



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 127 of 2007

IN THE MATTER OF THE ESTATE OF NDIRANGU KARIUKI.. DECEASED

AND

JANE WAMBUI NDUNGU..... APPLICANT

VERSUS

WAMAHIGA NDIRANGU & 4 OTHERS..... RESPONDENT

RULING

On 24th September, 1980, one, Ndirangu Kariuki, “the deceased” passed on. According to the petition of letters of administration taken out by Jane Wambui Ndungu “the petitioner”, the deceased was survived by Wamahiga Ndungu, Simon Peter Kingori Ndirangu, J.B. Goko Ndirangu, James Gichuhi Ndirangu and Grace Wambui Ndungu “*the protesters*”. Jane Wambui Ndungu presented the petition in her capacity as a niece to the deceased. The estate of the deceased in the main consisted of land parcel Tetu/Karaihu/45 “*the suit premises*”.

The protesters were cited and they duly entered appearance to the citation on 5th June, 2007. However it would appear that the protesters took no further steps upon entering appearance to the citation. Accordingly on 11th August, 2008 a temporary grant of letters of administration was issued to the petitioner. On 13th September, 2009, the petitioner applied for the confirmation of the grant. She proposed that the suit premises be distributed as follows:-

- (a) Herself representing the house of Ndungu Goko 2 acres.
- (b) The remainder to go to Wamahiga Ndirangu representing the house of the deceased.

The protesters did not agree with that arrangement on 26th March, 2009, he filed affidavit of protest through J.B. Goko, the third protester. Their protest was hinged on the fact that the petitioner should not at all benefit from the estate of the deceased as she and her late

husband had land at Burguret measuring 4 acres. That the deceased before passing on had shared his land among the protesters. The deceased bought the suit premises in 1940. The petitioner was not in occupation of the suit premises and resided in the village at Gatumbiro. Accordingly the protesters alone were the right and only beneficiaries of the estate of the deceased.

On 22nd April, 2009, Kasango J directed that the affidavit of protest be heard by way of viva voce evidence. On 25th November, 2009, the hearing commenced before me.

The protesters' case through J.B. Goko Ndirangu was that the petitioner was a wife of his paternal uncle called Goko Kariuki. He was a brother to the deceased. The deceased was his father. They were protesting because she was not entitled to inherit. Their father had one wife and the entire estate belongs to them. Indeed the deceased had shared out the suit premises to them before he passed on.

Cross examined by Mr. Karweru, learned counsel for the petitioner, he answered thus;- the suit premises were bought in 1940. However he was born in 1943. The deceased had a brother, Goko Kariuki and a sister, Wairimu Gichohi who is married. Goko Kariuki had never stayed on the suit premises. He used to stay in the village. The dispute had been arbitrated upon severally. A District Officer arbitrated on the dispute. His award was to the effect that the suit premises should be subdivided into two so that Joseph Ndungu Goko, the father to the husband of the petitioner should get 2 acres and the remainder should go to their family. Further when Goko died, Simon Peter Ndirangu, the 2nd protester came to court seeking that Goko Kariuki be interred on the suit premises. Despite their resistance, the court order in HCCA No. 70 of 1992 that Goko Kariuki be buried on the suit premises. The clan too has deliberated on the issue and ruled that the family of Goko Kariuki should have a share of the suit premises as it had been bought using the dowry of Wairimu Gichuru. Maina Gaita was present when the deceased bequeathed the suit premises to them. With that the protesters closed their case.

For the petitioner, she first called Rebecca Wairimu as a witness, a sister to both the deceased and Joseph Ndungu Goko. She was aware of the dispute. She knew the petitioner as a wife to her son whereas the protesters were sons to her brother. As far as he was concerned the petitioner was entitled to a share of the suit premises as she had a house thereon.

Cross examined by the 3rd protester, she responded that she did not know the acreage of the suit premises. She also did not know that the petitioner had put a house on an acre or so of the suit premises. All she knew was that the petitioner has been told to put up a house on the suit premises by the family. She also did not know that her brother had bought land in Burguret.

The petitioner herself testified that her husband was Joseph Ndungu Goko, a son of Goko Kariuki. Her husband had a brother the deceased and a sister Wairimu Kariuki. She married her husband in 1968 and used to stay on the suit premises. She found the suit premises already subdivided on the grant. Her father in law was using one portion whereas the other portion was being used by the father to the protesters. They put up their house on a portion that was being used by our father in law. She no longer occupies the suit premises as she was chased away. A portion of the suit premises belonged to her father in law and it is that portion that she was claiming. Her father in law was

buried on the suit premises through court order. She tendered in evidence, the court order. The dispute was also arbitrated upon by the D.O. who made an award to the effect that she was entitled to 2 acres out of the suit premises. She tendered in evidence a copy of the said award. Clan elders too deliberated on the issue and made a decision in favour of the petitioner. She tendered in evidence a copy of the proceedings of the clan elders. When her husband passed on, she was buried on the suit premises through a court order.

Cross examined, she responded that her father in law was killed by the protesters. They were arrested. Out of fear they vacate the suit premises. The suit premises were acquired jointly by her father in law and the deceased. The vendors were dead. The petitioner used to cultivate a portion of the suit premises and had planted trees. The suit premises has to date not been subdivided.

That marked the close of the petitioner's case.

Parties thereafter agreed to file and exchange written submissions. That was subsequently done. I have carefully read and considered them.

The issue for determination in this cause as pointed out by counsel for the petitioner is whether the petitioner is entitled to share in the estate of the deceased and if so what acreage. It is common ground that the petitioner is related to the deceased by virtue of being the wife to the deceased's brother's son. The protesters on the other hand are sons and daughters of the deceased and the registered proprietor of the suit premises. It is also common ground that the petitioner used to reside on the suit premises until she was ran out of the same following the death of his father in law. Indeed according to her evidence, her father in law was killed by some of the protesters. It was out of fear of or for her security that she relocated from the suit premises. This evidence was not seriously challenged. Indeed her only witness, testified to that fact by saying that the petitioner is entitled to a share of the land as she had a house on the land. Accordingly, it is not correct as maintained by the protesters that the petitioner had never stayed on the suit premises. That instead she and her father in law had all a long stayed in the village at Gatumbiro.

The petitioner's case is founded on trust. That the deceased, the father of the protesters was registered as the owner of the suit premises in trust for himself and his brother, Goko Kariuki, her father in law. Her evidence in this regard. It was amply supported by the evidence of her only witness, Rebecca Wairimu a sister to the deceased and petitioner's father in law. She had no interest in the estate. Accordingly she had nothing to benefit from testifying in favour of the petitioner and against the protesters. She seems to know much about the dispute. The protesters had no direct evidence to offer with regard to the dispute. Apart from the 3rd protester who testified they called no other evidence. The evidence of this protester was essentially hearsay. He was testifying to what he was told and not what he witnessed. After all he was born in 1943, yet the suit premises were bought in 1940. That being case, his evidence cannot be acted upon by a court of law. The protesters too had claimed that the petitioner and her late husband had their land and Burguret measuring 4 acres. In their evidence they led

no such evidence. Even in their written submissions they make no reference to such an issue. If anything, they confirm that the petitioner stay in the village at Gatumbiro.

There is evidence that the petitioner's father in law and husband were all buried on the suit premises. This was despite the protests by the protesters. Those burials were pursuant to court orders. It is instructive in the order made by Tunoi J as he then was on 26th November, 1992 in HCCA No. he stated thus:-

“.....The remains of the deceased – Goko Kariuki be interned and buried in land parcel No. Tetu/Karaihu/25 near where his house stood and where eventually his two acres will be excised.....” I am not aware of this decision having been a subject of a further appeal to the court of appeal. That being the case it stands. That order confirms two things, that the deceased had a house on the suit premises. Contrary to the submissions of the protesters and secondly, Goko Kariuki was entitled to the 2 acres out of the suit premises.

Then there are the proceedings before the District Officer, Tetu division having listened to the evidence of the protagonists, it reached the verdict thus:-

“.....The two parties have been living together in the disputed land and neither has applied to inherit the land. When their fathers were alive and hence shows that there were issues each party wanted to do secretly or behind the scenes. On balance of probabilities, the two parties are entitled ownership of land. In view of the foregoing, the disputed land should be sub-divided into two portions. The appellant to get 2 acres and the respondents get 5.1 acres if a fair approach has to be applied.”

Again to the best of my knowledge, this award has never been challenged. At least the protesters did not say so nor did they challenge its authenticity. It must therefore be taken to be correct. That award again recognizes the petitioner's father in law's interest. It confirms that the suit premises were bought by the two brothers contrary to the protesters assertion that it was solely bought by their deceased father. It also confirms that the two brothers used to stay on the suit premises together contrary again to the assertion by the protesters that the petitioner and her team never stayed on the suit premises. I will make no reference to the proceedings of the clan since they are in Kikuyu language and no translation was provided.

The totality of the foregoing evidence is that the suit premises ought to have been shared between the two brothers as that is how it intended to be. The evidence of the sister of the deceased, the order by the learned judge and the award by the D.O. all point to the fact that the deceased was registered as the proprietor of the suit to hold in trust for himself as well as his brother. After all he was a first born and as correctly submitted by Mr. Karweru, as the first born son in the family and as per the tradition now notoriously in the public domain, elder sons were usually registered as owners of land on behalf of their siblings. I believe this is what happened in the circumstances of this case.

That being my view of the matter I would dismiss the protest. I direct that the grant be confirmed as per the application for confirmation of grant dated 10th February, 2009 and filed in court on 13th February, 2009. Because the protesters all along knew about the petitioners interest in the estate and or the suit premises going by the earlier proceedings and they insisting on pursuing the protest, I will condemn them to the costs of these proceedings.

Dated at Nyeri this 22nd day of March 2010.

M.S.A. MAKHANDIA

JUDGE

Delivered on 22nd day of March, 2010,

By:

J.K. SERGON

JUDGE