



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 275 OF 2015**

**IN THE MATTER OF THE ESTATE OF ITOBI KAURA ALIAS JEREMIAH M'ITOB (DECEASED)**

**JOEL KIRIMI.....PETITIONER**

**VERSUS**

**STEPHEN MUROKI M'ITOB.....APPLICANT**

**RULING**

1. Before the Court is an application dated 22<sup>nd</sup> January 2021 seeking rectification of the grant herein. The grant was confirmed on 29<sup>th</sup> May 2018 in the following terms: -

**L.R. NO. AMWATHI/MAUA/3737 (1.0618 Ha/2.624 acres)**

- i. JOEL KIRIMI M'ITOB 0.75 acres**
- ii. BEATRICE KANINI KAIONGI 0.25 acres**
- iii. JOANINA KAWIRA M'ITOB 0.20 acres**
- iv. JOSHUA MURIUKI M'ITOB 0.75 acres**
- v. STEPHEN MUROKI M'ITOB 0.20 acres**
- vi. EUNICE KENDI 0.20 acres**
- vii. TABITHA KABAKA M'ITOB Balance**

**L.R. NO. AMWATHI/MAUA/5923 (0.4325 Ha/1.069 acres)**

- i. STEPHEN MUROKI M'ITOB 0.55 acres**
- ii. JOHN GITONGA M'ITOB 0.26 acres**
- iii. JAMES KABERIA 0.25 acres**

**L.R. NO. AMWATHI/MAUA/3926 (0.3945 Ha/0.975 acres)**

- i. JOEL KIRIMI M'ITOB (to hold in trust for**

**BONIFACE KARANI, CALVIN MUCHUI,**

**GLORY GATWIRI) 0.60 acres**

ii. **STEPHEN MUROKI M'ITOBI 0.10 acres**

iii. **JOSHUA MURIUKI M'ITOBI 0.10 acres**

iv. **JOEL KIRIMI M'ITOBI Balance**

**L.R. NO. AMWATHI/MAUA/7224 (0.1753 Ha/0.433 acres)**

i. **EUNICE KENDI 0.20 acres**

ii. **TABITHA KABAKA Balance**

### **The Application**

2. The Applicant urges that the distribution of L.R No. Amwathi/Maua/5923 included people who were not entitled to share in it and that the same should be registered in the names of Tabitha Kabaka and the Applicant jointly. He urges that John Gitonga and James Kaberia should not have been included in the said parcel because they have their portion in Athiru Gaiti.

3. The application is supported by the affidavit of Tabitha Kabaka who depones that the properties were allocated to strangers who are not beneficiaries. She further urges that the Petitioner failed to include parcel number Lower/Athiru Gaiti/887 as property of the deceased which is registered in the name of Julius Mwiti M'Itobi to hold in trust for the rest of the family and that she has been omitted in the distribution.

### **Petitioner's Response**

4. In opposition to the application, the Petitioner in his replying affidavit sworn on 8<sup>th</sup> February 2021 states that the application has been brought under the wrong provisions of the law. He urges that the grant has already been implemented and they are already in the process of subdivision and registration of the resultant portions. He urges that the Applicant previously attempted to protest but withdrew his protest and that the grant was confirmed in his presence and with his consent and that the Applicant is thus estopped from seeking to set aside the consent. He urges that their mother Tabitha Kabaka is well provided for in L.R No. Amwathi/Maua/3737 and 7224 and that his other siblings John Gitonga and James Kaberia have not gotten any other land from the estate.

5. He further urges in his further affidavit sworn on 5<sup>th</sup> March 2021 that the proposed changes are brought about by the Applicant who sold off his entitlements to wit 0.20 acres on Amwathi/Maua/3737 to Jeremiah Macenge and David Kithure. and 0.20 acres to Doris Gakii Kithure, 0.20 acres to John Muthoni and 0.10 acres to James Koome from land parcel No. Mawathi/Maua/59233 thus leaving him with 0.05 acres. He urges that the Applicant intends to sell more of his portions which will force him to intrude on his other sibling's portions.

6. He urges that he is surprised by the averments by his mother, Tabitha Kabaka. He urges that John Gitonga is his step brother and James Kaberia is his 1<sup>st</sup> born brother and as such, not strangers to their father's estate. That parcel number Lower/Athiru Gaiti/887 is registered in the name of Julius Mwiti M'Itobi, his deceased brother and does not form part of the estate of his deceased father.

7. He urges that his deceased father had orally distributed his estate and that land parcel Igembe/Lower/Athiru Gaiti 'A'/888 is registered in the name of Johana Ntonja M'Itoba, his step brother, to hold in trust for himself and for Stephen Muroki (Applicant), John Gitonga, Rose Nkatha and himself, Joel Kirimi. He urges that land parcel No. 3400 is owned by Shadrack Kiburi M'Itobi, his step brother and as such, he is not interested in the cause owing to his gift inter vivos. That land parcel 889 is owned by his step brother Jacob Muthee who is equally disinterested in the suit. That land parcel 4064 is owned by Henry Kamanja Kithure who bought it from his step brother Isaiah Meme who was also disinterested in the suit. That land parcel 884 is owned by his step sister Janet Mukonjira who was gifted the same by their father and thus lays no claim.

8. He urges that the transmission that is sought to be stayed has already been effected at the Maua lands registry and is thus overtaken by events and that there is no consent by the affected beneficiaries for the rectification. He further urges that the Applicant has already sold off his portions measuring 0.70 acres to third parties thus any change of the mode of distribution would cause chaos since each party has their own portions that they have already developed.

### **Determination**

9. The present application seeks rectification of the grant herein. The Petitioner urges that the application has been brought under the wrong provisions of the law because it is posited as one for rectification under Rule 73 of the Probate and Administration Rules but it is in real sense seeking for reopening of the cause.

10. This Court considers that though posited as one for rectification, the Applicant is in real sense seeking for revocation of the grant. The correct provision of the law to have brought his application under is Section 76 of the Law of Succession Act. The Court, however, has previously held that failure to cite the correct provisions of the law is not a fatal mistake. Rule 73 of the Probate and Administration Rules gives the Court inherent powers to make such orders as may be necessary for the ends of justice. This Court will therefore go into the merits of the application.

11. The basis for the Applicant's application is a claim on the distribution of L.R No. Amwathi/Maua/5923. He urges that the same was allocated to strangers. This allegation is supported by the affidavit of Tabitha Kabaka, the widow to the deceased. As per the grant, the parcel was allocated to the Applicant, John Gitonga and James Kaberia. According to the Petitioner, John Gitonga and James Kaberia are his step

brothers and are not strangers to the estate. This Court has also observed from the letter from the Chief dated 23<sup>rd</sup> January 2014 that the said John Gitonga and James Kaberia were named as heirs to the deceased. This Court thus finds that the two are not strangers as posited by the Applicant but they are rightful heirs to the estate and are therefore entitled to a share of the estate.

12. The affidavit sworn by Tabitha Kabaka in support of the application introduces parcel number Lower/AthiruGaiti/887. She urges that this parcel was left out in the list of the deceased's assets. She asserts that this property is registered in the name of Julius Mwiti M'Itobi to hold in trust for the rest of the family. This Court has observed that the said Tabitha Kabaka failed to attach a title deed to prove ownership of the parcel. However, from the search attached and the averments by the Petitioner, the Court observes that the said parcel is registered in the name of Julius Mwiti M'Itobi. The Petitioner asserts that this is his deceased brother.

13. This Court considers that the property is registered in the name of someone else other than the deceased in this succession cause. This fact confirms that the property does not form part of the deceased's estate. If Tabitha Kabaka or any other rightful heir lays a claim to the property by virtue of the purported trust, the correct procedure is for them to claim from the very Julius Mwiti M'Itobi. Since it is said that he is deceased, any claim against him ought to be formally lodged in a succession cause with respect to his estate.

14. This Court also observes that both the Applicant and the deceased's widow Tabitha Kabaka were provided for in the grant as follows: -

**Stephen Muroki M'Itobi (The Applicant)**

**i. 0.2 acres in L.R No. Amwathi/Maua/3737**

**ii. 0.55 acres in L.R No. Amwathi/Maua/5923**

**iii. 0.10 acres in L.R No. Amwathi/Maua/3926**

**Tabitha Kabaka**

**i. Balance (totaling 0.274 acres) in L.R No. Amwathi/Maua/3737**

**ii. Balance (totaling 0.233 acres) in L.R No. Amwathi/Maua/7224**

**Conclusion**

15. The application before this Court seeks rectification of the grant confirmed on 29<sup>th</sup> May 2018. The applicant urges that James Kaberia and James Gitonga M'Itobi who were allocated portions in L.R No. Amwathi/Maua/5923 are strangers to the deceased's estate. The Court, however, finds that the letter from the Chief dated 23<sup>rd</sup> January 2014 which was used to file the Petition includes these two as beneficiaries and more specifically, sons to the deceased. The Petitioner who opposed the application urged that the two are his step brothers. This Court thus finds that the two are rightful heirs to the deceased's estate and they are thus entitled to share in it.

16. The Court rejects the assertion that Land Parcel No. Lower/Athiru Gaiti/887 formed part of the deceased's estate, because the same is not registered in the deceased's name. The search document annexed to the affidavit of Tabitha Kabaka confirms that the parcel is registered in the name of Julius Mwiti M'Itobi. Julius Mwiti M'Itobi is said to be the Petitioner's deceased's brother. The Court thus finds that any claim to the property, including any claim based on a trust, ought to be lodged against the said Julius Mwiti M'Itobi's estate.

17. The Court does not, therefore, find any basis to interfere with the grant confirmed by the Court on 29<sup>th</sup> May 2018.

**ORDERS**

18. Accordingly, for the reasons set above, this Court makes the following orders: -

**i. The Applicant's application dated 22<sup>nd</sup> January 2021 seeking rectification of grant is hereby dismissed.**

**ii. This being a family matter there shall be no order as to costs.**

Order accordingly.

**DATED AND DELIVERED ON THIS 7<sup>TH</sup> DAY OF OCTOBER, 2021**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

**M/S L. Kimathi Kiara & Co. Advocates for the Applicant.**

