



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 220 OF 1991**

**In The Matter Of The Estate Of Muthuri Mwitari (Deceased)**

**JOSEPH GITUMA MWITARI.....PETITIONER**

**Versus**

**MONICA KABERE KWANDA.....1<sup>ST</sup> OBJECTOR**

**PETER MURUNGI NTHUURI.....2<sup>ND</sup> OBJECTOR**

**BEATRICE NKIROTHE.....3<sup>RD</sup> OBJECTOR**

**JUDGMENT**

[1] **MUTHURI MWITARI (“the deceased)** to whom this Succession Cause relates, died on 25<sup>th</sup> November 1990. The Chief’s letter of introduction dated 31<sup>st</sup> August 1991 stated the deceased was survived by one son Joseph Gituma M’Mwitari and left behind parcel No. ABOTH/GAITU/320.

[2] The petitioner petitioned for grant of letters which were issued to him on 17<sup>th</sup> June 1992. The grant was confirmed and a Certificate of Confirmation of Grant was issued on 6<sup>th</sup> September 1993.

[3] On 9<sup>th</sup> November 2015 summons for revocation or annulment of grant dated 9<sup>th</sup> November 2015 were filed before this court and brought pursuant to **Section 76 of the Law of Succession Act CAP 160, Rule 44 (1) of the Probate and administration Rules** and **Section 68 of the Land Registration Act 2012**. Therein, the objectors seek among other orders;

- (a) Revocation and or annulment of the grant of letters of administration intestate issued to Joseph Gituma M’Mwitari;
- (b) Cancellation of titles to land parcels LR No. Abothuguchi/Gaitu/1932, 1933, 1934, 1936, 3413, 3414, 2848 and 2851 registered in the name of the petitioner and to revert back to the name of the deceased and
- (c) The estate to be distributed equally amongst the dependants/beneficiaries.

[4] The application is premised upon grounds set out in the application and the supporting affidavit of Monica Kabere Kwanda sworn on 9<sup>th</sup> November 2015. It is contended that the grant is defective as it was obtained fraudulently by false statements and untrue allegations of fact. They argued that the petitioner misrepresented, concealed and misguided the court that the deceased was survived by one child, that is, the petitioner. They stated that the deceased has the following dependants:

**First House**

1. Mariamu Mukami Nthuri (wife deceased)
2. Jonathan Gitonga Mbui (son, deceased)
3. Joseph Gituma Mwitari (son)
4. Monica Gituma Mwitari (daughter)

## Second House

1. Martha Kaguna Ntuuri (wife deceased)
2. Peter Muriungi Thuri (son)
3. David Kimathi Muthuri (son)

[5] That the deceased left behind parcel No. ABOOTH/GAITU/320 which the petitioner divided into seven portions that is Abothuguchi/Gaitu/1930, 1931, 1932, 1933, 1934, 1935 and 1936. He went further and subdivided parcel No. 1930, 1931 and 1935. Parcel No 1930 was sub divided to Nos. 3413 and 3414; parcel No. 1931 was subdivided to No. 3431; and parcel No. 1935 was subdivided to Nos. 2848, 2849, 2850 and 2851. He then sold parcel Nos. 2849 and 2850 to David Mwirigi and Lucy Kareia Muriungi respectively. Now he is moving with speed to evict the objectors herein in order to dispose of the other parcels.

[6] The application was opposed vide the replying affidavit of Joseph Gituma Mwitari sworn on 24<sup>th</sup> September 2018. He stated that he filed this succession cause with the full knowledge of all the beneficiaries and that he followed the law as stipulated in obtaining the grant of letters of administration of the estate. He asserted that it was agreed that he be the administrator and custodian of land parcels LR No. Abothuguchi/Gaitu/1932, 1933, 1934, 1936, 3413, 3414, 2848 and 2851 to be registered under his name.

### **Submissions**

[7] This matter was canvassed by way of written submissions. The petitioner submitted that the petitioner never misrepresented himself as the only child of the deceased as there is a proper protocol stipulated in the Law of Succession Act that needs to be followed before one can be granted the letters of administration. He argued that they have reached an out of court settlement with all the parties. He stated that David Kimathi Muturi who was listed as a son of the deceased by the objectors is not a son but a stranger to the estate.

### **ANALYSIS AND DETERMINATION**

[8] On 13<sup>th</sup> December 2018, Igweta Muriithi & Co Advocates who are representing the objectors filed consent dated 10<sup>th</sup> December 2018 which has been signed by all parties. In the consent the 1<sup>st</sup> objector relinquished her interest in the estate; the 2<sup>nd</sup> objector accepted the whole of Abothuguchi/Gaitu/3431 and 3<sup>rd</sup> objector accepted to get 2 acres to be excised from Land parcel Abothuguchi/Gaitu/1934.

[9] In passing, I should point out that all children of the deceased, male or female or of other gender, are equal in the eyes of the law. And, none should be discriminated upon on the basis of any of the prohibited grounds set out in article 27 of the Constitution. In my experience as a judge, I have noted that proponents of patriarchy discriminate against women because they are women or that they are married or are married and happy in their marriages. But all these are prohibited grounds of discrimination to wit gender, sex or status. In fact, the principle of equality had already been enshrined in **Section 38 of the Law of Succession Act** which states that

***“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.”***

[10] In this case it seems that the petitioner is getting a larger share as compared to the rest of the children of the deceased. However, parties have consented on how the estate is to be distributed. I need not state that a lawful consent buries everything underneath and the court is accordingly guided. Nothing has been placed before the court which impeaches the said consent. See the stringent test of setting aside consent that was set out by the Court of Appeal in the case of **Brooke Bond Liebig (T) Limited vs. Mallya [1975] E.A.** which stated as follows:

***“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani v. Kassam (1952), 19 E.A.C.A. 131, where the following passage from Seton of Judgments and Orders, 7<sup>th</sup> Edn., Vol. I, p. 124 was approved:***

***“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”***

[11] No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion. All material facts were known to the parties, who consented to the distribution herein. The consent was the later filing and so I can safely state that the revocation application has been overtaken by subsequent events. Accordingly, the following orders commend themselves to me;

(1) I hereby dismiss the application for revocation with no orders as to costs; and

(2) I adopt the consent dated 13<sup>th</sup> December 2018 as judgment of the court. Accordingly, the petitioner shall transfer the whole of Abothuguchi/Gaitu/3431 to Peter Muriungi Mthuri and 2 acres out of Abothuguchi/Gaitu/1934 to Beatrice Nkire as stipulated in the consent.

Dated Signed and delivered in open Court at Meru this 16<sup>th</sup> Day of January, 2019

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**F. GIKONYO**

**JUDGE**

**In presence of -:**

Mr. Kiogora for M/S Soy for petitioner – present

Igweta for objector – absent

3<sup>rd</sup> objector - present

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**F. GIKONYO**

**JUDGE**