



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 607 OF 2010**

**IN THE MATTER OF THE ESTATE OF M'IMANYARA M'INIO alias IMANYARA INIO (DECEASED)**

**FRANCIS GUTURA M'IMANYARA.....PETITIONER**

**RULING**

1. This succession cause relates to the estate of **M'Imanyara M'Inio alias Imanyara Inio (deceased)**. On 19<sup>th</sup> March, 2012, a Certificate of Confirmation of Grant was issued to the Petitioner. By Summons dated 5<sup>th</sup> September 2017, the petitioner sought the rectification of that grant as follows:-

**L.R NYAKI/GIAKI/973**

- a) Timothy Kirimi M'Imanyara - 4 ½ Acre
- b) Francis Gutura M'Imanyara - 1 ½ Acre
- c) Moses Marete - 1 ½ Acre
- d) Harrison Muthuri Gutura - 1 ½ Acre
- e) Onesmus Mugita Gutura - 1 ½ Acre
- f) Francis Gutura M'Imanyara - 3 ½ Acres to hold in trust for:-

1. L M M-minor

2. E G M-minor

3. E N M- minor

- g) Moses Marete - 1/2 Acre

- h) Lucy Mwendu Gutura - 1/2 Acre

3. On 27<sup>th</sup> February 2018, the said Summons was dismissed for non-attendance by the petitioner and the file marked closed. The petitioner has now filed the present Summons dated 19<sup>th</sup> June 2018, seeking the setting aside of that order of dismissal and for the reinstatement of that application for hearing.

4. The application is based on the grounds set out on the face of the Summons and the affidavit in support sworn by the petitioner. It was deposed the subject application was slated for hearing on 27<sup>th</sup> February 2018. That on the said date, he and the other beneficiaries attended court but unfortunately went to High Court number 3 while the cause was before High Court number 1, that it is not until 12.30pm that they realized that they were in the wrong court. On inquiring, they were informed that the matter had been dismissed. He indicated that the beneficiaries were ready and willing to prosecute the application dated 5<sup>th</sup> September 2017, if given a chance.

5. I have carefully considered the affidavit in support and the submissions by the petitioner. In an application such as the present one, the principles applicable are; that the application must be made timeously; the reason for non-attendance and the prejudice to be suffered, if any, if the orders being sought are not granted.

6. In the present case, the order sought to be set aside was made on 27<sup>th</sup> February, 2018. The present Summons was lodged on 5<sup>th</sup> July, 2018, four months later. The petitioner told the court that he had learnt of the dismissal order on the same day it was made. There was no reason that was given why there was a delay of 4 months before the present application was made. Four months was inordinate delay to make the application and a good reason for the delay not being offered, I find that the application was not made timeously.

7. As to the reason for non-attendance, it was deposed that the petitioner and the other beneficiaries went to the wrong court and only realized the mistake at 12.30pm way after the order of dismissal had been made. I find that reason to be plausible, notwithstanding that the petitioner did not indicate why he did not read the Cause list for the day to know which court the matter was listed.

8. Be that as it may, should the order sought be granted? I have looked at the application sought to be re-instated. It seeks to alter the mode of distribution approved by the court on 19<sup>th</sup> March, 2012. That distribution took care of all the beneficiaries of the deceased. The petitioner was appointed to hold in trust the share of the children of the late John Makura, a son of the deceased. He now wants to reduce the share from 4 ½ acres to 3 ½ acres without giving any explanation. He also seeks to introduce 8 other people into the new proposed distribution who are not beneficiaries.

9. To my mind, what the petitioner intends to do is to abuse the powers of administration given to him for the following reasons:-

a) the grant was confirmed on 19<sup>th</sup> March, 2012, 6 years ago and yet he has failed to complete administering the estate;

b) in the original distribution, the court allowed him to take 6 acres while his other brother and the children of the late **John Makura**, were given 4 ½ acres each. That was of course against the dictates of **section 38 of the Law of Succession Act**;

c) the petitioner has now introduced his own children, **Harrisson Muthuri Gutura, Onesmus Mugita Gutura and Lucy Mwendu Gutura** in the intended rectification as beneficiaries;

e) the petitioner has also introduced a complete stranger to the estate, **Moses Marete**, and proposed to give him 1 ½ acres from his share and ½ acre from the shares of the minor children of the late **John Makura**;

f) the foregoing amounts to nothing but sheer greed, to steal from the minors over whom trust was bestowed on him.

g) further, if he intends to sell his share to Moses Marete and to distribute his shares to his children, let him follow the law whereby he should effect transfers to the said persons in the usual manner whereby they will pay stamp duty rather than expect to use the family court to deny the government revenue. Short cuts won't do!

10. Accordingly, although the court has the discretion and the jurisdiction to grant the orders sought in both applications, for the foregoing reasons, the court declines to grant them. Both applications are hereby dismissed and the petitioner directed to proceed with speed and conclude the administration of the estate failing of which, the grant should be revoked and a suitable administrator appointed.

**DATED and DELIVERED at Meru this 1<sup>st</sup> day of November, 2018.**

**A. MABEYA**

**JUDGE**