



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**  
**SUCCESSION CAUSE NO. 699 OF 2015**  
**(FORMERLY CHUKA SPM SUCCESSION CAUSE NO. 3 OF 2011)**  
**IN THE MATTER OF THE ESTATE OF THE LATE MUKINDIA AIRANYA Alias**  
**M'MUKINDIA MAIRANYI- (DECEASED)**

**AND**

SIRRAH MERUU MUKINDIA.....PETITIONER/APPLICANT

- VERSUS -

RUTH NKATHA RUKARIA.....PROTESTOR

**J U D G M E N T**

1. M'Mukindia Mairanyi (*"the deceased"*), died on 4th December, 2006. In a letter of introduction dated 9<sup>th</sup> February, 2010, the acting Chief of Gaitu West Location introduced the following as those who survived the deceased.

- a) Silla Meru Mwiti - widow
- b) Lydia Nkatha Mwiti - Daughter
- c) Priscilla Kiende Mwiti - Daughter
- d) Fredrick Muthama M'Mukindia - Son
- e) Japhet Muthuri M'Mukindia - Son
- f) Erah Kiburio Mukindia - daughter
- g) Moses Mugiira Mukindia - Son
- h) James Kiriira Mukindia - Son

2. Pursuant thereto on 7th January, 2011 Sirrah Meeru Mukindia, *"the Petitioner,"* petitioned for grant of Letters of Administration Intestate which was issued on 30<sup>th</sup> May, 2011 and confirmed on 14th February, 2012 as follows:-

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- a) Sirrah Meruu Mukindia - 7 acres
- b) Ruth Nkatha Rukaria - 2 acres

3. On 17<sup>th</sup> September, 2012, Priscilla Kiende, a daughter of the deceased filed an application for revocation of the grant on the grounds of concealment of material facts; that the Succession Cause was secretly lodged by the Petitioner and that the Petitioner had intermeddled with the estate of the deceased including selling to Ruth Nkatha Rukaria (hereinafter "*the Protestor*") two (2) acres of the estate land. Finally, that she and the other beneficiaries of the estate had not been provided for. On 6<sup>th</sup> September, 2012, the Petitioner applied for the rectification of the grant in which she sought to exclude the Protestor while proposing to distribute to all her daughters, daughters -in-law and one Teresia Kathure to whom she proposed to give a share of two (2) acres. This was met by a Protest filed on 23rd May, 2016 by the Protestor protesting the failure to be allocated the two (2) acres earlier shared to her. The matter was heard through viva voce evidence.

4. PW1, Sirrah Meruu the Petitioner told the court that she had three (3) sons and two (2) daughters with the deceased. That the Protestor was her neighbour. She denied having sold the land to her. That the Protestor had only leased the land to help the Petitioner lodge the Succession Cause. In cross-examination she denied having received any money from the Protestor. PW2, Priscilla Kiende Mwiti told the court that the family had leased the two acres to the Protestor for Kshs.5,000/- each per year since 2009; that the Protestor had informed them that she had used Kshs.30,000/- for the Succession Cause. Erah Kiburio (PW3) and Purity Kioro Mutiga (PW4) reiterated what PW2 had told the court. PW5, Erastus Kiviti M'Ringerera told the court that as the area Manager he had been called to sort out the boundary dispute between the Protestor and PW6. That both had claimed to have purchased the property from the estate. PW6 Teresa Kathure told the court that she had purchased two (2) acres from the estate on 8th August, 2012 for Kshs.600,000/-. PW7 was Lucy Mwonjiru who urged that she be catered for as she was a wife of one of the sons of the deceased who had since died.

5. RW1, Ruth Nkatha Rukaria the Protestor told the court that she purchased two (2) acres from the Petitioner vide an agreement dated 18<sup>th</sup> December, 2009 for Kshs.300,000/-. That she had paid a total of Kshs. 211,665/- and has been in occupation of the subject portion of two (2) acres since 2009 to date. That it was for this reason that the grant had been confirmed for 7.5 acres in favour of the Petitioner and 2 acres in her favour. She urged that the applications for revocation and rectification be rejected. The parties thereafter filed their submissions.

6. I have considered the evidence and the submissions on record. The issues for determination are; should the grant be revoked? should the certificate be rectified? What is the position of the Protestor and Teresa Kathure? Finally, in the circumstances, how should the estate be distributed?

7. Before considering the matter, I should clearly state that I found the Petitioner and her witnesses waiting in cander. They openly lied in order to court. For example, the basis for PW2's application was that the Succession Cause was filed secretly and that the Petitioner had intermeddled with the estate by selling two (2) acres to the Protestor. At the trial, she changed tune and swore that the Protestor had only leased two (2) acres to help the family lodge the Succession Cause! To say the least, this court was completely unimpressed by the Petitioners witnesses. It makes a mockery to the offence of perjury when witnesses raise a bible to tell the truth but each word dropping from their lips turns out to be a lie. Be that as it may, I will consider the matter within the acceptable parameters of the Law of Succession Act and the Evidence Act and make a determination.

8. On the first issue, the grounds for the revocation of the grant were that the petition for the grant was made secretly; that there was material non-disclosure; that there had been intermeddling with the estate and that the beneficiaries had not been catered for. From the evidence on record, it was clear that contrary the beneficiaries were involved within the Petition was being lodged but were not provided for at

the time of distribution. The application for rectification sought to rectify that problem. It is for this reason that Priscilla Kiende Mwitwi seems to have abandoned her application for revocation and sought to support the application for rectification. In this regard, the application for revocation is hereby struck out and with no order as to costs.

9. On the second issue, it is not in dispute that in the certificate of confirmation issued on 14<sup>th</sup> February, 2012, none of the beneficiaries of the estate of the deceased had been taken care of. The property was distributed between the Petitioner and the Protestor, who is admittedly a buyer of a portion from the estate. Under sections 35, 38 and 39 of the Law of Succession Act, it is imperative that the interests of the children of the deceased be taken care of. The children of a deceased parent take precedent over everyone. The Petitioner has by her application sought to take care of the interests of the children of the deceased by distributing certain shares to them. In this regard, in so far as the application for rectification sought to rectify the irregularity made in the earlier application for confirmation, the application is in order. The only thing is that the same should be granted taking into considerations the legal rights established after the trial. Issue number two is therefore answered in the affirmative but with some amendments on the proposed alteration as shall hereinafter become evident.

10. On the 3<sup>rd</sup> issue, the Protestor admitted that she had entered into the sale agreement for the sale of land, two (2) acres in the estate after the demise of the deceased. The issue of whether the transaction was a sale or lease does not matter at this juncture. What is clear is that after the demise of the deceased, but before the grant was issued and confirmed, the Protestor sought to acquire an interest in the estate by way of sale. She produced a sale agreement dated 18<sup>th</sup> December, 2009 between her, the Petitioner and some of the beneficiaries. She contended that she had paid a total sum of Kshs.211, 665/- towards that purchase.

11. Section 45 of the Law of Succession Act Provides:-

***" 45. (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."***

Further, section 82 of the Law of Succession Act provides:-

***"82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-***

***a) .....***

***b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:***

***Provided that-***

***i) .....***

***ii) no immovable property shall be sold before confirmation of the grant; (underlining mine).***

12. In the case of **Re Estate of John Gakunga Njoroge [2015] eKLR** Murithi J held:-

*" A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act....."*

**For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with immovable property of the estate is restricted by the provisions on the powers and duties of the personal representatives under Section 82(b) Proviso (ii), which provides that:-**

*"(ii) no immovable property shall be sold before confirmation of the grant." (Underlining mine).*

13. The net effect of the foregoing is that dealing with a property of a deceased person before a grant is issued is intermeddling and criminal under section 45 of the Law of Succession Act. Further, no immovable property of an estate of a deceased person can be sold before confirmation of grant. In this regard, the claim of a purchaser from either a beneficiary or an administrator of the estate before confirmation is to be directed against such individual and not against the estate. In **Re Estate of Geoffrey Kiricho Mbogori Chuka Succ. Cause No. 49 of 2016** the court held:-

*"In this regard, it is for the purpose of preserving the social fabric, cohesion and peaceful co-existence of or end to disputes between family members who are beneficiaries to estates, that the law restricts, indeed prohibits any dealing with an estate until the grant is confirmed. The net effect of the aforesaid provisions of the law and decided cases is that, the estate of the deceased cannot be dealt with without the sanction of the court. Before the grant of letters of administration are confirmed, no one including the administrators of the estate of the deceased can deal with the property of a deceased by way of intermeddling therewith or effect a sale of immovable property belonging to the estate. Anyone who purports to purchase property from the estate before confirmation therefore does so at his own peril."*

In this regard, the Protestor's claim is as against those she purported to have purchase the two (2) acres from and not the estate. Her claim cannot be entertained at this forum. She can sue to recover whatever she had paid.

14. Mr. Kaimenyi learned Counsel for the Protestor submitted that the confirmation of 7 acres for the Petitioner for her children was lawful and in terms of section 35 of the Act. Counsel relied on the case of **Justus Kioga Thiora Kiugu & 4 Others .v. Joyce Nkatha Kiugu & Another [2015] eKLR** in support of his submission. It is true that a surviving spouse is entitled to a life interest over the net estate of the deceased in terms of section 35 of the Act. However, as held by the Court of Appeal in the of **JustusThiora Kiugu case**, (supra) once the surviving spouse and the children agree and consent on distribution the court is to record the same. In the present case, it is the surviving spouse herself who has applied to distribute the estate to amongst others her children and they have no objection to her proposed distribution by way of rectification.

15. As regards, Teresa Kathure, she produced an agreement executed between herself and the Petitioner on 8th August, 2012 for Kshs.600,000/-. The grant had been confirmed on 14<sup>th</sup> February, 2012. In this regard, the Proviso to section 82 of the Act does not apply. Section 93 of the Act provides:-

***"93. All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act."***

16. In view of the foregoing, the purchase by Teresa Kathure is protected by the law. Her transaction is valid and cannot be affected and her inclusion in the proposed distribution on rectification is not affected.

17. On the basis of the testimonies on record and especially that of PW7, Lucy Mwonjiru M'Tuerandu and corroborated by the Petitioner, the estate of the deceased is to be distributed as follows:-

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i. Purity Kioro Mutiga	- 1.4 acres
ii. Ella Kiburio Mukindia	- 1.00 acre
iii. Lawrence Kimathi Amos	- 1.00 acre
iv. Grace Mwendwa M'Amundi	- 1.4 acres
v. Priscilla Kiende Mwiti	- 1.00 acre
vi. Lucy Mwonjiru M'Tuerandu	- 1.00 acre
vii. Sirra Meruu Mukindia	- 1.00 acre
viii. Teresa Kathure	- <u>2.00 acres</u>
<b>Total</b>	- <b><u>9.8 acres</u></b>

The names appearing on distribution are different from those appearing in the letter of distribution because the court was informed that nearly all the sons of the deceased have passed on and those who remained are their widows to whom their shares have been distributed to.

It is so decreed.

**DATED and Delivered at Chuka this 3<sup>rd</sup> day of November, 2016**

**A.MABEYA**

**JUDGE**