



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 497 OF 1992

IN THE MATTER OF THE ESTATE OF KAMUNYU KIMANI (DECEASED)

NJOROGE MBUGUA KIMANI.....APPLICANT

-VERSUS-

HANNAH MUTHONI KAMUNYU.....RESPONDENT

JUDGMENT

The deceased died intestate on 28th February 1976. He left Hannah Muthoni as widow and her children.

There has been longstanding dispute between the Applicant Njoroge Mbugua Kimani (now deceased), son of Mbugua Kimani, brother to the deceased and the Respondent, Hannah Muthoni Kamunyu, widow of the deceased on distribution of the deceased's estate. The Applicant now represented by his widow, Jacinta Mumbi Kimani who deponed vide Affidavit filed on 25th May 1995 claimed that the Respondent was not legally married to the deceased, she cohabited with the deceased for only 3 months prior to his death having lived with him from November 1975 and she came to his home with her children. The Applicant stated that he looked after the deceased as he was old and unmarried with no family until the Respondent stepped in a few months prior to his death.

On the other hand the Respondent asserted that the Applicant was not son to the deceased but son of his step brother; the deceased was an only child and therefore, he could not hold land in trust for anyone else.

COURT PROCESS

1. The dispute was first heard before Land Registrar in **Succession 68 of 1977** on 26th August 1982 as per annexed proceedings to affidavit filed by the Applicant on 25th May 1995. It was held that Njoroge Mbugua was entitled to inherit some land from Kamunyu (deceased) In Kikuyu customs it is common for a person to inherit something from someone who served him during old age or illness. In the Case of Njoroge, he served him as his step son and protected his property.
2. The Respondent appealed the decision of panel of elders at Githunguri Court in **SRMCC 449 of 1998; Njoroge Mbugua Kimani vs Ndungu Njogu**; and the Court set aside the Elders' panel decision.
3. The Applicant; Njoroge Mbugua filed a similar matter over the suit property in Kiambu Law Courts in **Kiambu Civil Appeal 68 of 1977** which nullified the Githunguri Court proceedings and

ordered fresh Succession Cause be filed.

4. This Court notes with concern that there were parallel proceedings in **P.A.374 of 1991** and **P.A.497 of 1992** over the same estate of the deceased in the High Court. Githinji J (as he then was) on 15th September 1995 as per Consent of parties; revoked grants issued in both matters separately but to the same estate and declared those proceedings a nullity. He then issued a fresh/new grant in the name of the 2 disputants; the stepson of the deceased; Njoroge Mbugua Kimani (deceased) and widow of deceased; Hannah Muthoni Kimani as administrators of the deceased's estate that comprised of **L.R.Gatamaiyu/Kagwe 853 & L.R.Gatamaiyu/Kamuchege/122. L.R.Gatamaiyu/Kagwe 853** lieu was to revert to the deceased's name and the titles issued were cancelled.

5. The Applicant Njoroge Mbugua contrary to orders by Hon J Githinji, without reverting the suit property **L.R. Gatamaiyu/Kagwe/853** to the deceased's name; he obtained a loan of Ksh 250,000/- and used the said property a security for the loan.

6. The Respondent, Hannah Muthoni filed suit **High Court Civil Suit 900 of 2002** and sued Njoroge Mbugua Kimani 1st Respondent and Family Finance Building Society, 2nd Defendant seeking orders restraining the 2nd Respondent from disposing by Public Auction L.R. Gatamaiyu/Kagwe.853 and the 1st Respondent to be ordered to repay the loan due and owing so as to have the suit property discharged.

To the Application, the Respondent attached Court order by Hon J Githinji of 26th February 2002, The Public Auction Notice by Jo-Mwaka Traders Agents of 2nd Respondent for sale of suit property L.R. Gatamaiyu/Kagwe.853 as property belonging to Njoroge Mbugua Kimani by public auction; Letter dated 4th April 2002 from the Respondent's advocates Gachuki & Company Advocates to the Applicant Njoroge Mbugua instructing him to settle the loan obtained from 2nd Respondent using the suit property as security.

The Applicant Njoroge Mbugua filed Summons for Review of Consent Order on 5th March 2003 and claimed that the Consent before Hon J. Githinji was reached without his knowledge and consent by his advocate on record.

On 2nd July 2003, the Respondent; Hannah Muthoni Kamunyu filed Summons for review of Court order of 16th June 2003 and sought to set aside the said orders and reinstate the orders of 14th June 1995. The Respondent sought for stay of execution of orders of 16th June 2003 because she paid as per annexed copies of Cash/Cheque Deposit from Family Finance Bldg Society dated 30th December 2002 Hannah Muthoni Kamunyu paid Ksh 288, 358.25 & Ksh. 19, 295.70 cts as per Cash/Cheque/Deposit dated 10th February 2003 as Auctioneers Fees to offset the loan by Njoroge Mbugua Kimani and had the suit property L.R. Gatamaiyu/Kagwe.853 discharged.

On 17th October 2003 L.J M. Koome declined to grant orders to review consent orders of Hon J Githinji of 15th September 1995. The only issue pending was distribution of the deceased's estate.

On 8th June 2004, the Applicant Njoroge Mbugua Kimani filed Summons for Confirmation of Grant.

On 14th June 2005, the Respondent filed Chamber Summons seeking the Land Register restore the title document of L.R. Gatamaiyu/Kagwe 853 to the name of the deceased Kamunyu Kimani as ordered by Hon. J Githinji.

She also sought caution placed against Manduki Property Agents claiming Purchasers' interest over the same property.

The Applicant Njoroge Mbugua Kimani filed documents on 22nd February 2007 to the summons of confirmation application which consisted of;

- a. Agreement dated 17th December 1975 between Kamunyus/o Kimani and Njoroge Mbugua son of Kimani and the translation thereof;
- b. Proceedings of 26th August 1982 and award of 30th August 1982 in **Succession Cause 68 of 1977** by Land Registrar.
- c. Abstracts of titles to the suit properties
- d. Sale agreement between the Applicant Njoroge Mbugua Kimani and Manduki Properties of Gatamaiyu/Kagwe/853.

HEARING

SUBMISSIONS

APPLICANT

On 24th April 2017 the Applicant filed Submissions on the application pending for determination which is the Summons for confirmation of grant dated 4th June, 2004. The application is brought under **Section 71 of the Law of Succession Act and Rule 40 (1) of the Probate and Administration Rules.**

The Application seeks the following prayers:

- a. ***The grant of letters of Administration intestate made to Njoroge Mbugua and Hannah Muthoni Kamunyu on the 14th June, 1995 be confirmed.***
- b. ***The distribution of the estate of the deceased and the beneficiaries thereto and their respective shares be determined by the Court with the Applicant being declared as beneficiary of L.R. No. Gatamaiyu/Kagwe/853.***

The Application is based on the grounds of the face of the application and the supporting affidavit of the applicant, **Njoroge Mbugua Kimani** sworn on 4th June 2004.

Before the application could be heard and determined, the Applicant passed on, on 2nd January, 2005. He was substituted with his wife Jacinta Mumbi Njoroge through an application dated 20th June 2006.

The facts of this dispute are that the applicant **Njoroge Mbugua Kimani** and the deceased, (Deceased) were relatives. During the time of demarcation, the parents of the applicant had passed away. He was therefore left under the care of **KAMUNYU KIMANI (DECEASED)**.

KAMUNYU KIMANI owned all that parcel of land known as Title Number **Gatamaiyu/Kagwe/245** which contained by measurement, approximately 13 acres. Out of this parcel of land, the deceased was entitled to 7 acres whereas the applicant herein would be entitled to 6 acres thereof.

This arrangement was recorded in writing on **17th December, 1975** when the deceased was selling his parcel of land to Fredrick F. Mburu in presence of the said Mburu and other witnesses during a meeting of Land Control Board. The Parcel Number **Gatamaiyu/Kagwe/245** was later partitioned for the purchaser to get his parcel of 7 acres. The remainder thereof, became Gatamaiyu/Kagwe/853.

RESPONDENT

On the same day (24th April 2017), the Respondent represented by her advocate Mr. Ndung'u Mwaura & Co. Advocates also filed her submissions mainly based on the evidence from the hearing proceedings.

HEARING

The matter was placed for further hearing before this Court on 13th October 2015. Initially, on 24th March 2014, hearing commenced before Hon. Justice Kimaru with PW1's evidence. Later the proceedings were typed.

The evidence of PW1 Daniel Njoroge Kimani stated that he knew Kamunyu Kimani (deceased) as his neighbour since 1971. In 1974, the deceased approached him that he wanted to sell part of his land, he called the prospective buyer Mwangi Ndegwa and his brother to his home. They agreed to meet at Githunguri at the bank so that the buyer would pay 29,000/- for 13 acres land. On meeting, the buyer paid only 2000/= He advised him to sell land to another buyer and he introduced him to Fredrick Mburu Gitau and they met and agreed to sale of ½ the land 7 acres at 7,000/- each acre totalling to Ksh 49,000/=.

Fredrick paid Ksh 20,000/= at first. Later, he paid Ksh 10, 500/=. They went to obtain consent from Githunguri Land Board. Njoroge Mbugua Kimani, objected to the sale. The Objector agreed to remove his objection only if the deceased wrote an agreement that the remaining land would be his as he sold ½. An agreement to this effect was drawn whereby it was indicated that the deceased held the said 6.6 acres in trust of the applicant's father during the time of demarcation. The Agreement of 17th February 1975 was drawn by Fredrick Mburu in the presence of Thuo Muchomba. The deceased died few months thereafter.

PW2 Jacinta Mumbi Njoroge testified before this Court, widow of Njoroge Mbugua Kimani (deceased) whom she substituted in these proceedings. She testified that the deceased died in 1976 and left two parcels of Land No. **Gatamaiyu/Kagwe/122 and Gatamaiyu/Kagwe 853** respectively. That **Gatamaiyu/Kagwe/122** is not in dispute.

PW2 further testified that after the death of her husband, the applicant's husband started claiming that Gatamaiyu/Kagwe/853 belonged to him which culminated in **Succession Cause No. 68 of 1977 in Githunguri Law Courts**. In that case, the applicant's husband had said that he was entitled to inherit respondent's husband's Parcel of Land because he lived close to him, assisted him to collect firewood, fetching water, removing jiggers from his feet and also concerned himself with protection of the deceased's pieces of land.

She testified that her claim was only 6.6 acres comprised in **Title No. Gataiyu/Kagwe/853**, which her husband was entitled to pursuant to the agreement dated 17th December 1975 made between him and the deceased.

She further testified that the reason why her husband could not be registered during demarcation was because he was not an adult. The father of her husband died during emergency and his land was registered in the name of the deceased to hold in trust for her husband.

By the time the deceased was selling his land, PW 2, had been married to the Applicant. She was therefore aware of the sale to **Fredrick Mburu** and the caution lodged by her husband during the Land Control Board, and the subsequent agreement between her husband and the deceased. In the said agreement, the deceased acknowledged that PW 1's husband was entitled to 6.6 acres, which however he did not manage to transfer as he died shortly thereafter.

Under Cross examination PW2 admitted that her husband and her family have never lived in Parcel of

Land No. **Gatamaiyu/Kagwe/853**. She further admitted that though she knows that there was an agreement between the deceased and her husband, she could not give details of this agreement.

She denied that the Respondent ever paid a loan on behalf of the Respondent to redeem the land. She further testified that the matter was heard in **Githunguri Court** and subsequently, in **Kiambu Court**. During re-examination she confirmed that the agreement dated **17th December, 1975** was valid, and there was a witness who testified to that effect (PW1). She further stated that she has no claim over **Gatamaiyu/Kamuchege/122** which was registered in the name of the Respondent.

RESPONDENT'S EVIDENCE.

The Respondent, DW1 Hannah Muthoni Kamunyu testified that she was married to the deceased who passed away in 1976. She stated that she got married to the deceased in 1970 and they had six children.

She also knew the Applicant, **NJOROGE MBUGUA** who was related to her husband, and was married to **JACINTA MUMBI**.

Her husband, owned two parcels of land, namely **Gatamaiyu/Kamuchege/122 and Gatamaiyu/Kagwi/245**. He had sold 7 acres of **Gatamaiyu Kagwi/245** and after sub-division, he was left with 6.6 acres which was registered as **Gatamaiyu/Kagwi/853**, which was now being claimed by the family of the Applicant. She testified that she lives on this piece of land. Further, the Applicant had taken a loan and used this parcel of land as collateral. When the Applicant failed to pay, the bank threatened to auction the land. She is the one who saved the land by selling part of **Gatamaiyu/Kamuchege/122** and paid the same to discharge the land.

As regards the relationship between the deceased and the Applicant, she testified that he was a stepson of the deceased. She denied the existence of the agreement dated 17th February, 1975 and testified that the contents are not true.

On cross examination, she testified that this matter commenced hearing in **1977**, when the matter was heard by the Elder's Panel at the D.O's Office. She was not satisfied with the decision of the Elder's panel and appealed in Githunguri Court. The Githunguri Court overturned the decision of the Elder's panel. The Applicant herein, **NJOROGE MBUGUA**, was dissatisfied with the decision of Githunguri Court and appealed the matter in Kiambu Law Courts.

Regarding the revocation of the confirmation of grant obtained in this cause, she confirmed that the order was made by consent. The court order was that both titles were to revert in the name of the deceased, but her title was still in her name. She also confirmed that the Applicant's family was not claiming **Gatamaiyu/Kamuchege/122** which was registered in her name.

She further confirmed that she salvaged the suit property and paid Ksh 288,358.85 for the loan and Ksh 19,295 as Auctioneers Fees to forestall the Auction due to loan of Ksh 250,000/- due and owing to the bank that Njoroge Mbugua Kimani the Applicant took and used suit property **Gatamaiyu/Kagwi/853** as security contrary to the Court order of Hon. J Githinji. She had to sell part of **Gatamaiyu/Kamuchege/122**, and offset the said loan and restored **Gatamaiyu/Kagwi/853**.

The Respondent stated that her late husband was an only child and the father of the deceased Applicant was born with 3 other siblings, so it was not possible to have the land left to her husband in trust for the step brother's son, the Applicant.

The Respondent sought from this Court that after this case being Court for 40 years, the suit property **Gatamaiyu/Kagwi/853** should revert to her name and her children as it belonged to the deceased as an only child.

DETERMINATION

This Court has considered the evidence on record and submissions and pleadings filed by respective parties. The issue before this Court for determination is only one of distribution of deceased's estate.

The main issues that have surfaced from the proceedings are;

1. The Applicant Njoroge Mbugua Kimani was Kamunyu Kimani's nephew; son of his brother Ndungu Kimani.
2. It is alleged pursuant to a written Agreement that the suit property L.R.Gatamaiyu/Kagwi/853 is ancestral land and Kamunyu Kimani was to hold ½ of the land in trust for Njoroge Mbugua Kimani.
3. Kamunyu Kimani sold 7 acres to Fredrick Mburu Gitau after Njoroge Mbugua Kimani objected at the Land Control Board Consent to the sale until Kamunyu Kimani agreed that the rest of the land 6.6 acres that remained belonged to Njoroge Mbugua Kimani.
4. It was alleged that Hannah Muthoni Kamunyu was not married to the deceased and came to his life 3 months before his death and she had no children with the deceased.
5. Njoroge Mbugua Kimani looked after the Deceased Kamunyu Kimani as he was old and unmarried.

This Court has found that there are allegations and counter allegations on the history and circumstances of this matter. The truth can only be deciphered by Kamunyu Kimani (deceased) and his stepbrother, father to Njoroge Mbugua Kimani who is also deceased. The law **Section 107 Evidence Act Cap 80** requires that he who alleges must prove the facts if judgment is to be delivered in their favour.

In the instant case PW2 and DW1 widows of the Applicant Njoroge Kimani Mbugua and Kamunyu Kimani have testified and their evidence is at variance and based on what they were told by their husbands which is not verifiable as it is one's word against the other's word. In the absence of proof on a balance of probabilities of any of their versions, this Court would distribute suit property **L.R.Gatamaiyu/Kagwi/853** into 2 equal parts each ½ to the Applicant's family and the other ½ to the Respondent's family.

However, there is a hitch, first, the Applicant Njoroge Kimani Mbugua sold the suit property **L.R.Gatamaiyu/Kagwi/853** to Manduki Properties (Purchasers); at the time he had no legal title to the suit property and could not pass a legal title to the Purchasers. There is evidence on record, the Ruling by Hon. J Githinji of 14th June 1995 where it was agreed by Consent that both grants were withdrawn and the title was to revert to the deceased's name Kamunyu Kimani ; this order was not complied with.

The Applicant; Njoroge Kimani Mbugua obtained a loan of Kshs. 250,000/- from Family Finance Building Society and used the said property in his name as owner as collateral. At the brink of an auction, Hannah Muthoni Kamunyu widow of Kamunyu Kimani sold off part of Gatamaiyu/Kamuchege/122 and used the proceeds to offset the loan by Njoroge Kimani Mbugua and the relevant receipts of payment by widow of the deceased are annexed to the Respondent's application of 16th June 2003 in the Court file. The suit property was discharged and restored upon payment by Respondent.

DISPOSITION

- 1. Therefore for the family of Njoroge Kimani Mbugua to get their ½ share, the monies paid by widow of deceased must and shall be paid to Hannah Muthoni Kamunyu first upfront in full.**
- 2. In the absence of the refund within a reasonable period 12 months from date of judgment, then the whole of the suit property L.R.Gatamaiyu/Kagwi/853 shall remain in possession of the widow of the deceased Hannah Muthoni Kamunyu and her family.**
- 3. The Registrar of Lands Kiambu shall rectify/amend/replace title document of L.R.Gatamaiyu/Kagwi/853 from the name of Njoroge Kimani Mbugua (deceased) to Hannah Muthoni Kamunyu; widow of the deceased Kamunyu Kimani as absolute proprietor of the**

suit property.

4. Any of the aggrieved parties to appeal to Court of Appeal.

DELIVERED DATED & SIGNED IN OPEN COURT ON 24TH OCTOBER 2018.

M.W.MUIGAI

JUDGE –FAMILY DIVISION –HIGH COURT

IN THE PRESENCE OF:

MR. NDUNGU FOR THE RESPONDENT

MR. WANJOHI FOR THE APPLICANT