

SUCCESSION

Property of deceased transferred using fraud can be traced.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCC. CAUSE NO. 167 OF 1993

IN THE MATTER OF THE ESTATE OF M'ITWAMWARI M'RAIJI

(DECEASED)

JULIUS GATOBU M'ITWAMWARI PETITIONER

VERSUS

ESTHER NKATHA M'ARIMI OBJECTOR

JUDGMENT

The petition for letters of administration intestate was filed in this cause by Julius Gatobu M'Itwamwari on 25th October 1993. The petitioner in filing that petition obtained the consent of Gerica Mberenya signed on 23rd September either 1993 or 1992. What is interesting to note is what was stated in that consent. I believe its best to reproduce some art of that consent:-

“Now, I Gerica Mberenya Nkamata wife of the deceased of P.O. Box 400 Meru do hereby consent to the letter of administration of the estate of the said deceased being granted to the said Julius Gatobu M'Itwamwari.”

Julius in the petition described himself as the son of the deceased. He emphasized that he was the only surviving son of the deceased. The deceased estate consists of parcel number Abothuguchi/Ruiga/354. Petitioner stated in that petition that the estate did not have any liabilities. A grant was issued to Julius on 23rd January 1997. He sought confirmation of that grant by an application dated 2nd April 1997. In that application, he sought to inherit the deceased parcel of land solely and absolutely. The application for confirmation came before Etyang J. on 14th July 1997. The proceedings of that day are very pertinent to the issue before me. It was stated either by the petitioner or on behalf of the petitioner as follows on that day:-

“Application is for confirmation. My mother signed the consent. She died on February 1992. Infact the chief of my area signed it.

ORDER

The consent for this petition is dated 23rd September, 1992 when it was sworn before the Commissioner for oaths. If it was signed by the applicant's mother as he says then what this petitioner has told the court is false. She could not have signed if she died in February 1992. The chief of his area could not also have signed it.

I am not satisfied that what is deponed to in this matter is correct. This matter is referred to O.C.S. Meru to investigate the circumstances in which this succession case was filed and the correctness or otherwise of the affidavit in support and that of the consent filed on 25/10/1995.

For this purpose Julius Gatobu M'Twamwari is arrested and is to be handed over to the O.C.S. Meru. These proceedings and ruling be extracted and passed over to O.C.S. Meru for compliance."

The court on 31st July 1997 gave an order that the temporary grant issued to Julius the petitioner be confirmed and that the deceased property be registered in his name. That order of confirmation was made following the filing of a report by the O.C.S. Meru Police Station which I will reproduce here. My understanding of that report is that Julius got the consent signed by his mother on behalf of his grandmother who brought him up since childhood. The report is as follows:-

"Please Sir, I forwarded herewith the attached order No. HC 167 of 1993 addressed to O.C.S. Meru for investigation.

Investigations was carried out. It was found that the only the(sic) applicant made is when asked his mother (sic) he mentioned the name of his grandmother who brought him up since childhood as he used to call the applicants mother(sic) signed the petition on behalf of the deceased who was her mother to enable succession to go through as it was decided by the clan elders as per attached copies of their dated 25th April 1992. the same petition was countersigned by the then a acting chief of Gitimbi location currently the chief of Kariene Location. During the investigation it was discovered that the applicant Julius Gatobu did not understand what asked (sic) by the name of his mother whom he used to call mother.

I recommend unless otherwise there was no malice aforethought to obtain a land illegally."

This judgment relates to the Chamber Summons dated 22nd July 1997 which was ordered on 2nd July 2007 that it be heard by way of viva voce evidence. That application was filed by Esther Nkatha M'Arimi. She deponed in her supporting affidavit that Julius was a grandson of the deceased and not the deceased's son. She stated that the deceased had only two daughters, that is, herself and Julius's mother called Gerica Mberenya. In evidence, Esther stated that the deceased died in 1985. Esther and Gerica have seven children each. Julius the petitioner is one of the children of her sister Gerica Ntherenya. She said therefore that Julius is a grandson to the deceased. She had no knowledge that Julius had petitioned for a grant. She said their mother had died and following her death their father now the deceased in this cause remarried a lady called Jerica Kauma. Jerica Kauma did not have children with the deceased. Esther said that she had planted coffee on the deceased land in 1980 even though she was still living with her husband. This was at a time when the deceased was still alive. The deceased at one time requested her to give her step mother Jerica Kauma some coffee bushes which she did. She was left with 300 bushes after giving her stepmother 200 bushes. She also grows other plants and vegetables on the property. This other plants had been uprooted by Julius. When the deceased died Julius according to her took over the coffee she had given to her stepmother. Julius had gone to live with his grandfather the deceased when he was a young boy attending standard four in school. That was 1983. After the deceased died, Julius did not return to his mother's home. Esther said that her sister Gerica Mberenya colluded with her son Julius to pretend that Julius was the son of the deceased in order to inherit the deceased property. When questioned she accepted that Julius was circumcised while staying at the deceased home. According to her, that was acceptable according to the Kimeru custom. PW2 said that the deceased was his paternal uncle. He too confirmed that Julius was the son of Gerica Mberenya Nkatha. He denied that Julius was the son of the

deceased. That the deceased had two daughters Esther and Gerica. Esther presently cultivates half of the deceased land and has planted coffee on that bush. In respect of Julius, he said:-

“What I know is that his mother is married to one Nkatha but Julius went to stay with his grandfather the deceased to take care of his livestock.”

PW3 also said that the deceased was his paternal uncle. He too denied that Julius was the son of the deceased and said that the deceased had only two daughters. He confirmed that Esther begun to cultivate the deceased property during the lifetime of the deceased and has continued to date. In his view, the deceased property should be inherited by the deceased's two daughters. Julius in evidence stated that his mother is called Jerica Kauma. He produced before court the national identity card of his mother being number 7732079/70 in the name of Jerica Kauma M'Itwamwari. He said that his mother died in 1992. He filed this succession in respect of his deceased father's estate. He was born in 1973. His sisters are Esther Nkatha and Gerica Mberenya. He however said that he does not share the same mother with his sisters. His deceased father's estate was the one property which he said the deceased had wished it to be inherited by him alone. The deceased also left behind cows and coffee bushes. He used some money belonging to the deceased to pay debts on behalf of the deceased estate. By the time the deceased died his two sisters were married and living with their husbands. During the lifetime of the deceased Esther needed school fees for her children and the deceased allowed her to pick his coffee to enable her to raise school fees. That coffee which she picks up to now is on an acre. Mberenya cultivates arrowroots and some bananas. He denied that they were related to PW2 and 3. He also produced a birth certificate as evidence of his heritage. DW2 stated that the deceased was a friend and they used to visit each other. He knew the deceased had two daughters and one son. This witness on being cross examined contradicted himself. At first he said that Julius Gatobu was a son of the wife of the deceased. On being asked who was the child of the second born daughter of the deceased that is Gerica Mberenya he said:-

“Yes, it is Gatobu who is the son of the second daughter.”

Perhaps on realizing what he had said he changed his testimony and said that Julius was the son of the deceased. On being reexamined by learned counsel Mr. Kirima for Julius he responded:-

“Gatobu is son, the way I use to see him at the deceased home. The rest I don't know.”:

Mberenya was DW3. She said that the deceased was her father and had three children and that Gatobu is her brother. That the deceased wished for his property to be inherited by Julius. This she said he made known through an oral Will. She however did not state when the oral Will was made.

As it will be recalled, DW3 Mberenya signed a consent in this cause giving consent to Julius to petition for a grant. In that consent she described herself as the wife of the deceased. The petitioner did not adduce evidence to explain that anomaly. I find that the description of Mberenya as a wife of the deceased is one of the many schemes adopted by the petitioner in this cause with a view to deceive. I have had an opportunity to consider all the evidence in this case and I am without doubt that Julius is lying to the court that he is the son of the deceased. I will analyze some of the evidence and documents before me which show that deceit. Julius in the petition described himself as the only surviving son of the deceased. If that is so, why does he later in evidence say that he has two sisters. Why did he fail to disclose their existence? In the same petition, he said that the deceased had no liabilities. In evidence, in order to explain a way what he did with the deceased money he said that he used it to pay the deceased debts. Again, there was no attempt to explain the discrepancy between what was stated in the petition in regard to the deceased debts and the evidence offered by Julius. Perhaps the most obvious deceit of Julius is when he informed the court before Justice Etyang that his mother died in February 1992. In making that statement, he did not consider the consent already filed in this case purportedly signed by his mother in September 1992. That statement led the court to order Julius to be arrested and to be investigated over his conduct in this matter. O.C.S. Meru Police Station made a report which is reproduced in this judgment. That report is very telling. The import of it was that the police on investigating found that Julius obtained the signature of his mother, that is, Mberenya, who signed the consent in this cause on behalf of his grandmother, presumably Jerica Kauma who brought him up since he was a child. That report although not made in very clear

English brings out those facts. The report entirely supports the case of Esther that Julius was taken to his deceased grandfather's home when he was a young boy so that he could attend a school nearby. He never thereafter left his grandfather's house. The birth certificate produced by Julius was obtained on 20th May 2010. That is, 37 years after his birth. What is however important is that on the column on that birth certificate entitled "Name and description of information" the entry is "self." In other words, Julius was the source of the information contained in the certificate of birth number L024038886/10. It shows his father's name as Luka M'Itumwari Raiji. His mother is shown as Jerika Kauma M'Ndiri. Bearing in mind the inconsistencies I have highlighted in this judgment relating to the petition by Julius I find that the certificate cannot be relied on by this court because it may not be the true reflection of the truth. When Mberenya gave evidence I observed her and I noticed a particular resemblance to Julius. I am inclined to believe that she is the mother of Julius and therefore Julius is not the son of the deceased. He is therefore not entitled to inherit the deceased land. By the time this case came for hearing, Julius had obtained the transfer of the deceased property into his name. However, since the proceedings that led to that transfer were based on deceit as I have found, I will order that the title be rectified. That is in keeping with the Court of Appeal on the case of Jane Gachoki Gathecha Vs. Priscilla Nyawira Gitungu & Ano. Civil Appeal No. 343 of 2002 The Court of Appeal found in that case that the petitioner who through fraud had obtained grant had no title on immovable property of the deceased which was capable of being transferred to a third party. The Court of Appeal stated thus:-

"We think, with respect, that there is a fallacy in invoking and applying the provisions of section 93(1) of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where, firstly, there is a "transfer of any interest in immoveable or moveable property." Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable..... Kabitau was a thief and fraudster simpliciter."

I find that the rightful heirs of the deceased estate are:-

Esther Nkatha, Gerica Mberenya. I order as follows:-

1. The grant issued to Julius on 23rd January 1997 is hereby revoked. A fresh grant shall be issued in the name of Esther Nkatha M'Arimi. The said grant shall be confirmed as follows:-

(a) An order is made that parcel number Abothuguchi/Ruiga/354 be rectified and be transferred in equal shares in the names of Esther Nkatha M'Arimi and Gerica Mberenya Nkamata.

2. Esther and Gerica will each get their portion from the area they are cultivating.

3. I grant leave to the Deputy Registrar of this court to sign any documents which will enable the realization of this judgment.

4. I order Julius Gatobu M'Itwamwari to pay costs of this suit to Esther Nkatha M'Arimi.

5. I order that this file be kept in the strong room.

Dated and delivered at Meru this 22nd day of October 2010.

MARY KASANGO
JUDGE