



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 742 OF 2012

IN THE MATTER OF ESTATE OF M'RIRIA M'BAGINE (DECEASED)

BETWEEN

RACHAEL WANJA RIRIA.....BENEFICIARY/APPLICANT

AND

PATRICK GITONGA RIRIA.....1ST PETITIONER/RESPONDENT

EMILIO MAGAJU KIUNGA.....2ND PETITIONER/RESPONDENT

RULING

Background

1. The M'RIRIA M'BAGINE (*Deceased*) died sometimes on 01st March, 2008. His estate comprised of the following assets:

- i. LR. NO. ABOTHUGUCHI/KIJA/357
- ii. LR. NO. ABOTHUGUCHI/GITIE/335
- iii. LR. NO. ABOTHUGUCHI/GITIE/335
- iv. LR. NO. ABOTHUGUCHI/ KIJA /121

2. Deceased was survived by his widow Roza Nkatha M'Riria (who later died) and the following children and grandchildren:

- 1) Patrick Gitonga Riria - son
- 2) Tarcisio Kimakia M'Riria - son
- 3) Teresia Kathure M'Riria - Daughter
- 4) Christine Kajuju M'Riria - Daughter
- 5) Olympia Kinya M'Riria - Daughter
- 6) Rachel Wanja Riria -Daughter
- 7) Simon Gituma M'Riria - Son
- 8) Emilio Magaju Kiunga - Son in law
- 9) Murangiri Fredrick - Grandson
- 10)Linus Mutua Gitonga - Grandson

11) Edward Ngentu Muriungi - Grandson

3. Letters of administration were issued to **Patrick Gitonga Riria and Emilio Magaju Kiunga (Petitioners/Respondents)** on 19th July, 2013 October, 2015.

4. A Certificate of Confirmation of Grant was issued on 27th March, 2014 distributing the estate as follows:

i. LR. NO. ABOTHUGUCHI/KIJA/357

- 1) Patrick Gitonga Riria - 10 acres
- 2) Teresia Kathure M'Riria - I acre
- 3) Christine Kajuju M'Riria - I acre
- 4) Olympia Kinya M'Riria - I acre
- 5) Rachel Wanja Riria - I acre
- 6) Linus Mutua Gitonga]
- 7) Edward Ngentu Muriungi] - I acre jointly
- 8) DK]
- 9) TM] - Balance jointly

ii. LR. NO. ABOTHUGUCHI/GITIE/335

- 1) Simon Gituma M'Riria - 0.97 acres
- 2) Patrick Gitonga Riria - 0.97 acres
- 3) DK]
- 4) TM] - 1 ½ acres jointly
- 5) Olympia Kinya M'Riria]
- 6) Rachel Wanja Riria]
- 7) Teresia Kathure M'Riria]
- 8) Christine Kajuju M'Riria] - Balance jointly

iii. LR. NO. ABOTHUGUCHI/GITIE/713

Wholly to Murangiri Fredrick (deceased's grandson)

iv. LR. NO. ABOTHUGUCHI/ KIIJA /121

Wholly to Emilio Magaju Kiunga (2nd Administrator/Respondent)

Summons

5. By summons dated 11th February, 2019 filed on 12th February, 2019, **RACHAEL WANJA RIRIA(Beneficiary/Applicant)** prays for orders that:

- 1) The Letters of Administration confirmed on 27th March, 2014 be revoked
- 2) The Court be pleased to appoint another administrator in place of the Patrick Gitonga Riria (1st Administrator)
- 3) LR. ABOTHUGUCHI/L-KIJA/1532 to 1538 and any further subdivision of LR. NO. ABOTHUGUCHI/KIJA/357 be

reverted to the name of the deceased for fair and just administration

4) LR. ABOTHUGUCHI/IGANE/713 /be reverted to the name of the deceased for fair and just administration

5) LR. ABOTHUGUCHI/L-KIJA/121 be reverted to the name of the deceased for fair and just administration

6) Costs be provided for

6. By consent of the parties recorded on 24th October, 2019, the parties comprised the summons dated 11th February, 2019 filed on 12th February, 2019 in the following terms:

1) Certificate of Confirmation of Grant was issued on 27th March, 2014 is amended as follows:

i. LR. NO. ABOTHUGUCHI/KIJA/357

a) Patrick Gitonga Riria - 10 acres

b) Grace Kagwiria to hold 10 acres in trust for herself and the minor children of TARCICIO KAMAKIA (deceased) namely DK and TM.

c) Christine Kajuju M'Riria - 1 acre

d) Teresia Kathure M'Riria - 1 acre

e) Rachel Wanja Riria - 1 acre

f) Olympia Kinya M'Riria - 1 acre

g) Roads - 1 acre

h) Balance equally to Christine Kajuju M'Riria, Teresia Kathure M'Riria and Rachel Wanja Riria

ii. LR. NO. ABOTHUGUCHI/GITIE/335

a) Simon Gituma M'Riria - 1.00 acres

b) Patrick Gitonga Riria - 0.91 acres

c) Grace Kagwiria to hold 1.05 acres in trust for herself and the minor children of TARCICIO KAMAKIA (deceased) namely DK and TM.

d) Balance of 1.05 acres to Olympia Kinya M'Riria, Christine Kajuju M'Riria, Teresia Kathure M'Riria and Rachel Wanja Riria

iii. LR. NO. ABOTHUGUCHI/GITIE/713

Wholly to Murangiri Fredrick (deceased's grandson)

7. The dispute relating to distribution of LR. NO. ABOTHUGUCHI/KIJA/121 which was wholly distributed to Emilio Magaju Kiunga (2nd Administrator/Respondent) was heard by way of *viva voce evidence*.

8. Rachael Wanja Riria (Beneficiary/Applicant) testified that her sister Olympia Kinya M'Riria and her husband Emilio Magaju Kiunga (2nd Administrator/Respondent) have been using the suit property. She proposed that Olympia Kinya M'Riria be given 1 acre and the balance be equally shared between Olympia Kinya M'Riria, Christine Kajuju M'Riria, Teresia Kathure M'Riria and Rachel Wanja Riria.

9. Patrick Gitonga Riria (1st administrator/Respondent) stated that the 2nd Administrator/Respondent has used the disputed land from the time that deceased was still alive. The 2nd Administrator/Respondent also stated that he was given the suit property but that he has built his home on Simon Gituma's land LR. NO. ABOTHUGUCHI/ KIJA /445.

10. I have considered the evidence on record and the issue for determination is whether Emilio Magaju Kiunga (2nd Administrator/Respondent) is entitled to the whole of the disputed property.

11. There is evidence that the deceased's family held a meeting with the chief on 20.09.2010 to discuss distribution of deceased's estate. The minutes do not disclose that distribution of the disputed land was discussed and the contention that the family agreed that the disputed land

be distributed wholly to the 2nd Administrator has therefore not been established.

12. The minutes of a meeting held on 29th June, 2009 and 23rd July, 2009 are not in the language of the court and are therefore of no probative value.

13. **The parties are in agreement that Emilio Magaju Kiunga (2nd Administrator/Respondent)** who is deceased's son-in-law has been using part of the disputed land. The administrators contend that the disputed land was given to the 2nd Administrator around 1980 when deceased was still alive. It was also the 2nd Administrator's case that the deceased put up a house for him not on the disputed land but on **Simon Gituma's land LR. NO. ABOTHUGUCHI/ KIIJA /445**. His wife Olympia Kinya M'Riria stated that the deceased did not specify the acreage of land in the disputed land that he was giving to her husband, the 2nd Administrator.

14. The consent to the distribution of the estate is disputed by the Applicant and Teresia Kathure who denied signing it whereas Olympia Kinya and Christine Kajuju deny that they signed the consent at the chief's office as alleged by the chief. This evidence puts the authenticity of the consent to mode of distribution into question and raises *prima facie* doubt that the consent was signed in the manner described by the Administrators. Such a consent cannot therefore be binding.

15. **I am in agreement with the persuasive decision in Paul Kathuni Gichunge v Victor Polycarp Ntwiga & 2 others [2016] eKLR**

THAT:

“A person can deal with his property as he wills during his lifetime. Whoever feels aggrieved on how his/her parent has dealt with his property should at the earliest question such person during his/her lifetime. He/she cannot wait until such person dies to raise issues of discrimination or unfairness. Such issues can only validly be raised in cases of a will since wills are kept secret until the testator passes on. However, bequests that are given as gifts inter vivos, are openly so given and in my view whoever is dissatisfied therewith is at liberty to question the same before the demise of the giftor.”

16. **That the deceased could during his lifetime bequeath his estate to whoever he wished is not disputed.**

17. I have considered the fact that the deceased put up a house for 2nd Administrator's not on the disputed land but on **Simon Gituma's land LR. NO. ABOTHUGUCHI/ KIIJA /445**. I have also considered that the deceased did not specially state that he was giving the disputed land to the 2nd administrator wholly vis-à-vis the fact that the deceased did not for 28 years from the time he allowed the 2nd Administrator to use the disputed land transfer it to him and I have come to the conclusion that it was not the intention of the deceased that the suit property be transferred to the 2nd Administrator.

18. The Applicant proposes that Olympia Kinya M'Riria **be given 1 acre of the disputed property and the balance be equally shared between** Olympia Kinya M'Riria, Christine Kajuju M'Riria, Teresia Kathure M'Riria and Rachel Wanja Riria. However, Teresia Kathure M'Riria and Christine Kajuju M'Riria stated in their evidence that they have no claim over the suit property.

19. From the foregoing analysis, the orders which commends to me and which I hereby issue are

THAT:

1) **LR. NO. ABOTHUGUCHI/KIIJA/121 is distributed as follows:**

- a) **½ to Olympia Kinya M'Riria**
- b) **½ to Rachel Wanja Riria**
- c) **Each party shall meet its own costs**

Dated at Meru this **11th** DAY OF **March** 2021

T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Applicant - N/A

For Respondent - Mr. Mutuma for Mutuma & Koskei Advocates