



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 375 OF 2009

IN THE MATTER OF THE ESTATE OF ELIUD NJOROGE KURIA (DECEASED)

RULING

1. The cause herein relates to the estate of Hiram Mururu Chege, who died on 19th January, 2008.
2. Representation to his estate was sought vide a petition for grant of letters of administration intestate filed herein on 17th February by Lucy Wanjiku Chege and Kelvin Karagu Chege, who described themselves as widow and son, respectively, of the deceased. In their affidavit sworn on 10th January 2009 to support the petition, they list themselves and Anthony Maina Chege as the sole survivors of the deceased. There is a letter on record dated 9th October 2008 from the Chief of Kihumbuini Location, Thika, lodged in court on 17th February 2009, where the survivors of the deceased were listed as, from the first house – Lucy Wanjiku Chege, Kelvin Karagu Chege and Anthony Maina Chege; and from the second house – Tabitha Wakiyu Kabuthia and Kevin Karagu Chege. A citation had earlier been issued, at the instance of Lucy Wanjiku Chege, for service upon Tabitha Wakiyu Kabuthia. A grant of letters of administration intestate was duly made to the petitioners on 3rd March 2011.
3. Predictably, Tabitha Wakiyu Kabuthia moved the court for revocation of the grant of 3rd March 2011 vide a summons dated 18th May 2011. The said grant was revoked on 10th April 2013 and a fresh one made in the names of Lucy Wanjiku Chege, Kevin Karagu Chege and Tabitha Wakiyu Kabuthia. A certificate to that effect was issued.
4. The summons dated 6th November 2013 is for the confirmation of the grant of 10th April 2013. The application is brought at the instance of only two of the administrators, Lucy Wanjiku Chege and Kevin Karagu Chege. Only members of the first house appear to support it, for the consent on distribution is executed by the three members of that house only. They propose that the three (3) landed assets be shared equally between the three administrators, while the pension due from Kenya Pipeline Co. Ltd should go to Lucy Wanjiku Chege absolutely.
5. In reply, the other administrator, Tabitha Wakiyu Kabuthia, swore on 6th February 2014, what she calls a supporting affidavit. In the body of the affidavit she objects to the mode of distribution proposed by the applicants. For all purposes her affidavit is a protest to the confirmation application. I shall therefore treat her as a respondent for the purpose of the application before me.
6. She states that she does not consent to the proposed mode of distribution, pointing out that she had not executed the affidavit in support of the application for confirmation of the grant. She raises several issues. The first being that the other two children of the deceased, that is to say Kevin Karagu Chege and Anthony Maina Chege, had not been provided for. Secondly, that the identity

of the property making up the estate of the deceased had not been properly ascertained, nor had the shares of the all the persons beneficially entitled been agreed upon.

7. She avers that the only assets forming the estate are Embakasi Ranching Plot No. 5577 and the Clayworks Plot No. 808. She argues that the rest – that is to say the Kahawa Sukari house on Plot No. 1370 and the pension benefits with the Kenya Pipeline Company Limited – do not form part of the estate of the deceased. She asserts that the Kahawa Sukari property was jointly owned by her and the deceased, while the pension benefits were subject to a nomination. Both assets therefore should pass in ways that lay outside of the succession process. She proposes that the two assets available for distribution should be shared out as follows:-Plot No. 5577 to herself and her son Kevin Karagu Chege and Plot No. 808 to Lucy Wanjiku Chege and her sons Kevin Karagu Chege and Anthony Maina Chege.
8. She has attached documents to her affidavit to support the assertion that Plot No. 1370 was jointly owned. There is a certificate from the Kahawa Sukari Ltd dated 3rd October 2007 indicating that the deceased and the respondent were the registered allottees of the said plot. There is a receipt issue by Kahawa Sukari Ltd dated 3rd October 2007 to acknowledge receipt of a sum of Kshs. 5,000.00, being the fee for the additional name of the wife, ostensibly for the allotment of Plot No. 1370. Then there is a letter from J. W. Wanjohi & Company, Advocates, dated 6th September 2012, to Kahawa Sukari Ltd, seeking confirmation that the letter dated 3rd October 2007 and the receipt dated 3rd October 2007 were legitimate documents issued by the Kahawa Sukari Ltd. The letter from Kahawa Sukari Ltd dated 13th September 2012 to J. W. Wanjohi & Co. Advocates, confirms that the two documents are authentic and had been issued by the company. It is specifically confirmed that the deceased bought the said property in 1996 and the addition of the name of the respondent was done with the full authority of the deceased, after he personally came to their offices, enquired about the procedure and paid the required fee.
9. The first applicant, Lucy Wanjiku Chege, responded to the protest by the respondent through an affidavit sworn on 6th March 2014. She asserts her position as the only person who was lawfully married to the deceased, and refers to the judgment of GBM Kariuki J. of 10th April 2013. She states that she married the deceased in 1985 and that Plot No. 1370 was acquired with her joint efforts with the deceased. She explains how they paid the purchase price in instalments and how they thereafter commenced construction of the house on it. She goes to state that deceased began to abuse her in 2001, she developed mental illness and was admitted at the Mathari Mental Hospital, where the deceased abandoned her, and it was during that period that the respondent began to have an affair with the deceased. She states that so far as Plot No. 1370 is concerned, the respondent only emerged in 2007 to irregularly have her name added to the allotment certificate. She points out that the addition of the respondent as co-owner of Plot No. 1370 came on 3rd October 2007, just two (2) months before the deceased died of hypertension on 19th January 2008.
10. She has attached to her affidavit a certificate of marriage serial number 19634 as proof that she married the deceased in 1985. There is also copy of the judgment of GBM Kariuki J. of 10th April 2013, where the court found that the respondent was not validly married to the deceased, but was a dependant thereof. Then there are copies of the statements filed herein on 21st September 2012 in the revocation of grant proceedings by the applicants. There are copies of documents relating to acquisition of the Embakasi plot dating back to 1991, Njiru property dating to 1999, plot No. 808 dating to 2001 and from the Kenya Pipeline Company Retirement Benefits Scheme which indicated who was entitled to pension benefits.
11. The parties swore and filed other further affidavit to reiterate the positions stated in their earlier affidavits.
12. Directions were given on 8th April 2014 that the application was to be determined on the basis of written submissions, to be highlighted. Both sides did file their respective submissions, but opted

to have the matter determined on the basis of the submission without the highlighting.

13. When I settled to prepare a ruling on the application, it transpired that the document intended to be the affidavit in support of the application had not been executed by the applicants but it had been commissioned by a Commissioner for Oaths. I then held in a ruling delivered on 23rd January 2015, that the applicants were to regularize the position by having the affidavit commissioned by a commissioner for oaths. The applicants did as directed and the matter came back to me on 23rd February 2015 for preparation of the ruling.
14. I have carefully perused through the affidavits and the documents placed before me by both sides. I have noted that the dispute revolves around the property at Kahawa Sukari and the pension. The applicants argue that these assets form part of the estate and ought to be distributed, while the respondent argues that they do not and are not available for distribution.
15. It is not in dispute that the Kahawa Sukari property was acquired in 1996. At that time the deceased was living with his statutory wife, the first applicant herein. The respondent was then out of the picture. She had had a child with the deceased before he married the first applicant, they parted ways and he married the first applicant in 1986. The first applicant had health problems as from June 2001 and sometime after that contact between the respondent and deceased resumed. It was during that period of resumption of relations that the details of allotment of the property were changed to include the name of the respondent.
16. From the material before me, the Kahawa Sukari is not registered under any land legislation in favour of the deceased and the respondent. The property is part of a large parcel of land which is registered in the name of Kahawa Sukari Ltd. The deceased acquired an interest in Kahawa Sukari Ltd which entitled him to be allotted a plot in the said larger property belonging to the Kahawa Sukari Ltd.
17. The respondent is no doubt setting up a case that the Kahawa Sukari property is not subject to the succession process since the principle of survivorship applied to it. The said principle operates to remove jointly owned property from the application of the law of succession. It applies to jointly owned property, and holds that where property is jointly owned, upon the death of one of the joint owners or tenants, the interest of the dead tenant unites or merges with that of the surviving tenant, and the latter becomes the sole proprietor thereof.
18. The principle is a statutory one. It was stated in Section 118 of the Registered Land Act, Cap 300, Laws of Kenya, for property registered under that Act. The Transfer of Property Act, Group 8 statutes of the Laws of Kenya, does not expressly provide for joint tenancies and for survivorship or *jus accensendi*, but its provisions in Sections 44, 45 and 46 deal with situations similar to those addressed in Section 118 of the Registered Land Act. The coming into force of the Land Act, 2012 and the Land Registration Act, 2012 brought to an end the application of the Registered Land Act and the Transfer of Property Act.
19. The Land Registration Act has a provision at Section 60 which mirrors Section 118 of the Registered Land Act. Section 60 provides as follows:-

“If any of the joint tenants of any land, lease or charge dies, the Registrar, on proof of the death, shall delete the name of the deceased tenant from the register by registering the death certificate.”
20. As noted earlier, the interest claimed by the respondent is not registered under any of the above statutes. Consequently, the said statutes are not of application in the circumstances. What the respondent holds is a certificate of allotment from the company holding title to the property. The said certificate of allotment does not confer title on the persons named on it. It merely indicates that the holder anticipates that title would be conferred to them at the time of subdivision of the property. As a result, the respondent cannot at this stage plead survivorship to claim entitlement

to the entire parcel of land.

21. The deceased acquired an interest in the property through purchase. That interest is yet to crystallise as titles have not yet been issued. The respondent did not participate in the purchase, but was allegedly introduced as a co-allottee ten (10) years after the initial allotment. There is nothing intrinsically wrong with that for the deceased as allottee had right to deal with his property as he pleased.
22. However, it is a matter of concern that the introduction of the respondent as co-allottee was done two or so months before the deceased died at a time when the deceased was generally doing poorly in his health. That should raise eyebrows. It should be so as the transaction sought to lock out the deceased's lawfully wedded wife and her children, yet the said property was acquired in the days when the two were on good terms and before the respondent reemerged. I am persuaded that the said change of details was done under suspicious circumstances and suggests fraud or undue influence. Consequently, I do hold that the same should not be allowed to stand. The property in question in my view remains, estate property available for distribution to all the members of the household of the deceased.
23. Then there is the issue of the pension. The deceased worked for the Kenya Pipeline Company Ltd and was a member of the Kenya Pipeline Company Retirement Benefits Scheme. There is pension due from the retirement scheme. The documents on record indicate that the pension dues are being paid to the two widows on equal basis. There is however no clear documentation detailing the circumstances under which the pension is being paid to the two. The scheme's trustees stated on the letters on record that the deceased was entitled to a gross monthly pension of Kshs. 78,152.00 for life, and in the event of his death the pension was to be paid to the spouse for life. They mentioned that they were aware of the judgment which recognized the respondent as a widow of the deceased.
24. It is not made clear whether the deceased had executed a nomination form naming any person as the nominee of whatever was due to him as pension. If there were a nomination then the person nominated by the deceased would have been the proper person to be paid the pension dues.
25. The pension scheme trustees have asserted that pension benefits do not form part of the estate of the deceased for the purpose of administration, and that they are payable in accordance with the scheme's orders. They cited Section 36A of the Retirement Benefits Act, No. 3 of 1997, which says-

“Upon the death of member of a scheme, the benefit payable from the scheme shall not form part of the estate of the member for the purpose of administration and shall be paid out by the trustees in accordance with the scheme rules.”
26. I note that although Section 36A of the Retirement Benefits Act refers to payment in accordance with scheme rules, the parties before me have not placed before me a copy of the scheme rules for the Kenya Pipeline Company Retirement Benefits Scheme that governs the pension dues in respect of the deceased. It would be such rules that would have helped me determine whether the payments currently being made are being done in accordance with the law. But as the matter of the pension is outside the scheme of succession, I need not tax my mind on it. The parties are advised to pursue the matter within the framework set out in the Retirement Benefits Act.
27. Having so decided on the two properties, I should proceed to determine how the estate is to be distributed.
28. For the purpose of distribution, the estate of the deceased comprises of three assets – Plot No. 1370 Kahawa Sukari Scheme, Plot Share No. 5577 Embakasi Ranching Co. Ltd and Clayworks Ruiru Plot (known as Uiguano wa Kirere Farm LR No. 10901/195 – Plot No. 808). The deceased was survived by five (5) individuals namely – Lucy Wanjiku Chege and her children, Kevin

Karagu Chege and Anthony Maina Chege and Tabitha Wakiyu Kabuthia and her son Kevin Karagu Chege. It is to these persons that the property named above is to be distributed.

29. The deceased had no doubt married twice, and therefore he had two houses. He could be said to have been a polygamist. His estate should therefore be disposed of in accordance with Section 40 of the Law of Succession Act, which states as follows:-

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Sections 35 to 38.”

30. It would appear that only one of the assets is developed, is that is Plot No. 1370. The others are undeveloped.

31. In view of everything, the said estate shall be distributed as follows:-

- a. **Plot No. 1370 Kahawa Sukari Scheme – to be sold and the proceeds of sale to be thereafter shared equally between Lucy Wanjiku Chege, Tabitha Wakiyu Kabuthia, Kevin Karagu Chege, Anthony Maina Chege and Kevin Karagu Chege;**
- b. **Embakasi Ranching Co. Ltd Plot share No. 5577 to Lucy Wanjiku Chege and her children, Kevin Karagu Chege and Anthony Maina; and**
- c. **Clayworks Ruiru Plot (known as Uiguano wa Kirere Farm LR No. 10901/195 – Plot No. 808 to Tabitha Wakiyu Kabuthia and her son, Kevin Karagu Chege.**

32. There shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF SEPTEMBER, 2015.

W. MUSYOKA

JUDGE