



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.286 OF 2011

IN THE MATTER OF THE ESTATE OF FRANCIS M'IKIRIA ALIAS

KIARA KIMOTHO ALIAS M' IKIARA KIMOTHO (DECEASED)

TERETHINA NCHENGE M'IKIARA.....PETITIONER/ RESPONDENT

VS

ANICIA KAJIJO M'IKIARA.....OBJECTOR/APPLICANT

JUDGEMENT

1. Before this Court is the objectors Application filed on 18th May 2018 seeking Orders;

a. *SPENT*

b. *SPENT*

c. *THAT the Honourable Court be pleased to issue temporary Order of injunction restraining the Petitioner /Respondent either by themselves, agents, servants, relatives and/or employees or whomsoever else acting on the Petitioner/ Respondent behalf or instructions from entering into, subdividing, fencing,cultivating, trespassing into, Excavating and/or inany manner whatsoever or howsoever dealing and/or interfering with the objector/ Applicant's Occupation, possession, developments enjoyment and use of her (1) one Acre of Land within L.R. NO. ABOTHUGUCHI/IGANE/284 as well as the whole of that land parcel No. L.R. ABOTHUGUCHI/U-KANGO/270pending the hearing and determination of this application inter-parties and thereafter as the Court shall Order.*

d. *THAT the Honourable Court be pleased to issue an Order for general stay of execution, enforcement and/or implementation of the subdivision and/or distribution of the deceased's estate herein as proposed in the rectified Certificate of Confirmation of Grant made herein on 08/11/2017 and dated 06/03/2018 particularly in relation to parcel Nos. L.R. NO. ABOTHUGUCHI/IGANE/284 and No. L.R. ABOTHUGUCHI/ U-KANGO/270 pending the hearing and determination of this application inter-parties and thereafter as the Court shall Order.*

e. *That this Honourable Court be pleased to set aside, discharge, vacate and/or cancel the rectified Certificate of Confirmation of Grant made herein on 08/11/2017 and dated 06/03/2018, and upon Cancellation thereof the original Certificate of Confirmation of grant made herein on 11/11/2014 and dated 12/08/2015 be reinstated, and the same implemented forthwith.*

f. *That Costs of the Application be provided for.*

2. The Application is supported by the Affidavit of **Anicia Kajijo M'Ikiria** and on the following grounds;

a. *That the objector did not participate in the proceedings for the rectification of grant and was not aware of the existence of any such proceedings.*

b. *That the objectors consent to the mode of Distribution in the rectified Certificate of Confirmation of grant was never sought.*

c. *That the rectified Certificate of Confirmation of grant has prejudiced the Objector in that her share and entitlement in land parcel L.R. NO. ABOTHUGUCHI/IGANE/284*

has been reduced from 1 ACRE to only half and also her whole share of the land parcel No. L.R. ABOTHUGUCHI/ U-KANGO/270 has all been taken away and given to the Petitioner/ Respondent and all this was done without the objector/ Applicant's Knowledge, participation or consent at all.

d. The Petitioner/ Respondent together with the Surveyor, police officers and other hired persons have descended upon the Deceased's land in Parcel No. L.R. NO. ABOTHUGUCHI/IGANE/284 whereupon they have caused massive damage, wastage and wanton destruction of property and they so intend to perpetuate the said wastage destruction and unless urgent injunctive orders are made forthwith

3. This cause relates to the estate of Francis M'Ikiara (deceased) who died on 8/9/2010 leaving behind the following dependants.

(i) Terethina Ncenge M'Ikiara -1ST Wife

(ii) Anisia Kajijo M'Ikiara- 2ND Wife

(iii) Anjenca Nckel M'rangiri- daughter

(iv) Edward Nyamu M'ikara- son

(v) Geodfrey K. Murithi-son

(vi) Rosemary Ntibuka M'Ikiara- daughter

(vii) Peter Gitonga M'ikiara-daughter

(viii) Jeniffer Muthuni M'Ikiara-Daughter

(ix) Kiende M'ikiara-daughter

(x) Judith Kiano M'ikiara-daughter

4. The deceased also left behind the following assets;

(i) Abothuguchi/Kariene/1306 Measuring 0.49 Ha

(ii) Abothuguchi/Igane/184 Measuring 3.0 Ha

(iii) Abothuguchi/L.Kaongo/270 Measuring 0.29 Ha

5. The matter was commenced by Institution of Citation Proceedings by Terethina Ncenge M'Ikiara and later on 21st February 2012 she filed for Letters of Administration.

6. Gazetted was done on 22nd June 2012 and on 7th August 2013 she filed for Confirmation of Grant. Both parties gave Proposals on their mode of Distribution.

7. On diverse dates Honourable MAKAU.J. heard the testimonies of both the Anisia Kajijo M'Ikiara (the Objector) and Terethina Ncenge M'Ikiara (the petitioner).

8. The Learned Judge J.A.Makau upon hearing Both sides on 6th November 2014 made a determination to the mode of distribution as hereunder;

a. Abothuguchi/Igane/184 to be shared amongst:-

I. Terethina Ncenge M'Ikiara (Life Interest) (where her house under construction is and where deceased grave and upon her demise the same to equally go to her sons - 1acre

II. Alicia Kajijo M'Ikiara (Life interest) on the side where she resides and where there is a shop- 1Acre

III. Edward Nyamu M'Ikiara (where his house is) 1 Acre

a. Peter Kimotho 1 Acre

b. Ajerica Ngekei Mwarangiri-0.7 Acre

c. Rosemary Ntibuka Muriuki. 0.7 Acre

- d. JennifferMuthoni. 0.7Acre
- e. Damaris Kende 0.7 Acre
- f. Judith M'IKIARA 0.7 acre

(As the five daughters are married and do not reside on the land)

- b. Abothuguchi/Kariene/1306 to Geoffrey K. Murithi
- c. Abothuguchi/L.Kaongo/270 to be Anicia Kajijo M'Ikaria
- d. Livestock petitioner and objector to keep livestock in her possession.
- e. Kshs 40,000/= held in Meru Capital Sacco to be shared equally between Terethina M'ikaria and Anicia Kajijo M'Ikaria
- f. Each party to bear its own costs.

9. Parties later on filed multiple Applications i.e.

(i) Application dated 11 March 2015 by Peter Kimotho objecting the house given to petitioner. Claims he built the same at a cost of over 1 million shillings, supported by Zachary Mwirigi Julius Kinothis Kimotho, Anicia Kajijo M'ikaria, Gerald Mugiira

(ii) Application dated 2nd November 2015 by Terethina Ncenge M'Ikaria seeking original title for purposes of transfer of the property to beneficiaries. The same was replied to by Anicia claiming he is also an administrator and that there is a pending application.

(iii) Application dated 19.01.2016 application by Rosemary Ntikuba seeking leave to file Appeal out of time.

10. The Application dated 3.03.2015 and 6.09.2015 were determined on 6.05.2016 by Hon. Gikonyo. J. which granted the following Orders ;

a. An order that the Objector shall release the Original title deed in respect to L.r. ABOTHUGUCHI /IGANE/184 to the petitioner within seven days from todays date which failing the Land Registrar Meru will dispense with the production of the original title document in respect thereof and shall register the transfer of the said parcel of land to the petitioner as per the Court's Judgement dated 6th November 2014.

b. This being a succession matter involving close family members, I will make no Orders as to costs.

11. The parties however later filed a Consent on 21. June 2017 which was the subject of the Application filed on 18th May 2018. The consent was signed on 20th June 2017 by Murango Mwenda & Co. Advocates and Mwirigi Kaburu & Co. Advocates.

Consent

Abothuguchi/Igane/184 to be shared amongst

I. Terethina Ncenge M'Ikaria - 1.50 acre

II . Alicia Kajijo M'Ikiara - 0.50 Acre on the side where she resides and where there is a shop- 1Acre

III. Edward Nyamu M'Ikiara (where his house is) 1 Acre

- a. Peter Kimotho 1 Acre
- b. Ajerica Ngekei Mwarangiri 0.7 Acre
- c. ROSEMARY Ntibuka Muriuki. 0.7 Acre
- d. Jenniffer Muthoni. 0.7Acre
- e. Damaris Kende 0.7 Acre
- f. Judith M'Ikiara 0.7 acre

(vii) Abothuguchi/L.Kaongo/270 to TerethinaNcengeM'Ikaria

The subdivision of L.R. No. Abothuguchi/Igane/184 to be done in such a manner that the portion of Terethina Ncenge M'IKIRIA SHALL HAVE A FRONTAGE TO Kioro-karindie road

That each party to bear his/her own costs.

12. The same had been adopted as an Order of the Court on 8th November 2017 and issued on 6th March 2018.

13. On 18.12.2017 this Honourable Court allowed the Application dated 30.10.2017 to the extent;

The OCS Kariene police station to provide security to the surveyor in executing the distribution as per consent entered into on 20.6/2017 and recorded in Court on 8.11.2017.

14. From the History highlighted above the issues for determination are;

(I) Whether Consent dated Should be set aside

15. It is trite law that a consent judgement can only be set aside in circumstances similar to those that can vitiate a contract. These are fraud, or collusion, misrepresentation of facts; agreement contrary to public policy or consent was given without sufficient material facts or in his application or ignorance of material facts or in general, for a reason, which would enable the Court set aside an agreement. See **Hirani vs Kassam (1952) 19 EACA 31**.

16. The Consent herein was signed by the respective advocates of both the Petitioner and the Objector. The land involved also manifestly affects the position of both the Applicant and the Objector with the seclusion of the other beneficiaries. The Consent as relates to the parties therein is therefore valid.

17. The applicant herein has objected to the Consent on the basis that she neither gave consent, nor was she aware of the proceedings.

18. The consent was however signed by her advocates on record. Prior to filing the consent there had been correspondence between the respective advocates.

19. The consent also relates to previous applications in these proceedings albeit determined. The same therefore infers and is true to the nature of these proceedings. It is also in the context of these proceedings that the Petitioner's Application dated 30th December 2017 was allowed on 18th December 2017. In essence the Consent Orders are in effect.

20. This Court however agrees that the consent Orders has manifestly affected the position of the objector in L.R. NO. ABOTHUGUCHI/IGANE/284 as well as the whole of that land parcel No. L.R. ABOTHUGUCHI/U-KANGO/270.

21. I therefore take the view that the aforesaid rectification was beyond the provision Conferred by Section 74 of the Law of Succession Act.

22. In ***In The Matter Of The Estate Of Hasalon Mwangi Kahero[2013]Eklr*** Musyoka J. explained the provisions of Section 74 as hereunder;

Section 74 provides for the errors on grants of representation that may be rectified by the court. It provides:

“Errors in names and descriptions or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court; and the grant of representation whether before or after confirmation, may be altered and amended accordingly”.

The procedure for seeking the relief is set out in Rule 43 (1), which echoes **Section 74** of the Law of Succession Act. Rule 34(1) says:-

“Where the holder of a grant seeks pursuant to the provisions of Section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to time or place of the death of the deceased or, in the case of a limited grant, the purpose for which the grant was made.....”

A close reading of these two provisions will show that the provisions of the Law of Succession Act and the Probate and Administration Rules is not analogous to the provisions in the Civil Procedure Rules on amendment of pleadings. The amendment provisions in Order 8 of the Civil Procedure Rules are extremely broad, and are not at all comparable to what **Sections 74** and Rule 43 provide. The provisions in **Section 74** and Rule 43 are extremely restricted. They permit rectification of grants in three clearly defined cases:-

(a) Errors in names and descriptions of persons or things;

(b) Errors as to time or place of death of the deceased;

c) In cases of a limited grant, the purpose for which such limited is made;

The power to rectify a grant is limited to these three situations or circumstances.

23. Whereas I do find that the Consent was Made in good faith and the elements of in validating a consent Order were not met the recorded Consent were not in the nature of rectification and the presence of all parties involved ought to have been confirmed before the Certificate of Confirmation of Grant was amended.

24. I therefore allow the Application dated 18th May 2018 in terms of prayer (3). The same however does not dispose the previous Orders Issued on 30th October 2017.

25. For the avoidance of Doubt this Court Orders;

a. The rectified Certificate of Confirmation of Grant made herein on 08/11/2017 and dated 06/03/2018 is hereby cancelled thereof, the Original Certificate of Confirmation of Grant made herein on 11/11/2014 and dated 12/08/2015 is hereby reinstated and the same to be implemented forthwith.

b. The Ocs Kariene police station to provide security to the surveyor in executing the distribution as per Confirmation of Grant dated 12/08/2015.

HON. A.ONG'INJO

JUDGE

JUDGMENT SIGNED, DELIVERED AND DATED THIS 22ND DAY OF NOVEMBER 2018.

HON. A.ONG'INJO

JUDGE