



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 647 OF 2005**

**IN THE MATTER OF THE ESTATE OF THOMAS KINDILI MUSEMBI (DECEASED)**

**ROSE MUKAI MUTALIA.....APPLICANT**

**VERSUS**

**FATUMA MUMBUA MUSEMBI.....1<sup>ST</sup> RESPONDENT**

**JOHN NGEREZA MUSEMBI.....2<sup>ND</sup> RESPONDENT**

**THERESIAH KAVATA.....3<sup>RD</sup> RESPONDENT**

**RULING**

The summons dated 17/1/2011 is filed by Rose Mukai Mutalia. What is left to be determined are prayers 4, 5 and 6 of the summons. They are as follows:-

4. **That the grant of letters of administration to Fatuma Mumbua Musembi, John Ngereza Musembi and Theresiah Kavata on 1/2/2006 and confirmed to them on 19/1/2007 be revoked and or annulled;**
5. **The respondents jointly and/or severally do render accounts in respect to rent collected from the premises NKU/Municipality Block 29/380, since they took over;**
6. **Costs of this application be bone by the respondents.**

This cause relates to the estate of Thomas Kindili Musembi who is the father of the three respondents and a brother to the applicant. The grounds upon which the applicant brings this application are that the grant issued and confirmed to the three respondents on 19/1/2007 was obtained fraudulently by making false statements and concealment of material facts as a result of which the applicant was denied her lawful inheritance. In her affidavit, the applicant avers that the deceased, Thomas Kindili Musembi died intestate on 20/9/04 and the grant of letters of administration were issued to the respondents which grant was confirmed on 19/1/2007; that the respondents failed to disclose that Parcel No. **Kalenjin Enterprises Block 29/380** also known as **Nakuru Municipality Block 29/380** had already been adjudicated upon in Succession Cause No. 479/1999, estate of the late Kavata Kindili; that the said property had been distributed to her and that the property did not therefore form part of the estate of Musembi Kindili. She exhibited the grant issued on 15/2/2001 in Succession Cause 479/1999; that upon discovery that the disputed land have been confirmed to the respondents, she filed a case in the Nakuru Land Disputes Tribunal Claim 17/2006 where it was ruled that the title was obtained illegally and should be cancelled; that the disputed land belonged to her late mother, Kavata Kindili who was a member of Kalenjin

Enterprises and during the Succession Cause 479/2004, the deceased herein, Musembi Kindili, her brother inherited the Miti Mingi plot, Mbaruk/Block 13/1036 Barut whereas she got the instant plot; that the respondents who are the brother's children cannot be entitled to her mother's property in priority to her; that the respondents have rented the said premises in which a school is operated and a church; that she has not been benefiting from the proceeds and it is her prayer that the proceeds be deposited in court to await the outcome of this application.

The application was opposed and Theresiah Kavata Musembi swore an affidavit on behalf of the other respondents in which she deposed that she belonged to the 3<sup>rd</sup> wife of the deceased, Thomas Misembi. The 3<sup>rd</sup> wife was Lucy Thomas Musembi; that the grant was issued to her and her siblings to administer her mother's portion of the deceased's estate which had been apportioned and determined before his demise; that the subject property comprises a semi permanent house where they have always lived with their parents to date and that the applicant is a sister of their father who is married and that their late father allocated their mother the subject property; that the applicant and her sister one Agnes Mutua Ntenge, sisters to her father have always disturbed them and intermeddled with the estate; that the applicant sold the subject property on 14/10/05 as per agreement of that date (TKM1); that she learnt of existence of two certificates of grant in respect of the Succession Cause 479/1999 (TMK2(a) & (b). That another property subject of the grant – **Miti Mingi Mbaruk Block 13/1036** Barut was sold by the respondents vide a sale agreement dated 20/9/1999 (TKM 3). The respondent further averred that she obtained a valid confirmation of grant in respect of the deceased's estate that has not been challenged in HC Succession Cause 479/1999 and that since obtaining the said grant, the applicant has filed several suits seeking to nullify the grant issued in the instant case and she prays the court to dismiss this application.

Having considered all the pleadings and submissions in this case, I have no doubt in my mind, and it is not denied that the subject suit land, Kalenjin Enterprises Block 29/380 is the same as Nakuru Municipality Block 29/380 Ronda. When the respondents first filed this succession cause in relation to their father, Thomas Musembi Kindili, they exhibited a letter from Rift Valley Enterprises Ltd (Kalenjin Enterprises Ltd) which confirmed that the said land was originally registered under Kavata Kindili who was then deceased. The letter is dated 30/11/05.

The applicant has also exhibited a certificate for ordinary shares from Rift Valley Enterprises which shows that Kavata Kindili, the applicant's mother was a member, holding 25 fully paid up shares. The above does confirm that Kavata Kindili was the original owner of the suit land, Nakuru Municipality Block 29/380 (Ronda) or Kalenjin Enterprises 29/380.

The question then is whether the said land was ever transferred to the deceased, Thomas Musembi Kindili in order for it to form part of his estate. It is not denied that the estate of Kavata Kindili was determined in HC Succession 479/1999. The only two properties in respect of that estate were distributed as per the confirmed grant dated 15/2/2001 with Thomas Kindili Musembi getting Miti Mingi/Mbaruk Block 13/1036 Barut and the applicant Rose Mutai Mutalia getting Nakuru Municipality Block 29/380. Though the respondent claims that she has learnt that there are two confirmed grants in respect of the same cause (479/1999), what is exhibited seems to be the same grant as TMK 2(b) save that the 2<sup>nd</sup> property is carefully omitted. It is the duty of the respondent to disclose where they obtained the grant that consists only one property because there is no doubt that the suit property did exist and belonged to Kavata Kindili and should have formed part of her estate. The said grant was confirmed on 15/2/2001. By the time Kalenjin Enterprises wrote the letter dated 30/11/2005, introducing Musembi in this cause, the suit property had already been distributed to the applicant and the said letter alleging that Succession Cause 479/1999 had given the suit land to Thomas Kindili was erroneous. Further to the above, by the time the applicant and one Agnes Mutua are said to have purported to sell the suit land to some purchaser on 14/10/2005, the applicant had been given the whole of that land as from 15/1/2001 when the grant was confirmed and she could deal with it as she pleased including selling it.

The respondents are children of Thomas Musembi a brother to the applicant. The applicant and Thomas Musembi were children of Kavata Kindili, the original owner of the suit land. The question is, would the respondents have priority to inherit the land to the applicant? Under **Section 38** of the **Law of Succession Act**, when an intestate has left surviving children but no spouse, the net intestate estate shall devolve upon

the surviving children equally divided among them. **Section 38** reads as follow:-

**“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one or be equally divided among the surviving children.”**

**Section 39** should only apply if the applicant and her brother were not alive so that the estate of their mother would devolve to their children.

It is the applicant who has priority over the respondents, being a child of the late Kavata Kindili. It is immaterial that the applicant is a married lady. **Section 38** of the **Act** provides that the children of the deceased share the deceased's estate in equal shares. It does not specify whether one is a married lady or not.

The suit property was subject of distribution in HC Succession Cause 479/1999 and the confirmed grant was issued on 15/2/2001. It has not been challenged by the respondents. Having been the subject of distribution way back in 2001, the same property could not have been subject to distribution again in 2007 and I therefore find and hold that the grant issued herein on 19/1/07 was issued based on misrepresentation and concealment of facts by the respondents herein and it must be revoked. If the respondents needed to lay any claim to the suit property, they should have done so in HC Succession Cause 479/1999. The grant in relation to the suit land having been issued way back in 2001, the respondents are hereby ordered to render an account of the suit property since it has been shown that it generates rents from a nursery school and church. From now henceforth, the respondents do deposit the rents from the premises in court. The deposit be made on the 10<sup>th</sup> day of each month till the suit land is handed over to the applicant in 90 days time. The applicant be at liberty to move the court as regards the accounts on rents. It is so ordered.

**DATED and DELIVERED this 30<sup>th</sup> day of May, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

N/A for the applicant

Mr. Oumo for the respondents

Kennedy – Court Assistant