



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

SUCCESSION CAUSE NO. 53 OF 2016

**IN THE MATTER OF THE ESTATE OF FRANCISCO KIHIANYU GACHUIRI alias
FRANCISCO KAHIANYUDECEASED**

AND

M'RUKUNGA KARIANYIPETITIONER

JUDGMENT

1. **FRANCISCO KAHIANYU GACHUIRI** (deceased) died on 11th August 1984. He was survived by **M'Rukunga Karianyi** – Son, who as at June 2014 was 74 years old; by **Peter Ndegwa Kahianyu** – son, who was at June 2014 was 73 years old, and **Lucy Muthoni Mutungi** – daughter who as at June 2014 was 66 years old. Both Peter and Lucy consented to M'Rukunga petitioning for grant of letters of administration in respect to their late father's estate. The only asset of that estate is parcel **No. LAIKIPIA KALALU/258 KALALU SETTLEMENT SCHEME**.

2. After a grant was issued, to M'Rukunga, Summons for confirmation of grant dated 21st September, 2015 was filed. In that summons it was sought that the asset of the estate be shared equally amongst the three siblings. That mode of distribution had the consent of those three siblings.

3. When that summons for confirmation came up for hearing on 2nd June 2016 M'Rukunga intimated to the court that he wished to protest to the mode of distribution of the estate. Finally on 21st July 2016 that Summons for confirmation was marked as withdrawn.

4. The court also revoked the grant issued to M'Rukunga and issued a joint grant in the names of the three siblings. Peter and Lucy filed another Summons for confirmation dated 13th March 2017 where they sought the estate be distributed equally amongst the three siblings. It is that summons that was the subject of hearing of M'Rukunga's protest.

5. M'Rukunga's evidence in support of that protest was that the deceased when he purchased parcel **No. LAIKIPIA KALALU/258 KALALU** also gave Peter money to purchase another land in that Settlement Scheme where Peter resides to date. Further that the deceased intended Peter not to share in the deceased's land. M'Rukunga's oral testimony was however contrary to the deposition in his affidavit of protest. In that affidavit of protest sworn by M'Rukunga and filed in court on 29th March 2017. M'Rukunga deponed –

“That in the presence of our mother, Lucy Muthoni Mutungi and my wife the deceased wished that parcel number LAIKIPIA KALALU/258 go to myself absolutely with a rider that just in case Lucy Muthoni be divorced I should give her a share of the same [to] build on”.

In oral testimony M'Rukunga stated that the deceased informed the husband of Lucy Muthoni, namely: Mr. Mutungi whereby deceased gave his oral will to Mr. Mutungi. M'Rukunga said this in that regard:

“Before our father’s death he said that Peter was to remain on his land and I was to stay on 258.

6. M'Rukunga also produced in evidence a document which he said was his brother Peter's consent to him, M'Rukunga, inheriting the deceased property absolutely. I will reproduce that document as follows:

“Dear Sir/Madam

Ref Land

Today on 12/2/2000 the family members of Francis Kahianyu want to let you know that their father died some years ago, who was titled with the land so they want to transfer the land and be titled by the name of Decettino Rukunga Kahianyu.

The accepted are:

- 1. Decettino Rukunga (sign)***
- 2. Peter Ndegwa (sign)***
- 3. Samuel Muthee (sign)***
- 4. Anjelica Kaita (sign)***
- 5. Joyce Kanini Gitonga (sign)***

7. Amongst those who witnessed that agreement was the wife of M'Rukunga namely Anjelica Kaita. M'Rukunga did not call his said wife to testify and neither did he explain her absence at the hearing.

8. What is pertinent to note of that agreement is that the agreement does not refer to any particular portion of Land. Accordingly it cannot be said, on a balance of probability, that the document referred to the deceased's land.

9. I had the opportunity to hear and observe M'Rukunga, Peter and Lucy testify before me. There is no doubt in my mind the M'Rukunga was lying when he testified that their deceased's father made an oral Will leaving his property solely to him. M'Rukunga when the Summons for confirmation dated 21st September, 2015 was filed, but which was later withdrawn by the beneficiaries' Learned Counsel, M'Rukunga consented to the deceased property being distributed equally amongst deceased's children. M'Rukunga signified that consent by appending his signature to the consent. It is also important to note that M'Rukunga at that point in time was the petitioner. It was him, essentially, who was seeking confirmation of the grant issued to him and in seeking that confirmation he sought that the deceased's property be distributed equally between him and his siblings. In sum, I did not believe the testimony of M'Rukunga. It was contradictory and unbelievable. On the other hand I formed the opinion that both Peter and Lucy were honest and credible witnesses.

10. Further to the above finding I find that the **Law of Succession Act Cap 160** does not support M'Rukunga. In particular **Section 9 of that Act** talks about when an Oral Will, such as the one M'Rukunga alluded in his testimony, would be valid. It provides:

“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”.

Competent witness is defined under **Section 3 of Cap 160** as:-

“a person of sound mind and full age”.

11. It is important to note that M'Rukunga was not, according to his testimony, present when his deceased father made the Oral Will. M'Rukunga did not call the witnesses, if any, that were present when his deceased's father allegedly made the Oral Will. On that score alone the alleged Oral Will is not valid as per Section 9 of Cap 160.

12. Further M'Rukunga did not state in evidence when, If at all, his father made his Oral Will. M'Rukunga needed to show that the Oral Will was made by the deceased, if at all, three months before the deceased died for that will to be valid.

13. Since both Peter and Lucy denied the existence of such Oral Will, in compliance with **Section 10 of Cap 160**, M'Rukunga needed to produce testimony of a competent, independent witness. He did not.

14. In the end the protest by M'Rukunga fails and is dismissed.

15. Peter and Lucy in evidence alluded to the frustrations they had experienced from M'Rukunga when they wanted to have the land surveyed. I am of the view because of that obstruction to the conclusion of this matter by M'Rukunga another grant should be issued to both Peter and Lucy.

16. I make the following orders:

(a) The protest filed by M'Rukunga Karianyi is dismissed with costs.

(b) The grant previously dated 29th November, 2016 is hereby revoked.

(c) A grant is hereby issued to Peter Ndegwa Kahianyu and Lucy Muthoni Mutungi.

(d) That grant is hereby confirmed as follows:

Land Parcel Number LAIKIPIA KALALU/258 KALALU SETTLEMENT SCHEME shall be registered in equal shares between

- M'RUKUNGA KARIANYI**
- PETER NDEGWA KAHIANYU; and**
- LUCY MUTHONI MUTUNGI.**

Dated and Delivered at Nanyuki this 21st day of September 2017.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant – Njue/Mariastella

Petitioner: M'Rukunga Karianyi

For petitioner:.....

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE