



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 218 OF 1993

In The Matter Of The Estate Of Nguchine Rubuni Alias Cornelius Nguchine Rubuine- Deceased

M'THURANURA M'NGUCHINE.....PETITIONER

-Versus-

MARIAMU KANYUA M'NGUCHINE.....OBJECTOR

JULIUS MURUIYA MUTWIRI.....INTERESTED PARTY

JUDGMENT

1. The Deceased herein *Nguchine Rubuni alias Cornelius Nguchine Rubuine* died on 8th January 1983. As per the letter of the Chief Ntugi Location dated 11th August 1993 the deceased left behind the following dependants;

- 1) *Ruth M' Nguchine (1st Wife)*
- 2) *Joyce Ngitoro M'Nguchine (2nd Wife)*
- 3) *Naomi Muthoni M'Nguchine (3rd Wife),*
- 4) *M'Thuranira M' Nguchine,*
- 5) *Musa Kirai,*
- 6) *Jennifer Kathina Kaaria,*
- 7) *David Riungu M' Nguchine,*
- 8) *Mariam Kanyaru,*
- 9) *Peter Kaaria,*
- 10) *Grace Mwari Mugambi,*
- 11) *Harriet Kinanu Nathan,*
- 12) *Gideon Muguingo Nguchine,*
- 13) *Jerica Kairigo Isaack,*
- 14) *Nancy Gacheri Julius,*
- 15) *Esther Kathanga John,*
- 16) *Miss Catherine Karwitha Nguchine,*

17) *Silas Kiunga Nguchine*,

18) *Mr. Wilfred Kimathi*.

2. The petitioner herein filed for Letters of Administration on 17th December 1993 listing the dependants/beneficiaries of the deceased as per the letter of the Chief. He also listed the following to be the properties of the deceased;

(i) *Kibiricha/Kibiricha/439-1.1 Ha*

(ii) *Kibiricha/Kibiricha/2014-1.08 Ha*

(iii) *Kibiricha/Kibiricha/2011- 1.36 Ha*

3. The petition for letters for Administration of the Estate was gazetted on 19th March 2010 and grant for letters of administration issued on 6th December 1994. The petitioner filed an application for Confirmation of Grant on 28th June 1995. The application was heard on 6th November 1995 and grant was confirmed by Ongindi. J. on 6th November 2015 distributing the estate as hereunder;

1. **M' Thurania M' Nguthine Kibiricha/Kibiricha/439 WHOLE**

Kibiricha/Kibiricha/2011 WHOLE

2. **Henry Muthee M'tHuranira**

Kibiricha/Kibiricha/2014 WHOLE

Application for revocation

4. The objector herein however filed summons for the revocation/ Annulment of Grant on 3rd September 2014. The petitioner replied vide Replied affidavits dated 7th March 2015 & 13th November 2015. Both parties also filed their respective statements and submissions.

Purchaser's case

5. The interested party herein also filed papers contending that he is a purchaser of 0.05 Acres excised out of KIBIRICHA/ KIBIRICHA/2011 sold to him by the petitioner. He filed an application to be enjoined in this proceeding on 23rd September 2016 and an affidavit dated 25th November 2016. He claimed to be a relevant party in this proceeding.

6. This Court on 13th November 2015 issued inhibitory orders on KIBIRICHA/KIBIRICHA/2011 and its subsequent subdivisions i.e. KIBIRICHA/KIBIRICHA/4546,4547,4786,4787 & 4788

ANALYSIS AND DETERMINATION

7. From the evidence on record and the submissions by the objector and the petitioner the following present themselves as the issues for determination;

a. Whether or not the Confirmed grant should be revoked?

b. Distribution of the estate

On revocation of grant

8. The objector herein relied on the grounds set out in the summons for revocation of grant, the objector's statement dated 8th August 2016, affidavit dated 4th April 2016 and statement by Mercy Nkatha Nguchine dated 22nd March 2018.

9. The objector's main contention is that the deceased had 4 houses; the **1st wife, Kathira Thurania** had two children to wit **Thurania Nguchine and Kirai Nguchine**, the **2nd Wife, Ruth Nduru Nguchine** had 3 children i.e. **Jeniffer Kathuni Nguchine, Mariam Kanyua Nguchine and Grace Mwari Nguchine**. The **3rd Wife, Joyce Gitori** had 4 children i.e. **David Riungu Nguchine, Peter Karai Nguchine, Gedion Muguongo Nguchine, Esther Kathanga Nguchine** whereas the **4th wife, Naomi Muthomi** had 6 children i.e. **Harriet Kinanu, Gacheri Nguchine, Angelica Kairigo Nguchine Karwirwa Nguchine, Cyrus Kiyunga Nguchine and Wilfred Kimathi**. Yet, none of the beneficiaries was informed of these proceedings. He claimed that she only learnt of the proceedings when the petitioner invited interested purchasers to KIBIRICHA/KIBIRICHA/2011 where she resides.

10. She averred that the deceased had prior to his death distributed the estate among the four houses each house getting 3 ½ acres except the 3rd wife who got five (5) acres. She avers that she is entitled to **KIBIRICHA/KIBIRICHA/2011** by virtue of being a daughter of the 2nd House. She further stated that the subsequent sale of ½ an acre to the interested party by the petitioner was not only illegal but void from the

beginning.

11. She refuted the claim that the decision by the petitioner to sell the parcel of land in **KIBIRICHA/KIBIRICHA/2011** was arrived at after a Njuri Ncheke Land Dispute Tribunal allowed him to do so. She averred that the Njuri Ncheke did not have jurisdiction to hear and determine the case.

12. She filed written submission in support of her case and argued that the deceased died intestate and as such the property ought to be distributed in accordance with section 40 of the Law of Succession Act. She further submitted that the original parcel of land was **KIBIRICHA/KIBIRICHA/1035** which was during the lifetime of the deceased divided to the 3rd and 4th House leaving behind the 1st and 2nd House. The 2nd wife was already installed in **KIBIRICHA/KIBIRICHA/2011** whereas the petitioner was leaving in kibiricha/kibiricha/439. Hence, she termed his actions as discriminatory and accused him of greed. The objector also took issue with the property granted to Henry Muthee i.e. kibiricha/kibiricha/2014 and averred that the property ought to be bequeathed to Mercy Nkatha Nguchine as the immediate beneficiary of the estate of Moses Kirai Nguchine

The petitioner's case

13. The petitioner refuted the objector's claims and averred that he informed all the beneficiaries of the estate of the deceased prior to the filing of the petition for letters of administration. That the original parcel of land **KIBIRICHA /KIBIRICHA/1035** was divided by the deceased during his lifetime to the following; Gideon Muingo Nguchine (Parcel 2008), Silas Kunga (Parcel 2009), David N Riungu (Parcel 2015), Peter Kaaria (Parcel 2012), Fredrick Muthuri (Parcel 2013), Naomi Muthoni Nguchine (Parcel 2010), Jeremiah Mugambi (Parcel 439), Henry Muthee (Parcel 2014) and Moses Kirai (Parcel 2011).

14. That **KIBIRICHA/KIBIRICHA/2011** was given to Moses Kirai to hold in trust of the daughters. That after confirmation of grant he decided to transfer the said property to himself since Moses Kirai could not meet the transfer expenses and as such Moses Kirai took him to the Land tribunal which directed that he sells ½ an acre of land to an interested party so that he could recover the costs incurred so far. That he sold ½ acre to the interested party and the remaining balance ought to be shared to the daughters of the deceased and Moses Kirai.

15. He stated that the parcel in **KIBIRICHA/KIBIRICHA/2014** belonged to Henry Muthee as per his father's allocation.

Interested party's case

16. The interested party has submitted that he is a *bona fide* purchaser for value and that the aforesaid property was transferred to him after the Land Dispute decided by the Njuri Ncheke. That the petitioner at the time the property was transferred to him had the capacity to transact and as such he has valid title to the property. He equally relies on the provisions of section 82 and 93 of the Law of succession Act to substantiate this claim and to seek this Courts protection.

17. I have set out the facts of the case. The first hurdle is whether is circumstances exist for revocation or annulment of grant. The grounds for revocation or annulment of grant are set out in section 76 of the Law of Succession Act as follows:

76 Revocation or annulment of grant

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;

d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

ii. to proceed diligently with the administration of the estate; or

iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

e. that the grant has become useless and inoperative through subsequent circumstances.

18. It is clear from the record that the petitioner did not cite or obtain consent of any of the other beneficiaries before filing the cause herein. The objector, being a daughter of the deceased, stands in equality with the petitioner in applying for grant of letters of administration. As such, she enjoys certain rights. See Rule 7(7) (a) (b) and (c) of the Probate and Administration Rules which provides:-

7) where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has:-

a) renounced his right generally to apply for a grant or

b) consented in willing to the making of the grant to the application; or

c) been issued with a citation calling upon him either to renounce such right or to

19. This is one of those instances where failure by the petitioner to seek and or obtain consent or renunciation of right to apply from the other beneficiaries of the estate with an equal standing vitiated the grant issued herein.

20. In addition, the position of Henry Muthee in relation to the estate is not clear. It appears that he benefitted from the estate whereas during the confirmation of grant, he was not listed among the beneficiaries in P&A 5. Curiously, the letter attached to the petitioner's list of documents lists him as one of the sons of the deceased but the letter from the chief annexed to the petition for letters of administration does not. The objector does not list him in her more detailed list of beneficiaries. According to the objector, Henry Muthee is a son of the petitioner. From the record, he is the son of the petitioner and not of the deceased. I need not state that grandsons only take directly in the estate of a deceased person in only two instances; (1) the share which their deceased parent would have taken were it not for his or her death. This is called the principle of representation; or (2) when they prove they are dependants in accordance with section 29(b) of the Law of Succession Act to wit, they are:-

(b) such of the deceased's... grandchildren... whom the deceased had taken into his family as his own..., as were being maintained by the deceased immediately prior to his death;

21. Lastly the petitioner has conceded that the property in **KIBIRICHA/KIBIRICHA/2011** ought to be distributed to Moses Kirai as trustee. At the time of Confirmation of grant he concealed this fact. He also concealed the fact that the daughters of the deceased were not provided for in the estate. He also conferred upon himself a benefit in the said property knowing too well that the said property does not belong to him. His claim that Moses Kirai failed to raise transfer fees of the property and so he transferred it to himself is not any lawful justification to transfer property ordained by court to belong to another beneficiary. At the time of confirmation of grant the properties identified for particular beneficiaries must be transferred to the particular beneficiaries and not others. The petitioner acted contrary to the order of court in transferring the said property to himself.

22. The above recapitulation of facts of this case shows contrived concealment of material facts and misrepresentation by the petitioner and as such the Grant issued on 6th November 2015 is hereby revoked.

Distribution

23. Now the way is open for distribution of the estate of the deceased. I should determine the estate property first. From the evidence, the deceased owned the original parcel of land known as **KIBIRICHA/KIBIRICHA/1035**. He subdivided it during his lifetime into parcel numbers 2008-2015. The petitioner alleged that he gave; Gideon Muguino Nguchine (Parcel 2008), Silas Kunga (Parcel 2009), David N Riungu (Parcel 2015), Peter Kaaria (Parcel 2012), Fredrick Muthuri (Parcel 2013), Naomi Muthoni Nguchine (Parcel 2010), Jeremiah Mugambi (Parcel 439), Henry Muthee (Parcel 2014) and Moses Kirai (Parcel 2011).

24. Doubtless, the deceased herein subdivided his estate and distributed part thereof during his lifetime leaving behind the following properties at the time of his demise;

(a) KIBIRICHA/KIBIRICHA/2011,

(b) KIBIRICHA/KIBIRICHA/2014; and

(c) KIBIRICHA/KIBIRICHA/439.

These are the estate property as shall become clearer later.

Festering waters of patriarchy

25. Of importance is that pleadings and evidence show that the deceased distributed part of his estate to his sons and a spouse only but to the exclusion of his daughters. Again, it is apparent that the 2nd house was not given any land for it had only daughters. Such distribution is discriminatory and was not for the benefit of the 4 houses and all the children of the deceased. Therefore, the objector's contention that she is entitled to **KIBIRICHA/KIBIRICHA/2011** for the benefit of the 2nd House which did not have a son but three daughters makes legal sense as it is sound legally.

26. Whereas it is the purpose of the Law of Succession Act to express the wishes of the deceased person for the benefit of his dependants/beneficiaries such wishes can only be given effect so long as they are not inconsistent/ repugnant to justice, and are consistent with the principles laid down in the Law of Succession Act. And, this Honourable Court's inherent power shall be invoked to correct any injustice that may have been occasioned by ignorance or out of an abuse of the Court process.

27. The deceased was polygamous and died intestate. As such, this estate is governed by **Section 40 of the Law of Succession Act**. The same provides

40. (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

[28] The petitioner and Moses Kirai come from the 1st House which benefited from KIBIRICHA/KIBIRICHA/389. But, the property is in the name of the petitioner. In order therefore to achieve equality and equity in the sharing of the estate of the deceased the said property ought to be distributed to the petitioner and Moses Kirai in equal shares.

[29] The interested party stakes claim in **KIBIRICHA/ KIBIRICHA/2011** and seeks the protection of court under section 93 of the Law of Succession Act which provides;

93(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this act.

(2) A transfer of immovable property by a personal representative to a purchase shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.”

[30] On 3rd December 2012 the Interested Party was issued with title to Parcel No. 4546 measuring 0.20 HA. He subdivided the said land into parcel Nos. 4786, 4787, & 4788 and now owns plot No. 4786 measuring 0.055 HA. He has title to Parcel No. KIBIRICHA/KIBIRICHA/4786 which was issued on 30th October 2013. He attests that he bought the property from the petitioner who had valid title after the petitioners and objectors deliberations with the Njuri Ncheke in the Land Dispute Tribunal made on 2nd December 2005. The decision however did not in any way confer title to the petitioner. It was the decision of the Njuri Ncheke that the land be transferred to Moses Karia and that it was Moses Karia who was to facilitate the processing fee. This did not in any way give the petitioner any colour of right to transfer the property to the interested party.

[31] In **Jane Gachola Gathetha vs. Priscilla Nyamira Gitungu and another (2006) eKLR** where a purchaser claimed that he was not aware of, and was not party to the fraudulent dealings in relation to the title in issue and was therefore not only protected under **Section 93(1)** of the **Law of Succession Act (Cap 66)** but also **Section 143** of the **Registered Land Act** the court of Appeal in Nyeri stated this:-

“We think with respect, that there is a fallacy in invoking and applying the provisions of Section 93(1) of the Law of Succession Act and the Superior Court fell into error in reliance of it. The section would only be applicable where firstly there is a transfer of any interest immovable or moveable property. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void abinitio and the property is traceable.”

[31] In **Re-Estate of Christopher Aide Adela (Deceased) (2009) e KLR Rawal J**, (as she then was) held:-

“As per my considered view, Section 93(1) of the Act talks of interest for immovable or movable property and Section 93(2) refers to transfer of immovable property. Obviously both provisions talk of different types of transfer and Section 93(2) protects a purchaser of the immovable property only if he was aware of some liabilities or expenses of the estate which are not met or paid and still got the property transferred in his names. The aspect reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of Section 23 of the Registered Land Act (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal actions prejudicing the interests and rights of right beneficiaries of the estate.”

[32] See also **Monica Adhiambo v Maurice Odero Koko [2016] eKLR & John Kiriinya Nduma M’kirera v Esther Gaceke Solomon & 5 Others & 2 others [2017] eKLR** where the Administrator transferred the property after the grant was confirmed but the Court issued inhibitory Orders against the transfers. The Court held that the purchasers cannot have such benefit against the beneficiaries of the estate.

[33] In this case, the interested party benefited from the estate with the full knowledge that the property did not vest in the petitioner. His initial title was issued after subdivision of KIBIRICHA/KIBIRICHA/2011. The petitioner herein did not have authority to grant title to the interested party because as stated in **Jane Gachola Gathetha vs. Priscilla Nyamira Gitungu and another (2006) eKLR** one cannot acquire any property in stolen property.

[34] The court cannot also confer title to the interested party herein. The result therefore is that all subsequent subdivisions arising therefrom i.e. **KIBIRICHA/KIBIRICHA/4546, 4547, 4786, 4787 & 4788** are cancelled and shall revert back to **KIBIRICHA/KIBIRICHA/2011**.

[35] The objector's claim in **KIBIRICHA/KIBIRICHA/2011** is justified and I agree with her averments that it should devolve for the benefit of the 2nd House. Accordingly, it ought to be shared equally amongst **Jennifer Kathuni Nguchine, Mariam Kanyua Nguchini and Grace Mwai Nguchini**.

[36] In relation to **KIBIRICHA/KIBIRICHA/2014** I do not find any evidence that it was a gift to Henry Muthee. A gift inter vivos premised solely on mere allegations cannot pass unless the gift is proved as required in law. As the alleged gift is of immovable property and no transfer or deed instrument was executed by the deceased, such gift would be incomplete or imperfect.

[37] On this subject of incomplete or imperfect gifts see **Halsburys Laws of England** which states in 4th edition volume 20 (1) at Paragraph 64 as follows

“....If a gift is to be valid, the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do”.

[38] Henry Muthee is a Son of the petitioner and he could be just the perfect way of the petitioner to get double portion of the estate and so he concealed this is his son or misrepresented deliberately that Henry was the son of the deceased.

[39] In the absence of cogent evidence that the deceased made a gift inter vivos to him, I find that the deceased did not make any gift to Henry Muthee and as such the property did not pass to him. Given also that the daughters of the estate have been discriminated against and disinherited the property should pass to the daughters of the deceased except **Jennifer Kathuni Nguchine, Mariam Kanyua Nguchini and Grace Mwai Nguchini** whom I have provided for above.

[40] In the upshot, I order that the estate shall be distributed as hereunder;

KIBIRICHA/KIBIRICHA/2014 to be shared equally amongst:-

Joyce Gitori, Esther Kathanga Nguchine, Naomi Muthomi, Harriet Kinanu, Gacheri Nguchine, Angelica Kairigo Nguchine and Karwirwa Nguchine

KIBIRICHA/KIBIRICHA/2011

Jennifer Kathuni Nguchine, Mariam Kanyua Nguchini and Grace Mwai Nguchini to share equally.

KIBIRICHIA/KIBIRICHIA/439

Thuranira Nguchine and Kirai Nguchine to share equally.

Grant now made to petitioner and objector and is confirmed as above.

No orders as to costs.

Dated, signed and delivered in open court this 21st day of January, 2019

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F. GIKONYO

JUDGE

In presence of

Mwirigi for E.G Mwangi for objector

Anampiu for petitioner

Mwiti for Kiogora for interested party.

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F. GIKONYO

JUDGE