



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NYERI

Succession Cause 124 of 1999

**IN THE MATTER OF THE ESTATE OF KIMATA GAKUU – DECEASED**

AND

JOSEPH GAKUU KIMATA)

JOHN MURIUKI KIMATA) ..... PETITIONERS

VERSUS

PHOEBE WAMAITHA KIMATA)

LEONARD KIMATA GAKUU ) ..... OBJECTORS

**J U D G M E N T**

On 4<sup>th</sup> November 1990, **Kimata Gakuu** also known as **Zakaria Kimata Gakuu** hereinafter referred to as “*the deceased*” passed on. He died intestate and was survived by his sons **Joseph Gakuu Kimata**, **John Muriuki Zakaria** and a daughter **Phoebe Wamaitha Kimata**. On 14<sup>th</sup> June, 1991, the aforesaid children of the deceased jointly petitioned the principal magistrate’s court, Nyeri for the grant of letters of Administration intestate. However, one **Leonard Kimata Gakuu**, the grandson of the deceased by one of his unmarried daughter objected to the petition and simultaneously cross-petitioned for the grant. On 10<sup>th</sup> November 1999 the matter was placed before **Juma J** as he then was for directions. The judge subsequently gave directions to the effect that “**objection proceedings be heard in this court by viva voce evidence .....**” Following several adjournments, the cause eventually came up for hearing on 13<sup>th</sup> February 2003 when a consent order was recorded. It was in terms that “**..... the 1<sup>st</sup> petitioner Joseph Gakuu Kimata and the Objector Leonard Kimata Gakuu are hereby appointed joint administrators of the estate. Issue of distribution to be determined by viva voce evidence.....**”

For reasons which are unclear from the record, the public trustee too had on 1<sup>st</sup> December 1993 petitioned this court for grant of letters of Administration intestate which were duly issued on 16<sup>th</sup> October 1996 and confirmed on 6<sup>th</sup> February 2003. In this confirmed grant it was deponed in the affidavit in support thereof that the deceased had been survived by:

**Joseph Gakuu Kimata – son – 59 years**

**John Kariuki Kimata – son – 52 years**

**Phoebe Wamaitha Kimata daughter – 57 years**

It was further deponed that the identification and shares of all persons beneficially entitled to inherit the said estate had been ascertained and determined as follows:-

Joseph Gakuu Kimata, John Kariuki Kimata and Phoebe Wamaitha Kimata, sons and daughters of the deceased absolutely in equal undivided shares. Indeed the confirmed grant was to that effect.

When the proceedings by the public trustee as aforesaid were brought to the attention of the court on 23<sup>rd</sup> June 2005, **Justice Okwengu** directed that the two causes namely HC. Succession Cause numbers 124 of 1999 and 157 of 1993 be consolidated and the cause to proceed under High Court Succession Cause number 124 of 1999. I am unable to comprehend and appreciate the need for that order of consolidation. After all High Court Succession 157 of 1993 had been finalised with the confirmation of the grant. I would imagine that the option available for those disgruntled would have been to apply for the revocation and or annulment of the said grant. Anyhow I should not appear to be sitting on appeal of that order made by my brethren.

Be that as it may, on 7<sup>th</sup> July 2006 the 1<sup>st</sup> and 2<sup>nd</sup> petitioners applied for the confirmation of the grant issued in this cause on 13<sup>th</sup> February 2003. They proposed that the only asset of the deceased being **Iriaini/Kaguyu/102** measuring 9.1 acres hereinafter referred to as “the suit premises” be shared equally among themselves and their sister, the 3<sup>rd</sup> Petitioner. This proposal was met with stiff opposition again by **Leonard Kimata Gakuu**. He filed an affidavit of protest. He wanted the estate of the deceased distributed as proposed in his application for confirmation of grant filed in court on 12<sup>th</sup> July 2006. In that application he had proposed that the suit premises be shared amongst himself 3 acres 3<sup>rd</sup> Petitioner (his mother) 3 acres and **Mary Nyawira Kimata** 3 acres. His proposed distribution was informed by the fact that the two petitioners had been given large portions of land by the deceased inter vivos and therefore were not entitled to the deceased’s estate.

The hearing of the cause then commenced before me on 16<sup>th</sup> October 2008. The protester testified that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners hereinafter referred to simply as “the Petitioners” were his maternal uncles. That the deceased was maternal grandfather. He did not agree with the mode of distribution proposed by the petitioners. The petitioner’s should not inherit any portion of the deceased’s estate as they were given land by the deceased as gift intervivos in 1966 and 1992 respectively. That **Iriaini/Kaguyu/88** was given to the 2<sup>nd</sup> Petitioner whereas **Iriaini/Kaguyu/96** was given to the 1<sup>st</sup> Petitioner. He tendered in evidence official search certificate in respect of the said parcels of land. That the deceased gave him a portion of the suit premises measuring 3 acres where he had put up his house, planted coffee and tea. His mother, daughter of the deceased was never married. **Mary Nyawira** who is her aunt is unmarried, has no child and is mentally unstable. He just wanted to be given the 3 acres assigned to him by the deceased and the remaining should go to his mother and her sister, Mary Nyawira.

Under cross-examination by **Mr. Kagio**, learned counsel for the Petitioners, the protester conceded that he was a grandson of the deceased, that the deceased had 5 children surviving him, 3 sons and 2 daughters. That he had no evidence other than what he was told that the petitioners had their separate parcels of land given to them by the deceased in his life time. Though the search certificates indicated that the two parcels of land were transferred, however they do not show from whom they were transferred. That the 1<sup>st</sup> Petitioner forcefully utilises the suit premises and in fact has caused some of his children to occupy the suit premises. That the deceased had money with the public trustee that was shared equally between the petitioners and his mother. That his aunt and even his mother had not filed affidavits of protest. Finally he conceded that the chief’s letter only gave the petitioners and his mother as the sole beneficiaries of the estate of the deceased.

Next on the stand was the Protester’s mother and the 3<sup>rd</sup> Petitioner herein. She testified that the Petitioners were her brothers whereas the protester was her son. That the deceased had three parcels of land, two of which he gave to the petitioners respectively. Whereas she stays on the suit premises with her sister Nyawira and the protester, the petitioners reside on their respective parcels of land. That she was objecting to the distribution proposed by the petitioners as they were given their separate parcels of

land by the deceased in his lifetime. The protester was given a portion of the suit premises by the deceased and has planted coffee and tea thereon.

Cross-examined by **Mr. Kagio**, she stated that the suit premises should go to her son herself and her sister who has a mental problem, has no children and is even blind. She conceded that the issue of distribution of the suit premises had been discussed before the chief and even D.O. between herself and the petitioners and it was agreed that it be shared equally among the three. However she hastened to add that she had now had change of mind. That the money from the public trustee was shared equally among the three. She maintained that the Petitioners were given separate parcels of land by the deceased. However she had nothing to show that the deceased gave the Petitioner the said parcels of land.

The protester further called **Peter Gathegethi** as his 2<sup>nd</sup> witness. He testified thus; the deceased was his neighbour and had 3 parcels of land. The protester resides on the suit premises with his mother and her sister. The Petitioners do not reside on the suit premises. That the deceased showed the protester where to stay in 1975. Cross-examined by **Mr. Kagio**, he stated that he did not know how the Petitioners got their parcels of land. With that the protester closed his case.

The 1<sup>st</sup> Petitioner testified on behalf of the Petitioners. His evidence was that the deceased was their father. That the 2<sup>nd</sup> Petitioner was his brother whereas the Protester was his nephew. That on 14<sup>th</sup> June 1990 the deceased summoned the three, the original three Petitioners in the presence of his brother **Leonard Kanyingi Gakuu** and directed that the suit premises should be shared equally between the three Petitioners. For that purpose the 1<sup>st</sup> Petitioner came to Nyeri and obtained the green card. He was then told to look for a surveyor and also collect forms from the land control board for purposes of subdivision. However on 30<sup>th</sup> August 1990 the deceased came down with illness and on 4<sup>th</sup> November 1990 he succumbed to the illness and passed on. On 30<sup>th</sup> March 1991 he summoned a meeting involving himself, the 2<sup>nd</sup> Petitioner, the 3<sup>rd</sup> Petitioner and the Protester and they agreed to carry through their father's wishes. They jointly appeared before the chief who endorsed the agreement and referred them to the D.O. The D.O. too endorsed the decision and then referred them to the D.C. The D.C. told them about the Kshs.21,000/= that was held to the credit of the deceased by Post Bank. The same was withdrawn and shared equally between the initial three Petitioners. As for the money in Barclays bank totalling Kshs.100,000/= the D.C. referred them to the public trustee. The public trustee took up the issue and eventually the sum of Kshs.100,000/= was again withdrawn and shared equally between the three. That the deceased had only the suit premises. That though the two petitioners had other parcels of land, those parcels were not given to them by the deceased but by the clan. He denied that the protester was ever given a portion of the suit premises by the deceased. Rather he utilises his mother's portion and the Petitioners had no objection to his continued use of that portion. It was his opinion that the suit premises be subdivided into 3 equal portions and shared equally among the three children of the deceased.

Cross-examined by **Mr. Mugo**, learned counsel for the protester the 1<sup>st</sup> Petitioner replied that he stayed with the deceased until 1963 when he moved to his parcel of land and left the deceased with his daughters on the suit premises. That the deceased's decision was never reduced into writing. That the Protester was his nephew. He was never given a piece of land by the deceased. The portion he occupies and in which he has planted tea and coffee belong to his mother the 3<sup>rd</sup> Petitioner. His other sister, Nyawira, had a mental problem and cannot therefore own anything. As for the 2<sup>nd</sup> Petitioner, he merely adopted the testimony of the 1<sup>st</sup> Petitioner as his own. That marked the close of the Petitioners' case.

Parties thereafter proposed and which proposal I went along with that they file written submissions in support of their respective positions. Respective written submissions were subsequently filed and exchanged. I have carefully read and considered them.

It is common ground that the protester is the grandson of the deceased. It is also common ground that the protester's mother and the Petitioners are the sons and daughter of the deceased respectively. It is also common ground that the Petitioners have their separate parcels of land. It is also common ground that the Petitioners still utilise a portion of the suit premises. It is also common ground that the protester occupies

a portion of the suit premises as well and has even planted tea and coffee and put up a house. It is also common ground that the protester's mother who initially was one of the Petitioners is alive and indeed was called as a witness by the protester. Of all the children of the deceased only the petitioners and the protester's mother have shown interest in the estate of the deceased. Nyawira it is contended by all the contestants herein that she is mentally unstable and blind. No guardian was appointed to take care of her interest. Accordingly she has neither petitioned nor filed an affidavit of protest against the proposed distribution by the Petitioners. The protester and her mother cannot purport to act for her in this cause by way of proxy. Accordingly the issue for determination should be how the estate of the deceased should be distributed between the Petitioners on one hand and the Protester and his mother on the other hand?

Section 38 of the Law Succession Act is very clear as to the distribution of the estate of the deceased who died intestate and has left a surviving child or children but no spouse. This is the scenario obtaining in the circumstances of this case. The section provides that in such eventually the net estate shall devolve upon the surviving child, if there be only one, or equally divided among the surviving children. However this provision of the law is subject to sections 41 and 42 of the same Act. Of particular relevance to this case is section 42 thereof. It provides that "where

**(a) an intestate has during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grand child or house; or**

**(b) Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or 35 that property shall be taken into account in determining the share of the net estate finally accruing to the child, grandchild or house."**

It was the evidence of the protester that he was given a portion of the suit premises by the deceased. The Protester also alleged that the Petitioners were given other parcels of land by the deceased as gift *intervivos*. It is for the foregoing reasons that in filing the affidavit of protest, the protester was perhaps invoking the above provisions of the law. However no cogent or credible evidence was tendered by the protester to show that the deceased actually gave him a portion of the land nor that the deceased gave the petitioners in his lifetime separate parcels of land. What came out from the evidence is that the protesters mother was not married and that the protester was in fact born and brought up by his mother on the suit premises. There is no evidence tendered by the protester that he was a dependant of the deceased. Indeed in the affidavit in support of the petition for letters of administration intestate jointly sworn by the petitioner and the protester's mother, does not show anywhere that the protester had survived the deceased. The only persons shown as having survived the deceased were the Petitioners and the protester's mother. The same story is replicated in the petition filed by the public trustee. The public trustee could not have just stumbled on this information. He must obtained it from the three, the protester's mother included. Then there is a letter from the chief indicating who should be the beneficiaries of the estate of the deceased. The protester's name is not featured among them nor is that of his aunt, Nyawira. At this juncture I must point out that parties are bound by the pleadings.

Then there is the unchallenged evidence of the 1<sup>st</sup> Petitioner regarding the deceased desire to have the suit premises subdivided into three equal portions and shared between the petitioner and the protester's mother. However the deceased passed on before he could effectuate his wishes. There followed thereafter a series of meetings with the chief, the D.O. and even the D.C. in which the issue of subdivision of the estate was discussed and agreed. Indeed the protester's mother agrees that such meetings were held and she was in attendance throughout and it was agreed that the deceased wishes regarding the suit premises be respected. However for reasons which did not come out clearly in her evidence, she has subsequently back peddled on the agreement, perhaps under the influence of her son the protester. Under cross-examination by **Mr. Kagio**, the protester's mother made this startling revelation "**..... I now do not agree with that decision.....**" The protester tendered in evidence two certificates of official search of the two parcels of land **Iriaini/Gakuyu/88** and **86** which the protester claimed belonged to the deceased initially and which he gave to the Petitioners. However a cursory glance at those certificates does not reveal that the said parcels of land ever belonged to the deceased in the first place. Indeed they tend to support the petitioners' contention that they were given the said parcels of land by their clan and not the deceased. It is trite law that whoever alleges must prove. It was incumbent upon the protester to bring

such evidence as would have shown that the two parcels of land initially belonged to the deceased and following his decision to give them to the Petitioners, the same were transferred subsequently and registered in the names of the petitioners. The certificates tendered do not provide such history.

There is also evidence that even when the deceased was alive, the Petitioner's used to cultivate the suit premises and their children, the protester included were also allowed to utilise the land. Surely if the deceased had given the petitioners their separate parcels of land as claimed by the protester, could he still have allowed them to utilise the suit premises? I have my own doubts.

The totality of the foregoing is that section 42 of the Law of Succession Act is not available to the Protester. The estate of the deceased has to be distributed in accordance with section 38 of the Law of succession Act. This is what the petitioners have endeavoured to do in their application for confirmation of grant dated 6<sup>th</sup> July, 2006 and filed in court the following day. I thus find no merit in the affidavit of protest which is accordingly dismissed with costs to the petitioners. The grant shall be confirmed in terms of the application for confirmation of grant dated 6<sup>th</sup> July 2006 and filed in court on 7<sup>th</sup> July 2006.

***Dated and delivered at Nyeri this 29<sup>th</sup> day of January 2009***

**M. S. A. MAKHANDIA**

**JUDGE**