



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 140 OF 2011**

**In The Matter Of The Estate Of the Late M'mungania M'mwongera- Deceased**

**M'NKANATA M'MWONGERA.....PETITIONER**

**Versus**

**JACOB KINYURU M'MUGANIA.....OBJECTOR**

**JUDGMENT**

1. **M'MUNGANIA M'MWONGERA** (“the deceased”) died intestate on 16<sup>th</sup> January 2011. A letter of introduction dated 5<sup>th</sup> January by the district officer of Abothuguchi West listed the following as the deceased’s survivors;

- 1) Sabella Mwari M'Mungania - Wife
- 2) John Kinyua M'Mungania - Son
- 3) Stanley Murerwa M'Mungania - Son
- 4) Jacob Kinyuru M'Mungania - Son
- 5) Gacheri M'Mungania - Daughter
- 6) Kagwiria M'Mungania - Daughter
- 7) Kirumba M'Mungania - Daughter
- 8) Kanana M'Mungania - Daughter

2. The petitioner M'Nkanatha M'Mwongera, a brother to the deceased petitioned for grant of letters of administration and listed Land Parcel No. **ABOTHUGUCHI/KATHERI 590** measuring 2.83 Ha, as the only asset of the deceased. He was granted letters of administration on 1<sup>st</sup> October 2012. On 25<sup>th</sup> February 2014 he was issued with a certificate for confirmation of grant.

3. The petitioner had a case in court with the deceased involving Land Parcel No. **ABOTHUGUCHI/KATHERI 590**, as indicated in the chief’s letter of introduction. The petitioner also filed chamber summons asking the court to lift an inhibition issued against the said piece of land in **MERU HCCC NO. 53. OF 1997**. This was granted by an order dated 27<sup>th</sup> March 2015.

4. Jacob Kinyuru vide Summons dated 16<sup>th</sup> January 2018 applied for the court to issue an order of inhibition to inhibit any dealing with Parcel No. **ABOTHUGUCHI/KATHERI/590** and review its orders dated 18<sup>th</sup> October 2018. He also requested the court to set aside the confirmation of grant and either strike out the cause and order the dispute herein to be determined in the pending **Meru High Court Civil Case No. 53 of 1997**. He also asked the court to cancel the registration of the petitioner in parcel no ABOTHUGUCHI/KATHERI/590 and the property to revert back into the name of the deceased. The reasons given are that; Meru high court Civil Case No. 53 of 1997 is still on-going; that the said parcel of land had never been family land; they have discovered new important point to prove so and that the objectors case was weakened by blunders from former counsels

5. This case was heard vide oral evidence. **OW1 JACOB KINYURU M'MUNGANIA** in his affidavit sworn on 16<sup>th</sup> January 2018 and Supplementary Supporting Affidavit dated 18<sup>th</sup> July 2018 averred that the deceased herein is his father. He lives on Land Parcel No. **ABOTHUGUCHI/KATHERI/590** and that **ABOTHUGUCHI/KATHERI/541** where his grandfather was buried is their original ancestral

land. They have managed to trace a person by the name of **SILAS MUTUA M'MUKINDA** son to the person who sold Parcel No. **ABOTHUGUCHI/KATHERI/590** to the deceased. The petitioner sold the ancestral land, **ABOTHUGUCHI/KATHERI/541** to **M'IKIUNGU M'ITARAKWA** and bought around **ONTULILI/ONTULILI/BLK 1 KATHERI/597**. The petitioner realized that his father was mentally unstable and sued him for the disputed land. Additionally the petitioner would not have agreed to be chased away from the land if it were ancestral land and that his sons are pushing him in this cause because they know the applicants have a bigger piece of land in Nanyuki.

6. **OW1**, stated that the cause herein is procedurally wanting since there is a pending Meru High Court Civil Case No. 53 of 1997 over the disputed piece of land. They had instructed their former advocate G.G MUGAMBI to pursue the citation issue but he did not, therefore letting them down. OW1, therefore prays that the disputed parcel be inhibited to stop further alienation of the parcel.

7. **OW2, SILAS MUTUA M'MUKINDIA**, in his affidavit sworn on 16<sup>th</sup> January 2018 averred that he is the son to Stephano M'Mukindia, who sold Parcel No. **ABOTHUGUCHI/KATHERI/590** to the deceased for 5 sheep before registration of parcels took place. He further stated that his father later sold 100 trees on the site to the deceased for 5/= shillings each. He indicated that the petitioners' father is buried on Land Parcel No. **ABOTHUGUCHI/KATHERI/541** which is currently registered in the name of **M'IKIUGU M'ITARAKWA** to whom the petitioner sold the land and moved to Nanyuki.

8. **PW1 M'Nkanata M'Mwongera** in his affidavit sworn on 12<sup>th</sup> March 2018 and a further replying affidavit dated 21<sup>st</sup> July 2018 averred that Land Parcel No. **ABOTHUGUCHI/KATHERI/590** is ancestral land and was never bought by the deceased. A copy of the register for the land in dispute (marked MM3) shows that the land was not bought by anyone as the deceased was the first registered owner. Land Parcel No. **ABOTHUGUCHI/KATHERI/541** has always belonged to M'Mikiungu M'Itarakwa alias Ikungu S/O Marete. His father was buried on the aforementioned land because of the declaration of state of emergency in Kenya in 1952, the area bordering Mt Kenya forest where **ABOTHUGUCHI/KATHERI/590** was situated was declared a special area and all people living there were required by the colonial government to move out of their land. M'Ikiungu M'Itarakwa allowed their father and his family to temporarily settle on his land on condition that he will return to his land after the end of the emergency. However their father died and M'Ikiungu M'Itarakwa allowed them to bury their father on his land.

9. **PW1**, further stated that after the state of emergency they moved back to **ABOTHUGUCHI/KATHERI/590** and the land was registered in the name of the deceased herein. He added that it is true that he sued the deceased in **Meru HCC No. 53 of 1997** claiming a share. However, he applied for the executive officer of this court to be appointed as guardian ad litem of the deceased after the applicant refused to be appointed so. He indicated that the suit had already abated and has been overtaken by events.

10. **PW1**, also indicated that he does not live in Nanyuki as alleged by the Objector/applicant and that he lives at **ONTULILI (KATHERI)** in his land parcel No. **ONTULILI/ONTULILI/ BLOCK 1 KATHERI/597** which he bought. **PW3 MARTHA GAUKU MWOGERA**, in her affidavit sworn on 12<sup>th</sup> March 2018 reiterated this.

11. **PW2 STANELY GITUMA M'IKIUNGU** in his affidavit dated 12<sup>th</sup> March 2018 avowed that **ABOTHUGUCHI/KATHERI/541** was their ancestral land and prior to the demarcation, adjudication and subsequent registration of the said land was registered in the name of his father Ikiungu S/O Marete alias M'Ikungu M'Itarakwa in 1963 (as indicated in SGM1) as the 1<sup>st</sup> registered owner. He restated what **PW1** averred that because of the state of emergency the petitioner's father approached his father and requested that he allow his family to temporarily settle in his land.

## **ANALYSIS AND DETERMINATION**

12. I have carefully considered the facts of this case and the written submissions. The issues for determination are-;

*a) Whether Order of review is merited. Naturally, orders of setting aside the property in issue to await determination of its ownership in a pending suit, of inhibition and cancellation of titles shall abide by the determination of review request.*

*b) Who is entitled to **ABOTHUGUCHI/KATHERI/590**?*

### **Of review**

13. The objector has sought for a review of orders that were made on 18<sup>th</sup> October by this court. **In re Estate of Livingstone M'mungania (Deceased) [2018] eKLR** the court held that;

*".....There are certain orders of the Civil Procedure Rules that imported to matters of Succession and Order 45 is one of them. This is provided for under Rule 63 of the Probate and Administration Rules. Order 45 Rule 1 provides that:-*

*"(1) Any person considering himself aggrieved—*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay".*

***For this court to exercise its jurisdiction under the said Order and grant a review, there must be discovery of new and important matter or evidence which was not within the knowledge or could not be produced at the time by an applicant; or on account of a mistake or error apparent on the record or any sufficient reason. In addition the application must be made timeously.”***

14. The Applicant/Objector stated in the summons that they had discovered new and important point that the parcel in dispute was not family land. They relied on the testimony of OW2 Silas Mutua who stated that his father had sold the land to the deceased. Discovery of new evidence has been pleaded. In law, application for review shall not be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation. For what the evidence by OW2 is worth, it was not shown that the witness or evidence by him was not within their knowledge or that the witness and evidence by him could not have been produced when the matter was decided. That aside, the petitioners produced a copy of the register of the said parcel which showed that the deceased was the first registered owner. In the face of this record, evidence by OW2 without the relevant documents which underpin the registration, is not formidable. In any case, the cumulative effect of these matters is that the evidence by OW2 is not a discovery of new important evidence in the sense of the law which could not have been adduced when the matter was determined. It cannot found a review of the orders. I reject the request for review.

15. With the foregoing decision, all the other requests fall by the wayside and I should just stop there. However, for completeness of record and proper evaluation of all matters before me I will consider the other requests and arguments thereto.

#### **Striking out of suit**

16. The Applicants/Objectors applied that this cause be struck out and the dispute herein to be determined in the Pending Meru HCCC No. 53 of 1997 or allow the objectors objection to be heard on merit. The petitioner contended that the suit had abated following the death of the deceased. I am aware of **Order 24 rule 4 (4) of the Civil Procedure Rules** which provides as follows;

***“4. (1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.***

(2) .....

***(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased Defendant.***

17. On abatement of suit, I will sat this. The suit concerns ownership of the suit property- a jurisdiction reserved by article 162(2) of the Constitution to the Environment and Land Court. Therefore, abatement of the said suit is a matter to be litigated in that suit. The argument is not profitable in these proceedings.

18. In addition, a request for striking out of a succession cause should be thought out carefully and the reasons thereof evaluated with clarity of mind, for such draconian order would only be granted in proper and clear cases. Striking of succession causes is a grave matter which not only impinges on rights of beneficiaries but also power of court over the estate of the deceased. The reason given herein may prompt action under rule 41(3) of the Probate and Administration Rules and perhaps have the contested land set aside to await a determination of ownership thereof by ELC but not striking out of proceedings. Of greater value is that these arguments and requests are coming after confirmation of grant whereupon this court is *functus officio*. The only option is for the applicants to pursue the pending suit and obtain a decree, and armed with such decree, approach this court for implementation of the decree.

#### **Inhibition**

19. Given what I have stated, Inhibition on any dealings with **ABOTHUGUCHI/KATHERI/590** cannot issue. The said request made in the Chamber Summons dated 11<sup>th</sup> October 2016 by the Objector/Applicant fails. I will give ample reasons for this; the request was considered and determined in a ruling of this court dated 18<sup>th</sup> October 2017. I therefore, agree with the petitioners that this second request would amount to an abuse of court process. Again, I agree that it is against the policy on bringing closure to litigation. See **section 7 of the Civil Procedure Act** on *res judicata*.

#### **Claim of ancestral land**

20. The Applicant/objector claimed that **ABOTHUGUCHI/KATHERI/590**, is not ancestral land and therefore the petitioner has no claim over it. The petitioner in his affidavit and submissions explained in depth as it was and gave documentary evidence in support of his claim. Copies of the register of the land in dispute show that the deceased was the first owner. This is sufficient for the purposes of these proceedings. The challenge by the applicant on ownership of the land should be canvassed in the correct forum; ELC. I have dealt with the evidence by Stephano M’Mukindia.

21. Consequently, I find nothing on which to disturb the confirmation of grant herein. Application for review, striking out of suit, inhibition and cancellation of title is hereby rejected. No orders as to costs.

**Dated, signed and Delivered in open court at Meru this 17<sup>th</sup> day of January 2019**

.....

**F. GIKONYO**

**JUDGE**

**In presence of**

**Kimathi for Nyamu for Petitioner**

**Ogoti for Objector**

.....

**F. GIKONYO**

**JUDGE**