REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 137 OF 1990

In the Matter of the Estate of Muronga M'Kobia (Deceased)

M'TURUCHIU M'KOBIA......................................PETITIONER

DAVID MUKIIRA MURONGA...............................PROTESTOR

Versus

PAUL MWITI..INTERESTED PARTY

JUDGMENT

[1] Before me is a Summons for Confirmation of Grant dated 24th June 2011 and a Protest by David Mukiira dated 28.6.2011. Direction given thereto on 5.7.2011 was that the protest be heard by way of viva voce evidence to determine:-

1. If the deceased left a valid oral will; and

2. Distribution of the estate.

[2] By law, I am obligated to determine the protest after hearing all parties concerned or interested in the proceeding. See rule 41 of the Probate and Administration Rules. I am also obligated under section 71 and 72 of the Law of Succession Act, in cases of intestacy, not to confirm the grant of letters of administration until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and to specify in the confirmed grant, all such persons and their respective shares. This duty I will do with great circumspection.

[3] From the evidence of the protestor, David Mukiira Muronga tendered on 26.2.2014:

(1) The Protestor is the son of the deceased;

(2) The petitioner is the brother to the deceased and father of the Interested Party one Paul Mwiti; and

(3) The petitioner and interested party are his uncle and cousin respectively.

(4) The deceased had three children, namely:-

a. Judith Ncenge;

b. David Mukiiri Muronge ; and

c. Joy Kathure.

[4] According to the protestor the estate property is:- LR. NO. ABOTHUGUCHI/GITHOMGO/214 measuring approximately 3 ½ acres and should be shared as follows:

1. David Mukiri……1 ½ acre

2. Martin Mwiti……1 acre; and

3. M’Twarachiu Mwonge (deceased)..1 acre.

[5] The Protestor alleged that the proposal by him is in line with the oral will the deceased made in February 1985 in his presence. He stated that the deceased died the same day he made the oral will. He did not however provide any death certificate to support his claim that the deceased died in February 1985 and not 1963 or 1987. His sister, Judith Ncenge supported the proposal by the protestor.

Of oral will

[6] By the evidence of the Protestor, oral will has been claimed. This is one of the issues listed by the court for determination. I must resort to the law. Section 9 and 10 of the Law of Succession Act provide as follows:-

9. Oral wills

(1) No oral will shall be valid unless-

(a) it is made before two or more competent witnesses; and

(b) the testator dies within a period of three months from the date of making the will: Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

(2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by sections 18 and 19.

10. Proof of oral wills

If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.

[7] The only witness who claimed the deceased made an oral will was the protestor. More trouble: he also claims that the deceased made a bequest to him in the oral will. I will refer to section 13 of the Law of Succession Act which states as follows:-

13. Effect of gift to attesting witness

(1) A will shall not be considered as insufficiently attested by reason of any benefit thereby given, either by way of bequest or by way of appointment to any person attesting it, or to his or her spouse.

(2) A bequest to an attesting witness (including any direction as to payment of costs or charges) or a bequest to his or her spouse shall be void unless the will is also attested by at least two additional competent and independent witnesses, in which case the bequest shall be valid.

[8] Yet another problem: the Protestor alleged that the deceased made the oral will in February 1985 in his presence and the deceased died the same day he made the oral will. He did not however provide any death certificate to support his claim that the deceased died in February 1985 the same day he made the oral will- and not 1963 or 1987. The cumulative effect of this analysis is that there was no or any other or independent witness to prove the alleged oral will by the deceased. In view of the law the alleged oral will was not proved at all. I find that there was no oral will made by the deceased.

Of Customary trust

[9] The interested party stated that the estate property belonged to their grandfather and was committed to the deceased to hold it in trust for his benefit and that of his late father- the petitioner. His argument was that his grandfather had only two children- his father M’Twaruchiu M’Kobia and the deceased herein. According to him the deceased called his brother- M’Twaruchiu to come and live in his father’s land after he had been chased from the forest. He claimed that during his lifetime, the deceased had called his brother so that he could give him his land but he died before he did so. The interested party said that he convened a meeting in 2011 and clan elders decided that the protestor and the interested party should take the share due to their respective fathers. He said that he was magnanimous enough such that he agreed to take 1 ½ acres and leave the protestor to take 2 acres, but the protestor refused the deal. He however confirmed that Martin Mwiti lives on the estate property where he had been left by their grandfather. But as he is the son of the protestor’s sister, he should get a share from the share of the protestor’s father. he should be allowed to take his father’s share.

Law recognizes customary Trust

[10] From the evidence before me, customary trust has been claimed by the interested party. A properly argued case would entail such specific evidence showing that the estate property was committed to the deceased to hold in trust for his benefit and that of the father of the interested party. Excerpts from the record on gathering and adjudication of land especially in the Meru would have been crucial material. Nonetheless, law customary trust is one of the overriding interests which need not be noted in the register of land. See some important lines in the decision of the Supreme Court in **PETITION N0 10 OF 2015 ISACK M’INANGA KIEBIA** below:

[52] Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.

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:

1. The land in question was before registration, family, clan or group land

2. The claimant belongs to such family, clan, or group

3. 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.

4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.

5. The claim is directed against the registered proprietor who is a member of the family, clan or group.

[53] We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in Obiero v. Opiyoand Esiroyo v. Esiroyo. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.

[54] In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that "to prove a trust in land; one need not be in actual physical possession and occupation of the land." A customary trust falls within the ambit of the proviso to Section 28 of the Registered Land Act, while the rights of a person in possession or actual occupation,, are overriding interests and fall within the ambit of Section 30(g) of the Registered Land Act.

[11] Free at last. Free at last. With this decision, we are freed from the shackles of **OBIERO vs. OPIYO** and **ESIROYO vs. ESIROYO**. Of great significance now is that customary rights and trusts now wear full legal sanctity in our statutes as overriding interests. But, as the Supreme Court stated, each case should be determined on its own facts. Except:-

Some of the elements that would qualify a claimant as a trustee are:

6. The land in question was before registration, family, clan or group land

7. The claimant belongs to such family, clan, or group

8. 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.

9. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.

10. The claim is directed against the registered proprietor who is a member of the family, clan or group.

[12] Applying this test, what does evidence show in this case? The interested party is a son of the brother of the deceased. The deceased and his father belong to the same family as they were blood siblings. The interested party claimed that the estate property belonged to their grandfather but was registered in the name of the deceased by virtue of him being the elder son. Evidence has it that the deceased looked for his brother who had been evicted from forest land and asked him to settle on his father's land; and indeed settled him on the estate land. The protestor also admitted that the father of the interested party lived on the estate property even during the lifetime of the deceased. He stated that the deceased offered the father of the interested party 1 acre of the estate property. He did not however give any explanation why his father would offer his brother 1 acre of his land. It is not surprising that he stated that he did not know the origin of the estate property. But, he confirmed that the petitioner did not have any other land. These pieces of evidence support real possibility that the land herein was family land. Therefore, I find that the evidence offered support a customary trust of the estate land.

[13] The only other issue is about Martin Mwiti. It has been admitted by the interested party that Martin was left on the land by his grandfather. He also admitted to be magnanimous and allowed the objector to keep 2 acres of land. He did not explain why. On the basis of evidence adduced, Martin is a dependant herein and the interested party was aware of this. Perhaps this explains his magnanimity. Martin is therefore is entitled to a share on that basis. I allocate ½ acre to him. The balance shall be divided equally between the objector and the

interested party – this is on the basis of the principle of representation as they take their respective father's shares. They shall hold the said portion of land on behalf of themselves and that of their siblings. The estate property shall be so distributed. Grant confirmed.

Dated, signed and delivered in open court at Meru this 29th day of October 2018

F. GIKONYO

JUDGE

In presence of

M/S Njenga for interested party

Gatari for objector – absent

F. GIKONYO

JUDGE