



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**SUCCESSION CAUSE NO. 280 OF 2006**

**In the Matter of the Estate of Itirithia Mbogori (deceased)**

**LYDIA MWARANIA.....PETITIONER**

**Versus**

**ALOIS IGWETA MURIRA.....PROTESTOR**

**JUDGMENT**

**Protest and confirmation of grant**

[1] Before me is a Summons for Confirmation of Grant dated 29<sup>TH</sup> November 2016 seeking confirmation of grant issued to LYDIA MWARANIA KIOGORA and ALOIS IGWETA MURIRA SIMBUMBU.

[2] The application is premised upon grounds set out in the application and the supporting affidavit of Lydia Mwarania. According to the summons, the deceased was survived by only one son- Jeremiah Igweta, the father of the parties herein. Lydia stated that she and Alois live in the estate property, to wit, NTIMA/IGOKI/2335. She proposed the estate be shared equally between the two. She filed witness statements in which the witnesses supported her claim.

[3] Alois Igweta, a joint administrator filed a protest on 31<sup>st</sup> March 2017 and his major quarrel was that the deceased who is his grandfather expressed a wish that he only should take the entire estate property for he helped the deceased until his death. He admitted that both occupy and live on the estate property except he occupies the larger portion. He requested for the surveyor to visit the land and establish the ground placement. He also stated that a portion of the land has been compulsorily acquired for the construction of a bypass and he should receive the compensation thereof for sharing among his the family members. He also averred that a meeting of the clan held on 16<sup>th</sup> July 2005 resolved that he gets the estate land in accordance with the wishes of the deceased. He also filed statements in support of his standpoint.

**ANALYSIS AND DETERMINATION**

[4] On 31<sup>st</sup> October 2018, parties agreed that the issue in controversy be determined upon the statements, affidavits and pleadings filed. I have considered the witness statements filed. From the material before the court, parties have muddled-up issues as they have introduced issues relating to the estate of the late Igweta to the estate herein. These proceedings relate to the estate of Itirithia Mbogori (hereafter the deceased). The deceased herein had only one son, Johnson Igweta who is now deceased. The estate comprises in NTIMA/IGOKI/235. Therefore, in law, the entire estate would devolve to him were it not for his death. In such case, his family takes the estate through the principle of representation and section 41 of the Law of Succession Act. The only trouble here is that the two sons of late Igweta namely Alois Murira and Daniel Kiogora are fighting over this estate. As Daniel Kiogora is also deceased, his wife, Lydia Mwarania is holding fort for his family. The evidence shows that the two families live on the estate property, except Alois claimed that he occupies the larger portion. I have looked at the minutes provided herein and they too recognized that these two families live in the estate property. They had resolved that the family of Daniel Kiogora should relocate to Kiirua land. Alois was to take care of coats of relocation. Alois claims that he helped the deceased until the deceased expressed wishes that he alone should take the property. Such is an oral will. The question is; has the oral will been proved in accordance with the law?

[5] The petitioner is representing his late Husband, one Daniel Kiogora. Alois has claimed oral will. The law on oral will is as below:

**9. 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.*

[6] Alois claimed that he helped his grandfather, the deceased and that the deceased expressed wishes that he alone should get the estate land. James Muthoga stated that he is a witness to the fact; that Alois built a house for the deceased. He did not however say that he was a witness to the alleged oral will. He only alluded to a meeting he attended in 2005 which had been convened by the late Igweta and in which Igweta stated that he had no objection to Alois getting his grandfather's land. The meeting was mainly to ask the Petitioner to leave the estate land. M'Murithi Mwithimbu merely stated that the deceased said that he left his land to Alois, and that the deceased died in 1979. Apart from the general statements that the deceased said that the land should go to Alois, no specific details was provided as to the venue and date of the alleged will, the people present and the exact expressions by the deceased about how he shared his land. Of importance, nobody has specifically claimed that the oral will was made in their presence on a specified date and that the testator died within a period of three months from the date thereof. Therefore the claim of oral will fail and is hereby rejected.

### **Distribution**

[7] The oral will claim is out of the way. The evidence show that these two families live in the estate property. The law is that the heirs of the deceased beneficiary will take the share of their deceased parent in equal shares. This is the principle enunciated in section 38 of the Law of Succession Act. Accordingly, I order that the estate herein shall be shared equally between the family of late Daniel Kiogora, and Alois Murira. As Daniel is deceased, his wife Lydia Mwarania shall hold the share of Daniel Kiogora for her own benefit and that of her children in equal shares. The subdivision shall however take into consideration existing houses or homesteads by the two families. The grant is confirmed in the foregoing terms.

[8] I however wish to advert to issues inextricable to this cause. First, parties were concerned about compensation for compulsory acquisition of the estate property. Such compensation will be paid to the person whose land is so acquired. If the entire land is compulsorily acquired, the two parties herein will receive the compensation and share it equally. In any other case, the person entitled will be determined after the survey identifies the portion for each one of them. In the meantime, the compensation shall be paid into an estate account to be opened in the joint names of these two parties. Second point; as these two are dependants of the late Johnson Igweta and I have seen the mix-up issues, I make a finding that what these two have taken through the principle of representation shall be taken into account in determining their share in the estate of Johnson Igweta.

[9] No orders as to costs.

**Dated and signed at Meru this 6<sup>th</sup> day of December, 2018**

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**F. GIKONYO**

**JUDGE**

**Dated, signed and delivered in open court at Meru this 10<sup>th</sup> day of December, 2018**

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**A. MABEYA**

**JUDGE**