



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 407 OF 2007

In the Matter of the Estate of Francis M'Ithili M'Eremania alias M'Ithili M'Irimania (Deceased)

GRACE MATARIA M'ITHILI.....APPLICANT/PETITIONER

VERSUS

JOHN KITHELA.....RESPONDENT/OBJECTOR

RULING

Cancellation of registration

[1] The Motion dated 20th September 2011 seeks for two significant orders, namely:-

(a) An order directing the District Land Adjudication & Settlement Officer, Tigania West to cancel all subdivision arising from L.R NO 352 Uringu 1 Adj. Section and distribution thereof; and revert to the original owner, the deceased herein; and

(b) An injunction restraining the Objector from dealing with the suit property in any manner detrimental until this cause is heard.

[2] The application is grounded on the Supporting Affidavit of Grace Mataria and other grounds stated in the application and amplified in the submissions filed herein. In a nutshell, the Applicant stated that she is the only surviving widow of the deceased yet the Objector has disinherited her completely. She claimed that, the objector, who is the son of the deceased, during the pendency of this cause and without any grant of representation, sub-divided the only estate property and distributed it to other persons some of whom are not rightful beneficiaries of the estate to her exclusion. She named Simon Muthee as such one person but who again sold the land to Murithi Kirigia. She averred that Muthee and the objector even had her arraigned in court in TIGANIA SRMC CRIMINAL CASE NO 1264 OF 2010 on trumped-up charges of malicious damage to property. She claimed that she has really suffered in the hands of the objector and unless the court intervenes she will remain poor and helpless. She therefore seeks the intervention of the court to undo these oppressive acts of the objector.

[3] The objector filed a replying affidavit and deposed that the deceased had three wives and none had independent portion of land. He stated further that the subdivisions herein were done 8 years ago after family discussions and each beneficiary was given his own share which each was registered owner, occupies and has developed. Therefore, the application has been overtaken by events; and that any change of registration will be too expensive and detrimental to the family and each individual beneficiary. He averred that all beneficiaries were in agreement with the distribution except the petitioner who is bringing new claims. According to him, the widow has a life interest on the property and she resides on her son's portion. He annexed proceedings before the chief and DO to show how the property was sub-divided. He

was, therefore of the view that the application should be dismissed.

DETERMINATION

[4] The parties agree that the original property No 352 belonged to the deceased. Even from the Petition it is the estate property to which these proceedings relate. There is no doubt therefore that the estate property is **L.R NO 352 Uringu 1 Adj. Section**. From the record and averments of the parties, the said estate property was subdivided in 2005; I get this by working 8 years backwards from the date of the replying affidavit, i.e. is 9th September 2013. Therefore, the subdivision and subsequent distribution of the estate property was done after the death of the deceased and before confirmation of the grant. The question then becomes: did any person including the objector have any authority from any written law or grant of representation to deal with the estate property the way the objector did? In law, except so far as expressly authorized by the Law of Succession Act, or by any other written law, or by a grant of representation under the Law of Succession Act, or by order of court, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. Only, the administrator or executor or a police officer or person duly authorized by the law or court may deal with the estate property in a manner consistent with the Law of Succession Act. Accordingly, such prohibited acts amount to intermeddling- and will attract criminal culpability under section 45 of the Law of Succession Act. Section 45 of the Law of Succession Act provides as follows:-

Protection

45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

[5] The objector was not a holder of grant of representation. In fact at the time of the subdivisions herein in 2005 this cause had not been filed. Therefore nobody had been appointed administrator of the estate of the deceased; and so nobody had any authority to subdivide and distribute the estate property. I must say here that, the Chief and the District Commissioner or the parties could not confer the authority and power to subdivide and distribute intestate estate property; only the court could do that. All that was done including subdivision, issuance of titles and transfer of the land to the beneficiaries and third parties was contrary to the law, and therefore, null and void for all purposes and intents. I wonder why the objector could even cause the arrest and arraignment in court of the widow of the deceased. That was a cruel and most unreasonable act a person can do. But before I close, let me address one pertinent issue. The objector has argued that the widow has a life interest on the property and she resides on her son's portion. That statement is tainted with patriarchal chauvinism; again, it is discriminatory of the widow as a woman. It is worth repeating that women have equal right in inheritance with men but of great importance, widows have distinct share in the estate of the deceased which should not be diminished into life interest only. In any case, what type of life interest is there when it has not been so expressed by the court? In fact the portion of land on which she is said to enjoy life interest is already registered absolutely- albeit unlawfully- in the name of a son of the deceased? That kind of arrangement is awkward and inconsistent with the law of succession as well as the Constitution and should be outrightly disregarded by courts if rights of women are to be realized in accordance with the Constitution and international instruments on rights of women. Although the following rendition in the case of **Re the**

Estate of M'Ngarithi M'Miriti alias Paul M'Ngarithi M'Miriti (Deceased) [2017] eKLR was on daughters it is relevant:

Discrimination of daughters in inheritance From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when **RONO vs. RONO [2008] 1 KLR 803** delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement the Constitution- which state categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the Constitution.

Conclusions and Orders

[6] On the basis of my analysis above, the subdivision, registration and transfer of the estate property was contrary to the law and therefore unlawful, null and void. I so declare all the transactions in respect of the estate property herein namely land parcel No 352 Uringu 1 Adj. Section. And accordingly, I direct:-

(1) The District Land Adjudication & Settlement Officer, Tigania West to cancel all subdivisions arising from L.R NO 352 Uringu 1 Adj. Section and revert the entire land into the name of the original owner, Francis M'Ithili M'Erimania alias M'Ithili M'Irimania, the deceased herein. For the avoidance of doubt all titles issued upon the cancelled subdivision be and are deemed cancelled also;

(2) The register of title shall be accordingly rectified by this order of the court to reflect the owner of the land to be Francis M'Ithili M'Erimania alias M'Ithili M'Irimania, the deceased herein;

(3) An injunction is hereby issued restraining the Objector and any other person from dealing with the suit property or in any manner interrupt the peaceable occupation of the suit land by the Applicant until this cause is heard;

(4) Should need arise to evict any stranger on the land, parties are at liberty to apply for appropriate orders.

(5) The objector shall pay costs of this application.

Dated, signed and delivered in open court at Meru this 15th day of February 2017.

F. GIKONYO

JUDGE

In the presence of:

Mrs. Ntaragwi advocate holding brief for Mrs. Kauma and

Mokua advocates.

F. GIKONYO

JUDGE