



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 209 OF 1994

IN THE MATTER OF THE ESATE OF KIUGU M'RIRIA...DECEASED

ADRIAN NYAMU KIUGU.....PETITIONER

VERSUS

ELIZABETH KARIMI KIUGU.....OBJECTOR

EDWARD GIKUNDA M'ARIMI.....PROTESTOR

J U D G M E N T

1. The objector/applicant through an application dated 8<sup>th</sup> June, 2009 brought pursuant to Section 47,71 (2) of the Law of Succession Act sought the following orders; that grant issued on 25<sup>th</sup> May, 2001 be confirmed and subsequent title No.Nkuene/Ngonyi/890 and Nkuene/Ngonyi 121 be cancelled and the earlier title Nkuene/Ngonyi 12 be reinstated. The applicant relied on her supporting affidavit in which it was averred the earlier grant was annulled on 14/7/2003. That the administrator subdivided the deceased property and sold the entire parcels to strangers. She prayed the resultant titles to be cancelled and to revert to the deceased name so as to effect distribution so that the objector/applicant gets one (1) acre and balance to the petitioner.
2. The petitioner filed replying affidavit to the applicant's application dated 7<sup>th</sup> September, 2009. The protestor Edward Gikunda filed affidavit of protest dated 7<sup>th</sup> September, 2009.
3. The court record reveals that on 14<sup>th</sup> July, 2003 the grant of letters of administration issued to the 1<sup>st</sup> petitioner were nullified by the court. That on 25<sup>th</sup> May, 2009 the court ordered that joint grant be issued to both Andriano Nyamu Kiugu and Elizabeth Karimi Kiugu and such grant to be confirmed notwithstanding 6 months having not lapsed upon application. The 2<sup>nd</sup> petitioner/applicant filed application for confirmation of grant dated 8<sup>th</sup> June, 2009 and same was ordered to be determined by way of viva voce evidence.
4. The objector/administrator gave evidence and called one witness whereas the 1<sup>st</sup> petitioner gave evidence and called no witness. The protestor gave evidence and called no witness. The court has considered the application; affidavit in support and the replying affidavits, the evidence by parties and the Law of Succession Act. The issues for consideration are as follows:-
  - i. ***Whether the petitioner is son or beneficiary to the deceased estate herein?***
  - ii. ***What is the relationship between the objector/petitioner and the deceased?***
  - iii. ***Who are entitled to the deceased estate and what is the fate of the purchasers from the 1<sup>st</sup> petitioner?***
  - iv. ***Who is entitled to costs?***
5. The objector/petitioner case is that she is wife to Kiugu Murithi M'Riria, the deceased herein having been married under customary law. That they had 3 issues namely; Josephine Ntakira Kiugu, Judith Igoki Kiugu, and Gatobu Kiugu and that she lived with her husband and children at Nkuene/Ngonyi/121. She produced green card exhibit O1 confirming that the land belonged to the

deceased as of 18/4/1967. That after death of her husband the 1<sup>st</sup> petitioner secretly sold the land and chased her. She reported to the Chief who told her the land belonged to the 1<sup>st</sup> petitioner as women do not have titles to land. That she then went to land's office and filed a caution on 24/11/1995. Exhibit O1 shows caution was lodged. The objector did not remove the caution but it was removed without her notice. That she later came to know the land had been subdivided into several portions being plots numbers 870,890 and 891 and transferred to other persons. The objector produced exhibits O2A in respect of Plot No. 890, 2B in respect of Plot No. 891 and 2C in respect of plot NO. 870. She referred to the 1<sup>st</sup> petitioner as a member of her late husband's clan and a neighbour and a son of M'Mwobobia. She testified that M'Mwobobia had no relationship with the deceased herein except that they come from the same clan. She averred the deceased herein mentioned the 1<sup>st</sup> petitioner as his son. That when the objector reported to the Chief he told her the 1<sup>st</sup> petitioner was son of Kiugu and she was chased by the said Chief, who is uncle to the 1<sup>st</sup> petitioner and now she resides at Kathithini market. She concluded by stating that the 1<sup>st</sup> petitioner is not entitled to inherit from the deceased.

6. During cross-examination of OW1 she testified that her husband had 2 brothers and one sister. She averred that she is not aware how the caution was removed and that the petitioner petitioned for the grant without her knowledge after she had been chased from her matrimonial home. She agreed in her scheme of distribution she had indicated that she should get 1 acre and the petitioner the balance stating that the land is 1 ¼ acres. She testified the deceased did not have any other wife, insisting that Nyamu is not son of the deceased but he got identity and in her husband's name. She confirmed the contents of her affidavit dated 8<sup>th</sup> June, 2009 are correct and testified that as the 1<sup>st</sup> petitioner got National Identity card in the name of Kiugu he should get a share from the deceased estate as well as other children of the deceased. She averred that the 1<sup>st</sup> petitioner should get a share but the mistake he made was to hide from her what was happening to the deceased land. She stated that land should be shared equally amongst 5 of the deceased dependants.
7. OW2 testified that OW1 is her mother and she is daughter of the deceased. She termed the 1<sup>st</sup> petitioner as a neighbour and son of Hellen M'Mwobobia and M'Mwobobia. That they went to same school but came from different areas. She testified that her mother's house was demolished and she was chased away and she now stays at a rented house after Nyamu demolished her houses. She testified Nyamu is not their brother and stays at his father's home at Ngushishi. She averred Nyamu is not entitled to anything as he is not a son of her father. During cross-examination she testified that her father had 3 children and that her mother never remarried after the death of her father. She testified that she lived on plot No. 121 upto 1981 when she got married at the age of 20 years but the other children and their mother lived on the land upto when their house were demolished. She further testified the 1<sup>st</sup> petitioner married while at M'Mwobobia's home.
8. The 1<sup>st</sup> petitioner testified that the deceased was his father and that he had only one wife, his later mother Hellen Nyai and she had 2 children, himself and Kiende (deceased). He adopted the contents of his affidavit dated 7<sup>th</sup> September, 2009 as his evidence in chief adding that the objector was married to Jeremiah Nkanata brother to his father and had children with him one Josphat Gatobu. He alleged the 2<sup>nd</sup> objector/ petitioner stays at Mitine and has 6 children and when he petitioned for grant he had no obligation to consult any one claiming he continued to use the land as he had a house therein. That he sold the land to Zaberio Nyamu; and Edward Gikunda. He confirmed he obtained identity card in the name of Kiugu. He confirmed that Zaberio sold his share to Mugambi and the he does not own any portion of land anymore. During cross-examination he testified that M'Mwobobia is unknown to him insisting that Kiugu is his father and that he was married to his mother. He stated that the objector is a stranger to him and was wife to Jeremiah Nkanata after death of his father. He denied that she is his step-mother. On being referred to his affidavit dated 7<sup>th</sup> September, 2006 he denied the same saying that was not his affidavit. He even denied the signature as his own. He denied having been in the same school

with OW2. He further denied even having any siblings. On being re-examined by court PW1 testified the signature in his ID card was his and on being referred to the signature in his ID card and the one in his affidavit dated 7<sup>th</sup> September, 2009 he changed his testimony and admitted that the signature was his own. He admitted the contents in paragraphs in the affidavit to be correct. He soon changed his testimony again stating paragraph 9 of his affidavit was false. He testified that his mother was buried on land of one John Kirimi who he said he did not know in a village at Igoki which is 5 kilometers away and that his sister was buried on plot 121. He further stated that the 1<sup>st</sup> objector is married at Mitine by one Kimundu who he does not know his other names and that he sold the deceased land in 1996 before the confirmation of the grant. On re-examination by his advocate he changed his mind and agreed he made the affidavit in question and all contents therein are correct.

9. PW2 Edward Gikunda M'Arimi a protestor testified that he was wholly relying on contents of his affidavit dated 7<sup>th</sup> September, 2009. He prayed that it be adopted as his examination in chief. During cross-examination he testified that he found the land being offered for sale in a year he cannot recall admitting that he does not know the 1<sup>st</sup> objector Elizabeth Karimi. He agreed the land had a house and coffee plants. He claimed the house belonged to Nyamu. On being re-examined he testified he paid Kshs.200,000/= as a purchase price and title was transferred to him. He testified that the titles are two.

10. I have carefully considered the evidence of OW1, OW2 and PW1 as to whether the 1<sup>st</sup> petitioner was son of the deceased or not. The petitioner in petitioning for grant of letters of administration of the deceased estate herein in Form P&A 80 he described himself as son of the deceased. He did not call any single witness to support his contention that he is son to the deceased. He claimed his mother was married to the deceased yet he did not call any evidence in support. In his evidence he stated that following the death of his mother she was buried at John Kirimi's land 5 kilometres away and on the land of a person whom he did not know. He did not give any reason why his mother was buried on John Kirimi's land and not that of the deceased, if she was married to the deceased. PW2 did not know anything about the biological father of PW1. OW1 and OW2 corroborated one another and stated that PW1 was from same clan with the deceased and that he was a neighbour but not a son of the deceased. PW1 I have observed was evasive and not trustworthy in his evidence. He denied signing the affidavit dated 7<sup>th</sup> September, 2009 and its contents however on being re-examined by court and being shown the signature in the ID Card and his affidavit he admitted the signature was his own. However, he stated the contents of paragraph 9 were false. On re-examination by his Counsel he owned all the contents of the affidavit which confirms the objector as his step-mother. The petitioner having failed to discharge the burden of proof on balance of probability following his assertion that he was son of the deceased I find that he was just from the same clan with the deceased and a neighbour but not a son of the deceased.

11. The objector in her evidence testified that she was a wife to the deceased. OW2 corroborated her evidence. The 1<sup>st</sup> petitioner admitted that the contents of his affidavit dated 7<sup>th</sup> September, 2009 in which under paragraph 9 he described the objector as his stepmother and himself as son of the deceased. He alleged following the death of the deceased the objector was married off to his uncle Jeremiah Nkanata and that she was subsequently married at Mitine where she got other 3 children. The petitioner did not call evidence in support of his assertion. I had earlier on found the witness to be evasive and incredible and as such I do not believe him. I therefore find and hold that the objector was a wife to the deceased herein and that she never remarried as she denied having remarried and her evidence was corroborated by OW2. She denied having other children and insisted of having only 3 children sired by the deceased.

12. The other issue to consider is who are entitled to the deceased estate. The objector and her 3 children are dependants to the deceased as envisaged by **Section 29(a) of the Law of Succession Act** and entitled to his estate. The objector in her affidavit dated 8<sup>th</sup> June, 2009 which she relied upon in her evidence especially during re-examination by her counsel she testified that the

petitioner is entitled as he has ID card in the deceased name. This point was not explained to satisfaction of the court but the objector do not mind the petitioner getting a share from the deceased estate. She suggested that herself and her 3 children and the petitioner do share the deceased estate equally. In view of the foregoing I find and hold the objector and her 3 children are entitled to the deceased estate, however, as the objector do not mind the petitioner getting a share this court is inclined to consider him in the distribution of the deceased estate. The court though it ruled that the petitioner is not son of the deceased it has no doubt from the objector's evidence there exists a key close relationship between the deceased and the petitioner that made her concede to share the deceased estate with her but that relationship remains a mystery to the court as parties failed to disclose the same.

13. The other issue for consideration is the fate of the purchasers from the petitioner. The petitioner in his own words admitted that he sold the land in 1996 before confirmation of grant. **Section 55 of the Law of Succession Act** bars distribution of capital before confirmation of grant. Further to the above personal representative have no powers to sell immovable property before confirmation of grant. **Section 82(b),(ii) of the Law of Succession Act** provides:-

***“82. Personal representatives shall, subject only to any limitation I imposed by their grant, have the following powers(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;***

***(ii) No immovable property shall be sold before confirmation of the grant;***

14. The petitioner sold plot Nkuene/Ngonyi/ 121 when he had no capacity to do so. All what he did was contrary to the Law of Succession Act and was and is illegal. The grant issued to the petitioner was subsequently annulled and all what he had done became null and void. The petitioner's counsel referred this court to **Section 93(1) and (2) of the Law of Succession Act** which provides:-

***93. (1) A transfer 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.***

***(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser***

***may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.***

Whereas the above section states that a transfer by 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, I am of the considered view that such transaction can only be relied upon where the legal representative is entitle to grant of representation but not where one is not and where one has obtained the grant fraudulently. The purchaser in this cause came from the neighborhood of the objector and it is not possible that he did not know of the objector herein. I therefore find and hold the sale to be invalid.

15. The upshot is that the 1<sup>st</sup> objectors/petitioner's application for confirmation of grant is allowed. The court proceeds to make the following orders:-

- a. ***The titles Nkuene/Ngonyi/870,890 and 891 be and are hereby cancelled and ordered to revert into the name of Kiugu M'Riria(deceased) to title Nkuene/Ngonyi/121.***
- b. ***Nkuene/Ngonyi/121 be distributed as follows:-***

1. *Elizabeth Karimi Kiugu,*
2. *Josephine Ntakira Kiugu*
3. *Judith Igoki Kiugu*
4. *Gatobu Kiungu..... 3/4 acre*

***B. Adriano Nyamu (to transfer his Share).....- ½ acre***

***to the purchaser as he has not been on the land since he sold his share in 1996.***

***c. The objector/petitioner gets costs of the petition.***

DATED, SIGNED AND DELIVERED AT MERU THIS 6<sup>TH</sup> DAY OF NOVEMBER, 2014.

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

1. Mr. B. G. Kariuki for objector/petitioner
2. Mr. G. Anampiu for the petitioner/purchaser

**J. A. MAKAU**

**JUDGE**