordered the sale proceeds to be held and not to be utilized pending hearing of this application. Parties agreed to dispose the application by way of written submissions. Subsequently, the Applicant filed hers on 20<sup>th</sup> January 2018 and the Respondents filed theirs on 30<sup>th</sup> January 2018.

11. In her submissions, Miss Ngigi appearing for the Applicant reiterated contents contained in the supporting affidavit and grounds on the face of it. Counsel submitted that the Applicant was entitled to Plots No. A, B, C& D excised out of ¼ of LR 219/32 (IR 95115) being a gift from her father during his life time. Counsel opined that the sale of Plot No. B, C&D by the Respondents was without prior notice and approval of the Applicant whose property was demolished without compensation despite the Respondent's knowledge that the Applicant has been in occupation since 2002.

12. Counsel further argued that, although the Respondents claimed that they had sold Plots B, C &D only, the buyer has fenced off the entire parcel of land including Plot A thus disinheriting her her rightful share. Mrs. Ngigi submitted that the act of demolishing her property was criminal punishable under Section 90 of the penal code and that her right to dignity under Article 28 of the Constitution had been violated. That without a court order, no lawful eviction could be carried out. Reference was made to the case of **Moi Education Center Co. Ltd. vs William Musembi & Others (2017) eKLR and Gusii Mwalimu Investment Co. Ltd & 2 Others vs Mwalimu Hotel Kisii Ltd, Civil Appeal No. 60/1995 and Teresia Irungu vs Jackton Ocharo & 2 others eKLR.**

13. On the other hand, Mr. Mutua counsel for the Applicant adopted the averments contained in the affidavit in support referring to the application as capricious and bad in law. Mr. Mutua stated that the properties in question were shared out by mutual agreement hence no cause for alarm as no appeal has been preferred challenging the mode of distribution. Counsel submitted that the property that was sold did not belong to the Applicant but the estate of the deceased.

14. I have considered the application herein, affidavit in support, a replying affidavit, further affidavit and submissions by both counsels.

15. The crux of the matter is a dispute over ownership between beneficiaries in respect to plots No. A, B, C& D excised out of ¼ share being an entitlement to the deceased out of LR 219/32 (IR 95115). According to the Applicant, she did not attend court when the grant was confirmed in which ¼ share of LR 219/32(IR 95115) was to be sold and proceeds shared out equally amongst the beneficiaries from the two

houses. She claimed that her father had gifted her ½ of the ¼ plot which comprises of Plots No. A, B, C & D after subdivision hence the other beneficiaries from her mother's house had no claim or share in it.

16. It is not in dispute that the certificate of confirmation of grant provided for the said plot to be sold and proceeds shared out equally amongst the beneficiaries. The Applicant cannot through the back door decide to get a bigger share than the court directed. She did not challenge the confirmed grant or mode of distribution either by way of review, revocation or appeal. To claim a bigger share at this point in time will be akin to challenging the confirmed grant and amending the same thereby technically revoking the same.

17. The argument by the Applicant that she was not aware of the distribution process is to say the least a dishonest statement. Accordingly, that prayer is dismissed for lack of merit.

18. Regarding compensation, the property that was shared out belonged to the deceased. At no point did the Applicant raise the issue of a gift *intervivos* or having any beneficial interest on that property by virtue of having developed it. Whatever was sold and thereafter demolished by the buyer belonged to the deceased and not the Applicant. The buyer who bought plots B, C & D being the fair and equal share of the Respondents and a widow to the son to the 1<sup>st</sup> Respondent was entitled to do her development in whatever manner she wanted.

19. If there was any claim that she had developed the property with her father's concurrence, she should have laid a claim during confirmation. It is my finding that the Applicant did not have anything of her own hence the element of compensation can only attract criminal proceedings and a civil suit for damages if she can prove the same before a civil court.

20. Regarding properties named as LR 341/147 Eastleigh, the same was given to Peter Isai Kivindyo absolutely. It is too late to challenge that mode of distribution at this stage as it was done by consent and no element of fraud, concealment or misrepresentation of material facts has been alleged or proved. In any event, such allegation can only attract an application for revocation which is not the case here.

21. Concerning Plots No. Ndalani/Ndalani/s Block 1/87, 871, 872, 873, 874, 1212, 877, 666, 701, 11, 114 which were given to the family of Robert Kivindyo (deceased), the Applicant has no right over the same as distribution was never challenged and the Applicant is sneaking in prayers for revocation of confirmed grant through the back door. Her claim is not based on any known legal principles for annulment or revocation of a grant. Concerning her claim for a commercial building known as A-Ithanga which was given to Grace Nyambura Kivindyo absolutely, the allocation was not challenged. In any event, the beneficiaries of the aforementioned properties were not even enjoined as interested parties. This court cannot be party to applications of this nature whereby a litigant deliberately ignores the right procedure to challenge a grant to gain access to properties she is not entitled to.

22. The allegation that the buyer of plots no. B,C & D has fenced off her Plot No. A as well, the Applicant is entitled to have the fence encroaching to her plot removed or in the alternative, sell her share to the said buyer or any other buyer or retain the same for her own use. The Kshs. 2,000,000 retained as per the court should not be released to the Respondents until confirmed that the Applicant's share has not been interfered with.

23. Accordingly, the application herein is dismissed for lack of merit with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>th</sup> DAY OF SEPTEMBER, 2018.**

**J.N. ONYIEGO**

**JUDGE**