



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 664 OF 2012**

**IN THE MATTER OF THE ESTATE OF M'MUCHIRI M'NABEA (DECEASED)**

**JERICAH NKIROTE M'MUCHIRI ..... PETITIONER**

**VERSUS**

**SARAH KARWITHA MUCHIRI MBAMBA**

**JOSEPH MWENDA MUCHIRI**

**LUCY MUKAMI MUCHIRI**

**MARY KITHIIRI MWITARI**

**M'INOTI M'NABEA alias**

**STEPHEN MURITHI NABEA .....OBJECTORS**

**J U D G M E N T**

1. **M'MUCHIRI M'NABEA ("the deceased")** died on 24<sup>th</sup> May, 2012. According to the area Chief's letter dated 16<sup>th</sup> July, 2012, the deceased left a widow and five children as his beneficiaries and eight properties constituting his estate.
2. On 2<sup>nd</sup> May, 2014, **Jerica Nkirote Muchiri ("the petitioner")** petitioned for letters of administration of his estate intestate which was issued to her on 29<sup>th</sup> August, 2013. She thereafter applied for confirmation and the grant was confirmed on 26<sup>th</sup> June, 2014 whereby 5 of the properties were distributed to her and 3 to one **Isaac Kimene Nabea**.
3. By an application dated 26<sup>th</sup> May, 2015, the objectors applied for the revocation of the grant and for the registration of **L.R. Nyaki/Kithoka/3249 and 3250** in the name of **Harun Muthomi** to be cancelled and the property to revert back to the deceased.
4. The application was grounded on the supporting affidavit sworn 26<sup>th</sup> May, 2015 by all the applicants. Basically, the applicants alleged that; they were beneficiaries of the estate yet they were not involved in the lodging of the petition; that the consents relied on by the petitioner to lodge the petition and distribute the estate was a forgery; that the deceased held the estate property in trust for, inter alia, his brothers.
5. The application was opposed by the petitioner vide her replying affidavit sworn on 13<sup>th</sup> July, 2015. The application was heard by way of *viva voce* evidence whereby the witnesses filed their affidavit evidence and witness statements on which they were cross-examined on.
7. **OW1 M'Inoti M'Nabea alias Stephen Muchiri Nabea** (hereinafter "the 5<sup>th</sup> objector") told the court that he was a brother to the deceased. That during demarcation in 1967, their father, **M'Nabea M'Rintwara**, had given the deceased **L.R. Nyaki/Kithoka/135** to hold in trust for his siblings as he was the eldest son. That he build a permanent house thereon in 1959 and has lived thereon to-date. That his wife and five children are buried thereon.
8. That despite as aforesaid, the deceased had subdivided the property into various portions and had sold some of the sub-divisions. That he had bought his own land, **L.R. Nyaki/Kithoka/298** which he has since distributed to his children. That the deceased held in trust for him 2 ½ acres in **L.R. Nyaki/Kithoka/135** which he was claiming. That the petitioner did not consult him and the other beneficiaries of the deceased before she lodged the Cause.

9. **OW2 Joseph Mwenda Muchiri** testified that he was a son to the deceased from the latter's 1<sup>st</sup> wife one Maritha Karambu. That the deceased had four wives from whom he begot many children who were, however not consulted by the petitioner when she lodged this Cause. That he knew that the deceased held **L.R. Nyaki/Kithoka/3248, 3249, 3250 and 3251** on behalf of the 5<sup>th</sup> objector.
10. **OW3 Sarah Karwitha Muchiri** denied signing the consent to the making of the grant by the petitioner. She supported the claim of the 5<sup>th</sup> objector. She set out those she contended to be the beneficiaries of the deceased who included one **Lucy Ntinyari** who was deceased but had left behind one daughter i.e. **Angela Nkirote**.
11. **OW4 Harriet Karamana** testified that she was a daughter to **Charity Kithao**, a sister to the deceased. That her late mother had been given **L.R. Nyaki/Kithoka/1490** by the deceased when he was still alive. She further testified that the deceased sold to her **L.R. Nyaki/Kithoka/3252**. It was her contention that the deceased held **Nyaki/Kithoka/135** in trust for all the beneficiaries of **M'Nabea M'Rintuara**.
12. **PW1 Jerica Nkirote M'Muchiri** told the court that she was the 2<sup>nd</sup> wife of the deceased, having been married for eight (8) years. That **M'Nabea M'Rintwara**, the deceased's father, gave each of his three sons and daughters their parcels of land while he was alive. That the 5<sup>th</sup> objector was given plot No. **Nyaki/Kithoka/298**, the deceased **Nyaki/Kithoka/135** while **Isaac Kimene** was given **Nyaki/Kithoka/334**.
13. That she intended to distribute the five properties confirmed to her to six of the deceased's children. She denied having sold **Plot Nos. 3250 and 3249** and contended that the same were sold to **Harun Muthomi** by the deceased. That **Plot No. 1505** was sold to **Isaac Kimene** and that none of the objectors had any claim over the estate.
14. **PW2 Charity Mwari** testified she was the biological daughter of the deceased. She denied that **OW2** was a child of the deceased. She supported **PW1's** testimony on how **M'Nabea M'Rintuara** had allegedly settled his children.
15. All the parties duly filed their submissions which the court has carefully considered. Having considered the record, the testimonies of the witnesses and the submissions of Learned Counsel, the issues for determination are; ***whether the grant should be revoked, who the beneficiaries of the deceased are, and how the estate should be distributed.***
16. The provision that relate to revocation and/or annulment of grant is **section 76 of the Law of Succession Act, Cap 160 Laws of Kenya (hereinafter "the Act")**. The section sets out the grounds upon which a grant may be revoked which include; if the grant was obtained fraudulently by the making of false statements or by the concealment from the court of things material to the case.
17. The objectors alleged that there was a mistake, concealment and misrepresentation of material facts by the petitioner. That they were not informed before this succession cause was filed and that the petitioner did not disclose that the deceased was holding the property, the subject of the Cause, in trust for his brothers and sisters.
18. It was the objectors' contention that they were not consulted before the Cause was filed. That they never consented to the filing of the petition. The petitioner submitted that being a widow of the deceased, she did not need the consent of the other beneficiaries before lodging the petition.
19. The evidence on record clearly showed that, although the deceased had about five wives, the petitioner was the only surviving widow. That being the case, under **section 66 of the Act**, she ranked in priority over all the other beneficiaries in applying for letters of administration. I agree with **Mr. Karanja**, Learned Counsel for the petitioner, that the petitioner did not require the consents of the objectors before filing the Cause.
20. Although there was no requirement for the petitioner to seek the consents of the beneficiaries, she nevertheless filed the consents. There was a consent filed on 26<sup>th</sup> October, 2012 together with the petition and another one for distribution on 2<sup>nd</sup> May 2014. The said consents were allegedly signed by **Sarah Karwitha, Lucy Mukami, Charles Karemu, Zipporah Nthaari and Joyce Makena**. Except **Charles Karemu's** signature, the other signatures were hand-written name initials. **Sarah Karwitha** appeared and denied ever signing any of the said consents.
21. Although the said documents were not subjected to forensic examination, a casual look at the documents clearly shows that the initials may have been made by the same person. The testimony of **Sarah Karwitha** that she was away in Sweden at the time and that she did not sign either of the said consents was neither challenged nor denied.
22. The petitioner did not deny in her evidence in chief as well as cross-examination that the consents were not signed by the persons appearing thereon. She casually stated in re-examination that the consents had been executed by the named persons. I did not believe her. **Sarah Karwitha** appeared and her evidence was never challenged.
23. It was submitted for the petitioner that the failure to obtain consents of beneficiaries is no ground to revoke a grant. The case of **Angelas Maina v. Rebecca Waiyego Mwangi & Another [2016] eKLR**, was relied on for this proposition. To my mind however, while the said decision may have been correct on its own facts, I do not think the reasoning would apply here.
23. To the extent that the petitioner presented in court forged documents which were relied on to issue and confirm the grant, the grant cannot stand. The court cannot close its eyes to an illegality. That would be tantamount to encouraging wrong doers in their unlawful mission. If it were that the consents were completely not there, it would have been a different case. However, here there were admittedly forged consents. That grant cannot stand. The same is for revocation.
24. A petitioner is a trustee who should act in utmost good faith. By presenting in court forged documents, the petitioner was not acting in

good faith.

25. The second issue is, who are the beneficiaries of the deceased? In considering this issue, the question of trust was raised by the objectors. The parties were agreeable as to who the beneficiaries of the estate were, except for **Joseph Mwenda and M’Inoti M’Nabea**. All the rest who were set out in the chief’s letter of introduction, to wit, **Jerica Nkirote, Sarah Karwitha, Grace Karimi, Joseph Kinyua, Lucy Gatiria, Lucy Mukami, Charity Mwari, Charles Karemu, Zipporah Nthaani, Joyce Makena, Rose Wanja, Nancy Kairuthi and Peter Mukundi** were admittedly the widow and children of the deceased and therefore beneficiaries.

26. Apart from those set out above, there were also claims by and or in respect of **Isaac Kimene** (who died shortly before the trial) and **Harriet Karamana**. I propose to deal with this issue by considering the claims of **Isaac Kimene, Harriet Karamana, Joseph Mwenda and M’Inoti M’Nabea** in that order.

27. Before I deal with the said claims, both **Mr. Mutunga and Mr. Karanja**, Learned Counsels for the objectors and the petitioner respectively were of the mistaken belief that this court has no jurisdiction to determine the issue of trust raised by the objectors. **Mr. Mutunga** submitted that the court should revoke the grant and stay the proceedings pending the issue of trust being argued before the Environment and Land Court (“the ELC Court”). **Mr. Karanja** on his part powerfully submitted that the court with jurisdiction was the ELC court and by dint of the dicta in the **Owners of Motor Vessel Lilian ‘S’ v. Caltex Oil Kenya Ltd [1989] KLR 1653**, this court should down its tools.

28. Far from that. In **Zipporah Wanjiru Mwangi v. Zipporah Wanjiru Njoroge [2017] eKLR**, the Court of Appeal delivered itself as follows:-

*“In succession proceedings where, as here, existence of a trust is alleged in respect of land claimed to be family land, it is appropriate to the court to give directions as to the procedure to be followed. ...*

*Where, as here, the issue (of trust) arises in succession proceedings whether the land is family land and therefore is subject to trust or whether it is owned absolutely by the deceased and therefore is not subject to distribution, the court hearing the succession proceedings has jurisdiction to determine the issue and to give appropriate directions on the hearing. This is in line with the jurisdiction vested in the High Court by Article 165(3) (a) of the Constitution and Section 47 of the Law of Succession Act, Cap 160”.*

29. **In re Estate of of M’Mukira M’Arimi (Deceased) [2019] eKLR**, the court felt that it was bound by the aforesaid pronouncement of the Court of Appeal and held:-

*“On the basis of the foregoing and the objectors having claimed the existence of a trust, I hold that this court has jurisdiction to determine the objectors’ claim in these proceedings.*

...

*..., a trust will not be implied or presumed unless it is to give effect to the intention of the parties. Before a trust can be implied, the intention of the parties to create a trust must clearly be determined and established. In the present case it was the objectors to prove the existence of the trust.”*

30. In view of the forgoing, I hold and find that where an issue arises before a family court when dealing with a Succession Cause such as this, that the land formed trust land, the family court has jurisdiction to determine the same. It is for this reason that this court gave the parties latitude to tender *viva voce* testimony. Indeed, the court granted the parties leave, even while the trial was going on, to file further affidavit evidence and even recalled witnesses to try and establish their respective cases.

31. Accordingly, I hold that this court has the jurisdiction to determine the issue of trust raised by the objectors in this matter.

32. I will now consider the claim by each of those said not to be beneficiaries. **Isaac Kimene** was but a brother to the deceased. He was not part of the objectors but had been included in the original distribution whereby three properties, to wit, **L.R. Nos. Nyaki/Kithoka/1490, 2528 and 3248** were distributed to him. The 5<sup>th</sup> objector alleged that the said properties had been distributed to him because the deceased held **L.R. No. 135** (the original property from which all the other sub-divisions arose from) in trust for his brothers and sister.

33. At the trial, it turned out that **Isaac Kimene** had filed a statement on 5<sup>th</sup> November, 2018. In that statement, he denied the existence of any trust in respect of **L.R. No. 135**. He stated that his father, **M’Nabea M’Rintwara** had distributed his properties to all his sons. That the deceased was given **L.R. No. 135**, the 5<sup>th</sup> objector got **L.R. No. 298** while he was given **Nyaki/Kithoka/334**. He also stated that he had bought **Nyaki/Kithoka/1263, 2528 and 3248** from the deceased on various dates. I caution myself that the said statement was not tested in cross-examination.

34. However, there were two agreements that were produced to back up the allegations of **Isaac Kimene**. There was an agreement dated 21<sup>st</sup> January, 1980 by which he purchased 2.5 acres (1ha) from **L.R. No. 788** from the deceased. After sub-division, this became **L.R. No. 1263**. There was also an agreement dated 10<sup>th</sup> December, 2001 whereby **Isaac Kimene** purchased ¼ acre from the deceased. That agreement was witnessed by among others the 5<sup>th</sup> objector. This was what constituted **Nyaki/Kithoka/2528 (0.10ha)** and **Nyaki/Kithoka/3248 (0.06ha)**.

35. To my mind **Isaac Kimene** was entitled to the said **Nyaki/Kithoka/2528 and 3248**, from the estate having purchased them from the

deceased during his lifetime. As regards **Nyaki/Kithoka/1490**, his statement was categorical that it belonged to his late sister **Charity Kithao**.

36. **Harriet Karamana**, testified that she was one of the daughters of **Charity Kithao**, who was a sister to the deceased. She told the court that her mother was entitled to **Nyaki/Kithoka/1490** where she had been settled by **M’Nabea M’Rintwara**. All the parties were agreeable to this fact. Indeed, the report by the District Surveyor dated 6<sup>th</sup> November, 2018 showed that that property was occupied by the late **Charity Kithao** and her grandson.

37. **Harriet Karamana** further told the court that in 2007, she purchased **Nyaki/Kithoka/3252 (0.03ha)** from the deceased. She produced an agreement dated 8<sup>th</sup> March, 2007 to prove her said allegation. That testimony was neither denied nor challenged in cross-examination. I accept the same.

38. In his statement, **Joseph Mwenda Muchiri** only supported the claim by the 5<sup>th</sup> objector. When he appeared, he told the court that he was a son of the deceased. That he had a birth certificate to that effect but did not produce it. He alleged that the deceased had indicated that he had the 5<sup>th</sup> objector’s land.

39. After analyzing the evidence on record, what came out clear was that **Mary Karambu** was the first wife of the deceased. Her first child was **Sarah Karwitha (OW3)**. She separated with the deceased after the deceased started to marry other wives. It would seem that she got other children but they did not belong to the deceased. The deceased only recognized **Sarah Karwitha** and that is why he gifted her **Nyaki/Kithoka/1503** in 1987. Indeed, she is the only child that the deceased gave land during his lifetime when he was busy selling other portions.

40. In this regard, **Joseph Mwenda** did not produce any evidence to prove that he was the son of the deceased. A mere statement was not enough. The only witness who corroborated his testimony was **OW1** whose evidence was self-serving. He had brought **Joseph Mwenda** to support his claim that the deceased held **L.R. No. 135** in trust. His own sister **Sarah Karwitha** refused to be drawn to the discussion whether or not he was a son of the deceased. I reject the claim by **Joseph Mwenda**.

41. What is now left is the claim by the 5<sup>th</sup> objector. His testimony was that **Nyaki/Kithoka/135** belonged to their father who gave it to the deceased to hold in trust for his brothers and sister. He testified that he has lived on that property throughout his life. That he married thereon in 1962, brought up his children thereon and has buried his wife and 4 children on a portion he is occupying. That the deceased held 2 acres thereon in trust for him. That he had bought **Nyaki/Kithoka/298** from **Silas Mugambi, Marete Kiregi and Kithamba Kiregi** and had since divided it to his sons.

42. On the other hand, the petitioner denied the claim of trust. She was firm that the father of the deceased had given all his sons their own properties save for his daughter **Charity Kithao** who had been divorced. According to her, the 5<sup>th</sup> objector was given **Nyaki/Kithoka/298**.

43. As held in the case of **Gichuhi v. Gichuhi [1982] EA 285**, the party relying on the existence of a trust must prove through evidence the existence and creation of such trust. And in **Ayoub v. Standard Bank of S. A [1963] EA 619**, the Privy Council quoted with approval **Cook v. Fountain [1676] 36 ER 984 at 987**, where it was held:-

***“So the trust if there be any, must either be implied by the law, or presumed by the court. There is one good, general, infallible rule that goes to both these kind of trust. It is such a general rule as never deceives; a general rule to which there is no exception, and that is this, the law never implies, the court never presumes a trust, but in a case of absolute necessity”.*** (Emphasis added).

44. From the foregoing, it was for the 5<sup>th</sup> objector to prove the creation and existence of the alleged trust. Further, this court will not presume the existence of a trust unless the said objector proves the existence of absolute necessity.

45. The evidence on record clearly shows that, on 2<sup>nd</sup> May, 1969, the deceased became the first registered owner of **Nyaki/Kithoka/135** measuring 7.4 ha. On the same day, the 5<sup>th</sup> objector was registered as owner of 2.8 ha being **Nyaki/Kithoka/298** The two were sons of **M’Nabea M’Rintwara**. The latter had one other son (**Isaac Kimene**) and two daughters now deceased. It was alleged by the petitioner but disputed by the 5<sup>th</sup> objector, that **Isaac Kimene** was given **Nyaki/Kithoka/334**. The parties did not disclose its size but the title therefor was issued on 31<sup>st</sup> January, 1983.

46. What came out clear at the trial is that, the entire family of **M’Nabea M’Rintwara** must have been living on **Nyaki/Kithoka/135**. Despite the 5<sup>th</sup> objector having his own property, **Nyaki/Kithoka/298**, which was said to border **Nyaki/Kithoka/135**, he had constructed and vastly developed his home on **Nyaki/Kithoka/135**. Further, **Isaac Kimene** had also developed his home on **Nyaki/Kithoka/135**.

47. It would seem that right from 1974, the deceased embarked on subdividing the said **Nyaki/Kithoka/135** and disposing portions thereof. He sub-divided a portion measuring 1ha where **Isaac Kimene** was occupying and transferred it to him as **Nyaki/Kithoka/1263** on 22<sup>nd</sup> March, 1982. **Isaac Kimene** was later to purchase other smaller portions from the deceased being **Nyaki/Kithoka/2528 and 3248**, respectively. The deceased sold other large portions to 3<sup>rd</sup> parties not related to his immediate family. Those parties have since taken possession and extensively developed their portions.

44. The 5<sup>th</sup> objector’s testimony, that was neither denied nor challenged, was that he constructed a permanent house on **Nyaki/Kithoka/135** in 1959. That he married thereat in 1962 and brought up his children thereon. That he has buried both his wife and four children on that property. That all this happened during the lifetime of the deceased who did not object to that course of events.

45. The court ordered for a report to be filed by the District Surveyor to show the nature of developments and occupation of the original **Nyaki/Kithoka/135**. The District Surveyor, Meru Central filed his report dated 6<sup>th</sup> November, 2018. From that report, it is clear that the 5<sup>th</sup> objector occupies and has developed three sub-divisions namely **Nyaki/Kithoka/3249, 3250 and 3251**. There are 5 graves on **Nyaki/Kithoka/3251** where he has constructed his permanent house while there is a zero grazing development on **Nyaki/Kithoka/3250**. The report clearly agreed with the testimony of the 5<sup>th</sup> objector.

46. The father of the deceased and the 5<sup>th</sup> objector is said to have died in 1976 and left the parties in occupation of their respective parts on **Nyaki/Kithoka/135**. They had clear boundaries even as at the time the District Surveyor went to the ground. There was no evidence that during his lifetime the deceased claimed the portions occupied by his brother, the 5<sup>th</sup> objector. There was no evidence that he tried to evict him therefrom and ask him to migrate to the property he had allegedly been given by their father.

48. To the contrary, the parties seem to have lived harmoniously whereby each developed his own portion on **Nyaki/Kithoka/135**, with the deceased actively sub-dividing portions thereof and disposing them to 3<sup>rd</sup> parties. The deceased never objected to the 5<sup>th</sup> objector burying not only his wife, but four sons on the portion he occupied on that property. To my mind, that was but a conduct of a person who very well knew that the portion occupied by the 5<sup>th</sup> objector had a claim on the portion he occupied.

49. How else would one explain that, since 1974 when he started sub-dividing and selling portions of **Nyaki/Kithoka/135**, he sold all other areas but did not interfere with the portion occupied by the 5<sup>th</sup> objector? It is clear that he only caused the area occupied by the 5<sup>th</sup> objector to be subdivided barely three (3) months before he died. The sub-division of **Nyaki/Kithoka/1505** from which **sub-division Nos. 3248, 3249, 3250, 3251, 3252 and 3255** arose, was registered on 2<sup>nd</sup> February, 2012 and the deceased died three months later on 25<sup>th</sup> May, 2012 aged 83 years.

50. To my mind, I am satisfied that the deceased held **Nyaki/Kithoka/135** in trust for the 5<sup>th</sup> objector and his late sister **Charity Kithao**, only to the extent of the area the two occupied. The 5<sup>th</sup> objector was in occupation of **Nyaki/Kithoka/3249, 3250 and 3251** while **Charity Kithao** and her children were in occupation of **Nyaki/Kithao/1490**.

51. It came out at the trial that **Nyaki/Kithoka/3249 and 3250** had been sold to and registered in the name of **Harun Muthomi** a month before the deceased died. How the said purchaser came to purchase from the deceased a property in the occupation of and fully developed by another (the 5<sup>th</sup> objector) is a puzzle. The question that will arise is, what sort of due diligence did he undertake before buying a property which is clearly in the exclusive occupation of another? That is not for this court to determine but the Environment and Land Court.

52. Since **Nyaki/Kithoka/3249 and 3250** seem to have been sold and registered in the name of a 3<sup>rd</sup> party, they do not form part of the estate of the deceased. This court cannot therefore make any orders in respect thereof. The parties know where to take their claim if any.

53. The deceased was polygamous. Save for the properties that are clearly meant for **Charity Kithao, Isaac Kimene** and the 5<sup>th</sup> objector, the estate is to be distributed in accordance to **section 40 of the Law of succession Act**. As already stated, the deceased had already gifted **Sarah Karwitha Muchiri Mbamba** with **Nyaki/Kithoka/1503** measuring 0.502 ha. She will only be entitled to a share if the estate is enough to cater for all the beneficiaries to that extent, which is not the case.

54. Accordingly, the application is allowed on the following terms: -

- a) the grant herein issued to the petitioner on 29<sup>th</sup> August, 2013 be and is hereby revoked.
- b) the deceased held in trust for **M’Inoti M’Nabea** and **Charity Kithao**, the portions occupied by them on **Nyaki/Kithoka/135**.
- c) the estate of the deceased shall be distributed as follows:-
  - i) **Nyaki/Kithoka/3252** to Harriet Karamana Nabea
  - ii) **Nyaki/Kithoka/3251** to M’Inoti M’Nabea alias Stephen Murithi Nabea
  - iii) **Nyaki/Kithoka/1490** to Harriet Karamana Nabea, Susan Wanja, Mary Kathiira and Gituma Nthiira in equal shares
  - iv) **Nyaki/Kithoka/2528 and 3248** to the Estate of Isaac Kimene
  - v) **Nyaki/Kithoka/3253** to Jerica Nkirote M’Muchiri, Joyce Makena Muchiri and Charity Mwari in equal shares
  - vi) **Nyaki/Kithoka/2532** to Charles Karemu
  - vii) **Nyaki/Kithoka/2531** to Lucy Mukami, Angela Nkirote and Zipporah Nthaani in equal shares.

55. This being a family matter, I will make no order as to costs.

It is so decreed.

**DATED and DELIVERED at Meru this 19<sup>th</sup> day of September, 2019.**

**A. MABEYA**

**JUDGE**