



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 201 OF 2001**

**IN THE MATTER OF THE ESTATE OF M'MWIRABUA NTABUA (DECEASED)**

**MUGAMBI NTHAKA.....PETITIONER**

**VERSUS**

**SAMWEL GITONGA MWIRABUA.....OBJECTOR**

**RULING**

M'MWIRABUA NTABUA(*deceased*) died on 20/08/1985 aged 85 years. As per the letter of the Chief Muringene location the deceased left behind the following dependants;

- a. Maritha Kaunanku- wife,
- b. Isaac Karuma M'Mwirabua-Son,
- c. Mugambi Uthaka-Son

The aforesaid letter also mentioned NJIA/BURI-E-RURI/389 MEASURING 0.41 Ha as his only asset.

Petition for Letters of administration was filed on 23/August 2001 by Mugambi Nthaka, consent to making grant (Form 38) in the aforesaid petition was made by Maritha Kaunanka and Isaac Karuma M'Mwirambu albeit the same not signed.

The petition in P&A 5 listed the beneficiaries and estate of the deceased as per letter of the chief.

The petition was gazetted on 28<sup>th</sup> September 2001. Grant of letters of Administration issued on 11.1. 2002. Application for Confirmation of Grant was made on 16<sup>th</sup> May 2002. On 1.07.2002 application for Confirmation of grant was heard in the presence of the Applicant and Maritha Kaunanku and the same was allowed by Hon. Kasanga Mulwa J. On 3.07.2002 certificate for confirmation of grant was issued

On 28th February 2006 the objector made an application for the revocation of the Grant issued on 3.07.2002. the same prayed for Orders;

The aforesaid Application was supported by the Affidavit of Samuel Gitonga M'Mwirabua.

On 1/3/2006 the Honourable Lenaola J. granted an order of inhibition restraining dealings in L.R. Njia/Buri – E- Ruri/389 .Despite various occasions when the matter was listed for hearing the same did not proceed till 3<sup>rd</sup> July 2018.

The Applicant/objector called 4 witness whereas the Respondent/petitioner called 3 witnesses. PW1 the applicant adopted his witness statement and affidavit during his testimony. He testified that he was the son of the deceased from the second wife. He also introduced persons survived by the deceased and in totality it mentioned One (1) widow and eleven (11) children.

- a. Martha Kaunanku- widow
- b. Samwel Gitonga M'Mwirabua- son
- c. Peter Lubeta M'Mwirabua- son
- d. Joseph Kaberia- son

- e. Isaac Karuma- son
- f. Agelina Kathela- Daughter.
- g. Rose Nthaka-daughter
- h. Regina Mukokinya- daughter
- i. Rucia Kaindi- daughter
- j. Kathoni Catherine-daughter
- k. Kanocia Jane-daughter
- l. Karema Gladys-daughter

He also claimed the petitioner is not related to the deceased and the Petitioner failed to include other properties in the letters of administration i.e L.R. Njia/Cia Mwendwa/11098 and 1719.

He testified that the wives of the deceased were;

- (i) Ciokalaine M'mwirabua( deceased),
- (ii) Mwothanga M'Mwirabua(deceased),
- (iii) Maritha Kaunaku.

He testified that he was searching for the fathers properties when he found out about the succession cause and that L.P. Njia. Buri –E-Ruri/389 had been transferred to the petitioner. He alleged that the petitioner did not involve the other family members in filing the succession cause and when the petitioner was summoned by the Clan elders he refused to attend.

He further testified that the petitioner is not the father's son and was never introduced as his child to the family. They are from Mumutua clan and as per the Ameru custom his father (deceased) never called elders or Mugicaro- a person with special relationship, to introduce the petitioner to them as his sons

He further testified that his father did not have an oral or written will and that it is not true that his father called upon one of this special friend to whom he claimed to have adopted the petitioner. It is not true that the petitioner was taking care of the deceased prior to his death. The deceased neither appended his signature to transfer the land to the petitioner nor were his stepmother and Mzee M'Ibamarie told by the deceased that the said land was to be transferred to the petitioner. By the time the father died all the properties were in his name.

PW2 Mzee Mwambua is the niece to the deceased and aged 73 years old. He testified that he also knows the petitioner. The deceased kept the petitioner in his farm to manage the farm. He confirmed that their clan is known as Ntamutua and that whenever one wishes to adopt a child one has to call the elders, clan members and his biological children. The deceased never lacked in his old age and his property was sufficient to take care of him. The amount of Kshs. 2000,000/= that the petitioner claimed he spent was proceeds from the farm. M'Imarua he confirmed is Mugicaro (special friend) to the deceased. He however did not know if the deceased called for the Mugicaro. He reaffirmed that this is a ceremony that is done in the presence of all the villagers and children of person adopting the child. He however stated that the petitioner stayed in the farm of the deceased for over 20 years. He lastly stated that the properties of the deceased should benefit his children and his surviving wife.

PW3 Peter Labuta is a brother to the petitioner and a son of the Second wife. He corroborated the testimony of Pw1 and further stated that in their house they have 2 sons and 4 Daughters, in the first House the wife (deceased) had one son whereas in the 3<sup>rd</sup> house the wife has 2 sons and 4 daughters. He testified that they are currently staying at Kiolome which is far away, 14 km apart, from the Property the petitioner was managing and that it is actually the petitioner who chased away his wife from the property. He averred that it is only Isaack who was given land by his father and that the deceased could not have done anything without notifying them. He averred that there were previous caretakers in the property (3 in number) and that it is only Mugambi who has sought to lay a claim to the deceased's estate.

PW4 Misheck Mataria aged 68 yrs adopted his statement. He reaffirmed the statements of Pw1 and Pw2. He testified that he comes from same clan as the deceased (Ntuamutua clan). He testified that he was not an official but was a member of the clan. He claimed the objector complained to the clan in the year 2016. The Clan later summoned the petitioner (4 times) but he never turned up. He advised the objector to take legal action vide letter dated 2/10/2016.

He averred that for a mugicaro to be done one has to call the village elders and the other children of the father. That the same applies if someone wishes to gift his children his property during his lifetime and in this case the same was not done. He however confirmed that he knew M'Immaria and M'Ithaa but never attended to any clan meeting with the two. He restated that the objector had alleged that the petitioner had grabbed land that belonged to the deceased but they did not conduct investigations because the petitioner never attended to the proceedings though they had summoned him severally.

RW1, Mugambi Nthaka testified that the Deceased had 3 wives. Deceased was his Uncle who adopted him. He took care of the deceased. The

deceased lived in Ntumbereria Village whereas he lived in Bwire- Ruri village which are far apart.No one in the immediate family of the first two wives intended to take care of the deceased.

That he was given adjudication of the parcel 389 in 1984 when he took possession. Was handed over the transfer documents prior to the deceased demise. He planted trees, miraa and avocado.

The deceased summoned remaining wife and Gichiario elders M'Imaria M'Muria and M'Itha and told them of his intention to adopt the petitioner. He also handed to them the transfer documents. At the time the objector and the other children were of tender ages hence they did not attend the meeting. He testified that the deceased had made an Oral will but he testified that he did not mention the same when he was making the petition. He also did not have anything to show that he spent money to take care of the deceased. He testified that by the time the deceased died he had shown him the 1 acre but had not transferred the same to him.

RW2 M'Imaria testified he knew both the petitioner and the deceased and that the deceased adopted the petitioner as per the Ameru customs. He testified that the objector and his wife were present during the Mugiciario. Other clan members were present i.e. M'Ikantha, M'ibamaria, M'Ithaa, M'Ithaa's wife was also present.

He further testified that in a Mugiciario the deceased children ought to be present however in this case the daughters of the deceased and the relatives were not present. That the deceased died before he had transferred the land to the petitioner. However the deceased had informed him of his intention to have the petitioner remain with the one (1) Acre he had given him and the same should not be taken away from him.

RW3, Karuma Isaack was also a son of the deceased with Mwathanga, 1<sup>st</sup> wife of the deceased. As per his written statement he was allowed to gather her mothers land i.e. 4 acres. Cikalaine allocated 3.5 Acres and Maritha 3 acres. He admitted that Mugamba Nthanka was adopted by his father in 1984 at the time Lubeta, Katheka and Kainde were of age. He testified that M'Imaria was given a book that contained the details for the adjudication and I.D by his father this signified that the deceased had issued the land to the petitioner. At the adoption ceremony M'Ithaka and M'Imaria were also present. Children from the 2<sup>nd</sup> house and the 3<sup>rd</sup> House were however not present. He admitted that the petition did not list all the survivors of the deceased nor did it list all the beneficiaries of the deceased; that he was aware and he signed a consent for the petitioner to file these succession proceedings but he never informed his stepbrothers and sisters.

Both parties filed their submissions restating the testimonies of both the objector and the petitioner.

From the record and the evidence adduced during the hearing the following presents themselves as the issues for Determination;

- a. Whether the impugned grant was obtained by making a false statement and concealing some facts that were material to the case.
- b. Whether the proceedings leading to the making of the grant being fatally defective.
- c. Whether the petitioner was gifted 1 acre in Land Parcel No. NJIA/BURI-E-RURI/389 was not proved. A gift inter vivos can't be held as such unless same was transferred to the beneficiary during lifetime of deceased. If that was the case the petitioner should have indicated that he was claiming a gift but not that he was a son of the deceased. The reasons for his claim in this estate is mixed up. Whether he claims as an adopted son or as having used his resources to take care of the deceased raises suspicion.
- d. Whether the petitioner was adopted by the deceased.
- e. RW1 was he adopted? Did he take care of the deceased? How was he taking care of the deceased when they lived miles apart? RW2- witness to adoption of RW1 by deceased as per Ameru customs confirmed deceased children were not present.
- f. Informed the petitioner was to remain with one acre of land.
- g. Customary claim
- h. Whether Petitioner obtained grant by making false statement concealing some facts that were material to the case? Whereas the chief of Mwiringene Location in his letter dated .....identifies Mugambi Uthaka and Isaac Karuma M'Mwirabua as the only children of the deceased, it turned out that petitioner was not a child to the deceased. He claimed he was adopted under Ameru customary laws. Although RW2 said he was present when petitioner was adopted, he confirms that the deceased persons other children were not present as required under Ameru Customary Law and Applicants 2<sup>nd</sup> witness Muroko M'Mwambia 73 years old said his uncle the deceased had hired the petitioner to take care of his miraa farm and could pick and sell miraa. He said none of the clan members and even deceased persons children were involved in the alleged adoption of petitioner as deceased persons son. He said petitioner didn't take care of his uncle as he had 11 children and one wife and he had enough resources including what petitioner was taking care of from which he kept himself.
- i. PW2 knew RW2 as Mugiciario to the deceased but he was not aware of the ceremony to adopt the petitioner. He said the work of the Mugiciario is to supervise that what is wished is implemented but the ceremony for the wish is normally done in presence of villagers and the children of the person making the wish so they know what to implement.
- j. Applicant said the petitioner stayed on the deceased miraa farm as a guard. He said deceased stayed in land in Thumberia with is 3 wives and petitioner took care of suit land which was far away.
- k. The claim of customary adoption by the petitioner has not been proved and was not sufficient ground for him to disinherit the

biological children of the deceased. In that regard I do find that his failure to disclose that deceased had other children was fraudulent and therefore this court finds that he proceeded against the clear provisions of S. 76 of the law of Succession Act. The applicant herein together with biological children of the deceased were in a position of preference to him and he therefore ought to have sought their consent to petition for Letters of Administration. His conduct is that of a person who wanted to disinherit the deceased persons rightful heirs .

**Whether the impugned grant was obtained by making a false statement and concealing some facts that were material to the case.**

In order to make a determination in respect to the revocation of the grant herein I am guided by the provisions of section 76 of the Act that provides;

I am also guided by the decision in **Abdo Ali Ahmed Al-Nakhlani v Adil Salah Ali Al-Nakhlani [2015] eKLR** that aptly provides;

*The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.*

25. A grant may also be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the Estate. See - **Matheka and anor v Matheka [2005] 1 KLR pg 456**. It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.

33. The facts of this case are that the petitioner herein failed to list all the material assets that belonged to the deceased. He also failed to prove that he is the 'adopted son' of the deceased. He also failed to list all the beneficiaries of the estate of the deceased. During his testimony he testified that the deceased had left behind an oral will. This fact he never disclosed when he petitioned for the letters of administration.

34. I therefore find and hold that the petitioner/respondent was guilty of concealing some facts that were material to the case.

35. He admitted that he only disclosed to the members of the family when he was approached by the objector. This was after the objector had realised that the land had been transferred to his name.

Section 51(1)(g) of the Succession Act as read together with Rule 26(1) of the Probate and Administration Rules, provide that: **"Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant."**

36. The grant was obtained contrary to the provisions of the foregoing laws.

**Whether the petitioner was a son of the deceased?**

The incidents of adoption according to the Petitioner's own testimony, and which testimony were that the Petitioner lived with the deceased for over twenty (20) years, he also took care of the property of the deceased including taking care of the deceased land and crops such as miraa and sugar cane. He also underwent Mugiciaro in the presence of Rw2 and 3. The process was however put to question by the testimony of objector and PW2, 3 and 4 since the process did not satisfy the Ameru custom

**In Re Estate of M'richuni (Deceased) [2008] eKLR** Honourable M. J. Anyara Emukule J faced with almost similar circumstances as the facts of this case stated as follows;

".....Those may not be all the incidents of adoption under Kimeru custom or common law and in the absence of any evidence to the contrary, that common law of the Ameru displaces inheritance to agricultural and livestock on the grounds of consanguinity under section 39 of the Law of Succession Act, and I so find and hold."

**Section 3 of the Act provides for the meaning of a child;**

References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, **in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.**

With reference to the Ameru customs implied from the proceedings it is clear that the process was not followed in conformance to the Ameru Custom. Not all the persons that should have been present in the Mugiciaro were present. The testimonies of the petitioner and his witnesses is also conflicting as to the persons who were in attendance. A crucial witness who would have corroborated the evidence of the petitioner i.e. Martha Kainukawas not called upon albeit their being her witness statement.

The threshold that therefore remains is whether the deceased had assumed parental responsibility towards the petitioner, within the meaning of section 3 of the Law of Succession Act.

Whereas the petitioner contends that he resided with the deceased person. This has been controverted by the evidence of the Objector that the

deceased person lived in Kilome a distance that is 14 km away. The petitioner did not also lead evidence as to how he came to be taken care of by the deceased and at what stage in his life was he taken in by the deceased. He only led evidence that the deceased was his uncle and he stayed at his land in plot no. 389 for 20yrs.

He also did not give evidence showing the deceased duty of care towards him. His evidence is only based on the testimony of IsaackKamaru who claimed that the petitioner was adopted by the deceased in 1984, a year prior to his demise. At the time, and this has been admitted by Isaack Kararu, 3 of the sons of the deceased were of age, one being Lubeta who testified that he was not included in the adoption Ceremony.

It then follows that the petitioner has not justifiably proven on a balance of probabilities that he is indeed a son of the deceased.

### **Whether the petitioner was gifted 1 acre in Land Parcel No. NJIA/BURI-E-RURI/389 by the deceased?**

The mode of presentation of the gift was equally intertwined with the adoption ceremony that falls short of the requirements provided for under the Ameru Custom. this fact has been ascertained by the testimonies of both the objectors witnesses and those of the petitioner.

The gift is also been said to have been transferred by presentation of a book and the deceased I.d.to Rw2. I agree with the submissions of the objector that the same was not proved. Firstly the book mentioned and/or a copy thereof was not produced as an exhibit nor were the relevant transfer documents. The transfer as effected was not complete.

Despite been in possession of the premises the same has been dispute by the fact that there were previous caretakers of the premises. At the time of the demise of the deceased the title was still in his name. The proceeds he got from the premises during the lifetime of the deceased were also given to the deceased. It clearly shows that title was not conferred upon him.

The position of gifts have been explained **In Dan OuyaKodwar v Samuel OtienoOdwar& another [2016] eKLR** where quoting Her Ladyship Nyamweya, P. **in Re Estate of the Late GedionManthiNzioka (Deceased)(2015)eKLR** when she expressed herself as follows:

*For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing of by delivery, by way of a declaration of trust by the donor, or by way resulting trusts or the presumption of. Gifts of land must be 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. In this regard it is not necessary for the done to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the done. See in this regard Halsburys Laws of England 4th Edition Volume 20(1) at paragraph 32 to 51.*

*In Halsbury Laws of England 4th Edition Volume 20(1) at paragraph 67 it is stated as follows with respect to incomplete gifts:*

*“Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, It is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where donor's subsequent conduct gives the done a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprises in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”*

In this case the petitioner did not prove that the gift actually passed to him or the deceased had an intention to have the same pass over to him. The same is contradicted by the evidence of Isaack Kamaru that clearly shows that he was given land by the deceased and the same was transferred to him.

Lastly the petitioner inferred that the deceased had left an Oral Will. At the time the deceased presumably made the will is way past the time limit for Oral wills.

### **Oral wills**

(1) No oral will shall be valid unless—

(a) It is made before two or more competent witnesses; and

(b) The testator dies within a period of three months from the date of making the will:

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by sections 18 and 19.

### **Proof of oral wills**

If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.

It was deponed that the will was made in the year 1984 whereas the deceased passed on in August 1985. The same cannot therefore be said to be an Oral will.

Having made the above determination it is proper to provide the procedure appropriate in the distribution of the estate.

The deceased having left behind one spouse and children the estate ought to be divided in line with the provisions of section 40 of the Law of Succession Act. The same provides;

**Where intestate was polygamous**

(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

RW2 led evidence to the extent that the properties had been subdivided as hereunder;

- (i) 1<sup>st</sup> Wife Mwathanga-4 acres
- (ii) 2<sup>nd</sup> wife Cikalaine allocated 3.5 Acres
- (iii) 3<sup>rd</sup> wife Maritha 3 acres

There is no proper explanation as to where the aforesaid acreage falls in. this Court will therefore direct

- A. The summons for revocation dated 28th February 2006 and filed in court on 28th February 2006 is allowed.
- B. The Applicant, Samuel Gitonga Mwirabua is hereby appointed as the Administrator of the Estate of the deceased.
- C. That any title issued with respect to Land Parcel No. NJIA/BURI-E-RURI/389 is hereby revoked and the same is reinstated back to the estate.
- D. The petitioner also failed to include all the assets of the deceased to enable the estate to be administered wholly. Evidence by the applicant disclosed that the deceased owned the following assets.

L.R. Njia/Cia Mwendwa/1109

L.R. Njia/Cia Mwendwa/719

L.R Njia/Buri-E-Ruri/389

This court finds that the grant made to the petitioner herein cannot stand. The petitioner does not have any entitlement at all on L.R. Njia/Cia Mwendwa/389 and should therefore vacate forthwith to enable the rightful beneficiaries inherit and use the same. The grant is revoked and if any transaction consequent to grant caused transfer of the land same should revert to the name of the deceased.

The applicant Samuel Gitonga M'Wirabua is hereby appointed as administrator of the estate herein to expedite distribution to rightful beneficiaries. The said Administrator to file and serve all beneficiaries with proposal for distribution of the deceased person's estate.

M. 22.11.2018 to confirm application filed and for issuance of certificate of confirmation. In event there is protest to the application for confirmation, protests to be filed together with submissions for a ruling on 19.12.2018.

**HON. A.ONG'INJO**

**JUDGE**

**RULING SIGNED, DELIVERED AND DATED THIS 15<sup>TH</sup> DAY OF NOVEMBER 2018.**

**In the presence of:**

C/A: Kinoti

Petitioner:- Mr Kaimenyi Advocate for Rimita for Petitioner.

Objector: Mr Gitonga Advocate for Objector.

**HON. A.ONG'INJO**

**JUDGE**