



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 346 OF 2009**

**IN THE MATTER OF THE ESTATE OF THE LATE MUKOMUKANGU M'ITUAMIKWA**

**PAUL MUTIITHI M'RUKARIA.....PETITIONER**

**VERSUS**

**ROSE KAREA KIRIMANA.....OBJECTOR**

**ALEX MWENDA**

**JACKLINE KARIMI**

**MERCY MUTHONI**

**KELVIN KINGORI.....INTERESTED/PARTIES**

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

1. **MUKOMUKANGU M'ITWAMIKWA** (“the deceased”) died on 16<sup>th</sup> August, 2007 at the age of 94. She left behind a property known as **Timau/Settlement Scheme/161** measuring 3.98 ha (equivalent to 9.83 acres). On 16<sup>th</sup> June, 2008, Paul Muriithi M'Rukaria (“the petitioner”) took out a Citation **Succession Cause No. 107 of 2008** against Nathan M'Mungania and Paul M'Kungania whom he alleged to be the brothers of the deceased. Despite being served, the citees did not enter appearance and on 28<sup>th</sup> April, 2009, the petitioner was allowed to proceed and administer the deceased's estate.

2. On 7<sup>th</sup> July, 2007, the petitioner lodged a petition for letters of administration intestate in this cause. In the petition, he disclosed the aforesaid Citees as the only beneficiaries of the deceased. He disclosed his claim as being that of a purchaser of one acre from the estate. On 28<sup>th</sup> January, 2010, the grant of representation was duly issued to the petitioner.

3. On 3<sup>rd</sup> May, 2010, **ROSE KAREA KIRAMANA** (“the objector”), filed an objection praying for the revocation of the grant. She contended that; the petitioner had obtained the grant fraudulently; that she was the only daughter of the deceased; that the grant was obtained by making false statements and concealment of material facts and that the deceased died at an advanced age and was suffering from stroke and could not have sold part of her estate as contended by the petitioner.

4. In her supporting affidavit, the objector deponed that the deceased was her lawful mother and that she was the only heir to the estate; that due to her advanced age and illness, it was impossible for her to have

entered into any sale agreement with the petitioner and that the alleged brothers of the deceased were fraudsters who had been imposed to enable the petitioner get the orders he got.

5. The objection was opposed by the petitioner through the Replying Affidavit sworn by him on 3<sup>rd</sup> September, 2010. He deponed that the objector was not a daughter of the deceased; that the deceased had sold him one acre in the estate property vide an agreement dated 17<sup>th</sup> August, 1998. That he had taken possession of the one acre and had continued to be in possession thereof to-date and he therefore denied all the allegations of the objector.

6. On 15<sup>th</sup> October, 2014, the Interested Parties joined the proceedings and filed a Replying Affidavit to the objector's application. They contended that; in or about 1985, their mother Margaret Kigetu Kibui purchased 2.5 acres of land from the deceased in the estate property; that they took possession thereof until their mother's demise in 2000; that before her demise, the deceased had commenced the process of subdivision whereby the deceased applied for and obtained the Consent of the land Control Board to subdivide and transfer the estate property as follows:

- a) 4 acres - Rose Kareia
- b) 2.5 acres - Margaret Kigetu Kibui
- c) 1 acre - Paul Muriithi Rukaria
- d) Balance - Douglas Muriithi (Rose Kareia's son).

7. That thereafter, a boundary dispute arose between the deceased and her neighbour one Mugambi Angaine which stalled the process of subdivision and the issuance of title deeds. The Interested Parties produced, inter alia, an undated Mutation Form duly signed by the deceased, an application for subdivision and Letter of Consent thereto dated 13<sup>th</sup> August, 1998 and a letter by one Mugambi Angaine addressed to the District Surveyor seeking assistance on the boundary dispute aforesaid. The Interested Parties urged that the court should order distribute the estate in terms of paragraph 6 above which according to them constituted the final wish of the deceased on how her said property should be held.

8. On 15<sup>th</sup> February, 2017, the parties agreed that the petitioner does file an application for confirmation and the rest of the parties do file protests, if there was any. Further, on 10<sup>th</sup> April, 2017, it was ordered that the protest that had been filed by the objector be determined through viva voce evidence and the parties do file affidavit evidence on which the deponents were to be cross-examined The parties duly filed their respective witness statements.

9. The petitioner duly filed the application for confirmation on 10<sup>th</sup> March, 2017. He contended therein that Nathan M'Mungania and Paul M'Mungania were the only dependants of the deceased and that he had lived on the one acre sold to him by the deceased for over 20 years now. He urged the court to determine who between the said alleged brothers of the deceased and the objector is the real heir of the deceased. He gave his own proposal on how the estate should be distributed.

10. On 21<sup>st</sup> March, 2017, the objector filed an Affidavit of Protest. In the protest, the objector reiterated her previous averments about her being the only heir of the deceased but now proposed that the estate be distributed as follows:-

- a) Paul Muriithi M'Rukaria - 1 acre
- b) Alex Mwenda

Jackline Karimi

Mercy Muthoni

Kelvin Kingori - 2 acres

c) Rose Karea Kirimana - Balance

11. She further explained in that protest that the deceased had informed her that the Interested Parties were entitled to 2 acres only and not 2.49 acres which they claim and that they should pay a balance of Kshs. 2,000/- they owed the deceased. She insisted that Nathan M'Mungania and Paul M'Kungania were not heirs to the deceased.

12. The hearing, the parties agreed that their respective witness statements and affidavits be admitted as their respective evidence and that only the objector was to be cross-examined on her affidavits.

13. The record shows that the objector filed witness statements of **Andrew Ngatu M'Rithara, Francis Kirimi M'Ritara, Paul Kirimana, M'Mukindia Guraru and her own statement.** The interested Parties filed witness statements for **Mbaabu M'Itabara, John Manene and Kambura M'Arachi.** I have carefully considered the said statements in detail and have found them to be at variance with the evidence of both the objector as contained in her Protest as well as the Interested Parties' original replying affidavit.

14. When cross-examined, the objector admitted that the deceased had sold to the petitioner one acre and Margaret Kigetu 2 acres from the estate property. That the additional half an acre that the Interested Parties claim was because the deceased and the mother of Margaret Kigetu, one Sussana Kathuni were sisters. She denied ever having seen the Mutation which had been approved by the deceased. She admitted that the petitioner and the Interested Parties live on the estate property.

15. I have considered the testimony of the objector and all the witness statements and depositions on record. The only issue for determination as it finally turned out at the trial is ***who are the rightful beneficiaries of the deceased? How should the estate of the deceased be distributed?***

16. The depositions by the objector and her witnesses were to the effect that the objector was adopted by the deceased ever since she was barely three months.

17. The petitioner insisted that one Nathan M'Kungania and Paul M'Nungania were brothers of the deceased and therefore her dependants. He disclosed their ages in the petition as being 80 years and 74 years, respectively. There was no evidence to show that they were either living with or were dependent on the deceased as at the date of her demise.

18. In any event, the alleged brothers of the deceased had originally served with the Citation and failed to appear which paved the way for the petitioner to be allowed to petition for letters of administration. If the petitioner really believed that the two were the real heirs of the deceased he should have served then with the application for confirmation this he did not do.

19. On the other hand, when the objector appeared and testified, her contention that she was an adopted daughter of the deceased was never challenged. It came out that she and her husband together with their children were in possession of part of the estate property. On cross-examination, she was firm that her home is established on the estate land as is those of her elderly sons if the objector was not entitled to the estate, she would not have continued to be in possession of part of the estate at all.

20. On the balance of probability, I hold that the objector and not Nathan M'Mungania and Paul M'Kungania is the rightful heir of the deceased's estate.

21. As regards the claims by the petitioner and the Interested Parties, there was no dispute that the deceased sold to the petitioner one acre of land. It was also not disputed that the deceased sold some land to Margaret Kigetu, the mother of the Interested Parties. The only dispute is, whether the area sold to her was 2 acres as contended by the objector or 2 ½ acres as contended by her children, the Interested Parties.

22. The Interested Parties produced a Mutation Form containing a thumbprint said to belong to the deceased; an application for consent for the subdivision of **Timau/Settlement Scheme/161** and a Letter of Consent from the Timau Land Control Board dated 13<sup>th</sup> August, 1998. The application for subdivision was made by the deceased and she had proposed to subdivide the estate property into four portions of 4 acres, 2 ½ acres, 1 acre and the balance. This is in tandem with the Mutation form which shows that the estate property was to be subdivided into 1.62ha, 1.01 ha, 0.405ha and 1.0ha, respectively.

23. During cross-examination, the objector admitted as to who the parties in occupation of the estate property were. She stated those in occupation as being the heirs and her family, the Interested Parties, the petitioner and the son Franklin Kimaita was in accordance with the Mutation form and sketch that was produced in evidence. The Mutation showed 4 acres, 2 ½ acres, 1 acre and 2.33acres, respectively as the proposed subdivisions.

24. Accordingly, on a balance of probability, I am satisfied that the petitioner and the Interested Parties have proved that the deceased had sold to them 1 acre and 2 ½ acres respectively before her demise. From the deposition of Alex Mwenda, I am satisfied that the deceased was unable to effect the subdivisions in time and get the respective titles because of a boundary dispute with her neighbour.

25. There was a deposition that the deceased had given the objector's son Franklin Kimaita a portion of the estate property. The property is occupied as per the Mutation form which resulted from the deceased's intended subdivision of her property. In this regard, the only inference is that it was the deceased's intention that apart from the objector having a portion of the property, Franklin Kimaita was to have a separate and distinct partion from that of his mother.

26. Accordingly, the estate property, **Timau/Settlement Scheme/161**, should be distributed as follows:-

a) Paul Muriithi M'Rukaria - 0.405 ha

b) Alex Mwenda

Jackline Karimi

Mercy Muthoni

Kelvin Kingóri

Antony Mwongera - 1.01 ha

c) Rose Karea Kiramana - 1.62 ha

d) Franklin Kimaita - 0.98 ha

27. This being a family dipute, I will not make any orders as to costs.

It is so decreed.

**DATED and DELIVERED at Meru this 5<sup>th</sup> day of April, 2018.**

**A. MABEYA**

**JUDGE**