



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 1006 OF 2012
IN THE MATTER OF THE ESTATE OF KIMANI KAGIA (DECEASED)
JUDGMENT

1. The deceased herein died on 31st December 1996. According to a letter from the Chief of Kikuyu Location dated 20th March 2009, he was survived by seven individuals, being children and grandchildren. The children are named as Wanjiku Wainaina, Teresia Ng'endo, Njeri Kimani, George Mburu and Joseph Njuguna; while the grandchildren are identified as Kimani Wainaina and Kung'u Muthaka. It is indicated that the family had agreed on Kimani Wainaina and George Mburu Kimani as the persons to apply for representation.

2. Representation to the estate was sought in Kiambu RMCSC No. 101 of 2009 in a petition lodged therein on 25th March 2009 by Kimani Wainaina and George Mburu, in their respective capacities as grandson and son of the deceased. He was expressed to have been survived by five individuals, being Wanjiku Wainaina, Teresia Ng'endo, Kung'u Muthaiga, George Mburu and Joseph Njuguna. He is said to have died possessed of Muguga/Muguga/87. A notice of the cause was published in the *Kenya Gazette* of 19th June 2009; a grant of letters of administration intestate was made on 18th August 2009. The grant was confirmed on 21st September 2011 in a summons dated 21st June 2011. The estate, the property now known as Muguga/Jet Scheme/87, was shared out at different proportions between Wanjiku Wainaina, Teresia Ng'endo, Kung'u Muthaiga, George Mburu and Joseph Njuguna.

3. Thereafter a cause was initiated herein on 17th May 2012 by George Mburu Kimani by way of an application of even date for revocation of the grant. His case is that the process of obtaining the grant in Kiambu RMCSC No. 101 of 2009 was defective to the extent that the deceased had died testate but was presented in the cause as having died intestate. Copy of an alleged will made on 6th September 1991 is attached to the application.

4. There are two responses to the application, by Kimani Wainaina and Joseph Njuguna Kimani. In his affidavit sworn on 17th September 2012, Kimani Wainaina avers that the applicant was one of the administrators appointed in Kiambu RMCSC No. 101 of 2009, and he participated in that cause, inclusive of filing a protest and proceedings for confirmation of the grant, but he never raised the issue of the will. In any event, he argues, the alleged document cannot pass as a will. On his part, Joseph Njuguna Kimani, a brother of the applicant, argues that the said applicant is actually a joint administrator of the estate. He avers that there was no will left by the deceased at all. He argues that the applicant had fully participated in the lower court proceedings, and he ought to have produced the said will then. He asserts that the grant on record had not been procured fraudulently or through concealment of facts.

5. Other affidavits were filed in the matter thereafter, sworn by Patrick Njoroge Njogu and Joseph

Njoroge. Patrick Njoroge Njogu alleges to have bought from Joseph Njuguna Kimani, a son of the deceased, his entitlement from the estate. The said Joseph Njuguna Kimani is said to have died, and Patrick Njoroge Njogu would like his interest taken care of. Joseph Njoroge was a neighbor of the deceased; he claims to have been present on 6th September 1991 when the deceased distributed his property amongst members of his family. He claims that he was the one who reduced the document into writing.

6. Directions were given on 11th June 2013, to the effect that the application be disposed of by way of affidavits and oral evidence.

7. The oral hearings commenced on 18th May 2016. George Mburu Kimani stated that he was a son of the deceased who had died on 31st December 1996. He was alleged to have been survived by one widow, Wambui Kimani. He testified that the family was not aware of the filing of the succession cause in Kiambu RMCSC No. 101 of 2009; he was only summoned by the court after the filing and told that Kimani Wainaina had been given authority to distribute the estate. He alleged that the deceased had distributed his property on 6th September 1991. He said that the deceased called village elders; he alleged that he was also present. The deliberations of the elders were allegedly reduced into writing by Joseph Njoroge. The elders did not sign it, but the witness and his mother signed it to signify that they were in agreement with what was discussed. He allegedly distributed his five acre farm – Wambui Kimani was given two acres, the witness got one and half acres, while Njuguna Kimani got a half acre. The deceased was left with about 100 feet, approximately one acre. He said that the original record of the proceedings was given to his mother, while he retained a photocopy. He testified that the property of the deceased had not been subdivided by the Lands office and subtitles issued, and therefore none of the survivors of the deceased had any title deeds from the property. He stated that Njuguna had no title to sell to anybody. He mentioned that Njuguna died during the pendency of the Kiambu proceedings.

8. During cross-examination, he stated that he got a copy of the title deed to the property from Kimani Wainaina through the local Chief. He conceded that he participated in the proceedings in Kiambu RMCSC No. 101 of 2009, where he even testified in the case. He said that his name was not recorded in the will, and the deceased had not appointed an executor in the said will. He stated that the deceased even fixed the boundaries of the portions that he distributed. He alleged that the deceased had said that the one care he retained under his name was to be inherited by whoever took care of him, but he did not reduce that into writing. He mentioned that he and his brother were not children of Wambui, but of another wife of the deceased who had left. He said Wambui had four children with the deceased. He stated that the dispute was on the one acre that the deceased retained after distributing her property. He alleged that the deceased had left another piece of land at Githunguri for Wambui's children. The Githunguri property was sold and another property bought at Nyakinyua. He claimed that he was entitled to two and half acres, and since he had already been given one and half acres by the deceased, he was entitled to the remaining one acre as he was the one who took care of the deceased. He said that Patrick Njoroge Njogu was buying a piece of land from his brother Joseph Njuguna Kimani. He took the matter to the local Chief who informed him that it had a case. He proposed that Wambui's two acres ought to go to her children, while he takes the two and half acres allotted to him by the deceased, the one acre that the deceased had retained, as well as the half acre that Njuguna was entitled to.

9. The second person to testify for the applicant was Joseph Njoroge Ikiegu. He stated that the deceased summoned him to be a witness to the deceased distributing his property amongst his family. He went to the deceased's home and found elders there. The deceased took them to the land he wanted to distribute. He gave his instructions orally, and the witness reduced them into writing. He gave his wife Wambui two acres, Mburu Kimani one and half acres, Njuguna Kimani a half acre and about one acre remained undistributed, and the deceased said that however fed him would be entitled to that portion. He said that the applicant was the one who took care of the deceased. He said the deceased had two wives, and distributed the property between the two families, with each taking two acres. He said he did not record that whoever fed the deceased would be entitled to the undistributed one acre, but added that what he said reflected the Kikuyu custom on the matter. He mentioned that all those who benefited from the distribution were present at that meeting, save for Njuguna Kimani. The document that he recorded was

subsequently signed by the deceased, his wife and the applicant. The witness stated that as the deceased was illiterate he read the document over to him in Kikuyu, even though he did not endorse in it that he did so. He said he could not tell why the elders did not sign the document. He said he could also not tell who made the alteration in line 5 of the document.

10. The respondent's case opened on 18th July 2016. Kimani Wainaina was the first on the stand. He stated that the deceased was his grandfather, adding that he had involved the witness in obtaining title deeds. He stated that the deceased did not leave a will as the matter of the alleged will was not raised at all during the proceedings in Kiambu RMCSC No. 101 of 2009. He said that he never heard his grandfather talk about the alleged will, adding that he saw the alleged will for the first time in court. He identified Joseph Njuguna Kimani as a son of the deceased. He also identified Patrick Njoroge Njogu as the person who was transacting with Joseph Njuguna Kimani over a parcel of land, that matter came up in the proceedings in Kiambu RMCSC No. 101 of 2009, where Njuguna confirmed the sale. He stated that he did not know the actual land on the ground that the two were transacting over. He stated that the deceased had delineated the property on the ground as between the two houses. He had distributed the property in such a way that the two houses were separated, retaining an acre of land in between them. Each side had been shown their portions. He said he was not present at the event of the making of the will. He mentioned that the deceased left him in possession of the title deed. He testified that during the proceedings in Kiambu RMCSC No. 101 of 2009 it was stated that the deceased's five acres were shared out in manner where each of the houses took two acres, and the deceased retained one acre. He allegedly told the lower court that the one acre ought to be shared out equally between the two houses.

11. Patrick Njoroge Njogu, the alleged buyer of a portion from one of the sons of the deceased, testified last in his capacity as interested party. He stated that in 2010, he bought a portion of the deceased's estate from one of the sons of the deceased. He allegedly bought a half acre, and was shown the portion by the applicant herein. The boundaries were marked by trees. He paid the full purchase price. During cross-examination he mentioned that the same was shown to him by the seller, Njuguna. He conceded that the title was in the name of the deceased. He also conceded that the consent of the Land Control Board was not obtained.

12. At the conclusion of the oral hearings I directed that the parties do file their respective written submissions. There was compliance and both sides did file their respective written submissions. I have had occasion to peruse through them and noted the arguments made in all of them.

13. The only issue for me to determine is whether the deceased left any valid will.

14. The document alleged to be the will of the deceased is in Kikuyu. There is an English translation. The English version says as follows –

'6/9/1991

Today the 6th September 1991 we were in the land of Kimani son of Kagia for the second time and we have subdivided the land as here below –

Wambui Kimani – 2 acres on the eastern side

Mburu Kimani – 1 and ½ acres

Njuguna Kimani – 1 and ½ acres on the western side

Kimani Kagia's portion is 100 feet and is in the centre

Kimani Kagia (finger print)

Witness are

1. Ngugi Gikonyo – chairman
2. Gitau Muruku
3. Karanja Kibui
4. Gitau Kamau
5. Muchai Thimani

The people who have gotten a share of the land

1. Wambui Kimani – 2 acres
2. Mburu Kimani – 1 and ½ acres
3. Njuguna Kimani – ½ acre
4. Kimani Kagia – 100 feet – finger print'

15. The first thing that I need to assess is whether the said document can pass as a will. After that I should evaluate whether, if it can pass as a will, it complies with section 11 of the Law of Succession Act, Cap 160, Laws of Kenya, on the formal validity of wills.

16. A will is defined in section 3 of the Law of Succession Act as follows –

‘ “Will” means the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II, and includes a codicil.’

17. There are several principal elements in the above definition of what constitutes a will. One, there must be a declaration by the person. Two, the declaration must be of the person's wishes or intentions. Three, the wishes or intentions must be in connection with what should happen to the property of the person after his death.

18. The question to be answered is whether the document dated 6th September 1991 was a declaration by the deceased of his intentions or wishes on disposition of his property upon his death. As worded the document does not sound as if it was authored by the deceased. The person speaking in it is not the deceased himself, rather it is the persons who visited the land of the deceased for a second time, and who have then proceeded to distribute it in a particular manner, who are speaking. In my view, the document cannot be said to be a declaration made by the deceased. Secondly, it talks of persons visiting the land and subdividing it. It cannot therefore be said that the document expresses wishes or intentions. It actually records what has been done. That is, it talks about wishes or intentions having been carried out by the act of subdivision of the land on 6th September 1991. It is a minute of what the elders did on 6th September 1991. Thirdly, it does not talk about distribution of the property after death, but actual distribution on 6th September 1991 when the document was made.

19. A will is futuristic, or a futurity. It addresses the future, not the present. It is about what is to happen in future. It is about the wishes or intentions of the testator being carried into effect sometime in the future after his death. The document dated 6th September 1991 is in no way futuristic or a futurity. It expresses no wishes or intentions, and it does not provide for the carrying out of any wishes or intentions sometime in the future following the death of the deceased. It is my conclusion that the document dated 6th September 1991 is not a will. It cannot therefore pass as the will of the deceased. That being the case, it cannot be said that there was a defect in the process of obtaining the grant in Kiambu RMCSC No. 101 of 2009. The proceedings in that cause to obtain the grant were neither fraudulent nor defective.

20. The application dated 17th May 2012 is without merit. It is hereby dismissed. The applicant shall bear the costs thereof. The file herein shall be closed, while the court file in respect of Kiambu RMCS No. 101 of 2009 shall be returned to the Kiambu Chief Magistrate's Court for final disposal.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH DAY OF SEPTEMBER, 2017.

W. MUSYOKA

JUDGE