



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 107 OF 2006

ISAAC MUNORU NAMAN.....1ST PETITIONER

RAEL KABURU NAMAN.....2ND PETITIONER

V E R S U S

SAMUEL MAORE.....RESPONDENT

RULING

The 1st Petitioner herein, Isaac Munoru Naman filed an amended summons dated 21/6/2012 in which he sought several orders against Samuel Maore the Respondent, *inter alia*, restraining Maore from using or leasing Plot No. 42, Maua Township and that the court do order that the said plot do revert back to the deceased's estate.

After considering the rival arguments, the court came to the conclusion that this being a succession cause, because the question of whether or not the Plot No. 42, Maua Township should form part of the deceased's estate ought to be determined at a full trial. The court dismissed that application. The parties fixed the matter for hearing and the hearing commenced by taking the 2nd Petitioner's case.

PW1 Samuel Maore (the Respondent) testified that Naman Nabea was his father, the deceased while his brother is Isaac Munoru Naman and the mother is Rael Kaburu Naman, 1st Petitioner, and 2nd Petitioner. He recalled that his father owned Plot No. 42 Maua, which was registered in the names of the father and mother. He produced in evidence a letter from Municipal Council of Maua dated 7/9/2001; that when the father died in 1996, the property remained with the mother. He produced in evidence the record of the Municipal Council of Maua showing the history of the plot whereby it shows that on 20/6/1994, the plot was transferred to the 1st Petitioner, Isaac Nabea, by the deceased but the deceased retransferred it in 1995 back to his own name and his wife, 2nd petitioner; that upon the deceased's death, the land went to the 2nd Petitioner because they were joint owners; that in 2010, the 2nd Petitioner transferred the land to him as per minutes, Municipal Council of Maua of 3/9/2010 (PEXNO.4). He denied that the plot should have been listed in this cause as part of the deceased's estate. According to PW1, his father left a will distributing all his estate to his two houses and that his siblings are not entitled to Plot 42.

1st petitioner (DW1) testified that 5 acres of land was registered in his names when he was a child; that when he grew up, their mother told him to share it with his brother PW1 and they shared it equally and were left with Plot 42 as family land; that before he died, the deceased called him secretly and transferred Plot 42 to him because the deceased had noticed that the mother had shown hatred towards him. However, his sisters advised him to have the mother's name included in the title to hold in trust for all of them and that after deliberations, the deceased agreed to transfer the land to his name and their mother's; that the plot remained in the mother's names till 2010 when she secretly transferred it to his brother, PW1. They decided to challenge the said transfer. He argued that the deceased made a will and left it with one Joseph Mutura, in which he transferred all his estate to his two wives to hold in trust. He said that the land that had been registered in his names was shared out equally and so should Plot 42 which is the only property in this case; that this dispute only relates to the house of Rael, the 2nd Petitioner but not the other house of the deceased's wife.

DW2, Janet Mtundu, is a sister to DW1. She testified that before their father died, he called John Mutura to write for him a will sharing out his property between his two wives. That Plot 42 had been registered in DW1's name but they persuaded him to have it registered in the mother's name so that she could be benefitting from the proceeds. She learned of the transfer of the plot to PW1 by the 2nd petitioner and that is why they came to court to challenge it so that it forms part of the deceased's estate.

PW3, Eunice Kamami, another sister of PW1 and DW1 reiterated what DW1 and 2 told the court that Plot 42 is family property to which all are entitled.

PW4 Elizabeth Thirindi, another sister to PW1 and DW1 said that Plot 42 Maua belongs to her mother's house. She said that the plot was left in Rael's name because she was supposed to use the proceeds for her upkeep.

I have carefully considered all the evidence on record and submissions by Counsel. PW1 produced documents in this court which set out the history of the disputed Plot 42 Maua and these facts are not in dispute. In the minutes of Maua Municipality dated 31/5/2007 (PEXNO.2) Minute 527, the deceased transferred Plot 42 Maua to 1st Petitioner, Isaac Munoru on 28/6/1994 and the transfer was approved. However, by the application No. 627 (PEX.3) the deceased sought to have the plot transferred back to his names with his wife Rael Kaburu as per Minutes of 29/3/1995. Although DW1-5 said that they are the ones who prevailed on their father to transfer the land back to deceased's name and that of their mother, there is no evidence to that effect. There is also no evidence that the land was held in trust by their mother, 2nd Petitioner. It is also not in dispute that as of 1996 when the deceased died, the land was still registered in the joint names of the deceased and his wife, Rael 2nd Petitioner. It is the case of Samuel Maore that the doctrine of ownership of *jus accrescendi* applies. The said common law doctrine is enshrined in the repealed land law Section 102 of the Registered Land Act (RLA) which reads:

“102. (1) Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently –

a. Dispositions may be made only by; all the joint proprietors; and

b. On the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly.

(2) For avoidance of doubt, it is hereby declared that –

a. The sole proprietor of any land, lease or charge may transfer the same to himself and another person jointly; and

b. A joint proprietor of any land, lease or charge may transfer his interest therein to all the other proprietors.

(3) Joint proprietors, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joint proprietorship, and the severance shall be completed by registration of the joint proprietors as proprietors in common and by filing the instrument”.

The said principle is to the effect that on the death of one joint co-owner, the entire co-owned estate survives to the remaining joint tenant or co-owner. The court was referred to the recent decision of **IN THE ESTATE OF JOSEPHINE MUMBUA SUCCESSION CAUSE 977/1998** and **IN THE MATTER OF ESTATE OF EDWARD KIHARA MUTTU (DECEASED) SUCCESSION CAUSE 199/2011**. Though the provisions of the Registered Land Act (RLA) applied to registered land yet the principle of joint ownership applies to all property regardless of registration status.

The holding in the above case applies to this case so that, since the land was fully owned by the deceased, upon the demise of the deceased, the interest of the deceased was fused with that of Rael and the deceased's interest was not available for distribution as part of the deceased's estate.

In this case, there is evidence that Rael, who is alive, has transferred Plot 42 Maua to her one son Samuel Maore (PW1). The question is whether she had the capacity to pass the land to PW1-4. DW1-5 claim that Plot 42 is family property but there is no evidence that it was held in trust by Rael nor is there any evidence that before his death, the deceased applied to have it held in common in terms of Section 102 (3) of the Registered Land Act. Rael became the sole owner after the deceased's demise and she had a right to deal with the land as she wished. The fact that the Plot had been transferred to Isaac and repossessed by deceased is not evidence that it belonged to the family. That status ended once the deceased retransferred it to himself and Rael.

It is admitted that the deceased left a will with one John Mutura distributing all his estate to his 2 wives. There is evidence that the deceased had two wives but this dispute only affects Rael's house. The will did not specify what properties were referred to. In any event, the will could not have included the disputed plot because it was jointly owned and the law applicable to Plot 42 Maua is as considered above.

The allegation by DW1 that 5 acres of land had earlier been registered in his name and he shared it equally with his brother Maore, cannot be a basis for Plot 42 being shared amongst deceased's children. In fact, DW1 did not provide any evidence to show that such property ever existed and was shared out.

Having considered all the above, I find that Plot No. 42 Maua now registered under Samuel Maore does not form part of the deceased's estate and is not available for distribution as part of deceased's estate. The application by the 1st petitioner is therefore dismissed. This being a family matter, each party will bear its own costs.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JUNE, 2015.

R.P.V. WENDOH

JUDGE

PRESENT:

Faith, Court Assistant

Mr. Nyanyire for 1st Petitioner

Mr. Omari Holding Brief for Mr. Mwanzia for 2nd Petitioner