



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. SUCCESSION CAUSE NO. 16 OF 2015

(FORMERLY CHUKA PM'S SUCC. CAUSE NO. 42 OF 2016 & MERU MISC SUCC. CAUSE NO. 66 OF 2008)

IN THE MATTER OF THE ESTATE OF THE LATE IRAMU MUTE AYUB (DECEASED)

AND

ANTIPAS MATIBU AYUB MUGO.....APPLICANT

- VERSUS -

TIRAS NTHIGA AYUB.....PETITIONER/RESPONDENT

J U D G M E N T

1. Betha Kangai Ayub died in or about 2005. She had four (4) sons and five (5) daughters one of whom predeceased her. While alive, all her daughters were and, as at the time of this Succession Cause, still happily married. Her sons were Mukuru Njue, Iramu Mute Ayub, Antipas Matibu Ayub Mugo (*"the Objector"*) and Tiras Nthiga Ayub (*"the Petitioner"*).

2. As an organised, focused and loving mother, she bought and settled all her sons on various properties while she was still alive. It is on that basis that in 1990 she bought the property known as Karingani/Ndagani/2363 measuring 0.0672 Ha and caused it to be transferred to Iramu Mute Ayub (*"the deceased"*) in 2001. The deceased was challenged in that he was deaf and mute. As at that time, she is said to have been in her late 90s. On 30th October, 2002, that property, Karingani/Ndagani/2363 (hereinafter *"plot 2363"*) was registered in the names of the Petitioner in trust for the deceased. But fate as would have it, Iramu Mute Ayub passed away on 26th July, 2005 aged 64 years and his said mother followed twenty (20) days after.

3. On 16th June, 2006, the Petitioner, one of the brothers to the deceased, applied for Letters of Administration Intestate for the estate of, the deceased. In Form No. P&A 5, he stated that he was the only person surviving him and the asset comprised plot 2363 plot only. On 29th August, 2006, the grant was issued to him which was subsequently confirmed on 11th April, 2007. In the meantime, immediately after the demise of the deceased the other brothers of the deceased, namely Antipas Matibu Ayub and Njue Ayub (*"the Applicant"*) entered plot 2363 and started cultivating the same. Pursuant thereto, on 11th March, 2008 after the confirmation of the grant in which plot 2363 was distributed to the Petitioner wholly, Ms Mokuia Mong'are & Associates wrote to the said two brothers accusing them of having trespassed on to plot 2363 which belonged to the Petitioner. It is then that the Applicant rushed to the lands office and discovered that by virtue of the present Succession Cause, the Petitioner was the sole and exclusive owner of the Plot 2363. The two brothers faithfully obliged and vacated from that property.

4. On 8th April, 2008 through the firm of Wilson P. Mburugu and Company Advocates, the Applicant took out summons under Section 76 of the Law of Succession Act (hereinafter "*the Act*") for the revocation of said grant. Of course the Petitioner opposed the application which was heard by way of viva voce evidence.

5. PW₁ was the Applicant. He testified that the Petitioner was his youngest brother. That the deceased was also one of his brothers who died without leaving a wife or child. That he had assisted his mother to buy plot 2363. That his late mother was in occupation and was cultivating plot 2363 before her demise. He told the court that after the deceased passed on, all the brothers entered into occupation and started cultivating the said property. Two years later, the Petitioner evicted them therefrom after having been registered as the owner. That he did not know about the present Succession Cause until he received the letter from the Petitioner's Advocates to vacate from plot 2363. He produced his mother's passbook with Chuka Farmers Co-operative Society Ltd wherein he was a Co-signatory and the letter dated 11/3/2008 by Mokuia Mong'are & Associates as P Exh 2 and 3, respectively. In cross-examination, he told the court that he was unaware that the Petitioner had been registered as a trustee of the deceased in the said property; that he had once attempted to have that property transferred to himself before it was transferred to the deceased. He closed his case and did not call any witness.

6. RW₁ was the Petitioner. He adopted his Affidavit which he had filed in opposition to the application. He told the court that neither he nor the Applicant contributed to the acquisition of plot 2363. The same was solely purchased by their mother. That after the attempt by the Applicant to be registered as owner of the said property were thwarted in 2000 by the area Land Board, his mother and the deceased decided that he the Petitioner be registered as trustee of the said property on behalf of the deceased. That he was the one taking care of both the mother and the deceased before they passed on. That his trusteeship became absolute after the deceased died. In cross-examination, he told the court that he never depended on the Applicant for his studies nor did the Respondent assist in the purchase of his land. The Petitioner further testified that he indicated in the application for grant that he was the only survivor because he had been advised that the trust became absolute after the deceased passed on. He admitted that after the deceased passed on the Applicant and his other brother had taken possession of the property and commenced cultivating the same.

7. RW₁ and RW₂ were Grace Ciakuthii and Lydia Kaari, respectively. They testified that they were both daughters of the late Betha Kangai Ayub and sisters to the deceased. That plot 2363 belonged to their mother who had expressed the wish that the same be held by the Petitioner in trust for the deceased and in the deceased's absence, the same belong to the Petitioner. That the Applicant had tried to trick their mother to be registered as the owner of plot 2363 but the Land Board bursted his intention when it summoned the other brothers whereupon it was agreed that the property be registered in the name of the deceased. According to them, they were happily married and the deceased's property should devolve to the Petitioner in terms of his and their mother's wish. That was the close of the Petitioner's case.

8. Although the court directed counsel's to file their submissions, none were filed and the court had to determine the matter on the basis of the evidence on record.

The issues for determination are; was the Succession Cause lodged secretly without the requisite consent of those entitled? Was, plot No. 2363 to devolve to the Petitioner on the demise of the deceased? How should the estate be distributed?

9. Before delving into the issues that arise for determination, I think it is proper to note the findings that are not disputed. It is not in dispute, as stated at the beginning of this judgment that the mother of the deceased and the parties to this cause had settled all her sons on their various lands. It is not in dispute that plot 2363 was first registered in the name of the mother, the late Betha Kangai Ayub and later transferred to the deceased in 2001. It is in 2002 that the property was then registered in the name of the Petitioner in trust for the deceased.

10. Although there seemed to be a dispute on whether or not the Applicant contributed to the purchase of Plot 2363, this court's finding after considering the evidence in totality is that; plot 2363 was purchased

by Betha Kangai for her own use. There was evidence to show that from her coffee proceeds, bananas and some goat, she paid the purchase price for the said property. Apart from stating that he had been in hi-flying jobs, including that of a banker and a co-signatory in the mother's passbook, the Applicant produced no evidence to show that he participated in the purchase of that property. Being a mere co-signatory in the pass book in my view was not evidence of co-ownership of the coffee proceeds. As at the time of the demise of the deceased, plot 2363 was registered in the name of the Petitioner but in trust for Iramu Mate Ayub.

11. On the first issue, the Petitioner admitted that he did not involve the Applicant and his other brother when lodging the Petition. Indeed he did not disclose in Form No. P&A 5 that there were other persons surviving the deceased other than himself. When asked why he did so, he frankly stated that he was advised by the officers at the lands office that on the demise of the deceased the trust had become absolute and he was the sole heir thereof. That there was no need to name the others as the property was not up for distribution. That this was a fact known by even the local chief who wrote a letter of introduction along those lines. This court saw the witnesses testify, the Petitioner seemed to be genuine. Even in his Affidavit, he was candid with the court. He swore in paragraphs 5 (c) and 7 of his Replying Affidavit sworn on 13th April, 2016 as follows:-

"5

(a)

(b)

(c) That I was not advised when filing the petition forms that I was required to list my other siblings nor seek their consents as the property herein was not subject to being shared but was to devolve absolutely to me following my late mother's wishes and which wishes were well known to my other siblings.

6.

7. That I do wish to state that I have come to court with clear hands and would wish to express that if the court does so hold that the parcel herein is part of my deceased brother's estate and should therefore be shared between all the siblings, then I would not have a problem with this direction so long as, all the siblings, myself and the two brothers including our three sisters do get a share." (Underlining provided).

In this court's view, that is not a position that is expected of a stealth and fraudulent Petitioner. He acted on wrong advice. He should have disclosed all those who are expected to have survived the deceased notwithstanding the existence of the trust.

12. The next issue is whether with the demise of the deceased, plot No. 2363 devolved to the Petitioner. The record shows that all the sons of the late Betha Kangai Ayub were settled by her during her lifetime. She purchased and became registered as owner of plot No. 2363 on 7th May, 1990. It became clear at the hearing that the Applicant did attempt in 2000 to have the property transferred from her to him. He explained that he wanted to be its administrator on behalf of the deceased who was challenged but the Land Board declined. That the Land Board directed that the incapacity of the deceased did not prevent him from being registered as owner. It is then that the family was called and the deceased was registered as owner instead of their mother. This version differed with the testimony of RW₂ Grace Ciakuthii Nyaga his sister. She told the court how she stumbled upon the Applicant and her mother at the local District Officer's office. That she was summoned into the office and found her mother crying. On being asked if she had brought her mother to transfer plot 2363 to the Applicant she denied. The mother was crying because she had discovered that the Applicant had tricked her to transfer plot 2363 to him. It is then that the Land Board directed that the rest of the family members be consulted on the issue.

13. The Applicant testified that he was not aware how the Petitioner came to be registered as trustee of

the deceased. That the registration of plot No.2363 in the Petitioner's name in trust for the deceased was fraudulent. On his part, the Petitioner testified that the registration was at the instance of both his mother and the deceased. That there was no fraud whatsoever on his part. RW₂ and RW₃ were categorical that their mother had stated that the property be registered in the name of the Petitioner in trust for the deceased because it is the Petitioner who was looking after both the mother and the deceased before their demise. That the said decision was made because of the deceased's apparent incapacity. That in the absence of the deceased, the property was to belong to the Petitioner.

14. The court has considered the evidence on record. It became clear at the hearing that the deceased and the mother were living together in plot No.2363. When the mother fell sick, she moved to live with the Petitioner and the deceased used to go to the Petitioner's home daily for food. The mother was about 100 years and the deceased about 64 years. The Petitioner's home was about a kilometre away while the Applicant was living five (5) kilometres away. It is more likely than not that the two (2), the mother and deceased, at their advanced age would seek help and readily get assistance from the Petitioner who was living a stone throw away as testified by the sisters than the Applicant who lived a little while away. It also became clear at the trial that the Petitioner was the one cultivating the property for the benefit of the two before their demise. It is after their demise that the Applicant and his other brother, Mukuru Njue Ayub invaded the same and started using it. The mother was too old to cultivate it. It required a person with energy to utilize it profitably for both the mother and the deceased.

15. From the evidence on record, this court is satisfied that the trusteeship of the Petitioner was not procured by fraud. It must have been the apprehension of both the mother and the deceased that since the Applicant had previously attempted to acquire that property through trickery, nothing would prevent such a likelihood in the future. That in order to secure the interests of the deceased, it would be safe to have it held by the Petitioner in trust for the deceased.

16. What happened after the demise of the deceased? I believe that this was a revocable trust that the deceased created. In bestowing the property upon the Petitioner in trust, he must have intended the same to be held on his behalf. He could have revoked that trust during his lifetime. On his death, it became irrevocable. He could not change the terms thereof. He must have intended the property to pass to the Petitioner absolutely. If it was his intention that it passes on to his beneficiaries who are his three (3) brothers upon his death, nothing would have been easier than to have registered all the three jointly in trust for himself. This he did not do during his lifetime. Further, considering that the property had escaped being taken by the Applicant earlier, the intention of the deceased was clear, that on his demise, the trustee becomes the owner absolute. This intention was expressed by the very act of having a property which had just been registered in his name in 2001 transferred to the name of the Petitioner in trust for himself only a year later, 2002. It should be recalled that, none of his brothers were taking care of both the mother and the deceased except the Petitioner. It is the Petitioner who was using plot 2363 for the benefit of both the deceased and his mother.

16. In view of the foregoing, I find that the trust was properly created by the deceased. It was his intention that the property be held by the Petitioner on his behalf and that on his demise the same remains or passes on to the Petitioner. In this regard, upon his demise, there was no estate available for distribution.

18. In the premises, the application is without merit and the same is hereby dismissed. This being a family dispute, I make no order as to costs.

DATED and Delivered at Chuka this 13th day of December, 2016.

A. MABEYA

JUDGE