REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 472 OF 2004

IN THE MATTER OF THE ESTATE OF SOPHIA WATARE GACHIGUA-DECEASED

Ephrahim Mwangi Gachigua.....Petitioner

versus

Beatrice Gakenia Mbugua.....Protestor

JUDGEMENT

Sophia Watare Gchigua (herein after referred to as the deceased) died intestate on 29th February 2004 at the prime age of 85 years. On 25th day of October 2004, **Ephrahim Mwangi Gachigua** a grandson to the deceased (herein after referred to as the Petitioner) petitioned for letters of administration intestate to the deceased's estate and listed title number **Konyu/Barich/2133** as the property comprising the deceased's estate.

The petitioner also took pout citations for service upon Grace Wanjira Mwangangi, Ellah Wanjagi Mugambi, Agnes Kamuru, Beatrice Gakenia Mbugua, Joyce Wairimu Kaura, Rose Mumbi Ndungu, Agnes Wanjiru Kihurani & Mercy Nyaguthii Ngatia the same persons listed in form P & A 5.

On 6th June 2005 the protestor herein and Joyce Nyambura filed a petition by way of cross-petition in their capacity as heirs/beneficiaries to the deceased's estate.

The petition by the petitioner was gazetted on 10th December 2004 and the grant issued on 16th May 2014. On 18th November 2014 the petitioner herein applied for the said grant to be confirmed and proposed distribution as follows:-

a. **L.R. No Konyu/ Baricho/2133** measuring **2.45** acres to be shared as follows:-

i. Ephrahim Mwangi Gachigua---------to get 0.45 acres

ii. Grace Wanjira Mwangangi

iii. Ellah Wanjagi Mugambi

iv. Agnes Wambui Kamuru

v. Beatrice Gakenia Mbugua

vi. Joyce Nyambura Mbicho To share 2.0 acres equally.

vii. Jane Wairimu Kaura

viii.Rose Mumbi Ndungu

x. Agnes Wanjiru Kihurani

ix. Mercy Nyaguthii Ngatia

b. L.R. No. **Nanyuki/Marura Block 11/57** to **Ephrahim Mwangi Gachugia** absolutely.

c. Barclays Bank of Kenya Shares to **Ephrahim Mwangi Gachugia** absolutely.

On 30th January 2015, **Beatrice Gakenia Gachigua** (hereinafter referred to as the protestor) filed an affidavit of protest and proposed distribution as follows:-

a. **L.R. No Konyu/ Baricho/2133** measuring **2.45** acres to be shared as follows:-

i. Grace Wanjira Mwangangi----0.288 acres.

ii. Ellah Wanjagi Mugambi------0.144 acres.

iii. Catherine Gathoni Kamuru----0.200acres to hold in trust for the family of Margaret Wanjiku Kamuru-deceased.

iv. Beatrice Gakenia Mbugua-----0.288 acres.

v. Ephrahim Mwangi Gachigua---0.144 acres.

vi. Joyce Nyambura Mbicho----0.288 acres.

vii. Jane Wairimu Kaura------0.288 acres.

viii. Rose Mumbi Ndungu---0.288 acres.

ix. Agnes Wanjiru Kihurani------0.288 acres.

x. Mercy Nyaguthii Ngatia -------0.288 acres

b. L.R. No. **Mutara/Thome Block 1/3439** (Mathira) to be transferred to **Joyce Nyambura Mbicho.**

c. **Nanyuki Marura Block 11/57** to be transferred to **Ephrahim Mwangi Gachigua** absolutely.

d. East Africa Breweries Shares, Kenya Commercial Bank Ltd shares, Barclays Bank of Kenya Shares, A/c No. 117 02 1211 Kenya Commercial Bank Ltd, Karatina, A/c No. 5503835 Barclays Bank of Kenya Ltd, Karatina.

---- All the above to be transferred in equal shares to:-

i. Beatrice Gakenia Mbugua

ii. Grace Wanjira Mwangangi.

iii. Ella Wanjagi Mugambi.

iv. Catherine Gathoni Kamuru.

v. Joyce Nyambura Mbicho.

vi. Jane Wairimu Kinyanjui.

vii. Rose Mumbi Ndungu.

viii. Agnes Wanjiru Kihurani

ix. Mercy Nyaguthii Ngatia

x. Ephrahim Mwangi Gachigua.

The Petitioner filed further affidavit in support of the application in which he averred *inter alia* that he was in agreement with the distribution proposed by the protestor on the following assets, namely, **Nanyuki/Marur Block 11/57** to be transferred to the petitioner, **L.R No. Mutara/Thom Block 1/3439 (Matrhira)** to be transferred to **Joyce Nyambura Mbicho** absolutely.

He also agreed to the proposal on the shares, however, he proposed that **Konyu/ Baricho/2133** be shared out as per his proposal because by a decision rendered in case no. **1** of 1998, the Karatina court awarded him **0.45** acres from the said land and that no appeal has ever been preferred against the said decision. He also averred that the Barclays Bank of Kenya Limited shares belong to him having been awarded to him in Milimani Rmcc No. **11445 of 2004** where the protestor had stated on oath that half of the said shares belong to him. (However, from the evidence adduced, no judgement to that effect was rendered)

At the hearing of the protest, the protestor stated that the petitioner is his sisters son, that the deceased was survived by 10 children as listed in paragraph **3** of the protest among them a son to **Catherine Njeri Gachagua**-deceased. She confirmed that a partial consent was recorded on 22nd July 2015 and it was only in respect of item number **5** relating to **Komu/Baricho/ 2133** and shares at Barclays Bank of Kenya Limited that the parties could not agree. She stated that the shares were bought by the deceased but were registered jointly in the deceased's and the petitioners name. Her proposal was that they be shared equally among the 10 beneficiaries.

As for **Konyu/Baricho /2133**, she proposed that the same be distributed as per paragraph **8** of her affidavit of protest and that only the petitioner is opposing the said proposal.

Agnes Wanjiru Kihurani supported the proposal in the affidavit of protest. She disputed that the petitioner was given **0.45** acres in a court decision and insisted that the case related to the original land, prior to its sub-division and asked for the shares to be shared equally. She stated that the shares were converted into cash and that the amount is currently held in a fixed deposit account at the Commercial Bank of Africa and proposed that the said sum be shared equally among the **10** beneficiaries.

She also stated that parcel number **Konyu/Baricho/2133** was valued at Ksh. 17,000,000/= inclusive of improvements. She proposed that the protestor gets the area she has built but equality be maintained. She insisted that the petitioner gets 0.144 acres because the deceased transferred parcel number **Nanyuki/Marur Block 11/57** measuring **11** acres to him, thus he benefitted elsewhere. Upon cross-examination she insisted that the shares were jointly registered, but at the material time the petitioner was young money and had no money to contribute towards the purchase.

The petitioner described himself as "an adopted son of the deceased" and stated that he was brought up by the deceased and he husband (his grandparents) before his mother, a daughter to the deceased died in 1973 when he was aged 8 years. He insisted that he purchased the shares jointly with the deceased. He claimed he raised the money using allowances received from the University between 1987 to 1990. (I note that he did not state the total contribution or the number of shares he purchased or evidence in support of the alleged contribution).

He stated that after the deceased's death, he went to Barclays Bank and they transferred the shares to him,

that the protestor went to court to stop the process but was not successful. He was able to sell the shares but the funds were placed in a fixed deposit account after the protestors raised a complaint. He insisted that the agreement with the deceased was that if she in not there, he takes the shares and vice versa. (However, no written agreement was produced to back the said position nor was the said position proved by way of oral evidence).

As for the land, he claimed that he was awarded him **0.45** acres by the Tribunal and the said award has to date never been reversed by any court. He claimed that he was asking for **0.45** acres being what the court gave him. (I find it perplexing that whereas the petitioner in court fondly described himself as the "adopted son of the deceased" the two had engaged in a vicious court disputes, a position that can safely be construed to mean that their relationship was not cordial at all. To me the evidence tendered in this case must be examined, scrutinized, analysed, appreciated and interpreted with this reality in mind).

He also claimed that **Nanyuki/ Block 11/87** was bought by his mother, that his mother gave money to the deceased to buy it for her. However, the said allegations were not backed by any tangible evidence.

Upon cross-examination he admitted that he did not have a copy of the court judgement awarding him title number **Konyu/Baricho/2133**. The tribunal proceedings produced relate to **Konyu/ Baricho/471**.

The parties having recorded a consent on the mode of distribution in respect of all the properties except title number **Konyu/Baricho/2133** and **Barclays Bank of Kenya Limited Shares**. These two items are the subject of this decision. Thus the issue for determination is the mode of distribution of the above two properties.

Counsel for the petitioner concluded his submissions by stating that the protestor had failed to prove her proposed mode of distribution and urged the court to confirm the grant as proposed by the petitioner. On the other hand counsel for the protestor maintained that land in the award relied upon is totally different from **Konyu/ Baricho/2133** in that the award talks of **Konyu/Baricho/471** and that the alleged award is over 18 years ago.

I have in several decisions stated that all cases are decided on the legal burden of proof being discharged (or not) and in this I am fortified by the words of **Lord Brandon** in *Rhesa Shipping Co SA vs Edmunds*[1] who remarked as follows:-

> *"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*

Clearly, whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[2] **:-**

> *"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*

With the above observation in mind, the starting point is that *whoever desires* any court to give *judgement* as to any legal right or liability, dependant on the existence of a fact which he asserts, *must prove* that those facts exist. The *burden of proof* in a suit or proceeding *lies* on that person *who would fail if no evidence at all were given on either side.* The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.

It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed.[3] The standard of proof in civil and criminal cases is the legal standard to which a party is required to prove his/her case. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of

probabilities. In the case of *Miller vs Minister of Pensions*,[4] **Lord Denning** said the following about the standard of proof in civil cases:-

> *'The …{standard of proof}…is well settled. It must carry a reasonable degree of probability…..if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'*

In my view the reason for this standard is that in some cases, the question of the probability or improbability of an action occurring is an important consideration to be taken into account in deciding whether that particular event had actually taken place or not. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

I find glaring gaps in the evidence presented by the petitioner. For example, whereas the Tribunal case number **45** of **98** relates to title number **Konyu/ Bacricho/ 471**, the proceedings relating to Land Case Number **1** of 1998 refer to **Konyu/Baricho/2133**. There was absolutely no attempt by the petitioner to clarify to the court the relationship if any between the two parcels of land. Secondly, whereas the said award gave to the petitioner **0.45** acres out of **Konyu/ Bacricho/ 471**, and the copies of proceedings relating to Land Case number **1** of 1998 show that an award was read in court on 2.9.1998, the proceedings do no show that judgement was entered in terms of the award as the law provided then. In fact at page **7** of the ruling delivered on 26th January 1999, the learned magistrate was very clear and loud that **"the award must be read and adopted by the lower court."** In fact in absence of anything to show that the award was ever read and adopted as a order of the court, the said award would be of no legal effect. More worrying is the fact that the copy of the decree exhibited by the petitioner reads "this case coming on 2nd day of September 1998 before the Senior Resident Magistrate ..... for the reading of a award dated 22nd October 1998...."

Evidently, the "decree" refers to "the reading of the award" but there is absolutely nothing to show that the judgement was entered in terms of the award, hence the decree must have been erroneously extracted before judgement was entered. Such a decree is obviously bad in law because it does not have roots from a court judgement. The judgment forms the concluding part of the civil suit and it determines the rights and liabilities of the parties. Basically judgment is followed by a decree which is its operating part. Decree is the operating part of the judgment and it has to be in harmony with the judgment. So, if there is no judgement, there can be no decree. A decree cannot be issued before the final judgment is rendered. Where a decree is not rooted in a judgement like is evident in the present case, then such a decree is null and void.

> *Order XLV rule 17 (1) of the Civil Procedure Code provided as follows:-*
>
> *"The court shall upon request enter judgment according to the award-*
>
> *a. When no application has been made within the time allowed by rule 16; or*
>
> *b. When an application under rules 12 or 13 has been heard and determined and no other application has been made within the time allowed by rule 16; or*
>
> *c. When every application under rules 14 and 15 has been heard and refused and no leave to appeal against such refusal has been granted within fourteen days of that refusal."*
>
> *Rule 17 (2) stipulates,*
>
> *d. "Upon the judgment so entered a decree shall follow and no appeal shall lie from such a decree except in so far as the decree is in excess of, or not in accordance with the award."*

In fact the learned magistrate who had the benefit of handing the file and perusing all the documents hitherto filed at the page **7** referred to above correctly observed that "I am of the view that an award by the land disputes tribunal has no force until and only after it has been read and adopted by court of competent jurisdiction.." With such clear sentiments coming from the magistrate and in absence of any record to show that the award was adopted as an order of the court as required, I find no reason to conclude otherwise. The consequence is that the said award/decree is of no consequence or force of law and is not worth the paper it is written on and cannot be acted upon.

As alluded earlier, even though the petitioner preferred himself as "an adopted son of the deceased" the documents produced in court show that the two were not in good terms at all. In fact the deceased is quoted at case number **45** of 1998 stating *"I brought up Mwangi and educated him. I speak the truth. I' m going to bequeath his mother but not him.."* The above position tells a lot about the relationship of the deceased and the petitioner. In particular, It is doubtful that the deceased could jointly purchase shares with the petitioner with whom they were battling in court. The protestor did in her evidence cast doubts on such a scenario and raised doubts on such a possibility and stated that the petitioner was living with the deceased and had access to her documents. She also stated that at the material time, the petitioner was a student and therefore had no income, casting serious and credible doubts on the petitioners financial ability to have contributed towards the purchase of the said shares.

The petitioner insisted that he purchased the shares using "university allowances" paid to him as a student. The petitioner carefully avoided stating how many shares he purchased, the value of the shares or his actual contribution towards their purchase. No documents were tendered to demonstrate how or when the shares were purchased jointly (if at all). No share certificate were tendered to prove the joint ownership. No document was tendered from Barclays Bank Ltd to confirm that the shares were jointly acquired.

Dead people tell no tales, hence, the demise of the deceased makes it rather difficult for the court to establish the correct position, but I am clear in my mind that the burden to clear all these doubts fell squarely on the petitioner, but he failed to help the court in clearing these serious doubts. It is not even clear how he transferred the shares to himself. No transfer documents were produced. No proper reason was tendered to confirm why upon learning of this dispute Barclays Bank of Kenya withheld the proceeds from the sale of the shares. I am however clear in my mind that Barclays Bank could not have opted to withhold the proceeds unless they were satisfied that there was a valid dispute.

I am also aware that proof in cases of this nature cannot be mathematically precise and certain and so the test should be one of satisfaction of a prudent mind in such matters. The onus must be on the person alleging and there must be clear and convincing evidence and absence of suspicious circumstances surrounding the case. For example, availing documents to confirm how the shares were acquired or the share certificates, or evidence of dividend payment, or the transfer instruments purporting to transfer shares to the petitioner could have shed light on the issue.

Entirely considering the facts of this case, the hostility towards each other in court characterized by evident distrust including suggesting that the petitioner lived with the deceased and could have had access to her documents, I find that there are unresolved suspicious circumstances surrounding the manner in which the shares were acquired and transferred to the petitioner culminating with the bank withholding the funds. Where there are suspicious circumstances, the onus would be on the person alleging to explain them to the satisfaction of the Court before the court can accept such evidence.Where there are doubts or suspicious circumstances, it is the duty of the person alleging to satisfy the conscience of the court.

What are suspicious circumstances must be judged in the facts and circumstances of each particular case. The **burden of proof** (Latin: *onus probandi*) is the duty of a party in a trial to produce the evidence that will shift the conclusion away from the default position to that party's own position. In the present case it was necessary to adduce sufficient evidence to prove that the petitioner contributed to the purchase of shares, demonstrate beyond doubt that he gave financial contribution and extent if any of the contribution. As mentioned above key documents in support of the alleged purchase of joint ownership of

the shares were not tendered nor were any documents produced pertaining to the alleged transfer of shares. The only evidence tendered by the petitioner was that the protestor alleges that the share certificates were in joint names in an affidavit filed in a court case that was never determined on merits. Such allegations contained in an affidavit filed in court in a case that was never determined cannot be termed as conclusive evidence nor does it take away the burden placed upon the petitioner to prove his case to the required standard. The case was never determined and the veracity or otherwise of the said allegations was never proved nor does the said statement answer the issues raised above on the petitioners contribution if any. Such evidence must be clear, cogent and must demonstrate evidence of absence of suspicious circumstances.

If the distribution of the property is unfair or skewed in such a manner that the person so alleging gets a prominent part in the alleged distribution of the estate which confers substantial benefits to him or his children to the exclusion of the other beneficiaries like in the present case, then, unless the contrary is sufficiently proved, that itself is a suspicious circumstance and in appreciating the evidence in such a case, the court should proceed with an open but nevertheless vigilant and cautious mind.[5]

Secondly, the evidence adduced must be clear and there should be no inconsistencies at all or evidence of bad blood with the deceased as in the present case. The issues cited above in the evidence of the petitioner raise serious doubts on the question of the alleged contribution towards the purchase of the said shares.

The burden of proof is often associated with the Latin maxim *semper necessitas probandi incumbit ei qui agit*, a translation of which in this context is: "the necessity of proof always lies with the person who lays charges." I find that the evidence tendered by the petitioner falls short of the required standard to clear the doubts in the mind of the court.

I am aware that the law seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to be honoured and effected.[6] But it must be proved beyond doubt that indeed the deceased undertook the actions in question and as mentioned above, there must be absence of suspicious circumstances and in this regard the relationship between the deceased and the person alleging is a relevant fact in determining the dispute. In this regard, as observed above, here is a petitioner who dragged the person he calls "adopted mother" to court demanding land and engages her is a vicious court battle.

There is no tangible evidence to demonstrate that the deceased during her life time jointly purchased shares with the petitioner. The evidence tendered by the petitioner is manifestly in adequate to warrant this court to conclude that the deceased jointly purchased shares with the petitioner or financially or otherwise contributed to the purchase. I had the opportunity of observing the demeanor of the petitioner as he gave evidence in court, and other than the evident inadequacies cited above, I found his evidence to be totally untruthful.

The petitioner also insisted that his deceased mother gave money to the deceased who bought for him title number **Nanyki Marura Block 11/57.** Again, these allegations were not supported by tangible evidence. The protestors version is that the deceased gave the said parcel of land to the petitioners mother. I have no reason to doubt this.

I have considered the protestors evidence and I and persuaded that she was truthful and that her proposed mode of distribution is fair, just and equitable and acceptable to all the other beneficiaries except the petitioner.

Accordingly, I allow the protest and make the following orders:-

> ***a. That*** *the Grant of letters of Administration intestate to the deceased's estate be made to* ***Eprahim Mwangi Gachigua*** *in this cause on 16th May 2014 be confirmed.*
>
> ***b. That L.R. No Konyu/ Baricho/2133*** *measuring* ***2.45*** *acres to be shared as follows:-*

Grace Wanjira Mwangangi----0.288 acres.

Ellah Wanjagi Mugambi------0.144 acres.

Catherine Gathoni Kamuru----0.200acres to hold in trust for the family of Margaret Wanjiku Kamuru-deceased.

Beatrice Gakenia Mbugua-----0.288 acres.

Ephrahim Mwangi Gachigua---0.144 acres.

Joyce Nyambura Mbicho----0.288 acres.

Jane Wairimu Kaura------0.288 acres.

Rose Mumbi Ndungu---0.288 acres.

Agnes Wanjiru Kihurani------0.288 acres.

Mercy Nyaguthii Ngatia -------0.288 acres

***c. <u>That</u>** shares at Barclays Bank of Kenya Limited be shared equally among:-*

Grace Wanjira Mwangangi

Ellah Wanjagi Mugambi

Catherine Gathoni Kamuru

Beatrice Gakenia Mbugua

Ephrahim Mwangi Gachigua

Joyce Nyambura Mbicho

Jane Wairimu Kaura

Rose Mumbi Ndungu

Agnes Wanjiru Kihurani

Mercy Nyaguthii Ngatia

***d. <u>That</u>** the rest of the properties be shared as per the consent recorded in court on 27th July 2015.*

e. No orders as to costs.

Right of appeal 30 days

Dated at Nyeri this **24th** day **November** of 2016

John M. Mativo

Judge

Delivered at Nyeri this **24th** day **November** of 2016

Hon. Justice Ngaah

Judge

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[1] {1955} 1 WLR 948 at 955

[2] {2007} 4 SLR (R} 855 at 59

[3]Koinange and 13 others vsKoinange {1968} KLR 23

[4]{1947} 2ALL ER 372

[5] See H. Venkatachala Iyengar vs B. N. Thimmajamma & Others, 1959 AIR 443, 1959 SCR Supl. (1) 426- Supreme Court of India

[6] See the Judgment o A. Mabeya J. in **Succession Cause No.43 of 2002, In the matter of the Estate of Noah Wanjala Kimawachi-Deceased**