



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 236 OF 2008**

**IN THE MATTER OF THE ESTATE OF JOSEPH MBAE SAMUEL M'AMO ALIAS JOSEPH MBAE S. M'AMO (DECEASED)**

**JUDITH GAKII MBAE ..... PETITIONER**

**-VS-**

**DUNCAN KIMATHI MBAE.....1<sup>ST</sup> PROTESTOR**

**STELLAH KANANA MUNGANIA ..... 2<sup>ND</sup> PROTESTOR**

**RULING**

1. This matter emanates from summons for revocation or annulment of grant dated 4<sup>th</sup> October 2011 which are brought pursuant to **Section 76 (b) ( c) and Rules 44(1), 73 of the Law of Succession Act (CAP 160) and all other enabling provisions of the law.** The applicant seeks among other orders that the grant confirmed on 21<sup>st</sup> September 2011 be revoked, set aside or cancelled as the same was obtained by making false statement and concealment from the court of fundamental issues material to the cause; and leave to file protest to the distribution of the estate out of time.

2. The grounds upon which the application is grounded upon are in its body and the supporting affidavits of Duncan Kimathi Mbae and Stellah Kanana Mugania each sworn on 4<sup>th</sup> October 2011. It is pleaded that the grant is defective in substance as it does not have the names of all the beneficiaries since it completely eliminated the 2<sup>nd</sup> protestor who is one of the wives of the deceased who is not provided for. She got married to the deceased on 19<sup>th</sup> May 1987 under Kimeru Customary Law and they had a son who is the 1<sup>st</sup> protestor.

3. The petitioner went ahead and filed the cause secretly and did not involve them. They did not provide their consent or confirmed the mode of distribution. Though the estate being substantial, the 1<sup>st</sup> protestor was given a share of 0.158Ha only from L. R. No. Nkuene/Ngonyi/597 of which he seeks a largely share. While the 2<sup>nd</sup> protestor claims to be provided for.

4. This was opposed by the petitioner vide her replying affidavit sworn on 12<sup>th</sup> October 2011. She deponed that the 2<sup>nd</sup> protestor was not married to the deceased as she is the only wife of the deceased under **African Christian Marriage and Divorce Act CAP 151** which was known by everyone. The deceased disclosed to her that he had fathered a child with the 2<sup>nd</sup> protestor of which he all took parental responsibility and they educated him. After the birth of the 1<sup>st</sup> protestor the deceased ceased all relationship with the 2<sup>nd</sup> protestor and did not father any other child with the latter.

5. She affirmed that the 1<sup>st</sup> protestor was aware of the cause and signed the consent but later refused to sign the consent to the mode of distribution. He was given ample time to file but failed to do so leading to confirmation of the grant. She asserted that the estate has been fairly distributed and that this is an afterthought and deserves to be dismissed with costs.

6. This matter was heard vide *viva voce* evidence. **PW1 Stellah Kanana Mugania** she relied and adopted he statement dated 4<sup>th</sup> September 2017 and went ahead and produced their list of documents filed on 16<sup>th</sup> January 2012 as **Ex P1 – 4**. She stated that she was never involved in the cause and never signed the consent. That when she met the deceased she was not aware that he was married with children. She found out later after she got their child. They cohabited with the deceased in a rental house in Meru Town as he never constructed a house for her. She was aware the deceased owned several parcels of land of which he identified one for her in Ntonyi. But before she could start using it he died. She confirmed that his son had told him that he had been provided for but was not satisfied. As for her she wants the land given to her.

7. At the close of the protestors' case, the petitioner gave a sworn testimony. She relied and adopted her statement dated 2<sup>nd</sup> November 2017 and her replying affidavit. She stated that the 2<sup>nd</sup> protestor is not her co-wife. That the deceased told her that he had no interest to enter into

a second marriage but he would take care of his child. When she knew of the child she educated and provided for him. As for the 2<sup>nd</sup> protestor, she saw her for the first time in court. At no time did she cohabit with the deceased at Nkubu or did the deceased give her land at Ntonyi.

8. The deceased owned 7 parcels of land and one plot. The protestor was given 0.1580 Ha of *Nkuene/Ngonyi/597*. Lucy Gacheri, Charles Koome, Edward Mutuma, Purity Kagwiria and herself each got 0.578 Ha. *LR Nkuene/Mikumbune/197* was given to Stephen Mutai. *LR Nkuene/Mikumbure/966 (0.10Ha)* was given to Edward Mutuma. *LR Nkuene/Mikumbune/970 (0.10Ha)* was given to Charles Koome. *LR Nkuene/Kithungure/1130 (0.202Ha)* was given to Jacob Guantai and Silas Kama, brothers of the deceased who were left in the custody of the deceased. She added more land to the 1<sup>st</sup> protestor who now has more land than the rest. As for her she got the plot in *Nkubu Market No. 259, LR Nkuene/Taita/1786* and *Nkuene/Mikumbune/223* but gave no share to 2<sup>nd</sup> protestor since she is not a wife. The deceased's brothers and his sons he gave them their shares of which they have constructed their homes where they have settled with their families. That even the 1<sup>st</sup> protestor stays on his land which he uses. She got the biggest share because she stays with her mother-in law plus what she has is what she contributed to put up and upkeep.

9. Upon conclusion of the oral evidence by the protestors and the petitioner and their witnesses, written submissions were filed by both parties. The protestors submitted that they have evidenced that they are dependants by virtue of **Section 29 of the Law of Succession Act CAP 160 Laws of Kenya** as son and wife of the deceased respectively. Moreover, the petitioner distributed the estate to two strangers of the estate leaving them out considering they are legitimate beneficiaries. They have no problem with the grant being confirmed but as long as the estate is distributed properly and fairly amongst the legitimate dependants. They relied on the case of *Serah wambui Gitau v Pauline Ncororo Kiura & 2 others – Meru Succ Cause No. 37 of 2003*.

10. The petitioner submitted that the 2<sup>nd</sup> protestor's claim ought to be rejected in its entirety as she is not a wife of the deceased. As for the 1<sup>st</sup> protestor he is a dependant of the deceased who consented to the petition for grant of letters of administration but failed to consent to distribution. He was aware of the proposed mode of distribution and given ample time to state his case but failed to do so.

11. The issues for determination are whether

1. Whether the Applicants/Protestors have proved that the grant that was made to the Petitioner on 21<sup>st</sup> September 2011 should be revoked and/or annulled.
2. Whether the 2<sup>nd</sup> Protester has proved that she was married to the deceased

**Section 76 of the Law of Succession Act** provides for grounds upon which the court can revoke or annul a grant of letters of Administration. It states:

**“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—**

**...”**

According to the protestors the grant made to the petitioner is defective in substance as it was secretly obtained by making of a false statement and concealment of fundamental material taking into account that they are dependants of the deceased.

12. To begin with, it needs to be established whether the protestors are dependants of the deceased as per **Section 29 of the Law of Succession Act**. The fact that the 1<sup>st</sup> protestor is a son of the deceased has not been refuted. The 2<sup>nd</sup> protestor alleges that she was the wife of the deceased and that they got married on 19<sup>th</sup> May 1987 under Meru customary law. This has been opposed by the petitioner who produced a certificate of Marriage dated 11<sup>th</sup> May 1974 to prove that she got married to the deceased at Ntemuene Methodist Church in Meru District, in the Eastern Province. The Petitioner confirmed that although her marriage to the deceased was monogamous the deceased however sired the 1<sup>st</sup> Protestor with the 2<sup>nd</sup> Protestor out of wedlock and there was therefore no marriage between the deceased and the 2<sup>nd</sup> Protestor.

13. In support of her claim that she was married to the 2<sup>nd</sup> protestor she produced a letter written to her by the deceased and an affidavit allegedly sworn by her and the deceased person. The 2<sup>nd</sup> protestor testified that the deceased penned of the letter as *'yours loving husband'*. Having thoroughly looked at the letter dated 30<sup>th</sup> June 1992 I have not seen the conclusion that the deceased referred to himself as the 2<sup>nd</sup> Protestors loving husband. From the contents of the letter it does not establish that the relationship between the 2<sup>nd</sup> Protestor and the deceased was a marriage. **“...to end with I will be very grateful if you write and tell me what you are planning your future with me, I would say that I want you and your son, if so please let me know”**. The 2<sup>nd</sup> Protestor was by then in Kerugoya while the deceased was

staying in Meru and there is nothing to show that she responded to this letter or even starting co-habiting with the deceased at any one time. There was no proof of a customary marriage between the deceased and the 2<sup>nd</sup> Protestor.

14. The 2<sup>nd</sup> protestor produced an affidavit that says that she and the deceased got married in January 1987. This is contrary to what the 2<sup>nd</sup> protestor stated as she said that they got married on 19<sup>th</sup> May 1987. Nonetheless, to legal requirements of an affidavit are laid down under **Section 5 of the Oaths and Statutory Declarations Act, CAP 15 of the Laws of Kenya** which states:

**“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”**

Thus, an affidavit must clearly state the place and date where it was made and it must be made before a commissioner for oaths.

15. I have no doubt that the alleged affidavit is fatally defective as the same contravenes the provisions **Section 5 of the Oaths and Statutory Declarations Act, CAP 15 of the Laws of Kenya**. The affidavit is not dated neither does it state the place it was made. Furthermore, **PW1** testified that it was sworn by the late Gituma advocate. This cannot be seen clearly on the affidavit. Consequently, the affidavit has no probative value and cannot be relied upon to find that the 2<sup>nd</sup> Protestor was married to the deceased.

16. For that reason, I am of the view that the 2<sup>nd</sup> protestor has failed to evidence that she is a wife of the deceased. Consequently, she cannot be considered as wife or dependant of the deceased. Also, the fact that she had a child with the deceased does not make her wife. This tends to evidence a ploy by the protestors so as to include the 2<sup>nd</sup> protestor so that she may get a share.

17. From the record, it shows that the 1<sup>st</sup> protestor was aware of this cause as he signed the consent to the making of a grant (Form 38) as confirmed by **PW1**. The 1<sup>st</sup> protestor refused to sign the consent for confirmation of grant which led to him being summoned by the chief. On 21<sup>st</sup> September 2011 the court noted that he failed to state what his protest was and went ahead and confirmed the grant. This clearly demonstrates that the 1<sup>st</sup> protestor was aware of this cause and the claim that it was filed secretly and without his consent does not hold water.

18. On the issue of distribution, **Part V of CAP 160** promotes equity and equality. The petitioner explained how she distributed the estate of the deceased. She explained that Jacob Guantai and Silas Kamau who are alleged to be strangers to the estate are brothers to her deceased husband and that the deceased had already settled them on LR. Nkuene/Kithungure/ 1130 prior to his death to share equally and that they had developed their respective portions of that lands. The Protestors did not dispute that the 2 are brothers of the deceased person. She also explained that the 2 brothers were left with the deceased as their guardian and that is the reason why he gave them the parcel of land in question. She made it clear that it was the deceased who showed his brothers and sons including the 1<sup>st</sup> protestor their portions where they have settled together with their families.

19. The only issue that the court takes with the Petitioner is that she didn't explain why LR.NO. Nkuene/Ng'onoyi/597 was distributed in the manner that she did because it appears that the 1<sup>st</sup> Protestor Dancan Kimathi is only getting 1.580 Ha whereas she gives herself and four of her children 0.578 Ha each from the same parcel. In her testimony the Petitioner said in cross examination that she had since added more land to the 1<sup>st</sup> Protestor and that he was now having more land than the rest but she did not give particulars of the area and the parcel from which the additional land was being taken from. In consideration of this issue this court hereby makes an order that the 1<sup>st</sup> Protestor will get 0.56 Ha out of LR. Nkuene/Ngonyi/597. The balance of the land to be shared between the Petitioner, Lucy Gacheri, Charles Koome, Edward Mutuma and Purity Kagwiria in equal shares. The rest of the distribution will remain as ordered by Justice Kasango on 21<sup>st</sup> September 2011.

20. The application dated 4<sup>th</sup> October 2011 is therefore dismissed for lack of merit save for the orders made in respect of LR. Nkuene/Ngonyi/597 in favour of the 1<sup>st</sup> Protestor. Each party to bear their own cost of the application.

**HON A. ONG'INJO**

**JUDGE**

**RULING DELIVERED, DATED AND SIGNED IN COURT ON 17<sup>th</sup> DAY OF OCTOBER 2019.**

**In the presence of:**

C/A: Kinoti

Applicant/Protestors:- Mr Omari Advocate for Protestors

Petitioner:-Mr Ringera Advocate for Petitioners – No Appearance

Ms Murithi holding brief

**Court**

Copies of the Ruling to be supplied upon payment of copying charges.

**HON A. ONG'INJO**

**JUDGE**