



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION NO. 240 OF 2007

IN THE MATTER OF THE ESTATE OF GATHUMA S/O KAGUMO

CHARLES WANGUNGU GATHUMA.....PETITIONER/RESPONDENT

VS.

PETER KIHAGI.....PROTESTER/APPLICANT

JUDGMENT

Background

GATHUMA WAKAGUMO died on the 27th July 1975 at the age of 83 years. He was survived by his wife Dorcas Muthoni and his two sons Geoffrey Ngunjiri Gathuma and Charles Wangungu Gathuma. He had one parcel of land AGUTHI/MUNGARIA/206 measuring about 4.5 acres. Certificate of title was issued on the 11th February 1959.

Geoffrey Ngunjiri Gathuma and Charles Ngunjiri Gathuma filed succession cause no 348 of 1985 in the RM's court at Nyeri with the consent of their mother.

On 22nd January 1986 Daniel Ngunjiri and Beatrice Wambui Kagumo filed an objection to the making of a grant of representation to the estate of Gathuma Wakagumo, together with a cross petition. Their claim was that the deceased was their brother, and they were entitled to a share of his estate. In his affidavit in support of the objection, Daniel Ngunjiri deponed that the deceased was registered as the proprietor of the said estate as a trustee for himself and them as well.

In response Charles Wangungu swore an affidavit where he deponed that indeed the objectors were his uncle and aunt, and that they had a land dispute with his father in Nyeri HCC 34 of 1972, where they had claimed interest in the land, and where his father had filed defence stating that he had bought the land himself without any contribution from them. That suit was dismissed on 21st September 1983 for want of prosecution.

On the 11th August 1992, Beatrice Wambui Kagumo passed away.

Daniel Ngunjiri Kagumo attempted to bury her on the suit property.

Charles Wangungu raised objections in RM Succession Cause no. 348 of 1985. The magistrate, Hon L.W Gitari (as she then was) in a ruling delivered on the 7th September 1992 granted the injunction restraining the applicants from burying the said Beatrice Wambui Kagumo on the suit land. The same was upheld by the high court P.K Tunoi J (as he then was) in Civil Appeal no. 66 of 1992.

The Judge stated “Further, I am satisfied that the deceased could not establish a prima facie case capable of succeeding in a trial as she was only an objector and there was no suit by her in existence. Her claim to the suit land was too remote and far-fetched”.

On 22nd November 1994, Peter Kihagi was substituted in place of Beatrice Wambui.

On 15th June 2006 Charles Wangungu Gathuma wrote to court requesting the transfer of the Cause to the High Court. The record shows that the Deputy Registrar directed him to file a formal application in the High Court. I did not see the application or the orders related to it but a letter dated 28th August 2007 sending the file to the Registrar High Court at Nyeri from the SPM’s court Nyeri.

On the 16th November 2007 the record shows that there was a Summons (General Form) dated 29th August 2007 that was filed and was to be placed before the Judge on the 20th February 2008.

Of relevance to this judgment is the affidavit of protest filed on the 7th of August 2015 by Peter Kihagi.

The protest was heard by way of oral evidence.

The Evidence

In his testimony PW1 Charles Wangungu Gathuma relied on the statement he recorded on the 25th June 2016. He testified that the deceased was his father and upon his demise he was the sole heir to his father’s property AGUTHI/MUNG’ARIA/206.

In cross examination he confirmed that the protesters were the children of a sister to his father hence they were his cousins. That the land in question was a consolidation of fragments of land his father bought between 1942 and 1943. That the two protesters had forcibly been living on the land without his authority and had refused to move when he told them to do so. That they were all living on the said parcel of land on different portions.

His witness PW2 Amos Gikaria told the court that the father to PW1, Gathuma bought land from his father, before the Emergency. That Gathuma had a debt of Ksh 115 which his father sent him to demand. Gathuma did not pay. He, PW2 was jailed for Mau activities for 10 years and when he came from jail, he demanded payment of the debt. Gathuma did not pay and the matter ended up in court where he paid only after his cow was attached through the court’s orders.

PW3 Waweru wa Theuri testified that he knew Gathuma Kagumo as he was his neighbour before the Emergency. That Gathuma owned a donkey and used to transport potato vines. He was also a toilet digger.

After detention he did not know where Gathuma went.

Peter Kihagi Ngunjiri testified that he recorded a statement on the 11th of November 2016. He told the court that he and his brother James Gathuma were sons of an unmarried woman Beatrice Wambui Kagumo who was a sister to Gathuma Kagumo. That they lived on the land Aguthi/Mung’aria/206 with the petitioner. That the land ought to be distributed among the three of them.

On cross examination about his paternity he denied that he had a father by the name Kihagi. That his mother had not been buried because the petitioner had raised an objection to the burial, but his uncle Daniel Ngunjiri was buried on 206.

The petitioner was unrepresented at the hearing while the protester was represented by Mr. Mahan.

Submissions

The issues for determination are;

1. Whether the land Aguthi/Mung'aria/206 is ancestral land?
2. Whether the protesters are entitled to inherit from the deceased?
3. On what terms ought the grant to be confirmed?

The petitioner submitted that he had provided evidence to show that his father had bought the land, and had not inherited it from his own father. That his two witnesses had confirmed this in their statements and testimony and there was documentary proof to that effect. That the protester had not demonstrated in evidence the basis for his claim that the land belonged to the deceased's father one Kariuki Kigumo.

He also submitted that the findings of the Magistrate's court and the High court with regard to the burial of the mother of Peter Kihagi the protester was also evidence in support of his contention that they had no right to inherit the said property.

Further that the suit his uncle and aunt had filed against his father in 1972 was evidence that his father had not agreed to any sharing of the land forcing them to sue him in court. That his father's position was always that the land was his and that is why he had it registered in his own name. There was a receipt showing that he had paid for the registration.

For the protester it was submitted that the land belonged to the petitioner's grandfather Kigumo Kariuki and the Petitioner's father Gathuma Kagumo was registered as proprietor in trust for himself and his siblings. That the suit land had been occupied by the three families for 62 years in equal shares

That he had not produced any sale agreements between his father and the alleged sellers of the land. That his two witnesses had not added any value to his case. In addition, that there was no evidence of a consent from the relevant Land Control Board under s. 6(i) (a) of the Act as at that time when the transactions were covered by the Land Control (Native lands) Ordinance. To this end I was referred to the case of **JAMES WACHIRA WAIGANJO vs. KAMONDO WANJOHI Civil Appeal No 123 of 1995 (CoA at Nyeri).**

The petitioner's response to these submissions were filed by the firm of Gori Ombongi and Co. Advocates. It was submitted that in the 1940s there was no Land Control law, hence the case cited was distinguishable, and in any event his father had bought fragments of land from various persons. Further that these submissions did not challenge his submissions.

I have carefully considered the evidence on record including the witness statements filed by the parties and their witnesses.

What emerges from the evidence is that this matter has had a long, 52 years old dispute between the deceased on one side and his two siblings, Beatrice and Ngunjiri (now both deceased) on the other hand. It is also not in dispute that these two siblings did live on parcel no. 206, and indeed Ngunjiri was buried there.

He who avers must prove.

The protester's position is that the land in question is ancestral land. The only evidence he placed before the court to prove this was his statement and a denial that his uncle did not purchase the land as alleged by the petitioner. He placed no evidence before the court that one Kigumo Kariuki, the father to the deceased, and his siblings ever owned or lived on the land Parcel 206. The protester did not provide any single piece of evidence to support his contention that parcel no. 206 belonged to his grandfather.

The petitioner on the other hand had two witnesses. Their evidence was not challenged in cross examination. They confirmed that his father did some kind of trade in his days and used the money to purchase fragments of land. One of them, and his testimony was not challenged, did testify that indeed his father sold the petitioner's father some land. He demonstrated that there was a court case, no 278 of 1962

through which the deceased he was forced to pay the balance of the purchase price. That gave credence to the evidence that indeed the deceased did purchase fragments of land which were later consolidated into no. 206.

The burial dispute with regard to the protester's mother also drew the conclusion that her claim was remote and far -fetched. That was never appealed against by the protester whose claim is dependent on his mother's right.

Living on the land per se did not make his mother and uncle heirs to their brother's property. They may have another claim, but it is not inheritance. Further, reading from the suit they filed in 1972, I found that to be a clear indication that they were not living on that land in harmony, or with the permission of the deceased, hence their moving to court to force his hand.

The authority cited is clearly distinguishable.

That case involved a claim for specific performance regarding a registered parcel of land Othaya/Kiandemi/303 whose transactions took place in the 1960s. By then there was a Land Control Ordinance in place. There was no demonstration that any existed in the 1940s when the petitioner's father bought the land.

In their judgment, Kwach, Akiwumi and Lakha JJ. A (as they then were) in reference to the Land Control (Native Lands) Ordinance no 28 of 1959 stated: -

“The transaction for which the respondent sought specific performance required the consent of the relevant land control board. This was a legal requirement. The effect of the arbitrator's ward was to grant the respondent the specific performance he sought. If no consent of the relevant land control board was obtained, then, the award was illegal”.

Hence the case is not applicable to the circumstances of this case.

I find therefore that there is evidence that the petitioner's father purchased the lands that were later consolidated into parcel no. 206. That parcel of land is not ancestral land and hence the brother and sister to the deceased are not beneficiaries of his estate.

The heirs to the estate of Gathuma s/o Kagumo are his children, the petitioner and his brother. Though his brother is deceased, the petitioner did not disclose whether he had a family who would be entitled to a share of the estate.

I find that the protest is not merited and it is dismissed.

A certificate of confirmation of grant of letters to issue for the estate to be shared equally between Charles Wangungu Gathuma and the heirs to the estate of Geoffrey Ngunjiri Gathuma.

If the latter was not survived by anyone, the estate to devolve to the petitioner.

There will be no orders as to costs.

Right of Appeal 30 days.

Dated, signed and delivered in open court this 18th Day of October 2017 at Nyeri

Teresia Matheka

Judge

In the presence of;

Court Assistant: Harriet

Charles Wagunga Gathuma

Peter Kihagi Ngunjiri

James Gathuma Ngunjiri