



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO.521 OF 2008**

**IN THE MATTER OF THE ESTATE EX-SENIOR CHIEF JOHN KINUTHIA WANYEE  
(DECEASED)**

**CHARLES KAHENDE KINUTHIA**

**SERAH WAIRIMU MUKIRI.....PETITIONERS**

**VERSUS**

**NAOMI NYABAE KAMUYU.....OBJECTOR**

**JUDGMENT**

John Kinuthia Wanyee, the deceased to whose estate these proceedings relate, died on 18<sup>th</sup> November 2007. On 18<sup>th</sup> March 2008, Charles Kahende Kinuthia and Serah Wairimu Mukiri, petitioned the court to be issued with a grant of probate of the deceased's last written Will. With the petition, the Petitioners annexed the last written Will of the deceased. In the Will, the deceased listed the beneficiaries to his estate. He also listed his properties. He indicated how the properties were to be distributed to the beneficiaries. The petition was gazetted on 23<sup>rd</sup> May 2008. On 28<sup>th</sup> June 2008, Naomi Nyabae Kamuyu (the Objector) filed an objection to the grant being issued to the Petitioners. She also filed an affidavit in support of the objection. The Objector stated that she was the sister to the deceased. She further stated that the deceased was registered as the owner of a parcel of land known as LR. No. Dagoretti/Riruta/56 (hereinafter referred to as the suit parcel of land) upon inheriting the same from their deceased father, Kamuyu Kinuthia.

The Objector stated that the deceased held the title to the said parcel of land in trust for himself and his siblings namely, the Objector and her sister Nditiai Kamuyu. The Objector averred that the deceased had caused the suit parcel of land to be subdivided into seven (7) parcels of land *i.e.* LR. Nos. Dagoretti/Riruta/3598, Dagoretti/Riruta/3599, Dagoretti/Riruta/3600, Dagoretti/

Riruta/3601, Dagoretti/Riruta/3602, Dagoretti/Riruta/3603 and Dagoretti/Riruta/

3604. The Objector stated that she, and the children of her late sister Nditiai Kamuyu had resided on the suit parcel of land even during the lifetime of the deceased. It was therefore the Objector's case that the court should recognize her and the children of her late sister as beneficiaries of the estate of the deceased, and who would be entitled to inherit the above parcels of land.

In response to the objection, the Petitioners swore a replying affidavit. They denied that the Objector was a beneficiary of the estate of the deceased. They however conceded that the Objector and Nditiai Kamuyu (Lilian Nditiai) were indeed the sisters of the deceased. They admitted the deceased had caused the parcel of land formerly registered as LR. No. Dagoretti/Riruta/56 to be subdivided resulting in the subdivisions referred to by the Objector. They explained that the suit parcel of land was owned by the deceased at the time of his death. He did not hold the same in trust for any of his siblings. They however conceded that the Objector and the children of Nditiai Kamuyu indeed reside in part of the suit parcel of land specifically the parcels of land registered as LR. Nos. Dagoretti/Riruta/3604 and Dagoretti/Riruta/3598.

The Petitioners explained that it was not the first time that the Objector had challenged the ownership of the suit parcel of land by the deceased. They annexed a copy of court proceedings conducted in the **Kikuyu African Court in Succession Cause No.15 of 1963**. In the case, the Objector objected to the deceased being registered as the owner of the suit parcel of land was rejected. The court made a finding that the suit parcel of land be registered in the name of the deceased, who was the first born son of Kamuyu Kinuthia who died on 7<sup>th</sup> January 1962. It was the Petitioners' response that that decision determined the dispute that then existed between the deceased and the Objector. It was therefore not open for the Objector to raise the same issues fifty (50) years after the dispute had been determined. In the premises therefore, the Petitioners urged the court to uphold the Will. They further urged the court to make a finding that the Objector and her late sister's children were not the dependants of the deceased and therefore are not entitled to inherit the suit property which exclusively belonged to the deceased.

Directions were duly taken before this court. On 25<sup>th</sup> May 2009, a consent was recorded in court on the following terms:

***“By consent, there be a grant of probate in favour of the Petitioners – Charles Kahindi Kinuthia and Serah Wairimu Mukiri as per the Will dated 7/7/2000; that the executors be at liberty to administer the entire estate with the exception of the following parcels of land which are in dispute: Dagoretti/Riruta/3599, 3600, 3601, 3602, 3603 & 3604. That the matter be listed for hearing by way of viva voce evidence when the Objector will call 3 witnesses and the executors will also call 3 witnesses”.***

Following the recording of this consent, the Objector testified as PW1. She called George Ng'ang'a Kibue who testified as PW2 and Salome Wanjiku Arrol who testified as PW2. On their part, the Petitioners called Serah Wairimu Mukiri who testified as DW1. After the close of both the Objector's and the Petitioners' respective cases, counsel for the parties filed written closing submission.

This court has carefully considered the evidence adduced by the parties to this case. The court has also had the benefit of perusing the written closing submission filed by counsel for the parties to this case. The issue for determination is whether the Objector and the children of her late sister Nditiai Kamuyu are dependants of the deceased and therefore entitled to inherit part of the suit parcel of land. According to the evidence adduced, there are certain facts which are not in dispute. It is not disputed that the deceased, the Objector, Nditiai Kamuyu (deceased), Emily Kamuyu (deceased) and George Ng'ang'a Kibue are siblings. They were the children of Kamuyu Kinuthia who died on 7<sup>th</sup> January 1962. It is further not in dispute that the suit parcel of land was previously owned by the said Kamuyu Kinuthia before it was transferred, on transmission, to the deceased by the **Kikuyu African Court in Succession Cause No. 15 of 1963**. It was common ground that the Objector, in the succession case before the Kikuyu African Court objected to the suit parcel of land being registered in the name of the deceased. On perusal of the proceedings before the said court, it was clear to this court that the Objector objected to the suit parcel of land being registered in the name of the deceased because she was of the view that her late father had indicated that she should inherit the land. The court ruled against her. The court reached that decision on the basis of the evidence adduced by, among others, the mother of both the deceased and the Objector who was of the view that the land should be registered in the name of the deceased.

This court takes cognizance of the fact that the basis upon which the decision was reached was Kikuyu Customary Law which recognized the primacy of the position of a first born son when it came to registration of land which was being inherited. It is further not disputed that although the deceased was

registered as the owner of the suit parcel of land pursuant to the said court decision, the deceased allowed the Objector and her late sister, Nditiai Kamuyu to reside on the suit parcel land. In this court's assessment, this was an acknowledgment by the deceased that he was holding the title of part of the suit parcel of land in trust for the Objector and her late sister. That is the reason why he allowed them to reside on part of the suit parcel of land for a period of more than thirty (30) years without let or hindrance during his lifetime. The question that this court asked itself is ***why the deceased did not evict the Objector and her late sister together with their children if indeed the Objector and her late sister did not have a legal right to occupy and live on the land?***

It was clear from the evidence adduced that the deceased, at least by his conduct, considered the Objector and her late sister to be entitled to part of the suit parcel of land. The deceased acknowledged the right of the Objector and her late sister to reside, occupy and use part of the suit parcel of land. This court therefore holds that the Objector, established to the required standard of proof on a balance of probabilities, that she and the children of her late sister are entitled to part of the suit parcel of land on the basis of the fact that the suit parcel of land was previously owned their father. According to the evidence adduced, it was established that the family of Nditiai Kamuyu (deceased) reside on the parcel of land registered as LR. No. Dagoretti/Riruta/3598 while the Objector and her children reside on parcel No. Dagoretti/Riruta/3604. They shall inherit these two parcels of land.

In addition, the family of Nditiai Kamuyu shall inherit the parcel of land registered LR. No. Dagoretti/Riruta/3599 while the Objector shall inherit the portion land registered as Dagoretti/Riruta/3603. The Petitioners, on behalf of their siblings, shall inherit the portions of land registered as LR. Nos. Dagoretti/Riruta/3600, Dagoretti/Riruta/3601 and Dagoretti/Riruta/3602. This court therefore orders that the grant of probate issued to the Petitioners by this court on 25<sup>th</sup> May 2009 be confirmed and the estate of the deceased distributed in accordance with the last Will of the deceased except as varied by the judgment of this court. Since this is a dispute involving family members, there shall be no orders as to costs.

**DATED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2014.**

**L. KIMARU**

**JUDGE**