

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. SUCC. CAUSE NO.254 OF 2005

IN THE MATTER OF THE ESTATE OF KAMAU WAWERU (DECEASED)

JOSEPH GIKONYO KAGURU.....APPLICANT

VERSUS

GEORGE GIKONYO KAMAU

ROSEMARY WAMBUI GICHURU.....RESPONDENTS

J U D G M E N T

Kamau Waweru, the deceased in this case died on 29th July 1995. In 1996, George Gikonyo Kamau and Rosemary Wambui Gichuru (the Respondents) petitioned the Kiambu Senior Principal Magistrate's Court in Succession Cause No.335 of 1996 to be issued with a grant of letters of administration intestate in respect of the estate of the deceased. A grant of letters of administration was duly issued to the Respondents on 8th October 1998. The same was confirmed. Joseph Gikonyo Kaguru (the Applicant) made an application before this court under **Section 76** of the **Law of Succession Act** seeking to have the grant of letters of administration intestate issued to the Respondents revoked on the ground that the Respondents had not considered his interest, and therefore recognized, a portion of the parcel of land previously registered as LR. No. Dagoretti/Riruta/2243 (the suit parcel of land). The Applicant stated that the said parcel of land had now been subdivided into various portions of land. His interest is now contained in a parcel of land registered as LR. No. Dagoretti/Riruta/4472. The application is supported by the annexed affidavit of the Applicant. He swore further affidavit in support of the application. The summons for revocation of grant was opposed. One of the Respondents, George Gikonyo Kamau filed a replying affidavit in opposition to the application. In essence, the said Respondent deponed that the Applicant was not entitled to the said portion of land because he had no proprietary interest in the same but was a mere licensee.

Counsel for the parties to the summons agreed by consent to file written submission in support of their respective clients' cases. They duly complied. The Applicant filed his submission on 14th February 2013 while the Respondents filed their submissions on 12th April 2013. The undisputed facts of this cause are that the deceased and the Applicant are brothers in-law. The deceased married the sister of the Applicant. According to the Applicant, sometime in 1989, he entered into an oral agreement with the deceased whereby the deceased agreed to exchange a portion of land measuring 0.22 acres comprising the suit parcel of land with the Applicant's parcel of land registered as LR. No. Loitoktok/Emperon/271 measuring 5 acres in Kajiado District. The Applicant averred in the affidavit in support of the summons for revocation of grant that in part performance of the oral agreement, the deceased and himself made applications, respectively, to the Dagoretti and the Loitoktok Land Control Boards for consent to be granted for the said transactions. In respect of the Dagoretti parcel of land, the Applicant averred that the deceased made an application for the suit parcel of land to be subdivided and the portion had been earmarked for to him, excised therefrom and transferred to him. The Applicant stated that he took occupation of the portion of land at Dagoretti. The deceased did not however take possession of the Loitoktok parcel of land. The respective transfers of the two portions of land were never effected because, according to the Applicant, the deceased died before the said transactions could be effected.

On their part, it was the Respondents' case that the deceased allowed the Applicant to reside on the suit parcel of land as a licensee. They further averred that since the agreement in respect of land was not in

writing, this court could not uphold an oral agreement because it would be contrary to **Section 3(3)** of the **Law of Contract Act**. They further averred that although the Applicant is in possession of the portion of land in the suit parcel of land, the fact that there was an alleged exchange of land between the Applicant and the deceased was never established. The Respondents took issue with the documents that the Applicant relied on in support of his contention that the deceased had attended a Land Control Board meeting in which consent had been granted for the two respective transactions. The Respondents doubted the authenticity of the consents of the Land Control Board. In fact, they alleged the said consents were forgeries because they were not supported by minutes of the respective Land Control Boards. The Respondents urged the court to dismiss the summons for revocation of grant with costs.

The issue for determination by this court is whether the Applicant established that he had an interest in the suit parcel of land which should be given recognition by the court. Upon evaluating the affidavit evidence on record, and the submission made by counsel of the parties herein, it was clear to this court that indeed the deceased had the intention to exchange a portion of the suit parcel of land measuring 0.22 acres with the Applicant's parcel of land at Loitoktok. The deceased exhibited this intention by signing the two applications which sought the respective consents of the Land Control Boards at Dagoretti and Loitoktok. This court does not agree with the thrust of the argument put forward by the Respondents that the said consents of the two Land Control Boards were forgeries. In part performance of the agreement, the deceased allowed the Applicant to take possession of the Dagoretti parcel of land. There was no evidence to suggest that the deceased actually took possession of the Loitoktok parcel of land. No transfers were executed. The Applicant is still the owner of the Loitoktok parcel of land both as the registered owner and the one in actual possession. The exchange transaction was therefore incomplete. The deceased died before the transaction could be completed. It was clear from the evidence that the Applicant desires to retain the portion of land at Dagoretti. He also wishes to complete the transaction in regard to transferring the Loitoktok parcel of land to the estate of the deceased. The Respondents however, as administrators of the estate of the deceased, have no interest in the Loitoktok property. The Applicant adduced evidence, in form of a valuation report, which showed that he had partially developed the suit parcel of land. The court has taken this into account in reaching its determination.

In conclusion, it was clear that the deceased had the intention to transfer the portion of land measuring 0.22 acres (now registered as LR.No. Dagoretti/Riruta/4472) in exchange for the Loitoktok land. The agreement was frustrated by the death of the deceased. However before his death, the deceased, in part performance of the agreement, had given possession of the said portion of land to the Applicant. In this court's considered opinion, it would be inequitable to remove the Applicant from the said portion of land after being in occupation of the same for a period of more than twenty (20) years. However, the Applicant must pay the purchase consideration for the said parcel of land because the administrators of the estate of the deceased are no longer interested in completing the exchange transaction.

In the premises therefore, this court directs that the suit parcel of land ie the portion that is currently occupied by the Applicant shall be valued by two registered Valuers, one each to be respectively appointed by the Applicant and the Respondents, who shall value the land only excluding any development thereon. The two valuation reports shall be presented to this court for the court to determine the purchase consideration that the Applicant shall pay for the said parcel land. The said valuations shall be undertaken within fourteen (14) days of today's date. This matter shall be mentioned on 7th October 2013 for this court to issue its final order. For the avoidance of doubt, the Applicant shall retain his Loitoktok land. There shall be no orders as to costs.

DATED AT NAIROBI THIS 18th DAY OF SEPTEMBER, 2013

L. KIMARU

JUDGE