



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS SUCCESSION CAUSE NO. 179 of 1993

IN THE MATTER OF THE ESTATE OF KENJI GITUNE (DECEASED)

FRANCIS WAHOME KENJI (substituting Wakarima Kenji)

GEORGE MACHARIA.....APPLICANTS/RESPONDENTS

VERSUS

PETER WANYAGA MAIMBA

(Substituting Wilson Maimba Gitune).....PROTESTER

JUDGMENT

The subject of this dispute is the distribution of LR AGUTHI/GITITU/68 measuring about 5.1 acres. It was registered in the name of Kenji Gitune in 1958. Kenji was the husband of Wakarima Kenji, (Wakarima) and brother to George Macharia (Macharia) and Wilson Maimba Gitune (Kuru)

The issue to be determined is whether the parcel should be shared equally among the three brothers at 1.7acres, or whether Kuru's share is larger by 2.1 acres, the rest with 1 acre each on account of his allegation that out of the 5.1 acres, 2.1 acres belong to him through purchase from a relative.

Kuru's case is that their father Gitune Kenji and his relatives shared their grandfather's land which was 15 acres equally each getting 3 acres. That one of his relatives Kamuhia Kahoya who had received his 3 cares sold him 2.1 acres and the other 1 acre to ne Wilson Kahuthia. That during demarcation the whole of his father's land comprising of 3 acres and his 2.1 acres were consolidated and registered in their elder brother's name and a title deed issued.

Kenji Gitune died in 1972. Kuru and Wakarima filed Nyeri PMSucc.No.310 of 1990. They obtained a grant of letters of administration on 22nd November 1991 which Kuru proceeded to confirm distributing the estate as above.

This matter has a long and twisted history. Wakarima and Macharia filed Summons for Revocation of the grant on 17th July 1995, pointing out that the said confirmation was obtained without their consent and the land was supposed to be shared equally among the brothers. By 4th April 2007 they had not prosecuted the same and Kuru moved the court to have the same dismissed. It was dismissed for want of prosecution vide Serگون J's ruling of 12th February 2010. The dismissal provoked Civil Appeal no 287 of 2012. The court of appeal on 31st March 2014 reinstated the Summons for revocation of grant dated 17th July 1995, directing that the same be heard on priority.

The matter did not take off for hearing due to various intervening factors, the death of the protester, the illness of Wakarima and subsequent demise, and the need to substitute them; and other interlocutory applications.

Hearing finally took off before me on the 17th September 2018.

Peter Wanyaga Kuru testified together with Margaret Nduta, and Wilson Kabuthi in support of the protest. Their position was that Wilson Maimba deserved a share of 2.1 acres out of the 5.1 acres because he had purchased the same.

Francis Wahome Kenji, George Macharia, David Ngatia, and Wilson Theuri testified in opposition to the protest and in support of application to revoke the grant issued to Wilson Maimba, taking the position that the land ought to be distributed equally among the three brothers.

I have carefully considered all the evidence on record both oral and documentary. In addition to all the affidavits, there were arbitration

proceedings pursuant to a court order dated 10th December 2013 (which order I could not trace in the file) from the office of the Chief Aguthi Location dated 8th January 2014. These were relied upon by Wakarima.

It appears to me because of the period of time the matter has taken in court and the numerous application made herein the proceedings took a peculiar turn where there was a Summons for Revocation of the grant and a Protest proceeding for hearing simultaneously. I can only presume that what was brought in as a Protest was intended to be a response to the Summons for revocation of grant. In the end the parties want this court to determine whether the parcel of land AGUTHI/GITITU/68 should be shared equally among them or whether Wilson Maimba should take the larger share?

The evidence that sits before me is that the parcel of land was registered in the name of the deceased. It is not in dispute that it was registered like that to hold for himself and his two other brothers. Hence it was upon Wilson Maimba to prove that he had purchased the 2.1 acres as alleged.

We only have his word against that of his brothers. It is said he was a business man. That he paid the money in installments, yet there is not a single document to support this evidence. He does not say how much he spent. In his witness statement filed on 30th January 2015 he states:

“What happened is that before land consolidation Kamuhia Kahoya sold me 2 acres of his land and one acre to Wilson Kabuthi. As a relative who had nobody else to help him I used to give him money”

It is noteworthy that he does not state how much he paid for the land or whether they made any record. Margaret Nduta’s testimony was that Kamuhia Kahoya was her grand-father and he sold land to Maimba.

“He used to tell me he was going to get money from him(Maimba)”

On cross examination it turned out she had no details of the alleged transaction, she did not know how much her grandfather sold the land for nor even Maimba’s brothers.

Wilson Kabuthi’s testimony was also about not knowing any details of the alleged transaction despite his being a co purchaser with Maimba. He was not sure whether he first bought one acre, or whether the total acreage bought was 3 acres. He was certain that what Maimba bought was consolidated with Gitune’s land.

The applicants’ testimony was that before Kenji died he called his brothers and was to share the land equally with them but death took over before he could do so. There was testimony by David Ngatia and Wilson Theuri that Maimba alleged to have spent some Ksh 300 to buy a parcel 0.2 acres from Kamuhia. That he demanded and the same was refunded to him threefold at Ksh 1000. This evidence was discredited by the protester as concoction to deny the estate of Maimba his rightful share.

Parties filed submissions where they summarized the evidence and urged me to find in their respectful favours.

I have found no evidence to support Maimba’s allegation that he bought 2.1 acres out of the 5.1 acres. It is noteworthy that the elders who conducted the arbitration also found the same. That Maimba and his witnesses did not persuade them that he had bought the 2.1 acres. Without that evidence the default is that the parcel of land be shared equally among the three brothers.

Hence I make the following orders:

1. That the grant issued to Wilson Maimba and Wakarima Kenji is revoked, both of whom are deceased.
2. The Protest is dismissed
3. A fresh grant to issue to Francis Wahome Kenji and Peter Wanyaga Kuru as joint administrators
4. LR Aguthi/Gititu/68 be shared into three equal portions of 1.7 acres each to: Francis Wahome Kenji on behalf of the children of Kenji Gitune, George Macharia and Peter Wanyaga Kuru on behalf of the children of Wilson Maimba Gitune
5. Each party to bear its own costs.

Dated delivered and signed at Nyeri this 25th day of January 2019

Mumbua T Matheka

Judge

In the presence of:

Court Assistant-Jerusha

No appearance for parties/counsel

Notice was served.

Mumbua T Matheka

Judge

25/1/19