



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

FAMILY DIVISION

SUCCESSION CAUSE NO 166 OF 2014

IN THE MATTER OF THE ESTATE OF SAMUEL KATHIERI ALIAS SAMUEL M'MUNORU KARIARI –DECEASED

MARGARET ACHII SAMWEL PETITIONER

VERSUS

EDWARD MWITHALI FRANCIS..... OBJECTOR

JUDGMENT

The Cause

1. The Petitioner herein vide petition for grant of letters of administration dated 26th March 2014 moved this court seeking to be granted letters of administration to administer the estate of the deceased. The Grant of letters of administration intestate were issued on the 14th July 2014.
2. On 27th July 2015, she filed an application for confirmation of the grant and it is on the basis of the said application that the objector filed an affidavit of protest against the mode of distribution of the estate of the deceased, Samuel Kathiari alias Samuel M'Munoru Kariari. Directions on the protest were taken on the 31st August 2016 when court directed that the same proceeds by way of *viva voce* evidence.

The Protestor's case

3. It is the Protestor's evidence that the deceased was his uncle and the petitioner his aunt. He stated that his father was a brother to the deceased and that when his grandfather died, all his properties were transferred to the deceased's name to hold in trust for him and his father.
4. He testified that upon his father's death, the deceased and the petitioner herein took him in and cared of him together with all the property which his father left behind:-

(a) LR NO NJIA /BURI- E- RURI/2281.

(b) LR NO NJIA /BURI- E- RURI/669.

(c) LR NO NJIA /BURI- E- RURI/2648.

(d) LR NO NJIA /BURI- E- RURI/3039.

5. He further testified that the Petitioner had upon the death of the deceased herein chased him away and has eventually disinherited him by taking all the land to herself and her children. He prayed that the estate be distributed equally between the two families and that he be given half of the estate which was his father's inheritance.

6. In cross examination, he averred that his father had no property and that all the properties mentioned above were registered in the name of the deceased. He further reiterated that upon his father's death he was taken care of by the deceased. He also stated that he was brought up by the deceased on LR NO NJIA /BURI- E- RURI/3039.

The Petitioner's case

7. The Petitioner on her part denied the Protestor's allegations. She confirmed that the Protestor is the deceased nephew; a son to his brother. She however stated that the protestor's father was given land in Akirangondu, although she was not sure of its title number as she has never gone there. She testified that the parcels of land belonged to the deceased and although the deceased was given land by his father, they joined it with other parcels of land that they bought with the deceased.

8. In cross examination, the petitioner stated that she bought the parcels of land together with her husband and that the Protestor was not entitled to the parcels as his father was given other parcels of land. She also stated that when she was married she moved into the parcel of land that belonged to the father in law.

Issues

9. From the evidence, the following issues arise for determination

(a) Whether this court has the jurisdiction to determine the issue of existence of the alleged trust in these proceedings.

(b) If in the affirmative, whether the alleged trust has been proved to show that the deceased held the estate in trust for himself and the Protestor's father.

a) Jurisdiction

10. In RE ESTATE OF THE LATE JONATHAN KINYUA WAITITU - (DECEASED) [2017] EKL.R. The court held that

*“This court (M.K. Ibrahim J. as he then was) in a decision cited with approval by this court in **In the Matter of the Estate of Peter Igamba Njoroge, Succession Cause No.432 of 2009 (unreported)** had this to say on the issue of probate court's jurisdiction to resolve a claim based on land held in trust. He stated:*

“I have also considered the second question which really is of locus standi or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position in law is that the Estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objectors' father.

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 nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.

In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/rights. They are lucky that the claim or trust is not caught by the laws of limitations of actions. However, this court appreciates that they require a reasonable time to institute proceedings before any distribution of the Estate.

I therefore do hereby hold that this court has no jurisdiction to determine the claim of trust or to give any relief in respect thereof. It is unfortunate that the question of jurisdiction was raised at the end of the hearing. It is always appropriate and reasonable for jurisdictional issues to be raised at the beginning of hearing or trials. Preferably, they should be raised in the pleadings at the outset.

Be that as it may, the fact that it is raised at the end does not change anything. If a court has no jurisdiction, then it has none. The conclusion of hearing does not confer any jurisdiction to the court. This will only go to the question of costs.”

11. From the foregoing, it is clear that the mandate of the probate court is limited. A distinction ought to be made between a claim against the estate of a deceased and a claim on inheritance in respect of the estate of the deceased.

12. To reaffirm this legal position, I again take refuge in the decision in *H.C. Succession Cause No.864 of 1996 [2015]eKLR* where the court held that:

“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive

suit to be determined by the Environment and Land Court.

Consequently and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.

In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.”

The upshot is that this court lacks jurisdiction to resolve the proprietary interest on land based on the alleged trust. The available option was for the objectors to articulate their claim by instituting proceedings against the estate of the deceased suing the administrators to obtain orders on declaration of a trust leading to enforcement of their proprietary interests on the land.” Also see in RE ESTATE OF NJUGUNA IGWIMA [2017] eKLR, in which it was held *inter alia*, that a brother of the deceased is not a beneficiary of his estate, unless he can show that he was a dependant of the deceased.

13. In the case of PETER MOTURI OGUTU V ELMELDA BASWETI MATONDA & 3 OTHERS [2013] eKLR, It was stated that,

“where a claim of trust has been raised, the Plaintiff had to establish the existence of a trust on which his case could be hinged or mounted.”

14. In the Court of Appeal cases of MUTHUITA .V. MUTHUITA (1982-88) 1 KAR 42 at 44 and NJENGA CHOGERA .VS. MARIA WANJIRA KIMANI & OTHERS [2005] EKLR, it was held that,

“customary law trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded.” The Court of Appeal noted in the above cases that though the High Court has unlimited original jurisdiction in Criminal and Civil Matters, it does not have jurisdiction to deal with matters that fall under the ambit of the Environment and Land Court.

15. In light of the above and the sentiments in the *locus classicus* case of Owners of the Motor vessels “Lillian S” -Vs- Caltex Oil (K) Ltd. Civil Appeal No. 540 of 1989 where it was held that,

“...Jurisdiction is everything. Without it a court has no power to make one more step. Where the Court has no jurisdiction, there would be no basis for a continuation of procedure pending other evidence. A Court of law shall lay down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

16. It is clear therefore that this Court's jurisdiction is to enforce the Law of Succession Act Cap 160 on administration of testate and intestate estates of deceased persons. In this regard the High Court shall hear and determine issues of issuance of grants, summons for confirmation of grants where lists of beneficiaries, lists of assets and modes of proposed distribution of estates are agreed and consented to by all beneficiaries. Where there is contest, the court may proceed to hear and determine the Protests and revocation of grants applications.

Where there is dispute as to what constitutes the net estate of the deceased available for distribution arising from contest as to deceased's title and ownership, then the distribution of the said asset is hived off and confirmation of grant of the undisputed assets may be granted to allow beneficiaries beneficial interest over the said part of the estate. If the contested asset(s) is /are the only ones available for distribution as in the instant case, then the confirmation proceedings grind to a halt pending outcome of the ownership and title of the said properties by Environment and Land Court.”

17. Similarly In the Estate of Richard Karanja Javan [2014] eKLR, Musyoka J had this to say at page 2;

“It is not in dispute that the deceased was the registered proprietor of the property in question. His registration as such was not disputed until after his death. The registration in question was under the Registered Land Act Cap 300 Laws of Kenya (now repealed). It was a first registration by dint of Section 143 of the Registered Land Act, the said registration cannot be faulted. There is Judicial authority on this in Obiero – vs – Opiyo & Others (1972) E.A. 227 where it was held that a first registration is indefeasible even if fraud is proved. There is therefore no merit in the applicant's case. Even if she had a case that there existed a trust in her mother's favour, the same ought to be established in a suit before the Environment and Land Court.”

18. In RE ESTATE OF SOLOMON MWANGI WAWERU (DECEASED) (2018) eKLR (A.K.Ndung'u J) found that a succession 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.

19. In THE MATTER OF THE ESTATE PETER IGAMBA NJOROGE, NAKURU SUCCESSION CAUSE NO.432 OF 2009 the court had this to say on the issue of a probate court's jurisdiction to resolve a claim based on land held in trust.

“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.”

20. From the above cited authorities, it is clear that this court does not have the jurisdiction to make a declaration on the existence of a trust.

b) Whether the alleged trust has been proved to show that the deceased held the estate in trust for himself and the Protestor's father.

21. Had the court had jurisdiction to determine the issue of trust it would have to establish whether the same was proved.

22. In the case of FELISTA MUTHONI NYAGA V. PETER KAYO MUGO [2016] EKLR, The court held that

“while it is the law that the registration of a party as the proprietor of land does not defeat a claim of trust nor relieve such proprietor of his obligation as a 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 the same as a trustee for the benefit of others.”

23. In SUSAN GACHERI MUGAMBI V MAUREEN FLORENCE KAGWIRIA & 2 OTHERS [2016] EKLR court observed that

“A Trust is a powerful institution and a substantial question of law. But its existence is largely a matter of fact unless it is presumed. Thus, he who alleges existence of a fact must prove. On this see section 109 of the Evidence Act which states that:-

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

24. Makhandia, J (as he then was) in the case of PATRICK MATHENGE GACHUI V. KARUMI WAMBUGU & ANOTHER [2010] eKLR expressed himself thus:-

“The burden of proving trust rests on the protesters. In my view, they have failed miserably to prove such trust. Their entire evidence was hearsay which a court of law cannot act upon. The mere fact that the protesters are in occupation of the suit premises is no proof of trust. In any event it is apparent that the 2nd protester only came to the suit premises in 1986. It is also instructive that the deceased got registered as the proprietor of the suit premises in 1978 when the 1st protester's father and 2nd protester were all adults. One wonders then, why the two could not at the time claim their portion of the suit premises if indeed they were clear in their minds that their deceased brother held the suit premises in trust for himself and themselves. The trust having not been proved, there is no basis for the protests. Accordingly they are dismissed.”

25. In ALICE WAIRIMU MACHARIA V KIRIGO PHILIP MACHARIA [2019] eKLR the court stated that

“The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that:- (a) the suit properties were ancestral clan land; (b) during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; (c) the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.”

26. The Court also stated the following at paragraphs 19 – 22 of the judgment:-

19. In the case of Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR which quoted with approval the holding in the case of Muthuita –vs- Muthuita [1982 – 88] 1 KLR 42, the Court of Appeal held that customary law trust is proved by leading evidence. Trust is a question of fact which must be proved by whoever is claiming a right under customary trust.

20. In the case of Isack Kieba M'Inanga Vs Isaaya Theuri M'Lintari & Another SCoK No 10 of 2015 the Supreme Court Justices held that;

*“...each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the **High Court in Kiarie v. Kinuthia**, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:- (a) The land in question was before registration, family, clan or group land; (b) The claimant belongs to such family, clan, or group; (c) The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; (c) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and, (d) The claim is directed against the registered proprietor who is a member of the family, clan or group.*

21. A trust can never be implied by the Court unless there was intention to create a trust in the first place. In Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR where the Court held,

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

22. In Juletabi African Adventure Limited & Another v Christopher Michael Lockley [2017] eKLR the Court also held that It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

27. From the above authorities, it is clear that the Protestor had the burden to prove the existence of the trust. the Protestors evidence had no information as to the history of the estate and how it moved from his grandfather to the deceased. There was no independent evidence of an elder or someone conversant with the estate to show that the deceased held the estate in trust of himself and the Protestor’s brother. The Prostestor thus utterly failed to prove the existence of the trust and thus his protest could not have been allowed had the court had the jurisdiction to consider the matter.

Conclusion

28. The upshot of all the above is that this court has no jurisdiction to determine the protest as the same falls within the purview of the Environment and Land Court. The protest is accordingly dismissed for want of jurisdiction on the part of the court. Each party in this matter shall bear their own costs.

29. It is so ordered.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Meru on this 24th day of July, 2019

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JUDGE

In the presence of

Muchiri for objector

Kirimi for petitioner

Mwenda - court assistant