



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CHUKA MISCELLANEOUS SUCCESSION CASE NO. 26 OF 2016

(FORMERLY MERU SUCCESSION CAUSE NO. 67 OF 2004)

IN THE MATTER OF THE ESTATE OF K KANAMPIU KABIRU (DECEASED)

AND

ALICE KATHURE KANAMPIU.....PETITIONER

VERSUS

AMOS MBAE KANAMPIU.....1ST RESPONDENT

MERCY KAWIRA BUNDI.....2ND RESPONDENT

JOHNSON NJERU KIRIMO.....3RD RESPONDENT

NDIGA JUSTUS.....4TH RESPONDENT

LUCY GATAKAA GITONGA.....5TH RESPONDENT

RULING

1. This cause involves the estate of the late **KANAMPIU KABIRU** (herein after to be referred to as the deceased) who died intestate on **17th January, 1998** domiciled in Chogoria. **ALICE KATHURE JUSTUS**, the applicant herein is the widow of the deceased herein and was appointed the administratrix of the estate of the deceased vide **Meru HC Probate & Administration cause No.67 of 2004** albeit in different name of **ALICE KATHURE KANAMPIU**. This is part of the issues that were canvassed in this matter. The grant was confirmed by the said court on **16th January, 2006** and the entire estate comprising that property then known as **L.R. No. MWIMBI/CHOGORIA/2400** measuring approximately 0.263 ha devolved to **AMOS MBAE**, a grandson to the deceased and the 1st respondent herein.

2. The applicant herein took out summons for revocation of grant in this court, dated **18th July, 2016** praying for the following substantive orders under section 76 Law of Succession Act.

a) That the certification of grant issued to **Alice Kathure Kanampiu in Meru H.C. Succession Cause No. 67 of 2004** be revoked.

b) That this court be pleased to order cancellation of all titles emanating from **L. R.**

Mwimbi/Chogoria/2400 that is **Mwimbi/Chogoria/4243, 4605, 4606, 4799, 4929, 5318 and 5319** and restore the original title L.R. No. **Mwimbi/Chogoria/2400** in the name of the deceased **KANAMPIU KABIRU**.

c) That this Hon. court be pleased to order the Land Registrar Meru South/Tharaka Districts to cancel all the resultant titles L.R. No. **Mwimbi/Chogoria/4243, 4605, 4606, 4799, 4929, 5318 and 5319** and restore the original title NO. **Mwimbi/Chogoria/2400** in the name of the deceased Kanampiu Kabiru.

3. The grounds upon which the above prayers/reliefs have been sought are as follows namely:

(i) That the proceedings to obtain the grant were defective in substance.

(ii) That the grant was obtained fraudulently by making of a false statement and by concealment from the court that the petitioner was not in court.

(iii) That the grant was obtained by means of an untrue allegation of fact essential to justify the grant.

(iv) The respondent gave false information by pretending to be Alice Kathure Justus.

4. The applicant has supported the above grounds vide an affidavit sworn on 18th July, 2016 where she has inter alia deponed that her late husband the deceased herein left the property comprising the estate to her and that that is where her home is. She has denied participating in the succession proceedings in **Meru H.C Succession Cause No. 67 of 2004** citing the fact that her official name is **ALICE KATHURE JUSTUS** and not **ALICE KATHURE KANAMPIU** which name was allegedly used by the 1st respondent to fraudulently and deceitfully transfer the estate to himself before subdividing and disposing it to 2nd, 3rd, 4th and 5th respondents respectively. The applicant has further stated that the 1st respondent's intention was to illegally and fraudulently disinherit her completely by using the purchases to evict her from the estate.

5. In her evidence in court at the hearing of this application, the applicant, testified that the first respondent tricked her into giving him the original title to the property comprising the estate and that the petition in Meru H.C was filed by the 1st respondent without her knowledge. She denied authorizing his grandson, the 1st respondent to file the petition on her behalf. She accused the said grandson together with the 5th respondent, Lucy Gatakaa Gitonga of conspiring to deprive her of her rights to the estate and in order to evict her from the estate. She further alleged that when the petition was filed in Meru, she was sick after a road accident that left her unable to walk.

6. The applicant further testified and denied transferring the estate to the 1st respondent. It was her evidence that the deceased herein during his lifetime distributed part of his properties to all his five sons and left behind parcel NO. **Mwimbi/Chogoria/2400** for her to utilize for her upkeep. She denied authorizing his grandson, the 1st respondent herein to dispose off part of the estate as she claimed that she was never informed of any intention to sell. She admitted during cross examination that she did go to Meru Law Courts but stated that she had gone there specifically for a case involving the road accident where she was a victim.

7. **Harriet Muthoni Mugambi**, one of the daughters of the deceased and a witness presented by the applicant, testified that she was not consulted when the petition for letters of administration in respect to the estate of her father was being filed in Meru High Court. She accused **Lucy Gatakaa Gitonga** whom she referred to in her affidavit as the "surveyor" of colluding with the 1st respondent by forging her signature with a view to defrauding her mother of the estate. She further testified that her late father had prior to his demise gifted his five sons with parcels of land and that parcel number **Mwimbi/Chogoria/2400** was left for her mother – the applicant herein. She denied that there was a family meeting prior to the filing of the succession cause in Meru High Court insisting that she was not

invited to any such meeting if at all. She further testified that the land should revert to her mother and if she wishes to get her a share of it, she would not mind it. She accused the 1st respondent of fraud and insisted that the problems they have at home was caused by the 1st respondent and that his problems with the police was due to the crimes he had allegedly committed.

8. In her written submissions through her learned counsel **P.M. Mutani** Advocate, the applicant has contended that the name used in the petition filed in Meru, **ALICE KATHURE KANAMPIU** was erroneous as her correct name is **ALICE KATHURE JUSTUS**. It has been submitted that the grant made in Meru High Court on 16.1.2006 was in error because the court was misled that the petition had been presented by the applicant herein a fact that she knew was not true. She has further submitted that the 1st respondent in collusion with the 5th respondent attempted to take away everything leaving her landless and faulted the same persons for trying to demonize her only daughter Harriet Muthoni Mugambi (PW2) who has been helping her.

9. The applicant has further submitted that none of the interested parties is a bona fide purchaser for value pointing out that the 5th respondent is a conspirator and an **accomplice in fraud acting as a surveyor**. She has pointed out the lack of any supporting documents from the purchasers and the 5th respondent in particular to prove that they had engaged in a genuine sale transaction. In her view, the fact that the 5th respondent took the lion's share of the estate without a sale agreement infers fraud.

10. The applicant has contended that the succession cause filed vide **Meru Succession Cause NO. 67 of 2004** was a fraud and has urged this court to invoke the provisions of **section 76 of the Law of Succession Act** and revoke it on grounds of fraud and misrepresentation. She has faulted the 1st respondent for misrepresenting himself as the son of the deceased rather than a grandson which he is. She has cited the decisions in the following two cases to support her submissions namely:

1) In the matter of the estate of Muiruri Muchoro deceased (**Nrb HCC Succession Cause No. 24/02) [2014] eKLR**

2) In the estate of Erastus Muriungi Ngaruthi deceased (**Meru HCC Succession Cause NO. 275 of 2014) [2015] eKLR**

11. The 1st respondent Amos Mbae Kanampiu the interested parties described as 2nd to 5th respondents that is Mercy Kawira Bundi, Johnson Njeru Kirimo, Ndiga Justus and Lucy Gatakaa Gitonga have opposed this application through their respective replying affidavits. Mercy Kawira Bundi, on her part vide a replying affidavit sworn on 15th August, 2016 has deposed that she purchased parcel No. **Mwimbi/Chogoria/4243** from the 1st respondent through an agreement dated 2nd February, 2007 and has exhibited an agreement dated 2nd February 2007 to support her claim. He has contended that at the time of purchase the first respondent owned **Mwimbi/Chogoria/2400** and that he believes the grant was not obtained fraudulently.

12. Johnstone Njeru Kirimo the 3rd respondent vide an affidavit sworn on 12th August, 2016 has deposed that he purchased parcel No. **Mwimbi/Chogoria/4605** after being approached by both the applicant and the 1st respondent. He has further deposed that he took possession of the parcel in 2008 upon purchase.

13. Lucy Gataka Gitonga, on her part has deposed that Harriet Muthoni (PW2) went to her place of work with CID officers from Chuka police station accusing her of fraudulently acquiring part of the estate. She further deposed that she requested the said Muthoni to get government surveyors to confirm boundaries of the parcels Nos. **Mwimbi/Chogoria/4799, 4929 and 5318** which she claims she purchased from the 1st respondent save for parcel NO.4929 which she claimed to have bought from one Ndiga Justus. She further denied under cross examination that she drew the petition for letters of administration presented in Meru High Court. She further added that the applicant was present when the transaction took place though she conceded that she never signed the alleged agreements. The agreements were however not tendered in evidence in this application.

14. Amos Mbae Kanampiu on his part vide a replying affidavit sworn on 12th August, 2016 has also blamed Harriet Muthoni Kanampiu for fighting him through this application and also allegedly orchestrating his arrest sometime in 2002. In his view, the said Harriet Muthoni did not want him to benefit from the estate. He has further deposed that the applicant petitioned for letters of administration and gave him the entire estate out of her love for him. He claims that all the children of the deceased were involved in the succession proceedings in Meru. He has further deposed that his grandfather, the deceased herein had expressed his wish that he should take the property forming the estate and take care of the applicant. He has also contended that the applicant attended court in Meru High Court where she allegedly made her wish to have the entire estate vested in him. He has denied cheating or misleading her grandmother adding that she visited a surveyor in Chuka and willingly surrendered the title to the estate. He has further deposed that he disposed off some parcels to the 2nd, 3rd, 4th and 5th respondents with the blessings of her grandmother and that he now takes care of her grandmother in parcel NO. **Mwimbi/Chogoria/5319**. He however conceded that the applicant never got any share as the parcel that went to him was to go to her.

15. In their written submissions made through their counsel M/S Muia Mwanzia and Company the respondents have accused Harriet Muthoni Mugambi (PW2) of misleading the applicant into filing this application which they contend is devoid of merit. They submit that the applicant expected the petition presented to Meru High Court by thumb printing adding that no evidence has been provided to the contrary and that it was her duty and burden to adduce evidence to show that the thumb print appearing in the papers presented to court was not hers. They have relied on the decision in the case of **RE ONESMUS IKIKI WAITHANWA [2008] eKLR** in support of this contention.

16. The respondents have further pointed out the conduct of Harriet Muthoni at the hearing of this application viva voce when she requested to testify on behalf of her mother the applicant and contended the same showed that the old lady was being pushed to testify in court. It is contended that the applicant's own son Timothy Riungu testified and confirmed what the family of the deceased had agreed and that the records from **Meru H. C Succession Cause No. 67 of 2004** showed that the applicant attended court during confirmation of grant.

17. The respondents have contended that the application before court has not met the threshold set out under the provisions of **section 76 of the Law of Succession Act** and therefore in their view the application ought to fail in that regard. They have cited the decision in unreported case of **RE MBAANDI NYAMWEYA** to support this view. The respondents however have not provided the citation of the decision or the decision itself but have contended that the court dismissed a similar application because fraud was not established.

18. Finally the respondents have faulted the applicant for constantly changing the goal posts in her case and that she is involved in a wild goose chase which in their view must fail.

19. This court has considered this application, the grounds upon which the application is presented, the evidence tendered and the written submissions. I have also considered the response made in opposition by way of replying affidavits, the evidence offered and the written submissions. I have also considered the authorities cited and annexed to the respective submissions. The applicant in this matter is a widow to the deceased herein and has invoked the provisions of **section 76 of the Law of Succession Act** in asking this court to revoke the grant issued in **Meru Succession Cause No. 67 of 2004**. It is apparent that the applicant really ought to have moved this court through the main cause (**succession cause no. 67 of 2004**) rather than a miscellaneous cause because the main cause was entertained in this court sitting in Meru. A miscellaneous cause is normally filed where the main cause was filed in the subordinate court. That as it may, this court decided to entertain and determine the application before court on the substance and merit in the letter and spirit of **Article 159 (2) (d)** of the constitution of Kenya 2010. After all the original file **No. Meru High Court Succession Cause No. 67 of 2004** was forwarded to the registry of this court and is now part of this miscellaneous cause. This court finds that there is no prejudice suffered to any of the parties in this application in that regard.

20. Now let me go back to the application before me. The court under section 76 of the succession Act

can revoke or annul a grant of representation whether confirmed or not either on an application of any party or on its own motion. The grounds upon which a grant can be revoked are well illustrated under the said section. The applicant in this case has cited fraud, false statement concealment and defect in the proceedings to obtain the grant as the main grounds upon which the grant issued vide Meru High Court Succession Cause No. 67 of 2004 should be revoked or annulled.

21. The applicant has stated that she did not take part in the succession proceedings in Meru High Court and that her signature (thumb print) appearing on the petition and other P & A forms filed vide **Meru Succession Cause No. 67 of 2004** were all forged. The respondents have denied this with the 1st respondent insisting that the applicant on her own volition executed the documents and appeared in court during confirmation of grant. The respondents have contended that the applicant should have tendered expert evidence to prove that the thumb print appearing on the petition presented and other documents were forged. I have considered the decision quoted by the respondent in the case of **RE ONESMUS IKIKI WAITHANDWA (supra)** where the court considered an English authority in the case of **DAVIS –VS – Magistrate of Edinburg 1953 sc 34**. The decision was however dealing with the validity of a written will and whether or not the signature appearing on the will was that of the testator. The court was considering and comparing the similarities of the signatures on the written will with other signatures appearing on the documents having known signatures of the deceased. The court was therefore being called upon to determine the authenticity of the signature on the will. The court decided that the objectors to the will should have assisted the court by adducing expert evidence to determine whether or not the signature appearing on the will was that of the deceased. In this present case, the circumstances in my view are somewhat different. The applicant has sworn an affidavit and testified on oath that she did not file the petition for grant of letters of administration in Meru High Court and that the same was done by the 1st respondent. In my view requiring the applicant to prove the said allegations by adducing expert evidence amounts to requiring her to prove the said allegations beyond reasonable doubt which is a rather higher standard of prove not applicable here. The correct standard applicable in disputes of civil nature is that of balance of probabilities. I therefore do not agree with the respondents that the applicant had the burden of adducing scientific evidence to enable the court determine whether the thumbprints appearing on the petition and other documents filed in Meru High Court Succession Cause No. 67 of 2004 are hers. It is also obvious that the ratio decidendi of the decision in the estate of **Onesmsu Ikiki Waithanwa (deceased) [2008] eKLR** does not apply here for the same reasons.

22. I have considered the applicant's contention on the thumbprint used as a sign to the petition presented in Meru High Court alongside other factors or evidence adduced in court at the hearing of this application. I have done this with a view to determining on a balance of probabilities whether or not there was misrepresentation or elements of fraud in the proceedings leading up to the issuance and confirmation of grant that is now the subject of this application. The applicant at the hearing of this application adduced evidence showing that her official name as per National Identity Card is **ALICE KATHURE JUSTUS**. The name used in the petition for letters of administration in Meru High Court was **ALICE KATHURE KANAMPIU**. It is of course true that both names "**JUSTUS**", "**KANAMPIU**" belonged and referred to one and the same person, the deceased herein and the applicant conceded during the hearing that the deceased was also known by the name **Kanampiu**. However, it is expected that when official documents such as the petition for letters of administration are launched in court the official name as reflected on the identification documents (which in our case is normally the national identity card) is used. The first name of the deceased as per the death certificate was **KANAMPIU** but it does appear that he also had a Christian name **JUSTUS** which is the name unusually adopted by the applicant. I say unusual because usually the name adopted by spouses (wives) in most cases is the second name/sir name so if one was to take a guess, obviously the sir name would be the name. So when the applicant says that the petition was filed without her knowledge, this court finds a correlation between the wrong name of the applicant used and the allegations of misrepresentation. The same stands out clearly when considered in the context of the circumstances obtaining in this cause.

23. This court observed keenly the demeanors of the applicant, the 1st respondent and the 5th respondent at the hearing of this application. The applicant, an old frail looking lady was steadfast and quite clear in her mind about the circumstances surrounding her present predicament. Contrary to the assertion by the respondent that she was under the influence of her daughter **Harriet Muthoni Mugmabi (PW2)**, she did

not appear to me that she was not speaking for herself. She was firm and clear even under intense cross examination by the respondent's counsel that she did not sign the documents presented in Meru High Court for the succession cause. I have of course noted from the court proceedings of **16th January, 2006** that the honourable court indicated that the petitioner was present in person. The name of the petitioner is however not indicated and neither the presence of other beneficiaries including the 1st respondent indicated. It is therefore hard to tell whether the person who appeared in Meru High Court on **16.1.2006** was the applicant as contended by the 1st respondent or an imposter as contended by the applicant. Had the honourable court indicated the name and the ID number of the person present in court perhaps it would be easier to tell with certainty that the person appearing in court was the applicant or an imposter. This fact coupled with the fact that the petitioner's name used in the petition for letters of administration is not the official name of the applicant herein does raise doubts whether the applicant actually presented the petition and attended court on **16.1.2016** in Meru.

24. The court's view is reinforced by the demeanor of the 1st respondent and the conduct of the 5th respondent at trial of this application. To begin with the 1st respondent during the hearing, appeared evasive when direct and uncomfortable questions were put to him under cross examination especially concerning the fact that the entire estate had gone to him leaving the widow landless. He in fact appeared apologetic in my view by stating that the remaining portion of land in his name was actually meant for the applicant but could not explain why the same had to be registered in his name.

25. The 5th respondent on her part did not appear convincing to me. She told this court that she worked as a secretary of a certain surveyor by the name Jephew Kanga who allegedly had an office in Chogoria where the estate is situated. What appeared striking is the absence of any agreement detailing the transaction of the acquisition of the lion's share of the estate. If the transaction was genuine as she purported she ought to have at least produced agreements showing how much and when she paid the amounts in consideration. The absence of any written agreement, though we are not questioning the legality of the said transactions at this stage, suggests that there are some irregularities in the said transactions. This court takes judicial notice of the rampant cases of rogue "surveyors" (actually brokers) who have caused havoc in this region by taking advantage of gullible litigants majority of who are old and illiterate by stealing from them their inheritance rights. Although this court for certain cannot at this stage conclude that the 5th respondent or the said **Jephew Kanga** is one such persons, I find it telling that a transaction to transfer almost the entire estate to the 5th respondent is not supported by any written document. There is absolutely no evidence tendered to show that she even paid anything for the parcels transferred to her. This fact when considered alongside the evidence tendered by the applicant and her witness (PW2) on a balance of probabilities show that the estate of the deceased herein were transmitted to the 1st respondent and the other respondents through fraud and/or misrepresentations.

26. The 3rd respondent in his affidavit just stated that he had acquired **Mwimbi/Chogoria/4605** which was one of the resultant subdivisions of **Mwimbi/Chogoria/2400**. He however never showed how he acquired the same. The 2nd respondent exhibited a written agreement showing how she had acquired parcel No. **Mwimbi/Chogoria/4243** but the agreement shows that she only paid part consideration of 80,000/= leaving a balance of Kshs.45,000/= and did not state whether she had paid the balance putting to doubt the legality of the acquisition.

27. It is important to note that the provisions of section 93 of the Law of Succession Act. only protects genuine and legitimate or bona fide purchasers for value in transactions involving properties forming the estate of deceased persons. Certainly the protection offered under section 93 of the Law of Succession Act does not include fraudulent or illegal transactions.

28. It is also important to note that the distribution of an estate of a deceased persons is clearly provided under section 35 to 40 of the Law of Succession Act In this instant matter the section applicable was section 35 of the Law of Succession Act which provides that where an intestate leaves one surviving spouse and child or children, that surviving spouse should have life interest on the net estate and upon her death the property would be divided equally among the surviving children. That is the position of the law.

However the parties can file a written consent suggesting a different mode of distribution and if all the parties (beneficiaries) are in agreement the court can adopt the consent if the same is fair and just. (see **the C.A decision in JUSTUS THIORA KIUGU & 4 OTHERS –VS- JOYCE NKATHA KIUGU & ANOR [2015] eKLR**). In that case the court of appeal held that where there's a surviving spouse and children, an estate of a deceased person can only be distributed in accordance with the provisions of section 35 unless there is a written consent proposing a different mode of distribution. I have noted that though there was a written consent dated 21st March, 2005 filed in **Meru Succession Cause No. 67 of 2004**, the same has been contested as Harriet Muthoni Mugambi stated that she did not sign the consent. The consent also appears to have missed out her correct official name which lends credence to her contention that her signature was forged. The consent filed also does not contain the mode of distribution of the estate. This court finds that on the whole the consent filed is defective in substance and could be relied upon by the respondents in support of their opposition against the applicant's claim that the proceedings leading up to the issuance and confirmation of grant was defective in substance. This court finds that from the foregoing, the proceedings to obtain and confirm the grant were defective in substance. All the children of the deceased or the beneficiaries were not involved as required by section 51 of the Law of Succession Act which adds another defect to the said proceedings.

29. The 1st respondent testified that her grandmother loved him and that he loved her and was taking good care of her but his actions in this cause tell a different story. Apart from attempting to completely disinherit her, he had no qualms solely utilizing the proceeds of the irregular sales of parcels of land carved out of the estate when the law (**section 66 of Law of Succession Act**) clearly gave the widow preference both in the administration and benefits accruing from the estate of her late husband. I am not convinced that the applicant willingly wanted the 1st respondent as he puts it to benefit from the estate against her own interest and that of her daughters. I have considered the evidence of **Timothy Riungu Justus (DW3)** and note that he conceded that the five sons of the deceased benefitted from parcels of land their late father (deceased) gifted in his lifetime. He was however unsure of how the proceedings were filed in Meru High Court though he admitted that they had agreed as a family to permit their mother, the applicant herein, to be the administratrix of the estate of their late father. The five daughters to the deceased though indicated as married ought to have been notified and involved in the succession proceedings under rule 26 (2) of Probate & Administration rules prior to the filing of the succession cause in Meru High Court. The cited rule was not complied with further rendering the petition defective in substance.

30. This court has considered all the above anomalies besides the fact that there was clear inadvertence to leave the old widow at the mercy of her grandson contrary to clear provisions of **section 35 of Law of Succession Act** as aforesaid. The great injustice visited upon the applicant cannot be disregarded in view of the clear provisions of **section 35 & 66 of the Law of Succession Act**. In the end this court finds that applicant has laid sufficient basis for this court to invoke the said provisions and allow the application dated 18th July, 2016. The same is merited and it is allowed under the following terms:

(i) The grant issued on 16th June, 2004 to **ALICE KATHURE KANAMPIU** and confirmed on 16th January, 2006 is hereby revoked or annulled. A fresh grant in respect to the administration of the estate of the late **KANAMPIU KABIRU** (deceased) is hereby given to the applicant **ALICE KATHURE JUSTUS**. She shall henceforth administer the estate in accordance with the law and in view of the age of this cause and her own age I grant her liberty to apply for confirmation of grant before the expiry of the statutory period of six months.

(ii) I further order the cancellation of all titles emanating from L.R **MWIMBI/CHOGORIA/2400** that is **MWIMBI/CHOGORIA/4243, 4605, 4606, 4799, 4929, 5318 and 5319** and restoration of the original title L.R. **MWIMBI/CHOGORIA/2400** in the name of deceased **KANAMPIU KABIRU**. The registrar of Lands Tharaka Nithi County is hereby directed to comply with this order forthwith.

(iii) The respondents shall pay costs of this application.

That is the ruling of this court and it is so ordered.

Dated at Chuka this 17th day of May, 2017

R. K. LIMO,

JUDGE