



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2897 of 2006

IN THE MATTER OF THE ESTATE OF GEORGE STEPHENSON KIARIE

Alias GEORGE KIARIE MUMIRA (DECEASED)

JOSEPHAT GREGORY MUMIRA NJOGU.....APPLICANT

VERSUS

JACINTA MUTHONI KIARIE.....1ST RESPONDENT

SIMON NJOROGE KIARIE.....2ND RESPONDENT

JUDGMENT

1. The contestation before court is between the immediate family of the deceased herein **George Stephenson Kiarie alias George Kiarie Mumira** on one side and his brother **Josephat Njogu Mumira** on the other hand.

2. The parties have been in and out of court severally and this time the subject of this judgment is a protest by **Josephat Njogu Mumira** (protestor) following an application for confirmation of the grant by the administrators of the estate, **Jacinta Muthoni Kiarie & Simon Njoroje Kiarie**

3. The protestor's case is that **Dagoretti/Kinoo/253** subject of the protest belonged to their late father, who in 1958 registered the same in the name of the deceased who was only 11 years old at the time, in trust of him. To support his assertion, he informed the court that as owner of the land their father had initially sold 4 acres to a cooperative Society which land was reclaimed by the family and one of their brother's paid back 20,000/- being the purchase price and interest to the said society. Further that their father sensing abuse of trust by the deceased had place a caution on the title as a beneficial owner.

4. The Protestor therefore seeks for revocation of the grant for the reason that the same was obtained fraudulently by making false statements, concealment from court of material facts and failing to disclose names of all beneficiaries.

5. On their part the administrators contend that the grant was obtained lawfully and by the right persons and the application is uninformed by factual realities. It is their case that the deceased was registered as the owner of the property subject matter on the 17th of November, 1958 and subsequently obtained a title on 22nd May, 1969. Further they urge that the said title does not indicate that the proprietor was so registered in trust for other persons.

6. Having considered the pleadings and evidence placed on record and submissions by counsel my view is that the issues for determination are;

i. Whether or not this court has Jurisdiction to hear the matter.

ii. Whether the deceased held the property subject matter in trust for his family (extended).

iii. Whether or not to nullify the grant.

7. There is no dispute that the deceased herein was 11 years old in 1958. The evidence that his father caused the land to be registered in his

name and the reason for his father's action as adduced by the Protestor and his witnesses has not been challenged.

8. Secondly it is not in dispute that the deceased father had sold a portion of the land subject matter to Kaggia Cooperative Society and several years back the Society agreed to return the land on refund of the purchase price.

9. Evidence that David Kiruri Mumira paid Kshs.20,000/= and Mumira Kiarie paid Kshs. 4,000/-being the initial amount and some compensation to the Cooperative Society has not been countered by the administrators either.

No explanation was given by the administrators either as to why David Kiruri Mumira paid back the society for land belonging to his brother.

10. It is also common knowledge that the deceased father had put a caution on the land which caution was removed by one of the administrators after their said father and the deceased were no more.

11. From my own research it appears that the question as to whether or not the probate court can determine whether a deceased held a property in trust is not yet moot as there are varying decision on the subject. On my part I align my view with the school of thought that a probate court may consider the issue depending on the circumstances surrounding a title and the evidence before it.

12. **Section 28** of the **Registration of Land Act Chapter 300** of the Laws of Kenya is very clear that registered land unless the contrary is expressed is subject to overriding interest including trust such that the said interest need not be indicated on title and it is a matter of evidence to be inferred by court.

13. The claim by the Protestor arises from succession and it is not an issue of land ownership *per se* and in my considered opinion therefore the matter is rightly before a probate court.

14. Makhandia JA in **Felistitas Muthoni Nyaga vs Peter Kayo Mugo** stated inter alia;

“...while it is law that the registration of a party as a proprietor of land does not defeat a claim of trust nor relieve the proprietor of his obligation as trustee there must be evidence upon which a court can conclude that in fact the registered proprietor of the land subject of the suit before it is in fact holding for the benefit of others.”

In **Kanyi vs Muthoria (1984) KLR 712 CA** stated:

“The registration of land in the name of the applicant under the Registered Land Act (Cap 300) did not extinguish the respondent's rights under Kikuyu customary law neither did it relieve the applicant of her duties or obligations under section 28 as trustee.”

15. The view of this court therefore is that the Protestor placed before it sufficient evidence to prove that the deceased was registered as the proprietor of the land at the behest of their deceased father and he held the same in trust for the father and therefore upon the death of their father, the deceased held the same in trust for his father's estate.

16. Having arrived at the above determination, the next question is whether or not to revoke the grant. Though the administrators were not candid to the court as relates to the suit property, their appointment as administrators *per se* does not hinder consideration of the Protestor and others in the distribution of the land in question as the deceased siblings have not laid a claim on the rest of the estate. The court declines to revoke the grant and directs that consideration be made when distributing the property subject matter so as to include the interest of the deceased siblings.

17. Costs to the Protestor.

DATED, SIGNED and DELIVERED at NAIROBI this 17th DAY OF SEPTEMBER, 2020.

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ALI-ARONI

JUDGE