



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

Succession Cause 50 of 1999

IN THE MATTER OF THE ESTATE OF JENIFFER KIARA (DECEASED)

ELIAS GITARI PETITIONER

JOYCE KATHAMBI OBJECTOR

JUDGMENT

L.R. No. 192 NGUSISHI SETTLEMENT SCHEME was the only property left by Jennifer Kiaca Anampiu, the deceased. After her death on 24th February 1982 one of her sons, Elias Gatari, the petitioner filed this cause on 15th February 1997, some fifteen (15) years later, to administer her estate comprising only the suit property. The grant was later issued and confirmed.

The objector, a sister-in-law to the petitioner sought the annulment of the same and leave to object out of time. That application was allowed by consent and the hearing of the objection and cross-application proceeded before Sitati, J. Following her transfer I proceeded with the hearing from the stage she had reached.

The issues in the matter are largely uncontroverted. The deceased got married three times to three different men, with whom she conceived and gave birth to two sons and one daughter. Her fourth child was a daughter. According to the evidence adduced, from her first marriage to one Isaiah, Damaris Karimi was born; from Kanampiu Kaimura the petitioner was born; from the third marriage to Shadrack M'Rimberia, the objector's deceased husband, Edward Muthomi M'Rimberia was born, while from her fourth association with unknown man Evangeline Kathure was born. Evangeline is married and lives at Muthambi with her husband. Both the objector and the petitioner live on the suit land. It is also common ground that the suit land was registered in the name of the deceased, although I cannot trace any document of title in the file. It is further conceded that the objector's husband, Edward Muthomi M'Rimberia was allocated 8 acres from his father's KIBIRICHIA/NTUMBURI/309 land – through High Court Succession Cause No. 228 of 1997.

The only issue in dispute is whether the petitioner is wholly entitled to the suit land. Put differently; whether the deceased's other children are entitled to a share of her estate, the suit land.

The objector called evidence that when she got married to Edward Muthomi M'Rimberia in 1980 she found him and his mother living on the suit land. According to her the suit land became her matrimonial home and has since lived there with her family. She buried her husband there in 2000.

The objector further stated that she learnt that the suit land had been allocated to the deceased by the then Minister for Lands, the late Jackson Angaine. That the criteria of allocation was being poor and landless. She has maintained that the petitioner was living and working at a place called Kionyo and only came to

the suit land later. She further confirmed that her deceased husband made a contribution of Kshs. 13,000/= while the petitioner made a similar contribution.

In conclusion the objector testified that the deceased left an oral will in which she stated that the suit land should be distributed in equal shares to her four children. The objector called three other witnesses. PW2 – Roseline Ciokuno is the sister to the deceased. She confirmed that indeed all the four children of the deceased had four different fathers. She confirmed further that she lived with these children as the deceased loitered around. According to her it is customary for the Ameru woman to take away her children when a marriage fails. She was emphatic that the deceased was allocated the land after she broke up with Shadrack, the objector's husband's father and while at her parent's home.

PW3 Teresina Tirende (Tirende) a niece to the deceased traced the history of the suit land from the day the deceased went to her (Tirende's) home in the same area as the suit land. She had gone there to be allocated the number of the suit land. She spent the night at Tirende's home and the following day obtained the parcel number. As she constructed on her newly acquired land the deceased lived with Tirende for one year.

A neighbour of the deceased, Khamisi Juma, PW4 first met the deceased in 1977 during the land allocation.

In his testimony the petitioner maintained that the suit land was allocated to the deceased on account of his (the petitioners) father, Kanampiu, who died in the forest fighting for the independence of Kenya.

That being so, he argued, the suit land solely belonged to him and his siblings are not entitled to a share of it. In his opinion each of his siblings should be allocated land by their respective fathers. That the objector's husband had in fact been allocated his father's land through a succession cause.

In the same breath, he maintains that he contributed funds towards the payment of the charges towards the suit property. The petitioner's first witness, M'Arithi Materi, a nephew to the deceased stated that the suit land was allocated to the deceased because her husband, Kanampiu, the petitioner's father had died in the forest as a freedom fighter. The petitioner's final witness was Domiano Muranga Materi another nephew to the deceased.

Of the two sides, the objector's witnesses gave consistent and truthful evidence. I am persuaded from their testimony that the suit land was allocated to the deceased as a poor landless lady with children and no husband.

Indeed it is in evidence that the petitioner was working away from home at Kionyo between 1976 and 1992. The petitioner has himself confirmed in his evidence in cross-examination that when he went to the suit land he found the objector and her late husband. There is credible evidence from Roseline Ciokumo, who lived with the deceased's children, Teresia Tirende with whom the deceased lived immediately after acquiring the suit land and Khamisi Juma, a neighbour, that the suit land was allocated to the deceased at a time when she had no husband.

Turning to the evidence by the petitioner and his witnesses I cannot help but to observe that the credibility of that evidence is highly questionable. The petitioner's basis for the claim is confused. It is not clear whether his claim is based on the fact that the suit land was allocated to his father, Kanampiu, or to his mother, the deceased, on behalf of Kanampiu or whether it is based on the fact that he purchased it.

Regarding the latter I have serious doubts as to the authenticity of four receipts allegedly issued in 1977. All of them were issued on 12th May 1977. The first two, P Exh. 2 P Exh. 2(a) are in respect of farmer share issued by Ex-Meru Detainees and Forest Fighters Co-operative Society Ltd for Kshs. 100/= each, while the next two receipts are not headed for Kshs. 25/= each. Two issues arise from these receipts. The first two emanate from the same source, Ex-Meru Detainees and Forest Fighters Co-operative Society Ltd. Indeed the serial numbers follow each other, namely 02723 and 02724. Both are for Kshs. 100/= in relation to the same service. The question is: why then two receipts? The same question can be raised

with regard to the second set of receipts.

The second issue is that the particulars of the transaction to which the receipts related is not disclosed. Of significance is the omission from all the four (4) receipts of the particulars of the suit land, L.R. Ngusishi 192. There is yet a third (3rd) set of receipts issued in favour of the Settlement Fund Trustee produced as P exhibit 2(e). Two of those receipts relate to payment made on 9th December, 1998 for the same Vote, Head and Item. The serial numbers are 144536 and 144537 respectively.

Again the question that begs is, why issue two receipts on the same day for the same item in respect of the same land? Apart from these doubts, I find the evidence adduced by the petitioner and his witnesses inconsistent and incredible. When the petitioner filed this cause he averred in his affidavit in support of the petition that the deceased was survived by him alone. A letter issued by the Acting Chief Abogeta Location dated 11th January 1999 was categorical that the petitioner was the only son of the deceased. These averments are clearly false.

Secondly, it is in evidence that the suit land is in Ngusishi Location. The letter by the Chief of Abogeta Location was clearly intended to circumvent the truth. As a matter of fact the Chief of Ngusishi Location subsequently issued a letter dated 13th November 2004 in which he confirmed that the deceased was survived by four (4) children from different fathers.

The petitioner's witnesses were not witnesses of truth. For instance, M'Arithi Materi stated in examination in chief that he comes from the area where the suit land is situated. In cross-examination he admitted that he hails from Abogeta, Kionyo in Meru South far from Ngusishi where the land is located.

He also testified that the suit land was allocated to Kanampiu. That this was before he died and while living with the deceased. That evidence contradicts that of the petitioner and his other witnesses to the effect that the land was allocated to the deceased following the death, in the forest, of her husband, Kanampiu. He gave a further contradictory testimony that the petitioner bought two (2) additional acres thus making the total acreage of the suit land to be 10 acres. Not even the petitioner has alleged that he did so.

Domiano Muranga Materi, another witness called by the petitioner traced the origin of the suit land to a society called the Mau Mau Fighters. It was his evidence that the land in question was part of the land allocated to the said society. That after the death of Kanampiu, the land was allocated to the petitioner. That again is not in consonance with the petitioner's case that the land was allocated to the deceased on account of Kanampiu's death while contributing to the freedom of this country.

From the foregoing, I come to the conclusion that the suit land was allocated to the deceased. She had four children from four different men. She moved with the four children back to her parent's home once each marriage broke up. The land was allocated to her while she was not in any form of association with any man. It is therefore not true that the land was allocated to her while married to Kanampiu. There is evidence that the land was allocated to her even after the death of the objector's husband, i.e., after she had left Kanampiu got married to Shadrack and even left him. Muthomi, the objector's husband was present when the land was acquired in the mid 70s. He settled there getting married in 1980 to the objector. The deceased died in 1982.

If indeed the petitioner was acting in good faith, if in fact he was solely entitled to the suit land, why then did he wait for over fifteen (15) years after the death of the deceased to bring this cause? There is only one main reason. Shadrack M'Rimberia, the father of the objector's husband died on 9th August 1996. Petition for grant of representation was filed the following year in 1997 and a grant confirmed on 23rd September 1998.

In the certificate of confirmation the objector's husband got eight (8) acres from KIBIRICHIA/NTUMBIRI/309. Five months after the above certificate of confirmation was issued the petitioner filed this cause on 15th February 1999. He had found a perfect excuse and reason to disinherit

his siblings. It was perfectly in order for the objector's husband to benefit from his father's succession cause. That *per se* did not disentitle him from benefiting in the distribution of his mother's estate. Indeed under the provisions of section 38 of the Law of Succession Act, all the deceased's four (4) children are entitled to equal share of the suit land.

Finally I need only to observe that the objector has brought her petition by way of cross-petition in her capacity as the daughter-in-law of the deceased and a dependant.

In the result it is ordered that the grant of letters of administration intestate be and is hereby issued to the petitioner and the objector jointly. I make no orders as to costs.

Dated and delivered at Meru this 20th day of January 2009.

W. OUKO

JUDGE