



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

SUCCESSION CAUSE NO. 95 OF 2013

RE ESTATE OF JASON WAGIKURI GITICHA (DECEASED)

JESSE MACHARIA MURAYA.....OBJECTOR

VERSUS

MARTHA MUKAMI GIKURI.....RESPONDENT

JUDGMENT

1. Jason Wagikuri Giticha (hereafter *the deceased*) died *intestate* on 19th April 1980. A grant of letters of administration was issued by the Resident Magistrates Court at Murang'a on 14th February 1985 and confirmed on 13th November 1986.

2. The grant was made jointly to two *daughters* of the deceased: Rahab Wanjiru Gikuri (now also deceased); and, Martha Mukami Gikuri (hereafter *the respondent*). The latter is also the administrator of the estate of her late sister by dint of a grant issued in separate proceedings at the High Court in Nyeri in Succession Cause No. 592 of 2010.

3. The objector is a *grandson* of the deceased. His father was Cornelius Muraya Gikuri who is also deceased. Cornelius was a brother of the respondent. The objector obtained a *limited grant* on 4th October 2012 at the High Court at Nyeri to bring these proceedings on behalf of his late father.

4. He filed summons for revocation of the grant on 13th February 2013. His case in a nutshell is that Rahab Wanjiru Gikuri and Martha Mukami Gikuri obtained the grant by fraud and disinherited his father. At paragraph 4 of the supporting affidavit he deposes that:

At all material times when the succession proceedings were taking place....my father was not involved.....and effectively was disinherited through fraud

5. The respondent denied those assertions in a reply filed on 26th November 2013. She concedes that the objector's father and Festus Murachia were her brothers. But she retorts that during her father's lifetime, he distributed to the two sons land measuring 18 acres and 11 acres respectively and some town plots.

6. Her case is that her father reserved the property Loc. 19/ Gacharegeini/146 measuring 14 acres to his unmarried daughters. She and the late Rahab Wanjiru Gikuri never got married. She submitted that both of them are entitled to 7 acres each and four T-plots: T179, T180, T181 and T182. She also argued that the application for annulment is a belated afterthought driven by pure greed.

7. I recorded *viva voce* evidence. The objector (PW1) relied substantially on his witness statement dated 16th October 2018. He gave a long history of the litigation. His father had made an application for annulment of the grant in the lower court in Murang'a Succession Cause 107 of 1984. It was dismissed on 19th January 1989. He subsequently filed Miscellaneous Application Cause No. 151 of 1992 at the High Court in Nairobi. It was dismissed for want of prosecution. In the meantime, the respondent filed Civil Case 151 of 1992 at the lower court in Murang'a seeking to evict the objector's father from the suit land. An order for eviction was granted. The objector's father later died on 23rd August 1994.

8. The objector testified that his grandfather (the deceased in this cause) had not distributed the suit land when he died. He denied that his father was given some other land by the deceased. He said that his father was buried on another piece of land that he had purchased.

9. The next witness was Cyrus Murachia (PW2). He is also a grandson of the deceased. His father was Festus Murachia (now deceased). He relied on his witness statement dated 16th October 2018. He said that the deceased in this cause had 4 daughters and two sons: Cornelius

Muraya (deceased); Festus Murachia (deceased); Ziphora Wairimu (deceased); Martha Mukami (the respondent); Rahab Wanjiru (deceased); and, Hellen Wanjiku (deceased).

10. He testified that the respondent and Rahab Wanjiru Gikuri obtained the grant in secret and excluded the other children. In his view, titles over parcels Loc. 19/ Gacharegeini/146 and T179, T180, T181 and T182 should be revoked; and, the land should revert to the name of the deceased, Jason Wagikuri. Under cross-examination he claimed that his father purchased Loc. 19/Gacharegeini/817. But he had no documentary evidence to back it up.

11. The respondent testified that following the land demarcation exercise, her father gave Festus Murachia Loc. 19/ Gacharegeini/817 measuring 10 acres. He also distributed Loc. 19/ Gacharegeini/816 measuring 16 acres to Cornelius Muraya. She said that her father was left in possession of Loc. 19/ Gacharegeini/146 which he said should be inherited by unmarried daughters. She conceded in cross examination that her father did not leave a will.

12. The respondent testified that she and her late sister were living on the suit land. Cornelius Muraya (the objector's father) was a teacher and lived in Weithaga. He later returned to the suit land. Upon the death of their mother in 1986, Cornelius started to interfere with her quiet possession saying she was "an old dog". That is when she sued to evict her brother from the land. She questioned the delay and wondered why the objector or his late father failed to sue the deceased. She also claimed that she had asked her brothers that all the three titles be consolidated and be divided equally among the children. She said that her brothers refused.

13. On cross examination, she said that her late brothers and sisters were aware of the succession cause in the lower court. She said that her brothers were both witnesses to the chief's letter (exhibit 1). The only siblings who did not attend the proceedings were her sisters Hellen and Ziphora who indicated that they were not interested in a share of their father's estate.

14. Both parties filed written submissions on 28th June 2019 and 1st July 2019 respectively.

15. I find that the applicant and PW2 are less than candid when they say that their fathers were completely in the dark about the succession cause filed at the lower court. Firstly, there is the chief's letter (defendant's exhibit 1) dated 26th April 1984. It lists the potential heirs for the suit land as the respondent and her sister Rahab. The witnesses on that occasion were their two brothers Festus Murachia and Cornelius Muraya. There were two other relatives, Joram Kamina and Misheck Mwangi.

16. Secondly, in the proceedings in the lower court (page 46 of the objector's bundle) the learned magistrate found that the respondents had served a *citation* on their brother on 16th July 1984. It is only thereafter that they lodged the petition for letters of administration. I remain alive however that the learned magistrate should not have entertained an application for annulment of the grant.

17. The point to be made however is that neither PW1 nor PW2 demonstrated by cogent evidence that their fathers were *unaware* of the succession cause.

18. I also find that during the lifetime of the deceased he gave his two sons the following pieces of land: To Festus Murachia Loc. 19/ Gacharegeini/817 measuring 10 acres; and, to Cornelius Muraya Loc. 19/ Gacharegeini/816 measuring 16 acres. The deceased was left in possession of Loc. 19/ Gacharegeini/146.

19. While it is clear there was no will, I believed the respondent that the latter property was reserved for any unmarried daughters. There are three reasons: First, the respondent and Rahab were unmarried and lived on the land throughout. Secondly, Cornelius Muraya (the objector's father) was a teacher and lived in Weithaga. He later returned to the suit land and occupied a house that he was constructing for his mother. Thirdly, and quite telling, the objector conceded that his father was not buried on the suit land but on Loc. 19/ Gacharegeini/816.

20. Although the objector and PW2 claimed their fathers purchased Loc. 19/ Gacharegeini/816 and Loc. 19/ Gacharegeini/817, they did not present evidence to back up the claims. From the respondent's evidence, I concluded that the two pieces of land were distributed by the deceased *inter vivos* to his two sons. It must follow that the objector and PW2, who are grandsons, cannot spread their tentacles to the suit land reserved for their unmarried aunts.

21. On the totality of the evidence I am hard placed to find that the respondent obtained the grant by fraud. The *burden of proof* was on the objector. It is also not lost on me that the *standard of proof* for fraud is *higher* than a balance of probability. See *Koinange v Koinange* Nairobi, High Court case 66 of 1984 [1986] eKLR, *Ratilal Patel v Lalji Makanji* [1957] EAR 314 at 317.

22. In the end, I am not satisfied that the objector has proved that the grant was obtained by fraud or concealment of material facts. I also find that neither the objector nor PW2 is entitled to a share of the suit land namely Loc. 19/ Gacharegeini/146 and T179, T180, T181 and T182.

23. I decline to *revoke* the confirmed grant. The upshot is that the objection is *dismissed* in its entirety.

24. Costs follow the event and are at the *discretion* of the court. Considering that this is a family dispute over inheritance; and, in the interests of justice, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 29th day of November 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Ms. Ogutu holding brief for Mr. Mbutia for the objector instructed by J.N. Mbutia & Company Advocates.

Respondent (in person).

Ms. Dorcas and Ms. Elizabeth, Court Clerks.