



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 3 OF 2005**

**IN THE MATTER OF THE ESTATE OF M'AMANJA M'ITHINYAI (DECEASED)**

**FLORENCE NKATHA PAUL .....APPLICANT**

**VS**

**JULIUS M'NDEGWA M'AMANJA.....1<sup>ST</sup> PETITIONER**

**DANIEL K. M'TWARUCHIU.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**1. M'AMANJA M'ITHINYAI (“the deceased)** to whom this Succession Cause relates, died on 26<sup>th</sup> October 1984. The Chief’s letter of introduction dated October 2004 stated that the deceased is survived by:-

1. Joanina Mwarionjiru - Widow
2. Julius M’Ndegwa - Son
3. Florence Nkatha - Daughter

And that his estate comprises of:-

Kiirua/Ruiru/251 and Nyaki/Chugu/1.

2. The petitioner, Julius M’Ndegwa M’Amanja, petitioned for grant of letters of administration intestate which were issued to him on 18<sup>th</sup> April 2005. The grant was confirmed and certificate of confirmation of grant was issued on 5<sup>th</sup> October 2006.

3. Thereafter, the applicant filed summons for revocation or annulment of grant dated 17<sup>th</sup> September 2012 pursuant to **Section 76 of the Law of Succession Act, Rule 26, 44, 49 and 73 of the Probate and Administration Rules and all other enabling provisions of the law** where she sought among other orders annulment/revocation of the grant letters of administration intestate issued to the petitioner.

4. The grounds upon which her application is grounded as set out in the application and the supporting affidavit sworn by Florence Nkatha Paul on 3<sup>rd</sup> September 2012 include:-

- i. That the grant was obtained fraudulently by making a false statement or by concealment from the court of something material to the case.
- ii. That the petitioner filed this cause secretly, without her consent
- iii. That the petitioner failed to give her rightful share of the estate of their father when he was survived by the two of them.
- iv. That the petitioner has greatly intermeddled with the estate by selling part of it.

5. This application was opposed vide the replying affidavit of Julius M’Ndegwa M’Amanja sworn on 11<sup>th</sup> October 2012 who deposed that it is not true that he filed the cause secretly as the applicant brought him the forms needed for this cause. That the applicant is an old woman of about 70 years who is married with adult children and she has never expressed any desire to get any share of the estate. The deceased left the two pieces of land for him to inherit save for one acre which he gave the applicant out of land parcel No. Kiirua/Ruiru/251. As for L.R.

Nyaki/Chugu/1 the deceased left it for him to own absolutely and which he sold after advising the applicant and she did not object to the sale. He declared that the applicant is being pushed by 3<sup>rd</sup> parties to claim while all along she knew the truth. He stated that the applicant has no genuine claim as she has not claimed her one acre from Kiirua/Ruiri/251.

6. The 2<sup>nd</sup> Respondent also opposed the application through his replying affidavit sworn on 7<sup>th</sup> August 2018. He deposed that he is an innocent purchaser as he bought land from the petitioner after the cause had been successful and grant issued to that effect. He argued that, from the records at the lands registry it is evident that since 2007 until the land was transferred to his name there was no encumbrance. After he bought the land he took possession and has developed it extensively. He was not aware whether or not the petitioner followed the law in respect to the cause but prays that his interest in the land be considered and protected. But since the petitioner is a beneficiary he ought to be considered into his share in the estate.

7. **OB1 Florence Nkatha** tendered into evidence her statement dated 13<sup>th</sup> February 2017. She affirmed that she did not give the petitioner the succession forms as alleged. She also denied that their father said that she should only get one acre. She stated that the deceased did not say anything about sharing of his land. She asserted that Daniel is not known to her and that she did not know whether Julius had sold to him their father's land as Julius did not consult her. She proposes that the estate be distributed equally amongst the two children of the deceased.

#### **Submissions**

8. This matter was canvassed by way of written submissions. The applicant submitted that **Section 38 of the Law of Succession Act** provides for equal distribution among children of the deceased and does not distinguish between sons and daughters or make distinction between married and unmarried daughters. She prays for cancellation of the title deed in respect of land parcel number Nyaki/Chugu/1 issued to the 2<sup>nd</sup> respondent and relies on the case of **Re Estate of Christopher Jude Adela (deceased) [2009] eKLR.**

9. The 2<sup>nd</sup> respondent in his submissions to support his claim relied on **Section 93 of the Law of Succession Act** as an innocent purchaser. He also made reference to **Adrian Nyamu Kiugu v Elizabeth Karimi Kiugu & Another [2014] eKLR** and **Jecinta Wanja Kamau v Rosemary Wanjiru Wanyoike & Another [2013] eKLR.**

#### **ANALYSIS AND DETERMINATION**

10. I have thoroughly perused the application, the affidavits, submissions and statements of parties as well as the entire record. Two issues emerge, namely:-

**i. Whether or not to revoke and or annul the grant of letters of administration intestate issued to Julius M'Ndegwa on 8<sup>th</sup> April 2005 and confirmed on 2<sup>nd</sup> October 2006; and**

**ii. how the estate should be distributed**

#### **Of revocation or annulment of grant**

11. **Section 76 of CAP 160** stipulates the grounds upon which the court may revoke or annul a grant of representation. In this cause, the applicant stated that the grant was obtained fraudulently by making a false statement or by concealment from the court of something material to the case; and that the petitioner filed this cause secretly and without her consent.

12. It will profit this decision to resort to **Section 66 and Part V of the Law of Succession Act** on order of preference in applying for grant of representation. At the top of the list is the surviving spouse followed by other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided by Part V.

13. The petitioner filed this cause and stated that the deceased was survived by a spouse and two children. See the Chief's letter. Although the chief's letter stated that the family agreed that the petitioner be the one to take out the letters of administration, there is nothing to show that consent to that effect was sought and or obtained from the surviving spouse or the applicant. The petitioner's claim that the applicant brought him forms to apply for letters is not supported by evidence. Similarly, his contention that the applicant was well aware of the cause is mere allegations. All pointers are that he filed the cause without her knowledge and consent.

14. Accordingly, neither the surviving spouse nor the applicant gave consent to the petitioner to apply. Similarly, none of them gave any formal renunciation of right to apply. Notably, the widow and daughter stood in priority and equality to the petitioner in applying for grant respectively and their consent is important. The time the chief's letter was written and petition documents filed, the widow was alive. On this see **Rule 7 (7) of the Probate and Administration Rules** which states:

**“(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 writing to the making of the grant to the applicant; or**

(c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.”

15. See also **Rule 26 of the Probate and Administration Rules**. Upon perusal of the record, I find no evidence to support the allegation made by the petitioner that he had the consent of the applicant. Consent **Form 38 or 39** is not in the record. Accordingly, the petitioner acted alone without the knowledge of the other beneficiaries. Accordingly, this grant is a perfect candidate for revocation. The grant of letters of administration intestate issued to Julius M’Ndegwa M’Amanja on 8<sup>th</sup> April 2005 and confirmed on 2<sup>nd</sup> October 2006 is hereby revoked. In light of the circumstances of the case, fresh grant of letters of administration shall be issued to JULIUS M’NDEGWA M’AMANJA and FLORENCE NKATHA PAUL.

#### **Distribution**

16. The deceased died intestate and is survived by his two children. Thus, the guiding provision of the law would be **Section 38 of the Law of Succession Act** which states:

**“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”**

17. By this principle of equality all forms of discrimination on the basis of sex, marital status or any other grounds is eliminated. The retired **Constitution of Kenya under Section 82** protected persons from all forms of discrimination. The current **Constitution of 2010 under Article 27** is more robust and has stamped out all forms of discrimination. Section 38 of the Law of Succession Act is an existing law as at the effective date of the Constitution and is perfect in line with the Constitution especially **Article 27**. Therefore, the estate of the intestate is divided equally among all the surviving children without caring whether the child is a son or daughter. The offensive practices and tradition which discriminated against daughters in inheritance has been shoved aside; it has received a lethal injection and its ebb will flow or rise again. Being guided by the law, the estate of the deceased this cause shall be distributed equally amongst his surviving children who are the applicant and the petitioner 1<sup>st</sup> respondent.

18. But before I close, I need to determine two other issues herein. One, the position of the purchaser herein. And two, the purported gift of one of the estate properties to the petitioner.

#### **Purchaser’s position**

19. The petitioner sold L.R. Nyaki/Chugu/1 measuring 0.39 Ha to the 2<sup>nd</sup> Respondent. From the record it shows that they entered into an agreement on 25<sup>th</sup> October 2011 however the green card shows that the 2<sup>nd</sup> Respondent was issued with the title deed on 11<sup>th</sup> October 2011. This raises a red flag in that how can one get title to land before entering into an agreement. Nevertheless, this parcel of land was transferred to the 2<sup>nd</sup> respondent after certificate of confirmation of grant had been issued on 5<sup>th</sup> October 2006.

20. The 2<sup>nd</sup> respondent affirmed that he is an innocent purchaser and seeks to protect his transfer through **Section 93 of CAP 160**. The effect of this section has been clearly explained in cases without number but I do not wish to multiply them except to cite the case of **Monica Adhiambo v Odero Koko [2016] eKLR** where it was stated in part that:

**“With that said, the fact that the petitioners title over the original suit land was revoked will automatically affect the interested parties ownership over the suit property because it will be a corruption of the law to validate how the original suit property belonging to the deceased was transferred to the petitioner. The fact remains that the petitioner stole a march over the other beneficiaries who were also to benefit on equal status in the property of the deceased and it would be unfair to validate the illegal actions of the petitioner by invoking Section 93 of the law of Succession Act. The reality of the situation is that provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawfully issued then, Section 93 can come to the rescue of such a purchaser.”** (emphasis added)

21. The petitioner obtained the grant herein fraudulently and without following the requirements of the law such as; he did not obtain relevant consent- I find this to be a stealth and contrived design by him to disinherit his sister. **Section 93** cannot therefore offer any protection to a transaction which is founded on fraudulent grant, and therefore, unlawful. It bears repeating that the section is not intended to validate illegal and fraudulent actions of the petitioner which are bent to disinheriting his sister.

#### **Alleged gift inter vivos**

22. The petitioner sold L.R. Nyaki/Chugu/1 and enjoyed the fruits of the sale alone. I note however that the 2<sup>nd</sup> respondent has taken possession and made developments on the land. In his affidavit the petitioner declared that the said parcel of land was given to him exclusively to own by the deceased. This was denied by the applicant. Other than making the generalized statements thereto, the petitioner did not prove there was any gift inter vivos made to him by the deceased. Accordingly, this parcel of land forms part of the estate property. Nonetheless, I note that he is keen on having this land go to the 2<sup>nd</sup> Respondent. He will have to deal with his own transgression and so I will make this land to be part of his share. I am guided by **Section 28 (d) of CAP 160**.

23. From the record, there is no green card or any documentation which can show what acreage land parcel No. Kiirua/Ruiiri/251 is. But from the petitioner’s statement he stated that he has ten children and each got one acre and thereafter he remained with the balance of 2.6 Acres. Thus, this means that the said parcel of land measures about 12.6 acres.

24. From the foregoing this court makes the following orders:

a. The grant of letters of administration intestate issued to Julius M’Ndegwa M’Amanja on 8<sup>th</sup> April 2005 and confirmed on 2<sup>nd</sup> October 2006 are hereby revoked.

b. Fresh grant of letters of administration be issued to JULIUS M’NDEGWA M’AMANJA and FLORENCE NKATHA PAUL.

c. The grant of letters of administration issued to JULIUS M’NDEGWA M’AMANJA and FLORENCE NKATHA PAUL is confirmed.

d. The estate shall be distributed as follows:

1. L.R. NYAKI/CHUGU/1 measuring 0.39Ha (0.96 Acres)

i. Daniel Kirima M’Twaruchiu

2. LAND PARCEL NO. KIIRUA/RUIRI/251 measuring 12.6 Acres shall be shared between:-

i. Florence Nkatha Paul - whose share shall be larger than that of Julius by 0.39 Ha

ii. Julius M’Ndegwa M’Amanja - balance.

Dated Signed and delivered in open court at Meru this 17<sup>th</sup> day of January, 2019

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**F. GIKONYO**

**JUDGE**

In presence of

Mutuma for applicant

Ann for petitioner – absent

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**F. GIKONYO**

**JUDGE**