



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 425 OF 2006

IN THE MATTER OF THE ESTATE OF M'MUTHAMIA M'TUERANDU (DECEASED)

STEPHEN KAMBI MUTHAMIA..... PETITIONER

-VS-

JOSEPH MWITI M'NDUMBAL..... OBJECTOR

RULING

1. M'MUTHAMIA M'TUERANDU ("the deceased") to whom this succession cause relates died on 11/03/1993. According to the petition documents the deceased was survived by:

- a) **Evangeline Karambu Mutungi** - Daughter in Law
- b) **Rael Ncurubi Kiriga** - Daughter Married
- c) **Gladys Regeria M'Arimi** - Daughter Married
- d) **Agnes Karimi Muthamia** - Daughter not Married
- e) **Stephen Kiambi M'Muthamia** - Son
- f) **Joseph Mwiti M'Ndubai** -

His asset was listed as **L. R. No. Nkuene/Ukuu/113 (1.772 Ha)**.

2. Grant of letters of administration intestate were issued to Stephen Kiambi M'Muthamia on 21/01/2008. They were then confirmed on 12/03/2008 with the estate being distributed as follows:

L. R. No. Nkuene/Ukuu/113

- a) Evangeline Karambu Mutungi - 1.97 Acres
- b) Agnes Karimi Muthamia - 0.25 Acres
- c) Joseph Mwiti M'Ndubai - 0.24 Acres
- d) Stephen Kiambi M'Muthamia - 1.97 Acres

3. The Objector filed summons for revocation an/or annulment of the grant dated 12/11/2008. The summons were dismissed by the ruling dated and delivered on 29/05/2009 for not following the law under **CAP 160**.

4. Then, the Objector then filed summons for revocation or annulment of the grant pursuant to **Section 76 (b) (c), Rule 44 (1) of CAP 160 Laws of Kenya** dated 8/06/2009.

5. The application was grounded upon the averments in the affidavit of Joseph Mwiti M'Ndumbai sworn on 8/06/2008 and on grounds on the face of the summons. It is contended that the grant was obtained fraudulently as the Petitioner concealed material facts to the effect that

the Suit Land was to be shared equally between the deceased and the Objector. That the Petitioner went ahead and distributed to the Objector 0.24 acres and the deceased's children getting a total of 4.19 Acres. He was not made aware of this succession cause and only became aware of it when he was informed by his neighbor. Moreover, it was argued that the Petitioner applied for confirmation of the grant before the six (6) months mandatory period had lapsed with a view to disinherit the Petitioner.

6. This was opposed vide the replying and further replying affidavit of Stephen Kiambi M'Muthamia sworn on 18/02/2010 and 9/02/2010 respectively. He deponed that the Objector is his distant cousin. That based on the degree of consanguinity the applicant is not entitled to anything from the estate of the deceased. The Petitioner stated that prior to the death of his grandfather, M'Twerandu M'Mwororo, he showed the deceased two portions on the Suit Land in his presence that was to be given to M'Ndubai M'Bagiri or his son the Applicant herein.

7. That in 1988 the deceased called for the Objector and he showed him the two portions on the Suit Land which they measured. By this time M'Twerandu M'Mwororo and M'Ndubai M'Bagiri had died. That the deceased advised the Objector to get a surveyor so that the portions could be surveyed, excised and be registered in his name.

8. The objector did not come back until after the deceased had died and informed the Respondent that he wanted to sell the portions he was shown by the deceased. He told him that a succession cause was needed to be filed first and after sharing the land then he would be able to deal with his portions as he pleased but since he wanted to sell his portions it was agreed in a meeting that he was to bear the expenses of filing as per annexure SKM2.

9. After signing the agreement, the Objector disappeared and returned later informing him that he had already subdivided the land and new title deeds issued. He was surprised as it is not possible to interfere with the Suit Land since it was still under the name of the deceased for no succession cause had been filed yet. The titles were then cancelled and the two portions belonging to the Objector were consolidated and measured in his presence as well District Land Surveyor as 0.24 Acres. The Objector did not raise any complaint as to the measurement of his portion.

10. That when the Respondent informed the objector of the intention to file this succession cause, he did not seem bothered and interested. The filing of this cause was never done in secret neither did he conceal anything. It is the Objector who seeks to frustrate the sharing of the estate to the beneficiaries. The share given to the Objector is per his grandfather's instructions to the deceased. He prays that the grant is not revoked for the share is now complete. No good reason has been brought forth to necessitate the revocation. Besides, the fact that the grant was confirmed before six (6) months period does not invalidate the same as it was issued by a court of competent jurisdiction.

11. In his further supporting affidavit sworn on 05/03/2010 the Objector stated that it is only the Petitioner and his family members who can explain how the title deed was changed without the process of succession. He stated that their grandfathers were step-brothers and that the Petitioner's grandfather gathered the family land alone and left it for his son the deceased to hold in trust for himself and the offspring of his step brother, M'Bagiri Mwororo who is his father. Their grandfathers were to share the Suit Land equally. The Applicant averred that at the time the deceased gathered and consolidated land and registered in his name he knew that he was holding it in trust for the grandfather of the Applicant and that is why he sent for the Applicant to show him his portion.

12. This matter was heard vide *viva voce* evidence. **OB1 Joseph Mwiti M'Ndumbai** relied on the averments he made in his affidavits sworn on 30/01/2009 and 8/06/2009. He stated that he lives in Naari on land which his father was registered as the first owner. The Applicant claimed that the land in dispute is ancestral land as it belonged to their great grandfather M'Mwororo M'Miregi. That his father was detained during the Mau Mau emergency which led to the land being registered in the name of the deceased. The deceased consolidated the Suit Land with his father's portion. In 1988 the deceased called him and gave him his father's share in the presence of the Petitioner and an elder called M'Marete. He began to use it and even leased it but the Petitioner took a portion of it. He even had a house on the Suit Land. When he took measurements of his portion he was with M'Mutungĩ and Petitioner. But the surveyor did not take measurements neither is it true that he should get 0.24 Acres.

13. **OB2 Edward Miriti Joseph** adopted his statement dated 26/02/2018 as his evidence. He stated that the Objector is his friend who leased to him his portion on the Suit Land and that he had been cultivating it since 2003. He said he used to cultivate a bigger portion but later the Petitioner took a part of it. When he reported the issue to the Objector, the matter was forwarded to the chief who summoned the Petitioner together with Evangeline. The matter was discussed and the Petitioner was asked to give the Objector his full portion but he refused. He stopped using the land but Dr. Kirimi Rimberia is using it. He told the court that the Objector never resided on the Suit Land but used to cultivate it.

14. At the close of the Objector's case the Petitioner testified adopting his replying affidavit sworn on 18th February 2010 and statement recorded and filed in court. He stated that the Objector is entitled to 0.24 acres, as instructed by his grandfather, as opposed to half the Suit Land as alleged. Their grandfathers used to cultivate and live on the Suit Land which measured $\frac{3}{4}$ acre. Later he and his brother bought other portions of land which were consolidated and registered under the name of the deceased to measure 4.43 acres. When the Objector processed fake succession they wrote a letter to the District Officer and Chief. At the D. O. 1's meeting it was decided that the titles be cancelled and the Land Registrar PW4 confirmed that the current status obtaining in their registers shows that the land is in the name of the deceased as it was on 23rd October 2008. When he brought the surveyor to the Suit Land he informed the Objector who did not show up. He was the one who gave the surveyor the measurements. He stated that **OW2** was occupying 0.24 acres and not 2 acres as alleged.

15. At the close of the parties testimonies, written submissions were filed and the Objector submitted by reiterating what he had stated. He emphasized that there were no exceptional circumstances that necessitated confirmation of the grant before the six months period was over as stipulated under **Section 71 of the Law of Succession Act**. Moreover, based on the degree of consanguinity of the families of M'Twerandu M'Mwororo and M'Bagiri M'Mwororo he ranks in priority to the Respondent. Therefore, he and the deceased are entitled to equal portions of the Suit Land. His portion is what belongs to his father's estate. Thus, the revocation is merited.

16. The Petitioner submitted that the Suit Land is registered under the name of the deceased. That the allegations put forth by the Objector

are not supported with any evidence and that he did not give the measurement of his father's land that was consolidated with the suit land. The Respondent insisted that the share that the Objector is entitled to out of the Suit Land is 0.24 Acres only and the application ought to be dismissed.

17. The issue for determination is **whether the Applicant has proved to the required standard the grounds upon which a grant should be revoked and/or annulled.**

18. **Section 76 of the Law of Succession Act** lays down the grounds upon which a grant may be revoked and or annulled. The Objector seeks to revoke the grant based on **subsection (b) and (c)** which states:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

...”

19. According to the Objector, the Suit Land is ancestral land tracing back all the way to their great grandfather M'Mwororo M'Miregi and that it was registered under the name of the deceased who held it in trust for himself and the Applicant's father to be shared equally. He affirmed that the Petitioner kept this from the court and went ahead to file this succession cause without his knowledge in order to disinherit him.

20. It should be noted that the function of the probate and administration court as stated in **In re Estate of Alice Mumbua Mutua (Deceased) [2017]eKLR** is a court that facilitates the collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets. When it comes to issues of land; that is *environment and the use and occupation of it and title to, land* that falls in the arena of the Environment and Land Court as stated under **Article 162 (2) (b) of the Constitution.**

21. However, the Court of Appeal in the case of **Zipporah Wanjiru Mwangi v Zipporah Wanjiru Njoroge [2017] eKLR** widened this jurisdiction to some extent and stated as follows:

“In succession proceedings where, as here, existence of trust is alleged in respect of land claimed to be family land, it is appropriate for the court to give directions on the procedure to be followed for adduction of evidence. Such procedure cannot be discredited merely on account of the fact that succession proceedings are designed to determine heirs and distribution of estate and not issues of trust. The fact that the court was called upon to determine whether the suit land was beneficially held and therefore not subject to distribution or whether it was family land and therefore liable to distribution among the heirs in the succession in itself justified the determination of the issue of trust. Where, as here, the issue (of trust) arises in succession proceedings whether the land is family land and therefore is subject to trust or whether it is owned absolutely by the deceased, and therefore is not subject to distribution, the court hearing the succession proceedings has jurisdiction to determine the issue and to give appropriate directions on the hearing. This is in line with the jurisdiction vested in the High Court by Article 165 (3) (a) of the Constitution and Section 47 of the Law of Succession Act, Cap. 160. Moreover, the Constitution of this country enjoins and expects the courts to determine the dispute fairly and with expedition, and without undue regard to technicalities of procedures - see Articles 159 (2) (d), 48; 50 (1); 10(1) (A); 10 (2) (b); 20 (2); 21(1), 165 (3) (a) and 164 (3).”

22. As a result, even though this court has no jurisdiction to determine matters that fall within the jurisdiction of the Environment and Land Court it has the power to determine the issue of trust and provide appropriate directions without usurping the authority of the Environment and Land Court.

23. From the evidence gathered by this court, it is not in dispute that the Suit Land is ancestral land. The issue that is in dispute is how much acreage the Objector is entitled to. According to the Objector he is entitled to half of the suit land based on what he alleges was shown to him by the deceased. However, according to the Petitioner, the Objector is entitled to 0.24 acres which was what their grandfathers were using. He added that the extra acreage of the Suit Land was land that he and his brother bought that was consolidated together with the 0.75 acres and registered in the name of the deceased.

24. The green card shows that the Suit Land was initially registered in the name of the deceased. The Petitioner in his distribution gave the Objector 0.24 acres which he claimed was shown to the Applicant by the deceased being the wish of their grandfather M'Twerandu M'Mwororo. He did so even before this objection was raised.

25. The burden to prove that the Objector/Applicant was entitled to half of the suit land lay on him. The Applicant did not bring any other independent witness or evidence that showed that he was entitled to more than 0.24 acres from the suit land other than the evidence of the Respondent/Petitioner together with Edward Muthuri PW3 who were present when the Applicant was shown two portions out of the suit land which total area upon survey was established to be 0.24 acres. The Applicant and his witness confirmed that the Applicant had never stayed on the suit land in. In the contrary he resides in the ancestral land in Naari. OW2 did not know the history of the suit land as he simply leased a portion of the land for purposes of farming. He did not explain how his name came to be registered as one of the proprietors of the suit land

if it is not true that the Applicant fraudulently processed the registration before Petitioning for letters of administration to the estate of the deceased.

26. The Objector told the court that apart from the Petitioner there was an elder who was present when the deceased gave him his portion. He unfortunately died a month before he gave his evidence. The Objector made no mention of him neither is the elder's statement on record. Moreover, this being ancestral land it means that the family is aware of it. However, the objector did not bring any family member to ascertain his assertions.

27. In conclusion this court finds that the Applicant was all along aware of the intention of the Respondent and other beneficiaries to petition for letters of administration to the intestate estate of the deceased and he even fraudulently purported to transfer the suit land before the succession cause was filed. He has not proved that the Respondent filed the cause secretly and he has also not proved that he was entitled to more than 0.24 acres out of the estate property. In the circumstances the application dated 8th June 2009 is dismissed for lack of merit. The Applicant will pay costs of the application.

HON.A. ONG'INJO

JUDGE

RULING DATED AND DELIVERED AT MERU VIA EMAIL THIS 21ST DAY OF MAY 2020 DUE TO THE PRESIDENTIAL DIRECTIVES ISSUED ON 15TH MARCH 2020 AND SUBSEQUENTLY ON 7TH APRIL 2020 DUE TO COVID-19 PANDEMIC.

HON.A. ONG'INJO

JUDGE