



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 15 OF 2013**

**IN THE MATTER OF THE ESTATE OF SAMUEL KIRUKI M'NYIRUU ALIAS SILAS KIRUKI M' NYIRUU Alias SAMUEL G.F KIRUKI**

**SAMSON MUTUA M' NJIRUU.....PETITIONER**

**VERSUS**

**DINAH KAWIRA NKABO.....OBJECTOR**

**MIKE MUTHAMIA MBAYA.....INTERESTED PARTY**

**JUDGEMENT**

1. The deceased herein of **Samuel Kiruki M'Nyiruu** died on 25<sup>th</sup> September 2009 and as per the letter of the Chief Ntima location dated 2<sup>nd</sup> August 2012 he left behind the following dependant; **Ruth Kamani M' Muiguika (sister-75yrs), Julia Wanja M' Niru (sister-65yrs) and Samson Muta M'Nyiruu (brother-58yrs)**.
  2. The petitioner herein petitioned for letters of Administration on 14<sup>th</sup> January 2013 listing the beneficiaries as per the letter of the Chief. He also listed the following as properties of the estate i.e. **Abothuguchi/Katheri/969, Ntima/Igoki/2778 & Ntima/ Igoki/3003**. The same was gazetted on 26<sup>th</sup> April 2013 and letters of Administration issued on 3<sup>rd</sup> June 2013. The petitioner filed summons for confirmation of grant on 16<sup>th</sup> May 2014 granting himself all the properties of the estate. The grant was confirmed on 17<sup>th</sup> July 2014 By Hon. J.A. Makau and a Certificate of Confirmation of grant issued on the same day.
  3. The objector herein, **Dinah Kawira Nkabo**, filed objection proceedings on 29<sup>th</sup> July 2015 claiming that she is a daughter of the deceased and that the petitioner had fraudulently concealed this material fact to this Honourable Court. That she has actually filed a Succession cause in **Meru Succession Cause No. 660 of 2014 In the matter of the Estate of Silas Kiruki M' Nyiruu**. In the Succession Cause she has attached a letter from the Chief- Katheri West Location that stated the deceased left behind **Jennifer Kaari Njagi (wife) & the Dinah Kawira Nkabo (daughter)**.
  4. She also prayed for inhibitory Orders over the deceased estate and equally stated that the petitioner herein has already sold Ntima/ Igoki/2778 to Mike Muthama Mbaya the interested party herein. This Honourable Court considered the Objectors application and on 31<sup>st</sup> August 2015 issued inhibitory Orders to the estate of the deceased.
  5. The Interested party, **Martin Muthamia Mbaya** Filed an Affidavit dated 18<sup>th</sup> March 2016 claiming that he was an innocent purchaser for value and that he purchased the property in Ntima Igoki/2778 from the petitioner herein through a Sale Agreement dated 12<sup>th</sup> July 2015 and for a value of Kshs. Twelve Million (Kshs.12,000,000/=).
  6. The matter then proceeded via viva voce Evidence. The objector called 9 witnesses, the petitioner called 5 witnesses whereas the interest Party called 1 witness.
- Objectors Testimony**
7. **Jeniffer Kaari, Obw1** was the first to testify. She averred that she first knew the deceased in the year 1978 when she was working as a Secretary and the deceased was working in the Cooperative Society- Ministry. That she got pregnant in the same year and Dinah Kawira was born in March 1979. That she was introduced to the family of the deceased and also attended the burial of the deceased parents i.e. Naomi & M'Nyira who were buried at the petitioners land. She affirmed that she was familiar with the deceased sisters and his elder brother and equally stated their names.
  8. She also presented photos herein marked as **MFI 1, 2, 3** that showed her with the deceased and her with the deceased and the petitioner.

She testified that she stayed with the deceased in Kiambu before he went for further studies and also stayed with the deceased in Nakuru, langalanga when the deceased was employed at Egerton University.

9. She averred that when the objector was born she was still staying in her father's home hence the reason why she gave the objector the name of his father. That the objector resided in her father's home and also attended Mukuri Primary School.

10. She admitted that it is the petitioner who farmed the deceased land and that she was not aware how the deceased got most of his estates. That at the time the deceased was in Hospital she could not visit him because she was also sick. She also could not also attend the burial of the deceased.

11. Lastly, she stated that the objector was informed of the death of the deceased by her cousin because at the time the objector was staying at Katheri.

12. OW2, was **Dinah Kawira** the objector herein. She testified that she was a daughter of the deceased and actually knows the petitioner since her childhood. She also testified that she knew the sisters, brothers and parents of the deceased whom she mentioned by name. She averred that her father paid for her secondary fees and that vide a letter dated 17<sup>th</sup> November 1997 directed to the Secondary School the deceased had sought to have the name of the objector changed prior to her registration of her Kenya Certificate of Secondary Education. She also testified that the petitioner had paid part of her Form Four Secondary Fees.

13. She testified that she visited the deceased in hospital prior to his death and that she stayed for three (3) days during the burial arrangements but the petitioner kept postponing the burial, She averred that her name was added in the Eulogy with a Biro after it was realised that she was not included in the Eulogy.

14. She testified that she had stayed with the deceased and equally stayed with her Aunt i.e. Julia Wanja and Ruth Kamani In the deceased property at Katheri and to this end she presented Photographs herein marked as MFI 6 &7 showing her with her aunt Ruth Kamani & Julia Wanja and Photograph of her mother, stepbrother and herself with the deceased at Lake Nakuru.

15. On cross-examination she stated that she was now, 37yrs of age and that she was given her grandfather's name because she was born out of wedlock. That she informed her uncle's by word of mouth before filing the succession cause and that she never knew the interested party prior to this proceedings. She agreed that the Green Card show that the purchaser was given title on 28<sup>th</sup> October 2014.

16. **Pw3 was Salome Ngeria, the Area Chief, Katheri West Location.** She testified that she was employed in the year 2007 and at the time did not know everyone within his locality. That the petitioner, the aunt and uncle approached her in her office seeking a letter of introduction for the purposes of filing the Succession cause. That it was then, from a photo album that she realised that the deceased had a daughter. That she called the family which acknowledged the objector as the daughter of the deceased. On cross examination she testified that later the objector came to seek a letter of introduction and it is the prior dispute that prompted her to give the objector the letter of introduction.

17. **Pw4 was Geoffrey Managu, Brother to the deceased.** He testified that the objector is the daughter of the deceased a fact that he knew since the objector was in Standard 2. That the petitioner did not inform all the family members (5 brothers & 5 daughters). He averred that his father had 2 wives, the 1<sup>st</sup> wife had 3 sons and the 2<sup>nd</sup> wife had 2 sons and that the relationship between the two houses was mutual. That when he was called upon he went to the chief's office and informed her of the daughter of the deceased herein the objector. That he is aware that the deceased did not take dowry or do a wedding with Jennifer Kawira. He however confirmed that the deceased paid school fees for the applicant citing one of the days the objector was chased away from school and the deceased paid for the same. He also stated that the objector stayed with the deceased during School holidays. He also confirmed that Dinah Kawira was present during the burial but was not earlier included in the Eulogy and was only included on the burial date. He averred that the objector was the first to throw soil to the burial grave.

18. **Pw5, Patrick Mwenda** testified that he knew the objector from the year 1990 when he was introduced to her during school holidays by the deceased. That he knew Jenniffer Kawira and affirmed that Jenniffer Kawira attended their grandparent's burial. He claimed that it was the petitioner who contested that the name of the objector should not be included in the Eulogy but never gave explicit reasons. He also confirmed that the objector occasionally stayed with her aunts, sisters to the deceased and that he is aware that the land in Ntima/ Igoki/2778 was sold to a 3<sup>rd</sup> Party and that when he last visited the site in 2017 he found out that the same had been fenced.

19. **Pw6, Leonard Ileri is a brother to Jenniffer Kawira.** He averred that the deceased and Jeniffer Kawira lived together at Kiambu. That however the objector was brought up at their home by his parents. He reiterated that the deceased wrote to the Principal of Ngera Secondary School to have the name of the objector changed so that she may acquire his Sir Name. That he had asked the objector to come with a goat according to Kimeru customs so that the daughter could be released to him and that he had started the process before his demise.

20. **Pw7 Peter Kathuria,** testified that he was a neighbour to the deceased and that he participated in the burial arrangements. That he also took photographs during the burial. He confirmed that the objector was present during the burial ceremony and that as a neighbour, the objector visited him whenever she came around.

21. **Pw8 Peter Karimi** testified that he is the Area manager in Katheri and that he met the deceased in the year 1980. That the deceased resided near his home and that the objector used to occasionally visit the deceased. That she also met the objector when she came to stay with the sister of the deceased. That the objector had come to the chief's office and stated that her father's land was being grabbed and that she was chased away from her father's land.

22. **Pw9 Ibrahim Kathirima** testified that he is also an Area Manager and that he stays 1km away from the deceased. That he participated in the burial arrangements and had informed the petitioner to add the name of the objector. He reaffirmed the statement of Pw8.

## Petioners Testimony

23. **Samson Mwenda M'Nyuri, the petitioner** was the first to testify. He stated that the deceased was his brother and that they were born of the same father and mother. That he came to know of the objector when he was summoned by the Area Chief in the year 2014. On cross examination he stated that he was also summoned to the County Commissioners office where there was a meeting and he was informed that the objector is the daughter of the deceased.

24. That prior to him petitioning for letters of administration he took the letter of introduction from the Area Chief Ntima Location because that's where the deceased properties are located and since he could not approach the Area Chief Katheri Location after the initial confrontation. That he is the one who took care of the deceased properties during his lifetime and after the petitioned for letters of Administration the properties in Abothuguchi/Igoki/ 2778 & Abothuguchi/ Katheri/769 were issued to him. He stated that he was together with Zipporah and Eluid, neice and nephew of the deceased took care of the medical bills of the deceased after his Road traffic accident that led to his demise. That he personally put his own title as security for the bill at Chogoria Hospital. That the bill at Chogoria hospital was about Kshs. 22,000/= but the bill at Kenyatta Hospital was about Kshs. 6,000,000/=. He averred that he settled the bills from friends with the help of Zipporah and Eluid and that he took a loan from Jamii Sacco. He however never led documentary evidence as to prove the substantial amount of the bill or that he personally paid the bill.

25. He averred that it was agreed among his sister's and elders that the land in Ntima/ Igoki/2778 was to be sold to settled debts accruing from the medical bill and that when he sold the same to the interested party for the sum of Kshs.12,000,000/= Kshs. 6,000,000/= went to improving the other properties of the deceased.

26. He stated that the objector was not present during the burial and that he was equally surprised that photos were taken during the burial since they had not commissioned anyone to take the said photos.

27. He lastly stated that his children and that of his sisters were dependant on the deceased. He particularly mentioned Eliud Mwiti, son of the deceased older brother, Stanley Mwiti, Zipporah, Daughter to Ruth Kamani, Mwendu Kabiti, grandchild to Ruth Kamani, and his two children Salome Mwendwa & Festus Mutua. He also stated that the deceased used to support him during his lifetime. He averred that his two children reside with Julia Wanja at the deceased land in Katheri.

28. He however on cross-examination stated that he does not have anything to show that the deceased paid fees for his sons and daughters. He stated that his son and daughter are over 20 years old and that he also resides in Katheri, in a farm granted to him by his father.

29. **Paul** cousin to the deceased was the second to testify. He affirmed that the deceased did not have a child. That he was the surety when the matter was being filed. That he resides in Katheri. On cross-examination however he testified that he does not know the nature of work the deceased did in Nakuru. He averred that he knew deceased family affairs but not his personal affairs but he could not confirm whether or not the deceased lived with a lady or whether he paid school fees for the objector. He could not also confirm whether or not the deceased visited his home together with his wife and the objector.

30. **Eluid Mwiti nephew to the deceased** testified that he resided with the petitioner for close to 20 years at his residence in Nakuru and during that time the deceased never introduced him to anyone as his daughter. That the deceased took him to Superior College where he was trained as an accountant. He averred that he never saw the deceased at the burial and that no photographs were taken. That he took part in paying the medical bill and actually contributed Kshs. 40,000/=. He however averred that the deceased bill was over Kshs. 100,000/=. He confirmed that in 2011 they agreed that the deceased land to be sold to settle the medical bills.

31. **Rev. John Kinyua** testified that he has known both the petitioner and the objector since the year 1981 and that he married the deceased niece hence he was close to the deceased. that the deceased had actually given him land to cultivate in the year 1985, 0.25 Acres and in the year 1992, 0.75 Acres. That he first saw the objector in the chief's office and now in court.

32. On cross examination he testified that he stays 2km away from the deceased residence and from his home he cannot see the home of the deceased. He averred that he was present during the burial and the name of the objector was not present in the eulogy.

33. On being cross examined by the court he averred that he has received disputes in church and normally holds discussions with the parties.

34. **Stephen Muthuri Mwiti** testified that he is a cousin to the deceased and was close to the deceased after he called him to Nakuru in 1989

where they stayed with the deceased together with Eliud Mwit. That he stated with the deceased till 1994. That during the burial no photographs were taken.

35. On cross-examination he testified that he could not tell whether the deceased visited home in the company of his wife and child.

### **Interested Party**

36. The interested party testified that he bought the parcel of land in NTIMA/IGOKI/2778 from the petitioner herein after conducting a search and confirming that the same belonged to the petitioner. That he became aware of the objector after being served with this court's proceedings and that his purchase was for value and in good faith.

### **Analysis and Determination**

37. It clearly spurns out that the deceased was a generous man during his lifetime and not only did he take care of his immediate family but also their sons and daughters. That being said I have to look and make a proper determination to the matter at hand hoping that I will gracefully endeavour to discern the deceased wishes with regard to his estate.

38. From the evidence on record for the applicant the petitioner and their witnesses as well as the interested party, coupled with the submissions thereto the issues for this court's determination are:-

- i.* Whether the applicant has proved she was a daughter of the deceased herein and therefore entitled to a share of his estate.
- ii.* Whether the petitioner obtained grant by making of a false statement or untrue allegations of fact.
- iii.* Whether it has been proved that the petitioner obtained grant by concealment of material facts to the court.
- iv.* Whether Interested party's interest is protected in the circumstances.

39. The applicant herein tendered evidence to prove that although she didn't stay with the deceased, she was his daughter and he paid her school fees. She said she visited the deceased person's ancestral home and stayed with her aunt, Julia Wanja whom she said has been suffering from stroke for 2 years. She said that the petitioner herein paid for her Form IV school fees and that he used to farm at her father, the deceased person's farm. She talked about her cousin Ziporrah Kagwika and petitioner didn't deny that there was a person with such a name in the family.

40. There was no evidence to rebut applicants' claims that it is the deceased who wrote to her the letter produced as Ex P4. Petitioner didn't explain how applicant came to know about his brothers and sisters if she was not related to them. Applicant said she visited her father at the accident ward but when she went to buy for him fruits the petitioner told her not to.

41. She said she attended burial of the deceased as the only child. She produced photograph she took at her father's grave and petitioner didn't deny that was his brother's grave. Petitioner said that they didn't have money to pay a photographer and it could not be true that any photographs were taken. Petitioner has not explained how he came to be on the photograph if the grave appearing is not of his brother and the applicant is not related to him.

42. The petitioner deliberately left out the applicants with the selfish intention of grabbing the deceased person's property.

43. PW3, the chief of Katheri West Location said the uncles and aunts of applicant went to her office and it was established that applicant was daughter of the deceased. She said that petitioner approached chief of another location to write a letter in respect of the deceased who hailed from Katheri West Location. She said it was chief of Kinoru Location who wrote letter introducing the petitioner instead of chief Katheri west location where deceased was domiciled.

44. PW4-Geoffrey Maragu the step brother of the deceased testified he knew applicant when she was in Standard 2.

45. PW5 Mwenda Gichuru also supported applicants' claim that she was daughter to the deceased. He said he knew the applicant since 1990. He said applicant's mother attended the burial of his grandparents. He confirmed the applicant attended the burial of the deceased and she was identified as daughter to the deceased although petitioner didn't want her name in the eulogy. He said the applicant used to stay in Chogoria with her grandparents and sometimes with her aunt Julia Wanja in Katheri and sometimes with Ruth Kamami in Muriene. This witness seems to be a brother to petitioner's 3<sup>rd</sup> witness who claims that he stayed with the deceased and was not aware he got married and sired a child.

46. Applicants' uncle also supported evidence that applicant is daughter to the deceased – PW6. PW7 said he took photographs at the burial of the deceased who was his neighbour and that applicant was present as the only child of the deceased. He identified the photographs, produced by applicant as the ones he took.

47. PW8 the Area Manager also confirmed that applicant was daughter to the deceased. He said he was a neighbour to the deceased. He said applicant used to visit the father in Katheri. He said applicant reported to him, she had been chased away from her father's property.

48. PW9 said that he is the one who told petitioner to put applicants' name in eulogy during the deceased person's burial because he knew she was his only daughter.

49. In consideration of the evidence of the 2 Area Managers in Katheru West Location, PW8 & PW9 as well as the evidence of the Chief – PW3 and in consideration of the evidence of PW1 the mother of the applicant and the uncle of the applicant PW6 together with evidence of PW5 the 1<sup>st</sup> cousin of applicant who is also the brother of 3<sup>rd</sup> petitioners witness, coupled with the striking resemblance between the petitioner and the applicant this court has no doubt in its mind that the applicant has proved overwhelmingly that she is the only daughter of the deceased.

50. In the circumstances the Law of Succession provides that where one dies intestate leaving no spouse, but leaving a child or children that child or those children the net intestate estate goes to the child or children in equal shares.

51. Where the deceased leaves no child or spouse the net intestate estate goes to the following in order of priority:-

- i. Father
- ii. Mother
- iii. Brothers and sisters and their children
- iv. Other relatives

52. In this case it has been established that the deceased was survived by the applicant as only child. The estate of the deceased should therefore duly devolve to the applicant.

53. In this regard this court finds that the petitioner in a bid to disinherit the applicant, 1<sup>st</sup> refused to include her name in the eulogy during the burial of the deceased. The petitioner secretly went to the chief of Ntima Location to get a letter to identify beneficiaries of the deceased who was domiciled in Katheru West Location. The Petitioner filed a claim in Meru CM's court No. 78 of 2013 as legal representative of the deceased persons estate and was paid damages arising out of the fatal road traffic accident and has deliberately failed to disclose to the court what he received on account of the deceased persons estate. He has further failed to account for how damages due to the deceased persons estate was utilised.

54. The petitioner claimed that he and his 2 sisters Ruth Kamamu and Julia Wanja agreed to petition for Letters of administration and dispose some of the deceased persons properties to offset medical and funeral expenses but the 2 sister didn't attend court to confirm allegations by the petitioner and petitioners 3<sup>rd</sup> witness.

55. The petitioner distributed all the 3 properties to himself. The certificate of confirmation was issued to him on 17<sup>th</sup> July 2014 and it was later rectified on 7<sup>th</sup> July 2015 and from annexure "MM1" to interested parties affidavits sworn on 18<sup>th</sup> March 2016, he sold LR Ntima/Igoki/2778 as the vendors whereas he was appointed Administrator of the estate. It is shown he sold it at Kshs 12,000,000/= to defray the deceased persons liability.

56. There is no evidence this money went into the petitioners account or that it was used to pay medical bills at Chogoria – Kshs 22,000/= or Kenyatta National Hospital where the deceased was transferred to from Chogoria. This court finds that the petitioners conduct of seeking a letter from Chief of Ntima Location after applicants 3<sup>rd</sup> witness the chief of Katheru West Location declining to give him a letter was shrouded with fraud. He concealed a material fact that the deceased had a child who was entitled to inherit from his estate.

57. Whereas he claimed that his sisters consented to him selling some of the deceased persons property it appears it is only Ruth Kamami who is purported thumb printed the sale Agreement.

58. The petitioner has never made any account to the court as a personal representative of the court and this court finds that apart from conducting himself in a fraudulent manner he failed to comply with statutory duties of an Administrator. In that regard he is not fit to be administrator but doesn't have preference to applicant as an administrator. Regarding the interest of the interested party, he said in his testimony in court that he acquired LR No. Ntima/Igoki/2778 from the petitioner. Respondent herein at a consideration of Kshs 12,000,000/= and took possession immediately after completing to pay purchase price. He said before paying he carried out a search and established that the property was registered in the name of the petitioner. He said he took occupation and started developing residential houses in which he resides now. He said when he was building nobody showed up to object or even caution land. He said that he went to Land Control Board and transfer was effected as there was no objection. He said the land and development there on is currently valued at Kshs 33 Million. He said he was innocent purchaser for value. He asked the court to enjoy peaceful occupation of the property. He said it took him one year and some months to develop the property. He said he continued with development event though there was a claim in court.

59. He said he was never served with any order stopping him from construction. He said he was served with pleadings n 3.10.2016 – one years and 3 months after he started developing the property and he was in final stages of development.

60. Was the interested party an innocent purchaser for value? Is his interested protected? The interested party seeks courts protection on basis of section 93 of the Law of Succession Act. It is not in dispute that the interested party purchased the property in question but as was determined in the case of Monica Adhiambo vs Maurice Odera Koko [2016]eKLR

**“.....the fact that the petitioners title over the original suit land was revoked and will automatically affect the interested parties ownership over the suit land because it will be a corruption of the law to validate how the original 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 on the property and it would be unfair to validate the illegal actions of the petitioner by invoking section 93 of the Law of Succession Act.**

61. In a similar tone the court in John Kirunya Nduma M'kirera vs Esther Gaceke Solomon & 5 others [2017] eKLR held as follows:-

**“.....The applicants herein can't unfortunately benefit from the unlawful and illegal conduct of John Kiriinya. If they paid him money then they should claim from him. The other beneficiaries of the estate can't be deprived of their inheritance because of the dishonest conduct of John Kiriinya”**

62. The interested party claims he has extensively developed the suit land No. Ntima/igoki/2778 and that he was not aware of the dispute after purchase until when he was served on 3.10.2016 and he responded to the claim. I have gone through the courts record and established that although the response by the interested party is dated 3<sup>rd</sup> October 2016, on 25<sup>th</sup> May 2016 his advocate was in court and the court ordered that interim orders prayed for in application dated 29<sup>th</sup> 2015 be extended pending interpartes hearing. If Interested party filed his pleadings on 3<sup>rd</sup> October 2016 it was not because he was not aware of the application. Interested party has not explained why he continued with development even after learning of the claim by the applicant. The view of this court as held by the authorities Supra is that the right of the interested party can't supersede that of the heir to an estate where a 3<sup>rd</sup> party has committed an unlawful and/or illegal act. The remedy that this court has for the interested party is to make good the loss to the applicant by paying market value of Lr Ntima/igoki/2778 within 30 days of today's date or have the property transmitted unto the name of the applicant.

63. The grant that was made to the petitioner/Administrator herein Samson Mutua M'nyuriu on 3<sup>rd</sup> June 2013 and confirmed on 17<sup>th</sup> July 2014 and rectified on 7<sup>th</sup> July 2015 is hereby revoked and all transactions arising therefrom nullified subject to the rider in reference to LR Ntima/igoki/2778.

64. Grant to the interstate of the deceased Samuel Kiruki M'Njuruu is now made to the applicant herein Dina Kawira Ncabo. The same to be confirmed devolving LR No. Abothuguchi/katheri/969 and Ntima/Igoki/3003 to her immediately. LR No. Ntima/Igoki/2778 shall await the interested party's compliance with order to compensate the applicant with value of the property within 30 days or in default have it registered in her name.

65. The interested party will then have recourse to the petitioner whom they alleged pocketed Kshs 12,000,000/=.

66. The petitioner will pay costs of the application for revocation

**HON. A.ONG'INJO**

**JUDGE**

RULING SIGNED, DELIVERED AND DATED THIS 7<sup>TH</sup> DAY OF FEBRUARY 2019.

**In the presence of:**

Mr Gikunda Advocate for Petitioner

Mr Gikunda Advocate holding brief for Muriuki for Interested party.

Applicant – present in person

**HON. A.ONG'INJO**

**JUDGE**

**Mr. Gikunda**

We apply for a copy of the proceedings and judgement. We also apply for temporary stay of execution to enable us seek further instructions.

**Orders**

Copies of proceedings and judgment to be supplied to parties upon payment of copying charges. Application for temporary stay disallowed save for orders made in regard to LR Ntima/igoki/2779.

**HON. A.ONG'INJO**

**JUDGE**