



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 221 OF 2004

IN THE MATTER OF THE ESTATE OF MURIRA KARIGICHA (DECEASED)

HENRY KUBAI MURIRA.....1ST APPLICANT

DAVID MWIRIGI MURIRA.....PETITIONER

WILSON KIMATHI MURIRA.....2ND PETITIONER

ROSALID GACHHERI NDUBI.....2ND APPLICANT

VS

MICHAEL MUTWIRI M'ICHUNGE.....1ST PROTESTOR

JACOB MBAABU KIRERA.....2ND PROTESTOR

JUDGMENT

[1] **MURIRA KARIGICHA (“the deceased”)** to whom this Succession Cause relates, died on 25th March, 2003. The petitioners petitioned for the letters of grant of administration where they stated that the deceased was survived by:

(a) 1st House

- (i) Nduru Gitonga - Daughter (married)
- (ii) Kiaro - Daughter (married)
- (iii) Karimi - Daughter (married)

(b) 2nd House

- (i) Sabina Murira - Widow
- (ii) Henry Kubai - Son
- (iii) Roase Gacheri - Daughter (married)
- (iv) Lucy Igoki - Daughter (married)
- (v) Jane Kajuju - Daughter (married)

(c) 3rd House

- (i) Maria Karimi Murira - widow
- (ii) Jackson Murithi - Son

- (iii) David Mwirigi Murira - Son
- (iv) Wilson Kimathi Murira - Son
- (v) Tabitha Nkatha Mutuma - Daughter (married)
- (vi) Rose Kiburua Murira - Daughter (married)
- (vii) DNM - Daughter (minor)
- (viii) ENM - Daughter (minor)

(d) 4th House

- (i) Silveria Karore Murira - Widow
- (ii) Jane Gaichugi Kinoti - Daughter (married)
- (iii) Robert Miriti Murira - Son
- (iv) NGM - Daughter (minor)

His assets were listed as follows:

- (1) Land parcel No. KIAAMURI 'A'/1019 measuring about 2.5 Ha
- (2) Land reference No. Abothuguchi/ Gaitu/330 measuring about 6.88 Ha
- (3) Land reference No. Timau settlement scheme/ Plot No. 1 measuring 5.8 Ha

[2] On 29th September 2004, grant of letters of administration intestate were issued to the petitioners. However, several protests and objections were raised consequently the grant was revoked and issued jointly to Henry Kubai Murira, David Mwirigi Murira, Wilson Kimathi Murira and Maria Karimi Murira Silveria karore Muria on 9th October 2009. Afterwards, by a summons for confirmation of grant dated 17th May 2010 the grant was confirmed and certificate of confirmation of a grant was issued on 2nd November 2011 where the estate was distributed as follows:

(a) L.R NO. TIMAU SETTLEMENT SCHEME/1 measuring 5.8 Ha or 13.34 Acres.

- (i) Jacob Mbaabu Kirera - Purchaser - 3 acres
- (ii) Michael Mutwiri M'Ichunge - Purchaser - 7 acres
- (iii) Sabina karigu Murira - 1 acre
- (iv) Henry Kubai Murira - 0.67 acre
- (v) Wilson kimathi Murira - 0.67 acre
- (vi) David Mwirigi Murira - 0.67 acre
- (vii) Robert Miriti Murira - 0.67 acre
- (viii) Jackson Murithi Murira - 0.67 acre

(b) L. R NO. ABOTHUGUCHI/GAITU/330 measuring 6.86 Ha or 16.96 Acres

- (i) Martha Karimi Murira - 1 acre
- (ii) Silveria Karore Murira - 1 acre
- (iii) Elizabeth Kainda Murira - 1 acre
- (iv) Henry Kubai Murira - 2.33 acres

(v) FNM (a person of unsound mind with DMM as his guardian) - 2.33 acres

(vi) Robert Miriti Murira - 2.33 acres

(vii) Jackson Murithi Murira - 2.33 acres

(viii) David Mwirigi Murira - 2.33 acres

(xi) Wilson Kimathi Murira - 2.33 acres

(c) L.R. NO KIAMURI 'A'/1019 measuring 2.5 Ha or 6.18 Acres

(i) Jane Gaichugi Kinoti

(ii) Rose Kiburio Murira

(iii) DNM to be shared equally

(iv) NGM

(v) Tabitha Nkatha Mutuma

(vi) ENM

(vii) Rose Gacheri Murira

(viii) Lucy Igoki Murira

(ix) Jane Kajuju Murira

[3] Amended summons for revocation of grant dated 23rd January 2012 were brought under **Section 76 (b) and (d) (ii) of the Law of Succession Act CAP 160 Laws of Kenya and Rule 73 of the Probate and Administration Rules**. The grounds upon which the application is made are in its body, the supporting and further supporting affidavits of Henry Kubai Murira sworn on 16th December 2011 and 4th June 2012 respectively. The major contentions were that; the grant was confirmed in their absence and without their consent; the distribution was not agreed upon; and the application of confirmation dated 17th May 2011 was not served upon them.

[4] It was further stated that it was not disclosed that L.R.NO KIAMURI 'A'/1019 is jointly owned by the deceased and Rosalid Gacheri Ndubi, and as a result she was left out of what she is entitled to. Furthermore, the said land has a dispute which has not yet been resolved. It was claimed that all these matters were not brought to the attention of the court. The distribution of both L. R. No. Timau Settlement/Scheme/1 and LR No. Abothuguchi/Gaitu/330 is inconsistent with the acreage for the latter measures 21.8 acres and only 14.35 acres have been distributed. While the former measures 14.21 acres yet 14.35 acres have been distributed this exceeds the actual acreage.

[5] Moreover, he stated that he, his mother and sisters are settled on LR No. Timau Settlement Scheme/1. It is therefore not fair for it to be distributed to persons who are not heirs of the deceased but alleged buyers. Michael Mutwiri alleged to have bought 7 acres but the tribunal in LDT Case No. 42 of 2002 awarded him 3 acres of which he is willing to give him. He however denied ever signing an agreement for sale of 3 acres to Jacob Mbaabu as claimed. He made more claims; that his mother Sabina Kainyu had filed a protest but she died before the protest was heard and the court was not informed of her death. That the grant was confirmed hurriedly without his knowledge therefore it would be in the best interest to have the grant revoked.

We bought land

[6] This was opposed vide the replying affidavits by Michael Mutwiri M'Ichunge, Jacob Mbaabu Kirera and Maria Karimi Murira sworn on 17th January and 31st January 2012 respectively. Michael affirmed that he purchased 7 acres out of land parcel No. Timau Settlement Scheme/1 which were awarded to him in the confirmed grant. He has gone ahead to sub-divide and process the titles. Jacob Mbaabu averred that he is a purchaser of value who bought 3 acres out of the said parcel of land of which he was awarded. They both have no problem with Rosalind getting the land for it was an honest mistake when the co-petitioners included it in this cause. But this should not necessitate the revocation or annulment of the grant. Maria Karimi, widow of the deceased, associated herself with the affidavits of Michael Mutwiri and Jacob Mbaabu.

[7] This matter was heard vide *viva voce* evidence. **OW1 Michael M'Ichunge** testified that he purchased the plot in 1997 from the deceased in which the 1st petitioner was present during the process. The 1st petitioner drafted the informal agreement before they went to advocate Florence Kajuju and drafted a formal agreement dated 5th April 1997 of which the 1st petitioner witnessed and wrote his ID number as 1160XXXX. He did not go to the land board because title had not been issued yet but were to apply once title came out. All this time he has been in full use of the land.

[8] When the matter was taken to the land disputes tribunal the tribunal refused to consider the agreement and only told him to go to court of which the Magistrate read that he only be awarded 3 acres. After he appealed via judicial review the judge awarded him 7 acres. All the

beneficiaries have agreed to his share apart from the 1st petitioner.

[9] **OW2 Jacob Mbaabu Kirera** told the court that before entering into an agreement with the petitioners they affirmed to him that the family had agreed to the sale by being shown a letter dated 6th May 2008. They went to Mburugu advocate who was dealing with the family and on 7th July 2004 they entered into an agreement where he bought 2 acres out of Timau Plot No.1 at Kshs. 130,000/- per acre. He was shown his portion and he started cultivating. The family then sold him another one acre of which they went to Kiget advocate in Nanyuki where they entered into an agreement on 27th April 2006. The 1st petitioner signed and confirmed that he will get 2 acres as per his affidavit dated 9th November 2005. In addition, the petitioners signed acknowledgement of their receipts of the monies he paid. Everyone is ok with him getting the 3 acres apart from the 1st petitioner.

[10] **OW3 Fredrick Kiugu Manene** neighbor to the deceased stated that about 12 years ago the 1st petitioner sought for his assistance in the sale of 2 acres of land. He accepted and they went to the office of Mburugu advocate where he witnessed the sale made to **OW2** for Kshs. 160,000/-.

[11] **OW4 Andrew Mpuku** ascertained that he knows the administrators of the estate. That in 2004 Henry Kubai told him that his family was selling their land that is Plot No. 1 Timau settlement scheme in order to file this cause. He introduced him to Jacob Mbaabu who inquired whether the family had agreed to sell. Henry summoned his family members who agreed to the sale. They entered into an agreement dated 7th July 2004 of which he was a witness. In 2006, Henry told him that they needed more money of which they sold some land again to Mbaabu of which he witnessed the agreement and saw Henry sign it. Mother of Henry was aware of the transactions as she was alive by then. Henry was to transfer land to Mbaabu after the cause is over.

[12] At the close of the objectors' case interested parties called three witnesses. **IP Maria Karimi Murira** adopted her affidavit sworn on 10th July 2013 as her evidence. She told the court that she stands by the distribution stated in her affidavit and does not wish to add anything except that indeed the land at Timau was sold to Mbaabu and Mutwiri.

[13] **IP2 Wilson Paul Mburugu** testified that Mbaabu bought 2 acres from the petitioners through the agreement dated 7th July 2004 at a consideration of Kshs. 260,000/-. When they came he wrote the agreement as per their instructions and witnessed it and the money was used for the succession cause.

[14] **IP3 Kiprotich William Kiget** advocate of the High Court of Kenya affirmed that on 27th April 2006 he wrote a sale agreement between the petitioners and Jacob Mbaabu. That the purchase price was Kshs. 170,000/- of which Kshs. 60,000/- had been paid before execution of the agreement. They acknowledged the payment and balance was to be paid as per the agreement.

Submissions

[15] This matter was canvassed by way of written submission in which Michael Mutwiri M'Ichunge and Jacob Mbaabu Kirera; Maria Karimi Murira and Silveria Karore Murira; and the petitioner Henry Kubai reiterated what they have already stated.

ANALYSIS AND DETERMINATION

[16] This court has carefully considered the evidence, pleadings and submissions of the parties. The issue for determination before this court is *whether or not to revoke and annul the grant confirmed on November 2011.*

Legal test

[17] Revocation and or annulment of grant is on the basis of one or more of the circumstances set out in **Section 76 of the Law of Succession Act**. The 1st Petitioner has relied on Section 76 (b) and (d) (ii) which provides that:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) ...

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) ...

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) ...

(ii) to proceed diligently with the administration of the estate; ...”

His arguments fit Section 76 (b) and (d) (ii). He urged that; he was neither informed nor was his consent given in relation to the application dated 17th May 2010; land parcel LR NO. KIAMURI 'A' 1019 was held jointly between the deceased and the 2nd petitioner; and that

strangers have been allocated a share of the estate yet they are not beneficiaries.

[18] With regard to land parcel L. R. NO. KIAMURI 'A' 1019, the 1st petitioner produced a green card to show that the property is being held jointly between the deceased and 2nd petitioner. From the record, neither party is in objection to the 2nd petitioner being given her share which is half of the land since she held it jointly with the deceased.

[19] The 1st petitioner pointed out that him and his family were neither informed nor consulted with regard to the application for confirmation of the grant dated 17th May 2010. He affirmed that his previous advocate on record at that time M/S KIGET & CO ADVOCATES were never served. However from the record, an affidavit of service sworn by Stanley Mworira M'Mbui on 18th November 2011 states that he served M/S KIGET AND COMPANY ADVOCATES on the 24th October 2011 at 4. 00PM at their offices with the hearing notice. The notice shows that indeed it was received by the said firm on 24th October 2011 but it was under protest for counsel was already engaged in another matter at Nanyuki Law courts. The notice read that failure to attend or send someone authorized by law the case will proceed their absence notwithstanding

[20] Consequently, the 1st petitioner and his advocate were informed of the matter. The notice served carries some notice or directives that should the person served or a person duly authorized by him fail to appear on the appointed date the matter shall proceed their absence notwithstanding. They chose not to follow directives given on the notice. The 1st petitioner has no reason whatsoever why they did not appear, and they cannot seek revocation of the confirmed grant on their own default. The 1st petitioner and his advocate ought to have been vigilant and be keen to send a person authorized by law to step in their place or even seek for an adjournment. However, the 1st petitioner cannot deceive this court that they were not aware of the matter yet they were served with the notice.

[21] On the issue of consent, the 1st petitioner was aware of these proceedings and confirmation application as well as its hearing. He had every opportunity to raise this issue when the matter came up for hearing on 2nd November 2011 of which they chose to ignore.

[22] In relation to the issue of strangers being given a share of the deceased's estate, I note that OW1 and OW2 are buyers. **OW1** stated that he bought land 7 acres of L.R No. Timau Settlement/Scheme/1 from the deceased himself through the agreement dated 5th April 1997. The agreement stated that **OW1** buys 7 acres for Kshs. 70,000/-. When the matter was taken to the land disputes tribunal by the petitioner it refused to consider the agreement and only told him to go to court of which the Magistrate read that he only be awarded 3 acres. After he appealed via judicial review he was awarded 7 acres. However, I cannot trace from the record the judicial review **OW1** is referring to. However, the widows of the deceased affirmed that the deceased sold 7 acres to **OW1**. As of **OW2** he declared that he bought three acres from the petitioners through agreements dated 7th July 2004 and 27th April 2006. The advocates who drafted the agreements, who are **IP2** and **IP3** respectively, appeared before this court and confirmed this. Additionally the witnesses who witnessed these agreements that is **OW3** and **OW4** appeared before court and confirmed the claims by the purchasers. It was confirmed by them as well as **IP1** that the land was sold to **OW2** to be able to get funds to file this succession cause. However, the 1st petitioner has stated that his signature was forged on those agreements as it is not him who signed. He has alleged forgery but he has not provided any evidence to prove his allegations. The evidence is clear and overwhelming that the 1st Petitioner entered into the said agreements.

[23] His former advocate Mr. Kiget confirmed to the court that the 1st petitioner signed the agreements. I observed the 1st Petitioner, his demeanor and the evidence adduced. He was not truthful. It was clear to the court that the 1st Petitioner sold the lands in question but with the intention of having the transactions invalidated on the basis that they offended section 82 and **Section 45 of CAP 160**. He contrived a scheme which may look honest and innocent but whose true character was to defraud the objectors herein. Such person who has come to the court with unclean hands will not get the aid of law. This court cannot therefore be hoodwinked by a dishonest litigant to set aside its orders as that would conveniently use the court to perpetuate a fraud and ill intentions of the party. This is what is happening in this case. See the evidence and this is a justifiable inference.

[24] As **IP1** told the court the two purchasers ought to get their shares for they have already eaten their money which they paid as purchase price. No other beneficiary disputes the purchasers getting the acres they purchased. I am of the view that the 1st petitioner did indeed enter into an agreement with **OW2** together with the other petitioners. Now that he has seen that he is getting a smaller share than expected he is hiding behind the law to take away the acres his father and he sold. This court will not be used to assist undeserving beneficiaries to swindle persons on contrived or other pretences. The 1st petitioner has not moved the court to seek justice but to enforce his desire to get more land from the people he sold the land himself. I am satisfied that **OW1** bought 7 acres from the deceased. Such person has beneficial interest and may be listed broadly as a creditor. He cannot be deprived of his rights merely because the vendor of the land died before completing the transaction. I have stated before that such person has the right to approach the court to compel the personal representative of the deceased to complete the transaction.

[25] Concerning errors on acreage of the lands concerned which were pointed out by the 1st petitioner, such are capable of correction by way of rectification of grant. In any event, the 1st Petitioner and the other petitioners are the ones who initiated this cause and specified the acreage thereto. It is ironical that he has noticed these errors after over 10 years of the initiation of these proceedings. I say no more.

[26] From the foregoing, I take the view that the application for revocation of grant by the 1st Petitioner is founded on dishonesty and fraud by the 1st Petitioner. And revocation cannot be granted on such grounds. I find that the 1st Petitioner has not satisfied the threshold of section 76 of the Law of Succession Act. I dismiss it with costs to the objectors.

Rectification

[27] Nonetheless, when errors of description or names are brought to the attention of the court, may be rectified under Section 74 of the Law of Succession Act which states:

“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.”

[28] The error in acreage and the fact of joint ownership are easily rectified. All parties including the 1st Petitioner agree to the joint ownership of L.R. NO KIAMURI ‘A’/1019 measuring 2.5 Ha or 6.18 Acres by Rosalid Gacheri Nbubi and the deceased. Consequently, I find this a fit case to order rectification of the grant. Accordingly, the certificate of confirmation of a grant shall be rectified as follows:

(a) L.R NO. TIMAU SETTLEMENT SCHEME/1 measuring 5.8 Ha or 13.34 Acres

- (i) Jacob Mbaabu Kirera - Purchaser - 3 acres
- (ii) Michael Mutwiri M’Ichunge - Purchaser - 7 acres
- (iii) Sabina Karigu Murira - 1 acre
- (iv) Henry Kubai Murira - 0.67 acre
- (v) Wilson kimathi Murira - 0.67 acre
- (vi) David Mwirigi Murira - 0.67 acre
- (vii) Robert Miriti Murira - 0.67 acre
- (viii) Jackson Murithi Murira - 0.67 acre

(b) L. R NO. ABOTHUGUCHI/GAITU/330 measuring 6.86 Ha or 16.96 Acres

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- (vi) Robert Miriti Murira - 2.33 acres
- (vii) Jackson Murithi Murira - 2.33 acres
- (viii) David Mwirigi Murira - 2.33 acres
- (ix) Wilson Kimathi Murira - 2.33 acres

(c) L.R. NO KIAMURI ‘A’/1019 measuring 2.5 Ha or 6.18 Acres

- (i) Rosalid Gacheri Nbubi - 3.9 Acres

Balance to be shared equally amongst:-

- (ii) Jane Gaichugi Kinoti
- (iii) Rose Kiburio Murira
- (iv) DNM
- (v) NGM
- (vi) Tabitha Nkatha Mutuma

(vii) ENM

(viii) Rose Gacheri Murira

(ix) Lucy Igoki Murira

(x) Jane Kajuju Murira

It is so ordered.

Dated, signed and delivered in open court at Meru this 19th day of December, 2018

F. GIKONYO

JUDGE

In presence of

Kirimi for E.G Mwangi for 1st and 2nd objector

Kiogora for 3rd objector – Ms Ayata holding brief

Petitioner in person – present

F. GIKONYO

JUDGE