



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 140 OF 2006**

**IN THE MATTER OF THE ESTATE OF TUAMBAE NAIBAE (DECEASED)**

**WILLIAM M'ARIMI MUTUAMBAE.....PETITIONER**

**AND**

**ROSEMARY KARAMUTA FOR ESTATE OF GEORGE GATIMI.....OBJECTOR**

**JUDGMENT**

[1] The Petitioner herein William M' Arimi Mutuambae filed Summons for Confirmation of Grant proposing to distribute the estate of the deceased as follows;

***LR NO. KIIRUA/NAARI/37***

***WILLIAM M' ARIMI-3.30 ACRES***

***GEORGE GATIMI M' AMBAE-7.00 ACRES***

[2] But George Gatimi objected to the proposed mode of distribution on the basis *inter alia* that the Petitioner who is his brother had all along lived on Kiirua/Naari/2624 which was given to him and registered into his name by their deceased father for he was his eldest son. It is not therefore true that the Petitioner had acquired the said land solely through his efforts. According to the Objector, LR Kiirua/Naari/37 is his inheritance exclusively.

[3] However, the original Objector George Gatimi died and was substituted by his wife Rosemary Karamuta.

**Oral testimony**

[4] Oral testimony was adduced. OB1 Rosemary Karamuta evidence was that she was the widow of George Tumbae (the original objector but now deceased) who was the brother of the Petitioner. She stated that she got married to the Objector in the year 1972 and that at the time, the Petitioner was residing and fully settled on LR KIIRUA NAARI/2624, while the Objector was living on LR KIIRUA/NAARI/37. It was her evidence that all her married life, the Petitioner had never used this land and that the Petitioner had his own land i.e. KIIRUA /NAARI/2624 given to him by the deceased during his lifetime. She contended that KIIRUA/NAARI/2624, occupied by the Petitioner was the property of the deceased because he could not be registered to own two parcels he nominated the Petitioner to be so registered. It was her evidence that all her married life, the Petitioner and the Objector had never had any conflict until

the filling of the instant Succession Cause and that this Cause was filed without involving the Objector which was a wider scheme to interfere with the Objector's ownership of LR KIIRUA/NAARI/37.

[5] OB2 Nathaniel M' Muthaura testified that he knew the parties herein and that he was a member of the land committee. He said that the deceased had indicated that he never wanted land in Naari and as a committee they advised him to give the land to his son, the Petitioner, who at the time was an adult. He stated further that the Petitioner is married and has at no given time lived on the land at Kiirua; only the deceased, his wife and the Objector lived and used the land at Kiirua.

[6] OB3 Sabella Micheni gave evidence that the parties herein were his brothers but George was deceased. William was their eldest brother while George Gatimi (deceased) was the youngest. It was her evidence that the Petitioner was given LR KIIRUA/NAARI/2624 by their father while LR KIIRUA/NAARI/37 was registered in the name of their father. William got married in 1954 while still living with their father on LR KIIRUA/37 but after marriage he relocated to LR KIIRUA/NAARI/2624. The late George got married in 1972 while living in LR KIIRUA/NAARI/37.

[7] OB4. Anastasia Nkatha Francis the area chief of Maitai location confirmed that she knew the family of Tuambae Naibae (the deceased). She stated that William was a resident of Naari Michaka and in all his life he has lived on LR KIIRUA/NAARI/2624 measuring about 8 acres. But, his brother George Gatimi (now deceased) lived and utilized KIIRUA/NAARI/37 exclusively. She further testified that the land upon which William settled belonged to the deceased but it was given to him by virtue of him being the eldest son.

[8] William M' Arimi testified as PW1. He told the court that he was the firstborn of Mutuambae Naibae (deceased) and that his father's estate comprised LR KIIRUA/NAARI/37 which measures 3.68 Hectares. He stated that in the year 1957 he was awarded land parcel NO. KIIRUA/NAARI/2624 by the government in KIIRUA/NAARI/Settlement Scheme and was therefore the registered owner of that land.

### **Submissions by Petitioner**

[9] In his submissions, the Petitioner reiterated the contents of his witness statement and reiterated that LR KIIRUA/NAARI/2624 was allocated to him directly by the government and could not therefore form part of the estate of the deceased. According to him, the estate of the deceased comprises only in KIIRUA/NAARI/37 in which he is entitled to a share as a beneficiary. The Petitioner further contended that there was no evidence on record by the Objector to support his claim that LR NO.KIIRUA/NAARI/2624 belonged to the deceased.

### **Submissions by the Objector**

[10] It was submitted for the Objector that the deceased owned two parcels of land namely KIIRUA/NAARI/37 and KIIRUA/NAARI/2624 except that the deceased had the Petitioner (William M' Arimi Mutuambae) registered as the owner of LR KIIRUA/NAARI/2624 during his lifetime. And that the Petitioner has all his life lived on this parcel exclusively since the 1960s while LR KIIRUA/NAARI/37 was reserved for the Petitioner's younger brother (the Objector). The Objector contended that the Petitioner was settled fully by the deceased during the deceased's lifetime and that if the Petitioner did not believe that LR KIIRUA/NAARI 2624 did not belong to his father he could not explain why he is claiming only 3:30 Acres in KIIRUA/NAARI/37; while he could go for half share thereof.

### **DETERMINATION**

[11] The original Objector and the Petitioner are brothers. Upon the death of the original Objector he was substituted by his wife Rosemary Karamuta George, the current Objector herein. The Petitioner has argued that he acquired LR KIIRUA/NAARI/2624 on his own effort; it was awarded to him by the government in the KIIRUA/NAARI Settlement Scheme. He says that the said land is not therefore part of the estate of the deceased. No evidence was however tendered to support his claims.

[12] The Objector on the other hand contended that LR KIIRUA/NAARI 2624 was registered in the name of the Petitioner at the behest of the deceased during his lifetime and therefore should be treated as part of the estate of the deceased. Further claim was that the Objector had all along in his entire life lived on LR NO. KIIRUA/NAARI/37 to the exclusion of all others including the Petitioner. And the Petitioner has been living on LR NO KIIRUA/NAARI/2624 since he got married in 1957. The Objector called 3 witnesses (including their sister) who attested to these facts and their evidence to that effect was never challenged by the Petitioner. OB2 Nathaniel M' Muthaura who knew the parties herein and was a member of the land committee at the material time of gathering and adjudication of these lands stated that the deceased had indicated that he never wanted land in Naari but as a committee they advised him to give the land to his son, the Petitioner, who at the time was an adult. This evidence was direct and specific that LR KIIRUA/NAARI/2624 was registered in the name of the Petitioner at the advice of the committee and at behest of his father by virtue of him being the firstborn son. The Petitioner did not adduce any evidence or call any witness to disapprove this crucial piece of evidence or to prove his claims that LR KIIRUA/NAARI/2624 was allocated to him by the government directly. The records of gathering and adjudication was quite thorough and kept details of persons and their respective fragments of land. Every other interests on the land were also recorded. I expected the Petitioner to adduce such evidence to show that he got the land himself and was never his father's land. I should note that the Petitioner appeared to contradict himself when at one point he said he acquired the land through his own effort while on the other hand he stated that the same was allocated to him directly by the government.

[13] This is also important; that LR KIIRUA/NAARI/37 measures 10 acres or thereabout. But, the Petitioner proposes that he gets only 3.30 Acres and the Objector to get 7.00 Acres. Curiously, he did not state exactly why he extended such magnanimity to his late brother while he should have gone for a half share of the estate if indeed his claims are true that KIIRUA/NAARI/2624 was neither his father's land nor registered to his name by his father during his life time. His quest for a lesser portion may easily be mistaken for an act of generosity but when it is seen within the evidence before the court, it is contrived maneuver. The overall impression of the evidence before court is that KIIRUA/NAARI/2624 was given to the Petitioner and registered in his name by the deceased during his lifetime.

[14] The above recapitulation of facts brings me to section 42 of the Law of Succession Act which provides as follows:-

**42. Previous benefits to be brought into account *Where***

**a. an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or**

**b. property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.**

[15] I have said before and I will repeat here that section 42 of the Law of Succession Act is intended to bring fairness and equity in the sharing of the estate of the deceased amongst the beneficiaries. The section will also acts as restraint on any insatiable appetite by an inconsiderate beneficiary whose only intent is to get double portion of or as much as possible from the estate without consideration of fairness and equity in the distribution of the estate. It is not uncommon that persons who have been provided for by the deceased during his lifetime with land or other settlements still come back- and without disclosing the earlier settlement or bequest to them by the deceased- claim a bite of what was left for the others. It be known henceforth, that such earlier settlements or gifts in the lifetime of the deceased are in law referred to as gifts *inter vivos* and are taken into account under section 42 of the Law of Succession Act in determining the share of the net intestate estate finally accruing to the donee. On this see the case of **Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR** where Nyamweya J stated that:

**“In law, gifts are of two types. There are the gifts made between living persons (gifts *inter vivos*), and gifts made in contemplation of death (gifts *mortis causa*)....**

**For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be complete for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard Halsburys Laws of England 4<sup>th</sup> Edition Volume 20(1) at paragraph 32 to 51.**

As I have found, LR NO KIIRUA/NAARI/2624 was given to and registered in the name of the Petitioner by the deceased during his lifetime. The gift is therefore complete and shall be taken into account in determining the share of the net intestate estate finally accruing to the Petitioner. Accordingly, upon consideration of all the circumstances in this case:-

- a. LR NO KIIRUA/NAARI/2624 is gift inter vivos to the Petitioner by the deceased; he keeps it as his inheritance herein.
- b. LR KIIRUA/NAARI/37 is therefore distributed to the Objector's family under the principle of representation as the Objector beneficiary is deceased. The said property shall now be registered in the name of Rosemary Karamuta George for her benefit and that of all the children of the late GEORGE GATIMI.
- c. The grant herein is confirmed in terms of (b) above.
- d. This being a succession cause involving close family members, I order each party to bear own costs. It is so ordered.

**Dated, signed and delivered in open court at Meru this 18<sup>th</sup> day of December, 2017**

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**F. GIKONYO**

**JUDGE**

In the presence of:

Mr. Rimita advocate for Petitioner

M/s. Mwilalia advocate for Mr.Mokua advocate for Objector.

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**F. GIKONYO**

**JUDGE**