



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 296 OF 2001**

**IN THE MATTER OF THE ESTATE OF M'RUTERE M'MUGWIKA ALIAS RUTERE ANDREW (DECEASED)**

CATHERINE NYOROKA RUTERE.....ORIGINAL PETITIONER

HARRIET NTHIIRA RUTERE.....FORMER ADMINISTRATOR/RESP

LUCY NKANDI KIRIMI.....ADMINISTRATOR/RESPONDENT

-VS-

TIMOTHY GITUMA RUTERE.....APPLICANT

ROSE NCEKEI MUTHURI.....APPLICANT

CECILIA KAJUJU M'RUTERE..... APPLICANT

**RULING**

1. This ruling relates to four applications which the court ordered that they be consolidated and be determined together. The applications are as follows: -

- a) Summons for rectification dated 26<sup>th</sup> January, 2018;
- b) Summons for revocation of grant dated 31<sup>st</sup> January, 2018;
- c) Summons dated 12<sup>th</sup> April, 2018 for revocation of grant;
- d) Summons dated 16<sup>th</sup> June, 2018 for accounts.

2. I propose to deal with the said applications in the order in which they were filed. But before doing so, I propose to give a brief background to these applications and the role of each applicant. The **Rutere M'Mugwika ("the deceased")** died on 7<sup>th</sup> November, 1999. His was a polygamous family and he left four properties as his estate with the following beneficiaries:-

**First House Catherine Nyoroka Rutere (1<sup>st</sup> wife)**

- i) Rosalia Nchekei
- ii) Cecilia Kajuju
- iii) Luka Kiriimi Rutere (deceased but left a widow, Lucy Nkandi)
- iv) Idda Mwendwa
- v) Ann Kinya

v) **Nicholas Rutere.**

**Second House Harriet Nthiira (2<sup>nd</sup> wife)**

i) **Dennis Mwirigi**

ii) **Timothy Gituma**

iii) **Edwin Kimathi.**

3. Catherine Nyoroka petitioned for letters of administration which were granted to her and subsequently confirmed on 7<sup>th</sup> November, 2003. In the confirmed grant, she excluded all her married daughters, to wit, **Rosalia Nchekei, Cecilia Kajuju, Idda Mwendwa and Ann Kinya.** She distributed the estate to her daughter-in-law Lucy Nkandi, Nicholas Rutere and her co-wife and her children only.

4. She died on 26<sup>th</sup> January, 2011 and since then, the estate has known no peace. Upon her demise as aforesaid, the second widow of the deceased, Harriet Nthiira took up the administration of the estate. She then applied for the rectification of the Certificate of grant whereby she removed **Lucy Nkandi** from ½ ownership of **Plot No. 76, Makutano Meru town** and distributed the entire property to herself. She also exchanged the ownership of **Plot No. 1703** which she held jointly with her children with **Plot No. 1704** previously held by Lucy Nkandi and Nicholas Rutere.

5. Against that background, Lucy Nkandi successfully applied for the removal of Harriet Nthiira as the administratrix of the estate in May, 2017. In its Judgment delivered on 17<sup>th</sup> May, 2017, this Court directed that the distribution do revert to the way it was as per the original Certificate of Confirmation of 7<sup>th</sup> November, 2003. It is against the foregoing background that the aforesaid applications have been brought. The court decided to determine all of them in this omnibus ruling in order to bring an end to the unending litigation on this estate in this court. Henceforth, the parties are to litigate in the higher courts, if at all.

**a) Application dated 26<sup>th</sup> January, 2018**

6. This is a summons under *section 74 of the Law of Succession Act Cap 160 (“the Act”) and Rule 43 of the Probate and Administration Rules.* In this application, Lucy Nkandi Kirimi (“**the applicant**”) sought an order for the rectification of the grant whereby the holding and/or distribution of the property known as **Ntima/Igoki/2719**, is exchanged with that of **Plot No. 76, Makadara Estate.** She also sought an order that **Harriet Nthiira Rutere** and/or her children do surrender the original title deed to **L.R. NO. NTIMA/IGOKI/2719** to the Land Registrar Meru Central District for cancellation or in default, the production of the original be dispensed with.

7. The grounds for the application were contained in the body of the summons as well as the supporting affidavit of Lucy Nkandi Kirimi sworn on 26<sup>th</sup> January 2018. It was contended that there was a mistake as between where **Plot No. 76 Madaraka Makutano** was located on the ground vis a vis **parcel No. NTIMA/IGOKI/2719.** That the home of Harriet Nthiira Rutere and her children is situate on **Plot No. 76 of Madaraka Makutano** and not land **parcel No. 2719** which is a commercial plot.

8. It was contended that at the time of distribution, the location of the two properties were mistake or misapplied as to their location on the ground leading to erroneous distribution. The home of **Harriet Nthiira** and her children was thought to be on **parcel No. NTIMA/IGOKI/2719** and that **Plot No. 76 of Madaraka Makutano** was thought to be the commercial plot. That after being appointed the administratrix, the applicant engaged the services of a Valuer who discovered the said mistake. The applicant therefore sought the rectification of the grant so that the distribution is changed to be in line with the original intention, that is, the home occupied by **Harriet Nthiira** and her children remain theirs and the commercial property be distributed equally between **Harriet Nthiira** and the applicant.

9. The application was opposed by Harriet Nthiira vide her Replying Affidavit sworn on 27<sup>th</sup> July, 2018. She contended that the said application was similar to the one she had made on 13/2/2013 which had led to the application that reverted the distribution to the one of 7<sup>th</sup> November, 2003. That entertaining the present application will be akin to this court sitting on appeal on its own decision.

10. On behalf of **Harriet Nthiira**, it was submitted that the applicant was seeking to redistribute the estate yet **Plot No. 2719** had already been transmitted. That the applicant was becoming dictatorial and should be removed from the administration of the estate. For the applicant, it was submitted that, the applicant is entitled to a share in **Plot No. 2719.**

11. I have considered the Affidavits and submission on record. This is an application for the re-rectification of the grant. The court has jurisdiction to rectify a grant but must be guided by *section 74 of the Act* which provides: -

**“Errors in names and descriptions, or in setting forth the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly”.**

12. I have seen the distribution that was made on 7<sup>th</sup> November, 2003. In that distribution, **plot No. 76, Makutano** was distributed to **Harriet Nthiira** and the applicant equally while **Plot No. 2719** was distributed to Harriet and her children wholly.

13. It is not disputed that **Plot No. 76** is a residential property which is and has been in occupation by **Harriet Nthiira** and her children. That is where her matrimonial home is located. It is not in dispute that **parcel No. 2719** is a commercial plot. **Harriet Nthiira** did not deny that

there had been a mistake as to the actual location of these two properties on the ground and that the mistake was only discovered when the applicant commissioned the valuer to value the estate.

14. The question therefore is, why would a matrimonial home be distributed 50:50 between a widow of the deceased and her children with a daughter-in-law? Was the intention to distribute between the widow and a daughter-in-law equally, the matrimonial home or the commercial property?

16. None of the parties addressed this issue. I have seen the copy of the green card for **Plot No. 2719**. The area therefor is approximately 0.055 ha. The valuation report by **Roma Valuers Ltd** dated 28<sup>th</sup> July, 2018 shows that **Plot No. 76 Makutano** is approximately 312sm (square metres). It has a 3 bedroomed bungalow and a garage.

17. In her affidavit in support of the application for confirmation sworn on 25<sup>th</sup> March, 2003, in distributing the two properties, **Catherine Nyoroka (the original petitioner)** swore at paragraph 6 as follows: -

**“(a) LAND PARCEL NO. NTIMA/IGOKI/2719 measuring 0.053 HA to go to**

**(i) HARRIET NTHIIRA**

**(ii) DENNIS MWIRIGI**

**(iii) TIMOTHY GIKUNDI**

**(iv) EDWIN KIMATHI**

**(b) Plot No. 76 (Makutano-Meru town) to be subdivided equally between HARRIET NTHIIRA and LUCY NKANDI KIRIMI IN PLACE OF CATHERINE NYOROKA RUTERE with the former taking the lower side (eastern side) and the latter taking the upper side (western side).**

**...”**

18. From the foregoing, the question is, was it the original intention in 2003 to distribute the matrimonial home of **Harriet Nthiira** into two equal shares? I don't think so. From the graphic description of the distribution given by the original petitioner of **Plot No. 76 (Makutano-Meru town)**, she must have mistakenly considered it to be the commercial property. There is no way she must have intended her daughter-in-law to share with her co-wife the latter's matrimonial home. It is impracticable!

19. Accordingly, I am satisfied that there was a genuine mistake in the description and consequent distribution of **Plot Nos. 76, Makutano and 2719**. There was a mistake of where the two properties lay on the ground. A matrimonial home cannot be distributed to persons not belonging to that home. There was clearly an error in the description of the properties.

20. There was a deposition that **Plot No. 2719** had already been transmitted to **Harriet Nthiira**. The transmission seems to have been effected on 15<sup>th</sup> June, 2012. With the acts of Harriet having been declared fraudulent in the Judgment of this Court of 11<sup>th</sup> May, 2017, and the distribution having been by mistake, the transmission is hereby set aside and the title thereto rectified accordingly.

21. Accordingly, the application dated 26<sup>th</sup> January, 2018 is hereby allowed as prayed.

**b) Application dated 29<sup>th</sup> January, 2018**

22. This is a Summons brought under **section 46, 76 (d) (i) and (ii), 83 (e) (g) and (h), 95 (a) and (b) of the Act and Rules 44 (i) and 75 of the Probate and Administration Rules**. The applicant is **Timothy Gituma M'Rutere**. He sought for the revocation of the grant issued to **Lucy Nkandi Kirimi** on 11<sup>th</sup> May 2017 and for a fresh grant to be issued to **Timothy Gituma M'Rutere, Dennis Muriuki Rutere and Edwin Kimathi Rutere**.

23. The grounds for the application were contained in the body of the Summons and the supporting affidavit of Timothy Gituma Rutere (**“the applicant”**) sworn on 31<sup>st</sup> January 2018. It was contended that in terms of the judgment delivered on 11<sup>th</sup> May, 2017, **Lucy Nkandi Kirimi (‘the administrator’)** was given 6 months to finalize and file accounts of the estate but had failed to do so and no extension had been sought or granted. That she has not demonstrated any interest in finalizing the administration.

24. The application was opposed vide the replying affidavit of **Lucy Nkandi Kirimi** sworn on 17<sup>th</sup> February, 2018. She deponed that the delay in distributing the estate was caused by an error on the grant which she had already sought to rectify vide her application dated 26<sup>th</sup> January, 2018.

25. In his submissions, the applicant contended that the administrator was in contempt of the orders of this court made on 11<sup>th</sup> May, 2017. That she had admitted that she had not complied with the subject order. The cases of **Kariuki & 2 Others v. Minister for Gender, Sports Culture and Social Services and 2 Others [2004] KLR 588** and **Mwangi Gakuri Benard Kigotho Maina & Another [2016] eKLR** were relied on for those submissions.

26. I have carefully considered the affidavits on record and the submissions of learned Counsel. The applicant seeks the revocation and/or annulment of the grant on the ground that the administrator had failed to finalize and distribute the estate within the 6 months ordered. Her response was that she discovered an error in the grant which she has already sought to rectify.

27. For a grant to be revoked, one must meet the grounds set out in **section 76 of the Act**. It is not in doubt that the administrator failed to meet the 6 months deadline given by the court. However, she explained that the grant had an error which she had sought to rectify vide her application dated 26<sup>th</sup> January, 2018. That fact was not denied by the applicant. The court has already found that indeed there was an error in the grant issued to the administrator. That error has already been corrected. That being the case, I am not satisfied that the failure to comply with the subject order was not deliberate. The cases relied on by the applicant are not applicable. It is only now that the administratrix can proceed with the administration without any hiccup.

28. Accordingly, I am not satisfied that the applicant share met the threshold set out in **section 76 of the Act**. The application therefore fails.

**c) Application dated 12<sup>th</sup> April, 2018**

29. This was a Summons brought under **section 49, 63(1) and 73 of the Probate and Administration Rules (sic)**. In this application, **Rose Ncekei Muthuri and Cecilia Kajuju M'Rutere ("the applicants")**, sought for the revocation of the grant and for the cancellation of all entries made in the register in respect of **NTIMA/IGOKI/2719, KIBIRICHIA/1704 & 1703, PLOT 76 MAKUTANO** and for the same to revert to the name of the deceased.

30. The grounds for the application were contained in the body of the Summons as well as the supporting affidavit of **Rose Ncekei Muthuri** sworn on 12<sup>th</sup> April, 2018. It was contended that the grant was made fraudulently by concealment of material facts in that, although the applicants were named as children of the deceased, they were not allocated anything. That they never consented to the filing of either the Cause or the mode of distribution.

31. That they had learnt of the Cause last year; that they have tried to have a discussion about their interest but it has been in vain. That the petitioner is extremely hostile and may dispose and transfer the estate properties to 3<sup>rd</sup> parties; that she has been collecting rent from one of the properties and has accounted to none yet she was not a legal wife of the deceased.

32. The applicants filed a supplementary affidavit on 28<sup>th</sup> June, 2018 wherein they introduced one **Jane Kinya Kirimi** as an objector. They stated that the administrator was not honest and they have never discussed this matter with her previously.

33. The application was opposed vide a replying and further affidavit of **Lucy Nkandi Kirimi** sworn on 8<sup>th</sup> June, 2018 and 4<sup>th</sup> July 2018, respectively. She deponed that the applicants were all along aware of this succession cause and were never interested as they knew the wishes of their father. That they were always in communication with her and knew the status of the cause. That they are happily married and settled in their respective homes which is the reason why they have remained silence for 18 years. She alleged that the application was brought in cahoot with the previous administratrix in order to frustrate her administration of the estate.

34. There was also the replying affidavit of **M'Ringera M'Nchau** sworn on 29<sup>th</sup> June, 2018 in opposition to the application. He stated that he was an age-mate and cousin to the deceased. He set out the history on how the deceased had acquired and settled his aforesaid properties. That the applicants had all along been aware of these proceedings.

35. **Harriet Nthiira Rutere** likewise opposed the application vide her replying affidavit sworn on 27<sup>th</sup> July, 2018. She contended that the application was misplaced as this Cause was commenced by the applicants' late mother in 2001.

36. The parties filed their respective written submissions together with the authorities relied on which I have carefully considered. The application was brought under the provisions which do not provided for the revocation of a grant. That makes the application defective. However since the court can discern what the applicants are seeking, I will nevertheless consider the application on merit.

37. The provision that cloth the court with power to revoke a grant is **Section 76 of the Act**. The question here is whether the applicants have met the criteria set out therein.

38. Addressing the meaning and tenor of **section 76 of the Act** in **Nyaga Cottolengo Francis v. Pius Mwaniki Karani [2017] eKLR**, the Court of Appeal held:-

**"That provision has been construed by this Court in Matheka Case (supra) which laid out the guiding principles as follows:-**

**'1. A grant may be revoked either by application by an interested party or on the court's own motion.**

**2. Even when revocation is by 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 the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law ....**

**3. ..."**

39. The applicants' contention was that, the grant was fraudulently obtained in that, although they were named as children of the deceased,

they were not catered for. That they never gave any consent to the filing of the cause and distribution. They also alluded to the fact that the previous administrator was not entitled to petition for letters as she was not a legal wife of the deceased. It was some sort of an objection.

40. In so far as the applicants sought to challenge the standing of **Harriet Nthiira Rutere** to petition and raise an objection thereto, that objection cannot lie. Firstly, the time for objection passed long time ago and there was no leave to bring such an objection. Secondly, it is the applicant's own mother, **Catherine Nyoroka** who originally brought this Cause. In the petition, she recognized **Harriet Nthiira Rutere** as a co-widow. It cannot now lie in the mouth of the applicants that **Harriet Nthiira Rutere** was not a wife of the deceased.

41. On the issue of the applicants' consent not being sought, I have perused the entire record and I cannot trace Form Nos. 37 and 38. Consent of beneficiaries need to be sought before lodging a petition as set out in **Rule 26 of the Probate and Administration Rules** where the applicant is entitled to apply in a degree equal or lower than that of any other person.

42. Under **section 66 of the Act** and as affirmed by the Court of Appeal in the case of **Nyaga Cottolengo Francis v. Pius Mwaniki Karani (supra)**, the surviving spouse of a deceased has priority in applying for letters of administration intestate. That being the case, the exception in **Rule 27 of the Probate and Administration Rules** will permit a surviving spouse to apply for letter of administration without the consent of the other beneficiaries. Accordingly, **Catherine Nyoroka** did not act fraudulently when she failed, if at all, to seek the consent of her daughters to file these proceedings.

43. As regards distribution, the applicants were not catered for. Their mother distributed the estate giving shares to all those entitled except the daughters of the deceased who were by then married.

44. In the affidavits of the administratrix and **M'Ringer M'Nchau**, it was alleged that the original administrator, **Catherine Nyoroka** distributed the estate in accordance with the wishes of the deceased. It should be noted that although **Catherine Nyoroka** was the elder wife who had been married in church, she nevertheless recognized **Harriet Nthiira Rutere** as co-widow and distributed to her and her children a reasonable share in the estate. She did this without being pushed by **Harriet Nthiira Rutere**. This in my view suggests that she might have been following the wishes of the deceased.

45. Further, it was also alleged that it is for the reason that the applicants' mother was executing the deceased's wishes that the applicants had not complained for the last 18 years. This court has considered that the aforesaid averments made on oath neither denied nor challenged by the applicants even though they filed a supplementary affidavit.

46. The court also has considered the time lapse of 19 years since the demise of the deceased and now and has found it to be unreasonably long. The applicants waited for 17 years since these proceedings were instituted for them to now emerge with a view to revoke the grant that has existed for 15 years. They were all aware that their father had passed on in 1999. That his estate was due for administration yet they did nothing about it.

47. My view is that, if a party has a right that right must be sought to be enforced within a reasonable time. A court of law is also a court of equity. Laches defeats equity. A party cannot sleep on his rights years on end and then one day rise up and demand the enforcement of such rights. He must explain the reason for the failure to enforce those rights on time or at all.

48. In this cause, the grant was issued in 2002 and confirmed on 7<sup>th</sup> November, 2003. The applicants have not explained where they have been all these years for them to now spring up and remember that their father's estate, to which they were entitled to a share, existed. To my mind 17 years is too long a period to wait and come to court and seek to upset a confirmed grant. I do not believe that the applicants were unaware of these proceedings for all that period. Their application was not well intended.

49. For the foregoing reasons, I find the application dated 26<sup>th</sup> April, 2018 to be without merit and the same is hereby dismissed with costs to the administratrix and **Harriet Nthiira Rutere**.

#### **d) Application dated 16<sup>th</sup> June, 2018**

50. This is the last application for consideration. It was brought under **section 45 (1) and (2) of the Act, Rule 73 of the Probate and Administration Rules**. The applicant sought that **Harriet Nthiira Rutere** be declared an intermeddler with over Plot No. **NTIMA/IGOKI/2719** and plot No. **76 Madaraka Estate ("the said properties")**; that the rent collected from the said properties be deposited in an interest earning account in the joint names of the administratrix's advocates and Harriet's advocates and that Harriet do render account for rent collected from the said properties from 7<sup>th</sup> November, 1999 to-date.

51. The grounds for the application were that the deceased had fully developed the said properties and were generating rental income. That since the death of the deceased, Harriet has been solely receiving the income from the said properties without accounting to the deceased's estate. That the rental proceeds from the said properties be preserved to await the final distribution of the estate. She produced valuation reports by M/S Roma Valuers Ltd which placed the rental income at Kshs.5,079,180/- in respect of **L.R. NO. NTIMA/IGOKI/2719** and Kshs.1,625,000/- in respect of **L.R No. 76 Madaraka Estate**.

52. The application was opposed vide a replying affidavit of **Harriet Nthiira Rutere** sworn on 6<sup>th</sup> July, 2018. She deposed that when she was made administratrix, she transmitted **L.R.NTIMA/IGOKI/2719** to the lawful beneficiaries. That applicant should not concern herself with the said property since the same was distributed to the correct beneficiaries who have been enjoying the proceeds therefrom. That neither the applicant nor her husband are beneficiaries of the said property and the applicant cannot therefore seek any accounts in respect thereof.

53. That **plot 76 Makutano** is her home which she occupies and there are only temporary timber structures which she uses and it not was a

commercial property as alleged. That the said property was acquired by her and the deceased and was registered jointly and upon the demise of her husband, the same reverted to her solely and should legally not be subjected to this cause. That there was nothing to account unless she was being asked to pay rent over her own property. She dismissed the valuation reports as not supported by actual or true facts since she is in occupation of Plot 76 Makutano personally and **L.R. NTIMA/IGOKI/2719** cannot fetch the proposed rent.

54. The application was also opposed by **Rose Nchekei Muthuri** vide a replying affidavit sworn on 29<sup>th</sup> June, 2018. She stated that M.G.Kaume & Co. Advocates be made a joint account holder of the rents collected. That being the children of the deceased they should get equal shares to all rents collected as well as of all the properties of the deceased.

55. **Lucy Nkandi** filed a further replying and supporting affidavit sworn on 4<sup>th</sup> and 25<sup>th</sup> July 2016, respectively. In those affidavits, she denied that **Plot No. NTIMA/IGOKI/2719** belonged to Harriet or that she jointly owned it with the deceased. She stated that **Jane Kinya** cannot be introduced into the proceedings as an objector or otherwise vide a replying affidavit.

56. I have carefully considered the affidavits and submissions of the respective parties. The view this court takes is that this application is misplaced. Firstly, Harriet has hitherto been dealing with the properties in her capacity as administratrix of the estate. Therefore, she could not be an intermeddler. Secondly, while **Plot No. 76** is her matrimonial home, **L.R.NTIMA/IGOKI/2719** had been erroneously distributed to her. Her collection of rent from that property cannot therefore be said to be unlawful for her to be called upon to account for it.

57. In this regard, it would be unfair to ask her to render accounts from 1999 in respect of those properties.

58. In view of the foregoing, the court makes the following orders:-

**a. the applications dated 29<sup>th</sup> January 2018, 12<sup>th</sup> April, 2018 and 16<sup>th</sup> June, 2018 be dismissed with costs.**

**b. the application dated 26<sup>th</sup> January, 2018 be allowed.**

**c. the grant dated 11<sup>th</sup> May, 2017 be re-rectified as follows:-**

**Land Parcel No. NTIMA/IGOKI/2719**

**1. Harriet Nthiira Rutere - ½ share**

**2. Lucy Nkandi Kirimi - ½ share**

**Plot No. 76 Madaraka Estate:**

**1. Harriet Nthiira Rutere**

**2. Dennis Muriuki Rutere jointly in**

**3. Timothy Gituma Rutere equal shares**

**4. Edwin Kimathi**

**d. Harriet Nthiira Rutere and/or, Dennis Muriuki Rutere and/or, Timothy Gikunda Rutere and/or Edwin Kimathi do forthwith surrender the original title deed to LR. NO. NTIMA/IGOKI/2719 be surrendered to the Land Registrar Meru Central District for cancellation and in default, the production of the same be dispensed with.**

**e. The administration of the estate be completed within the next six months**

**f. I will not make any orders as to costs on the application dated 26<sup>th</sup> January, 2018.**

**DATED and DELIVERED at Meru this 8th day of November, 2018.**

**A. MABEYA**

**JUDGE**