



IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 126 OF 2002

(IN THE MATTER OF THE ESTATE OF DOMINIC KIHURI KIBIRA (DECEASED))

JAMES MUTAHI KIHURI.....APPLICANT/PETITIONER

-VERSUS-

STEPHEN KIBIRA KIHURI (A).....1ST PETITIONER/RESP

JOHN GITONGA KIHURI.....2ND PETITIONER/RESP

GEOFFREY MUGO KIHURI.....4TH PETITIONER/RESP

TEREZA NJERI KIBIRA.....RESPONDENT

RULING

By a summons in general form dated 1st October, 2014 and brought to court under **Rule 75 of Probate and Administration Rules**, the applicant sought mainly for an order that the respondent by herself, her agents or any other person acting on her behalf be restrained from burying one Stephen Kibira Kihuri (B) (“the deceased”), on a land parcel known as **LR. No. Othaya/Gura/25** (“the suit land”).

The summons was supported by the affidavits of James Mutahi Kihuri sworn on 1st October, 2014 and John Gitonga Kihuri sworn on 13th October, 2014.

The basis of the applicant’s summons is that prior to the deceased’s death there was a dispute, between the applicant and the deceased over occupation and ownership of the suit land; he fears that the respondent intends to bury the deceased on the suit land to perpetuate the deceased’s claim over it and perhaps seek to retain it as part of the deceased’s estate.

The applicant says that he has developed what he refers to as his portion of the suit land and if the deceased is buried on that portion, then he shall be disinherited.

The applicant has annexed to his affidavit a title deed showing that the deceased owned a parcel of land in Nyandarua where he could as well be buried; the deceased’s remains, in his view, need not be buried on the suit land.

The respondent, who is the deceased’s wife, opposed the application and filed a replying affidavit sworn on 6th October, 2014.

In her affidavit the respondent said that the deceased, herself and the applicant were all living on land known as **LR. No. Othaya/Kihugiru/561/4** which is a residential plot in Othaya town until such a time that the applicant became so abusive that the deceased and the respondent had to leave. As at the time of the deceased's death, they were living at her sister's place in Othaya.

The respondent admitted that the applicant has a designated portion on the suit land where he even recently buried his daughter; however, she contended that the deceased also had his own portion on that same parcel of land which as of to date is still registered in the name of the Dominic Kihuri Kibira who was the applicant's and the deceased's father but who died way back in 1982.

While the respondent admitted that the deceased owned land in Nyandarua, she says the suit land is a family land to which the deceased and the applicant are entitled in equal measure; to this end, she has argued that if the applicant could bury his own daughter on that land, there is no reason why the deceased should not be buried on the same parcel.

The submissions by counsel for both the applicant and the respondent replicated the contentions by their respective clients in the affidavits they filed in support of and in opposition to the summons before court.

One thing that is clear is that the application was made against a backdrop of a pending succession cause in which a protest or protests have been filed against the confirmation of grant of letters of administration of the estate of the late Dominic Kihuri Kibira issued in May 2007.

The suit land forms part of the deceased's estate and in the affidavit sworn on 23rd October, 2008 by John Gitonga Kihuri who is one of the administrators of the deceased's estate, the suit land was proposed to be shared out between John Gitonga, James Mutahi and Geoffrey Mugo who are three of the deceased's nine children.

As far as I can gather from the record, some of the survivors of the estate of the late Dominic Kihuri Kibira could not agree on the distribution of his estate as proposed in the summons for confirmation of grant; there are at least two affidavits of protest on record one of which was filed by the deceased. The protests are set to be heard on 9th December, 2014.

The summons herein and the response thereto reflect the extent of the differences between the survivors on the distribution of the late Dominic Kihuri Kibira's estate. There is no doubt that the uncertainty as to the share of the deceased's estate amongst his survivors will be cleared once this court distributes the entire estate; before then the court has to deal with the unfortunate intervening event which is the death of one of the contesting survivors and more particularly whether his remains can be interred on any part of the deceased's estate which, in this regard, is land parcel number **LR. No. Othaya/Gura/25** while the dispute as to whether he was entitled to a share of that part of the deceased's estate is still pending.

This being an interlocutory application, it would be irresponsible on my part if I was to make any conclusive remarks on the extent of shares the estate each of the contestants is entitled to at this stage; that is a question that should be left for determination at the conclusion of the succession cause. There are, however, some undeniable and undisputed facts and to some extent admissions which can help resolve the current dispute.

It is a fact not in dispute that Dominic Kihuri Kibira died intestate and therefore the distribution of his estate is subject to the intestate provisions of the **Law of Succession Act (Cap 160)**; it is a fact that the applicant and the deceased are the sons of Dominic Kihuri Kibira and therefore prior to the deceased's death, they were entitled, as much as the rest of the survivors of the estate of Dominic Kihuri Kibira are, to a share of the deceased's estate; it is a fact that the shares for all the survivors of the late Dominic Kihuri Kibira eligible for a share of his estate are yet to be ascertained; and finally, in the absence of such an ascertainment, it is also a fact that any of the survivors of the late Dominic Kihuri Kibira, including the deceased's wife, the respondent herein, are eligible for a share of the part of his estate known as land parcel number **LR. No. Othaya/Gura/25**.

Added to these facts are what I would regard as admissions in the applicant's and respondent's affidavits.

In the affidavit sworn by the applicant on 13th October, 2014 in response to the respondent's replying affidavit, it is apparent that the deceased entered the suit land and has been using about half an acre of that land since the year 2010. The applicant describes the portion he has been using as part of his 4.3 acre entitlement.

The respondent on the other hand acknowledges in her affidavit in response to the summons "*that the applicant has a designated portion of the said land where he recently buried his daughter*".

It is apparent from the applicant's and the respondent's depositions that both the deceased and the applicant have either been using or have been in constructive occupation or possession of the suit land; what is not so apparent is how much of this land each of them has been using or is in constructive possession. Either way, I am of the humble view that none of these factors entitles them to any particular share either in size or in location of the land parcel number **LR. No. Othaya/Gura/25** as long as it is subject to distribution amongst all the survivors or beneficiaries of the estate of Dominic Kihuri Kibira.

Looked at in this context, I would be hesitant to appreciate the applicant's fear that if the deceased's remains are interred on any part of the suit land, he would either be disinherited or such an interment would be a basis for a claim of a right of ownership of the land parcel known **LR. No. Othaya/Gura/25** or any part thereof; I know of no provision either in the **Law of Succession Act** or in any other law that creates proprietary interest in land by the mere fact that the remains of an individual have been interred in that particular land. If such a law exists, and I doubt it does, then the applicant's counsel did not bring it to my attention. Simply put, the applicant's argument has no basis in law.

Counsel for the respondent informed the court, and I have no reason to doubt him, that he had instructions from his client that she will not be pursuing to claim any particular portion of suit land for the sole reason that her husband, the deceased, has been buried there; if this was not a sufficient assurance to cast away the applicant's fears, I would add that even if the respondent was to mount such an argument, it would be of no consequence as it is clearly deficient in law.

I have stated earlier that since the distribution of the estate of Dominic Kihuri Kibira including the suit land is subject to intestate provisions of the Law of Succession Act, the possibility that the deceased, being one of his legitimate survivors, would have received a share of his estate cannot be ruled out; while I cannot be certain at this stage of how much and which part of the estate the deceased would have been given, I am almost certain that if he was going to get any part of the suit land, his share would have certainly been larger than the size of a grave in which his remains will be interred. The point is, subject to the intestate provisions of law on the distribution of the deceased's estate, a grave, by its sheer size, should not and cannot have any significant impact on any part shared out of the land parcel **L.R No. Othaya/Gura/25** which, from the evidence available, appears to be relatively substantial in size. I am not persuaded the deceased's grave or burial site will prejudice any of the parties' rights as much as it will not confer any rights in the distribution of intestate estate of the Dominic Kihuri Kibira.

The upshot of this is that I do not find any merit in the applicant's summons dated 1st October, 2014 and it is hereby dismissed; the interim orders issued by this court on 3rd October, 2014 are hereby discharged. Parties will bear their own costs.

Signed, dated and delivered in open court this 31st day of October, 2014

Ngaah Jairus

JUDGE