



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Succession Cause 696 of 2006**

**IN THE MATTER OF THE ESTATE OF KIMANI NYAITUGA (DECEASED)**

**JUDGMENT**

This cause which relates to the estate of the late Kimani Nyaituga (the deceased), has had a chequered history. The deceased died on 25<sup>th</sup> November, 1981. The only asset he left behind is a 36 acre piece of land situate in Nyandarua District known as **Title No. Nyandarua/ Milangine/190** (the suit land). His brother, the late Erastus Chege filed Nyahururu DM Succession cause No.3 of 1983 and was appointed the administrator of his estate.

Three people seek to inherit the suit land. They are Jackson Ngugi Kabuga who claims to have purchased 10 acres of it from the deceased (the purchaser); Kamau Koomu, a son of the deceased's sister (the nephew) who claims to have been gifted a piece of the suit land and the family of the late Erastus Chege who was the elder brother of the deceased. The issue is whether any or all these three parties are entitled to inherit the suit land and if so what share each is entitled to.

Prior to his death, the deceased, who was unmarried and had no children, subdivided the suit land and sold 10 acres to the purchaser, allocated 9 acres to the nephew as a gift, 12 acres to his brother Erastus Chege also as a gift and left 5 acres for himself. Annexed to the affidavits of the purchaser's son, Peter Njuguna Ngugi and Kamau Koomu are copies of the letters of consent issued to the deceased in respect of the transfers of 10 acres to the purchaser and 9 acres to the said Kamau Koomu.

It is not clear if before the deceased died the suit land had been surveyed and subdivided. What is clear, however, is that acting on the said grant, the late Erastus Chege allocated the four subdivisions of the suit land more or less as the deceased had done. He allocated the subdivision known as Title No. Nyandarua/ Milangine/ 433 comprising of 10 acres to the purchaser and transferred it to him; the subdivision known as Title No. Nyandarua/ Milangine/ 434 comprising 9 acres to Kamau Koomu but registered in his name; transferred the subdivision known as Title No. Nyandarua/ Milangine/ 435 comprising about five acres which the deceased had retained for himself to his son the objector and retained the remaining 12 acres for himself. He refused to transfer the 9 acres portion to the nephew on allegations that he had misled the deceased to gift that portion to him and that he had failed to surrender Kshs.4,500/= to the deceased which the deceased had instructed the purchaser to pay to him and demanded payment of that sum before he could

transfer that portion to him. That refusal prompted the nephew to file Nakuru HCCC No. 497 of 1990 against the late Erastus Chege. After hearing the case, the retired Justice Ondeyo declared the proceedings in Nyahururu DM Succession No. 3 of 1983 a nullity for lack of that court's jurisdiction but nonetheless held that the late Erastus Chege held the 9 acres portion in trust for the nephew and directed the Deputy Registrar to transfer it to him if Erastus Chege refused to do so. On appeal, the Court of Appeal upheld the judge's declaration of Nyahururu DM Succession Cause No. 3 of 1983 as a nullity but faulted her declaration of the late Erastus Chege as trustee for the nephew in respect of the 9 acres. It directed that fresh succession proceedings be instituted in respect of the estate of the deceased. This is that cause.

Kamau Koomu the said nephew of the deceased, Jackson Ngugi Kabugua the purchaser of the 10 acres portion and Susan Njeri, the wife of the late Erastus Chege who was a brother to the deceased were appointed administrators of the deceased's estate. Later Njeri gave a general power of attorney to her John Maina Chege. Upon the purchaser's death, he was, by consent, substituted by his son, Peter Njuguna Ngugi.

Kamau Koomu initially applied for confirmation of the grant of letters of administration and proposed that the 10 acres portion already transferred to the purchaser do remain with his family, the 12 acres portion be inherited by Erastus Chege's family and that he inherits the 9 acres gifted to him as well as the 5 acres portion which the deceased had retained for himself but which the late Erastus Chege had transferred to his son, John Maina Chege.

Peter Njuguna Ngugi later joined Kamau Koomu in the application for confirmation but John Maina Chege protested. According to him, the sale to the purchaser was null and void for lack of writing and valid consent of the area Land Control Board. As for Kamau Koomu, he claims that being a son of the deceased's sister, he is not supposed to inherit any of the deceased's properties. He bolstered his right to inherit the deceased's entire land by claiming that besides being a son of the deceased's brother, his family assisted the deceased to pay the SFT loan in respect of the suit land. It is therefore safe to treat the said Kamau Koomu and the said Peter Njuguna Ngugi as the applicants for confirmation of the grant and John Maina Chege as the objector.

M/s Githui & Co Advocates submitted on behalf of the objector that the purchaser's claim is bad in law. He is a creditor who should have lodged his claim under **Order 36 Rule 1** of the **Civil Procedure Rules**. Even on its merits they said that claim must fail for three reasons. One, **Section 35** of the **Advocates Act** requires documents which confer an interest in land to be drawn by an advocate. **Section 4** of the **Registration of Documents Act Cap 285 of the Laws of Kenya** requires all documents purporting to confer an interest in land to be registered. And **Section 4** of the **Stamp Duty Act** requires such document to be stamped. They said in the absence of a written agreement evidencing compliance with these provisions, the entire transaction, if at all there was any, was null and void. They cited the case of **National Bank of Kenya Vs Wilson Ndolo Ayah, Civil Appeal No. 119 of 2002** in support of this contention.

Secondly, they dismissed **Ex.1A** and **1B** annexed to the affidavit of the purchaser's son, Peter Njuguna Ngugi, as farcical in that they show that on 8<sup>th</sup> January 1981, the deceased received Kshs.600/= and on 19<sup>th</sup> January 1981 Kshs.1,200/= and immediately underneath there is a total of Kshs.65,490/=. They said it is not clear how that total is arrived at. Besides this those exhibits are inadmissible as they are not stamped as required under the Stamp Duty Act. Thirdly, they submitted that the entire transaction is void for lack of consent. They said this is because the registration of the transfer **Ex.2A** on 13<sup>th</sup> March 1981, preceded the letter of consent dated 15<sup>th</sup> April, 1981. For these reasons they urged me to

dismiss the purchaser's claim.

On the claim by Kamau Koomu, the deceased's nephew that the deceased gave him 14 acres as a gift, counsel for the objector submitted that a gift is a dealing within the meaning of **Section 6** of the **Land Control Act** which requires consent. They said as the gift was allegedly made on 13<sup>th</sup> March 1981 while the purported letter of consent supporting it is dated 15<sup>th</sup> April 1981, that transaction is also void for lack of consent. They also reiterated their above submissions regarding the transfer of an interest in land and urged me to dismiss the nephew's claim for non-compliance with those provisions.

With these submissions, counsel for the objector concluded that the land should be inherited by the deceased's elder brother's son, John Maina Chege. Although Kamau Koomu is a son of the sister of the deceased, they cited the Court of Appeal decision in **Mwathi Vs Mwathi [1995-1998] 1 EA 229** and the **Restatement of African Customary Law by Eugene Cotran at page 14** and submitted that as the deceased was a Kikuyu, and in the absence of the deceased's father, the deceased's land should be inherited by the deceased's brother's said son, John Maina Chege.

Mr. Muhia for the purchaser and the nephew submitted that their claims of those two are clearly established. The purchaser bought 10 acres of the suit land and paid the purchase price in the presence of witnesses as is clear from **Ex.1A** and **1B** annexed to Peter's affidavit. He said those documents should not be dismissed merely because they were not stamped as **Section 19** of the **Stamp Duty Act** allows late stamping of documents. Consent for that transaction was obtained and the deceased's brother, the late Erastus Kamau, recognized that sale and transferred 10 acres to the purchaser.

As for the nephew, Mr. Muhia submitted that soon after being allocated the suit land, the deceased who was not married and had no family of his own took the nephew to stay with him on the suit land. The nephew not only took care of the deceased but also assisted him pay the SFT loan for the land. Prior to his death the deceased applied and obtained consent to gift 9 acres to him. The objector's father recognized that also but failed to transfer the 9 acres to him. He concluded that the nephew's claim is also established.

Mr. Muhia finally submitted that the remaining 5 acres should be inherited by the nephew. He said this is because he took care of the deceased and assisted him to pay the SFT loan.

I have considered these submissions and the averments in the parties' affidavits. Section 32 of the Law of Succession Act provides that:-

**“The provisions of this Part shall not apply to –**  
**(a) agricultural land and crops thereon; or (b) livestock**  
**situated in such areas as the Minister may, by notice in the Gazette, specify.**

The only Gazette Notice I know of that the Minister has ever issued in this regard is **Legal Notice No. 94 of 1981** gives the Districts the Minister has specified to which customary law applies as **West Pokot, Turkan, Marsabit, Samburu, Isiolo, Mandera, Wajir, Garissa, Tana River, Lamu, Kajiado and Narok**. That excludes the operation of customary

law to land like the one in this cause situate in Nyandarua District. I therefore agree with Mr. Muhia that in view of this provision and in the absence of any gazettelement by the Minister, Kikuyu Customary Law does not apply to the deceased's estate.

After declaring the grant by the DM's court null and void, the Court of Appeal directed that succession proceedings in respect of the deceased's estate be instituted in a court of competent jurisdiction and this is that cause. The same claims are now urged afresh.

The purchaser claims to have bought 10 acres from the deceased himself. It is also claimed that the deceased gifted 9 acres to his nephew, Kamau Koomu, and 12 acres to his brother, the late Erastus Chege. It is not true as Mr. Githui for the objector contended that there is nothing in writing from the deceased to support these claims as there are purchase price payment acknowledgement notes. I disagree with him that the amounts stated in the exhibits annexed to Peter Njuguna's affidavit do not add up to the total purchase price. According to me they exceed the purchase price of Kshs.50,000/= by Kshs.2,008/=.

I agree with Mr. Muhia that those documents should not be dismissed merely because they were not stamped as **Section 19** of the **Stamp Duty Act** allows late stamping of documents. Moreover the deceased himself applied and obtained the consent of the area Land Control Board in respect of that sale and the gifts to his brother and nephew. As I have said copies of the letters of consent dated 15<sup>th</sup> April, 1981 have been exhibited. That the deceased signed the transfers on 13<sup>th</sup> April 1981 is neither here nor there. He gave possession of those portions of land to those people. He could not have done all that if he had not intended to gift the 9 acres to his nephew and if he had not been paid the full purchaser price. Those people have since 1981 occupied their respective portions.

As I have said upon his death, his brother, the late Erastus Chege, albeit acting on a null and void grant of letters of administration from the DM's court, recognized the purchaser's claim and transferred the 10 acres portion to him. Even without the acknowledgement notes and given the fact that under **Section 3** of the **Law of Contract Act** as it stood in 1981 part performance sufficed, the purchaser's claim is established. In the circumstances, I hold that the transfer by the said Erastus Chege, though under a grant which was null and void, of the 10 acres to the purchaser be and is hereby validated and left intact.

The deceased gifted 12 acres to his brother, the late Erastus Chege. Though there is no document to support the gift to the brother, that and the one to the nephew those are gifts inter vivos which should be respected. I suppose the 12 acres portion is registered in the name of the late Erastus Chege. I hold that that should left intact to devolve to his family.

In respect of the deceased's gift of 9 acres to his nephew, we have a copy of the letter of consent issued to the deceased following his application for consent. I also hold that those 9 acres should be transferred to the nephew, Kamau Koomu Murega.

This leaves me with the 5 acres portion the deceased had left for himself which as I have said the late Erastus Chege transferred to his son, John Maina Chege.

John Maina Chege, the objector, is a son of the deceased's brother, the late Erastus Chege. There is no evidence to support his claim that his family assisted the deceased to pay the SFT loan. To the contrary, according to the affidavit of Jeremiah Mwangi Githaiga, Erastus Chege or his family did not assist the deceased to pay the SFT loan. The objector's claim is therefore based on Kikuyu Customary Law (which at any rate has not been proved) that as a son of the deceased's brother he is the one entitled to inherit his estate as opposed to the nephew who is the son of the deceased's married sister. I have already held that Kikuyu Customary Law does not apply to the deceased's estate. The objector being as cousin of the nephew has no better claim to inherit the deceased's property than the nephew. I have already found that the deceased had gifted 12 acres to Erastus Chege. He evinced no intention that the nephew should inherit the 5 acres he had retained. The averments in the affidavit of Samuel Mwangi Gikonyo that the deceased directed that there should be no boundary between the 9 acres gifted to the nephew and the 5 acres he had retained for himself is not sufficient evidence as Mr. Muhia submitted of his intention that the nephew should inherit it. As I said earlier the objector and the nephew being cousins, neither has a better claim than the other over that portion. In the circumstances I hold that they should both share it equally.

Given the belligerent attitude taken by the late Erastus Chege's family, especially the objector, I do not think they will co-operate to give effect to this judgment. I therefore direct the Deputy Registrar of this Court to transfer the 9 acres piece of land, that is **Title No. Nyandarua/Milangine/434**, to the nephew, Kamau Koomu Murega. I also direct the Nyandarua District Land Registrar to regard as cancelled the Title Deed, if any, issued to the late Erastus Chege in respect of that piece of land and issue one in the name of Kamau Koomu Murega upon receipt of transfer duly executed by the Deputy Registrar of this court on behalf of the said Erastus Chege or whoever is the current registered owner of that piece of land may be.

In respect of the 5 acres portion I order that the same be subdivided into two equal portions at the cost of the objector and the nephew. If the objector refuses to transfer the half share to the nephew I direct the Deputy Registrar to do it on his behalf.

This being a family matter, I hold that each party bears its own costs.

**DATED and DELIVERED this 13<sup>th</sup> day of May, 2010.**

**D. K. MARAGA**  
**JUDGE.**