



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 23 OF 2005**

**IN THE MATTER OF THE ESTATE OF ANDEREA M'IKIUGU (DECEASED)**

**JUDAH KIUMBE.....PETITIONER**

**Versus**

**TERESIA KANYUAERA THIURU.....OBJECTOR**

**JUDGMENT**

[1] **ANDEREA M'IKIUGU (“the deceased”)** to whom this Succession Cause relates, died on 28<sup>th</sup> July, 1989. Through the Chief’s letter of introduction dated 11<sup>th</sup> March 2003 he stated the dependants of the deceased as:

- a) Rosa Mukubu - Widow
- b) Judah Kiumbe - Son
- c) Benjamin Thiuru - Son
- d) Quinus Murithi Mutua - Grandson

His asset comprising of Land Parcel No. Kiirua/Naari/527.

[2] On 8<sup>th</sup> April 2005 the petitioner was issued with the grant of letters of administration intestate. Subsequently, he filed summons for confirmation of grant. On 23<sup>rd</sup> August 2005 Benjamin Thiuru (*now deceased*) filed summons for annulment of grant pursuant to **Section 76 (a) & (b) of CAP 160 Laws of Kenya and Rule 44 (1) and 73 of the Probate and Administration Rules**. The grounds upon which the application is grounded are contained in the affidavit of Benjamin Thiuru and Rosa Mukubu sworn on 23<sup>rd</sup> August 2005.

[3] It is contended that the proceedings to obtain the grant were defective in substance and it was obtained fraudulently by the making of a false statement and concealment from the court of material facts. That the petitioner never gave them any actual notice of his intention to file this cause as he deceived his elderly and illiterate mother, Rosa Mukubu, to affix her thumb print on the consent documents. He told her that the papers were concerning his own identity. It was also stated that the intentions of the deceased were that his property be administered in accordance with his will which was made available to the whole family before his death. The petitioner filed this cause with the purpose of defeating the intentions of the deceased.

[4] The objector’s application was also supported by Joyce Kananu Kaberia vide her affidavit sworn on 19<sup>th</sup> November 2018. She affirmed that the deceased had three parcels of land. L.R.No. Ntima/Igoki/1719 was registered in the name of the petitioner so as to allow the deceased to acquire the land at Naari. When the deceased fell ill he called all his children as well as villagers and said that Judah Kiumbe share L.R.No. Ntima/Igoki/1719 equally to himself, Abel and Benjamin and his failure to share he should vacate Naari land and leave it to the two brothers and his daughter to get 1 acre. Judah refused to attend that meeting and assistant chief was sent to call him but he refused to come.

[5] The application was opposed by the replying affidavit of Judah Kiumbe sworn on 28<sup>th</sup> May 2008. He deposed that their mother could not have objected to the grant having duly consented to his filing of these proceedings. Therefore, the cause was not filed secretly. Judah averred that his mother was tricked into signing her affidavit on promises that she would be bought for medicine since she was ailing. He stated that the alleged will is false as it was neither written nor signed by his father. According to him, the deceased had stated that LR NO. Naari/Kiirua/527 was to be shared equally among all the three sons. The alleged land stated in the will at Timau was his for it was registered

jointly in his name and that of his father after each one of them contributed personal shares towards its purchase.

[6] Quinnus Murithi, son of Abel Mutua (deceased), swore an affidavit in support of the petitioner's case on 10<sup>th</sup> November 2008. He deposed that he supports the proposal by Judah Kiumbe and affirmed that Ntima/Igoki/1719 measuring 0.64Ha is owned by Judah Kiumbe and he has no claim on it.

[7] *Viva voce* evidence was also adduced. **OW1 Teresia Kanyuera** wife to Benjamin Thiuru and daughter in law to the deceased affirmed that the deceased had three pieces of land: Ntima/Igoki/1719 measuring 1 ½ acres which the petitioner sold. Mutethia Farm Timau measuring 5 acres which the deceased and petitioner sold but she got nothing. Nonetheless, the deceased gave her husband one extra acre at Naari land which the children of the deceased, neighbors and chief say so as well. Naari land, Kiirua/Naari/527 measures 8 acres of which the deceased gave each son two acres but left two acres for himself and his wife. After her husband died the petitioner chased her away and sold the land. She suggested that the Naari land should be shared as follows: 4 acres to her, Abel's family 2.5 acres and Judah 1 ½ acres. She is not sure whether Abel received anything in Timau land as a result he should get something extra

[8] **OB2 Rael Mwari Jason** daughter of the deceased testified that the deceased had three sons and five daughters namely: Naitore, Sevelina, Rael, Martha, Helena, Judah Kuimbe, Abel Mulaa and Benjamin Ithuru. She confirmed that the deceased had three parcels of land. She stated that the land at Gathare Kirige, that is Ntima/Igoki/1719, was registered in the petitioner's name so that the deceased could get another land at Naari. The land at Timau stood in the name of their father but part of it was sold and he distributed the rest to Judah and Abel. Before the deceased died he talked about how his lands ought to be distributed. He said that the land at Kirige was to go to his three children with 4 acres to Benjamin, Kiumbe and Mutua 2 acres each. Timau land was sold by the deceased and Judah as she witnessed Judah receiving money from the sale of the land.

[9] Through his affidavit evidence sworn on 19<sup>th</sup> November 2018 the petitioner deposed that his grandfather is the one that said that he should be given Ntima/Igoki/1719. At that time demarcation had not been done and when he reached 18 years and above he was given the land by his father and was given the first registration. He was added a small portion during demarcation. That that is his land which does not form part of the estate. As of Naari land it was shared out between the three sons where he showed them where to build The girls did not get any share.

[10] Jeremiah M'Rimberi through his evidence *de benesse* stated that he knew the deceased as they were neighbors. He knows his children but he cannot remember their names apart from Judah Kiumbe. That the deceased used to say that the shamba belongs to his three sons.

#### **ANALYSIS AND DETERMINATION**

[11] The issue of determination is *whether or not to revoke and or annul the grant*.

[12] **Section 76 of the Law of Succession Act** provides for the grounds upon which this court relies on to establish whether or not to revoke and or annul a grant. The objector seeks to have the grant annulled or revoked based on two grounds which comprise of **subsection (a) and (b)** which states:

**“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) that the proceedings to obtain the grant were defective in substance;**

**(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;...”**

[13] The objector alleges that they were not informed neither were they consulted. Furthermore, the deceased had already stipulated how his estate ought to be distributed through his will. For written wills to be valid they need to be signed by the testator and attested by two or more competent witnesses as is so provided under **Section 11 of CAP 160**. the validity of the will has been contested and valid questions which cannot be answered by any party arise.

[14] When petitioning for letters of administration preference is usually given to the certain persons to administer as stipulated under **Section 66 of the Law of Succession Act**. If they do not wish to do so they may give their consent to another person to take out the letters instead and on their behalf. In this case, the petitioner filed a consent which was given to him by the widow of the deceased, who is the petitioner's mother. However, from the affidavit filed by Rosa Mukubu, the widow of the deceased declared that the petitioner deceived her into giving him the consent to take out the letters of the administration. If she knew the truth she would not have given it. On the other hand, the petitioner alleged their mother was tricked into signing the affidavit. Both parties contend different assertions however it is not in dispute that the deceased's widow was elderly and illiterate of which she may be manipulated. Sadly, she is not available to ascertain what the truth is.

[15] Nevertheless, the person taking out letters of administration needs consent from all the beneficiaries. The petitioner pointed out that the deceased was survived by the widow, two sons and grandson but failed to mention his sisters. Apparently, the deceased had three sons and five daughters. It should be noted that **Article 27 of the Constitution** insists on equality and freedom from discrimination which has been upheld by **CAP 160** as well. Therefore, this ought to be exercised by everyone. I have perused the record and there is no consent that has been given by the daughters of the deceased as well as by Benjamin Thiuru in either Form 38 or 39. It should be noted that daughters are equally entitled to a share of the estate as laid down under Part V of the Law of Succession Act that provides for equal distribution amongst the children of the deceased. Therefore, if they desire not to have a share then they ought to renounce of their interest in writing.

[16] Concerning the assets belonging to the estate, the petitioner only stated Land Parcel No. Kiirua/Naari/527. From the objector and her

witnesses they mentioned that the deceased had two other properties which are Ntima/ Igoki/1719 and Muteithia Farm Timau. On 22<sup>nd</sup> February 2016 the court called for records from the land registry and further on 28<sup>th</sup> May 2016 called for the adjudication officer to appear and produce the file for adjudication carried out in respect of Ntima/Igoki/1719. However, from the evidence produced by both parties it can be deduced that the deceased was the one that caused the land be registered under the name of the petitioner as alleged. Before, this court can make a decision on whether this land belongs to the deceased or not, I am of the view that the orders it called upon be effected first before making a decision.

[17] Nevertheless, from the foregoing I am of the view that there are substantial grounds to cause the grant to be revoked. As a result this court ought to make the following orders:

- a) That the grant letters of administration intestate issued to the petitioner on 8<sup>th</sup> April 2005 be revoked
- b) Fresh grant letters of administration intestate be issued to Teresia Kanyuera Thiuru and Judah Kiumbe
- c) That the land records with regard to Ntima/Igoki/1719 and Muteithia Farm Timau be presented before this court within the next 30 days from today.
- d) That the adjudication officer to appear and produce the file for adjudication carried out in respect of Ntima/Igoki/1719 on a date to be appointed by court.

**Dated, signed and delivered in open court at Meru this 18<sup>th</sup> day December, of 2018**

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**F. GIKONYO**

**JUDGE**

In presence of

Mutegi for Mburugu for objector

M/s Njenga for M/s Kiome for petitioner

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**F. GIKONYO**

**JUDGE**