



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2434 OF 2009

IN THE MATTER OF THE ESTATE OF ADDISON KURIA MORRIS KABIRU (DECEASED)

POLLY WANJIRU KABIRU.....APPLICANT/OBJECTOR

VERSUS

ESTHER MUTHONI KURIA.....1ST RESPONDENT

HELIMAH WANGARI KURIA.....2ND RESPONDENT

RULING

1. The deceased Addison Kuria Morris Kabiru died intestate on 21st September 2007. He was survived two widows, Monicah Waruguru Kuria (deceased) and Esther Muthoni Kuria(1st respondent) and the following children:

- a) Elizabeth Wanjiru Kuria – daughter;
- b) Virginia Wangui Njenga – daughter;
- c) Mary Njeri Kamau – daughter;
- d) Mary Wairimu Kuria – daughter;
- e) Hannah Waithera Kuria – daughter;
- f) Helimah Wangari Kuria –daughter (2nd respondent); and
- g) Morris Kabiru Kuria – son (deceased)

The grant of letters of administration intestate was issued to the respondents on 21st May 2010, and confirmed on 8th February 2011. The estate of the deceased comprised of L.R. No. 8679/2 Mau Narok, Nakuru.

2. On 22nd April 2015 the applicant filed this application seeking the revocation of the certificate of confirmation of grant issued to the respondents on 8th February 2011. She further sought an order compelling the administrators of the estate to render account of the rental income collected by them in respect of the lease of the parcel of land owned by the deceased. The lease was from 21st May 2010 to date. The application was based on the grounds that despite the applicant being the widow of the deceased's late son Morris Kabiru Kuria, with whom she had one child, she and her child had been left out, both in the petition for grant and in the distribution of the estate. The application was supported by applicant's affidavit dated 21st April 2015.

3. In response to the application, the respondents filed the following grounds of opposition:

- a) that the summons do not satisfy the provisions of **Section 76** of the **Laws of Succession Act (Cap. 160)**; and

b) that the objector is guilty of laches for failure to invoke **sections 67 and 68 of the Act and Rules 7(4), 15 and 17 of the Probate and Administration Rules.**

4. The respondents filed a joint replying affidavit dated 30th November 2015. They conceded the fact that the applicant was the wife of the deceased's son Morris Kabiru Kuria, but stated that the deceased had bequeathed his late son approximately 1.35 Ha of land known as Lari/Kirenga/1079 and Kapomboi/Kolongolo Block 1/Kiriita/7 measuring 1.764 which properties were inherited by the applicant upon the death of her husband in **Succession Cause No. 596 of 2010**. They further stated that the applicant later sold both properties to Mwangi Chege and Maureen Njeri Chege and to Cyrus Nderitu Macharia. They annexed a joint affidavit of Mary Wambui Ngumba and Alfred Kimani Morris, the deceased's sister-in-law and brother, respectively, in which they stated that the late Morris Kabiru Kuria had received Kapomboi/Kolongolo Block 1/Kiriita/7 and Lari/Kirenga/1079 from the deceased as his inheritance and was not entitled to the remainder of the estate. It was the respondent's case that the applicant having squandered all her inheritance from her husband now sought to mischievously and selfishly interfere with the deceased's estate which she is not entitled to.

5. The respondents filed their witness statements dated 16th May 2016 reiterating the contents of their replying affidavit and further stating that the petition for grant did list the late Morris Kabiru Kuria as a son of the deceased and as such there was no concealment of that fact from the court. Alfred Kimani Morris Kabiru also filed his witness statement stating that he was the chairman of the entire Kabiru family and a brother to the deceased. He confirmed that the deceased bequeathed his two parcels Kapomboi/Kolongolo Block 1/Kiriita/7 and Lari/Kirenga/1079 to his late son Morris Kabiru Kuria before he died which properties were later inherited by the applicant, and that Morris Kabiru Kuria was not entitled to the remainder of the estate of the deceased.

6. The applicant also filed a witness statement on 4th February 2016 accusing the respondents of not informing her of the succession suit with regard to the deceased; and of leasing L.R No. 8679/2 Mau Narok-Nakuru and exclusively utilizing the proceeds thereof to her disadvantage and to the disadvantage of her child.

7. Parties filed their submissions which I have considered.

8. **Section 51(2)(g) of the Laws of Succession Act (Cap 160)** (as read with **rule 7(1)(e) of the Probate and Administration Rules**) states that when petitioning for a grant, the petitioner should include in the petition the names and addresses of all spouses and children of the deceased. In this petition the respondents listed the late Morris Kabiru Kuria as a son and beneficiary of the estate of the deceased. However, it was known that he had left the applicant and child but there was no reference to them. In the application for confirmation that was filed on 20th January 2011 there was no reference to either the late Morris Kabiru Kuria or the applicant and her child. The applicant was certainly a beneficiary of the estate of the deceased whose consent was required at the filing of the petition and during confirmation. Her exclusion was material concealment which under **section 76(b) of the Act** calls for the revocation of the grant.

9. On whether the applicant was entitled to the estate of the deceased, I note the uncontroverted evidence of the respondents, the evidence of Alfred Kimani Morris Kabiru, the chairman of the entire Kabiru family and a brother to the deceased, and the evidence of Mary Wambui Ngumba, the deceased's sister-in-law, that the deceased had bequeathed Kapomboi/Kolongolo Block 1/Kiriita/7 and Lari/Kirenga/1079 to his late son Morris Kabiru Kuria, which properties had been inherited by the applicant after the death of the deceased's son through **Succession Cause No. 596 of 2010** but later disposed of.

10. **Section 42 of the Act** allows a person to distribute his properties during his lifetime. The section states as follows:-

“42. Where -

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild, or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

11. These gifts given during the lifetime of the deceased are referred to as gifts *inter vivos*. In **Dan Ouya Kodwar –v- Samuel Otieno Odwar & Another [2016]eKLR** it was stated that –

“For gifts *inter vivos*, the requirements of the law are that the said gifts may be granted by deed, an instrument in writing of by delivery, by way of declaration of trust by the donor, or by way of resulting trusts or the presumption of. Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. *Gifts inter vivos* must be completed for the same to be valid.”

12. In this case, the deceased gifted Kapomboi/Kolongolo Block 1/Kiriita/7 and Lari/Kirenga/1079 to his late son Morris Kabiru Kuria. The properties were registered in favour of the deceased's son as evidenced by the copies of the green cards filed and became absolutely owned by the deceased's son. The respondents were required to indicate during the application for confirmation that the deceased had provided for Morris Kabiru Kuria and, if that was their case, to state that the gift was sufficient bequest to him. At the point the applicant would have raised her claim. She was, however, not given the opportunity.

13. Kapomboi/Kolongolo Block 1/Kiriita/7 measures 1.764 Ha (about 4.4 acres) and Lari/Kirenga/1079 measures about 1.35 acres. In total, the late Morris Kabiru Kuria got about 5.75 acres. The deceased was left with L.R. No. 6879/2 Mau Narok, Nakuru which measures 283

acres which, according to the certificate of confirmation, was shared equally between two houses. The 1st respondent was to be registered in respect of one half to hold in trust for herself and for Hannah Waithera Kuria, Helimah Wangari Kuria and Morris Kabiru Kuria in equal shares. Helimah Wangari Kuria got the other half to hold in trust for herself and on behalf of Elizabeth Wanjiru Kuria, Virginia Wangui Kuria, Mary Njeri Kamau and Mary Wairimu Kuria in equal shares. This means that, each house got 141.5 acres to share among its members. If the late Morris Kabiru Kuria were alive he would have shared in the 141.5 acres registered in the name of Helimah Wangari Kuria. He would be the 5th beneficiary in that house. Now that each member was to share equally, that would mean that he would have got 28.3 acres. I consider that he already got 5.75 acres from the deceased as gift *inter-vivos*. There was no evidence regarding the values of the parcels he got in relation to the 283 acres. Under the circumstances, and in bid to attain some measure of both equality and equity, I will apportion him 10 acres from the 141.5 acres due to their house.

14. I have indicated in the foregoing that the grant and certificate of confirmation ought to be revoked. But, since the dispute was only about the distribution of the estate that excludes the family of the late Morris Kabiru Kuria, the grant will not be revoked. Instead, the application will succeed to the extent that the certificate of confirmation issued on 8th February 2011 shall be amended so that the applicant will get ten (10) acres of the share allocated to Helimah Wangari Kuria and her siblings. After the 10 acres are deducted, she (Helimah Wangari Kuria) shall hold the balance in trust for herself and for Elizabeth Wanjiru Kuria, Virginia Wangui Kuria, Mary Njeri Kamau and Mary Wairimu Kuria in equal shares.

15. This is a family dispute and therefore each party shall bear own costs.

DATED and DELIVERED at NAIROBI this 2ND day of OCTOBER 2018.

A.O. MUCHELULE

JUDGE