



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 109 OF 2016**

**IN THE MATTER OF ESTATE OF HENRY MUTHEE KATHURIMA (DECEASED)**

**SARAH MWAKA KATHURIMA .....PETITIONER**

**VERSUS**

**JOSEPH KIMATHI KATHURIMA .....INTERESTED PARTY/APPLICANT**

**R U L I N G**

1. By a Summons dated 1/10/2019 brought under *section 47 & 76 a, b, c Law of succession Act rule 44 and 73 probate and administration rules*, the applicant seeks an order that the grant confirmed on 20/11/2017 and rectified on 20/5/2019 be revoked.
2. The applicant also sought orders of inhibition inhibiting any dealings with **plot No. NAIROBI/BLK. KIT/101/F25 KITSURU, PLOT NO. NAIROBI LR. 209/18869, MAZERAS MOMBASA TITLE NO. 1892, MERU MUNICIPALITY TITLE NO. II/870, MERU MUNICIPALITY TITLE BLOCK II/871, NGUSISHI SETTLEMENT SCHEME TITLE NO. 10 (44.5 ACRES), NIRIMITI SETTLEMENT SCHEME TITLE NO. 149 (24 ACRES), LR.NO. NYAKI/THUURA/2129, KAMURITA MARKET PLOT NO. TIMAU MARKET PLOT NO. LR 129307, PLOT NO. 10 SUBUIGA, NGUSISHI PLOT NO. 59, SUBUIGA SETTLEMENT SCHEME LR. NO. 1844 and 1861, LR NO. ABOTHUGUCHI/KARIENE/1821, LR NO. ABOTHUGUCHI/KARIENE/ 2483.**
3. The application was based on the grounds of the face of the Summons and on the supporting affidavit and supplementary affidavit of **Joseph Kimathi Kathuruma**. He averred that he was the first born of the deceased, that they had given the petitioner the blessings to file the petition in this matter. That he did not execute the consent dated 17/9/2017 for the confirmation of grant.
4. That on 20/11/2017, a meeting was held and chaired by the petitioner and the applicant's paternal uncle where the beneficiaries could not agree on the mode of distribution. That the petitioner had distributed to herself, 95% of the properties of the deceased and left **Joseph Kimathi Kathurima and Judy Nyakairo Ng'ng'ira** with 2% only.
5. That when the matter came up for confirmation, the petitioner had tricked the beneficiaries that what was coming up for hearing was the appointment of the administrator. That the applicant only came to discover that the estate had been distributed after the petitioner began to dispose some of the properties. He was not informed of distribution and neither was his sister **Judy Nyakairo** involved in the confirmation of grant or distribution of the estate. That the petitioner had sought for confirmation of grant and distribution of the estate secretly and by concealing material facts.
6. The application was opposed through the replying affidavit of **Sarah Mwaka Kathurima** dated 14/10/2019. She averred that the applicant is the deceased's son born out of wedlock. That during the deceased's lifetime, the applicant was granted use of **NYAKI/THUURA/2129** and **SHOP/LODGING KAMURITA MARKET**. That despite the fact that the applicant was not a dependent, she had distributed property to him and that she had obtained the consent of all the children of the deceased.
7. The petitioner further contended that an inventory of all the deceased assets and liability was done. That the major liabilities was monies owed to Housing Finance Company Ltd in respect of **LR. 209/4066/1/NAIROBI (GREEN HOUSE)** of Kshs. 21,956,619/-. That she was compelled to sell the property for Kshs. 21,500,000/- to settle that debt. That there was another debt of Kshs. 12,000,000/- due to Post Bank Credit which must be paid to discharge land reference **NTIRIMITI 149**. That she had given the applicant the following properties:-
  - a) Land reference **NYAKI/THUURA/2121** 4 acres valued at Kshs. 20,000,000/-.
  - b) **SHOP/LODGING** on Plot at **KAMURITA MARKET** valued at Kshs. 3,500,000/-.
  - c) 14 Acres in **LR. NTIRIMITI 149** upon payment of Post Bank Credit valued at Kshs. 9,800,000/-.

- d) Vehicle Registration KAU 980N valued at Kshs.400,000/-.
- e) Lorry registration No. KAA 862T valued at Kshs.700,000/-.
- f) Land Rover Registration KAS 707D valued at Kshs. 300,000/

8. The petitioner averred that the total value of the properties she had distributed to the applicant was Kshs. 34,700,000/-. That all other beneficiaries had consented to the distribution of the estate including her stepdaughters and that the applicant was actuated by greed and hatred toward her as his step mother.

9. The applicant filed a Supplementary affidavit in answer to the contentions by the petitioner. He denied all the contentions made by the petitioner.

10. I have considered the affidavits, submissions and the record in its entirety. The issue for determination was ***whether the grant that was confirmed on 20/11/2017 and rectified on 20/5/2019 should be revoked.***

11. ***Section 76 of the Law of Succession Act*** provides for revocation or annulment of grant. The grounds set out therein are that a grant will be revoked where proceedings to obtain the grant were defective in substance; where 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 the grant was obtained by means of an untrue allegation of a fact essential in point of law or the person to whom the grant was made has failed, after due notice and without reasonable cause either to apply for confirmation or to move diligently with the administration.

12. It is the petitioner's contention that all the beneficiaries consented to her being the administrator and the distribution of the estate of the deceased. The applicant admitted that he and the other beneficiaries consented to the petitioner bringing the petition herein. He however, denied that he consented to the application for confirmation. Further, his sister did not consent to the distribution.

13. I have considered the entire estate, the petitioner applied for the grant to be confirmed before the expiry of the six months provided for by law on the ground that she intended to pay liabilities. That application was made on 28/9/2019. The same was allowed and the grant was confirmed on 20/11/2019.

14. In paragraph 9 of the affidavit in support of the application for confirmation, she stated; ***"THAT the deceased was survived by beneficiaries whose interest has been taken care of and their consent obtained to the confirmation of this grant"***.

15. There was no ***Form 37*** as provided under ***rule 40(8) of the Probate and Administration Rules*** that was annexed to the application or any consent whatsoever. Further, even in her reply to the present application, the petitioner did not provide the alleged consent.

16. How is the Court to take the petitioner's averment in paragraph 9 of the supporting affidavit aforesaid? That was a positive averment that all the beneficiaries had given their consent on the basis of which the Court confirmed the grant. It now turns out that the applicant and his sister did not sign any consent. To my mind, the confirmation was obtained by the making of a false statement and by means of an untrue allegation of fact.

17. The applicant averred that when he attended Court on the date of confirmation, he had been tricked that the matter was coming up to confirm the appointment of the administrator and not distribution of the estate of the deceased. This was not denied by the petitioner in her replying affidavit. This is buttressed by the actions of the administrator of attempting to redistribute other properties to the applicant way after she had misled the Court in the distribution of November, 2017.

18. Further, looking at the distribution of the estate of the deceased, the same defies the principles set out in ***sections 35 to 40 of the Law of Succession Act***. Unless the distribution was consented to by having the all beneficiaries sign the necessary consents, the same does not meet the criteria set up by the law in the sections referred to above.

19. There was the issue of valuations that was raised, that is the duty of the administrator and not a beneficiary.

20. Accordingly, I am satisfied that the application has merit. The same is allowed in terms of prayer nos. 2 and 3 of the Summons.

21. The Court makes further directions as follows:-

- a) within 45 days of the date hereof, the administrator;
  - i) do carry out and file in Court valuations of all the properties of the deceased.
  - ii) do obtain and file in Court, copies of bank statements for all the bank accounts belonging to the deceased from 24/5/2016 to-date.
  - iii) details and evidence of all liabilities owed by the estate.
- b) the administrator do file and serve within 45 days of the date hereof, a fresh application for confirmation of grant.

c) any beneficiary not agreeable to the fresh mode of distribution, do file and serve the administrator a protest thereto within 14 days of such service.

**DATED** and **DELIVERED** at Meru this 11<sup>th</sup> day of December, 2019.

**A. MABEYA**

**JUDGE**