



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**SUCCESSION CAUSE NO.460 OF 2008**

**In the Matter of the Estate of Kwaria Marete (Deceased)**

**KAMUNDI JOHN M'MUNGIIRIA.....PETITIONER**

**-VS-**

**DIOCESE OF MERU TRUSTEE REGISTERED**  
**(ST. DOMINIC NYANGENE CATHOLIC CHURCH)...INTERESTED PARTY**

**RULING**

**Setting aside order**

[1] The significant order sought in the application dated 26<sup>th</sup> April 2016, is one for varying and setting aside of order of the court made on 18<sup>th</sup> April, 2016. The said order was made pursuant to an application for rectification of grant and effectively removed the Interested Party from the Certificate of Confirmation of Grant. The application is expressed to be brought under section 47 and 74 of the Law of Succession Act, rule 49, 63 and 73 of the Probate and Administration Rules.

[2] The application is based on the grounds set out in the application and the two Supporting Affidavits by Fr. Basilio Njagi, one of the Registered Trustee of the Interested Party and Stanley Kiunga, the Chairman of the Church. Fr. Basilio deposed that the parcels of land occupied by Nyagene Secondary School- sponsored by the interested party- were registered in the name of the County Council of Meru as Trustees. In 2009, the Council agreed to subdivide the said school land and 4 acres were given to the Interested Party to construct a Prayer House and for other spiritual needs. He averred that these subdivisions and occupation are not in doubt. Then, the Petitioner and the Interested Party agreed to exchange ½ acre of land; accordingly the Petitioner was given ½ and he gave the church ½ acre. The Petitioner took immediate possession of the ½ acre of land and he has rented it to a tenant. The church also took immediate possession of the ½ given in exchange by the Petitioner i.e.[particular withheld] and constructed the church which is to cost Kshs. 5,000,000. So far the church has spent Kshs. 3 Million and is doing final touches but the church is using the premises pending completion. He stated that they obtained consent of the Land Control Board to subdivide the land as per the grant. And that they have been ready at all times to transfer the exchanged ½ acre to the Petitioner but the change in Local Government, reconstitution of County Land Control Board and resignation of the secretary stalled the process. In particular the resignation of the secretary to the Board infuriated the Petitioner. But, at the time of the affidavit, the matter was with the County Government and Titles will be out soon. The deponent stated that the Petitioner was aware of all that was going on including the construction of the

church yet he concealed these facts from the court.

[3] Fr. Basilio explained why the interested party was not present during the hearing of the application for rectification to be that; the Priest in charge who was served with the application passed it to the chairman and church officials of the local parish instead of sending it to the Diocese Head Quarters. He was of the view that the church will suffer irreparably unless the order is reversed. He was also apprehensive that the Petitioner wants to give the land to a church of another denomination. Again, he complained that the Petitioner had attempted using mob of people to remove the gates of the church but was repulsed. He does not wish to see nasty incidents happening among the people of God and so he beseeched court to intervene and reverse its orders. Stanley confirmed that the application was served upon Fr. R. Kinyua-father in charge. Fr. Kinyua send Stanley, Julius Mwenda and Robert Kimathi to go to court and find out what the matter was all about. Stanley stated that upon arrival in court they inquired about where land matters were being handled and were directed to the wrong court. The case was not called and so they contacted Fr. Kinyua who advised them to consult the Administrator Fr. Mbiko who directed them go to the advocate's office for directions. The advocate perused file and told them that the case had been finalized in their absence.

[4] The Interested Party also filed written submissions in which it reinforced the averment stated above. They argued that what they are asking is an opportunity to be heard on the application for rectification so that the truth- which was concealed from the court- is laid before the court. They posit that the Petitioner misdirected the court to obtain the rectification as what he wanted rectified was not an error and could not have been dealt with under rectification for it was a matter of distribution- a matter of material nature. Therefore, they are convinced these issues are substantive and should entitle them to be heard. They sought the order to be reversed.

### **Application opposed**

[5] The Petitioner filed a Replying Affidavit and submissions in opposition to the application form setting aside the order herein. He averred that he is registered owner of the suit property herein having acquired it through transmission from the estate of the deceased herein. He acknowledged thee exchange agreement herein but he calls it gentleman's agreement. He stated that he later discovered that the land given by the church was public land. According to him, the agreement was that the church will erect a temporary church first and later would construct a permanent church after they have transferred the ½ to him. But, to his surprise and contrary to the agreement, they erected a permanent church without his consent. He tried to halt the construction by consent but in vain. He explained how through his generosity he included the church as beneficiary of ½ of the estate property. Again, after confirmation, he applied to and obtained consent to subdivide the suit land in accordance with the grant which was granted. He once more caused the church to appear before the chief so that they can transfer the land to the Petitioner but in vain hence his application to rectify the grant. The application was even served and so the claim that the application was done secretly is not true. The Petitioner argued that the verbal agreement for exchange of land was null and void in law.

[6] The Petitioner also filed submissions in support of the above averments. The major argument was that the Interested Party is a stranger to the estate and not a beneficiary. He cited the restriction of sale of immovable property of the estate in section 82(b) (ii) of the Law of Succession Act. He acknowledged that he misrepresented to the court that the church was a beneficiary of the deceased estate. In addition, he submitted that the Interested Party has not come to court with clean hands as it had been served with the application but chose not to attend court. Service is not in dispute and no sufficient cause has been shown for not attending court. For those reasons, he prayed for the application to be dismissed.

### **DETERMINATION**

[7] Upon careful consideration of the application before me, I am of the following persuasion; that I need only determine whether the order made on 18<sup>th</sup> April 2016 should be set aside. The question would, therefore, be whether sufficient cause has been shown as to impel the court to set aside the impugned order. The affidavit of Stanley Kiunga explains how he together with Julius Mwenda and Robert Kimathi

attended court on the instructions by Fr. Kinyua- Fr. Kinyua is the one who had been served with the application. Stanley states that upon arrival in court, they enquired about where land cases are being handled, but they were directed to the wrong court. That aside, Fr. Basilio has also given some vital information that Fr. R. Kinyua passed over the application to the chairman instead of the Diocese Head Quarters. Before I analyze this contention, let me consult the affidavit of service filed on 18<sup>th</sup> April 2016; I note it states that the application was served upon the chairman of St. Dominc Catholic Church one Mr. RujinoKinyua at the threshold of his home. It is not clear whether the said Mr. RujinoKinyua and Fr. R. Kinyua is one and the same person. There is a muddle-up of facts. But at least it is admitted by the Respondent that service of the application was done upon Fr. R. Kinyua. That notwithstanding, the church has its own official hierarchy and secretary who should be the appropriate person to be served with court process. That is not the case hear and the church may be entitled to vitiate the kind of service herein. In addition, although there is no concrete proof, I do not find any unusual or suspicious matter which may make me disbelief the averments by Stanley that they came to court premises but were directed to the wrong court. Again, but without discussing them, the issues being raised are quite substantial and I would like to determine them inter partes in line with the constitutional command that courts should always strive to serve substantive justice by hearing both parties in the suit. I am, therefore, convinced to, and I hereby set aside the order made on 18<sup>th</sup> April 2016. In consequence thereof, the amended grant and Certificate of Confirmation dated 22<sup>nd</sup> April 2016 together with all subsequent transactions based on the said amended Certificate of Confirmation are set aside. The application for rectification dated 18<sup>th</sup> January 2016 shall be heard between the parties at such date as shall be assigned by this court and agreed between the parties. It is so ordered.

**Dated, signed and delivered in open court at Meru this 13<sup>th</sup> February 2017**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

M/s. Mbaikiata for interested party

Mrs. Ntaragwi/Otieno C for petitioner

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**F. GIKONYO**

**JUDGE**