



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 84 OF 2015

IN THE MATTER OF THE ESTATE OF KAGUA GATHAGU alias KAGWA GATHAGU (DECEASED)

VIRGINIA WAMUYU WATENE.....APPLICANT

VERSUS

STEPHEN WATENE KAGWA.....PROTESTOR

JUDGMENT

Kagua Gathagu died intestate on 2 March 1988. He was domiciled in this republic and his last known place of residence was Ruguru location, in Nyeri County.

According to the petition for grant of letters of administration filed by the protestor on 5 February 2015, the deceased was survived by the following persons:

1. Duncan Wachira Kagua (son aged 62)
2. Agnes Kirigo Githagu (daughter-in-law aged 63)
3. Stephen Watene Kagua (son aged 60)
4. David Muriithi Kagua (son aged 50)
5. Monica Muthoni Maina (daughter aged 47)

The only asset comprising the deceased's estate is a parcel of land registered in his name as Title No. Konyu/Ichuga/647 measuring approximately 0.89 hectares.

The protestor and the applicant were appointed as joint administrators of the deceased's estate on 26 February 2016.

By a summons for confirmation of grant dated 21 February 2017, the applicant sought to have the grant confirmed. In the affidavit in support of the summons, she acknowledged the deceased's survivors as listed in the protestor's affidavit in support of the petition; however, she added that the deceased was also survived by herself and Gladys Ngima Gatundu, as nieces of the deceased.

She proposed that the deceased's estate should be distributed equally in shares of 0.73 acres each between herself, the protestor and Gladys Ngima Gatundu.

The protestor filed an affidavit of protest in which he swore that only the children of the deceased are entitled to his estate. The applicant being the deceased's niece and Gladys Ngima being the wife of his late paternal uncle have no part in the deceased's estate, so he swore.

At the hearing of the protest the extent of the deceased's estate and his surviving children are issues that were not disputed. The evidence that the deceased was registered as the owner of the parcel of land in issue in 1959 was also not disputed.

It was also common ground that the applicant is the daughter of the deceased's late brother called Watene Gathagu.

According to the protestor, he had been living in the deceased's land since 1959 and that neither of his uncles (the deceased's brothers) had ever lived in that land. He denied that the land belonged to his paternal grandfather as suggested by counsel for the applicant. He also denied that his father held the land for himself and in trust for his two brothers.

On her part, the applicant testified that the deceased was her father's elder brother. It was her evidence that the deceased was not the absolute proprietor of Title No. Konyu/Ichuga/647 but rather was a trustee of his brothers' interest in the land. She testified that she and her late mother cultivated the portion due to their father; the last time she cultivated the land was in 1968. She testified further that she was representing her father's interest in this cause.

In answer to questions put to her during cross-examination, she testified that her father died in 2007. She conceded that neither her father during his lifetime nor anybody else in her family had lodged any suit to claim a share of the deceased's land. She also conceded that the deceased had exclusively occupied the land prior to his death.

Gladys Ngima testified that her husband, Gatundu Gathagu, was the deceased's brother. She testified that Title No. Konyu/Ichuga/647 belonged to her father-in-law and therefore his three sons, including her husband were entitled to a share of the land. She, however, admitted that she had never lived on this land. Like the applicant, she conceded that the deceased had been in exclusive occupation of the land till his death and that he occupied the land exclusively even in the lifetime of his two brothers.

After assessing the evidence and the submissions by the respective learned counsel for the applicant and the protestor, I am disposed to conclude that the applicant's cause must fail on two main grounds. In the first place, as much as the applicant has held herself out as representing the interest of her late father, she has not presented any evidence that she is the duly appointed representative of his estate.

In Troustik Union International Ingrid Ursula Heinz versus Jane Mbeyu & Another in Civil Appeal No. 145 of 1990 reported as (1993) eKLR, the Court of Appeal held that under section 82(a) of the Law of Succession Act, cap.160, the power to agitate by suit any cause of action vested in the deceased at the time of his death vests in his personal representative who in turn is defined in section 3 of the Act to mean executor or administrator of a deceased person. And 'administrator' means the person to whom letters of grant of administration has been made under the Act.

In the present application no grant of letters of administration has been made to the applicant and therefore she lacks any capacity to pursue her late father's perceived interest in the deceased's land or estate.

The second reason why the applicant's claim on the deceased's estate is bound to fail is that she has not proved that the deceased was registered to hold Title No. Konyu/Ichuga/647 for himself and in trust for his brothers who include the applicant's father.

A certificate of official search filed alongside the petition shows that the deceased was registered as the absolute owner of Title No. Konyu/Ichuga/647 on 14 April 1959. Since then until 2007, 48 years later, when the applicant's father died, no one, including the applicant's father had lodged any claim of any nature on the deceased's land. What's more, both the applicant and Gladys Ngima admitted that neither the applicant's father nor Ngima's husband had ever lived or cultivated the deceased's land; to the contrary, it was their testimony that the deceased had been in exclusive occupation and use of this land since 1959 till his demise in 1988.

And even if the applicant had any reason to believe that the land was held in trust, then it behooved her to initiate the necessary proceedings for a declaration of such a trust. In the absence of such proceedings or in the absence of a declaration of a trust by a court of competent jurisdiction this court cannot proceed as if such a trust exists.

In the ultimate, I find and hold that the applicant's and Gladys Ngima's claim on the deceased's estate has no foundation both in fact and in law. The applicant's summons for revocation of grant is thus dismissed.

Since the applicant ought not to have played any role in the administration of the deceased's estate, I am inclined to revoke the grant issued in the joint names of the applicant and the protestor; in its place I appoint the protestor as the sole administrator of his father's estate.

For completeness of record, I order that the deceased's estate be shared equally between his children and Agnes Kirigo Githagu whom the protestor has acknowledged that she is as much entitled to the deceased's estate as the deceased's children. The fresh grant is confirmed in the foregoing terms.

Considering that this is a family dispute, I make no order as to costs. It is so ordered.

Signed, dated and delivered in open court on the 21st day of February 2020

Ngaah Jairus

JUDGE