



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 1664 OF 2001

(CMCC KIAMBU - SUCCESSION CAUSE 297 OF 1999)

IN THE MATTER OF THE ESTATE OF DAVID KAMAU MBARIA (DECEASED)

MARY WARIMU MBARIA.....1ST PETITIONER

AFROHIOS NJOROGE KAMAU.....2ND PETITIONER

VERSUS

PETER BORO MBARIA.....1ST PROTESTOR

HUMPHREY NJENGA KARUMBA.....2ND PROTESTOR

DAVID NJOROGE KARIUKI.....3RD PROTESTOR

JUDGMENT

INTRODUCTION

The deceased died on 3rd October 1998.

The parties were involved in proceedings in Kiambu Chief Magistrate's Court; where the Petitioners/Administrators filed petition on 15th October 1999.

The Objector, Peter Boro Mbaria brother to the deceased filed Objection to making grant application on 26th November 1999 & 6th April 2000. He alleged that Plot Kabete /Gikuni/T17 was registered in the deceased's name but in trust for; Danson Kariuki Mbaria, Peter Kinoro Kinuthia and Njenga Karumba. There is also Ernest Kabuthia Nguru and Kanyori Mbaria and himself 1 share.

In this Court the grant of letters of administration were issued to the Petitioners on 19th February 2007.

The Petitioners herein filed an application for confirmation of grant via summons dated 30th January 2008. A grant of letters administration intestate of the estate of David Kamau Mbaria, the deceased herein, had been made to the Petitioners Mary Wairimu Kamau and Afrohios Njoroge Kamau on 19th February 2007. The affidavit sworn jointly by the Petitioners on 6th March 2008, in support of the summons indicates that the deceased was survived by nine (9) dependants:

1. Mary Wairimu Kamau - Window
2. Afrohios Njoroge Kamau - Son
3. John Waweru Kamau - Son
4. Peter Boro Kamau - Son
5. Nelson Muiruri Kamau - Son

6. Serah Wanjiru Mbugua - Daughter
7. Zipporah Njeri Kamau - Daughter
8. Naomi Waringa Kamau - Daughter
9. Peter Boro Mbaria - Brother (Objector)

Annexed to the summons is a consent to the mode of distribution of the estate which is signed by all the dependants with the exception of Peter Boro Mbaria, the 1st Protestor.

The Petitioners proposed that the deceased's estate comprising **Kabete/Gikuni/T.17, Kabete/Nyathuna/207, Kabete/Gikuni /T.86** and **1.22 acres of Kabete/Nyathuna/205** be shared equally between the deceased's widow and his children. The remaining 1.22 acres of Kabete/Nyathuna/205 was to be registered in the name of the 1st Protestor Peter Boro Mbaria. One of the deceased's daughters Serah Wanjiru Kamau forfeited her share.

On 3rd February, 2018 Peter Boro Mbaria filed an affidavit of protest in which he opposed the confirmation of grant stating that he was not consulted before the filing of the Petition and the consequent application for confirmation of grant. Peter contends that he has an interest in the deceased's estate as the property known as Kabete/Gikuni/T.86 is family land which was registered in the name of the deceased during demarcation in the year 1959 to hold in trust for Peter and himself. Peter urged that he has occupied half a portion of the property since then and has since connected electricity and put up three (3) residential houses, cowsheds, poultry houses and a 110 foot borehole.

According to Peter, the property listed in the application for confirmation of grant as Kabete/Nyathuna/1962 and 1965. The 1st petitioner Mary Wairimu holds one title and Peter holds one title. He stated that he has no interest in Kabete/Gikuni.T.17 and Kabete/Nyathuna/207.

On 22nd July, 2016 the Petitioners filed a schedule of properties for distribution in which they sought partial confirmation of the grant of letter of administration. The Petitioners proposed that the properties known as Kabete/Gikuni/T.17 and Kabete/Nyathuna/207 be shared equally between the deceased's widow and his six children. For the property known as Kabete/Nyathuna/205, they proposed that ½ a share go to the Petitioners and the other ½ go to Boro Mbaria the 1st Protestor. The court had on 18th July 2016, directed the parties to set out the agreed properties and deferred the confirmation to a later date.

Later on 16th May 2017, the 2nd Protestor Humphrey Njenga Karumba filed an affidavit of Protest sworn by himself on 12th May 2017 to object to the confirmation of grant in respect of the property known as Kabete/Gikuni/T/17.

According to the 2nd Protestor, at all material times Kabete/Gikuni /T.17 was equally and fractionally owned by himself, Danson Kariuki Mbaria, Peter Kinoro Kinuthia, Ernest Kabuthia Nguru, Kanyori Mbaria and Kamau Mbaria. The property was allocated to the parties by the defunct Town Council of Kikuyu. A copy of an allotment letter dated 7th September 2000 and a copy of certificate of official search dated 14th September 2016 is annexed to the affidavit.

The 2nd protestor stated that there is pending a suit on the disputed ownership of the property in the Environment and Land Court at **Nairobi in Case No. 600 of 2016, Humphrey Njenga Karumba and others –vs- Mary Wairimu and others**. That the Petitioners through the ongoing confirmation of grant proceedings intend to deprive him and his co-owners of the property. He urged that he has never renounced his right to own the property and the court should therefore debar the Petitioners from abusing the judicial process of confirmation of grant to unduly confiscate the suit property from the rightful owners.

On his part, the 3rd Protestor David Njoroge Kariuki filed an affidavit of protest sworn by himself on 12th May 2017 in his capacity as administrator of the estate of the late Danson Kariuki Mbaria, one of the alleged fractional owners of Kabete/Gikuni/T.17. David reiterated the sentiments of the 2nd Protestor and stated that the petition for confirmation of grant over the property is misrepresentative and un maintainable in law. He urged the court to exclude the property from the ongoing confirmation of grant proceedings to enable the environment and land court adjudicate the property's disputed ownership.

1ST PROTESTOR'S WRITTEN SUBMISSIONS

Learned counsel Mrs. Muhuhu of Muhuhu & Co. Advocated filed written submissions dated 28th January 2019 on behalf of the 1st protestor in which she asked the court to allow the protest and order that Peter Boro Mbaria, the 1st protestor obtain ½ a share of Kabete/Gikuni/T.86 where he is already in possession.

Mrs. Muhuhu submitted that the 1st Protestor's evidence was not contested. That the evidence that the property known as Kabete/Gikuni/T.86 was held by the deceased in trust for himself and the 1st Protestor was not challenged by any evidence to the contrary. Counsel urged that they had proven the existence of a trust by adducing evidence pertaining to the history of the land.

Mrs. Muhuhu asked the court to disregard the testimony of the 1st petitioner as the 1st Protestor did not have a chance to cross-examine her to extract the qualifying facts or circumstances left out in examination in chief. The 1st Petitioner gave her testimony in examination in chief after which she was stood down. The 1st Petitioner was however a no show at the further hearing of the matter denying the 1st Protestor a chance at cross-examining her.

2ND AND 3RD PROTESTORS' WRITTEN SUBMISSIONS

Learned Counsel Ms. Munyua of Ngonyo Munyua & Co. Advocates filed written submissions dated 22nd February 2019 on behalf of the 2nd and 3rd Protestors in relation to the property known as Kabete/Gikuni/T.17. Counsel contended that the Protestors had adduced evidence to prove that at the date of the deceased's death, the property was owned jointly by Danson Kariuki Mbaria, Humphrey Njenga Karumba, Peter Kinoro Kinuthia, Ernest Kinuthia Nguru and Kanyori Mbaria. Counsel urged that the Petitioners failed to rebut the evidence nor did they produce any documentary proof for their basis of the claim of ownership.

Ms Munyua asserted that the Petitioners do not understand the ownership details of the property. That while it is trite law that he who alleges must prove, the Petitioners had failed to produce a single document to prove that the deceased was the sole owner of the property such as to wholly constitute his net intestate estate. Counsel pointed out that the 3rd Protestor David Njoroge has testified that the plot was initially registered in the deceased's name during the demarcation period sometime in 1952 which registration details were changed in 1976 to reflect the true position of ownership. That the property was however managed by all six (6) joint owners from the onset.

To prove their claim, the 2nd and 3rd Protestors annexed various documents to wit receipts issued by Kiambu Africa District Council for payment of change of registration of ownership fees; bundle of rates payment receipts to Town Council of Kikuyu; Application dated 29th January 1975 and 23rd June 1976 for change of ownership of plot; extracts of Kikuyu Council minutes of 26th September 1975, on approval of change of names and a copy of search from Kikuyu Town Council.

DETERMINATION

From the pleadings and the submissions filed by the parties hereto, it is evident that the ownership of Kabete/Nyathuna/207 has not been disputed. For Kabete/Nyathuna/205 which the 1st Protestor indicated is now Kabete/Nyathuna/1962 and Kabete/Nyathuna/1965, I note that the Petitioners did not contest that it belongs to the estate and the 1st Protestors in equal shares. I will therefore not deliberate on these two properties. As such, I find that there are two issues for determination:

- a) Whether the properties known as Kabete/Gikuni/T. 86 and Kabete/Gikuni/T.17 constitute the deceased's estate and if so, whether they are available for distribution.

- c) Whether the grant of letter of administration of the estate of the deceased should be confirmed and in what terms.

KABETE/GIKUNI/T.86

According to the 1st Protestor Peter Boro, the property was registered during land adjudication in 1959 during which time only one family member would be registered to thereafter redistribute. A certificate of search dated 9th December 2008 is on record as annexed to Peter's affidavit of protest of 20th February 2009. The search indicated that the property was registered on 29th July 1959 in the name of one Kamau Mbaria. Peter urged that he deceased was his brother, who held the title in trust for himself and Peter.

Due to Peter's advanced age, his son Dedan Boro testified on his behalf with the leave of this court. Dedan reiterated that the property known as Kabete/Gikuni/T.86 should be shared on a 50-50 percentile between Peter and the deceased's estate. According to Dedan, the property was held by the deceased in trust for himself and his two brothers, Peter Boro and Dedan Mugo Mbaria who died and was not survived by anyone. The property was therefore to be subdivided into two (2) equal portions, 1/2 for Peter Boro and the other for the deceased. He urged that only ½ a portion of the property constitutes the deceased's net intestate estate, and is available for distribution between his beneficiaries.

Dedan's testimony found support in the testimony of Kamau Njoroge Gatura who gave sworn testimony that Kabete/Gikuni/T.86 is ancestral land. He did not know who resides on the property or how it came to be registered solely in the deceased's name or anything about the title to the land, but asserted that ½ of it should devolve to Peter Boro and the other ½ to the deceased's estate. He urged that the property was to be shared equally between three brothers one of whom died without having a family, leaving the property to be shared between Peter Boro and Kamau Mbaria, the deceased herein.

In opposition, the 1st petitioner testified that there is nothing to divide since the 1st protestor's father the late Njoroge Mbaria had divided the property into **Kabete/Gikuni/T.85, T.86, T.87, T.88**. That a succession cause in relation to the late Njoroge Mbaria's estate was filed at Kiambu Law Courts. No documentary evidence was provided in support thereof.

On cross-examination, the 1st Petitioner stated that Kabete/Gikuni/ T.86 is divided into four (4) portions, two(2) on the upper side and two (2) on the lower side. The record shows that the property was listed as available for distribution under paragraph 11 of the affidavit sworn on 6th March 2008 in support of the summons for confirmation of grant. It was proposed that it is divided equally between the widow and children of the deceased. The property was however omitted in the schedule of properties dated 20th July 2016 filed for the partial confirmation of the grant of letters of administration.

Based on the evidence on record, and in the absence of additional evidence, I am inclined to hold that the property known as Kabete/Gikuni/T.86 was held by the deceased in trust for himself and his brother Peter Boro, who is entitled to ½ share of the property. The remaining ½ share of the property shall devolve to the deceased's intestate estate to be shared amongst his beneficiaries.

KABETE/GIKUNI/T.17

In relation to this property, the 3rd protestor David Njoroge Kariuki testified that it is owned by six (6) people; Kamau Mbaria, Peter K.

Kinuthia, Danson Kariuki Mbaria, Humphrey Njenga Karumba, Ernest Nguru and Godfrey Kanyori Mbaria. He asserted that during demarcation in 1951, the property was registered in the sole name of the deceased. However, in 1975, they decided to register the property in the names of all six (6) of them whereupon the deceased applied to Kiambu City Council to effect the change of ownership. The change of ownership was effected in 1976. Copies of the application for change of ownership and registration, permission to effect the change of registration and the letter of allocation are on the record.

On her part, the 1st Petitioner told the court that Kabete/Gikuni/T.17 belongs solely to the deceased. She asserted that she does not know Njenga Karumba, Ernest Nguru and Kanyoro Mbaria who are named as co-owners of the property. She however stated that Danson Kariuki and Peter Kinoro are brothers of the deceased. She admitted to there being a shop on the property and stated that she is the one currently operating the shop which she has operated for the last two (2) years. She did not however produce any receipts in proof thereof.

During cross-examination, learned counsel Ms. Munyua drew attention to an affidavit sworn by the 1st petitioner on 22nd November 2001. Under paragraph 3 of the affidavit, the 1st Petitioner deposed that “*the suit property was jointly administered by Danson Kariuki Mbaria, Godfrey Kanyori Mbaria, Njenga Karumba and Peter Kinoro Kinuthia.*” Despite the affidavit being on record as having been sworn by the 1st Petitioner, she denied knowledge of it stating that it is not her affidavit.

The 2nd and 3rd protestors stated that there is pending suit in the Environment and Land Court at **Nairobi in Cause No. 600 of 2016**, in relation to the disputed ownership of the property, a statement that was not opposed by the Petitioners. In light of the suit pending in the Environment and Land Court, this court cannot distribute the property until the disputed ownership is settled by the court.

DISPOSITION

In light of the evidence on record, and the arguments advanced by each of the parties in support of their cases, I hereby confirm the Grant of letters of administration intestate made to Mary Wairimu Kamau and Afrohios Njoroge Kamau on 19th February 2007 partially with the following orders;

a) The Property known as Kabete/Nyathuna/205 as per the Replying Affidavit of the 1st Protestor Peter Boro Mbaria LR Kabete/Nyathuna no longer exists as it was subdivided into Kabete/Nyathuna /T. 1965 and Kabete/Nyathuna/1962 following the affidavit of Protest filed on 3rd February 2009.

b) Kabete/ Gikuni/T.86 was held by the deceased in trust for himself and his brother Peter Boro, the 1st Protestor herein as per affidavit filed on 20th June 2017. Peter Boro is entitled to half a share of Kabete/Gikuni/T.86. The remaining share shall constitute the net intestate estate of the deceased available for distribution to the widow and children of the deceased. This was admitted by Mary Wairimu Kamau widow of the deceased; in her examination in Chief

c) The deceased’s estate comprising Kabete/Nyathuna/207, shall be shared equally between the deceased’s widow and six (6) children as proposed under paragraph 11 of the affidavit sworn on 6th March, 2008, in support of the summons for confirmation of grant.

d) The property known as Kabete/Gikuni/T.17 is not available for distribution as there is pending a dispute over its ownership. It shall await the outcome of the pending suit ELC 600 of 2016.

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND NOVEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE.....FOR THE PETITIONERS

NO APPEARANCE.....FOR THE PROTESTORS

MS JASMINE –COURT ASSISTANT