



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Succession Cause 383B of 1994

**IN THE MATTER OF THE ESTATE OF SOLOMON NGUNJIRI KIMONDO –
DECEASED**

MURIUKI KIMONDO PETITIONER

VERSUS

NGIMA SOLOMON NGUNJIRIOBJECTOR

R U L I N G

On 13th December 1994 one, **Solomon Ngunjiri Kimondo** hereinafter to as “*the deceased*” passed on. On 30th September 1994; one **Muriuki Kimondo**, hereinafter referred to as “*the Petitioner*” petitioned this court for the grant of letters of administration intestate. He indicated in the petition that he had done so as the brother of the deceased. Apparently, he had lodged the said petition without a letter from the local chief in support thereof as is the normal practice. However he deponed that the deceased was his brother and was the registered owner of land parcel No. **Guthi/Muruguru/818** hereinafter referred to as “*the suit premises*”. That the deceased was registered as such in trust for the Petitioner and himself in equal shares. It would appear that he filed the petition without the death certificate of the deceased as well. On this aspect of the matter he deponed that the death certificate of the deceased was being held by **Ngima Solomon Kimondo**, the wife of the deceased. Thereafter he proceeded to cite the said **Ngima Solomon Ngunjiri**. **Ngima’s** reaction to the citation was to object to the making of the grant to the petitioner. Her objection was premised on the grounds that she and her children were the only persons entitled to the estate of the deceased as the deceased was husband and or father. That the Petitioner was not related directly to the deceased as the father of the petitioner and deceased were step brothers and finally that the petitioner inherited the estate of his deceased father together with three other brothers of his who were no longer interested in the estate of the deceased. She also went on to file an answer to the petition as well as petition by way of cross-petition reiterating what she had already stated in her objection to the grant. The only addition being that the petitioner had “**unlawfully changed his name to illegally tend (sic) to legitimise his abstract claim over part (sic) deceased estate, when he very unlawfully filed succession without my knowledge, consent or family consultation, to very (sic) issue a citation.**” That the Petitioner had prior filed a court case against the deceased, which was still pending in court. Finally that the deceased had expressly directed that the Petitioner be ignored with regard to his claim to the estate.

On 26th January 1997 a consent order in these terms was recorded by **Justice Osiemo** “**.... By consent matter in dispute referred to arbitration by D.O. Municipality to be assigned (sic) by 4 elders. 2 to be nominated by either side. Award to be field within 90 days**” The award was eventually field in court on 8th June 1998 and read to the parties on 12th October 1998. The award was in terms that “**..... The Objector’s husband was given land by the clan at Gachika while the Petitioner was given the**

land in dispute. Each of them puts up in their respective piece (sic) of land. I would therefore give the Petitioner the land in dispute where he has lived since demarcation....” As Esther Ngima **Ngunjiri** hereinafter referred to as “*the Objector*” was unhappy with the award, she on 5th November 1998 filed an application to set aside the same. That application was resisted. However on 8th October 2002 the said application was by consent of the parties allowed. It would then appear that the court decided to hear and resolve the matter for on 14th September 2004 a temporary grant was issued to the Petitioner.

On 27th September 2005, the Petitioner applied for the confirmation of grant through **Messrs H.K. Ndirangu Esq., Advocate**. He proposed that land parcel **Ruguru/Gachika /200** be registered in the name of the Objector whereas he retained the suit premises. That application provoked the Objector to file an application for the revocation of grant dated 18th October 2005. Subsequent however that application was by consent withdrawn on 10th May 2006. That withdrawal was followed immediately by the filing of the affidavit of protest by the Objector.

In the Protest, the Objector maintained that the Petitioner was a distant relative of the deceased and not beneficiary of his estate. The Petitioner too was not a dependant of the deceased. That the deceased had been survived by the Objector and her 7 children. That the Petitioner’s father and the deceased’s father were step brothers and had his own parcel of land number **Aguthi/ Muruguru/88**. Accordingly the Petitioner was not entitled to the deceased’s estate which comprised the suit premises as well as **Ruguru/Gachika/200**.

On 28th June 2007, the cause came before me for directions. Parties agreed that the same be heard by way of viva voce evidence. Directions in those terms were duly issued. Thereafter the hearing commenced before me on 14th May 2009. First on the stand was the Protestor. She testified that the deceased was her husband and had the two parcels of land aforesaid. The suit premises had been given to him alone. The Petitioner was a step brother to the deceased. His father was called **Ruigi** who was a brother to the deceased father. **Ruigi** had his own land. Originally the land belonged to **Ruigi**. However **Ruigi** subdivided the same and gave a portion to the deceased being the suit premises whereas he retained 819. The Petitioner has 4 other siblings. None of them was claiming the suit premises because they knew that the suit premises did not belong to them. She was not sure whether the Petitioner had obtained letters of administration of his father’s estate. She thus prayed that the application for confirmation of grant be dismissed and the grant be confirmed as per her Protest.

Cross-examined by **Ndirangu**, learned counsel for the petitioner, she stated that she stays on **Ruguru/Gachika /200**. However nobody stays on the suit premises. The Petitioner had earlier on sued the deceased during the subdivision as his house fell on the side of the deceased’s suit premises. The deceased was staying at Gachika in his maternal step father’s home; whereas **Ruigi** was staying at Kieni. She denied that there were 2 **Ngunjiri Kimondos** as the deceased was born alone. She did not know the name of the Petitioner’s first son as they stay apart. The Petitioner’s mother was known as **Nyagichuhi Ruigi**. Whereas the deceased’s mother was **Mutahe**. She denied that the father in law had 2 wives. She had been married during land consolidation and demarcation. **Ruigi** subdivided the land in order to give one portion to the elder son of the other wife, **Nyagichuki**. The Petitioner sued the deceased over the land after his house fell in the suit premises during subdivision. She did not know that the Petitioner was called **Muriuki Kimondo**. All along she knew him as **Muriuki Ruigi**. Gachika land was never part of clan land. With that the Protester closed her case.

The Petitioner opened his case by stating that the deceased was his stepbrother. His mother was **Mutahe** whereas his was known as **Nyagachuki**. Their father had 2 wives. His mother was the first wife. The father had 2 parcels of land at Gachika and Muruguru. Muruguru land was subdivided into **818** and **819** by **Ruigi**. One parcel was to go his mother’s house and the other was to remain with him. However the deceased was registered in 1976 as the proprietor of the suit premises. To the Petitioner the said registration was fraudulent. The deceased misled **Mr. Ruigi** into registering the suit premises to himself. He took advantage of similarities in names to effect the illegal transfer. **Ruigi** on discovering what had happened advised him to sue the deceased which he did. This was in HCCC No. 15 of 1978.

The deceased passed on before the case was concluded. He then initiated these proceedings. He claimed that **Kimondo Ruigi** had 2 wives. His mother was the first. The 2nd wife was known as **Mutahe**; the mother of the deceased. Gachika land was given to the deceased. The suit premises were registered in the name of the deceased by mistake. It was meant for his brother, known also as **Ngunjiri Kimondo**. The deceased house was expected to occupy Gachika land whereas their house was to occupy the suit premises. He prayed that the court endorse the aforesaid scheme of distribution.

Cross-examined by **Mr. Mugo**, he responded that **Ruigi** was his uncle. He had no family. His father **Kimondo** was a brother to **Mbuchi** and **Ruigi**. **Ruigi** did not sue the deceased for being misled. Rather it was him who sued. He registered a caution on the suit premises in 1977 yet **Ruigi** had not seen the need to do so. His 2 brothers reside on **Aguthi/Muruguru/819** and are not claiming a portion of the suit premises. Though he was working during land consolidation and demarcation, he never demanded from **Ruigi** their share of the land. He conceded that he sued the deceased over the suit premises. The award was in his favour though he did not have a copy thereof. Following the death of the deceased, the protester was substituted therein. In the case he had sued both the deceased and **Ruigi**. That the case was still pending.

The 1st witness called by the Petitioner was **Joseph Mundia Mararo**. He knew the Petitioner as his father was his step brother. He had been involved in land demarcation and consolidated. The father of the deceased had 2 wives – **Nyagichuki** and **Mutahe**. **Mutahe** later left. She left him with the son, **Ngunjiri**. During land demarcation and consolidation he gave the said **Ngunjiri** land at Gachika. This is where his wife, the Protester stays. **Kimondo**, father of **Ngunjiri** had a brother called **Ruigi**. **Ruigi** did not have a wife or children.

Cross-examined by **Mugo**, he stated that **Ruigi** was a young brother of **Kimondo**. He is dead. He had a parcel of land but had no wife nor children. He had been given land by his father. However he did not know whether **Ruigi** shared out his parcel of land.

The last witness called by the Petitioner was **Wambui Macharia**. However she had been in court during the testimony of DW2. Though I allowed her to testify, it was on the basis that her evidence will be treated with abundant caution. The petitioner was her brother in law. Her husband **Macharia Kimondo** had passed on. She knew that the protester had a son by the name **Kimondo**. She also had a son by that name as well. The protester was a wife of the deceased who was a step brother to her husband. The deceased came to the land earlier. The suit premises belonged to her mother **Nyagichuki**. She has all along stayed on the suit premises since demarcation. She maintained that the Protester should be satisfied with Gachika land and leave the suit premises to her as it belonged to the 1st house. The Protester had never stepped on the suit premises save for the boundary features she fixed.

Cross-examined by **Mr. Mugo**, she responded thus that the suit premises were registered in the name of the deceased. She did not know whether **Ruigi** subdivided the land and gave it out. That the land with boundary features belongs to the deceased. That the Protester cannot have 2 parcels of land. She did not know why the deceased Planted the boundary. **Ruigi** was alive but was not present. When she asked **Ruigi** about the boundaries, she advised them to sue. With that the Petitioner closed his case.

Parties thereafter agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered the written submissions. The issues for determination in this cause are fairly straight forward. They are essentially three; whether the suit premises forms part of the estate of the deceased solely or is so held in trust for the Petitioner and members of the 1st house. Lastly is the question of costs. It is common ground that **Ruigi s/o Ruoro** was the registered proprietor of the original land parcel **Aguthi/Muruguru/361**.

It is also common ground that this parcel of land was subsequently subdivided into two portions; **Aguthi/Muruguru/818** (the suit premises) and **Aguthi/ Muruguru/819**. It is also common ground that **Ruigi** had neither a wife or children. It is also not in dispute that the deceased had another parcel of land at **Ruguru/Gachika/200** on which the protester currently resides. It is also not in dispute that the deceased

died on 14th December 1984 and it is also not in dispute that the protester was the wife of the deceased. Finally it is not in dispute that the suit premises are registered in the name of the deceased. However the point of departure between the Petitioner and Protester is that whereas the Petitioner contends that the deceased misled and fraudulently caused **Ruigi** to transfer and register the suit premises in his name knowing very well that the suit premises belonged to the 1st house in which the petitioner belongs, the protester on the other hand maintains that the deceased was given the suit premises alone. There was no fraud nor did he mislead **Mr. Ruigi** in so doing. Between the evidence offered by the protester and the Petitioner, which one should I believe? I think that the testimony of the Protester was consistent and truthful. Indeed I watched her as she testified and I informed the impression that she was a honest and truthful witness. However I cannot say the same of the Petitioner. First in the Petition he described his relationship to the deceased as a brother knowing very well that, that was not the truth. Secondly, in his affidavit in support of the petition he did not as much as mention the protester and his children as having survived the deceased which fact he knew very well. Further in the inventory section of the affidavit, he indicated that the suit premises belonged to the deceased, yet in his testimony he turned round and stated that the suit premises were fraudulently transferred by the deceased to himself. Indeed it is even difficult to follow the basis of the Petitioner's claim to the suit premises. First he claims that the suit premises were registered in the name of the deceased's name in trust for himself and members of the 1st house in which he belongs. Yet in another breath he claims that the deceased fraudulently caused **Ruigi** to transfer the suit premises to him. Yet in another breath he claims that the suit premises were registered in the name of the deceased by mistake. It was in fact meant for his brother called **Ngunjiri Kimondo**. These are contradictory positions to take in a matter. If the transfer and subsequent registration of the deceased as the proprietor of the suit premises was on the basis of family trust for himself and the members of the petitioners family, it could not again have been fraudulent. It must have been voluntary and genuine. On the other hand if it was fraudulent, the intention would have been that the deceased would inherit the suit premises solely and the issue of trust would not arise.

There is evidence though that the Petitioner was aware of the subdivision of the suit premises. Indeed it would appear that the Petitioner only started to question the subdivision by the **Ruigi** after his house fell on the side of the deceased's suit premises. The Petitioner therefore was all along aware of the subdivision and cannot therefore claim fraud. In any event if as he claims that the deceased prevailed upon **Ruigi** by tricks and fraud to transfer to himself the suit premises, one would then have expected that the said **Ruigi** will be in the forefront of suing the deceased. However according to the evidence of the Petitioner, when he confronted him over the issue, **Ruigi** advised him to sue. If that were true, then one would have imagined that the Petitioner would have wished the said **Ruigi** to be on his side at least as a witness. What did the Petitioner do instead? He filed suit against the deceased and the said **Ruigi** jointly. Why would he sue **Ruigi** if his complaint was that he was misled into transferring the suit premises to the deceased by the deceased.

HCCC No. 15 of 1978 had a serious bearing on this cause. However for reasons that I am unable to fathom, none of the parties saw the need to tender in evidence the proceedings of that case. To my mind it behoved the Petitioner to tender into evidence the details of such case. After all it was him who had initiated the same. Much as he claimed to have abandoned the same, there is evidence however that following the death of the deceased he was substituted in the suit by his wife, the protester. Indeed the Petitioner himself confirmed under cross-examination that the suit is still pending in court. Why did the Petitioner not wish this court to see the proceedings of that case? Is it possible perhaps that the matters in this cause are also directly in issue in that case? Perhaps with attendant consequences. One too would have wished to see the basis and or essence of that suit. The evidence shows that the said **Ruigi** died in 1980's. Further, there is also evidence that the real beneficiary of the subdivision, **Ngunjiri** though alive according to the evidence of the Petitioner was not keen to pursue the claim. Indeed he never joined hands to sue the deceased alongside **Ruigi**. What does this tell us? I think the Petitioner's claim is a make belief story.

In any event I do not think that this cause is the appropriate forum to canvass family trust. It is best left to be ventilated in our other civil courts. In succession causes, the court is ill equipped to deal with the concept of family trust and or clan land. Since HCCC 15 of 1978 is still alive, perhaps the issue of family trust is best left to be ventilated therein. After all the Protester has since been made a party to the suit in

substitution of her deceased husband.

It would appear also that the Petitioner's claim was anchored on the fact that after the subdivision by **Ruigi**, one portion was to go to their mother's house. Indeed under cross-examination by **Mr. Mugo**, he categorically stated that "..... **I am claiming from the deceased my mother's share**" Yet there is evidence that he never obtained a grant of letters of administration that would have enabled him pursue such claim on behalf of his mother if at all. Yet again, none of the Petitioner's brothers who are alive and kicking have laid claim to the suit premises on that basis why? Is it because as the Protester said the said brothers know that the suit premises do not belong to them. That assumption cannot be ruled out completely.

The Petitioner did admit in his evidence that he was an adult person at the time of land consolidation and demarcation. Indeed he was then working. I find it hard to believe that the Petitioner would have allowed the deceased to have himself registered as aforesaid, fraudulently or not since 30th December 1976 going by the copy of the green card tendered in evidence and hardly do anything to assert his entitlement until 13th December 1994 when the deceased passed on. Of course there was HCCC 15 of 1978. However since the details of the said suit were not availed one cannot effectively say that the petitioner filed the said suit in order to ventilate his rights.

The upshot of all the foregoing is that I am persuaded that the suit premises belong to the deceased's estate. No sufficient evidence was led to show that the deceased's estate holds the suit premises in trust for the Petitioner and his family. In any event this is not the forum for the ventilation of family trusts. How about costs? This being a family dispute, I do not think that it would be proper to burden any of them with costs. The Petitioner's application for confirmation of grant is otherwise dismissed. I will however confirm the grant as per the affidavit of protest, that is to say, land parcel numbers **Aguthi/Muruguru/818** and **Ruguru/Gachika/200** shall otherwise go to the estate of the deceased represented in these proceedings by the Protester.

Dated and delivered at Nyeri this 22nd day of July 2009

M. S. A. MAKHANDIA

JUDGE