



**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'IRUTERE M'MMUGWIKA (DECEASED)**  
**HARRIET NTHIIRA RUTETE .....PETITIONER**  
**LUCY NKANDI KIRIMI ..... APPLICANT**

**JUDGMENT**

1. The late Rutere M'Mugwika (hereinafter "the deceased") died on 7<sup>th</sup> November, 1999 at Chogoria Hospital aged 74 years. He left behind two widows, Catherine Nyoroka and Harriet Nthiira and eight children. However, one of the sons Luka Kirimi Rutere died shortly thereafter. The deceased also left the following properties forming his estate:-

- (a) LR Ntima/Igoki/2719
- (b) LR Kibirichia/Kibirichia/1703
- (c) LR Kibirichia/Kibirichia/1704
- (d) Plot No. 76, Makutano Meru Town

2. On 3<sup>rd</sup> December, 2001, Catherine Nyoroka Rutere (hereinafter "the first wife") petitioned for Letters of Administration Intestate which were issued to her on 19<sup>th</sup> September, 2002. On 23<sup>rd</sup> March, 2003, she applied for the confirmation of that grant which was confirmed on 14<sup>th</sup> October, 2003. A Certificate of Confirmation was issued on 7<sup>th</sup> November, 2003 distributing the estate as follows:-

(a) **Ntima/Igoki/2719**

- (i) Harriet Nthiira    }
- (ii) Dennis Mwirigi   } Jointly
- (iii) Timothy Gikundi }
- (iv) Edwin Kimathi   }

(b) **Plot No. 76 (Makutano Meru Town)**

- (i) Harriet Nthiira    -    ½ share

(ii) Lucy Nkandi Kirimi - ½ share

(c) **Kibirichia/1704**

(i) Nicholas Rutere - 0.5 Acres

(ii) Lucy Nkandi - Balance

(d) **Kibirichia/1703**

(i) Nicholas Rutere - 0.5 Acres

(ii) Harriet Nthiira }

Dennis Mwirigi } Balance Jointly

Timothy Gikundi }

Edwin Kimathi }

3. However, for unexplained reasons, Catherine Nyoroka Rutere did not take effective steps to finalise the administration of the estate until she died on 26<sup>th</sup> January, 2011.

4. One (1) year later, the second wife of the deceased, Harriet Nthiira Rutere appeared on the scene. On 16<sup>th</sup> January, 2012, she made an application to rectify the Certificate of Confirmation by rectifying three (3) names of the beneficiaries and for her to be appointed the Administratrix and replace Catherine Nyoroka Rutere who had passed on 26<sup>th</sup> January, 2011 as aforesaid. That application was allowed on 7<sup>th</sup> May, 2012 and a fresh Grant of Letters of Administration and Certificate of Confirmation of Grant issued on the same day. In that Certificate, the distribution of the estate remained as had been in the original Certificate of Confirmation of Grant dated 7<sup>th</sup> November, 2003. However, Plot No. LR Kibirichia/1703 was typed as Kibirichia/1704 such that there were two Kibirichia/1704 in the same Certificate.

5. A year later, Harriet Nthiira Rutere (hereinafter “the Administratrix”) came back to Court with yet another application for “the rectification of the grant”. She prayed as follows:-

***“(1) That this honourable Court be pleased to rectify the confirmed grant to correct the parcel of land and distribution as per the supporting affidavit.”***

I will revert to the contents of that Affidavit later on in this judgment. Nevertheless, as a result of that application, the estate was re-distributed as follows:-

(a) **LR Ntima/Igoti/2719**

(i) Harriet Nthiira Rutere }

(ii) Dennis Muriuki Rutere } Jointly

(iii) Timothy Gituma Rutere }

(iv) Edwin Kimathi }

(b) **Plot No. 76 (Makutano Meru Town)**

Harriet Nthiira Rutere - Whole

(c) **LR No. Kibirichia/1703**

(i) Nicholas Rutere - 0.5 Acres

(ii) Lucy Nkandi Kirimi - Balance

(d) **LR Kibirichia/1704**

(i) Harriet Nthira Rutere }

(ii) Dennis Muriuki Rutere } Jointly

(iii) Timothy Gituma Rutere }

(iv) Edwin Kimathi }

A rectified Certificate of Confirmation of grant was thereupon issued on 29<sup>th</sup> April, 2013 to reflect the foregoing changes. This then is the historical background to this matter.

6. On 9<sup>th</sup> August, 2016, Lucy Nkandi Kirimi (hereinafter “the Applicant”) filed an application under Section 76 of the Law of Succession Act, Cap 160 Laws of Kenya (hereinafter “the Act”) seeking various orders including the revocation and/or annulment of the rectified grant issued on 29<sup>th</sup> April, 2013 and to reinstate the original confirmation of 7<sup>th</sup> November, 2003. She also prayed to be appointed as administratrix or the executive officer of this Court be empowered to execute all the necessary documents to effect the original grant.

7. The grounds for the application were contained both in the body of the Summons and the Supporting Affidavit sworn by the Applicant on 9<sup>th</sup> August, 2016. These were that the Administratrix had stealthily and fraudulently filed an application for re-rectification of the confirmed grant which had the effect of removing the Applicant as co-owner of Plot No. 76, Makutano Meru and Nicholas Rutere as owner of 0.5 acres in Kibirichia/Kibirichia/1704 (sic). That the fraudulent acts of the Administratrix had the effect of denying the Applicant and the said Nicholas Rutere their bequests. At the ex-parte stage, inhibition orders were issued against any dealings with Plot No. 76, Makutano Meru and Kibirichia/Kibirichia/1704, respectively.

8. The Application was opposed by way of a Replying Affidavit of Harriet Nthira Rutere sworn on 21<sup>st</sup> November, 2016. She contended that the changes she had effected were done properly through an application for rectification with the knowledge of the Applicant’s Advocates; that there was an error on the property numbers which she sought to rectify; that the first wife used to live in Kibirichia/Kibirichia/1703 and that she, the Administratrix was using Kibirichia /Kibirichia/1704 (both hereinafter “Plot Nos. 1703 and 1704, respectively). She further contended that she and the deceased were jointly registered as owners of Plot No. 76 Makutano and that under Section 60 of the Land Registration Act, 2012 that property was not subject to succession.

9. She further contended that she has her home and she resides on Plot No. 76, Makutano. That all had agreed on rectification and that the application for revocation was meant to frustrate her and was made in bad faith. She concluded that the Applicant did not have any right and was being driven by greed and that Nicholas Rutere was unknown to her. She urged the Court to dismiss the Application.

10. By a Supplementary Affidavit sworn on 14<sup>th</sup> February, 2017, the Applicant denied the averments of the administratrix and stated that Plot No. 76, Makutano was not registered. That the Administratrix was living in LR No. Ntima/Igoki/2719 that is behind Plot No. 76, Makutano. That Plot No. 76 Makutano was leased to Karimi Groceries and Mediwell Clinic, respectively. She clarified that Nicholas Rutere was a son of the deceased but born by a different mother.

11. Learned Counsel filed their respective submissions. Mr. Arithi submitted that, through her Affidavits, the Applicant had established the grounds under Section 76 of the Act for the revocation of the grant. Counsel relied on the cases of Meru Succession Cause No. 505 of 2008 In the matter of the Estate of M'Arimbi M'Mutia and Succession Cause No. 26 of 2002 In the matter of the Estate of M'IKinya M'Anjuri in support of his submissions. On his part, Mr. Anampiu, Learned Counsel for the Administratrix submitted that the first wife had filed the Petition without the knowledge or consent of the Administratrix; that on discovery, the administratrix applied to be appointed as administratrix whereby she discovered errors in the original grant which she applied to be rectified and for equitable redistribution of the estate. Counsel explained the errors as well as what was contended to be the inequitable distribution of the estate. That the parties had agreed on these redistribution but the Applicant had now reneged on it. That the Applicant is only entitled to share in her husband's estate and not that of the estate of the deceased. Counsel therefore submitted the application be dismissed.

12. I have considered the entire record, the Affidavits on record and the submissions of Counsel. The issues for determination are:-

- (a) does the Applicant has any *locus standi* to bring the current application?
- (b) was the original petition filed without the knowledge and consent of the administratrix?
- (c) did the parties agree to the application for rectification by the administratrix?
- (d) is Plot No. 76 Makutano (Madaraka) is subject to the succession of the estate of the deceased?
- (e) what orders should be made?

13. It was the contention of the Administratrix that since the Applicant is the daughter-in-law to the first wife, the Applicant had inherited what belonged to her husband and the first wife. That she should therefore not stake any claim on the estate of the deceased and seek to claim what should belong to the administratrix. The Applicant contended otherwise. The undisputed evidence on record is that the deceased died on 7<sup>th</sup> November, 1999. He was survived by amongst others, a son by the name Luka Kirimi Rutere, the husband to the Applicant. That son sadly passed away on 11<sup>th</sup> December, 2000. On such death, his estate was entitled to inherit a share from the estate of the late father, the deceased herein. On 7<sup>th</sup> August, 2002, the Applicant was appointed the administratrix of the Estate of the late Luka Kirimi Rutere. On being appointed as such, the Applicant acquired the legal right to stake claim on the estate of the deceased on behalf of the estate of her late husband. Accordingly, the Applicant has the locus to bring the current application.

14. The next issue is whether the original Petition was lodged by the first wife Catherine Nyoroka Rutere, without the knowledge and consent of the Administratrix (the second wife). It was the contention of the administratrix that she was not aware nor involved in the original confirmation. It was further submitted on her behalf that the Petition had been filed without her Administratrix's knowledge or consent.

15. I have perused the entire record. I could not see form Nos. P & A 37 and 38, the consent for filing the Petition and the consent for the confirmation. The said forms are missing from the record and one cannot tell whether they were ever filed or not. Even from receipt Nos. L635666 and M304728 for lodging the Petition and the Summons for confirmation, one cannot tell if the said forms were lodged with the Court. The first wife of the deceased passed away and has no opportunity to clarify whether or not she sought the consent of her co-wife or whether the co-wife had any knowledge of the succession cause or not. We have to go with the word and conduct of the administratrix.

16. In all the Affidavits the Administratrix swore and filed, nowhere did she disclose when the first time she knew of these succession proceedings. She left it to the Court to speculate and make assumptions. The very first document filed by the Administratrix was on 16<sup>th</sup> January, 2012, approximately one year after the demise of the first wife of the deceased. It was a Summons to rectify the grant. She swore an

Affidavit in Support of that summons. In that Affidavit, she never stated that she was unaware of these proceedings. Likewise, in her subsequent Affidavit sworn on 13<sup>th</sup> February, 2013 in support of an application for further rectification, she never stated that she had neither been involved in nor informed of these succession proceedings.

17. The very first time she raised the issue is when she swore the Replying Affidavit in opposition to the present application on 21<sup>st</sup> November, 2016. In paragraph 16 of that Affidavit, she stated:-

***“16. That indeed I was not part and was not involved at all on the proposal of the initial distribution and confirmation of the grant otherwise I would have pointed out the mistake and errors which were rectified by the rectified grant dated 29-4-2013”.***

18. In her Further Replying Affidavit sworn on 5<sup>th</sup> April, 2017, she deponed at paragraphs 2 and 9 as follows:-

***“2. That as I had stated earlier the succession cause herein was filed by my co-wife CATHERINE NYOROKA RUTERE without any consent from me or knowledge and I only came to discover later and applied accordingly.***

***9. That if the rectified grant were to be annulled then we would as well have the original grant annulled as well since from the word go, I had contested the original distribution which was unfair and not equitable to enable me to contest distribution which was done in error originally.” (Emphasis added).***

19. From the foregoing, it is crystal clear that the very first time the Administratrix had the opportunity to raise the issue of lack of consent or knowledge of these proceedings was in January, 2012 when she applied for the very first rectification. Instead of raising that issue, this is what she stated on oath in paragraphs 4 and 5 of her Affidavit in Support of the application:-

***“4. That indeed I am already named as a beneficiary in the confirmed grant together with the children of the deceased and thus the most appropriate person to be appointed as the administrator (sic).***

***5. That no one is disputing the distribution as per the confirmed grant and I intend to implement the same as confirmed once I am appointed.” (Emphasis added).***

This makes it crystal clear that the very first time she had the opportunity to dispute the original distribution by the first wife, she did not do so. But instead, she swore to implement the grant as confirmed if she was appointed the administratrix.

20. Accordingly, the conclusion this Court makes is that, it is not true that the Administratrix did not have knowledge of this succession cause. It is clear from her conduct that she must have been aware of these proceedings much earlier than January, 2012 but she was waiting for the appropriate time when she would take control of the same and steer them towards the direction, goal and destiny she desired. This is why although the deceased died in 1999 and the grant was confirmed in 2003, she took no action or step until immediately after the demise of the first wife in January, 2011. Further, even then, she did not file either a Protest or an application to revoke the grant or challenge the distribution. She applied to be made the administratrix alleging that she intended to complete the administration of the estate and effect the grant as had been confirmed. Further, contrary to what she deponed in Paragraph 9 of her Further Replying Affidavit, there is no evidence that prior to deponing that Affidavit she had protested or contested the distribution of the estate as had been undertaken by the first wife.

21. In this regard, it cannot lie in the mouth of the Administratrix that she did not have knowledge of the distribution, or that the distribution was inequitable or she intended to challenge the same. It is now too late in the day. She could not support the distribution when she wanted to be appointed the administratrix, thereby get all the consents of the concerned beneficiaries, but turn around to challenge the same when

she has materially altered the original distribution to the detriment of the other beneficiaries. A party to a proceeding cannot probate and approbate at the same time. That allegation is rejected as being an afterthought and only a smokescreen to divert attention from the actions she has committed in these proceedings.

22. The next issue is whether Plot No. 76 Makutano (Madaraka) is part of the estate of the deceased and therefore subject to the succession proceedings. It was the administratrix's contention that that property was registered in her and the deceased's names jointly. She produced a document entitled 'Letter of Allotment' dated 11<sup>th</sup> June, 1991 in her Further Replying Affidavit sworn on 5<sup>th</sup> April, 2017 to support her contention. That document bears the names of Rutere Mugwika and Harriet Nthira.

23. Firstly, there is no evidence that Plot No. 76 Makutano (Madaraka) is registered anywhere in the names of the deceased and the Administratrix as she alleged. Indeed in Paragraph 11 of her Replying Affidavit of 21<sup>st</sup> November, 2016, she urged that the Court should call for the records of the said property to satisfy itself of its ownership. Of course, it is not part of the Court's duty to assist a party prove his/her case. Secondly, there is no evidence that the alleged letter of Allotment has been registered as claimed by the Administratrix. Finally, if there was any truth in the allegation that Plot No. 76 Makutano (Madaraka) was not part of the deceased's estate, nothing would have been easier than the Administratrix to challenge the distribution as early as January, 2011 when she took over the administration of the estate. Indeed, in her first rectification, she left the distribution of Plot No. 76 Makutano (Madaraka) to her and the Applicant undisturbed as had been effected originally. If the "Letter of Allotment" is genuine, and it is dated sometimes in 1991, it must have been in existence in 2012 and she would have waved it at the Court then to have that Plot struck out from the Certificate of Confirmation but she did not do so probably because that letter may not have existed then. Furthermore, she was still represented by the very same Advocates.

24. The finding which this Court makes on that issue is that, Plot No. 76 Makutano (Madaraka) was as much part of the estate as the rest of the properties. The Court doubts the authenticity of the so called 'Letter of Allotment' as it was being waved at it four years after the Administratrix took over the administration of the estate and only after her action of removing the Applicant from entitlement thereto was challenged.

25. A careful consideration of the record as well as the conduct of the Administratrix, shows the following:-

(a) that the Administratrix lied low during the lifetime of the first wife (original petitioner) and left her undertake these proceedings until confirmation of the grant; she never challenged the confirmed grant or the distribution during the lifetime of her co-wife;

(b) upon the demise of the co-wife, the Administratrix applied to be joined as the administratrix of the estate so that she could take control of the proceedings and the estate. When she made that original application dated 13<sup>th</sup> February, 2013, she sought and obtained all the consents of all concerned including the Applicant. In that application, she never tampered with the distribution as had been undertaken by her co-wife;

(c) once she was in control of the proceedings, the Administratrix made a second application for rectification of the confirmed grant. This time, she never sought anyone's consent. She did it discreetly. In the alleged rectification, she did three things:-

(i) she removed the Applicant from sharing Plot No. 76 Makutano.

(ii) she exchanged LR Kibirichia/Kibirichia/1703 with Kibirichia/Kibirichia/1704 probably because the latter is slightly bigger. She exchanged the former which had originally been shared to her with the latter that belonged to the Applicant and Nicholas Rutere.

(iii) She altogether removed the name of Nicholas Rutere from ownership in Plot No. 1704

and disinherited him of the same by a stroke of a pen.

26. To this Court's mind, this was but sheer greed. She had started as an innocent applicant who was concerned with the finalization of the administration of the estate of the deceased but on having been appointed Administratrix and thereby taken control of the proceedings and the estate, she knocked off the other beneficiaries from their inheritance without either consulting them or notifying them of her intentions. There is nothing on record to show that the Applicant and Nicholas Rutere were informed of or their Advocates served with the application dated 13<sup>th</sup> February, 2013. This is why Courts must always guard and be on the lookout on "innocent applications for rectification of certificates of confirmation of grant" when made. Courts must insist that where the distribution is affected by the proposed rectification, all the beneficiaries must be present in Court at the hearing or they should sign a consent signifying their approval which should be filed with the court. In the present case, no such consent was filed nor were the beneficiaries present in Court when this monumental "redistribution" was undertaken in the name of rectification of grant.

27. The other issue is that, this Court found the Administratrix to be economical with the truth. She lied that she lives on Plot No. 76, Makutano (Madaraka) and that that is where she was left by the deceased. When she was confronted with a clear explanation by the Applicant that she and her children live on Plot LR. Ntima/Igoki/2719 and that that is why that property was wholly distributed to her and her children, she had no answer in rebuttal. Further, when it was disclosed by the Applicant that Plot No. 76, Makutano (Madaraka) is leased by Karimi Groceries and Mediwell Clinic, she never commented in her Further Affidavit sworn on 7<sup>th</sup> April, 2017. Further, she had the temerity to state that she does not know who Nicholas Rutere is. When faced with the explanation that he was a son of the deceased from another mother, she remained mum. Then the question arises, if Nicholas Rutere was a stranger to the estate, why did she as the Administratrix not question his inclusion in the distribution from the beginning in 2012? Why still retain him in her fresh "redistribution" when she lumped him together with the Applicant in Kibirichia/Kibirichia/1703? The answer is simple, she did not mind about him once she had excluded him from LR Kibirichia/Kibirichia 1704 when she distributed it to herself.

28. The Administratrix contended that the original distribution was inequitable in her disfavour with her children. Nothing could be further from the truth. To my mind, the co-wife had been too good and fair to the Administratrix. In her distribution, she only included the estate of her late son (through the Applicant) in the distribution. Had she included herself as well as all her four (4) daughters who are still alive of which she was entitled to do in terms of Section 42 of the Law of Succession Act, the total number of units for distribution would have been eleven (11) which would have resulted into minute shares for the Administratrix and her three (3) children. The Administratrix should count herself lucky that the distribution did not go that route and that neither has it been pressed to go as such.

29. From the conduct of the Administratrix and her untruthful averments on oath, this Court greatly doubts her *bona fides* or honesty in the continued administration of the estate. There are no accounts that have been filed from any income collected from the leased property LR No. 76 Makutano (Madaraka) ever since she took over administration of the estate to-date. Her suitability as an Administratrix is in serious doubt. This is so notwithstanding that she is the surviving widow of the deceased and runs in priority in applying for the grant. However, her lack of *bona fides* in dealing with the estate and the other beneficiaries of the estate, denies her that opportunity of continuing to administer the estate.

30. Accordingly, in view of the foregoing, I find the Application to be meritorious and I allow the same and make the following orders:-

(a) the grant issued to the Administratrix on 7<sup>th</sup> May, 2012 is hereby revoked.

(b) a fresh grant is hereby issued to LUCY NKANDI KIRIMI.

(c) the rectified Certificate of Confirmation issued on 29<sup>th</sup> April, 2013 is hereby set aside and the grant is hereby confirmed as had been originally on 7<sup>th</sup> November, 2003 save for rectification in

the names of the beneficiaries.

(d) the new Administratrix to undertake the administration of the estate, finalise the same and file accounts with the Court within six (6) months.

(e) this being a family dispute, I make no order as to costs.

It is so decreed.

**DATED AND DELIVERED AT MERU THIS 11<sup>TH</sup> DAY OF MAY, 2017.**

**A. MABEYA**

**JUDGE**

**11/05/2017**