



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 384 OF 2008

IN THE MATTER OF THE ESTATE OF MARION NJERI MAGUA (DECEASED)

KENNETH KABURU KIMANI.....PROTESTOR

VERSUS

MUGWE MAGUA.....PETITIONER/ADMINISTRATOR

RULING

1. The parties, who are the administrators of the estate of the deceased herein, filed an application for confirmation of grant via summons dated 30th January, 2009. The court had on 5th September, 2008 issued a Grant of letters of Administration Intestate to Leonard James Kimani and Mugwe Magua, who are the sons of the deceased whose estate is in issue. The deceased whose estate is in issue herein died intestate on 30th August, 1998.
2. On 21st April, 2010 Leonard James Kimani, the original Protester, filed an Affidavit of protest to the summons for confirmation of grant. In the affidavit, he complained that the summons for confirmation of grant proposes to have the only asset of the estate namely a parcel of land known as Dagoretti/Uthiru/38 distributed to his brother and co-administrator Mugwe Magua absolutely. Leonard admitted to signing the affidavit in support of the summons for confirmation of grant but stated that he did not know the implications thereof. In his understanding, the said parcel of land was to be shared between himself and the Petitioner in equal shares.
3. When the matter came up for hearing on 28th April 2010, Dulu J directed that the matter proceed by way of *viva voce* evidence. Leonard Kimani however died on 22nd February, 2014 as shown on the death certificate of serial number 436785 produced in court. Upon Leonard's death, his son Kenneth Kaburu Kimani, the Protester herein, filed an application via summons dated 24th November, 2016 seeking to be substituted in place of his deceased father in order to prosecute the case. The application was granted by an order of this court issued on 10th April, 2017 and Kenneth Kaburu Kimani substituted as the Protester.
4. The hearing commenced with the Petitioner's case, with Mugwe Magua, the Petitioner, testifying first. He relied on his witness statements of 3rd March, 2013 and bundle of documents of 19th May, 2010. He stated that he filed the petition for grant of letters of administration intestate with his brother Leonard James Kimani who has since died. They were the only surviving children of Marion Njeri Magua, the deceased herein. Their late mother's estate comprises a property known as Dagoretti/Uthiru/38. He contended that it was not proper for the property to be shared between himself and the estate of his deceased brother Leonard Kimani, since the property was his inheritance.
5. Mr. Mugwe stated that he is the son of James Magwa Ngando who died in 1963. His late father had two wives: Margaret Mwarania the 1st wife and Marion Magua the 2nd wife. He also had property, namely two pieces of land in Gikambura and two pieces of land in Dagoretti/Uthiru namely Plot no. 38 and Plot no. 39 which he apportioned amongst the members of the two families during his lifetime. The property known as Kalai/Gikambura/170 & 1440 was given to Margaret Mwarania the 1st wife, and Dagoretti/Uthiru/38 to Marion Magua, the 2nd wife who is the deceased whose estate is in issue herein. His elder brother Leonard Kimani was assigned a property known as Dagoretti/Uthiru/39 measuring approximately 1.6 hectares and which was registered in his name on 4th September, 1958.
6. He produced a journal entry which indicated that his late father gave Plot no. 39 to his brother Leonard on condition of good behavior. That Leonard occupied the property and later subdivided it amongst his children on 25th May, 1999 as shown on the green card thereby creating titles number 1233 to 1245. He denied the averment that Leonard bought plot no. 39 stating that Leonard stated working in 1958 and his earnings were not enough to purchase the property.
7. He denied the allegations that Dagoretti/Uthiru/39 measured a small acreage. He contended that the Dagoretti/Uthiru/38 initially measured ten (10) acres while Dagoretti/Uthiru/39 measured two (2) acres. That during demarcation, his late father hived off three acres from Plot no. 38 to add to Plot no. 39 making it five (5) acres. He urged that Plot no. 38 further reduced when the government compulsorily acquired a portion of it.

8. Mugwe Magua denied allegations that his brother Leonard Kimani suffered from mental illness in 1998 and stated that he only came to learn of the claims through a letter of 12th May, 2015 attached to the summons for substitution of the protester filed by Leonard's son. He contended that his brother read and understood the documents filed in court and willfully signed the consents to the mode of distribution. That he and Leonard had an excellent relationship and the affidavit of protest was influenced by Leonard's family.
9. Rahab Wariara Mbugua, a sister-in-law to the deceased testified in support of the Petitioner's case and stated that the deceased herein had three (3) children one of whom has since died. She contended that her late brother James Magua, had two pieces of land namely: Dagoretti/Uthiru/39 Ndumbuini and Dagoretti/Uthiru 38 which he bought for himself and a piece of land at Gikambura which he inherited from their father. She asserted that James gave the Gikambura land to his first wife, Dagoretti/Uthiru/38 to Mugwe Magua and the land in Ndumbuini to Leonard Kimani.
10. Rahab denied the claims that the Ndumbuini plot was bought by Leonard Kimani and urged that even though the plot is registered in the name of Leonard Kimani, it belonged to her late brother James Magua who bought it from the family of Kebara. She urged the court not to grant the estate of Leonard Kimani a share of Dagoretti/Uthiru/38 stating that it would amount to a double portion.
11. The Protester, Kenneth Kaburu Kimani testified that he is a son of Leonard Kimani, the original Protester, who has since died. He stated that he obtained a limited grant at Kikuyu Law Courts on 11th November, 2016 to enable him proceed with this case on behalf of his father's estate. He adopted the affidavit of Protest sworn by Leonard Kimani on 21st April, 2010 and the witness statement of his late mother Mary Wambui Kimani dated 16th October, 2014 as his evidence. He also relied on his witness statement dated 24th June, 2016.
12. Kenneth Kaburu stated that even though his late father Leonard Kimani signed the affidavit in support of the summons for confirmation of grant and the mode of distribution, he was suffering from amnesia at the time and did not therefore understand the implication thereof. He did not however produce any medical documents to confirm this claim. He asserted that in the affidavit of protest, Leonard contested the mode of distribution which would grant Mugwe Magua the property known as Dagoretti/Uthiru/38 absolutely as he wanted the property shared on an equal basis according to the deceased's wishes.
13. Kenneth stated that his late father Leonard Kimani had a property known as Dagoretti/Uthiru/39 which he acquired and was registered in his name in 1959 one year before Kenneth was born. That his father started working in 1957 and therefore had the means to buy the property. He however stated that he did not know how his father acquired the property. He maintained that the property has always belonged to his father and that he has not seen any records indicating that the property belonged to either his grandmother or grandfather.
14. Kenneth further stated that the suit property, Dagoretti/Uthiru/38 belonged to his grandfather and upon his death, it was transferred to his grandmother who is the deceased herein. The property is what comprises the estate of the deceased. The deceased resided on the property until her demise. Kenneth urged that if the property went solely to Mugwe Magua, it would be tantamount to disinherit his late father Leonard Kimani.
15. Kenneth confirmed that the Petitioner uses the property known as Dagoretti/Uthiru/38 and that no one has objected to his continued use or development of the land. He stated that he was not aware of the consent granted to the Petitioner by the Kikuyu Land Control Board on 21st July, 1992 or if his late father Leonard was involved in the transfer. None of them however took any action against the Kikuyu Land Control Board. He urged that there was never an attempt by the Petitioner to transfer the property to his name pursuant to that consent.
16. Kenneth contended that the Petitioner was compensated together with the deceased when the government compulsorily acquired part of Dagoretti/Uthiru/38 because of the developments he had made thereon and not because he was the rightful owner of the property. He urged that the journal presented by the Petitioner referred to land at Ndumbuini but did not give the land reference number. He urged that Dagoretti/Uthiru/38 and Dagoretti/Uthiru/39 were registered in 1959 yet the letters referred to by the Petitioner were written in 1932 and 1952 and may therefore not relate to the two parcels of land. Further that he could authenticate that the journals were kept by his grandfather or seek a handwriting expert to confirm that the handwriting was of his grandfather.
17. Learned Counsel Mr. Ngugi filed written submissions dated 6th August, 2018 on behalf of the Protester. Counsel submitted that the Petitioner failed to produce a confirmed grant in respect of his late father's estate to show that the deceased held Dagoretti/Uthiru/38 in trust for him. That in the absence thereof, the property should be governed by the provisions of **section 38 of the Law of Succession Act**. That the Petitioner's claims are a ploy to disinherit his late brother Leonard Kimani.
18. Counsel further submitted that the journal presented by the Petitioner did not qualify as a testamentary disposition. That the writings were not attested to and had been kept a secret until the point of their production in court. Counsel urged that the writings are a forgery authored by the Petitioner himself and do not hold any legal value. Further that the Petitioner produced the journal entries selectively and one cannot therefore ascertain what the author recorded in the intervening periods. Counsel pointed out that the journal entry of 23rd June, 1932 which was allegedly revised on 13th October, 1959 was suspect since all it did was replace the name Kayu with the Petitioner's name without amending its contents. Further that there was no certificate of translation on the record and the translation failed to mention the Protestor or any other land save for the suit property.
19. Counsel contended that the Petitioner could not use the compensation paid to him for the compulsory acquisition to assert his claim on the land. He urged that the Petitioner was only compensated for the developments thereon. Further that it was questionable that the consent of the Kikuyu Land Control Board presented in court indicated that the suit property was being transferred to him as a gift and not as a beneficiary. Counsel submitted that the property known as Dagoretti/Uthiru/38 was not gifted to the Petitioner as alleged and urged the court to distribute the property between the two legitimate heirs of the deceased, Leonard Kimani (deceased) and Mugwe Magua, in equal shares in accordance with **section 38 of the Law of Succession Act**.
20. Learned Counsel Mrs. Ndungu filed written submissions dated 5th September, 2018 on behalf of the Petitioner and submitted that the

estate of the deceased herein should be distributed in accordance with **section 38** of the **Law of Succession Act** while taking into account previous gifts by her deceased husband.

21. Counsel contended that the journals presented in court indicated that Leonard Kimani was given Dagoretti/Uthiru/39 during their late father's lifetime while Dagoretti/Uthiru/38 was registered in the name of the deceased herein to hold in trust for the Petitioner. He urged that the journals presented in court have evidential value and are therefore admissible in court.

22. Counsel asserted that the Protester failed to prove that Leonard Kimani purchased the property known as Dagoretti/Uthiru/39 or contradict the Petitioner's evidence that the property was gifted to Leonard Kimani *inter vivos*. He asserted that the property was Leonard's share of his inheritance and urged the court to take the share into account in distributing the deceased's estate. That this would ensure equitable and fair distribution of the deceased's estate. He urged the court to dismiss the Protest stating that it is intended only to delay the distribution of the deceased's estate.

23. I have perused the pleadings and the submissions filed by the parties hereto and find that the two main issues for determination are:

a. Whether the deceased held the property known as Dagoretti/Uthiru/38 in trust for the Petitioner and it does not therefore form part of the deceased's estate.

b. Whether Leonard Kimani bought or inherited the property known as Dagoretti/Uthiru/39 from his father *inter vivos*.

Whether the deceased held the suit property, Dagoretti/Uthiru/38 in trust for the Petitioner.

24. The Petitioner testified that he was to inherit the suit property known as Dagoretti/Uthiru/38 since his brother and the children of his father's 1st wife had been catered for during his father's lifetime. He averred that it was his late father's wish that he should live with his mother on the property, which he states his mother held in trust for him. That he developed the property by putting up three (3) permanent houses, eight (8) temporary houses, permanent cow sheds and rehabilitating the borehole on the property. The deceased occupied one of the permanent houses until her demise.

25. The Petitioner urged that when the government compulsorily acquired part of the land in 1980, it was he and the deceased who were compensated. He was compensated for the developments he had made on the property and the deceased was compensated for the crop she had planted on the property.

26. He further stated that he sought the consent of the Land Control Board to transfer the property absolutely from his mother to himself as a gift. The consent was granted by the Kikuyu Land Control Board on 21st July, 1992. His mother however died on 30th August, 1998 before he could transfer the property to his name since he was unable to raise the stamp duty fee which was capped at 4 per centum. Since he and the deceased did not sign any transfer forms, he filed a petition for letters of administration intestate in order to transfer the property from the deceased into his name.

27. Mr. Ngugi submitted on behalf of the Protester that it was contradictory for the Petitioner to state that the stamp duty assessed on the transfer was exorbitant when he had admitted that he and the deceased failed to execute any transfer forms. He urged that the transfer forms were needed for the purposes of assessing the stamp duty.

28. The provisions of the **Stamp Duty Act CAP 480 Laws of Kenya** and in particular **section 17** thereof indicates that to assess whether an instrument is chargeable with any duty and the stamp duty payable, an abstract of the instrument should be presented to the collector. In the absence thereof, the collector is unable to calculate the stamp duty payable, if any, on any instrument.

29. The green card and certificate of search on the record show that the property was acquired by the deceased from her late husband James Magua through a succession cause and registered in her name on 22nd June, 1964.

30. The court notes from the evidence presented that the Petitioner has enjoyed quiet possession of the land and at no time did the deceased or his late brother Leonard Kimani object to his use or development of the property. This was confirmed by the Protester who testified that no one has objected to the Petitioner's use or development of the property which he has continuously developed over the years, since he returned from the United States in 1969 to the time of the deceased's demise.

31. It is not in doubt that the late James Magua willfully signed the documents filed in court in seeking the grant and the consents to the mode of distribution. What is disputed is whether he understood the contents of the documents or the implications of signing them. Whereas the Protester claimed that Leonard was suffering from amnesia at the time of signing the documents and did not understand the implication thereof, he did not produce any medical documents to support his claim. It is trite law that he who alleges must prove and further that all persons of lawful age are presumed to be sane unless evidence is presented to the contrary. In the absence of contrary evidence, I can only presume that Leonard Kimani was sane at the time of executing the documents presented in filing this succession cause.

32. The evidence on record demonstrates that the Petitioner enjoyed quiet possession of the suit land and put up developments thereon during the deceased's lifetime. When a portion of the property was compulsorily acquired by the government, it was the Petitioner who was compensated for the land acquisition and the developments on the portion of the acquired property and not Leonard Kimani.

33. Whereas a copy of the grant through which the deceased acquired the property was not produced, I find that the deceased at all times acted on the basis and represented that the Petitioner was to obtain proprietary interest in the property. The deceased allowed the Petitioner to develop the land incurring expenses in the process and it can therefore be inferred that there was a common intention between the Petitioner and the deceased in relation to the beneficial ownership of the property.

34. Although the Petitioner was an adult in 1958, he was about to leave the country and indeed he did leave for the USA and for pragmatic reasons, it made sense to leave the land in his father's name.

35. In the circumstances therefore and in order to reach the result required by equity, justice and good conscience I find it fit to impose a constructive trust for the benefit of the Petitioner in relation to Dagoretti/Uthiru/38. (See – **Kanyi Muthiora vs. Maritha Nyokabi Muthiora Civil Appeal 19 of 1982; Hussey vs. Palmer [1972] 3 All ER 744**). The evidence presented demonstrates that though the land was acquired by the deceased from her husband through a succession cause and consequently registered in her name, from the manner in which all three of them related with the said land, she held the land for the benefit of the Petitioner. I therefore find that the actions of the deceased during her lifetime gave rise to a constructive trust.

Whether Leonard Kimani bought or inherited the property known as Dagoretti/Uthiru/39 from his father *inter vivos*.

36. In his testimony, the Petitioner argued that his late brother Leonard inherited the property known as Dagoretti/Uthiru/39 from their late father. That their father distributed his property amongst the households of both his 1st and 2nd wife in 1958. He stated that at the time of the distribution, he was away in the United States having moved there in 1958. That he returned to Kenya in 1969, six (6) years after the death of their father who had passed on earlier in 1963. Upon his return, his mother handed him his late father's journals in which he had expressed his wishes on how his property should be distributed.

37. The Petitioner urged that since he was away when their late father distributed his property, his father gave the property known as Dagoretti/Uthiru/38 to his mother to hold in trust for him. This was echoed by Rahab Wariara Mbugua, an aunt of the Petitioner who testified on his behalf.

38. In opposition, Mr. Ngugi submitting for the Protester pointed out a contradiction in the Petitioner's testimony. He noted that the Petitioner had testified that Dagoretti/Uthiru/39 was given to Leonard when he was in United States of America (USA) yet the green card indicated that the property was registered in Leonard's name on 4th September, 1958 and the Petitioner had testified that he left for USA in September, 1958. Mr. Ngugi urged that the Petitioner was an adult and married before he left for USA and if their late father distributed his property to his married adult children during his lifetime, Dagoretti/Uthiru/38 would have been registered in the name of the Protestor who was also an adult and married at the time.

39. The Protester on the other hand testified that Dagoretti/Uthiru/39 was acquired by Leonard Kimani (deceased) and registered in his name in 1959, one year before he was born. He asserted that the property always belonged to his late father Leonard even though he did not know how his father acquired the property. That Leonard was employed in 1957 and therefore had the means to buy the property. He did not however produce any documentation or present any witnesses to corroborate his assertions.

40. It is noteworthy that the evidence presented shows that Dagoretti/Uthiru/38 was registered in the name of James Magua (deceased), the husband of the deceased herein, on 4th September, 1958 which is the same date on which Dagoretti/Uthiru/39 was registered in the name of Leonard Kimani (deceased). The fact that both properties were registered on the same date corroborates the evidence of the Petitioner and Rahab that both parcels of land belonged to their late father James Magua. The circumstances surrounding the acquisition of Dagoretti/Uthiru/39 however boils down to the word of the Petitioner supported by Rahab against that of the Protester, who had not been born at the time of the said acquisition, and who admits that he does not know how his father acquired it.

41. The only additional evidence is found in the evidence of Rahab Wariara, the deceased's sister-in-law who stated that her late brother James Magua bought the property known as Dagoretti/Uthiru/39 from the family of Kebara. She however stated that all the elders present at the time of the purchase have all since died and could not therefore be called to testify. She asserted that her late brother James had four parcels of land. That during his lifetime, James gave the two parcels of land in Gikambura to his first wife, Dagoretti/Uthiru/39 to Leonard Kimani (deceased) and Dagoretti/Uthiru/38 to Mugwe Magua both from the house of his second wife. I find the evidence of the deceased's sister-in-law Rahab credible as opposed to that of the Protester who had not been born when Dagoretti/Uthiru/39 was registered in the name of Leonard Kimani (deceased).

42. In the circumstances therefore, and based on the evidence presented by the parties hereto I am inclined to hold that Leonard Kimani (deceased) inherited the property known as Dagoretti/Uthiru/39 measuring 2 acres *inter vivos* from his father, the late James Magua, as his share of inheritance. That would explain why his father hived off 3 acres from the 10 acres of Dagoretti/Uthiru/38 to compensate Dagoretti/Uthiru/39, a fact that was not disputed by the Protestor. The Petitioner being the last born son explains why it was he who lived with the deceased until her demise.

43. Having determined that a constructive trust arises in relation to the property known as Dagoretti/Uthiru/38 and which can be implied in favour of the Petitioner, and further that Leonard Kimani (deceased) inherited Dagoretti/Uthiru/39 from their late father, I find that Mugwe Magua is entitled to the property known as Dagoretti/Uthiru/38 absolutely and order as follows:

- a. The Affidavit of Protest filed on 21st April, 2010 is hereby dismissed.
- b. The Grant of letters of Administration Intestate issued on 5th September, 2008 to Leonard James Kimani and Mugwe Magua be and is hereby confirmed to Mugwe Magua.
- c. The property known as Dagoretti/Uthiru/38 shall vest in Mugwe Magua absolutely.

SIGNED DATED and DELIVERED in open court this 22nd day of January, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Petitioner.

In the presence ofAdvocate for the Protestor.