



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Succession Cause 257 of 1995

IN THE MATTER OF THE ESTATE OF RUTERE M'MWITI (DECEASED)

IN THE MATTER OF THE ESTATE OF RUTERE M'MWITI (DECEASED)

LAWRENCE KIREMU RUTERE APPLICANT/PROTESTER

ANGELO MWOBBI RUTERE RESPONDENT

JUDGMENT

When Angelo Mwombi Rutere herein after called Angelo, petition for grant of letters of administration intestate he produced a letter from the chief each indicated that the beneficiaries of the estate of the deceased herein were himself and four married daughters of the deceased. The only property of the estate was Nkuene/L. Mikumbune/366. The grant was issued to Angelo and later confirmed on 3rd September 1997. By that confirmed grant, the suit property was distributed wholly to Angelo. An application dated 21st October 2004 was filed by Lawrence Kiremu Rutere. The application was seeking the revocation of that grant on the basis that Lawrence was also a son of the deceased. He stated in his application that he had been wrongly left out of this succession. His application was supported by the affidavit of Paulina Nchoro M'Rutere. In her affidavit, Paulina stated that she was the wife of the deceased. She further stated that Angelo and Lawrence were both her children with the deceased. By the time the application for revocation came up for hearing, Angelo had divided the property into four parcels namely Nkuene/L./Mikumbune/1920, 1921, 1922 and 1923. Hon. Lady Justice Sitati ordered that there be a site visit which was undertaken by the Executive Officer of this court. That report was presented in this succession. When Hon. Lady Justice Sitati ruled on the application for stay of eviction by Lawrence, the Hon. Judge adopted the Executive Officer's report. The Judge in her considered ruling had this to say:-

“From the report also, the parties were and still are in agreement that the applicant has always lived and worked on parcel number 921 and a part of 922. This was the case long before subdivision and before transfer of some of the original suit land to third parties.

After carefully considering the submissions and the report filed in court after the visit to the locus in quo, I am persuaded that prayer (b) of the application dated 21/10/2004 is merited. The applicant built a home on the suit land in 1986, and he has lived on the suit land uninterrupted since then. In my view, the applicant is a dependant of the deceased under the provisions of Section

29(b) of the Law of Succession Act. This is assuming that the applicant is a stepchild of the deceased. From what was observed on the ground, the deceased had taken the applicant into the deceased's family as his own, and by the time of the deceased's death, the applicant was being maintained by the deceased. If the applicant was not entitled to a share of the deceased's estate, the deceased would have said so before his demise. There is no averment by the respondent that the deceased said anything that would disentitle the applicant from a share of the deceased's estate. Accordingly, I order that the applicant should not be evicted from the suit land until the wider issue of distribution of the deceased's estate has been sorted out."

The ruling of Hon. Lady Justice Sitati has not been appealed against. That finding of the Judge in that ruling is therefore binding on me as I decide this judgment. The Judge in her considered ruling granted orders of stay of eviction and further revoked the grant issued to Angelo. This present judgment relates to the protest to Angelo's application for confirmation of grant where Angelo prayed that the suit property be inherited by him alone wholly. Lawrence, in his affidavit of protest stated that he is the brother of Angelo and that their father was the deceased. He stated that after the grant was confirmed by this court, Angelo proceeded to sub divide the suit property amongst himself, his children and a purchaser. In that distribution, he had left out Lawrence. Lawrence deponed that he was entitled to one half of the deceased property and that the other half should be given to Angelo. Angelo responded to that affidavit by denying that Lawrence was a son of the deceased. Rather he said that Lawrence was a son of M'Mugiira Raria but that they shared the same mother, Paulina Nchooro. Angelo stated that the said father of Lawrence Raria had called Lawrence before his death with a view to him giving Lawrence his land. He further stated in his affidavit that the suit property had already been subdivided into 4 portions and distributed to his children that is, parcel No. 921 and 922. He retained for himself parcel No. 923. Parcel No. 920 had been sold to Agnes Raria who in turn had sold it to the Hon. Kiraitu Murungi. He finally stated that Lawrence was not entitled to inherit from the deceased. For the first time, in this action, Angelo stated in his replying affidavit to the application for revocation that:-

"My deceased father said that the objector (Lawrence) should go to his father, in the presence of the sub area and chief."

The protest by Lawrence proceeded for hearing by way of *viva voce* evidence. Evidence in support of the protest by Lawrence was adduced by Paulina Nchooro and Lawrence himself. Paulina stated that the deceased was her husband and Angelo and Lawrence were both her sons who she bore with the deceased. She said that each son had occupied half of the deceased land but after Angelo sold a portion of the land they no longer have equal shares of that land. That Angelo has a bigger portion. On being cross examined about the parentage of Lawrence, she stated that Angelo was lying by saying that M'Mugiira was the father of Lawrence. She said that there was a time that she and Mugiira "shared" traditional beer but that was long after the birth of Lawrence. It was not clear to the court what the sharing of traditional beer signified. Lawrence in evidence stated that Angelo was his brother and that they had 4 sisters who are married. He also reiterated that Angelo had subdivided the land into 4 portions and had sold parcel No. 920. Parcels No. 921 and 922 he registered in his children's names whilst 923 was in his name. Lawrence said that he was born in 1962 and the deceased herein died in 1965. That Angelo was older than him having been born in 1954. He stated that they had all along lived together as a family and that in all that time Angelo had not complained about his lineage. On being cross examined, he stated that Angelo had lied to the chief in order for him to be excluded in the list of beneficiaries. In reference to M'Mugiira he said that he did not even know where his home was. Angelo in evidence reiterated that Lawrence was not the son of the deceased but rather of M'Mugiira. He said that M'Mugiira had a parcel of land No. 298. He produced a green card of that parcel. The green card shows that the said title was closed after subdivision into 3 portions and before the subdivision it was indeed in the name of M'Mugiira where he held a 1/3 of that land. Angelo finally stated that he was the one to inherit the deceased property because Lawrence was never a dependant of the deceased for his upkeep. It was only on being cross examined that Angelo denied that Lawrence resided on the deceased property or that he

had planted coffee and banana trees. Again for the first time in re-examination, he stated that Lawrence only came on the deceased land after the death of the deceased. Angelo called a witness who described himself as a former sub area. He stated that the deceased was related to him although he did not state their exact relationship. He said he knew the deceased family well except for the deceased daughters who are older than him. He said that Angelo was the son of the deceased whilst Lawrence was the son of M'Mugiira. That whilst he was a sub area without stating the date he said that M'Mugiira approached him sending him to Paulina to ask Paulina to surrender Lawrence to him because he did not have a son. According to this witness, Paulina responded by saying that Lawrence would be given to M'Mugiira when he was grown up. That was the entire evidence that was tendered before court. I must begin by stating that Hon. Lady Justice Sitati revoked the grant issued to Angelo. Having done so, there is no grant issued to any person in this matter. However, when the protest was heard by way of *viva voce* evidence, partly before Lady Justice Sitati and partly before Hon. Justice Ouko, the parties did address themselves in their evidence in respect of the distribution of the estate. I have the power under Section 66 of the Law of Succession to appoint an administrator of the estate. In doing so, I should have the best interest of the parties. The only issue for determination before me is how the deceased estate should be distributed. As stated before, Angelo initiated this cause by bringing to court a letter written by the chief of Nkuene Location dated 30th March 1992. The chief in that letter listed the beneficiaries as Angelo and 4 married sisters. Lawrence has contended in this matter and was supported by Paulina that Angelo petitioned for grant of letters of administration intestate secretly in this matter. I find that if Angelo is to be believed that he did not file the cause secretly, then he would need to explain why he left out his mother's name in the petition. In all probability, it was because he did not want Lawrence to know that he was petitioning. Further, if he was confident that Lawrence was not the son of the deceased, he failed to state why he did not disclose to him that he was petitioning since it is accepted by all parties that Lawrence was living on the deceased property. As I stated before, the executive officer's report so confirmed and that report was adopted by the court and that adoption has not been the subject of an appeal. It is not clear why Angelo had to wait until Lawrence discovered that a succession had been filed while he was being evicted from the land by Angelo. My finding is that Angelo did not name his mother and Lawrence to the chief because he has not been candid in this matter and had intention of inheriting the deceased property alone. In respect of the evidence that M'Mugiira sent DWII to Paulina, I find it is an afterthought on the part of Angelo. If that was the case, from the time Angelo begun to respond to the application of Lawrence, he would have raised it. The sub area did not specify the date he was sent, if at all. He stated in evidence that the chief had to be involved but was not specific what that involvement was. Angelo further stated that the deceased had said that Lawrence was not his son. No evidence was adduced by any persons who might have heard him say so. That evidence by Angelo therefore remains uncorroborated. Having considered the entire evidence and the affidavits on record, I make a finding that Lawrence was a son of the deceased and is entitled to share in the deceased's estate. As stated before, the deceased property was sub divided by Angelo. In my view, the registration of parcel No. 921 and 922 in the names of the children of Angelo was an attempt to keep those parcels out of reach of Lawrence. In any case, grandchildren do not have a greater right of inheritance than a son. Those transfers were not effected after a purchase. They were not *bona fide* transfers. The said sons of Angelo cannot therefore be protected by Section 93 of the Law of Succession Act. That section validates a transfer to a purchaser made by a person issued with a grant. But even where a transfer is made to a purchaser, it has been held that such transfer can be invalidated "if shown to be either fraudulent and or upon other serious defects and or irregularities". See the case High Court Nairobi Succ. Cause No. 2853 of 2003 **Rebecca Veronica Adela Vrs. Prisca Khatambi Kibukosya & Another**. The Court of Appeal in interpreting section 93 found that where a person had no interest in land, for example, where one had no right of inheritance, such transfer can be invalidated. This was the finding in Civil Appeal No. 343 of 2002 **Jane Gachoki Gatheca and Priscilla Gitungu & others**. The court of Appeal in that case stated:-

"A thief acquires no right or interest which is transferable in stolen property. The transaction would be void ab initio and the property is traceable."

In our case, here I find that the parcels No. 921 and 922 are traceable. The reason I so find as stated before is because the same were transferred by Angelo to his children. As I stated before, I find that

Lawrence is a child of the deceased. The other reason why I find them traceable is because the transfers were, I believe, made to deny Lawrence land. It is worth noting that one of the children of Angelo, Phineas, was a minor when the property was transferred into his name. The judgment of this court is as follows:-

1. The registration of titles Nkuene/L.Mikumbune/921 registered in the name of Angelo Mwobi M'Rutere and parcel No. 922 registered in the name of Phineas Bundi Mwobi be and are hereby cancelled. The same are to be registered in the name of Lawrence Kiremu Rutere. The necessity by the Land Registrar of having the original title documents is hereby dispensed with.

2. A grant and a confirmed grant shall issue in those terms to Angelo Mwobi M'Rutere jointly with Lawrence Kiremu Rutere. If either of the two administrators fails to execute documents to put into effect the judgment of this court, leave is hereby granted to the Deputy Registrar of this court to sign such documents instead of such an administrator who is refusing.

3. The costs of the protest shall be paid to Lawrence Kiremu Rutere by Angelo Mwobi M'Rutere.

Dated and delivered at Meru this 29th October 2009.

MARY KASANGO

JUDGE