



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 3187 OF 2003**

**IN THE MATTER OF THE ESTATE OF ELIPHAS MBAKA KIMAITA (DECEASED)**

**BETWEEN**

**SELINA KAGENI MUSYOKA.....APPLICANT**

**AND**

**JESCA CIAMBAKA MBAKA.....RESPONDENT**

**RULING**

1. The deceased Eliphas Mbaka Kimaita died intestate on 19<sup>th</sup> December 2002. He was survived by a widow Jesca Ciambaka Mbaka (the respondent) and 6 adult children. The respondent petitioned this court on 10<sup>th</sup> November 2003 for the grant of letters of administration intestate. She indicated that the estate of the deceased comprised land parcels Magumoni/Mukuuni/609 and Thuita/Magumoni/662, vehicle registration number KYZ 504 Nissan Matatu and pension held at the judiciary. The grant was issued to her on 6<sup>th</sup> January 2004 and confirmed on 12<sup>th</sup> October 2004.

2. The applicant Salina Kageni Musyoka is the sister-in-law of the deceased. She was the wife of the deceased's step-brother called Trolken Musyoka Kimaita who died in 2011. She filed summons dated 16<sup>th</sup> March 2015 for the revocation of the grant and the redistribution of the estate. Her case was that the land parcel Magumoni/Mukuuni/609 which the respondent alleged belonged to the deceased was in fact family land but registered in the name of the deceased; that the deceased held 0.979 Ha of it in trust for her late husband. She stated that the deceased's family and that her late husband had clearly demarcated portions of the land, and that the deceased had begun the process of subdivision and transfer before he died. The applicant provided documents to show that she had gone to the High Court at Meru in Misc. Application No. 327 of 2014 and obtained a limited grant to enable her pursue her claim over the disputed land. She had served a citation on the respondent who had filed a replying affidavit dated 10<sup>th</sup> February 2015 over the same.

3. On 22<sup>nd</sup> April 2015 the respondent filed before this court summons for the rectification of the confirmed grant. She sought that 0.979Ha of Magumoni/Mukuuni/609 be given to the applicant in the rectified grant. The application was allowed by consent and a fresh certificate issued on 6<sup>th</sup> July 2015 giving the applicant 0.979Ha of Magumoni/Mukuuni/609 .

4. On 7<sup>th</sup> November 2015 the applicant filed the present application seeking to enforce the grant giving her 0.979Ha and to stop the respondent from evicting her from where her homestead is situated on the disputed land. Her case was that the respondent had refused to transfer the 0.979Ha to her; that her homestead of 38 years was comprised in the 0.979Ha; that a subdivision on the ground had been done many years back; and that the respondent was going against this and was seeking to evict her from the portion. The respondent filed a replying affidavit denying that she had refused to transfer the 0.979 Ha to the applicant. Her case was that the applicant wanted to be given the upper portion of the land in question and she be given the lower portion which to her was unfair. She wanted the land shared from up to bottom. She denied that she wanted to demolish the applicant's homestead, and stated that her proposed mode of sharing would still leave the homestead intact. She stated that if the mode proposed by the applicant is adopted she will not have access to the main road. She went on as follows:-

**“9. That there existed no trust between my husband and the applicant’s husband but my husband only settled his brother the applicant’s husband in his land as he did not have his own land and not because he had any mandate to do so.....**

.....

.....

**15. That the only reason I entered into consent with the applicant and granted the applicant 0.979Ha out of the land parcel Magumoni/Mukuuni/609 was because I wanted to settle this case amicably as the applicant is my sister-in-law so that we live happily as a family and not because there was any subdivision done by my husband prior to his death.”**

5. It is material to point out that whereas the respondent acknowledges that the applicant has a homestead on this land, and that the deceased had allowed the applicant's husband 0.979Ha of the land that comprised the estate, she petitioned for the grant and had the same confirmed without providing for the applicant, or even indicating that she was a beneficiary of the estate. She was, I find, forced by the application for revocation to consent to giving the applicant the said 0.979Ha. When she alleged in paragraph 14 of the replying affidavit that the applicant's hands were not clean it was in fact her hands that were dirty.

6. The applicant got the parties' former Chief Eustace Mutegi to swear a supplementary affidavit to give the history of the two families over the land. He was there when the Meru District Surveyor came to the land in 1989/1990 and, in the presence of the deceased and the applicant's husband, shared the land in accordance with how the two had settled and occupied. The deceased took the lower side and the applicant's husband took the upper part. On this basis a consent from the Land Control Board ('EM1') was obtained and mutation form ('EM1') drawn. The mutation form shows the sketch of the land. Bernard Nderi Kimaita is the elder brother of the deceased and the applicant's late husband. He swore a supplementary affidavit to support the applicant and also the evidence of the former chief. He stated as follows:-

**“11. THAT the boundaries between the two positions are well marked for Trolken Mucioka Kimaita settled on his 0.0979 in 1976 and has so far developed his portion extensively with mature coffee and water hole.**

**12. THAT the proposed subdivision by Jessicah Ciambaka Mbaka to re-subdivide the land afresh is against the family wishes.”**

It is notable that the respondent did not swear any further affidavit to challenge the averments of the former chief or of Bernard Nderi Kimaita.

7. I have looked at, and considered, the written submissions by counsel. I accept the sworn evidence of the applicant as supported by her two witnesses whose affidavits I have referred to in the foregoing. I

find that the deceased and the applicant's husband had well established and demarcated portions in Magumoni/Mukuuni/609 as shown in the sketch produced by their former chief Eustace Mutegi. It is on that basis that I allow the application dated 17<sup>th</sup> November 2015. The respondent is given 60 days to effect the transfer of the 0.979Ha of Magumoni/Mukuuni/609 to the applicant, failing which the Deputy Registrar of this Court will sign all the documents to effect that transfer. I ask that the respondent pays the costs of this application.

**DATED and SIGNED at NAIROBI this 30<sup>TH</sup> day of JUNE 2016.**

**A.O. MUCHELULE**

**JUDGE**

**DELIVERED AND SIGNED this 4<sup>TH</sup> day of JULY 2016.**

**W. MUSYOKA**

**JUDGE**