REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

Succession Case 23 of 1992

IN THE MATTER OF THE ESTATE OF M'MAGIRI M'MUGIRA (DECEASED)

SAMUEL KINOTI…….……...……PETITIONER

VERSUS

ERASTUS KITHINJI M'MAGIRI……...……OBJECTOR

R U L I N G

The application before the court is dated 10th June, 2004. It seeks orders that this court do amend/alter/or vary the grant of Letters of Administration Intestate to Samuel Kinoti Magiri, Erastus Kithinji Magiri and Joyce Kithiru Magiri issued on 25th August, 1994 and confirmed on 17th June, 2002 so that in relation to a parcel of land known as L.R. Nkuene/Mikumbune/681, the same piece may be now given to Kalex Mwiti Magiri and Peter Riungu Magiri instead of it going to Kalex Mwiti Magiri, Peter Riungu Magiri and Joyce Kithiru Magiri. The undisputed facts before the court are to the effect that soon after the grant and manner of distribution were agreed upon, the mother of the two beneficiaries aforementioned who was the third administrator and third beneficiary, died within about three months after the confirmation. On the date of her death, the estate of the deceased had not actually been distributed. The relevant piece of land, L.R. Nkuene/Mikumbune/681, had not been transferred to and registered in the names of the beneficiaries, Kalex Mwiti Magiri, Peter Riungu Magiri and Joyce Kithiru Magiri. After Joyce Kithiru Magiri's death, the two surviving administrators Samuel Kinoti Magiri and Erastus Kathinji Magiri developed serious differences as to how their deceased mother's share should be distributed.

Samuel Kinoti Magiri thought it should stand to be shared between Kalex Mwiti Magiri and Peter Riungu Magiri. Erastus Kithinji Magiri wanted Joyce Kithilru Magiri's share to be divided among all the sons. There was some indication during the arguments that most members of the family wanted the share to go particularly to Kalex Mwiti Magiri.

The main issue however is whether

a) Mr. Kioga's replying affidavit opposing the application to rectify, vary or amend was valid or defective and to what extent.

b) The one surviving administrator whether or not supported by the rest of the family, had the final say as to whom Joyce Kithiru Magiri's share should go

c) The death of Joyce Kithiru Magiri, affected the original shares of the estate and whether the death should revert her share to the drawing board for fresh distribution.

I have carefully considered the material before the court upon which the court is expected to act. I have no doubt and there is no dispute that the appointment of administrators was by consent of the sons of the deceased, M'Magiri M'Mugira. So was the original intended distribution to be by consent. L.R.No.Nkuene/Kathera/140 went by consent to Geofrey Nyamu Magiri, Samuel Kinoti Magiri and Erastus Kithinji Magiri in equal shares. L.R. No.Nkuene/Mikumbune/681 by consent, as well, went to Kalex Mwiti Magiri, Peter Riungu Magiri and their mother Joyce Kithiru Magiri. The shares going to each beneficiary in relation to L.R. Nkuene/Kathera/140 are not specified although it is stated that they would share equally. The share to Joyce Kithiru Magiri, which is finally, the subject of the dispute before

the court, is not specified. I will first however wish to dispose the issue of Mr. Kioga's replying affidavit. Mr. Arithi for the applicant thought the affidavit was invalid, incompetent, and defective and should not be relied on but be struck out. This is because it was sworn by Mr. Kioga on behalf of the respondent's instructions, argued Mr. Ariithi. That if Mr. Kioga, who is an advocate and who should always only act on instructions, had such instructions to swear the affidavit, then he should have deponed so on the head of the affidavit This he failed to do, argued Mr. Arithi, and thus clearly showed, that he had no instruction to swear the affidavit. I have considered this issue. It is now trite law that an advocate acting on instructions of his client, should avoid swearing any affidavit in the matter in which he is acting unless the circumstances are such that it is necessary, nay, imperative, to require him to swear such an affidavit. It is understood that where an advocate swears an affidavit, especially in relation to contentious issues, the advocate becomes a potential witness and should appreciate the fact that he stands to be called as such witness. He should therefore avoid acting as advocate in the same matter where he is a potential witness. If he continue to so act, he will in my view be antagonizing his professional standing under the Advocates Act and generally before the law. To that end this court and even superior courts, have had occasion to comment on this rule with a view of advising advocates and discouraging some of them who breach the same. In this case Mr. Kioga even went out of the way to defend the fact that he had deponed the affidavit in question rightly. He argued that by the fact that he was acting in the matter he had accordingly acquired the relevant knowledge and information that was required to swear the affidavit. I have carefully considered this position but find it untenable. In my view an advocate does not become authorized to swear an affidavit merely because, by virtue of his representation, he becomes knowledgeable of the relevant facts. He still needs to decide whether or not swearing such an affidavit will not bring him in professional conflict with his position as such advocate. He needs to decide whether if he swears such an affidavit he will not place himself in a position where he becomes a potential witness by the sheer nature of the contents of the affidavit. And in my view, even where he finally finds that he indeed has to swear such affidavit because he is the only one who should do so by the nature of things, he nevertheless, must at the head of the affidavit clearly reveal that he has been authorized by his client to do so, preferably through a short affidavit by his client to that effect. I have examined the affidavit sworn by Mr. Kioga Advocate.

All he says is that he is his client's counsel and that he is well-versed with the facts of the matter. He does not anywhere in it depone that he has been authorized by his client to swear the affidavit and does not therefore point out his source of authority to swear the same. I accordingly have no hesitation in ruling that Mr. Kioga's affidavit in reply to this application was sworn without the authority of the principal. It is therefore not only incompetent but defective. Mr. Arithi urged the court to strike it out. I entirely agree with him. I hereby strike out the said replying affidavit of Mr. Kioga. Without the replying affidavit on the record, the application would appear to be unopposed. Should the court in those circumstances proceed to grant it? The applicant seeks to have the grant of Letters of Administration issued on 25.8.1994 and confirmed on 17th June, 2002, amended, altered or varied in such a way as to allocate L.R. Nkuene/Mikumbune/681 to Kalex Mwiti Magiri and Peter Riungu Magiri instead of the said piece of land going to the mentioned two, and their mother, who is now dead. The dispute here is that Erastus Kithinji Magiri who was not sharing part of this plot before Joyce Kithiru Magiri died, now wishes to have a part of it or wants to have a right in making a decision as to who should share over of Joyce Kithiru Magiri's share.

I have considered the issues involved. It is my view that at the time Joyce Kithiru Magiri died, effective distribution of the estate though complete, had not become effective as it had not been registered in her name. In my opinion the process of distribution required to start afresh in the occurence of Joyce Kithiru Magiri's death. This would require the grant of letters to be amended preferably by consent of all the stakeholders or by a decision of this court on two aspects – the first aspect would be to either replace the deceased's 3rd personal representative Joyce Kithiru Magiri or to authorize the remaining two - representatives, Samuel Kinoti Magiri and Erastus Kithinji Magiri to act until there is a full and final settlement in distribution of the estate. If however the surviving administrators and stakeholders felt that on Joyce Kithiru Magiri's death, a full settlement had been fully achieved, then, they could decide to treat her estate as an independent estate and would seek a fresh Grant of Letters of Administration in relation thereto. Whichever course they decide to follow, it is my opinion that no one administrator or potential beneficiary would have the right or power to chart any new course alone or independently without the

consent of the other or others.

But in this application the applicant is trying to do exactly the opposite of what is stated above. He wants this court to effectively declare that the share belonging to Joyce Kithiru Magiri should go to Kalex Mwiti Magiri and Peter Riungu Magiri without considering what the objector herein, Erastus Kithinji Magiri who is one of two surving legal representatives believes. In my view the applicant should not be allowed to get his way since the way Joyce Kithiru Magiri's share should be treated is as per one of the courses suggested above. Amendment or alteration or correction of the confirmed Grant of Letters aforementioned can only be so done as per the consent of all the stakeholders involved in this matter and suit. The result then is that this application is misconceived and must fail. It is dismissed with costs to the respondent.

Dated and delivered at Meru this 28th day of July, 2005

D.A. ONYANCHA

JUDGE