



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MERU

SUCCESSION CAUSE NO.239 OF 1996

IN THE MATTER OF THE ESTATE OF JAPHETH MWIRABUA (DECEASED)

JANET NKATHA KITHINJI.....PETITIONER

VERSUS

RODAH KAGWIRIA KITHINJI.....RESPONDENT

RULING

1.The application dated 7/12/2018 was partially determined by the court through its partial ruling delivered on 28/5/2019 which left the only unresolved issue to be what constitutes the estate properties. That determination, in the partial decision, was to help decide whether the three properties given to the interested party by the judgment were indeed the property of the estate.

2.In accordance with the partial ruling, the Petitioner/applicant filed two affidavits; that sworn on 25/11/2019 and filed on the same day and that sworn 19/3/2021 but filed on 22/3/2021. The Interested party/ Respondent on his part filed 3 affidavits sworn on 4/10/2019 but filed on 8/10/2019, sworn on 11/3/2020 and filed on 12/3/2020 and that sworn on 30/ 3/2021 and filed on 6/4/2021.

3.From the onset, the application concerns three assets given to the interested party in the judgment. Those assets are; plot No 682, situate at Gakoromone, Meru Town, Kiirua Nkando/46 and Ruiiri/Rwarera/825.

4.It is those assets the applicant contends were given by the judgment to the Interested party by an error apparent on the face of the record on the basis that Plot No 682, Meru town is the most valuable in the entire estate and in which the petitioner invested her entire retirement benefit and from which she derives her daily bread. It is also contended that by its value, it should not go to one person in whole considering that there are 10 other children besides the petitioner and the interested party. Another ground advanced is that the interested party bludgeoned and exaggerated the property of the estate and thus misled the court as to the real assets and value thereof by repeating or misdescribing one property and introducing a property that had never belonged to the deceased. For those reason the petitioner seeks that the court re-looks the distribution.

5.The position taken by the interested party in opposing the application is that there is no mistake or in deed a reason to review the decision. She asserts that the Meru town property belonged to the deceased and that the administrator never developed it but only renovated in order to get good income in rental income. In reality, it is the property known as plot No. 682- Gakoromone Market that is of interest to both.

6.I have examined in depth the official searches exhibited by the parties herein in respect to the estate properties as provided by both parties. The official searches reveal as was found by the court in its decision of 28/5/2019 that the property Known as Kiirua / Nkando/46 was indeed transferred to the administrator and later subdivided into Kiirua/Nkando 5456 and 5457 and transferred to John Bundi M'Makathimo and Charles Ntubiri in August 2018. My analysis also reveal that Ruiiri/Rwarera/825 is still in dispute in a litigation before the court. Essentially therefore those two asset should not have been given out to the respondent without the clarity being obtained on their being free for transfer. In fact the property under litigation can only be shared out once its title is established in favour of the estate while those in the names of third parties to the estate could not be ordered shared out without according to the registered owners a right to be heard. On that basis I find that there is indeed an error of facts apparent on the face of the record which deserves correction by review.

7.On Plot No. 682-Gakoromone Market in Meru Town, it is common ground that the same belonged to the deceased and currently owned by the applicant. The contention however is that the same was not developed as at the date the deceased died. While the objector/interested party asserts that it was indeed developed by the deceased and only renovated by the administrator /applicant the applicant contends that it was solely developed by her using her retirement benefits. The applicant further contends that it is the most prime and valuable in the estate and thus it would be unjust to give it wholly to one beneficiary.

8.I have given due regard to the fact that little was availed by the interested party that the plot was developed by the deceased just as the

administrator has also given nothing to show when and how much she employed in improvement of the property. In such scenario and with the uncontroverted position that it is the most prime and valuable asset of the estate, I do find that it ought to be shared by all beneficiaries. However, in that sharing I will take notice as judge Gikonyo observed, that the administrator as spouse, has an interest in the property of the deceased husband quite separate from that accruing by virtue of inheritance. The dearth of evidence in that regard notwithstanding, I find that the widow is entitled to and shall get 40% while all the children will share the balance of 60% equally

9. In coming to the above conclusions, I take note of the findings of fact by Gikonyo j at paragraphs 3-7 of the partial decision that there was indeed an exaggeration of the extent of the estate to make it appear vast and that led the court into making mistakes of fact.

10. In conclusion, the decision of 28/5/2019 is reviewed to the effect that:

a) Plot No 682, Meru town shall be shared between the administrator and the all the children of the deceased disclosed in these proceedings and decreed by the decision of 28/5/2019, as follows

I) Janet Nkatha Kithinji 40%

ii) All the children 60% (to share equally)

b) Kiiirua/Nkando/46, was non-existent as at the date of the decision having been subdivided and registered in the names of third parties to these proceedings and was thus not available for distribution to the interested party.

c) Ruiiri/Rwarera/825 is demonstrated to be under litigation and its distribution remains but would abide the outcome of Meru High Court Civil Appeal No 8 of 2019.

11. Only to the foregoing extent, I do allow the application dated 7th December 2018. I make no orders as to costs

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF FEBRUARY, 2022

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Mutisya for the applicant/Petitioner

Mr. Wambua for the interested party.

Patrick J.O Otieno

Judge