



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO.1003 OF 2014

IN THE MATTER OF THE ESTATE OF ERNEST NJOGU GATOTO s/o GATOTO (DECEASED)

PAUL MAINA NJOGU.....PETITIONER/RESPONDENT

-VERSUS-

LOISE NYAMBURA KIIHIHU.....OBJECTOR/APPLICANT

J U D G M E N T

On 13th November 2014 the chief Gathuitu location one Stephen Maina Dedan wrote a letter to the Registrar, High Court of Kenya at Nyeri

'Ref: Gath/Land/Vol 1/85

Ref: IN THE MATTER OF THE LATE (SIC) NJOGU s/o GATOTO AND KIIHIHU GATOTO'S ESTATE GIKONDI /GIKONDI/120'

In the letter he stated that the two deceased persons hailed from his jurisdiction. That they passed away on 26th July 1988, and 6th November 1992 respectively. He attached their respective certificates of death. He also stated that they left behind L.R. GIKONDI/GIKONDI/120. He proceeded to list their respective heirs; two sons, a daughter and a daughter in law for Njogu Gatoto and for Kihihu Gatoto, a wife, five sons and seven daughters. He also annexed a certificate of search for the said parcel of land dated 7th August 2014 which showed that it was issued in 1978 and was registered in the joint names of Njogu s/o Gatoto and Kihihu s/o Gatoto in equal shares of 3.3 acres each.

Thereafter Paul Maina Njogu from the family of Njogu Gatoto filed this cause on 9th December 2014 with the consent of his brother, sister and sister in law.

On 10th March 2015, Loice Nyambura Kihihu w/o Kihihu Gatoto filed an objection through the firm of Peter Mwangi Muthoni Advocates.

The grounds for the objection were that the deceased Ernest Njogu Gatoto (Paul Maina Njogu's father) sold his share of the parcel of land i.e. the 3.3 acres to one Thiru Baragu in 1967, who in turn sold the same to Kihihu Gatoto alias Kihihu s/o of Gatoto. Hence the petitioner Paul Maina Njogu had no claim over the said property. She also filed an answer to the petitioner, and a cross petition all based on the same grounds.

On 26th February 2016, the parties through their respective counsel- Mr. Nderi for the petitioner and Mr. Muthoni for the objector entered into a consent whereby Loice Nyambura Kihihu and Paul Maina Njogu were appointed joint administrators of the deceased's estate with the option that either/or both of them could file for confirmation. The grant was issued on 21st July 2016.

On 9th September 2016 the objector filed summons for confirmation of grant. She indicated in her affidavit in support that the deceased was survived by 4 children- the petitioner, Peter Maina Njogu, Margaret Wangui Maina and Mary Muthoni Gachau. She described herself as a sister in law and a dependant. She identified herself as the sole heir of the ½ share of the 3.3 acres in Gikondi/Gikondi/120. In a quick rejoinder the petitioner filed a protest on 20th September 2016. He deponed that after perusing the objection and the summons for confirmation of grant he had no problem with the Estate of Ernest Njogu Gatoto being shared equally between the 2 families – i.e. his and that of Loice Nyambura Kihihu.

Directions were taken on 20th September 2016 that the protest be heard by way of viva voce evidence. It was also directed that HCC Succession Cause No.1031 of 2014 be availed.

PROTESTOR/PETITIONER'S CASE

The petitioner /protestor testified that the deceased was his father, and that the parcel of land Gikondi/Gikondi/120 was registered in the names of his father and his uncle. The objector was wife of his uncle. His position was that the two brothers ought to share the land in equal shares as indicated in the title deed.

On cross examination he told the court that he did not know that his father had sold his inheritance, and that the husband of Loice had bought it. He did not know Thiru Baragu, the purported buyer.

THE OBJECTOR'S CASE

The objector –Loice Nyambura Kihihu testified that the deceased was a brother to her husband who was also deceased. She testified that after her husband died she filed Succession Cause No.1031 of 2014. That the petitioner/protestor's father had sold his ½ share of Gikondi/Gikondi/120 to one Thiru Baragu (deceased) who had in turn sold it to her husband. She produced in court a book she claimed her husband had left with her as proof of the transaction. The contents had been translated from Kikuyu language to English and produced as evidence.

On cross-examination she could not recall the year her husband gave her the book. She confirmed that her husband and his brother never went to the Land Control Board to 'pass' as they say, meaning validate, the said transaction. She said there was no written agreement between the two brothers about the said parcel of land; that Njogu pre-deceased her husband but her husband did not do anything to inherit his brother's land.

She called one witness Lawrence Mwangi Kariuki who testified that he knew the two deceased brothers because they were his neighbours. He said that Njogu sold his land to Thiru but Kihihu decided to buy it back. That Njogu had land in Nyahururu, where he moved to with his family.

On cross-examination he said that the deceased brothers and Thiru Baragu were his father's age mates. He never witnessed any of the alleged sale agreements.

Both parties having closed their cases they each filed written submissions through their respective counsel.

The objector relied on the alleged sale agreement and urged the court to find that, the fact that the deceased had moved to Nyahururu was reflective of the sale of his inheritance.

The petitioner urged the court to find that there was no evidence of sale of the protestor/petitioner's share of the estate by his father.

ANALYSIS AND DETERMINATION

I have carefully considered the evidence before me. I have perused the file-Succession Cause No.1031 of 2014 – in the Estate of Kihihu Gatoto.

It is noteworthy that the same Chief's letter mentioned herein above used by the petitioner/protestor is the same one that was used by Loice Nyambura Kihihu, the objector in filing her petition. In the affidavit in support of the petition for letters of administration she deponed that her husband's asset was ½ share (3.3) acres in L.R Gikondi/Gikondi/120. The grant was confirmed and issued on 12th July 2016 to the effect that Loice Nyambura Kihihu was to inherit ½ share i.e. 3.3 acres out of Gikondi/Gikondi/120.

The issue then is –is there any evidence to support the allegation that the deceased herein Ernest Njogu Gatoto sold his ½ share to her husband?

It is important that at the time of filing the said succession cause No.1031 of 2014 with regard to her husband's estate Loice Nyambura Gikondi, the objector herein never made any mention that her husband owned the whole parcel Gikondi/Gikondi/120, neither did she file the cause with respect to the whole parcel of land, but did so only with respect to the ½ share in tandem with the manner in which the land was registered.

This begs the next question -at what point did Loice Nyambura Kihihu 'know' or 'realise' that her husband had bought the other share from his brother?

The only evidence she relied on is the booklet, and its translations. The 1st page states that on this 19th January 1967 Njogu Gatoto, together with his brother Kihihu Gatoto, and his son Gatoto Njogu sold his three acres of land to Thiru Baragu at Kshs.800/-per acre. It also contains a list of 9 people who were alleged to be present during the sale. However, the specific parcel of land is not mentioned and the absence of the signatures everyone including the seller, the buyer and the alleged witnesses stands out like the smoke of a fire starting in some thick wilderness.

The document proceeds to 8th July 1967 showing that of Kshs.300/- was paid to Kihihu Njogu and Gatoto Njogu. Except for the alleged witnesses neither the buyer nor the seller signed for the transaction.

It goes on to show that on 5th November 1967 Kshs.280/- was paid to Kihihu Gatoto and Gatoto Njogu. There are no signatures of buyer, sellers or witnesses. Similarly, that on 7th February 1968 Kshs.200 was paid to Gatoto and Njogu Gatoto or Gatoto Njogu, on 19th May 1968, Kshs.50/- was paid to Gatoto Njogu, on 15th January 1967, he was paid Kshs.200/-, on 2nd February 1969 Kshs.130 was paid to Gatoto Njogu.

On 18th January 1967 the entry shows conflicting information. It is either that Kihihu Gatoto gave Kshs.20/- to Thiru Baragu or Thiru Baragu gave Kihihu Gatoto the money, and then one Wanjiru, whose role or description in the transaction is not given, added him Kshs.20/-; that on 5th June 1969, Thiru Baragu gave Kihihu Gatoto and his son Gatoto Kshs.40/-, on 1st August 1969 Gatoto Njogu was given Kshs.20/-, on 3rd September 1969 Kshs.100/- was given to Gatoto Njogu, and the last balance of Kshs.10/- was given to Gatoto Njogu on 10th November 1969.

I have reproduced the above record as it appears in the exercise book and translations by Mr. Muthoni Advocate. He submitted that these records were not challenged by the petitioner/protestor in anyway.

The 1st thing that stands out is that no parcel number was indicated in the alleged sale nor where the land was situated. Secondly the record speaks for itself- if there was any money paid out by Thiru it was received by both the husband to Loice, the objector, and one Gatoto Njogu. The objector simply produced the said documents but did not identify who this Gatoto Njogu was. In fact the payment records are quite interesting. On 18th January 1967 the money was received by Kihihu Gatoto and his son. There is no clear evidence that the deceased Ernest Njogu Gatoto alias Njogu s/o Gatoto is the same as Gatoto s/o Njogu.

In any event the two brothers died in 1988 and 1992 respectively; there is no evidence that between 1967 and 1988 when the 1st one died there was any dispute as to the ownership of the said parcel of land. Neither was any evidence produced that Kihihu actually bought the land from Thiru Baragu. It only shows Thiru Baragu paying out money for unknown parcel of land.

Be that as it may the objector was not a party to these 'sale' agreements and no witness was called to testify from the family of Thiru Barangu to confirm the allegation that he had bought the deceased's share of the estate and the same had been redeemed by Kihihu Gatoto, the objector's husband.

The submission that the documentary evidence was not challenged raises the question as to the evidentiary value the alleged sale agreement containing glaring serious omissions: no mention of the specific parcel of land subject of the sale, not signed by any of the parties, and witnesses; vis a vis a title deed that clearly states that that parcel of land is owned in two equal shares by two named persons and a confirmed grant that shows that the heirs to one of the registered proprietors filed a succession cause to pursue only the ½ of the property that her husband was entitled to? It goes without saying that the latter carries more weight.

I find therefore that the objection is misplaced, and not supported by any evidence. The objection is dismissed. The summons for confirmation of grant is also dismissed.

The protest is allowed. The parcel of land Gikondi/Gikondi/120 being 6.6 acres of land, and being registered in equal shares in the names of Ernest Njogu Gatoto and Kihihu Gatoto ought to be shared equally between the two of them.

The remainder after the confirmation of grant in Succession Cause No.1031 of 2014 to be inherited by Paul Maina Njogu, Peter Mwangi Njogu, Margaret Wangui Maina and Mary Muthoni Gachau in equal shares.

It is so ordered.

Each party to bear its own costs.

Dated, delivered and signed at Nyeri this 28th day of September 2018.

Mumbua T. Matheka

Judge

In the presence of:

Albert-Court Assistant

Nderi for petitioners

Muthoni for objector

Mr. Muthoni for the objector- I apply for leave to appeal.

Mr. Nderi: No objection

Order: Leave to appeal granted