



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**SUCCESSION CAUSE NO.37 OF 1992**

**In the Matter of the Estate of Gerishon Muthamia Mugambi Alias G Muthamia M' Mugambi**  
**(Deceased)**

SUSAN GACHERI MUGAMBI.....APPLICANT

Versus

MAUREEN FLORENCE KAGWIRIA.....PROTESTOR

LAWRENCE KIRUKI MUGAMBI.....1<sup>ST</sup> INTERESTED PARTY

MBAYA MUGAMBI.....2<sup>ND</sup> INTERESTED PARTY

**RULING**

[1] By a Summons for Rectification of Grant dated 12<sup>th</sup> September 2013, the Applicant sought for the following orders:

- 1. That the grant of probate issued to Beuty Kameme Muthamia on 1<sup>st</sup> September 1992 be rectified and be confirmed in terms of paragraph 8 of the supporting affidavit.***
- 2. That Susan Gacheri Mugambi be appointed as the legal adiministratix in place of Beuty Kameme Muthamia (deceased).***
- 3. That the assets which were left out during filing if this succession cause be included.***
- 4. Costs of this application be in the cause.***

[2] Before the application could be heard on merits, the Protestor filed an affidavit of protest contending inter alia that the Applicant is her sister and that the deceased was their father and that prior to and after passing on of their mother she and all other beneficiaries agreed that all of the deceased's properties were to be shared equally among all the legitimate beneficiaries. She contended that the Applicant without her knowledge included the names of Lawrence Kiruki Mugambi and Mbaya Mugambi who were not children of the deceased. She then instructed her advocate to take the necessary legal action to protect their beneficial interest in the estate of their deceased father. Consequently, she proposed that the estate be shared comprising of the assets below to be equally amongst all the legitimate beneficiaries of the estate:

**(a) L.R NO.KIBIRICHIA/KIBIRICHIA/794**

**(b) L.R NO. KIBIRICHIA/KIBIRICHIA/757**

**(c) L.R NO. ABOTHUGUCHI/KITHIRUNE/1674 and**

**(d) L.R NO. ABOTHUGUCHI/KITHIRUNE/1675.**

[3] The interested parties on the other hand contended that the Applicant in her affidavit rightly distributed Land Reference No Abothuguchi/Kithirune/1674 and Land Reference No Abothuguchi/Kithirune/1675 to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties respectively. They further contended that the deceased in this cause was their brother and that their father who is deceased had registered L.R NO. Abothuguchi/Kithurune/528 in the name of the deceased when he was a minor and that since their father Mugambi M' Rimbitu had other land which the deceased wanted and occupied, the two agreed that L.R NO. Abothuguchi/Kithirune/528 be subdivided into 4 portions and transferred to the following persons:

**a. Lawrence Kiruki.....1<sup>st</sup> interested party**

**b. Mbaya Mugambi.....2<sup>nd</sup> interested party**

**c. Edward Gikundi.....a brother**

**d. M' Mugambi M' Rimbitu.....the father**

The interested parties further contended that Edward Gikundi Mugambi and the father M' Mugambi M' Rimbitu had their portions transferred but that since the 1<sup>st</sup> and the 2<sup>nd</sup> interested parties were working in western province and Nairobi respectively they were not be able to have the transfer done during the lifetime of the deceased. They further contended that they the deceased administrator who was the wife of the deceased recognized their shares and she left a will showing that the parcels belonged to them. Consequently, they contended that the administrator was under an obligation to transfer these lands to them.

[4] When the matter came up for hearing on 30<sup>th</sup> November 2015, the parties agreed to file their respective proposals on distribution. The Applicant proposed the estate to be distributed as follows:

**LR NO.KIBIRICHIA/794**

**(a) Robert Mworja Muthamia**

**(b) Tony Gitonga Muthamia –to be shared equally**

**LR NO. KIBIRICHIA/757**

**(a) Robert Mworja Muthamia.....0.81 Ha**

**(b) Tony Gitonga Muthamia .....0.81 Ha**

**(c) Susan Gacheri Muthamia**

**(d) Maureen Florence Kagwiria}**

**(e) Nancy Nguta.....} to share the balance equally**

**(f) Caroline Kendi Muthama.....}**

**LR NO ABOTHUGUCHI/KITHIRUNE/1674**

**Lawrence Kiruki Mugambi.....whole**

**LR NO. ABOTHUGUCHI/KITHIRUNE/1675.....whole**

[5] The Protestor on the other hand proposed the estate to be distributed as follows:

**(a) L.R NO.KIBIRICHIA/KIBIRICHIA/794**

**(b) L.R NO. KIBIRICHIA/KIBIRICHIA/757**

**(c) L.R NO. ABOTHUGUCHI/KITHIRUNE/1674 and**

**(d) L.R NO. ABOTHUGUCHI/KITHIRUNE/1675**

**Be shared equally among all the legitimate beneficiaries.**

[6] Parties filed submissions in support of their respective proposals on distribution outlined above. The Interested parties emphasized that no one had challenged the purported will of the deceased administrator and as such the will of the mother to the protestors should be respected. They branded the Protester as greedy, malicious and someone without respect for family values. They therefore urged the court to reject the protest and allow the application for rectification of grant.

[7] The Protester also emphasized on their line of arguments that the family agreed that the available properties be shared equally among all the legitimate beneficiaries namely:

**1. Robert Muga (son)**

**2. Susan Gacheri (daughter)**

**3. Maureen Kagwiria (daughter)**

**4. Tony Gitonga (son)**

**5. Nancy Nguta (daughter)**

**6. Caroline Kendi (daughter)**

The Protestor submitted that the alleged will belonged to Beauty Kamene and not Gerishon Muthamia Mugambi (the deceased) who was the registered owner of the properties and that the same was of no probative value. They also submitted on the 1<sup>st</sup> and 2<sup>nd</sup> interested parties' affidavit, the Protestor submitted that the purported letters of consent annexed in the affidavit were dated 6<sup>th</sup> August 1987 and 2<sup>nd</sup> July 1987 whereas Gerishon Muthamia died in the year 1990 and that the reasons given by the interested parties that they were working in western province and Nairobi respectively were an afterthought. Consequently she urged the court to disallow the application dated 12<sup>th</sup> September 2015.

## **DETERMINATION**

[8] I have carefully considered this application and the rival submissions by the parties. The interested parties' case was that the deceased had agreed with his father to subdivide LR NO ABOTHUGUCHI/KITHIRUNE/528 into 4 portions and to be transferred to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties herein, their brother and father. They contended that the subdivision was done and their father and brother had their land transferred into their names. However, they contended that since they were working in western Kenya and Nairobi respectively, despite consent of the land board having been obtained L.R

NO ABOTHUGUCHI/KITHIRUNE/1674 and 1675 were not transferred to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties, respectively, during the lifetime of the deceased. But, the strong point by the interested parties is that the deceased was registered as a trustee for them and other family members.

### **Alleged trust**

[9] From the evidence of record in this case save for the interested parties merely stating that the deceased had agreed with his father to subdivide LR NO. ABOTHUGUCHI/KITHIRUNE/528 into 4 portions and have the same transferred to the interested parties, their brother and father there was no evidence to support these facts. There was also no cogent evidence to prove that the deceased was holding the land in trust for them. As was rightly submitted by the Protestor the alleged letters of consent produced by the interested parties were dated 6<sup>th</sup> August 1987 and 2<sup>nd</sup> July 1987, whereas the deceased died in 1990. This was period of three years since the said letters of consent were issued to the interested parties. The interested parties did not demonstrate the steps that they took to have the land registered in their favour during these three years. The contention by the interested parties that they were working in Nairobi and western province could, therefore, be an afterthought.

[10] Trust is a powerful institution and a substantial question of law. But its existence is largely a matter of fact unless it is presumed. Thus, he who alleges existence of a fact must prove. On this see section 109 of the Evidence Act that:-

***“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”***

From the circumstances of this case the interested parties' have not tendered any evidence to proof that indeed the deceased was holding the land in question in trust for them and so they have not discharged this burden. The photocopies of the land control board consents produced are not enough as the transaction was not completed within the time prescribed in the Act. More specific evidence of the transaction and perhaps the minutes of the board were required. Therefore, the point fails.

### **Alleged Will**

[11] The interested parties also sought to rely on a purported will by the deceased's wife Beauty Kamene in which she allegedly bequeathed the suit properties to them. They further contended that no one had challenged the purported will of the deceased. However, contrary to those submissions, the Protestor challenged the said Will on the ground that it belonged to Beauty Kamene and not Gerishon Muthamia Mugambi (the deceased) who was the registered owner of the properties. I am in agreement with the Protestor that the Will was of no probative value as the same was made by the deceased's wife who was not the registered owner of the properties in question. The deceased's wife could not purport to bequeath what she did not have. The argument fails too. I must state, however, that she could pass her beneficial interest through a will but that share is yet to be determined in this cause. On this see literary works in the book *“The Law of Wills, Butterworth's London: Dublin, and Edinburg 2002”*, at page 65, that:

***“In general a testator may dispose of any property vested in him at the time of his death for an interest not ceasing on his death...the general rule is that every kind of property and interest in property may be the subject of a gift by will...”***

In the same book at paragraph 7.18 under the heading "General Rule allowing testamentary disposition" it is stated:-

***“....a testator of full capacity may dispose by will of his equitable interest in any property to which he is entitled at the time of his death, always subject to the paramount interest in such property which by law devolves on the personal representatives for the purposes of due administration.....”***

## **Distribution by court**

[12] It is not in dispute that the Protestor herein was a daughter of the deceased whereas the interested parties were brothers of the deceased. There is no surviving spouse and so I am guided by section 38 and the order of priority provided in Part V of the Law of Succession Act. Therefore, the Applicant and the Protestor being daughters of the deceased would rank in priority to the interested parties who are brothers of the deceased. In accordance with the law, the net estate should be divided equally among the children of the deceased.

[13] Taking into account the totality of the circumstances of this case and having found that the interested parties' were not able to prove that the deceased was holding or had registered the land in trust for them; I find the mode of distribution proposed by the Protestor to be the most appropriate. Consequently I order that all the estate property listed below shall be shared equally among all the legitimate beneficiaries of the estate of the deceased:

**(a) L.R NO.KIBIRICHIA/KIBIRICHIA/794**

**(b) L.R NO. KIBIRICHIA/KIBIRICHIA/757**

**(c) L.R NO. ABOTHUGUCHI/KITHIRUNE/1674 and**

**(d) L.R NO. ABOTHUGUCHI/KITHIRUNE/1675.**

This being a succession matter I make no order as to costs.

**Dated, Signed and delivered in open court at Meru this 25<sup>TH</sup> day of April 2016.**

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**F.GIKONYO**

**JUDGE**

**In the presence of:**

Mr.Rimita advocate for interested party.

Mr.Wamache advocate for the protestor.

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**F.GIKONYO**

**JUDGE**