



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 154 OF 2013**

**In The Matter Of The Estate Of Gerald Rimberia M’riria (Deceased)**

**STANLEY G. MUTUA RIMBERIA.....1<sup>ST</sup> PETITIONER**

**KIMATHI PATRICK RIMBERIA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**MARTHA RIGIRI GERALD.....1<sup>ST</sup> OBJECTOR**

**ROSE GAKII.....2<sup>ND</sup> OBJECTOR**

**KENNETH KIAMBI RIMBERIA.....3<sup>RD</sup> OBJECTOR**

**JUDGMENT**

[1] **GERALD RIMBERIA M’RIRIA** (“the deceased”) to whom this Succession Cause relates died on 19<sup>th</sup> September, 2013. He was survived by:

**1<sup>st</sup> House**

- a) **Monica Kainda - Widow (deceased)**
- b) **Stanley G. Mutua - Son**
- c) **Priscilla Nkuene - Daughter**
- d) **Josephine Nkatha - Daughter**
- e) **Kimathi Patrick - Son**

**2<sup>nd</sup> House**

- a) **Martha Rigiri - Widow**
- b) **Kellen Karimi - Daughter (Married deceased)**
- c) **Kenneth Kiambi - Son**
- d) **Rose Gakii - Daughter**

His assets are listed as **Parcel No. Abothuguchi/Katheri/ 2418, 2419 and 2420.**

[2] Grant of letters of administration intestate was made to Stanley G. Mutua M’Rimberia and Kimathi Patrick Rimberia on 14<sup>th</sup> June 2013. Revocation and or annulment of the said grant was applied for through a chamber summons dated 1<sup>st</sup> April 2014 expressed to be made pursuant to **Section 76 of the Law of Succession Act and all other enabling provisions of the law.** The applicants also sought for a fresh grant to be made as per the will.

[3] The application was premised on the grounds set out in the application and the supporting and further supporting affidavit of Martha Rigiri Gerald and Rose Gakii sworn on 1<sup>st</sup> April and 15<sup>th</sup> September 2014 respectively. These grounds are:-

- a. That the petitioners obtained the grant secretly by concealing material facts and without consulting or obtaining their consent.
- b. That petitioners made untrue statements especially that the deceased died intestate when he left a will which was read to all family members after his death.

[4] The application was opposed through the 1<sup>st</sup> replying and further replying affidavit of Stanley G. Mutua Rimberia sworn on 27<sup>th</sup> June and 30<sup>th</sup> September 2014 respectively. He deposed that they tried to convene a meeting with the 2<sup>nd</sup> family in order to agree on the filing of a cause but they refused to cooperate. As such, there was no fraud or concealment of material facts in the petition. He further averred that they were neither aware of the will nor alleged reading thereof. He also stated that the signature on the will is not their father's, thus, a forgery. Besides, the will discriminates against the 1<sup>st</sup> house which would get 3 acres while the 2<sup>nd</sup> house gets 8 Acres. As a result, distribution should be as per the Tribunal's award. Consequently, he termed the application as misconceived and should be refused with costs.

[5] In the 2<sup>nd</sup> replying affidavit of Joseph Kingaru Nkoroi sworn on 27<sup>th</sup> June 2014 it was deposed that he did not appear before the chambers of Mbaabu M'noti & Co. Advocates and did not witness the deceased sign the alleged will. That his identity card number was lifted from the transfer documents of the plots he had bought together with the deceased. His purported signature on the alleged will is a forgery.

### Oral testimonies

[6] This application was heard *vide viva voce* evidence. **OW1 Martha Rigiri** stated that the deceased was the original owner of Parcel No. **Abothuguchi/Katheri/894** which he subdivided into parcels Nos. 2418, 2419, 2420 and 2421. He distributed No. 2418 to his daughters. No. 2419 was given to Patrick Kimathi and Stanley Mutua with each getting 1 ½ acres and ½ acres respectively. He left No. 2420 for himself and her and No. 2412 transferred it to the 3<sup>rd</sup> objector who has taken possession. Kiambi was not given anything in the will since he had been given No. 2421. But the deceased's house is in No. 2421 and he is also buried there. She lives there as well but cultivates No. 2420. She acknowledged that the deceased gave Mutua 13 goats when their goat business went down but she does not know whether he was given land at Mwereru.

[7] Further testimony: the deceased distributed this property before he died where he met his sons together with Joseph Kinyua and Kimaita were present at the meeting which was held on 18<sup>th</sup> October 2008. Priscilla, Rose and she were also present. The will he wrote in the office of Mbaabu M'noti Advocates with Aaron Kimaita and Joseph Kingaru as his witnesses reflected what he had told them. She only came to know about it when the deceased was ill. She saw the photocopy but as for the original was with the advocate. She avowed that Joseph Kingaru is lying as he was there with the deceased and Kimaita in the advocates' office. She wishes that the estate be distributed as per the will.

[8] **OW2 Rose Gakii** daughter of the deceased affirmed that parcel No. 2418 is divided amongst the four daughters of the deceased with each using their respective portions. Stanley and Patrick cultivate the land that was given to them while Kennedy Kiambi was given No. 2421 and already has his own title. She confirmed that the deceased wrote a will where he expressed his wishes and subdivided the land on the ground. She attended the meeting for 18<sup>th</sup> October 2008 where the deceased summoned them together with elders and expressed his wishes. What he told them in the meeting is what is in the will.

[9] **OW3 Kenneth Kiambi Rimberia** adopted his statement dated 21<sup>st</sup> December 2015 as his evidence-in-chief. He corroborated what had been stated by **OW1** and **OW2**.

[10] **OW4 Aaron Kimaita M'Rimberia** asserted that he took the deceased to the advocate's office to write the will. He was one of the witnesses to Will and he saw the deceased and the other witnesses sign the Will. He is surprised that one witness denounced the will.

[11] **OW5 Joseph Kinyua** adopted his statement dated 21<sup>st</sup> December 2015 as evidence-in-chief. He stated that he knows the deceased as he was his friend and attended the meeting which was convened on 18<sup>th</sup> October 2018. He avowed that the deceased did not chase away his children of the 1<sup>st</sup> house as they are the ones who protested and walked out. The deceased shared out his property as stated which were written down in the minutes of which he signed them.

[12] **OW6 Andrew Arimi** assistant EO of the court, Meru produced file for Meru ELC JR No. 27 of 2009 as evidence.

[13] **OW7 Julius Mbaabu** advocate practicing in Mbaabu M'noti & Co. Advocates verified that the deceased was well known to him as he was his client before the will. He attested to the signatures by the witnesses and the deceased. He did not know the witnesses but they were identified by their identity cards. It was his testimony that the affidavit of Joseph Nkoroi is full of falsehood and wonders why he did not report the allegation of forgery. He is merely trying to defeat the will which was done and signed by him, the other witness and the deceased before him.

### Submissions

[14] Parties also filed written submissions in support of their respective standpoints in the matter. The objectors submitted that the will dated 3<sup>rd</sup> December 2004 is a valid will of the deceased. They argued that the burden is on the petitioner to prove its invalidity as it has met all the requirements and has provided for all his dependants. As for property known as **L. R. NO. ABOTHUGUCHI/KATHERI/ 2421** he stated that it does not form part of the estate as the deceased had already transferred it nearly 5 years before his demise. They relied on the case of

[15] The petitioners submitted that to prove the validity of the will one must refer to **Section 11 of the Law of Succession Act**. The onus of proving a will lies on the objectors who allege its existence and that it was attested to by two competent witnesses considering one of the witnesses said to have signed alleges that he did not. They urged that the objectors did not produce any evidence to show that Joseph Kingaru signed the will. Furthermore, the maker of the will did not produce the **original** copy of the will neither could he tell whether he knew the signature of the deceased or not and refused to confirm this position when asked as to how many signatures the deceased had. They concluded that the signature alleged to be the deceased's has not been proved to be his. Consequently, they argued that the will was not valid as it was not attested as per the law considering the original will was not produced. Also it is discriminating upon one house which goes against the Constitution and the deceased left out L. R. No. Abothuguchi/Katheri/2421 out of the will. He relied on the case of **Meru HC Succ Cause No. 46 of 2013 Re Estate of M'Tanya M'Ibutu**.

#### **ANALYSIS AND DETERMINATION**

[16] I have been called upon to determine:

- a) Whether L. R. No. Abothuguchi/Katheri/2421 forms part of the estate of the deceased**
- b) Whether the will dated 3<sup>rd</sup> December 2004 is valid and binding**
- c) Whether or not the grant issued on 14<sup>th</sup> June 2013 ought to be revoked**
- d) Distribution of the estate.**

#### **Whether No 2421 is estate property**

[17] The decision in MERU HC JR No. 27 of 2009 is directly relevant in deciding whether L. R. No. Abothuguchi/Katheri/2421 forms part of the estate. Meru Central Dispute's Tribunal made a determination in respect of the original land parcel No. **Abothuguchi/Katheri/894** before subdivision of Parcel No. 2421 therefrom. The Deceased and the 2<sup>nd</sup> objector aggrieved by the decision filed JR No. 27 of 2009. The High Court held in the said JR application that:

**"... I find that the award of the respondent was clearly not within the mandate granted to the LDT by Section 3 (1) of the Act. It goes without saying that the decree emanating from the Magistrate's Court that read the Respondent's award made in Meru Central District Land Disputes Tribunal dated on 22/4/2009 in Tribunal Case No. 67 of 2008 is a nullity ab initio.**

**In the end I find that the Judicial Review Notice of Motion has merits and I grant an order of certiorari removing to this court the decision by the respondent dated 29/3/2011 and quashing it. I also issue an order of prohibition, prohibiting the respondents and the interested parties from implementing the decision in Meru Central District Land Disputes Tribunal dated made on 22/4/2009 in Tribunal Case No. 67 of 2008"**

[18] The High Court quashed the decision of the tribunal and prohibited the tribunal and petitioners from implementing the decision of the tribunal. I do not understand therefore, how the petitioners could base the distribution of the estate on the tribunal's award that was quashed. I do not even think the petitioners did not understand the effect of an order of certiorari on the award and prohibition against them from implementing the said award. No appeal was preferred against the said orders. When the award was declared a nullity and was quashed, it meant all was blown away and nothing can be founded on the award. Here I will politely remind these parties what Lord Denning stated on founding a proceeding on a nullity in the case of **Mcfoy -vs- United Africa Co. Ltd (1961) 3 All E R 1169:**

**"...every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.**

Accordingly, the quest by the petitioners to distribute the estate on the basis on the basis of the award by the tribunal is disingenuous and ill advised.

#### **Free property of deceased**

[19] In law, the estate property consists in free property of the deceased. See **Section 3 of the Law of Succession Act** that:

**"free property", in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death;"**

[20] I have perused the green card and I see that the title initially belonged to the deceased but was transferred to Kenneth Kiambi on 22<sup>nd</sup> April 2004. This was done when the deceased was still alive as he died in 2013. Applying the law, **L. R. NO. ABOTHUGUCHI/KATHERI/2421** cannot, therefore, be categorized as free property of the deceased for two reasons: (1) he was not legally competent to freely dispose of it at the time of his death; and (2) the property was registered in the name of the 2<sup>nd</sup> objector as the absolute legal proprietor. Therefore, L. R. No. Abothuguchi/Katheri/2421 does not form part of the estate. Except, however, such property given as gift inter vivos by the deceased is taken into account under section 42 of the Law of Succession Act in determining the ultimate

entitlement of the donee beneficiary in the net intestate estate. Accordingly, I agree with counsel that such property should not be included in a will as estate property except within the sense of section 42 of the law of Succession Act perhaps to provide justification on the testamentary dispositions the deceased may have made after taking the gift into account.

## **The will**

[21] Now I will tackle the question of validity of the Will dated 3<sup>rd</sup> December 2004. For a Will to be valid, it must comply with the legal prescriptions in **Section 11 of the Law of Succession Act**, *inter alia*, the will must be signed by the deceased and attested by two competent witnesses in the presence of each other. **Section 11 of the Law of Succession Act** provides that:

**“No written will shall be valid unless—**

**(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;**

**(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;**

**(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”**

[22] **OW7** was the advocate for the deceased. He averred that the deceased was known to him as he was his client even before the will. He confirmed to have drafted the will as well as attesting to the signatures appended to the will by the deceased and witnesses. He stated that the witnesses were identified to him by their identity cards. Each signed in the presence of each other and him as well. **OW7** produced the original will as Obj. Ex. 1 in court. The evidence of **OW4**- one of the witnesses in the will- affirmed the evidence by **OW7**. Specifically he stated that he signed the will in the presence of the deceased and the other witness, one Joseph Kingaru Nkoroi. But Joseph denied in his affidavit that he witnessed to the said will. He alleged that his signature had been forged. It is trite law that whoever alleges must prove. Other than merely making a claim of forgery, Joseph did provide an iota of evidence to prove forgery. It is surprising he did not make any report of the alleged forgery immediately he learnt about it. He failed to prove his allegation of forgery. **OW7** and **OW4** asserted that the allegations made by Joseph are full of falsehoods. I am not swayed by his claim that his ID Number was lifted from a document he had signed earlier. He did not say by whom and how. He did not prove this allegation. It is more probable that he is not telling the truth. I find and hold that the deceased made the Will herein as his testamentary disposition of his assets. The Will satisfies all the legal requirements. Before I close on this matter, I note that the contents of the will are similar to the contents of the meeting held on 18<sup>th</sup> October 2008 by the deceased where it is said that he distributed his estate. Accordingly, the will dated 3<sup>rd</sup> December 2004 has been proved to be the last will of the deceased; its valid testamentary disposition of property by the deceased and is binding.

## **Of revocation of grant**

[23] Are there grounds of revocation or annulment of grant as stipulated IN **Section 76 of the Law of Succession Act**? The section provides as below:-

### **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.**

[24] The objectors claimed that the petitioners obtained the grant secretly by concealing material facts and without consulting or obtaining their consent. Looking at the arguments herein, of significance is to ask is whether:-

**(a) The proceedings to obtain the grant were defective in substance; or**

**(b) 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; or**

**(c) 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**

[25] The evidence available show that the petitioners were aware of the will. But they chose to file this cause as if the deceased died intestate. Where there is a will, the cause is filed for probate with will annexed. The omission is substantial and renders the proceedings defective in substance. In addition, the omission is concealment of something material to the case or fraudulently intended to justify the grant. fact.

[26] More lapses are coming. In filing these proceedings, the petitioners ought to have obtained consent from the beneficiaries. **Rule 26 of the Probate and Administration Rules** requires consent from all the beneficiaries to be filed in Form 38 or 39. The indication is that the petitioners did not seek the consent of the objectors and the member of the 1<sup>st</sup> house. No consent is traced in the record. A better cast of the potency of such facts to cause a revocation of grant was aptly stated in the case of **SAMUEL WAFULA WASIKE vs. HUDSON SIMIYU WAFULA CA NO.161 OF 1993**(Kwach, Omolo and Tunoi JJA) that:-

**“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.”**

[27] Also, it should be noted that preference is given to certain persons when it comes to taking out letters of administration. See what needs to be done under **Rule 7(7) of the Probate and Administration Rules**:

**“(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.”**

[28] The petitioners stated that they approached the 1<sup>st</sup> house but they refused to participate in the filing. There is no evidence of such effort or refusal to cooperate. Again, no citation was filed. Yet, the 1<sup>st</sup> objector is a widow of the deceased. Therefore, grant issued to the petitioners is a perfect candidate for revocation. A fresh grant should also issue to the 1<sup>st</sup> objector and a representative of the 2<sup>nd</sup> house to bring about fair representation. Notably, the will does not name any executor of the will.

[29] From the foregoing I make the following orders:

**a) The grant of letters of administration intestate issued to Stanley G. Mutua M’Rimberia and Kimathi Patrick Rimberia on 14<sup>th</sup> June 2013 be revoked**

**b) Fresh grant of letters of administration with will annexed (*grant cum testament annexo*) is made to Martha Rigiri Gerald and Kimathi Patrick Rimberia and is confirmed.**

**c) The last will of Gerald Rimberia M’Riria dated 3<sup>rd</sup> December 2004 is valid and the estate shall be administered in accordance with the said will.**

**d) Each party shall bear own costs. It is so ordered.**

**Dated, signed and delivered in open court at Meru this 4th day of April, 2019**

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**F. GIKONYO**

**JUDGE**

**In presence of:**

Mutegi for petitioner

Mutembei for Ngunjiri for objector

2<sup>nd</sup> and 3<sup>rd</sup> objectors present

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**F. GIKONYO**

**JUDGE**