



## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA AT NAIROBI

#### SUCCESSION CAUSE NO. 1750 OF 2008

#### IN THE MATTER OF THE ESTATE OF SAMUEL THUO KAMUYU (DECEASED)

#### RULING

1. The cause herein relates to the estate of Samuel Thuo Kamuyu, who died on 12<sup>th</sup> March 2008.
2. Representation to his estate was sought by a petition for grant of letters of administration intestate lodged in the cause on 24<sup>th</sup> July 2008 by his widow, Grace Njeri Thuo, and daughters, Charity Wamugo Thuo and Faith Mweru Thuo. He was expressed to have been survived by the said widow and two daughters, and to have had died possessed of a property known as Dagoretti/Waithaka/322. A grant of letters of administration intestate was accordingly made to the petitioners on 18<sup>th</sup> November 2008.
3. The administrators lodged a Summons in court on 23<sup>rd</sup> September 2009 for confirmation of the grant, proposing distribution of the estate between the three administrators. Affidavits of protest were lodged against the proposed distribution by Johnstone Kimani Kamuyu, sworn on 10<sup>th</sup> May 2010, and Edward Kirumba Kamuyu, sworn on 2<sup>nd</sup> July 2010. The grant was confirmed on 8<sup>th</sup> June 2010 distributing the estate amongst the three administrators, and a certificate of confirmation of grant was subsequently issued. However, the confirmation orders were set aside on 20<sup>th</sup> July 2010 and the certificate of confirmation of grant cancelled.
4. The issues raised in the affidavits of protest referred to above are relevant to the ultimate decision to be in this ruling. The protestor's case is that the property, the subject of the proceeding, was held in trust by the deceased on his own behalf and that of the other children of his mother. He asserts that there is a finding to that effect by Rawal J. in Nairobi **HCSC No. 730 of 1995**, in the matter of the estate of the deceased's father, Thomas Kamuyu Thuo, in a ruling delivered on 21<sup>st</sup> November 2008.
5. On 14<sup>th</sup> July 2010, an application dated 13<sup>th</sup> July 2010 was lodged at the registry seeking amendment of the grant made to the administrators. The said application was grounded on the matters raised in the affidavits of protest referred to in paragraphs 3 and 4 above.
6. The application of 14<sup>th</sup> July 2010 was responded to by one of the administrators, Charity Wamugo Thuo, through her affidavit sworn on 29<sup>th</sup> July 2010. She asserts that the property in question was not held in trust by the deceased for the protestors as alleged, but rather it belonged to the deceased exclusively. She states that Rawal J. in the ruling of 21<sup>st</sup> November 2008 in **HCSC No. 730 of 1995** did not hold that the property was held in trust but only expressed an opinion that he deceased held the property in trust.

7. The parties agreed on 16<sup>th</sup> September 2014 that the issues outstanding in the matter be disposed of by way of written submissions. I gave directions to that effect. The parties complied by filing their respective submissions, complete with authorities that they relied on.
8. I have carefully perused through the record – the applications pending, the rival affidavits and their annexures, as well as the submissions lodged by counsel for both sides – and I am of the view that I should determine the pending applications simultaneously. There is the application dated 23<sup>rd</sup> September 2009 which seeks confirmation of the grant and the application dated 14<sup>th</sup> July 2010 which seeks revocation of the grant.
9. There is no dispute that the administrators are the survivors of the deceased. The only dispute is whether the property which makes up the estate of the deceased belonged to him absolutely or he had held it in trust for his siblings. How the estate of the deceased is to be distributed, in my view, rests solely on the answer to that question.
10. The background to how the deceased came to be registered as owner of the subject property, Dagoretti/Waithaka/322, was set in the ruling of Rawal J. of 21<sup>st</sup> November 2008 in **HCSC No. 730 of 1995**. The said property formed part of the wealth of the father of the deceased, the subject of the proceedings in **HCSC No. 730 of 1995**. He settled his first two houses in Dagoretti/Waithaka/336, which is not the subject of these proceedings, and the third house on Dagoretti/Waithaka/322. The parties in the instant cause were members of the third house that was settled on Dagoretti/Waithaka/322.
11. Rawal J. took oral evidence with respect to the two assets. At the end of it Rawal J. identified two undisputed facts relating to Dagoretti/Waithaka/322, which are relevant to the dispute now before me. Rawal J. noted:-

**“There are thus some undisputed facts before the court-**

1. **The 3<sup>rd</sup> house has been moved to and settled in property No. 322 since 1969. The property was registered in the names of the eldest son Samuel Thuo who is now deceased.**
2. **The children of the third house have built their houses on property 322 and have never put up any structure on the property No. 336.**
3. **...”**

12. Rawal J. then went ahead to identify the various issues that were to be determined by the court. Issue (a) aptly addressed the matter now at hand, it was framed as follows-

**“(a) whether the *intervivos* registration of property No. 322 in the names of the eldest son of the 3<sup>rd</sup> house was in trust for all the children of the said house.”**

13. After considering the facts and the law Rawal J. concluded as follows-

**“Thus I do agree with Mr. Kamonde the learned counsel for two houses, that the members of 3<sup>rd</sup> house have acquired overriding interest on 11 acres each against the title held by the deceased owner of property No. 322 ... The facts on record do unhesitatingly point that the registered proprietor of property No. 322 held the same in trust for his mother’s family.”**

14. The issue as to whether Dagoretti/Waithaka/322 was held in trust by Samuel Thuo Kamuyu was resolved once and for all in **HCSC No. 730 of 1995** by Rawal J. The matter is *res judicata*. I cannot reopen it. It cannot be re-litigated over. The deceased, Samuel Thuo Kamuyu, held the said property in trust for himself and for all his siblings from his mother’s side of the family.
15. The said asset cannot therefore be distributed as if it belonged solely to Samuel Thuo Kamuyu. It

has to be distributed first equally between all the children of the third house, with Samuel Thuo Kamuyu's share going to the administrators of his estate.

16. As indicated above, I have two applications to determine, one for revocation of the grant herein and the second for the confirmation of the grant. After due consideration of all circumstances of the case, I am of the view that the grant ought to be revoked so that the other beneficiaries to the property known as Dagoretti/Waithaka/322 can be incorporated into the administration of the estate. The grant on record cannot therefore be confirmed in the circumstances.

17. I have noted from the ruling of Rawal J. of 21<sup>st</sup> November 2008 that the court did not give directions on how Dagoretti/Waithaka/322 was to be shared between the members of the third house, all nine (9) of them; and I shall therefore not venture to deal with distribution at this stage.

18. The orders that I am disposed to make are as follows:-

- a. **That the grant of letters of administration intestate made on 18<sup>th</sup> November 2008 to Grace Njeri Thuo, Charity Wamugo Thuo and Faith Mweru Thuo in respect of the estate of the deceased is hereby revoked;**
- b. **That I appoint Grace Njeri Thuo and Edward Kirumba Kamuyu administrators of the estate of Samuel Thuo Kamuyu, deceased;**
- c. **That a grant of letters of administration intestate in respect of the estate of the said Samuel Thuo Kamuyu shall issue according to the said Grace Njeri Thuo and Edward Kirumba Kamuyu.**
- d. **That the new administrators shall apply for confirmation of the said grant within thirty (30) days of the date of this ruling;**
- e. **That the matter shall be mentioned after thirty (30) days for compliance; and**
- f. **That there shall be no order as to costs.**

**DATED, SIGNED and DELIVERED at NAIROBI this 23<sup>RD</sup> DAY OF OCTOBER, 2015.**

**W. MUSYOKA**

**JUDGE**