



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 960 OF 2014

IN THE MATTER OF THE ESTATE OF SUSAN NYAMBURA MUNDIA alias NYAMBURA w/o MUNDIA (DECEASED)

AND

JOSEPH MUTHEE MUNDIA.....PETITIONER

-VERSUS-

JOHN MUNDIA KAGUNU.....1ST PROTESTER

JOSEPH GITHAIGA KAGUNU.....2ND PROTESTER

GEORGE NDIRANGU KAGUNU.....3RD PROTESTER

SIMON MUGO KAGUNU.....4TH PROTESTER

JUDGMENT

Susan Nyambura Mundia died on 18th October 2002 at the age of 82 years. According to the assistant chief's Gitathini Sub-location letter of 9th September 2014 she was survived by;

1. Titus Mundia –son 78yrs
2. Angelica Mundia – daughter 70yrs
3. Joseph Muthee Mundia- son 66yrs
4. Mary Wagaki Wamukurwe –daughter 60yrs

Her estate comprised of

1. Tetu/Unjiru/610
2. Tetu/Unjiru/612
3. Ndaragwa/Aberdare Forest North Block 1/855

Joseph Muthee Mundia, with the consent of the other siblings brought the petition for grant of letters for administration for their mother's estate on 27th November 2014.

On the same 27th November 2014 Titus Kagunu Mundia and George Ndirangu Kagunu. Grant of letters of administration intestate was issued to Joseph Muthee on 16th March 2015.

On 9th September 2015 Titus Kagunu Mundia filed summons for revocation of grant dated 8th September 2015 alleging fraud and concealment of material fact in the obtaining of the grant issued to John Muthee.

The outcome was that the grant was revoked and a fresh one issued on 2nd August 2016 to Joseph Muthee Mundia and Titus Kagunu Mundia as joint administrators of the estate.

Thereafter on 29th July 2016 Joseph Muthee Mundia filed summons for confirmation of grant dated 28th July 2016. He proposed that the estate whole estate be shared equally among the four siblings.

This provoked an affidavit of protest from Titus Muthee Mundia to the effect that;

1. That with regard to the Tetu/Unjiru/610 it could not be shared equally because although it was registered in the name of their mother, the siblings had bought it through monetary contributions. That the agreed contribution per person was Kshs. 13,000/- but not all had paid. He proposed that the same be shared according to each sibling's contribution. He annexed a schedule of payments which showed each siblings contribution. There were contributions from his two sons as well.

- a) Titus Kagunu Mundia.....Kshs.13,000/-
- b) Joseph Githaiga Kagunu.....Kshs.13,000/-
- c) Joseph Muthee Mundia.....Kshs.240/-
- d) John Mundia Kagunu.....Kshs.13,000/-
- e) George Ndirangu Mundia.....Kshs.25,760/- (Dcd)
- f) George Ndirangu Kagunu.....Kshs.13,000/-
- g) Anjelicah Wanjiru Mundia.....Kshs.13,000/-

2. That he had no objection to distribution of Tetu/Unjiru/612 equally among the siblings.

3. That for Ndaragwa/Aberdare Forest North Block 1/855 it comprised of 2 shares bought from Gatarakwa Farmers' Cooperative Ltd.

- i) One share of 1.332 Ha by Stanley Mundia Kagunu which was transferred to Susan Nyambura Mundia.
- ii) 1.335 Ha which was purchased jointly by George Ndirangu Mundia and John Mundia Kagunu he annexed a copy document from Gatarakwa Farmers Co.Ltd dated 29th December 1980 showing that

“Mundia Kagunu member No.T6/6/..... paid for 2 shares and the receipts issued to him got lost....he is requested to produce this letter during the allocation of plots”.

The document went on to list a series of receipts dated between 30th October 1973 to 28th November 1978.

He proposed the following mode of distribution:

For **LR. NO. TETU/UNJIRU/610** – according to contribution towards purchase:

- a. Titus Kagunu -0.23 acre
- b. Joseph Githaiga -0.24 acre
- c. Joseph Muthee -0.01 acre
- d. John Mundia -0.2 acre
- e. George Ndirangu -0.43 acre deceased his share be held by Simon Mugo Kagunu
- f. George Kagunu -0.2 acre
- g. Anjelicah Wanjiru -0.2 acre

For **LR. NDARAGWA/ABERDARE FOREST NORTH BLOCK 1/855:**

One share comprising 2 acres to be shared by:-

- a) Titus Kagunu Mundia -0.267 ha
- b) Angelicah Wanjiru Mundia -0.267 ha
- c) Joseph Muthee Mundia -0.267 ha
- d) Mary Wagaki Wamukurwe -0.267 ha
- e) Simon Mugo Kagunu -0.267 ha

The other share to be shared by Simon Mugo Kagunu and John Mundia as follows: -

- a) Simon Mugo Kagunu -0.667 ha
- b) John Mundia Kagunu -0.667 ha

On 15th August 2010 the protesters appointed the firm of Kimunya & Co. Advocates to represent them.

John Mundia Kagunu filed his affidavit of protest on 15th August 2016 on his behalf and on behalf of Joseph Githaiga Kagunu, George Ndirangu Kagunu and Simon Mugo Kagunu. He stated that he and other protesters were sons of Titus Kagunu Mundia, and grandsons of Susan Nyambura Mundia.

They opposed the mode of distribution proposed by John Muthee Kagunu in the summons of confirmation of grant of 28th July 2016. His protest supports that of Titus Kagunu that the LR Tetu/Unjiru/610 was purchased from one Kinga Mwendia who was selling it at Kshs. 90,000/- in 1996. That the children of the deceased and those who were present at the meeting held to agree on the purchase agreed to pay Kshs.13,000/- each. That the land would be registered in the grandmother's name in trust for everyone who contributed to the purchase.

That payments were made through an advocate and upon completion of payment the land was transferred to their grandmother hence Tetu/Unjiru/610 should be shared equally among the 7 persons who contributed to its purchase namely:-

- a) Titus Kagunu Mundia.....Kshs.13,000/-
- b) Joseph Githaiga Kagunu.....Kshs.13,000/-
- c) Joseph Muthee Mundia.....Kshs.240/-
- d) John Mundia Kagunu.....Kshs.13,000/-
- e) George Ndirangu Mundia.....Kshs.25,760/- (Dcd)
- f) George Ndirangu Kagunu.....Kshs.13,000/-
- g) Anjelicah Wanjiru Mundia.....Kshs.13,000/-

That George Ndirangu Mundia – (deceased) had paid for John Muthee Mundia. That he had, before his death, bequeathed his share to Simon Mugo Kagunu. He annexed documents to supports these averments.

With regard to the Ndaragwa/Aberdare North Block 1/855 he deponed that he had paid through his grandfather for 2 acres out of the total amount and that he ought to get 2 acres out of the 8 acres and the balance be shared equally among the other beneficiaries.

He too had no issues with the distribution of Tetu/Unjiru/612.

During the hearing the protester John Mundia Kagunu testified that the deceased was his grandmother and his father was Titus Mundia Kagunu. That with regard to Tetu/Unjiru/610 seven persons had contributed to its purchase in the name of their grandmother and therefore the 7 persons should each get an equal share. That although Joseph Muthee Mundia had only contributed Kshs.240/- his brother George Ndirangu had paid the balance for him, that George had given his portion to Simon.

Regarding the Ndaragwa/Aberdare Forest North Block 1/855 land, his testimony was that at the material time he was working for the Ministry of Works and his mother told him about the land at Gatarakwa Buying Company. He was by then working with the Ministry of Works that because his grandfather was buying shares he could add him money and buy his own shares that one share was Kshs.1200/-. One was 4 acres. He paid Kshs.600/- for ½ a share- that the receipt got lost.

Cross-examination by Mr. Gacheru for the applicant he told the court that the sale agreement for 610 was in the name of his grandmother and the seller Kinga Mwendia. That all the payment receipts were in the grandmother's names and that the names of the alleged contributors were not in the sale agreement. That the land was registered in their grandmother's name in 1997. He conceded that he was a grandson. His father was alive but that the grandmother held the land in trust for him and others.

With regard to the Ndaragwa land, he said that there was no receipt in his name/ his mother's name. That all the receipts were in his grandfather's name- that he had no idea how much the first share cost but that the total would have been 2440/- including survey – Kshs.2720/-. He conceded that he never demanded his share while his grandmother was alive/when the land was transferred to his grandmother.

On re-examination he testified that it was not necessary to ask for his share when his grandmother was alive because “everyone was aware”.

The 3rd protester George Ndirangu Kagunu testified that he was in the meeting held on 11th February 1996 where it was agreed that the land No.610 would be purchased by contributions by the 7 persons who were present. That his role in all this was to receive the contributions from each member and deliver the same to the advocate's office and collect the receipts. That at that time the family was united.

On cross-examination he said that Mary Wagaki was not to get a share because she never made any contribution; that his father Titus was on the list. He said the minutes never stated that he was the treasurer/ the one to receive contributions and pay to the advocate.

Referred to the sale agreement between Kinga Mwendia and his grandmother, he said that it stated that the land would be registered in her name- that the receipts, the title deed were all in her names.

The protester's closed their case.

Joseph Muthee Mundia testified that he was going by his summons for confirmation of grant to share his mother's property equally among the four siblings. That the protesters – children of his elder brother had told lies to the court. He testified that the protesters would have asked for their shares when the deceased was alive. That he never paid any money but his wife contributed. That the sale agreement was between their mother and the seller. That their mother had sought for a harambee to pay for the land but the protesters resisted despite the fact that there was a priest who was willing to assist their mother.

About the allegation that the 1st protester had bought land through their grandfather, the petitioner testified that that was not true as there was nothing to stop the 1st protester from buying his own shares at that time.

On cross-examination he told the court that all his mother's estate was to be inherited by her children. He conceded that there was a meeting on 11th February 1996 but he was not present. That his wife who was present told him that there was no agreement to contribute money to pay for the land. That except for Mary all the other siblings made some contribution. He said the LR Tetu/Unjiru/ 610 belonged to his father but Kinga Mwendia had hijacked the title deed; that his father began buying the land in 1965 but he had no proof.

He also conceded that a sitting of the clan (muhiriga) decided that his nephews should get a share of LR 610 and that upset him. He conceded that the protesters paid some money but his own children did not contribute because they were small children then.

He denied that his deceased brother left his share to Simon saying that when Ndirangu was sick it was his wife who had assisted him. That with regard to the Ndaragwa land's shares, the 1st protester was lying because he could have bought his own shares.

On re-examination he said he was aware of the agreement between his mother and Kinga Mwendia but was not present when it was written. He said the land was bought for their mother but everyone changed their mind when she died.

At the close of the petitioner's case counsel, Kimunya for the protesters, Wabandi Gacheru for the Petitioner, agreed to file written submissions which I have considered.

The issues for determination are: -

1. Whether Tetu/Unjiru/610 is part of the deceased's estate and if so how it should be shared.
2. Whether the 1st protester purchased part of Ndaragwa/Aberdare North Bkck 1/855 and how it should be distributed

It is common ground that the distribution of Tetu/Unjiru/612 into 4 equal shares among the surviving children of the deceased is not disputed

With regard to Tetu/Unjiru/610, it is common ground that the land was purchased at Kshs. 90,000/- from Kinga Mwendia. The applicant argues that this money was paid to rescue his father's title deed which Kinga had hijacked. He produced no evidence to support the claim that the land had belonged to his father and that Kinga had somehow got hold of the title deed which needed to be rescued.

The protesters on the other availed documentary evidence to support their claim. He conceded that although he was away there was a family meeting of 11th February 1996 to discuss Kinga Mwendia's threat to sell the land. There are minutes showing that those present agreed to contribute Kshs.13,000/- and exempt their mother/grandmother.

- ü Sale agreement of 24th February 1996 between the deceased and Kinga Mwendia for Tetu/Unjiru/610 at Kshs. 90,000/-.
- ü Records of contributions for each of those present
- ü The petitioner conceded that his brother George Ndirangu paid his shares and it is written there.

ü Receipts from the firm of Lucy Mwai & Co. Advocates acknowledging receipt of payment of the monies towards the purchase of the said parcel of land.

Clearly therefore it is evident that the children of the deceased, plus the protesters herein contributed to the purchase of the said parcel which was registered in the deceased's name. There is no evidence by the petitioner supporting his testimony that his father bought the No.610 in 1965, neither is there evidence that the family was contributing money to rescue the title deed from Kinga Mwendia. Kinga Mwendia was the registered owner of Tetu/unjiru/610, and he sold it to the deceased and four of the deceased's children and two grandchildren contributed to buy the same.

The protester's relied on case of **In the matter of the Estate of Kipsang Kandie (Dcd) Charles K. Kandie vs. Mary Kimei Kipsang Court of Appeal Nakuru Civil Appeal No.141/2012** in arguing that the contribution by the protesters in purchasing the said land created a resulting trust. In the alternative that by such contribution they acquired the same degree of consanguinity as the children of the deceased and were therefore entitled to inherit as of right.

On the issue of trust, the applicant relied on **Re Estate of Njuguna Iguma (2017) eKLR** and **Re Estate of Solomon Mwangi Waweru (deceased) (2018) eKLR.**

In both of these cases this court (M.W.Mungai J) and (A.K.Ndung'u J) found that this court has no jurisdiction to hear and determine issues related to trust in land as that is the jurisdiction of the Environment and Land Court. The court was of the view that the parties relying on trust ought to file separate proceedings to articulate their claim or right in the correct forum.

In the matter of the Estate Peter Igamba Njoroge, Nakuru Succession Cause No.432 of 2009 had this to say on the issue of a probate court's jurisdiction to resolve a claim based on land held in trust.

In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed.

The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.

Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary or dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.

In **Kipsang Kandie** the Court of Appeal with regard to resulting trust stated:-

“A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Blacks Law Dictionary) (supra)...Therefore, unlike in constructive trusts where unknown intentions may be left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another is immaterial. (see Snell's Equity at P.177 (supra))” (emphasis mine)

From the evidence before me, the protesters and the applicant through his brother George Ndirangu made contributions towards payment for the land Tetu/Unjiru /610. It is also evident that the deceased did not make any contributions to the payments as they exempted her. In the end the property was registered in her name. The protesters testimony which the applicant challenged is that their grandmother was to hold the land for all of them. Two of the contributors are not direct beneficiaries as they are grandchildren whose father is alive. In any event, they made the contributions in their personal capacities and not on behalf of their father/the deceased.

The mandate of this court as probate court is limited and does not extend to the determination of issued of ownership of property/declaration of trust –see **H.C 864/1996 (2015) eKLR** cited in **Re Estate of Njuguna Igwima**. Clearly in the circumstances, the issue of the distribution of the LR Tetu/Unjiru/610 can only be dealt with after the issue of trust has been dealt with by the appropriate court.

With regard to Ndaragwa/Aberdare North Block 1/855, there was no evidence at all produced by the 1st protester to support his claim that he had purchased ½ a share through his grandfather in the 1970s. He produced no evidence of having given his mother Kshs.600/- to purchase and the shares for him. The document he relied on bore the names of Mundia Kagunu as the owner of the receipts that were said to have been lost and if indeed any of the receipts had been issued in his name, the records at the land buying company would have shown as much. In any event he did not demonstrate that he could not have purchased the shares in his name or in his mother's name. What is clear is that all the shares were purchased in Mundia Kagunu's name and his interests were transferred to his wife – the deceased herein upon his demise.

At the time of the said transfer and issuance of title deed in 1981 he was an adult who would have established his claim then. I find therefore that his claim that he bought ½ a share in this property is not proved. In the upshot, I find that: -

i) The issues on surrounding the property Tetu/Unjiru/610 are not within the jurisdiction of this court and ought to be settled in the appropriate court.

ii) The properties Tetu/Unjiru/612 and Ndaragwa/Aberdare Forest North Block 1/855 be distributed in accordance with the summons for confirmation of grant dated 28th July 2016 into 4 equal shares to;

a) Joseph Muthee Mundia

b) Angelicah Wanjiru Mundia

c) Titus Kagunu Mundia

d) Mary Wagaki Wamukurwe

iii) No orders as to costs.

iv) It is so ordered.

Dated, delivered and signed in open court at Nyeri this 18th day of March 2019.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant: Juliet

Mr. Kimunya for protesters

Mr. Gaceru for the petitioner

Joseph Muthee

Angelica Mundia

John Mundia

George Ndirangu Kagunu

Titus Kagunu

Mumbua T. Matheka

Judge

18/3/19