



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO.742 OF 2013

IN THE MATTER OF THE ESTATE OF KANYUA GATHANGU alias PAUL WAKANYUA (DECEASED)

PHILIP GATHANGU WAKANYUA &

JOHN GICHIRA WAKANYUA..... PETITIONERS

-VERSUS-

PHILIP WACHIRA KINYUA

NAFTALI MBOGO WAKANYUA.....PROTESTORS

J U D G M E N T

Kanyua Gathangu alias Paul Wakanyua died on 25th November 2003. He was the registered proprietor of L.R Othaya/Thuti/369 approximately 12.1 Acres, and L.R Marmanet/North Rumuruti Block 2/3200 (Ndururumo).

His two sons from each of his widows' house filed this cause on 15th October 2013. Letters of administration of estate intestate were issued on 27th November 2013.

On 2nd September 2014 they filed summons for confirmation of grant in which they sought to distribute the estate as per paragraph 5 of their supporting affidavit among themselves, their siblings and Tana Water Services Board. Of significance to this application was the distribution whereby each of them would get 1.5 acres of the Othaya/Thuti/361. Out of his share Samuel Ndiritu would share 0.815 acres to Tana Water Services Board, and John G. Wakanyua who would get an additional 2.5 acres together with the Marmanet property.

This mode of distribution was challenged in the joint affidavit of protest filed by Philip Wachira Kinyua and Naftali Mbogo Wakanyua on 6th November 2014. Their contention was that the L.R Othaya/Thuti/361 was ancestral land which the petitioner's father held in trust for himself and for their father. That the same should have been shared equally between the two brothers i.e. their father, and their uncle at 6.05 acres each for their families to share. That they were not parties to the sale to Tana Water Services Board and only became aware of it in 2014. They had no interest in the Marmanet property.

On 7th March 2015, John G. Wakanyua swore and filed a further affidavit in which he deponed that his entitlement in Othaya/Thuti/361 was only 1.5 acres, that the out 2.5 acres was land he was holding in trust for the protestors because at the time of filing" the *summons for confirmation of grant, the protestors disagreed on who between them would be registered for their 2.5 acres*".

The protest was partly heard by Mativo J.

The 1st protestor Philip Wachira testified that the deceased was brother to his father Ndonga Gathangu who died in the 1940s. His mother died later. That his family lived on L.R Othaya/Thuti/361 which is where his mother was buried. That his cousins proceeded to file this cause without informing him or his brother. Despite the fact that they all lived on the suit land, his cousins completely disinherited them when they filed the summons for confirmation of grant, only for John G. Wakanyua to turn around and purport to say that they were only entitled to 2 ½ acres, which he was holding in their trust.

Philip denied any knowledge of any 3-acre piece of land that was allegedly shared equally among his father and his 2 uncles. He testified that his other uncle, one Gichera had a separate parcel of land not connected to the one that was registered in the deceased's name.

Naftali Mbogo agreed with his brother's testimony. He denied that as alleged, that the deceased bought 10 acres and gave his mother 1 ½ acres out of his generosity in addition to the one acre his father was allegedly entitled to. Even upon her death in 1998 his mother was buried on the deceased's land.

2nd petitioner John Gichira Wakanyua testified that the deceased had the two brothers Gichira and Ndonga. Ndonga had 2 sons (the protestors) and a daughter. He said that the ancestral land was only three acres which was shared equally among the three brothers. He testified that during the period of land demarcation and consolidation, Gichira's one acre was put separately and Kanyua bought his own 10 acres making his total ownership to be 11 acres including the one he inherited from the ancestral land. By this time his brother Ndonga had died. Ndonga's widow, the mother to the protestors requested Kanyua to put his 11 acres with her husband's one acre so that she could live near him. He agreed so that he could also assist to raise his deceased brother's children. Later, the protestors' mother asked for the one acre to be separated so that it could be given to her sons to enable them live independently.

A meeting was called. The assistant chief-DW2 Peter Ndegwa was present at this meeting where this issue was raised. According to the petitioner and his witness, the deceased gave the protestors' mother her one acre, and added her 1 ½ acres making up the 2.5 acres the protestors were entitled to. He was left with 9.5 acres of which his children were entitled to at 1.5 acres each.

According to the petitioner the land where Tana Water Services had the water tank belonged to one of the beneficiaries Samuel Nderitu who sold it at Ksh.930,000/-. He was paid 75% of the purchase price and the balance would be paid after issuance of the title deed. He testified that the protestors only came to court after they were denied Ksh.10,000/- each from the said sale but never objected to the construction of the water tank by Tana Water Services Board.

John also alleged that the two protestors feared having the title issued in their names because their mother left a curse on their land, and they had sought that his (DW1's) mother would hold the land in trust for them. That when his mother fell sick they agreed with her that he would take her place and hold their land in trust for them. He said he was now ready to transfer their 2 ½ acres to them.

On cross-examination this witness told the court that his father died in 2003, the protestor's mother in 1998, and that the distribution of the land by his father of the 2 ½ acres was done in 1984. However, by the time the protestors' mother died, the deceased had not transferred the 2 ½ acres to her, nor had he done so by the time of his death. He had also not made any efforts to approach the land Registrar to carry out the said exercise. Except for the petitioner's testimony there is nothing to support the alleged distribution.

He also said that the two protestors were aware of the cause but asked their aunt to take care of their share however, they became uncooperative and refused to give out their national Identity cards for purposes of registration of the land in their names. He confirmed that in his first proposal on the mode of distribution the protestors were not provided for and he only came up with their share after they filed their affidavit of protest challenging that mode of distribution. He confirmed that even in the latter proposed mode of distribution, there was no statement to the effect that he was holding the 2.5 acres in trust for the protestors.

With regard with the sale to Tana Water Services Board, he said they did not involve the protestors because it was one Samuel Nderitu who was selling his portion.

DW3 Philip Kibanga testified that he was present during the 1984 meeting though he could not recall the date. DW2 had told the court that it was DW3 who had recorded the proceedings. DW3 said that he had recorded the proceedings, but gave the record to the deceased. He said that there was no other copy of the same.

Parties having closed their cases opted to make written submissions Gichuhi Mwangi & Associates for the petitioners, and M. K. Kiminda Advocate for the protestors.

I have carefully considered the evidence and the written submissions. The only issue for determination **is whether the protestors are beneficially entitled to a share of the property Othaya/Thuti/361 and if so in what shares?**

From the evidence it is not denied that the protestors and the petitioners live on the said parcel of land. For some reason the petitioners did not distribute anything to the protestors and completely disinherited them in the confirmation proceedings. It is only upon the filing of the protest that John G. Wakanyua came up with the story that at the filing of the summons for the confirmation of the grant, the protestors were in disagreement and reluctant to have their share registered in their names because their mother had left a curse on the land. If that was the case, why would the protestors be seeking the same through these protest proceedings? What happened to the curse? The story of the alleged curse does not add up. Neither does the reason for the petitioners wanting to register the protestors' land their name(s) yet they were each getting property in their own names. That story is not believable.

Juxtaposed to the story of that curse is the story there was ancestral land of three acres which was shared among the petitioner's father and his two brothers, one of who was the father to the protestors. And the other story that the petitioners' father purchased 10 acres of the 12.5 acres. None of these is supported by any evidence. Or that his father gave the protestors' mother 1.5 acres out of his generosity. It is all hearsay. From the evidence, the protestors have lived on that land all their lives, their mother was buried on that land. The petitioners' concede that the land for the protestors' father and their own father's land were consolidated during the period of demarcation and consolidation and all of it registered in the name of the deceased. There is nothing to show that the protestors' father was entitled to only one acre of that land. Without supporting evidence that the deceased bought part of Othaya/Thuti/361, the only tenable conclusion is that the land belonged to the two brothers and each of them was entitled to an equal share.

The other allegation that the deceased distributed his estate sometime in 1984 is also not supported by any evidence. DW2 and DW3 testified that they were present, that a record of the proceedings was kept, and handed over to the deceased and conveniently that there was no other copy except the one kept by the deceased? Why was it not kept by the chief/ the secretary or copies thereof? Considering the importance of the alleged proceedings, it would have been expected that the deceased would have enforced the same at once or at least during his lifetime. No explanation was given for failure to produce the written record where all these things are alleged to have been put in writing and where parties were alleged to have signed the same. Once again there is no supporting evidence to show that at some time the deceased distributed his property between himself and the protestors' mother.

On the issue of Tana Athi Water Service Board the protestors have clearly indicated they are not interested in that issue for as long as they get their father's share of the land. In their view the petitioners and their siblings can decide what to do with their share.

I have also noted that the protestors have a sister whom they have not mentioned in the protest but who was mentioned by DW1. No consent or renunciation of her inheritance from her have been filed. It is not clear, and this court must ensure that she is not disinherited to avoid any further proceedings in this matter.

In conclusion I find and hold that;

- 1) The land was registered in the name of the deceased for himself and his brother Ndonga.
- 2) The protestors are beneficially entitled to their fathers' share which is $\frac{1}{2}$ of L.R. Othaya/Thuti/361.
- 3) That L.R. Othaya/Thuti/361 be distributed into two equal shares between the family of the deceased, and the family of the protestors.
- 4) The share for the petitioners to be in the name of John G. Wakanyua to distribute according to the wishes of the beneficiaries of his father's estate to be expressed through consents.
- 5) The share for the protestors to be distributed in three equal shares to include their sister unless renounces her share.
- 6) The Marmanet property to be registered in the name of John G. Wakanyua to distribute to the beneficiaries of his father's estate according to their wishes to be expressed through consents.
- 7) 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:

Ms. Nyakio Mureithi for Petitioners

Ms Mwangi for Kiminda for protesters

Albert-Court Assistant