



REPUBLIC OF KENYA
HIGH COURT NAKURU
SUCCESSION CAUSE 294 OF 1993

THEURI KAHOYA GITUNE.....APPLICANT

VERSUS

MARGARET GAKENIA NDERITU.....1ST RESPONDENT

DANSON MWAURA MWANGI.....2ND RESPONDENT

JUDGMENT

By a summons for Revocation of Grant dated 17th October, 2001 and filed on the same date, the applicant/objector, Theuri Kahoya Gitune, prays that the Grant of Letters of Administration Intestate, issued to the 1st Respondent on 9th March, 1994 (*and confirmed on 19th January 1995*) be revoked or annulled and that the applicant be awarded three acres out of land parcel No. L.R. Nyandarua/South Kinangop/7 which he claims to have acquired from the deceased during his lifetime. The applicant claims to have been in occupation of the said parcel of land since 1963, a fact which is not disputed by the Respondents, who although admitting that the applicant is entitled to ownership of part of the land, hold the position that, he is not entitled to three acres, as claimed, but to a smaller portion.

The confirmed grant awarded the applicant 2.2 acres of the suit land and 5 acres to the 2nd respondent, a purchaser. The 2nd respondents' entitlement to a portion of the suit land is also not disputed. The only dispute is as to what acreage the two are entitled to going by the wishes of the deceased owner. The applicant claims to have bought 3 acres of the suit land whilst the Respondents contend that the deceased bequeathed to the applicant, as a gift inter vivos, only the remainder of the parcel after the 2nd Respondents' 5 acres purchased by the 2nd respondent were excised upon completion of the survey. The respondents depositions are contained in their respective Replying Affidavits filed on 13th November, 2001.

After several twists and turns involving these proceedings, in the course of which, the application was once dismissed for want of prosecution and later reinstated, it became clear to the court that parties needed to call oral evidence to establish and prove their respective claims. The applicant, who was said to have been weakened by age did not attend court to testify but was represented by his son **Eliud Maina Theuri (PW1)** upon whom he had conferred a power of attorney. In addition to Eliud, two other witnesses, **Elijah Kariuki Chege (PW2)** and **Joshua Kimani Njuguna (PW3)** testified for the applicant. The 1st respondent testified as DW1 and the 2nd respondent as DW3. They called one **Charles**

Wathare Chege (DW3) to testify in support of their defence. At the close of the hearing, counsel for the parties herein requested to file written submissions and the court allowed them to do so.

PW1 testified that he was the nephew of the deceased and the son of the applicant and also that the deceased was married to the 1st respondent. He had known the couple since their marriage in 1991 which took place while he and his family were occupying the subject parcel of land. PW1 stated that he was born in the suit land in 1963 but his knowledge as to how the family came to be in occupation was based on what his parents told him. He had been told that the parents came from Nyeri at the invitation of the deceased who then asked them to pay council rates and an outstanding loan over the suit land in order that he could transfer the same to them. According to PW1, they managed to raise Kshs.9,000/= which was only enough to purchase 3 acres of the entire plot, estimated to have measured 9 acres in all. He testified further that the Land Board Consent for the transfer of the three acres was issued on 18th December, 1991 and produced a copy thereof as an exhibit. Still in his evidence in Chief, PW1 told the court that the Land Control Board took notice of an undertaking by the deceased to transfer 5 acres of land to the 2nd respondent.

Under cross examination, PW1 admitted the contents of the Respondents' Agreement for Sale dated 7th September, 1991 in respect of the 5 acres awarded to him under the grant and confirmed that he was personally aware of the sale of the same from the deceased to the 2nd Respondent. He also admitted that the acreage of the entire plot was not ascertained when the sale was negotiated and concluded and that, although his father (*the applicant*) referred to measurements of 9.3 acres when he sought to have the boundary between his portion and that of the 2nd respondent established, PW1 had since established from the land registrar that the actual measurement of entire plot was 6.69 acres. He categorically refused to accept the respondent's position that the 2nd respondent is entitled to 5 acres out of the now surveyed plot and his father, the remainder of 1.69 acres. Save for the Land Board consent dated 18th December, 1981, PW1 produced no documentary evidence to show that the applicant had bought three acres from the deceased for Kshs.9,000/= as alleged.

PW2 testified that he was aware of the applicant and his family's occupation of the parcel of land, and that his father (*the deceased*) had sold 5 acres of the same to the 2nd Respondent and 3 acres to the applicant. He was unsure of the total acreage, stating only that he knew (*from information given by the purchasers*) that it was 9.3 acres. He testified that as far as he knew the land was subdivided in 1982 and trees planted to mark a boundary. A wire fence, was also erected to divide the applicant's 3 acres and the 2nd respondent's 5 acres. Without producing any document to support his testimony PW3 told the court that the applicant, who to his knowledge, had been given the suit land by the deceased '*to take care of*' paid the Settlement Fund Trustees' loan in consideration for a transfer of the same to himself and his wife who happened to have been the deceased's sister. He denied any knowledge of the 2nd respondent or how he acquired an interest over the suit land. PW3's testimony was founded on the fact that he was the treasurer of the Co-operative society through which owners of the several plots of the settlement scheme paid their loans to the Settlement Fund Trustee. Under cross examination, he confirmed however that the applicant herein was not a member of the co-operative since the land was not his but that it was the deceased who was the member.

The 1st Respondent (DW1) testified that Plot No. 7 South Kinangop belongs to two people, the applicant and the 2nd respondent. She was personally involved in the negotiations regarding the sale of 5 acres of the suit land to the 2nd respondent. She told the court that the 2nd respondent was introduced to her and her late husband by the applicant when the land was threatened with repossession by the Settlement Fund Trustee, their loan, subject to which the land had been allotted to the deceased having fallen into arrears. That was in 1981. DW1 was aware of an agreement for sale dated 7th September, 1981 evidencing the sale of 5 acres of the suit land by the deceased to the 2nd respondent for Kshs.41,000/= and also a second agreement of the same date wherein the deceased and the applicant agreed to the transfer of the remainder of the parcel (*after the excision of the 2nd respondents 5 acres*) to the applicant. The agreements were in the Kikuyu language but translated copies had been filed by

consent alongside the respondents' list of documents. DW2 executed the two agreements as a co-owner with the deceased. The agreements were executed at the office of the chief, Mugumu Location and were witnessed by four assistant chiefs. DW1 also testified that she accompanied her late husband, the applicant and the 2nd respondent to the meeting of the Land Board Kinangop Division when the consent to transfer the land was given. She stated that, although the consent obtained indicated that the land measured eight acres, a figure which she said was given by the applicant, the same was only an estimation since the land had not been surveyed yet. She produced the Land Board consent dated 18th December, 1981 as exhibit D.4. She testified however that the applicant has all along been aware that the 2nd respondent was entitled to 5 acres of land as per the sale between himself and the deceased. Asked why in her application for the confirmation of the Grant she had given an acreage of 7.2 acres DW.1 told the court that the same was her own estimation. She denied that the applicant had bought the portion occupied by himself and his family from the deceased. Under cross examination DW1 accepted the Applicants' contention that going by the search conducted (but not produced as an exhibit) the suit land measures 6.69 acres. She was, however, categorical that the 2nd respondent should get the 5 acres he bought as was stated in the confirmed grant. She denied that the agreements representing the transfers were forged by herself and the 2nd respondent.

Charles Wathari Chege (DW2) was the Assistant Chief, Mugumu sub-location between 1981 to 1983. He testified that he was a witness to the agreement for sale between the deceased and DW1 and the 2nd respondent for the sale of the disputed 5 acres to the 2nd respondent. Also the second agreement evidencing the gift of the remainder of the parcel to the applicant herein. He produced the two agreements dated 7th September, 1981. Asked about the boundary placed by the parties after the transfers DW2 testified that the same were to be confirmed by a surveyor. DW2 testified that he did not have any knowledge of the exact acreage of the suit land but was aware that the applicant had been living on the portion that he occupies for a long time.

The second respondent (DW3) testified and confirmed DW1 and DW2's testimonies as to how he came to acquire and occupy a part of the suit land. He told the court that in 1981 he was landless and in need of land to settle in. He met the deceased at his home where the deceased offered him the suit land upon DW3's undertaking to clear a settlement Fund Trustee loan, outstanding in regard to the same. DW3 cleared the loan on 2nd September, 1981 as confirmed by a letter dated 8th January 2001 (Ex D.7) written to the Nyandarua District Lands Tribunal by the Accountant, Revenue Collection, Land Adjudication and Settlement Department, Nairobi. He then entered into the agreement dated 7th September, 1981 (Ex.D.1) which was executed in the presence of the applicant, who acted as DW3's witness. A second agreement was drawn and executed between the deceased and the applicant by virtue of which the applicant was to get the remainder of the suit land after DW3's 5 acres had been excised. DW3 attested the second agreement as the applicant's witness. According to DW3 the settlement scheme plots had not been mapped out at that time and the portion shown to him as representing his 5 acres was merely an approximation. He entered into possession after the sale was concluded but the vendor died on 22nd March, 1993 before the land was subdivided. DW3 testified further that on 27th March, 1982 he entered an agreement with the applicant in regard to sharing the survey fees. The said agreement, which DW3 produced as 'Ex.D.3' clearly specified that the applicant would get the remainder of the suit land after DW3's 5 acres had been excised as did the Land Control Board's consent dated 18th December, 1981 which he produced as 'Ex. D.4'. He testified further that his interest over the suit land is well represented in the Succession Cause as is the interest of the applicant. DW3 also produced as 'Ex.D.5' an agreement entered between him and the applicant on 18th September, 1995 in regard to the subdivision, where the parties agreed to have the District Surveyor conduct a survey of the parcel and to hive off DW3's 5 acres with the remainder going to the applicant. PW1 witnessed the agreement together with four other witnesses. A survey was carried out as per the agreement and a boundary erected. The applicant dismantled the boundary and lodged a dispute before the District Lands Tribunal. The District Surveyor had by then established the actual acreage of the plot to be 6.667 acres. DW3 produced as 'Ex.D.6' the Tribunal proceedings in DLT cause No.42 of 2000 wherein an award had been made to the effect that the applicant gets 3 acres out of the suit land and DW3 gets the remainder. He testified that the award was subsequently upset by the Appeals Tribunal and also by the Court. The position remains the

same to date.

Under cross-examination DW3 testified that he had lived on the land for 12 years prior to the demise of the deceased while the applicant occupied the portion given to him by the deceased. He explained the delay in not registering his 5 acre portion to the delay in the mapping and also the fact that, after the owner died, a grant of letters of administration intestate had to be obtained. He categorically denied the applicants' lawyers' suggestion that the applicant's signatures on the agreements of 7th September, 1981 were forgeries and strongly opposed counsel's suggestion that the suit land be shared equally between himself and the applicant.

In the written submissions filed on behalf of the applicant it is stated that the deceased, in 1981, divided the suit land between the applicant and the respondent. That is not in the evidence. An attempt was made to establish that the applicant bought the 3 acres he claimed for Kshs.30,000/= . This too was not proved by the evidence adduced for the applicant. It is irrelevant, in my view whether the applicant came into possession by way of a sale or a gift inter vivos since his interest and possession are not disputed. The real issue in dispute is the size of the respective plots to be awarded to the applicant on one side and the 2nd respondent on the other and whether the grant issued to the 1st respondent, which gave the applicant 2.2 acres and the 2nd respondent 5 acres, should be annulled and/or revoked and the applicant awarded 3 acres of the suit land while the 2nd respondent gets the remainder.

The applicant claims that the deceased had caused the land to be subdivided by an agricultural officer and a boundary put in place. According to counsel, the Land Control Board consents which approved the sale of "5 acres out of 8" to the 2nd respondent and the transfer of "3 acres absolutely" to the applicant meant that the applicant would get 3 acres while the 2nd respondent would get 5 acres "if the land was 8 acres". I am unable to understand the basis of such an interpretation or the logic therein.

The applicant does not dispute the 2nd respondent's purchase of 5 acres from the deceased who also transferred to him the parcel on which he is settled and has lived in since 1963. The evidence tendered before this court shows clearly that the deceased sold 5 acres of the suit land to the 2nd respondent leaving the remainder of the same to the applicant. Whereas, as set out in the respondent's written submissions, the Land Board consent in respect of the transfer to the 2nd respondent noted a consideration of Kshs.41,000/= no consideration was entered in the consent to the applicant's transfer. This clearly negates the applicant's contention that he bought three acres of the land from the deceased, confirming, however, the respondent's assertion that the portion occupied by him was bequeathed to him as a free gift. It is clear that the land had not been surveyed when the deceased transferred the same to the two contestants. The boundary erected then was merely an approximation and cannot override the boundary established after the land was surveyed.

From the evidence I have no doubt in my mind that the deceased's intention was to give the applicant herein the remainder of the suit land after the 2nd respondent's 5 acres had been excised therefrom. I disallowed the applicant's summons for revocation of the grant, only ordering, that the same be rectified to the effect that the 2nd respondent be and is hereby awarded 5 acres of L.R.NO.NYANDARUA/SOUTH KINANGOP/7 while the applicant gets the remainder thereof.

I award the costs of these proceedings to the respondents.

Dated, signed and delivered at Nakuru this 18th day of September, 2009

M. G. MUGO

JUDGE