



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT KENYAAT MERU**  
**SUCCESSION CAUSE NO 181 OF 2015**  
**IN THE MATTER OF THE ESTATE OF ZAKAYO M'RITARI M'RWITO (DECEASED)**

**BETWEEN**

ALICE MUKOMWENE.....1<sup>ST</sup> ADMINISTRATOR

**AND**

MOSES NTARANGWI.....1<sup>ST</sup> ADMINISTRATOR/PROTESTOR

**AND**

DORCUS KENDI.....1<sup>ST</sup> INTERESTED PARTY

GLADYS KARAMBU.....2<sup>ND</sup> INTERESTED PARTY

DUNCAN MWONGERA.....3<sup>RD</sup> INTERESTED PARTY

**RULING**

**Introduction**

1. By a ruling dated 29<sup>th</sup> April, 2021, this court made orders

i. Enjoining Dorcus Kendi, Gladys Karambu and Duncan Mwongera as interested parties

ii. Directing the Administrators Alice Mukomwene and Moses Ntarangwi to identify respective shares of each of the beneficiaries to the estate and apply for confirmation of grant within 30 days from the date hereof

**Summons**

2. By summons dated 26<sup>th</sup> May, 2021, Alice Mukomwene (*1<sup>st</sup> Administrator*) applied to distribute the estate of the deceased as follows:

**LR.NO. NTIMA/NTAKIRA/2203**

i. Alice Mukomwene - ½ share

ii. Dorcus Kendi, Gladys Karambu and Duncan Mwongera - ½ share jointly

iii. Erick Mwenda Miriti and Roselyn Kireriah - ¼ acre

**LR.NO. KIIRUA/NKANDO/97**

i. Alice Mukomwene - ½ share

**ii. Dorcus Kendi, Gladys Karambu and Duncan Mwongera - ½ share jointly**

3. The 1<sup>st</sup> Administrator contends that **Moses Ntarangwi (2<sup>nd</sup> Administrator)** is not entitled to deceased's estate for the reason that he caused deceased's estate in **LR.NO. KIIRUA/NKANDO/97** to be transferred and has since disposed off a large portion leaving only 8 acres to his name.

4. **Moses Ntarangwi (2<sup>nd</sup> Administrator)** on the other hand proposed as follows:

**LR.NO. NTIMA/NTAKIRA/2203 equally to**

**i. Moses Ntarangwi**

**ii. Alice Mukomwene**

**iii. Dorcus Kendi, Gladys Karambu and Duncan Mwongera - jointly**

5. It is his evidence that **LR.NO. KIIRUA/NKANDO/97** does not form part of deceased's estate and further that Erick Mwenda Miriti and Roselyn Kireriah are not beneficiaries of deceased's estate.

**Analysis and determination**

6. I have considered the evidence on record and I have deduced the following issues for determination.

**i. What comprises the estate of Zakayo M'ritari M'rwito (Deceased)**

**ii. Are Erick Mwenda Miriti and Roselyn Kireriah beneficiaries of deceased's state**

**iii. How should the estate be distributed**

**What comprises the estate of Zakayo M'ritari M'rwito (Deceased)**

7. The position in law is that whoever alleges has to prove. There is a dispute concerning how L.R KIIRUA/NKANDO/97 that originally belonged to the deceased was transferred to Moses Ntarangwi.

8. Whereas both Administrators concede that L.R KIIRUA/KIIRUA-NKANDO/97 originally belonged to the deceased. None of them tendered nay registration document in support thereof.

9. In **In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR**, the court in dealing with a dispute concerning where some property formed part of the estate of the deceased had this to say:

**“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on ownership of the property in the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation.”**

10. Similarly, in **In Re Estate Of The Late Jonathan Kinyua Waititu (Deceased) [2017] eKLR**, it was also held that Succession Courts do not have jurisdiction to dig deeper into the issues of ownership or title to land.

11. From the foregoing, I am of the considered view that the issues in the protest herein are deeply rooted in the ownership of L.R KIIRUA/NKANDO/97 which matter falls squarely under the jurisdiction of the Environment and Land Court.

12. Pending the determination of ownership of L.R KIIRUA/NKANDO/97, this court shall proceed to distribute L.R NTIMA/NTAKIRA/2203 which has been determined to form part of the estate of the deceased.

**Are Erick Mwenda Miriti and Roselyn Kireriah beneficiaries of deceased's state**

13. A sale agreement dated 05.05.2013 reveals that Joseph Muthomi M'ritara and Alice Mukomwene sold ¼ an acre of L.R NTIMA/NTAKIRA/2203 to Roselyn Kireriah and Eric Mwenda at a cost of Kshs. 550,000.

14. Section 45 of the Law of Succession Act (*the Act*) provides as follows:

**Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**

15. The primary function of a probate court is distribution of the estate of a dead person. (See ***InRe Estate of G K K (Deceased) [2017] eKLR***).

16. Since the claim on behalf of Erick Mwenda Miriti and Roselyn Kireria his that of purchaser on the basis of a sale of land agreement executed after the death of the deceased and before confirmation of the grant herein, the said purchasers are not beneficiaries of the estate and should not be entertained in a succession cause. As such, their claim cannot be litigated in this succession cause. Given the circumstances of the case and the fact that the sale of the land violated Section 45 of ***the Act***, this court cannot aid them in enforcing an unlawful transaction. For purposes of directing the interested parties, it suffices to cite Musyoka J ***In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR*** that:

**“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”**

17. Applying the above legal test, the 1<sup>st</sup> Administrator’s proposal to distribute ¼ acre of L.R NTIMA/NTAKIRA/2203 to Roselyn Kireriah and Eric Mwenda fails and is dismissed.

#### **How should the estate be distributed**

18. Section 38 of the Law of Succession Act Cap 160 Laws of Kenya (***the Act***) enshrines the principle of equal distribution of the net intestate estate to the children of the deceased.

19. From the foregoing, I find that the proposal for distribution of **LR.NO. NTIMA/NTAKIRA/2203** made by **Moses Ntarangwi (2<sup>nd</sup> Administrator)** is fair and lawful.

20. It is therefore hereby ordered:

1) Roselyn Kireriah and Eric Mwenda are not beneficiaries of deceased’s estate

2) Pending the determination of ownership of L.R KIIRUA/NKANDO/97, L.R NTIMA/NTAKIRA/2203 is distributed equally to:

**i. 1/3 to Moses Ntarangwi**

**ii. 1/3 to Alice Mukomwene**

**iii. 1/3 jointly to Dorcus Kendi, Gladys Karambu and Duncan Mwongera**

3) Each party shall bear its own costs

**DATED AT MERU THIS 2<sup>ND</sup> DAY OF DECEMBER 2021**

**T. W. CHERERE**

**JUDGE**

**Court Assistant - Morris Kinoti**

**For 1<sup>st</sup> Administrator - Mr. Anampiu for Gikunda Anampiu Advocates**

**For 2<sup>nd</sup> Administrator - N/A for Okubasu & Munene Advocates**

**For Interested Parties - N/A for Kaberia Arimba & Co. Advocates**