



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 519 OF 2015

**IN THE MATTER OF THE ESTATE OF THE LATE M'MUGIIRA M'MUGAMBI- Alias
MUGIRA KAGUNDU- DECEASED**

AND

CECILA IGOKI NYAGA.....PETITIONER

VERSUS

BASIL NTWIGA J. NYAGA.....1ST PROTESTOR

EUPRAIM MIRITI JUNIUS.....2ND PROTESTOR

ANCERIMINA KAARI.....3RD PROTESTOR

J U D G M E N T

1. This Probate and Administration cause relates to the estate of the late **M'MUGIIRA M'MUGAMBI alias MUGIRA KAGUNDU** (deceased) who died intestate on 13th August, 1977 domiciled in Meru. The deceased died and left the following dependants namely:-

- (i) Cecilia Igoki Nyaga - widow
- (ii) Ephraim Miriti Junius Nyaga - son
- (iii) Nazarine Ithima - daughter
- (iv) Basil Ntwiga Junius Nyaga - son
- (v) Angelina Kaari - daughter
- (vi) Emilio Junius Nyaga - son
- (vii) Lawrence Kaburu Junius - son

2. The Petitioner herein and the widow to the deceased **CECILIA IGOKI NYAGA** was appointed the administratrix of the estate of the deceased through a grant issued to her on 13th July 2014. The property comprising the estate as listed on the petition is that property known as **KARINGANI/NDAGANI /1572**.

3. The Petitioner/Administratrix herein took out summons for confirmation of grant dated 13th August,

2015 and proposed to have the estate distributed as hereunder.

1) Cecilia Igoki Nyaga - 1 acre

2) The remaining part of the estate be shared equally among the following dependants namely:

(i) Euphraim Miriti Junius Nyaga

(ii) Basil Ntwiga J. Nyaga

(iii) Lawrence Kaburu Junius

(iv) Emilio Junius Nyaga

4. The proposed mode of distribution did not go down well with some of the dependants namely:-

(i) Basil Ntwiga J. Nyaga

(ii) Euphraim Miriti Junius

(iii) Ancerimina Kaari

The three protestors filed their respective affidavits of protests. The main bone of contention by the protestors is that five acres out of the estate should not be considered for distribution as the same was redeemed by **BASIL NTWIGA J. NYAGA** from one **SAVERIO NYAGA** and **GEOFFREY KINGANGI** who had purchased three acres and two acres respectively from the deceased.

5. Basil Ntwiga J. Nyaga, the 1st Protestor and perhaps the main protestor in his affidavit of protest sworn on 2nd September 2016 deposed that apart from redeeming the ancestral land comprised in **MUTHAMBI/LOWER KARIMBA/285**, he also redeemed five acres out of estate herein from one Saverio Nyaga who had purchased three acres from the deceased and one Geoffrey Kingangi who had purchased two acres. He further deposed that as educated son he felt the responsibility lay on him to educate his siblings and ensure that they had a place to settle. He faulted his brother Lawrence Kaburu Junius of being behind the squabbles in the family which squabbles has ended in court vide **Chuka Principal Magistrate's Court Civil Suit No. 50 of 2016**.

6. In his evidence in court the 1st protestor testified and that expressed his opposition to the estate being distributed equally among the children of the deceased stating that the proposition would prejudice him having redeemed five acres in the estate out of his own efforts and volition. He denied the Petitioner's claim that the deceased had leased out two acres and three acres to Saverio Nyaga and Geoffrey Kingangi respectively. He maintained that the two had purchased their respective parcels and agreed to be paid back. According to him Saverio Nyaga had purchased his parcel at 900/- per acre and agreed to be paid back Kshs.1,500/- per acre which he claimed he did. He further added that Geoffrey Kingangi had purchased his parcel from the deceased at Kshs.1600/- per acre and agreed to sell it back at Kshs.2000/- per acre which he claims she repaid. The 1st Protestor therefore asked this court to grant him the five acres and only distribute the remaining five acres to all the dependants.

7. The 1st Protestor also testified that he is the one taking care of his mother, the Petitioner and in his view on the basis of that the Petitioner should not be considered in the distribution of the estate. He conceded under cross-examination that he had no written agreements to prove that his late father had sold two parcels to Zaverino and Kingangi and that he had no document from Land Control Board to prove that there was a transaction between the deceased herein and the two purchasers.

8. Ephraim Miriti (DW1) testified and supported the first Protestor. He denied that Zavarine Ithima redeemed parcel part of the estate herein and added that the person who redeemed it is the 1st Protestor

herein in 1983. It was his evidence that the first respondent also redeemed ancestral parcels known as **Muthambi/Karimba/473, 474 and 285**. He testified that he was present when the first respondent paid Saverio Nyaga Kshs.1500 and Geoffrey Kingangi Kshs.2000 respectively. He accused his brother Lawrence Kaburu Junius of greed by cutting down all the indigenous trees growing on the estate. Ancerimina Kaari (PW3) one of the daughters to the deceased also testified and supported and associated herself fully with the evidence tendered by both the 1st and 2nd Protestors.

9. The Protestors' position was supported by **WILLIAM MBUNDI** (DW4) a clan member who testified that the 1st protestor redeemed two parcels that had been sold by the deceased herein to Zaverio Nyaga and Kingangi. He also told this court that he was present when the 1st Protestor paid back Kshs.1,500/- to Saverio Nyaga and Kshs.2000/- to Kingangi. He conceded that the money was paid to the two purchasers but that there was nothing to prove the transaction. He further added that the purchasers had not done any constructions on the redeemed parcels and had only been cultivating

10. M'Wabengi M'Warucha (DW5) was another witness called by the Protestors and he told this court that he was one of the witnesses when the 1st Protestor refunded Kshs.1500/- to Zaverio Nyaga and Kshs.2000/- to Geoffrey Kingangi. He added that the transaction was done under a mango tree and that the same transactions were not reduced into writing as at the time written agreements were not common. He further added that he witnessed the transaction on as sub-chief because the chief was on leave at the time and at the time he was the one in charge of Karimba where the transaction was done.

11. The Petitioner herein Cecilia Igoki on the other hand testified that she was the only widow to the deceased and that he had ten children six of who survived the deceased. She has named the six children as follows namely:-

(i) Ephraim Miriti Junius Nyaga

(ii) Nazarine Ithima

(iii) Basil Ntwiga Junius Nyaga

(iv) Ancerimina Kaari

(v) Emilio Junius Nyaga

(vi) Lawrence Kaburu Junius

12. The Petitioner denied the claim made by the Protestors that the deceased had sold two parcels to Zaverio Nyaga and Kingangi insisting that the two had been leased the parcels to enable them raise school fees for the 3rd Protestor who then according to her was at Chuka High School. The position of the Petitioner was that her daughter zavarine Ithima is the one who redeemed the leases from the lessees Zaverio Nyaga and Japhlet Kingangi respectively. She testified that the first Protestor was still in school when the money was refunded to the creditors because according to her the deceased had borrowed money from the two and gave them leases in consideration.

13. The Petitioner justified her proposed mode of distribution of the estate stating that the estate should be distributed equally among all the children and that no child should be given a bigger share than the others. She tendered a copy of the official search as the P Exhibit 1 showing that the estate comprising in **L.R. KARINGANI/NDAGANI/1572** measuring approximately 3.8 ha is registered in the name of the deceased herein Mugira Kagundu. She has deposed that the deceased had told her that the estate should be distributed equally among all his children and did not want to go against those wishes. She added that if she was to favour any of her children she would favour Nazarine Ithima because to her she is the one who took the responsibility of educating her siblings and providing for the family. She also credited her for paying back Kshs.2,700/- to Zaverio Nyaga and Geoffrey Kingangi despite being married.

14. She had further deposed that Nazarine Ithima gave her Kshs.2700/- to redeem the parcels which according to her had been leased out and that when she took the money she was accompanied by the 1st Protestor. She conceded that the 1st Protestor redeemed ancestral land known as **MUTHAMBI/LOWER KARIMBA/285** for the deceased's family and that the land was now registered in her name upon redemption. She denied the suggestion that the 1st Protestor paid fees for his other siblings but conceded that the land at Lower Karimba belongs to him (1st Protestor) and that she has not suggested that the same be treated as part of the estate.

15. Nazarine Ithima (PW2) testified and supported her mother (the Petitioner herein) in her evidence. She testified that the estate herein comprises that property known as **KARINGANI/NDAGANI/1572** and that the same measures approximately ten acres. In her view the Petitioner's proposal was fair to all the children or the beneficiaries. She testified that she took a loan and refunded the money to Zaverio Nyaga and Kingangi who according to her had lent the deceased Kshs.1200/-and 1500/- respectively for purposes of paying fees for the 1st Respondent. It was her evidence that the 1st Protestor only contributed Kshs.600/- which was used to top up what she had borrowed to add up to Kshs.2700/-. She further testified that in 1978 she assisted her mother (the Petitioner) to place a caution on the estate because Ephraim Miriti (2nd Protestor) wanted to sell it off secretly. It was her position that she deserved to be given more because she paid more to redeem the two parcels from the creditors but added that she was not claiming any bigger share because in her view all beneficiaries should be treated equally.

16. Emilio Junius Nyaga (PW3) testified and associated himself to the evidence tendered by the Petitioner (PW1) and his sister (PW2).

17. I have considered the evidence tendered by both the Petitioner and the Protestors. I have also considered the written submissions made by both counsel. What is not contested in this cause is the fact that the deceased died intestate on 13th August, 1977 and left the following dependants surviving him;

- (i) Cecilia Igoki Nyaga - widow
- (ii) Euphram Miriti Junius
- (iii) Nazarine Ithima
- (iv) Basil Ntwiga J. Nyaga
- (v) Ancerimina Kaari
- (vi) Emilio Junius Nyaga
- (vii) Lawrence Kaburu Junius

18. The contested issue in this cause is not how the estate should be distributed. It is apparent that all the parties would want to have the estate distributed equally among all the children of the deceased inclusive of the widow. The contested issue is whether or not the estate comprised in that property known as **KARINGANI/NDAGANI/1572** should be distributed as is which is about ten acres as proposed by the Petitioner or five acres only should be treated as the estate and be distributed as proposed by the Protestors. The beginning point in resolving this issue is get the meaning of the word "estate." What is an **"estate"**?

19. The concise English dictionary defines an estate as ***"person's money and property in its entirety at the time of their death."*** The Black Law Dictionary defines an estate as ***"the amount degree, nature and quality of a person's interest in land or other property especially real estate that may be possessory the ownership being measured in terms of duration."*** Section 3 of the Law Succession Act (Cap 160 Laws of Kenya) defines to be ***"free property of a deceased person,"*** and ***"free property"*** in that section is defined as ***"the property of which that person was legally competent freely to dispose during his***

lifetime and in respect of which the interest has not been terminated by his death.”

20. The above definitions particularly the definition given under **Section 3** of the **Law of Succession Act** is important in resolving the dispute herein and this court shall apply its mind to the same in resolving the issue in this cause. The reason is simple. The property comprising an “**estate**” is subject to distribution according to **Section 35 (5)** of the **Law of Succession Act**. An estate is that property or money held in the name of a deceased person at the time of his death free from encumbrances. A property is free from encumbrances when the owner is by law free and able to deal with it in whatever manner he/she wishes. The question that comes up in this cause is whether the property forming the estate herein was free property at the time the time the deceased passed on. Could the deceased before his demise deal with the property like say disposing it? Before I answer this important question it is important to take a look at the law relating to the transaction of the type of property comprising the estate herein.

21. The estate herein comprised in that property known as **KARINGANI/NDANGANI/1572** is an agricultural land going by the evidence tendered in this court and by a dint of **Section 2** of **Land Control Act**. Transactions affecting agricultural land in Kenya is controlled by the cited statute. **Section 6(1)** of the **Land Control Act** (Cap 302 Laws of Kenya) provides as follows:-

“Each of the following transactions –

a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area..... is void for all purposes unless the Land Control Board for the land control area of division in which the land is situated is has given its consent in respect of that transaction in accordance with this Act.”

The 1st Protestor conceded under cross-examination at hearing of the protest herein that the estate is an agricultural land and to the best of his knowledge no consent was sought from the Land Control Board when Zaverio Nyaga and Geoffrey Kingangi purchased their respective portions of the estate from the deceased. According to Nazarine Ithima (PW2) the transaction between the deceased and Zaverio Nyaga took place in 1974 while the transaction between the deceased and Geoffrey Kingangi took place in 1975. Although Nazarene insist that the transaction was related to lease and not sale, the description in so far as requirements of the statute (Land Control Act) is concerned is insignificant because both leases and sale of agricultural land requires approval of Land Control Board. Furthermore, the Land Control Act came into operation on 12th December, 1967 and therefore when the alleged transactions took place between the deceased and Saverio Nyaga and Geoffrey Kingangi, that law was in force.

22. It is also undeniably clear that the said transactions whether they were leases or sales were not put in writing and the import of the provisions of **Section 3(3)** of the **Law of Contract Act** (Cap 23 Laws of Kenya) stipulates that for such contracts relating to disposition of an interest in land to have a force of law, the agreement should be in writing. This court was told by one of Protestors witnesses, **WILLIAM M'BUNDI (DW4)** that he was not present when the transaction between the deceased and Saverio and Kingangi took place. He however stated that he was present when the 1st Protestor herein paid back Kshs.1500/- to Saverio Nyaga and Kshs.2000/- to Kingangi. He further added that the transaction was not reduced to writing ostensibly because in those times agreements were never put in writing. The evidence of **M'WABENGI M'WARUCHA (DW5)** also revealed that the transaction was done under a mango tree with nothing made in writing.

23. This court was faced with two totally different perspectives in regard to what type of transaction actually took place between the deceased, Saverio Nyaga and Geoffrey Kingangi. Both sides (Petitioner and Protestors) held different positions but none in my view tendered sufficient evidence to show that their respective position outweighed the other. So even before I consider the legal implications of the transaction pursuant to the above cited statutes this court noted from the evidence tendered that neither the Petitioner's position or the protestors' was backed by tangible evidence. To begin with the Petitioner's position she holds that the transactions were leased and that her daughter Nazarine Ithima (PW2) redeemed the leases by paying back the leases. She however could not give the length or the duration of the alleged leases or show any document showing that her said daughter paid back any

money. She also failed to tender any written document to prove the allegations. She and Nazarine were however very passionate about how the money was raised and paid back. On the other hand, the protestors were categorical that the transactions were for sale rather than leases and that the 1st Protestor refunded the money to redeem the said two parcels of land from Saverio Nyaga and Geoffrey Kingangi respectively. However none of the witnesses called witnessed the said transaction between the deceased and the two alleged purchasers. The witness called only witnessed the redemption part of the deal and even then there was no documentary proof to back up the claims.

24. The above scenario left the position of both the Petitioner and the Protestors to a situation where I can only describe as the Petitioner's word against the Protesters. This court finds neither position, even before I address mind to the legal position, to have been proved to the required standard in law. (which in this case is on a balance of probability). What is more significant is my finding that neither of the transaction (whether it is a lease or sale) between the deceased and Saverio Nyaga nor the transaction between the deceased and Geoffrey Kingangi had the force of law. The transactions if any were in law null and void for want of approval from Land Control Board. The contracts if at all were not enforceable going by the provisions of **Section 3(3) of Law of Contract Act**.

25. This court finds that the purported redemption (whether it was done by Nazarine Ithima or Basil Ntwiga J. Nyaga) if any could only have had a moral force but certainly it lacked legal backing in view of clear provisions of **Section 6 of Land Control Act**. The section as observed above says the transactions in the absence of requisite consent from Land Control Board is void for all purposes. When something is void for all purposes, it cannot yield any right or benefit. It is not valid and legally not binding and that is why I have observed that the parties herein may have felt they had a moral obligation to redeem their late father's estate but that obligation was and could not be legally binding to anyone. In law a party cannot and should not expect to profit or gain from a void transaction because that is not tenable.

26. The 1st Protestor testified that the two purported purchasers did not obtain titles upon purchase of their respective portions and reason is the same. The law was not complied to facilitate a formal transfer. So if the family in this cause decided to refund the purchasers because of the voidable transactions they were perfectly in order because the law (**Section 7 of Land Control Act**) specifies refunds as the only remedy for a voidable transaction.

27. In the end I find that the Petitioner's suggested mode of distribution is tenable in law. The protest filed by the Protestors for the reasons aforesaid is not tenable in law and lacks merits. The grant issued on 13/7/2014 is hereby confirmed and the estate of the deceased herein comprised in that property known as **L.R. KARINGANI/NDAGANI/1572** shall be equally distributed among the following namely:-

- (i) Euphraim Miriti Junius
- (ii) Nazarine Ithima
- (iii) Basil Ntwiga J. Nyaga
- (iv) Ancerimina Kaari
- (v) Emilio Junius Nyaga
- (vi) Lawrence Kaburu Junius

Cecilia Igoki Nyaga being the widow will have life interest in the estate and shall hold the estate for her benefit and in trust of all the above named children.

This being a family matter I make no order as to costs so each party shall bear own costs.

Dated and delivered at Chuka this 18th day of December, 2017.

R. K. LIMO

JUDGE

18/12/2017

Judgment dated, signed and delivered in the presence of

Mugo for Petitioner and

Murithi holding brief for Kijaru for Protestors.

R.K. LIMO

JUDGE

18/12/2017