



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.107 OF 1998

In The Matter Of The Estate Of The Late Raiji Gataaru Alias M' Raiji Gataru (Deceased)

M' KUNGANIA MI IBAGINE.....PETITIONER

-Versus-

GLADYS KATHUNI M' RINKANYA.....OBJECTOR

JUDGMENT

[1] These proceedings relate to the estate of Raiji Gataaru alias M' Raiji Gataru (deceased). On 21st September 1998, a Grant of Letters of Administration Intestate were issued to M' Kungania M' Ibagine (now deceased). On 15th November 1999, a Notice of Objection was filed by Gladys Kathuni M' Rinkanya, the Objector herein, contending inter alia:-

- 1. That the petitioner is not a beneficiary but a stranger to the estate of the deceased; and**
- 2. That she was the only surviving beneficiary to the estate, yet her interests had not been catered for.**

[2] The objector gave oral testimony in support of her case. She testified as OBW1. The gist of her evidence was:-

- 1. That the deceased was her father and he died in 1969 leaving her as the only surviving child.**
- 2. That at the time of his death he left a parcel of land known as LR. NO. Abogeta/U Chure/517 ;**
- 3. That at the time of his death he had not build any house on that land; only cultivated it.**
- 4. That the land was left for her to cultivate but she did not cultivating it as the petitioner was cultivating yet he was not related to the deceased though he used to call him "uncle".**

[3] Her witness, OBW2, M' Mburugu M' Itirithia gave evidence to the effect:-

- 1. That he knew the deceased as they used to herd cattle together and were neighbours;**
- 2. That the deceased was married and had one child Kathuni (the objector herein).**

[4] She called yet another witness, OBW3, one Geoffrey Kiome whose evidence was:-

- 1. That he knew the deceased since they were neighbours;**
- 2. That the deceased had a wife and one daughter (the objector herein).**
- 3. That when the deceased got his land, he never lived there but he used to farm on the land; and**
- 4. That the daughter was left farming the land but stopped when she got sick;**

5. That he did not know why the petitioner entered the land since they were not related with the deceased although they were village mates.

6. That the family of M' Kungania had their own land.

Petitioner's case

[5] His witness, PW1, Jamulick M' Ithima gave his testimony. The core of his evidence was:-

1. That he knew the petitioner (now deceased) as he was his elder brother;
2. That the deceased (M' Raiju Gataru) was from his family;
3. That he knew Gladys Kathuni (the objector) as a daughter of the deceased and that the deceased had land which was being occupied by M' Kungania (deceased) and
4. That the deceased (M' Raija Gataru) had said that he had left the shamba to M' Kungania M' Bagine in his presence.

[6] PW2 was Jose N. Mbaya. It was his evidence

1. That he knew the original petitioner as his neighbor on Abogeta U-Chure and that he had been in occupation of the estate property since 1965;
2. That he knew the Objector and that she had never been in occupation of the suit property.

[7] PW3 was Muthuri Kungania. It was his evidence:-

1. That the suit property belonged to M'Kungania M' Bagine having been left to him by Raiji Gaturu;
2. That M' Kungania lived on the suit property and that the deceased was living elsewhere in Mikungune in Meru.

[8] After close of the respective parties' case, the court directed them to file submissions. The objector reiterated her claim as set out above. She emphasized that as the only child of the deceased, she is entitled to the estate property. She stated that although the petitioner claimed to be a nephew of the deceased he had not proved this in court and all evidence pointed to the fact that he was not a close relative of the deceased. According to her, there was also no evidence that the deceased had given the petitioner the land *inter vivos*. But she adduced evidence to show that she used to utilize the land even when she was living with her husband meaning that she had never denounced her claim over her father's land.

[9] On the other hand it was submitted for the petitioner that it was clear from the proceedings that the deceased who had no sons took in the original petitioner as his own son and that from the evidence there was no contest that the original petitioner took the entire property from early 1970s and developed it immensely. They submitted further that it was abundantly clear that the deceased and the original petitioner were related by blood.

ANALYSIS AND DETERMINATION

[10] I have carefully considered the evidence on record and the rival submissions by the parties. The objector, the petitioner and all their witnesses confirmed that the deceased was survived by only one child, the objector. Doubtless, therefore, the deceased is the father of the objector. However, is the objector, the sole heir of the estate of the deceased? She claimed she is. What does the evidence portend?

[11] The petitioner makes two claims. One, that he is related to the deceased by blood. And, two, that the deceased gave him the estate property for he did not have a son.

Of blood relations

[12] Whereas the petitioner made an assertion that, from the evidence on record it was clear that the deceased and the original petitioner were related by blood, there was nothing on record which show that the petitioner and the deceased were related by blood. The statement was wild and at large; it was not supported by any evidence and therefore it was made without any basis. The exact relationship between the original petitioner and the deceased was not stated. There was also no evidence that the original petitioner was an adopted son of the deceased. Even if it were to be accepted that they were related, by virtue of Section 66 of the Law of Succession Act she being the only child and daughter of the deceased would rank in priority in inheritance of the estate of the deceased.

Of gift inter vivos

[13] According to the objector the deceased did not make any grant to the original petitioner. Her evidence was that the deceased had left the estate land for her to cultivate. She stated that she only stopped cultivating the land due to illness. She also stated that the original petitioner Mr. Mungania had land elsewhere. She was categorical that Mungania had filed this cause to shut her out. Her evidence was corroborated by OW2 and 3. Of significance was that she used to cultivate the suit land and only stopped due to ill health. Has this evidence been dislodged?

[14] The petitioner argued that the deceased gave him the estate land for he did not have a son. The best this argument could portend is a gift inter vivos to him. The said gift must be proved by way of transfer or deed of transfer for it is a gift of land. None was produced. PW1, the brother to the original petitioner stated that the deceased had given M' Kungania M' Bagine the suit property in his presence. He did not provide specific details of the event and the gifting. Surprisingly, he stated that he could not recall when M' Kungania entered the suit property despite having testified that the land was given to him in his presence. He further testified that the land was being occupied by M' Kungania (his deceased brother). But, in cross examination he appeared to contradict himself when he stated;

“The deceased was the owner of the land subject of this succession cause, the objector and her mother were left on the deceased land when he died. I know the the objector very well. At one time she was unable to cultivate the land due to old age and ill health.”

[15] Evidence by PW1 and the contradiction therein only helps to confirm the evidence of the objector and her witnesses that she was farming on the suit property but stopped at some point due to poor health.

[16] More from PW1. He stated as follows in cross examination;

“Kungania has his own lands. He has 3 lands he owns.....the said parcels of land are within Abogeta sub location and Nkuene.”

[16] Again this serves to confirm the evidence by the objector that the petitioner had parcels of land elsewhere.

[17] PW2 appeared to contradict PW1 when he stated that even though he knew the objector, she was not in occupation of the suit land and he had never seen her there. This was contrary to PW1's evidence in cross examination that the objector and her mother were left on the land when the deceased died and that at one time she was unable to cultivate the same due to poor health. The submissions by the petitioner that the deceased had left the land the subject matter herein to him even before his death was not therefore proved or supported by any evidence. PW1 who alleged to have been there when the deceased gave the original petitioner the suit land could not even remember when the petitioner entered the suit land. At this juncture, I am properly grounded to state that the evidence by the objector and her witnesses was truthful and remained cogent even under intense cross examination.

[18] The petitioner has not proved a gift inter vivos was made to him by the deceased. Accordingly I find the objection filed by the objector herein on 15th November 1999 to be meritorious and I allow it. I find that the objector is solely entitled to the estate. I make a grant to her and the estate shall devolve to her solely and absolutely. The grant is accordingly confirmed.

[19] In light of the conduct of the petitioner in this succession cause, the costs of this succession cause shall be borne by the petitioner.

Dated, signed and delivered in open court at Meru this 28th day of January, 2019

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F. GIKONYO

JUDGE

In presence of:-

Ann for protestor

Arimi for petitioner

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F. GIKONYO

JUDGE