



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

SUCCESSION CAUSE NO. 5 OF 2020

FORMERLY MOMBASA H.C SUCCESSION CAUSE NO. 386 OF 2004

**IN THE MATTER OF THE ESTATE OF M'KIUNGA M'RINYIRU alias M'KIUNGA
M'WARINGIRI (DECEASED)**

GEORGE M. KIUNGA.....1ST APPLICANT/OBJECTOR

ANDREW KIREMA.....2ND APPLICANT/OBJECTOR

ISAIAH MUNYUA.....3RD APPLICANT/OBJECTOR

VERSUS

STELLA KOORU.....1ST RESPONDENT/PETITIONER

JOSEPH MUTHAURA.....2ND RESPONDENT/PETITIONER

RULING

1. By Summons under certificate of urgency dated 20th November 2023 pursuant to Section 80 of the Civil Procedure Act, Order 45 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules, the 1st applicant seeks:

1. *Spent*
2. *THAT the Honorable court be pleased to review the ruling delivered on 10th June 2021 and vary the holding that L.R No. Nyaki/Mulathankari/82 was registered as joint tenancy, and its place hold that the property was registered in equal common shares and therefore [not] subject to the doctrine of successorship.*
3. *THAT consequently, half share of L.R No. Nyaki/Mulathankari/82 which measures approx. 1.04 Ha be included as an asset of the estate of M'Kiunga Rinyiru (deceased) and distributed as proposed under paragraph 8 of the affidavit in support of the summons.*
4. *THAT the cost of this application be provided for.*

2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of George Muriungi Kiunga, the 1st applicant herein, sworn on even date. He avers that in the ruling of 10/6/2021, the court found that **L.R No. NYAKI/MULATHANKARI/82 (*henceforth called the suit land*)** was registered to M’Nchebere M’Rinyiru and M’Kiunga M’Rinyiru as joint tenants, and therefore M’Kiunga having predeceased M’Nchebere, the land devolved to M’chebere through the doctrine of survivorship and was thus not available for sharing by the beneficiaries of the deceased herein. He has discovered new and important evidence which was not within his knowledge when he filed the summons for revocation of grant dated 13/12/2019 to the effect that the suit land was registered to M’Nchebere M’Rinyiru and M’Kiunga M’Rinyiru in equal common shares. **The land registrar had erroneously registered the said land as joint tenancy on 16/8/2020, which error was duly corrected on 14/7/2023 to indicate registration as equal common shares.** He is advised by his advocate on record that the applicable doctrine is that of successorship and not survivorship. He therefore urges the court to review its decision and consequently order that half share of the suit land be included as an asset in the estate of the deceased herein and be distributed pro rata among his children in the manner he has proposed.
3. The 1st respondent/petitioner opposed the application by her replying affidavit sworn on 5/2/2024. She urges that the applicants are her step children who have vowed that she will never know peace in her old age. **She concurs that the deceased herein and M’Nchebere M’Rinyiru held the suit land as tenants in common, thus the deceased herein is entitled to his half share of the land.** During his lifetime, the deceased bought L.R No. NTIMA/IGOKI/1978 and transferred it to his 1st wife where she settled with her family. The deceased then settled her and the respondents, his 2nd family in half share of the suit land, which they have extensively developed and it is the only place they call home. None of the applicants has either occupied the suit land or claimed the same during the lifetime of the deceased. The court in its ruling of 10/6/2021 at paragraph 16 held that the 1st house benefitted from L.R No. NTIMA/IGOKI/1978, which ruling has not been appealed against and therefore the same stands. She accuses the applicants of trying to appeal against the said decision through a back door by filing the instant application for review. She urges that the suit land belongs to the 2nd family and should only be distributed to them.

Submissions

4. The application was canvassed by written submissions which were duly filed by both parties. The applicants urge that the applicable law is that of a successor rather than a survivor and the estate of the deceased is therefore entitled to half share of the suit land, which position is not contested by the respondents. The point of departure is the contention that the deceased had settled his 1st household on L.R No. NTIMA/IGOKI/1978 while the 2nd household was settled on the half share of the suit land. They urge that L.R No. NTIMA/IGOKI/1978 was expressly excluded from the estate of the deceased since it has never been registered to him. They urge the court to find that the suit land was registered in common shares and distribute it equally among all the 14 beneficiaries of the deceased.
5. The respondents insist that the deceased had during his lifetime settled his 1st family on L.R No. NTIMA/IGOKI/1978 and his 2nd family on the suit land. They urge that the court by its impugned ruling held that the 1st house benefitted from L.R No. NTIMA/IGOKI/1978, which ruling has not been appealed against. They maintain that half of the suit land belongs to the 2nd family and it should be distributed to them only.

Analysis and determination

6. In order to succeed in his quest for review, the 1st applicant is required to establish to the satisfaction of the court any one of the following three main grounds as stipulated under Order 45 of the Civil Procedure Rules:

“i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or ii. That there was a mistake or error apparent on the face of the record; or iii. That sufficient reasons exist to warrant the review sought. In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.”
7. The review sought is predicated on alleged discovery of new and important evidence to wit an official search showing that the suit land was registered in the name of the deceased and M’Nchebere M’Rinyiru in equal shares, and thus the doctrine of survivorship does not apply. According to the 1st applicant, the half share of the suit land belonging to the deceased forms part of his estate and it should thus be distributed equally among the 14 beneficiaries. On their part, the respondents contend

that they were settled on the half share of the suit land belonging to the deceased, and therefore the same ought to be distributed only to them.

8. Although the estate herein, pursuant to the certificate of confirmation of grant dated 5/12/2007 comprised of L.R No. NYAKI/GAKI/129 only, the court properly noted at paragraph 16 of the impugned ruling that the 1st house benefitted from L.R No. NTIMA/IGOKI/1978 as follows;

“16. Furthermore, this Court observes that the family of the 1st wife whom the 1st and 2nd Applicants alongside their sisters are associated with benefitted from the parcel namely NTIMA/IGOKI/1978. Although as admitted by parties, this property is already registered in the name of the 1st and 2nd Applicants’ late mother, and is therefore not part of the estate of the deceased, this Court takes into consideration that the said family of the first wife already has benefitted from this property over and above what they obtained from the distribution of the deceased’s estate. This is so for the case of the Respondents who are said to have benefitted from the other parcel namely NYAKI/MULTHANKARI/82 much as it now belongs to the deceased’s brother as shall be discussed hereunder.”

9. The question that lingers is whether the deceased and M’Nchebere M’Rinyiru were joint owners or tenants in common.
10. Tenancy in common is defined under section 2 of the Land Act to mean a form of concurrent ownership of land in which two or more persons possess the land simultaneously where each person holds an individual, undivided interest in the property and each party has the right to alienate, or transfer their interest; while joint tenancy is defined to mean a form of concurrent ownership of land where two or more persons each possess the land simultaneously and have undivided interest in the land under which upon the death of one owner it is transferred to the surviving owner or owners.
11. The court notes the certificate of official search which shows that the suit land is registered in the name of the deceased and M’Nchebere Rinyiru in **equal shares**. The Court of Appeal in **Mukazitoni Josephine v Attorney General Republic of Kenya (Criminal Appeal 128 of 2009) [2015] KECA 407 (KLR) (Crim) (25 September 2015) (Judgment)** rendered thus:

“34. We have considered the appellant’s contention and the learned judge’s finding. The title document to the property has two names and this is

concurrent ownership. There is no indication as to whether the property is held on a tenancy-in-common or joint tenancy or tenancy in entirety. When a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in joint tenancy and not tenancy-in-common or tenancy in entirety. A tenancy in common or tenancy in entirety means that the interest of each registered owner is determinable and severable; in a joint tenancy, the interest of each owner is indeterminate, each owns all and nothing.

12. On the basis of the evidence then available, the court properly addressed the issue of whether the suit land formed part of the estate of the deceased as follows;

“18. On the allegation that property namely NYAKI/MULTHANKARI/82 was left out in the distribution, this Court finds in the negative. From the evidence adduced, it is apparent that the said property is registered in the joint names of the deceased and his brother, M’Ncebere M’Ringiru. This was evidently a joint tenancy. The position in law is clear that in such joint tenancies, when one of the tenants passes on, the remaining tenant automatically becomes the new sole owner under the doctrine of survivorship. This implies that the property is not up for distribution as the surviving tenant is now the new owner. The property will only be up for distribution upon the demise of the new sole owner, and even then, this property would only be the subject of the Estate of this new owner. This is the hallmark of the principle of jus accrescendi which provides for the right of survivorship.”-

The deceased herein having died on 14/4/2003 while his brother M’Ncebere Rinyiru died on 21/3/2013, and thus the doctrine of survivorship had, on the facts, crystallized.

13. However, on the new evidence before the court as to the correction by the Land Registrar to register the parcel of land as being held by the two brothers in **equal shares**, the principle of survivorship does not apply as the shares of the owner parties are determinable and registered as equal shares, and each’s share can be severed as such. The application for review has merit to the extent of the nature of the holding of the parcel of land which, therefore, becomes part of the deceased’s estate.
14. There was, however, no evidence to rebut the respondent’s case that the deceased had settled his second family on the 1/2 share of the parcel **NYAKI/MULTHANKARI/82**

having already settled the first family in parcel no. **NTIMA/IGOKI/1978**. Accordingly, the court does not find occasion on the facts of this case to review the outcome of the case, which is that the suit property, the $\frac{1}{2}$ share of **NYAKI/MULTHANKARI/82**, remains the property of the deceased gifted to the respondent's family during the deceased's lifetime.

ORDERS

15. Accordingly, for the reasons set out above, the application dated 20/11/2023 is allowed to the extent only that on the basis of the discovery of the new material fact of the registration of the land in equal shares, it declared that the land is not subject to the doctrine of survivorship because the respective shares of the owners is ascertained, determinable, severable, and registered on the Green Card as **equal shares**, meaning that each of the two brothers is entitled to half share of the parcel of land.
16. The prayer for the distribution of the suit property as set out in Prayer No. 2 of the Summons that *"half share of L.R No. Nyaki/Mulathankari/82 which measures approx. 1.04 Ha be included as an asset of the estate of M'Kiunga Rinyiru (deceased) and distributed as proposed under paragraph 8 of the affidavit in support of the summons"* is declined because of the finding that the deceased had given the land to the second family represented by the 1st Respondent herein.
17. There shall be a consequential order that the half share of L.R No. Nyaki/Mulathankari/82 which measures approx. 1.04 Ha shall be included as an asset of the estate of M'Kiunga Rinyiru (deceased) and distributed to the 1st Respondent on behalf of her family.
18. There shall be no order as to costs.
Order accordingly.

DATED AND DELIVERED THIS 17TH DAY OF OCTOBER, 2024.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Kaumbi for Applicant.

Mr. Kithinji for Respondent.