



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 73 OF 2004

**IN THE MATTER OF THE ESTATE OF M' KIRERA M' RINGINE alias KIRETIA RINGINE NGATUNYI ITIRITHIA-
DECEASED**

GEORGE KANGORIA M' KIRERIA.....1ST PETITIONER

ESTHER GACEKE SOLOMON.....2ND PETITIONER

VS

JOHN KIRIINYA NDUMBA M'KIRERIA.....PROTESTER

RULING

1. By Summons for Confirmation of Grant filed in court on 21st September 2018, the Administrators sought to distribute the estate of the deceased as follows:

L.R NO. KIRIMARA/KITHITHINA/108

- 1. CHARITY KATHUKU MURITHI-0.61 ACRES**
- 2. REBECCA KOORU M' KIRERIA-0.61 ACRES**
- 3. SASINTA MUKOBURI M' KIRERIA- 0.61 ACRES**
- 4. GEORGE KANGORIA M' KIRERIA-0.61 ACRES**
- 5. SIMON KIJUKI MKIRERIA-0.61 ACRES**
- 6. ROSE KAGWIRIA -0.61 ACRES**
- 7. ESTHER GACEKE SOLOMON 0.61 ACRES**
- 8. JOHN KIRIINYA NDUMBA M' KIRERIA-0.61 ACRES**

L.R NO. NYAKI/THUURA/125

- 1. JOHN KIRIINYA NDUMBA M' KIRERIA-1.00 ACRES**
- 2. ESTHER GACEKE SOLOMON-1.00 ACRES**
- 3. GEORGE KANGORIA M' KIRERIA 1.00 ACRES**
- 4. SIMON KIJUKI MKIRERIA-1.00 ACRES**
- 5. REBECCA KOORU M' KIRERIA-1.00 ACRES**

L.R NO. NTIMA /IGOKI/60

1. SASINTA MUKOBURI M' KIRIINYA-0.125 ACRES
2. CHARITY KATHUKU MURITHI-0.125 ACRES
3. ROSE KAGWIRIA -0.125 ACRES
4. ESTHER GACHEKE SOLOMON -0.125 ACRES
5. JOHN KIRIINYA NDUMBA M' KIRERIA-0.125 ACRES
6. SIMON KIJUKI M' KIRERIA-0.125 ACRES
7. GEORGE KANGORIA M' KIRERIA-0.125 ACRES
8. REBECCA KOORU M' KIRERA-0.125 ACRES

2. On 23rd April 2018, the Petitioner filed an affidavit of Protest to the proposed mode of distribution and contended that the deceased in his life time had shared out land parcel number **Nyaki/Thuura/125** as follows;

- a).JOHN KIRIINYA NDUMBA-1 ACRE
- b).SOLOMON KIMATHI- 1 ACRE
- c).GEORGE KANGORIA 1 ACRE
- d).SIMON NJUKI 1 ACRE
- e).REBECCA KOORU 1 ACRE.

Consequently he urged the court to distribute the estate of the deceased as follows;

- a).**KIRIMARA/KITHITHINA/108**- JOHN KIRIINYA NDUMBA M' KIRERA
- b).**NYAKI/THUURA/125 to**
- c).JOHN KIRIINYA NDUMBA M' KIRERA-1 ACRE
- d). ESTHER GACEKE SOLOMON- 1 ACRE
- e). GEORGE KANGORIA M' KIRERIA-1 ACRE
- f). SIMON KIJUKI M' KIRERIA- 1 ACRE
- g).REBECCA KOORU M' KIRERIA 1 ACRE
- h).**NTIMA/IGOKI/60 to**
- i).GAKOROMONE A.I.P.C.A -1/4 ACRE
- j).JOHN KIRIINYA NDUMBA M' KIRERIA-1/4 ACRE
- k). MARY MWELU GITONGA-1/4 ACRE
- l).MARY WANJIKU WATHIGO ¼ ACRE

3. The Protestor's case was as follows; Protestor witness 1 was **John Kiriinya**. It was his evidence that the deceased was his father and that the deceased had left the following properties; **KIRIMARA/KITHITHINA/108, NYAKI THUURA 125 and NYAKI/GIAKI 131**. It was his evidence that he had been given L.R NO 108 by the deceased in 1984 and that he had been in occupation since then. It was his further evidence that his father was in the process of transferring the same to him at the time of his death.

4. The Administrators case on the other hand was as follows; Administrator witness 1 was **Esther Gaceke Solomon**. She adopted her witness statement filed in court on 20th July 2018, and testified that the deceased was the father to her husband Solomon and that the deceased was survived by 8 children. It was her evidence that that she was in total agreement with the proposed mode of distribution with her co-administrator George Kangoria, as the same was fair and treated all the children of the deceased equally. It was her evidence that the proposal had the support of all the members of the family except the Protestor who wanted a lion's share of the estate and that if his proposal

was allowed, he would take alone two of the 3 parcels of land left behind by the deceased. She further denied that the deceased ever gave the Protestor **L.R NO. KIRIMARA/KITHITHINA/108**.

5. Petitioner's witness number 2 was **Rebecca Kooru**. It was her evidence that everyone was in the agreement to the proposed mode of distribution by the Administrators, except the Protestor. She further denied that the family had agreed to sell any part of L.R NO. NTIMA/IGOKI/160 and that further the Protestor sold the land to the two buyers fraudulently and secretly and that and that this was the reason why the court had cancelled the titles issued to the purchasers. She further contended that she was the only daughter of the deceased who was not married and that all her life she had lived on L.R NTIMA.IGOKI.60 with her children and that if the land was shared as proposed by the Protestor, she would be evicted from the land.

6. Petitioner's witness number 3 was **George Kangoria M' Kirerria**. It was his evidence that that he was one of the deceased sons and that the Protestor was his brother. It was his evidence that initially the Protestor had initially filled this cause secretly whereupon the court subsequently revoked the Grant and appointed him and Esther Gaceke Solomon as joint Administrators and that after they had been appointed Administrators they discovered that the Protestor had sold off part of the deceased estate to strangers and the titles which had been issued to Mary Mwelu Gitonga and Mary Wanjiku Wathigo cancelled and reverted in the name of the deceased.

7. It was his further evidence that a meeting of all the family members had been convened and with the exception of the Protestor, all the beneficiaries had agreed to the distribution of the estate as set out in the affidavit supporting Summons for Confirmation dated 16th September 2016.

8. After close of the respective parties' case, the parties filed submissions. It was submitted for the Protestor that the deceased in his lifetime settled the Petitioner on land parcel No. Kirimara/kithithina/108 and handed him the title but unfortunately he died before transferring the same to the Protestor and that prior to institution of this succession cause, the beneficiaries of the deceased had consented to sell 2 portions of ¼ each from land parcel no. NYAKI/IGOKI/60. Consequently, the Protestor contended that the purchasers were entitled to their portions of land.

9. On the other hand, it was submitted for the Administrators that with regard to the proposal by the Protestor that that he gets the entire land known as KIIRIMARA/KITHITHINA/108 measuring 5 acres on the basis that the deceased had given him during his lifetime, it was submitted that if indeed that was true, the deceased would have transferred to him before he died and that it was not in dispute that the deceased had ailed for a long time and that since the Protestor was given the title in 1984 and the deceased died in 1998 a difference of 14 years, it was submitted that this was a long period of time and if that was the intention, the deceased would have done so during that period. With regard to sale agreements it was submitted that the alleged sale agreements were entered into before the Grant was confirmed and that by virtue of the law they were invalid and that any purchaser of a deceased property before the date of Confirmation of Grant as in this case, was not protected by section 93 (1) of the Law of Succession Act and that such an agreement was automatically nullified and would not be considered by this court. Consequently, the Administrators urged the court to confirm the Summons dated 16th September 2016, as the Administrators had taken care of all the beneficiaries into consideration and divided the estate equally and fairly.

10. I have carefully considered the proposed mode of distribution by both the Protestor and the Administrators; the evidence on record, rival submissions by the parties and the authorities relied upon by the parties. The Protestor's case was that the deceased had settled him on land parcel no. KIRIMARA/KITHITHINA/ 108 and handed him the title deed but unfortunately died before he could transfer this land to him. No evidence was however tendered by the Protestor to support these allegations. Indeed and as was rightly contended by the Administrators, the Protestor alleged to have been given the title in 1984 by the deceased whereas the deceased died in 1998, a difference of over 14 years. There was nothing that prevented him from transferring the said parcel of land to the Protestor if indeed that was his intention. In addition the Protestor never called any evidence to support these allegations.

11. On the other hand the Administrators evidence that they had sat down and agreed on the mode of distribution, save for the Protestor remained uncontroverted throughout the hearing. The Protestor in this cause appeared to be a lone ranger. It is not in dispute that in the instant succession cause, that the deceased was not survived by a spouse. His estate should therefore be distributed in accordance with Section 38 of the Law of Succession Act CAP 160 of the Laws of Kenya. The same provides as follows:

Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

12. I have carefully perused the proposed mode of distribution by both the Protestor and the Administrators. The proposed mode of distribution by the Administrators in paragraph 6 of the affidavit in support of Summons for Confirmation of Grant proposes to share the net estate of the deceased equally and fairly amongst all his surviving children. On the other hand the proposed mode of distribution by the Protestor is skewed and unfair as the Protestor is getting a lion's share of the deceased estate and these smacks of greed on part of the Protestor. This probably explains why the initial Grant issued to him was revoked. The same is certainly unfair and cannot be allowed to stand. Accordingly, I hold and find the proposed mode of distribution by the Administrators to be fair, just and equitable and accordingly the estate of the deceased shall be distributed in accordance to the proposed mode of distribution by the Administrators at paragraph 6 of the affidavit in support for Confirmation of Grant dated 16th September 2016.

13. With regard to the alleged sale of part of the deceased estate to Mary Wanjiku Wathigo and Mary Mwelu Gitonga, the Administrators contended that they had never consented to the said transfers and that and that the said transfers were in blatant defiance of court orders of inhibition issued on 30th October 2013. It is indeed not in dispute that the said transfers were indeed effected in blatant disregard of court orders by the Protestor. It is also not in dispute that the said transfers were done before the Grant was confirmed. I am alive to the provisions of **Section 93 (1) of the Law of Succession Act**. The same provides

Validity of transfer not affected by revocation of representation

(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.

14. Section 93 of the Law of Succession Act has been a subject of Judicial interpretation in a number of cases in Jane Gachola Gathetha vs Priscilla Nyamira Gitungu and another (2006) eKLR the Court of Appeal in Nyeri stated thus:-

“We think with respect, that there is a fallacy in invoking and applying the provisions of Section 93(1) of the Law of Succession Act and the Superior Court fell into error in reliance of it. The section would only be applicable where firstly there is a transfer of any interest immovable or moveable property. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void abinitio and the property is traceable.”

15. In Re-Estate of Christopher Aide Adela (Deceased) (2009) eKLR Rawal J stated as follows:

“As per my considered view, Section 93(1) of the Act talks of interest for immovable or movable property and Section 93(2) refers to transfer of immovable property. Obviously both provisions talk of different types of transfer and Section 93(2) protects a purchaser of the immovable property only if he was aware of some liabilities or expenses of the estate which are not met or paid and still got the property transferred in his names. The aspect reading of the said provisions will indicate that the transfer to a purchaser, if shown to be either fraudulent and/or upon other serious defects and/or irregularities can be invalidated. Reading these provisions in the manner will be commensurate with provisions of Section 23 of the Registered Land Act (Cap 281) or any other provisions of law regarding proprietorship of an immovable property. It shall be a very weak or unfair system of law if it gives a carte blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fairness and justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal actions prejudicing the interests and rights of right beneficiaries of the estate.”

16. In the instate cause and the said transfers having been effected in blatant disregard of court orders and without the consent of the other beneficiaries, the said transfers were irregular null and void *abinitio* and the same cannot be allowed to stand and the interested parties Mary Wanjiku Wathigo and Mary Mwelu Gitonga cannot take cover under Section 93 of the Law of Succession Act.

17. Accordingly the estate of the deceased shall be distributed in accordance with paragraph 6 of the Affidavit in support for Confirmation of Grant by the Administrators dated 16th September 2016.

18. With regard to costs, courts rarely make orders as to costs in succession matters to avoid antagonizing the parties further. However in this case and in light of the Protestor’s conduct and as was rightly contended by the 1st Administrator, the Protestor has subjected the other beneficiaries to untold pain and suffering. Accordingly he must suffer the consequences of his actions. I therefore direct the costs of this Succession Cause to be borne by the Protestor.

HON. A.ONG’INJO

JUDGE

RULING SIGNED, DELIVERED AND DATED THIS 15TH DAY OF NOVEMBER 2018.

In the presence of:

C/A: Kinoti

Petitioners:- Mr Murage Mwenda for Administrator.

Protester: Mr. Kariuki Advocate for Protester.

HON. A.ONG’INJO

JUDGE