



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 1530 OF 2012**

**IN THE MATTER OF THE ESTATE OF MUNGAI MACHARIA KIHORO (DECEASED)**

**BETH MUTHONI NGANGA.....APPLICANT**

**VERSUS**

**SAMUEL FUNDI MUNGAI.....RESPONDENT**

**RULING**

1. The application before court is brought pursuant to Section 45 and 47 of the Law of Succession Act Cap 160, rules 63 and 73 of the Probate and Administration Rules seeking for orders that: -

- **The court do order cancellation of the transfer and subsequent title deed issued as a result of an illegal transfer of Plot No. 1513 Mwiriukia.**
- **The court do issue an order of injunction against Samuel Fundi Mungai whether by himself, his servants and/or agents, advocates or auctioneers from entering upon or in any way interfering with the rights of possession, occupation, use or enjoyment of Plot No. 1513 Mwiriukia pending hearing of the application and determination of the suit.**
- **The court do issue an order of injunction restraining Kariua Mwiriukia Farmers' Co-operative Society from transferring or in any way interfering with ownership of Plot No. 1513 Mwiriukia pending determination of the suit.**

2. The application is predicated on the grounds that the Applicant is a beneficiary and a co-administrator, and pending in court is an application for confirmation of grant dated 17<sup>th</sup> December 2013 yet to be heard and that without consent of other beneficiary the Respondent has sold the property subject matter for Kshs. 4.5 million, having so far received Kshs. 2.4m out of the sale price; the property as proposed in the application for confirmation is to go to the Applicant and the intended sale is therefore to her detriment.

3. The application was objected to by the Respondent in replying affidavit sworn on 5<sup>th</sup> October 2021 on grounds that the deceased died testate and the petition for grant of letters of administrate intestate was filed without his knowledge and consent and neither that of other beneficiaries. Further in a will written by the deceased on the 1<sup>st</sup> of November 1987 the shares in Githingiri which later translated to Plot No. 1513 Mwiriukia, Share Certificate No. 245 was to go to him; the Applicant who is a married daughter did not get any property, additionally, he has extensively developed the said property. He urged the court ought to respect the will of the deceased.

4. In his reply, the Respondent did not respond to the allegation that he has sold the property subject matter, so the averments of the Applicant remain unchallenged.

5. The Law of Succession Act Section 5 gives persons capable of making wills the freedom of disposing off their property by way of a will. However, this freedom comes with certain requirements which include the requirements provided for in Section 11 as follows: -

**“No will shall be valid unless**

**a) The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by direction of a testator;**

**b) The signature or mark of the testator, or the signature of the person signing for him is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;**

c) **The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of a testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person, and each of the witness must sign the will in the presence of the attestor, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”**

6. The court has pronounced itself many a times even before promulgation of the Constitution on the place of daughters when it comes to succession. The case of **Rono vs Rono Civil Appeal No. 66 of 2002** is a good reference, The provision in Article 27 of the Constitution of Kenya 2010, outlaws discrimination on account of sex or marital status.

Article 27 of the Constitution provides as follows;

**Equality and freedom from discrimination**

**(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.**

**(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.**

**(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.**

**(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.**

**(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).**

7. Based on the above analysis and the fact that the Respondent has not sought to have the grant intestate issued revoked the issue of the deceased having died testate does not arise. Secondly for as long as the grant has not been confirmed whether the property is likely eventually go to a party does not give the said party a ticket to sell, transferred and/or interfered with or deal with the same without leave of the court.

8. Consequently, and in a bid to preserve the estate the court hereby bars any of the beneficiaries from dividing, selling, transferring and/or in any matter whatsoever interfering with Plot No. 1513 Mwiriukia or any other property of the estate until further orders of the court.

9. Costs will abide the outcome of the suit.

**DELIVERED AND SIGNED AT GARISSA THIS 14<sup>th</sup> DAY OF OCTOBER, 2021.**

.....

**ALI ARONI**

**JUDGE**