



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
SUCCESSION CAUSE 104 OF 1998
IN THE MATTER OF THE ESTATE OF
NJAGATHA KIHUMBA – DECEASED

BETWEEN

PAUL KIHUMBA KIORIA PETITIONER

AND

MARGARET NJERI NJAGATHA 1ST PROTESTER

JULIUS KIHUMBA NJAGATHA 2ND PROTESTER

R U L I N G

The death of one, **Njagatha Kihumba**, hereinafter referred to as “*the deceased*” occurred on 17th July 1982. On 23rd June 1998, one, **Paul Kihumba Kioria** describing himself as the stepson of the deceased petitioned this court for a grant of letters of Administration intestate. As required the Petitioner cited several other people with an interest in the estate of the deceased. The citation aforesaid elicited a response from **Margaret Njeri Njagatha** and **Julius Kihumba Njagatha**. They are the wife and son of the deceased respectively. Their objection was on the basis that the Petitioner was not entitled to a share in the estate of the deceased and that they were the only ones together with their other 8 siblings entitled to inherit the estate which consisted of Land parcel Nos. Loc. **14/Kairo/116** and **Chinga/Gathera/286**. Contemporaneously with the filing of the objection, they also filed petition by way of cross-application and Answer to the Petition.

On 9th March 2000, the cause was placed before **Juma J** (as he then was) for directions. However by consent of the parties Temporary grant was issued to both Petitioner and Objectors jointly. Thereafter the judge directed that issue of distribution be determined by way of oral evidence.

The hearing thereafter commenced before **Mitey J** (as he then was) on 9th July 2002. In my view however, the hearing aforesaid was premature as there was no application on record for confirmation of the grant. Nonetheless the hearing proceeded. I do not understand why such an important step in the

cause was missed by the parties who were all represented by able counsel. Indeed it was not until I took over the hearing of this cause that I pointed out that anomaly. Further even though a temporary grant had been issued the same had not even been extracted from court. Remedial measures were thereafter undertaken resulting in the issuance of the temporary grant as well as the filing of an application for confirmation of grant. In the application, the Petitioner proposed that Loc. **14/Kairo /116** should go to **Margaret Njeri Njagatha**, whereas **Chinga/Gathera/286** should go to the Petitioner together with **Lucy Wambui Kibe** and **Eunice Wangechi Ithagi** in equal shares.

The application was opposed by **Margaret Njeri Njagatha** as well as **Julius Kihumba Njagatha** hereinafter referred to as "*the Protesters*". As far as they were concerned the entire deceased's estate could only be shared among the immediate family of the deceased. They proposed that the entire estate goes to the 1st Protester absolutely.

Parties agreed that the evidence hitherto taken by **Mitey J** in the absence of both the application for confirmation of grant and affidavit of protest was still relevant and there was no need to recall they said witnesses to testify afresh. In effect counsel for the parties were saying that I should act on the evidence taken by **Mitey J** and that I should proceed with the cause from where **Mitey J** had left.

Before **Mitey J**, the Petitioner testified that the deceased was a younger brother to his father who passed on during the state of emergency. He knew the 1st Protester as a wife of the deceased. When his father died, land had not been consolidated. During land consolidation, he was a young boy and in school. The deceased was in detention. Two parcels of land in Nyeri and Murang'a respectively were consolidated. The one in Murang'a became Loc. **14/Kairo /116** whereas that in Nyeri became **Chinga/Gathera /286**. Henceforth these parcels of land shall be referred to in this ruling as **Kairo** and **Chinga** lands respectively. The Petitioner after consolidation settled on Kairo land with his mother. The deceased and his wife also stayed on Kairo land briefly. Later his father told the deceased and his wife to relocate to Chinga land. He did so. The Petitioner's brother **Ithagi** also moved to Chinga land. There is tea on the land planted by the deceased. After the deceased passed on the witness was chased out of the Kairo land. His claim was in respect of Chinga land. That the 1st Protester is the one who told then to move to the land at Chinga. His father had subdivided each of the two parcels of land into 2 equal portions.

Cross-examined by **Mr. Wahome**, learned counsel for the Protesters he stated that his mother was called **Margaret Wanjiku Kioria** and she is the registered proprietor of Loc. **14/Kairu/106**. Hers was a first registration. She passed on over 10 years ago. He denied that he was also known as **Kihumba Kamau**. He conceded though that he has a parcel of land known as Loc. **14/Kairu/129** registered in his name. Initially it was registered in his names as **Kihumba Kamau** which he later rectified to read **Paul Kihumba Kioria**. That parcel of land was given to him by his grandfather. He had nothing though to show that Chinga land belonged to his father. He also confirmed that he never laid any claim to Chinga land during the lifetime of the deceased. Nor did his mother much as the deceased predeceased his mother.

The 2nd witness summoned by the Petitioner was **Reuben Githutho Kiganya** who came from the same clan as the deceased. He confirmed that **Kioria Kihumba** was a brother of the deceased. He died during emergency. Land consolidation was done when the deceased was in the forest. The deceased had land in Murang'a but not in Nyeri. **Kioria Kihumba** had no land in Murang'a but had land in Nyeri. After detention the deceased took over **Kioria's** wife, **Wanjiku**. By then the 1st Protester had not been married by the deceased. The deceased put up a house for **Wanjiku** at Kairu. They were blessed with one son, **Ithagi**. Later the deceased married the 1st Protester. Before the deceased passed on he was living with **Wanjiku's** sons in Chinga. The deceased subdivided the Chinga land into 2 portions. He also subdivided Kairo land into 2 portions. The sons of **Wanjiku** do not till the Kairo land. They were chased away from Chinga by the 1st Protester after the death of the deceased. As far as he was concerned, Chinga land belonged to **Kioria** whereas Kairo land belonged to the deceased.

Cross-examined by **Mr. Wahome**, the witness stated that the deceased was in detention whereas

Kioria was in the forest at the time of consolidation. He too was in the forest. **Wanjiku** was at home then. **Wanjiku's** son (PW1) was at home as well. **Wanjiku** was given land by **Kihumba**, her father in law. The deceased was registered in Chinga land. The deceased and **Kihumba** had no other brothers though they had 4 sisters. It had been decided before the chief that the Kairo land be subdivided between the 1st Protester and **Wanjiku**, however the 1st Protester refused. He conceded that PW1 lives on his own land in Murang'a which he was given by his grandfather during emergency. **Wanjiku** too was given land. That is as far as **Mitey J.** handled the matter.

Thereafter the same remained in limbo from 9th July 2002 until 9th March 2009 when I took over the same for reasons which are not apparent from the record. It was then that the Petitioner closed his case.

The 1st Protester testified that the deceased was her husband. The Petitioner was a nephew of the deceased being a son to the deceased brother by the name **Kioria Kihumba** who is also deceased. The Petitioner has his own land in Kairo. The parcels of land registered in the deceased's name were 2, Kairo and Chinga. The Petitioner had constructed his house in Kairo and does not utilise the deceased's lands aforesaid. The Petitioner lied when he stated that her husband had authorised him to use the Chinga land. She conceded though that **Lucy Wambui Kibe**, a wife to the brother of the Petitioner stays on Chinga land. She entered the same without her consent though. The petitioner had threatened to kill her because of denying him the two parcels land. **Ithagi Kioria** a brother of the deceased had passed on. However he had constructed on Chinga land. He knew PW2. He had died immediately after testifying. He was not a relative of the deceased and she never saw him during family gatherings.

Cross-examined by **Mr. Kiminda**, learned counsel for the Petitioner, she confirmed that **Ithagi Kioria** was buried on Chinga land. His wife though still occupies part of Chinga land. He occupied the land in the lifetime of the deceased and planted tea bushes. His family stays on the land to date. She did not agree with clan elders' verdict that the Petitioner's family was entitled to a share of the Chinga land. When she married the deceased she found the mother of the Petitioner in the homestead of the deceased. She denied that he deceased had put up a house for the petitioner's mother. When she died, she was buried at Kairo. She denied that the deceased inherited the Petitioner's mother. On that score, she claimed PW2 had lied. She stated that she did not know that the Petitioner's mother had a child, **Ithagi** together with the deceased who died and was buried in Chinga land. By the time she married the deceased, Chinga and Kairo lands were already registered in the name of the deceased.

The 2nd Protester testified as well. He stated that the deceased was his father and the 1st Petitioner, his mother. He denied that the Petitioner was a step son of the deceased. He was a nephew though. He testified further that the Petitioner could not inherit a portion of the deceased estate as he had his own parcels of land Loc. **14/Kairo/129**, Loc. **14/Kairo/1446**. **1446** was as a result of subdivision of parcel No. 106 whose registered owner was **Margaret Kioria**, the mother of the Petitioner. Before the death of the deceased, **Wanjiku Kioria** had not claimed any land from him. The grandmother had distributed various parcels of land among her sons. The Petitioner's father's land was registered in the name of his mother **Margaret Kioria** as her husband **Kioria Kihumba** had passed on. If they were entitled to the deceased's land, the Petitioner should have claimed the same during his lifetime. The brother to the Petitioner was allowed to construct a house in a portion of Chinga land in exchange for 1st Protester being allowed to cultivate the Kairo land. Later the arrangement collapsed when the Petitioner stopped the 1st Protester from cultivating the land. It was then that they asked them to leave Chinga land and they refused. Thereafter they embarked on suing them before the chief and D.O. The Petitioner should inherit from his mother and not Chinga land. He did not know PW2 who was not even a member of the family. He denied that **Wanjiku Kioria** was his father's other wife.

Cross-examined by **Mr. Kiminda**, he maintained that **Kibe Kioria** was buried in Chinga. His family and that of **Ithagi** still reside on Chinga land. This land was registered in the deceased name in 1958. Kairo land was registered in the deceased's name at the instance of the grandmother. **Wanjiku Kioria** had her house in Kairo land. Before she died she had already moved into her own parcel of land at Kairo. When she fell sick she moved from the deceased's land at Kairo to her own land. The dispute between the two families started following the death of the deceased. The chief and D.O. ruled that each

person inherits from his own father. That marked the close of the protesters' case.

Parties thereafter agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered them together with authorities cited. It is common ground that the protesters are a widow and son of the deceased. On the other hand the Petitioner is a nephew of the deceased. The Petitioner's claim to part of the estate of the deceased in particular Chinga land is anchored on the fact that it was their father's land but which had been registered in the name of the deceased. Apparently the deceased was in detention during land consolidation and demarcation with particular regard to Chinga land. The burden of registration therefore fell on the shoulders of the deceased's mother who was also a mother to the Petitioner's father. At this time the Petitioner's father's whereabouts were unknown. However it was possible that he was in the forest. However it was common ground that he never left the forest alive. He died therein or so it is assumed. The Petitioner's story is that Chinga land though registered in the deceased's name, it was his father's share who was the elder brother to the deceased and whose whereabouts were unknown. It was for that reason that it was registered in the deceased's name whose whereabouts were then known as he was in detention. If that is the basis of the Petitioner's claim, then it is bound to fail for the simple reason that the Petitioner has no locus standi to pursue the claim. It is common ground that the Petitioner's father never survived the forest or so it is assumed. However none of the witnesses who testified were ever certain that he died. All that they knew was that they never saw him after the end of state of emergency. It is therefore possible that the deceased passed on. It is also possible that the deceased never passed on. However whichever way one looks at it, the stakes are against the Petitioner. If he died, then for the Petitioner to clothe himself with locus standi, he ought to have sought and obtained a grant of letters of administration with regard to his estate. It is trite law that for one to legally pursue a claim on behalf of the deceased estate, one must first seek and obtain a grant of letters of administration to the said estate whether limited or confirmed. I said so in the case of **NYR Succession Cause No. 258 of 1998 in the matter of the estate of Wamahu Wambugu (UR)**. Nothing has been shown to me that would persuade me to change the views I expressed in the above case. In the circumstances of this case it is conceded that no such grant was obtained by the Petitioner. On the other hand, supposing the Petitioner's father never actually died, that he left the forest and relocated to some other place! again the Petitioner's claim hits a brick wall. He never applied to have his father presumed dead and thereafter obtain a grant. So that if the Petitioner's father is alive, the petitioner cannot mount this claim. However if he disappeared without trace, it behoved the petitioner to seek a presumption of his death with attendant consequences. The petitioner opted for none of the above options.

The deceased pre-deceased the Petitioner's mother. Ordinarily, one would have expected that the Petitioner's mother would pursue her husband's entitlement to a portion of the estate of the deceased. Surprisingly she never did so. Of course, the case for the petitioner is that perhaps that would not have been possible since his mother had been inherited by the deceased after her husband's failure to come out of the forest and the consequential assumption that he may have died. The Petitioner himself never alluded to such evidence though. That evidence came through PW2 who claimed to be from the same clan as the deceased. Between the Petitioner and clan member, who would know better regarding the relationship between his mother and the deceased. I would imagine the Petitioner since he was her eldest son. The Protesters have maintained that they did not know PW2 as they never saw him during family gatherings. These contentions were not seriously challenged by the Petitioner. Further it is this very same witness who claimed that following that union, a son by the name, **Ithagi** came forth. The Petitioner again was silent on this aspect of the matter. The Protesters on the other hand maintain that the deceased never married the Petitioner's mother but had constructed a hut for her and indeed if he ever was a wife, the child **Ithagi** would have been named after the deceased. Having regard to the circumstances of this case and the evidence tendered, I intend to agree with the Protesters' position. I have no doubt in mind that a levirate union was a recognised customary form of marriage among the kikuyu people. **Eugene Cotran** in his **Restatement of African Volume 1** confirms that fact. This is a customary form of marriage. Like every other customary marriage, the onus is upon the person who proclaims the existence of such marriage to prove it. Indeed in the case of **Njoki v.s Mathara and others, civil appal number 71 of 1989 (UR)**, **Kneller J.A.** held that:-

(1) The onus of proving a customary marriage is on the party who claims it.

(2) **The standard of proof is the usual one for civil action, balance of probabilities.**

(3) **Evidence as to he formalities required for a customary law marriage must be proved to the above standard.**

I cannot say that the Petitioner and or his witness (PW2) discharged the burden of proving the existence of a kikuyu customary levirate marriage between his deceased mother and the deceased. The evidence is scanty. Indeed it was only referred to in passing.

Yes the protesters reside on Kairo land. The Petitioner's brothers, **Kibe Kioria** and **Ithagi Kioria** and their families occupied, cultivated and constructed on Chinga land. Some of them still live on the said land. However that occupation alone does not alter the position on the ground. In any event if that claim is based on continuous and uninterrupted occupation of the suit premises this is not the proper forum to ventilate such claim. However and as already stated, the Petitioner never pursued the claim against the deceased in his lifetime.

It would appear from the written submissions that the petitioner is also hinging his claim to Chinga land on account of dependency. This is a complete departure from his pleadings as well as the evidence led. A party is normally bound by his pleadings. In the affidavit in support of the Petition for letters of administration, the Petitioner stated that he was presenting the petition in his capacity as a stepson of the deceased. As correctly pointed out by **Mr. Wahome** in his written submissions, a party cannot be allowed to approbate and reprobate as this would offend time tested trite law. Even if I was to consider the issue of dependency, I would still hold that no credible evidence of dependency was adduced by the Petitioner. He never showed that he was a dependant of the deceased in any way. His claim on behalf of the **Kibe** and **Ithagi** families was that they have lived on the parcel of land. There is unchallenged evidence by 2nd Protester that the Petitioner has his own parcels of land on which he has settled. He acquired these parcels of land long before the deceased passed on. He could thus not have been a dependant. **Kibe** and **Ithagi** families occupied a portion of Chinga land with the consent of the deceased. They were utilising the land for their upkeep. They never relied on the deceased for their upkeep. They cannot thus claim to be dependants.

In his petition for letters of administration intestate, the Petitioner described himself as a step son knowing very well that, that was untrue. It turned out so by virtue of his own evidence as well as the evidence of the Protesters. If the Petitioner could lie on such simple thing, what else has he not lied about?

The upshot of the foregoing is that I find no merit in the Petitioner's claim which I accordingly dismiss. The grant shall be confirmed in accordance with the affidavit of protest filed in court on 7th December 2008. Because of the close family relationships between the parties herein I shall make no order as to costs.

Dated and delivered at Nyeri this 31st day of July 2009

M. S. A. MAKHANDIA

JUDGE