



In re Estate of Japhet M'Rintaugu Kairebu (Deceased) (Succession Cause 203 of 2007) [2023] KEHC 3035 (KLR) (6 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3035 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 203 OF 2007**

EM MURIITHI, J

APRIL 6, 2023

**IN THE MATTER OF THE ESTATE OF JAPHET M'RINTAUGU
KAIREBU ALIAS RINTAUGU S/O KAIREBI (DECEASED)**

BETWEEN

NANCY NKANANCHI KINYUA PETITIONER

AND

JAMES NDEREBA MWONGERA 1ST APPLICANT

CHARITY GAKII 2ND APPLICANT

ZIPORA KINYA 3RD APPLICANT

PRISCILA GACHERI 4TH APPLICANT

RULING

1. By Summons dated November 2, 2021 pursuant to rules 63 (1) & 73 of the *Probate and Administration Rules*, the applicants seek that:
 1. The Honorable Court be pleased to review the order of confirmation made on the May 8, 2018 in respect to the share given to John Mutwiri Mwangera out of LR No Abothuguchi/kithirune/280.
 2. The share due to John Mutwiri M'mwongera out of LR No Abothuguchi/kithirune/280 be shared out to John Mutwiri M'mwongera, James Ndereba, Charity Gakii And Zippora Kinya in equal shares, so that each gets 0.372 Acres.
 3. There be an order for costs against John Mutwiri M'mwongera.



2. The grounds upon which the application is premised are set in the application and supporting affidavit of James Ndereba Mwongera, the 1st applicant herein, sworn on November 3, 2021. He avers that the deceased herein was his grandfather, who was survived by 8 children including his mother, Alice Mwari. It was agreed that their mother's house was entitled to its own share which was to be given out to her children in equal shares. He later discovered that the entire share of their mother out of LR No Abothuguchi/Kithirune/280 (hereinafter called the suit property) was given to their brother John Mutwiri Mwongera alone leaving out all the others, except for the 4th applicant who got 0.253 Acres. He now prays that the certificate issued on May 8, 2018 be reviewed and the share of John Mutwiri M'Wongera, being 1.86 Acres out of the suit property be re-distributed equally among John Mutwiri M'Wongera, James Ndereba Mwongera, Charity Gakii, Luicy Mukami and Ziphora Kinya. The suit property has not been shared out to the beneficiaries and it is still in the name of the administratrix Nancy Nkanachi Kinyua. The review is necessary so that no beneficiary is left out of the estate as it would be unfair and unjust for one person to take the entire share due to their mother, to the exclusion of the others.
3. John Mutwiri Mwongera opposed the application through his replying affidavit sworn on February 24, 2022. He contends that the applicants have been given a share of land by his deceased mother at Nanyuki as per the green cards on record, and they should be satisfied with what they were given or work hard to acquire their own property. He accuses the 1st applicant and his 2 brothers of secretly filing succession cause No 381 of 2004 in respect of the estate of his late grandfather one M'Mbogori S/O Muguna on parcel Nos Abothuguchi/kithirune/1184 & Abothuguchi/Kithirune/289 and selling the land to 3rd parties after the grant had been confirmed. He prays for the dismissal of the application as the 1st applicant is a very rapacious and greedy person who cannot get satisfied with what he has.
4. The 1st applicant swore a supplementary affidavit on March 15, 2022 averring that he has an equal right to that of John Mutwiri in respect of his mother's share. He avers that it is indeed John Mutwiri who benefitted from the land in Nanyuki and not him. He avers that HC Succession cause No 381/2004 involved the estate of his grandfather M'Mbogori M'Muguna, which estate was shared equally among his 3 sons. Since his father had died, he was registered on his father's behalf to hold in trust for his siblings. He does not know what happened to Abothuguchi/kithirune/1184 and he was not a party to its sale. He denies ever chasing his own mother out of the land.

Submissions

5. The applicants urge that there is sufficient reason to review the grant since a beneficiary of the estate is now deceased and there is need for the grant to be reviewed in order to ensure all the beneficiaries of the deceased beneficiary get her share of the estate. They urge that they have equal right to that of John Mutwiri in respect of their mother's share of the estate, and cite *Re Estate of Tuaruchiu Marete (Deceased)* (2019) eKLR. They urge that unless the orders sought are granted, the rightful beneficiaries of Alice Mwari will be disinherited of their rightful share to the benefit of John Mutwiri.
6. John Mutwiri accuses the 1st applicant of collusion and division of his late grandfather's estate one M'Mbogori S/O Mungania amongst themselves to the exclusion of his late mother, who was entitled to a share thereof. He insists that the 2nd, 3rd and 4th applicants had each been given plots in Nanyuki by their late mother from her share. He urges that it was his deceased mother who voluntarily directed that he be given her share of the suit property. He urges the court to dismiss the application with no orders as to costs, and relies on *Eastern Produce (K) Ltd v James Kipketer Ngetich* (2005) eKLR.



Analysis and determination

7. A court can only review its decision upon proof of any of the conditions as listed under order 45 of the *Civil Procedure Rules* as follows

“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.”

8. The import of the review sought by the applicants is to re-distribute the share of John Mutwiri equally between the 5 of them. That share was given to the said John Mutwiri by a grant of letters of administration intestate duly confirmed by this court on April 28, 2015.

9. The applicants had approached this court by an application dated December 4, 2018 seeking rectification of the certificate of confirmation of grant in order to re-distribute of the share of John Mutwiri M’Mwongera equally between the applicants and the said John Mutwiri. In dismissing that application, the court (Patrick JO Otieno, J) rendered itself thus:

“The nature of the rectification sought by the applicants is to re-distribute the share of John Mutwiri to the 1st to 3rd applicants on the basis that he got which was not meant to be his. That is never a ground for rectification. I see the application to substantially seek the alteration of the very structure and substitution of the distribution as ordered by the court on the May 8, 2013. For the foregoing analysis, I find that the application is completely misconceived, and I therefore dismiss it with no orders as to costs.”

10. Although the former application sought rectification of the grant, it was premised on the exact same grounds as those supporting the current application for review. The applicants want a second bite at the cherry! It is an abuse of the process of court to seek the same reliefs by different multiple applications before the same court. And if the applicant contends that the court was wrong in its conclusions on the distribution of the assets in the confirmation of Grant, it clearly is not a matter for review but appeal.

11. The applicants contend that the share of the suit property given to John Mutwiri belonged to their deceased mother Alice Mwari, and therefore it ought to have been shared equally among her 5 children, instead of being given to him alone. In response, John Mutwiri accuses the applicants of being greedy as they were already adequately provided for. The 1st applicant got their mother’s share of Abothuguchi/kithirune/289 which belonged to their grandfather. The 2nd, 3rd and 4th applicants were each given plots in Nanyuki by their late mother.

12. The court has seen the copy of Green Card in respect of Abothuguchi/kithirune/289 which belonged to Mbogori S/O Mungania, but was subsequently registered equally in the names of the 1st applicant, M’Rintaugu Mbogori and M’Murithi M’Mbori. There is also a copy of Green Card in respect of Nanyuki Marura Block 8 (Nturukuma) 413 which belonged to Alice Mwari Mwongera but was later registered in the name of Gakii Mwongera, the 2nd applicant herein. There is another copy of Green Card in respect of Nanyuki Marura Block 8 (Nturukuma) 4162 which belonged to Alice Mwari Mwongera but was later registered in the name of Prissila Gaceri, the 4th applicant herein. The court has seen the copy of Green Card in respect of Nanyuki Marura Block 8 (Nturukuma) 4161 which belonged to Alice Mwari Mwongera but was later registered in the name of Lucy Mukami M’Mwongera. The



court notes the copy of Green Card in respect of Nanyuki Marura Block 8 (Nturukuma) 4160 which belonged to Alice Mwari Mwongera but was later registered in the name of Kinya Mwongera, the 3rd applicant herein.

13. The court is satisfied on a balance of probabilities that all the applicants were adequately provided for by their deceased mother.
14. The court notes that John Mutwiri had previously deponed in his replying affidavits sworn on February 25, 2019 and November 4, 2019 that his deceased mother voluntarily directed that the disputed share of the suit property should be given to him because he took care of her after the 1st applicant chased her away from Abothuguchi/kithirune/289.
15. Although the 1st applicant contends that he was registered as a joint proprietor of Abothuguchi/kithirune/289 to hold in trust for his siblings, there is no evidence thereto.
16. This court finds that the applicants have not proved existence of any of the grounds of review as set out under Order 45 of the Civil Procedure Rules to warrant grant of the orders sought.

Orders

17. Accordingly, for the reasons set out above, this court finds that the application dated November 2, 2021 is bereft of merit and it is dismissed.
18. The court does not make any order as to costs.

Order accordingly.

DATED AND DELIVERED ON THIS 6TH DAY OF APRIL, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Murango Mwenda & Co. Advocates for the Applicant.

M/S Mbaabu M'Inoti & Co. Advocates for the Respondent.

