



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 165 of 2001

IN THE MATTER OF THE ESTATE OF BERNARD KARUE NGURE – DECEASED

ELIUD KARURI KIMARU PETITIONER

Versus

WILLIAM GITHUI KARUE

NGURU KARUE

MURICHO KARUE

MWANGI KARUE

MUNDIA KARUE OBJECTORS

JUDGMENT

Letters of Administration Intestate in respect of the estate of Bernard Karue Nguru deceased were sought by the petition of Eliud Karuri Kimaru. He described himself in that petition as a purchaser. He also set out the names of 5 sons of the deceased who survived him. An objection to that petition was filed by William Githui Karue. The court issued a grant to both of them jointly on 24th March 2004. Eliud filed summons for confirmation dated 9th October 2004 whereby he sought distribution of the only property of this estate namely Kirimukuyu/Ngandu/591 as follows-

- ELIUD KARURI KIMARU – 2 acres
- WILLIAM GITHIU KARUE – 2.8 acres (for himself and his brothers)

William filed an affidavit of protest against that confirmation. In his affidavit he stated that the family of the deceased are the only occupants of the suit property. On that land there are two permanent houses and several semi-permanent houses occupied by family members. Further that the family had planted banana trees and coffee bushes and had fenced the land. The electricity and water connection accounts were in the names of William and Joseph Mwangi Karue his brother. The case was ordered to be heard by viva voce evidence. William in his evidence repeated the above averments of his affidavit. He said that Eliud was their neighbour. When his deceased father died he was young man of 16 years old. The deceased left his children and grand children occupying the suit property. That his father was an alcoholic in his life time and had died of alcoholic coma. He referred to an agreement of sale which Eliud relies on in support of his claim as a purchaser and stated that their late father was literate and could not therefore had

thumb printed the agreement. Eliud in his evidence did confirm that the deceased knew how to read and write. William also stated that he was unaware when the land control board was obtained. He denied that their late father sold 2 acres to Eliud and said that the issue of purchase only arose after the death of their father. That Eliud sued their late father after his death but that suit was dismissed for having been filed against a dead person. In his evidence Eliud confirmed that he is a neighbour to the family of the deceased. He was also a good friend of the deceased in his lifetime. He said that the deceased had a loan which was secured by the suit property with AFC. The deceased requested him to pay the loan because AFC was threatening to sell the land. It is as a result of that request that they entered into an agreement dated 20th June 1978. In that agreement the purchaser Eliud agreed to buy 2 acres of the suit property from the deceased and in turn the purchaser was to deposit Kshs. 6000 with the firm of M/s Ghadially advocate which amount was to be paid to AFC. Eliud was further to pay kshs. 4,700 to the deceased. There was a balance of kshs. 9,300 which amount was to be paid to the deceased at completion. Eliud also submitted as an exhibit letter of consent from Mathira Land Control Board which consent was granted on 7th November 1978. This was 3 months after the execution of the sale agreement. He further submitted in evidence the transfer which bore a thumbprint in respect of the transferor. That transfer is dated 20th June 1978. He said that the only thing that prevented him from obtaining a title was the caution that had been registered on the title by the deceased brother. On being asked why the deceased thumb printed his document he responded as follows:-

“Deceased knew to read and write but he decided to thumb print. He was happy to thumb print because I saved the land from being sold.”

He however denied that the deceased was alcoholic. He said that he knew him to be a Christian. The plaintiff’s advocate in submissions argued that the transaction between Eliud and deceased was defeated by the provisions of the Land Control Act Section 6(1). I however beg to differ with those submissions. The correct section which applies to consent is section 8(1). The first limb of that section provides:-

“8(1) An application for consent in respect of controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto.”

The period therefore within which consent should be obtained is 6 months of the transaction. The consent before court was obtained within 3 months.

As I begin to consider this judgment I am aware that all the parties confirmed that the deceased was literate and could sign his name. Indeed William produced a copy of the deceased national identity card which bore his signature. It is not clear why when he knew how to read and write he chose to thumb print an agreement and transfer. The explanation given by Eliud is not satisfactory to the court. There was no evidence of subdivision of the deceased 4.8 acres to enable Eliud to get his two acres. The agreement was allegedly entered into in 1978. The deceased was alive for 2 years after that agreement. If indeed there was an agreement to sale there was time for the subdivision to be undertaken. Eliud said that the only impediment to his registration of the two acres was the caution of the deceased brother. If that was the only impediment it is not clear why Eliud only sued the deceased even though it was after his death when he was seeking that the land be transferred in his name. The agreement of sale provided that Eliud would pay kshs. 9,300 at the completion. Not only was there no evidence of this payment there was also no evidence of the other monies which allegedly went to the AFC or to deceased personally. On a balance of probability having considered the evidence and counsel’s submission I find that the protestor’s case should succeed. The judgment of this court is as follows:-

1. The court orders that the grant hereof be confirmed in the following terms.

· LR NO. KIRIMUKUYU/NGANDU/591 to be distributed equally between William Githui Karue, Nguru Karue, Muricho Karue, Mwangi Karue, and to the estate of Mundia Karue.

2. The Deputy Registrar of this court is authorized to sign all the necessary documents to effect that distribution in place of Eliud Karuri Kimaru.

3. The court awards the costs of this protest to the objectors as against Eliud Karuri Kimaru.

Dated and delivered this 10th day of February 2009

MARY KASANGO

JUDGE