



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO. 505 OF 2008
IN THE MATTER OF THE ESTATE OF M'ARIMBI M'MUTUA (DECEASED)
CYPRIAN MURORI M'ARIMBI.....PETITIONER
VERSUS
FRANCIS MUTUA M'ARIMI
ANGERICA MBORENYA KARIMBI.....PROTESTORS
MUCHUI KARIMBI
AND
FLORENCE KAIMENYI.....INTERESTED PARTY
RULING

1. This Court issued a certificate of grant with respect to the estate of the deceased on 2nd May 2019. The same was rectified on 20th May 2019. Before the Court is an application dated 17th September 2020 by way of summons seeking (further) rectification of grant.

The Application

2. The Petitioner/Applicant seeks rectification on the grounds that three of the names of the beneficiaries in the grant were erroneously written as follows: -

- i. MARIMI M'MUTUA instead of M'ARIMBI M'MUTUA**
- ii. CYPRIAN MURORI M'ARIMI instead of CYPRIAN MURORI M'ARIMBI**
- iii. PURITY KINYUA instead of PURITY KINYA**

3. He further urges that the mode of distribution with respect to Land Parcel No. Abothuguchi/Kariene/2078 measuring approximately 2.7095 acres and Abothuguchi/Kariene/2247 measuring approximately 0.4520 acres be corrected so that each of the beneficiaries get the correct shares as follows: -

Land Parcel No. Abothuguchi/Kariene/2078 (2.7095 acres)

Florence Kananu	0.31615
Florence Kaimenyi	0.31615
Angerica Mberenya	0.31615
Julius Kinoti	0.31615

Lazaro Gitonga	0.31615
Muchui Karimbi	0.31615
Mary Kajuju	0.31615
Purity Kinya	0.31615
Stella Mukami	0.1803

Land Parcel No. Abothuguchi/Kariene/2247 (0.4520)

Stella Mukami	0.13585
Sarah Kagwiria	0.31615

4. The Petitioner/Applicant urges that the Court in distributing Land Parcel No. Abothuguchi/Kariene/2078 made an error and omitted one portion measuring 0.2874 acres that was not allocated to anyone. He urges that this portion should be added and each beneficiary to thus get 0.31615 acres. He further urges that Stella Mukami should get 0.1803 acres and 0.13585 acres from Land Parcels No. Abothuguchi/Kariene/2078 and 2247 respectively.

5. When the matter came up for hearing, Counsel for the Applicant sought to make changes to the proposed mode of distribution, in view of the findings of a most recent survey report. He claims that the survey report reveals that Land Parcel No. Abothuguchi/Kariene/2078 measures 2.47 acres and not 2.7095 acres and Land Parcel No. Abothuguchi/Kariene/2247 measures 0.320 acres and not 0.4520 acres.

6. During hearing, the District surveyor was called as a witness in support of the application. His evidence was as follows: -

“I am Peter Kimani. I am in charge of the Meru County Survey Office under the Ministry of Lands and Physical Planning. I have filed a report dated 5th February 2021 signed by Mr. J. K. Munyua. He is a government surveyor in our office. I have information of the surveyor. After I received instruction from the court I gave instructions for Mr. Munyua to go to the ground and he reported to me.

I invited the beneficiaries to be represented on the day. Most of the beneficiaries were present. The Area Chief was also present. The finding of the report issued was on the ground measurements. We confirmed that the acreage on the green card of parcel No. Abothuguchi/Kairene/2078 is different from what is on the ground. On the ground it measures 1.0 Ha (2.47 acres) whereas in the registered area is 1.097 (2.71 acres). Land parcel Abothuguchi/Kairene/2247 measures on the ground 0.13 Ha (0.32 acres) and on the green card it is shown as 0.183 Ha (0.45 acres). The combined size of the 2 parcels is 1.13 Ha (2.79 acres). So any tally should be done in accordance with the actual size on the ground. During subdivision, the surveyor shall have to provide access to the portions subdivided. I pray that my report be used in Court as exhibit.”

7. During cross-examination the Surveyor testified as follows: -

“I did not visit the land. I sent a surveyor to visit the land. He brought me measurements. I consider that the two parcels of land are registered under the General Boundary Survey and measurements indicated on the maps or green card does not reflect the position on the ground. That is why any time one wishes to do a survey on subdivision, one is supposed to verify the measurement on the ground as defined by the existing physical boundaries. The discrepancy is justifiable considering the records that supported the 2 parcels are published under the General Boundary Survey. These are actual measurements on the ground and the map gives only approximate measurements which are always subject to ground survey.”

8. With respect to the prayer for correction of the beneficiaries’ names, Mr. Kaimenyi urges as follows: -

“The parties have provided their ID cards. The correct names for Purity Kinya M’Arimba. The correct name for the Interested Party is Florence Kaimenyi Kinoti. The correct name of Mary Kajuju is Mary Kajuju Maitha and Stella Mukami M’Arimba. I propose that the correct names as appearing in their IDs be used.”

9. The Interested Party sought to testify on her own behalf. She testified as follows: -

“I bought the shamba on 26th September 2007 from Francis Mutua. I have an agreement of sale dated 26th September 2007. I took possession of the land immediately. There was a half way built house which I completed. I got half an acre of parcel number 2078. The vendor agreed and I paid the full sum of the purchase price. The agreement required removal of a caution by Lazurus. I refer to paragraph 7 of the agreement. I claim for 2078 ½ (half) acre in accordance with the agreement. I have built my house on one corner of the plot. I have been on the land.”

10. During cross-examination, she testified as follows: -

“When I bought the house, the parcel was still in the name of the deceased M’Arimba. It was not in the name of Francis

Mutua. It was on the name of his father. When I was buying the land I asked the rest of the members of the family. I asked who had got the land in accordance with the agreement. They agreed that I should stay there. The brothers were not in agreement. I went and sat with them and they agreed. I do not have anything to show that I spoke to the brothers. There are other children in the family. I did not speak to the brothers but their mother spoke to them. Their mother is Angelica Mberanya. I did speak to the mother of the other children. The Purchase price was paid to in Francis with whom we had an agreement. The other children were not involved. The land had not been subdivided. We were the ones who did the subdivision. It was then that the others came. As I bought the land, I knew succession was to be done later. I had been told in 2017 parcel of land that only 5 children would inherit the parcel of land. Francis Mutua did not lie to me. The claim by the other children came later.”

11. During cross-examination she testified as follows: -

“I bought half an acre of 2078. I have heard the surveyor. I know I should get the share of Francis Mutua. I was buying ½ acre of the deceased’s shamba. I have heard what the surveyor said. I only ask how I will get my due portion.”

12. During re-examination she testified as follows: -

“I believe the 5 brothers because they gave the original title to the land which I have deposited with the bank. I pay for storage. If I had not been given the title, I would not have accepted the deal. That is why I went to the chief to clarify whether they were the right people to hold the title.”

Determination

13. The Applicant seeks rectification of grant on two grounds. First is that the names of some of the beneficiaries were captured wrongly. The names of the affected beneficiaries were listed in the application and during hearing, Counsel for the Applicant introduced other names to be rectified. This Court will allow this prayer as it will assist to have the grant implemented at the lands registry.

14. The second ground is that the measurements of the two properties Land Parcel No. Abothuguchi/Kariene/2078 and Land Parcel No. Abothuguchi/Kariene/2247 were captured wrongly in the grant. The Court has considered the evidence tendered by the District Surveyor who confirmed that the measurement of the properties as captured in the register and green card does not reflect what is on the ground. He testified that whereas Land Parcel No. Abothuguchi/Kairene/2078 measures 1.0 Ha (2.47 acres) on the ground, it is registered as 1.097 (2.71 acres). He further testified that whereas Land Parcel No. Abothuguchi/Kairene/2247 measures 0.13 Ha (0.32 acres) on the ground, it is registered as 0.183 Ha (0.45 acres). He testified that the combined size of the 2 parcels is 1.13 Ha (2.79 acres).

15. This Court finds that the correct acreage that is up for distribution is what is on the ground. The is therefore a basis to rectify the grant to reflect the actual portions as per the findings of the survey report. In finding so, this Court has considered that none of the other parties produced a second or alternative survey report to challenge what the District Surveyor indicated in the report dated 5th February 2021.

16. The Interested Party has urged that she bought half an acre in Land Parcel No. Abothuguchi/Kairene/2078 from Francis Mutua. She has produced a sale agreement and an agreement confirming the sale in support of her claim. This Court has observed that the Interested Party is not a party to the sale agreement she relies on. She is only a witness. In addition, Section 82 (b) (ii) of the Law of Succession Act provides that no immovable property belonging to a deceased person shall be sold before confirmation of grant. In the circumstances, that sale agreement is invalid for purposes of the law of succession. It does not matter that she claims to have gotten consent from the family members before getting into the sale agreement since there can be no valid consent over an illegality.

17. She claims that the property was sold to her during the lifetime of the deceased. This does not help her case because the said Francis Mutua could not purport to sell what was not his. Further, this Court considers that Francis could not sell more than what he was entitled to.

18. The Court however considers that the other beneficiaries have not objected to the Interested Party getting a share in the parcel. In the circumstances, this Court finds that she can get a share, but only that which was to be allocated to Francis Mutua who purportedly sold his portion to her. Should she have a claim for a bigger portion than what will be allocated to her, she is at liberty to pursue her vendor, in a civil claim for refund of the purchase price or otherwise as may be advised to her.

Conclusion

19. The application for rectification is premised on two grounds. The first ground is that the names in the grant were not captured correctly. The second ground is that the measurements on the lands register as had been captured in the initial grant do not reflect what is on the ground. There is an unchallenged survey report produced by the District Surveyor to confirm the actual acreage on the ground. Land Parcel No. Abothuguchi/Kairene/2078 measures 1.0 Ha (2.47 acres) and Land Parcel No. Abothuguchi/Kairene/2247 measures 0.13 Ha (0.32 acres).

20. The Court accepts that the names of the beneficiaries should be corrected as this will assist in the implementation of the grant. The Court also accepts that the grant should be rectified to reflect what is on the ground.

21. With respect to the Interested Party’s claim for half a share, the Court considers that the purported sale agreement which she relies upon was entered into in 2007. This was way before the grant was confirmed, and is thus invalid, in view of the provisions of Section 82 (b) (ii) of the Law of Succession Act. The said section prohibits the sale of a deceased’s immovable property before the grant has been confirmed. In addition, the sale agreement does not mention her as a purchaser. This Court finds that owing to the fact that the other beneficiaries do not object to her entitlement, she will be allocated the share that would have otherwise been allocated to Francis Mutua, her purported vendor.

Should she have any further claims, she will be at liberty to pursue such other claims she may have against Francis Mutua, as she would any other civil claim.

ORDERS

22. In the end, the Court makes the following orders

i. The grant herein be and is hereby rectified to reflect the correct names of the affected beneficiaries as follows: -

- a. MARIMI M'MUTUA to be rectified to M'ARIMBI M'MUTUA**
- b. CYPRIAN MURORI M'ARIMI to be rectified to CYPRIAN MURORI M'ARIMBI**
- c. PURITY KINYUA to be rectified to PURITY KINYA M'ARIMBI**
- d. FLORENCE KAIMENYI to be rectified to FLORENCE KAIMENYI KINOTI**
- e. MARY KAJUJU to be rectified to MARY KAJUJU MAITHA**
- f. STELLA MUKAMI to be rectified to STELLA MUKAMI M'ARIMBI**

ii. The mode of distribution of the parcels be rectified to reflect the correct acreage as follows: -

Land Parcel No. Abothuguchi/Kariene/2078 (2.47 acres)

Florence Kananu	0.279
Florence Kaimenyi Kinoti	0.279
Angerica Mberenya	0.279
Julius Kinoti	0.279
Lazaro Gitonga	0.279
Muchui Karimbi	0.279
Mary Kajuju Maitha	0.279
Purity Kinya M'Arimbi	0.279
Stella Mukami M'Arimbi	0.238

Land Parcel No. Abothuguchi/Kariene/2247 (0.32 acres)

Stella Mukami M'Arimbi	0.041
Sarah Kagwiria	0.279

Order accordingly

DATED AND DELIVERED ON THIS 14TH DAY OF OCTOBER, 2021

EDWARD M. MURIITHI

JUDGE

Appearances

Mr Nyamu for the Applicants

Mr. Kaimenyi for the Respondents

Florence Kaimenyi Kinoti, the Interested Party in person