

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Succession Cause 110 of 2002

IN THE MATTER OF THE ESTATE OF ONESMUS KIBIRA WANJOHI..... DCD

AND

LUCY GATHONI WAMBUGU.....PETITIONER

JUDGMENT

The grant of letters of administration intestate in respect of this estate was issued jointly in the names of Lucy Gathoni Wambugu and Joseph Kamau Kibira. Lucy Gathoni applied for confirmation of that grant and proposed the mode of distribution of the assets of the estate. That mode was protested to by Joseph Kamau. This judgment relates to the protest proceedings. In evidence Joseph Kamau said that the deceased was his father. They lived with him until the time of his death on parcel No. THEGENGE/KARIA/1937. He stated that his mother got married to the deceased in 1982. In 1983 she left the deceased because of her alcoholism. Indeed that the deceased chased her away. On leaving the deceased she went to reside at property Tigithi/Matanya Block B/1006. On being cross examined he denied mistreating the deceased. On being questioned whether indeed the deceased was his biological son of the deceased he responded in the affirmative. He however was unable to substantiate this claim because of the date that he gave for his birth corresponding to the date that his mother got married to the deceased. He said that he was born in 1974. His mother got married in 1982. On being questioned about the claim by John Wachira Wanjohi for half an acre of the property Thegenge/Karia/1937 he stated that it is correct that John Wachira had purchased a property from his father and that that transaction was completed before the death of his father and he was then given his land. In respect of the sale agreement between Lucy Gathoni and Eustace Muga Theuri he stated that the same was entered into after the death of their father. Joseph Kamau denied that he was aware of a Bank account owned by the deceased. The other petitioner Lucy Gathoni in her evidence stated that she was the wife of the deceased and that they got married in church in 1982. She presently resides at the Matanya property of the deceased. On being married they lived together with the deceased for three years. Because the Karia property was small she relocated to Matanya property. This was because she had married the deceased whilst she had five children. In total she now has eight children. She claimed that Joseph Kamau abused her and threatened to kill her in order to get the deceased's inheritance. She stated that the deceased sold part of the Karia property to John Wachira Wanjohi. She received Kshs.30,000/- from John Wachira being the balance of the purchase price. She however stated that she was not aware of how much money had been paid to the deceased by John Wachira. After the death of the deceased she entered into an agreement dated 9th June 2003 with Eustace Muga Theuri for the purchase of a quarter of an acre of the Karia property. She received from him Kshs.160,000/- being the total purchase price. The deceased in this matter died on 3rd November 2001. The grant was issued in the joint names of Lucy Gathoni and Joseph Kamau on 21st February 2005. In the court's view Lucy Gathoni had no power from this court to sell the property to Eustace Muga. She had no capacity to enter into that agreement. Accordingly that agreement is not recognized under the law. In evidence she further stated that the deceased had a bank account although she did not know in which bank where he kept the proceeds of the sale of land. Further at his death the deceased left pending in the lower court cases whose proceeds should be divided amongst his children. This witness proposed that confirmation be issued as prayed in the application. She alleged that the protestor mistreated the deceased. That he also demolished her house which was on Karia property. That this was done by the protestor and his wife as she was in that house. The trees that are on the Karia property she found them there when she got married to the deceased. On being cross examined she stated that the agreement between John Wachira and the deceased was brought to her notice after the death of the deceased. John Wachira Wanjohi stated in evidence that there was a transaction between him and the deceased whereby he agreed to buy ¼ of an acre of the Karia property. He said that he had paid the deceased Kshs.120,000/- and the balance that remained was Kshs.30,000/-. The balance that remained he paid to the deceased's wife Lucy Gathoni. This amount he paid to her on 6th April 2000. On being cross examined this witness confirmed that he had previously purchased another parcel of land from the deceased. The one that he now requires the court to put into effect was the second transaction. He said that the same was witnessed by the petitioner and her children. It ought to be noted that Lucy Gathoni earlier in her evidence said that she first got to know of this transaction when John Wachira showed her the agreement. John Wachira said that none of the deceased's children or the petitioner co-signed the agreement. He denied being used by the petitioner for further her case in this matter. On being re-examined he could not remember the date of the earlier agreement. Eustace Muga Theuri confirmed that he entered into an agreement with Lucy Gathoni to purchase from her 3/8 of a hectare of Karia property. He first paid her Kshs.20,000/-and finally paid her in total Kshs.160,000/-. On being cross examined he stated that he expected Lucy Gathoni to be able to transact that agreement because she was the wife of the deceased. DW 4 was Joseph Matu Mathenge. He stated that the deceased's father and his father were brothers. He lives about 3 km away from where the deceased resided. He said that the deceased married

Lucy Gathoni in 1983 in a Catholic Church. When being married she had 5 children. They resided together at Karia property for five years thereafter Lucy Gathoni moved to another shamba. The deceased died in his house alone. Without disclosing who was responsible he stated that the deceased at the time of his death was in cow shed. That at the time of his death the deceased was not in good terms with the protestor because the protestor wanted him to buy him a vehicle. On being cross examined he stated that the deceased died due to hunger and sickness. Lucy Gathoni summoned the bank manager of Barclays Bank Nyeri Branch to give evidence in respect of Account No. 65537. The bank manager stated that that account was opened on 6th November 2001. It was in the joint names of Onesmus Kinyua Wanjohi and Joseph Kibira. For one to qualify to open a bank account according to the bank regulations they needed to have an identity card and an introduction. The introduction had to be by a customer known by the bank for twelve months. That account as at 6th November 2001 had a credit balance of Kshs.574,876.05/-. The manager was unable to say whether all the requirements of opening an account were met. As at 10th January 2002 the account had accrued interest at Kshs.19,126.45/-. After various withdrawals the account was closed on 18th October 2002. The banker was unable to say whether the deceased had any other bank account at Barclays bank. The protestor Joseph Kamau was recalled for further cross examination. He confirmed that he had a joint account with the deceased. He however was unable to state when this was opened. He used to withdraw money from that account since he had a bank pass book which money he used to clear the deceased's indebtedness. He had contributed Kshs.5000/- to open that account. He used to pass on various amounts to his deceased father to deposit into that account. He confirmed that the account was closed in 2002 and that he did not give to his mother any money from the withdrawals.

As I begin to consider the evidence before me I wish to start with the claims made by the alleged purchasers of the deceased property. The agreement entered between John Wachira Wanjohi and the deceased is dated 6th April 2000. In that agreement John Wachira agreed to purchase a ¼ of an acre land for the consideration of Kshs.150,000/-. He alleged without proving it before court that he paid the deceased Kshs.120,000/-. That was not confirmed by any member of the family of the deceased. Even Lucy Gathoni although she confirmed receiving Kshs.30,000/- from John Wachira she could not confirm whether if any money was paid to the deceased. Joseph Kamau stated that there was a previous transaction between John Wachira and the deceased and that transaction was completed by the time the deceased died. Having considered the evidence before court I find that the evidence of Joseph Kamau is more believable. John Wachira did not explain to the court why a transaction that was started in April 2000 had not been completed by the time the deceased passed away. Even if that transaction was entered into there is proof of payment of the purchase price. Payment of Kshs/30,000/- to Lucy Gathoni cannot be recognized by this court because it has no basis under the law in the absence of a grant. In whole looking at the agreement in the Kikuyu translation I note that there seems to be an addition of 20% which does not seem to in same writing of the original agreement. I find that John Wachira Wanjohi is not entitled to claim of the deceased estate. In regard to the agreement between Lucy Gathoni and Eustace Muga that goes without saying that Lucy Gathoni had no backing of the law to enter into that agreement. Section 82 of the Law of Succession Act recognizes that such an agreement could only have been entered into by personal representatives of the estate. That agreement was entered into prior to the grant of letters of administration herein. Even if it was entered into after the grant was issued it would be avoid contract since the co-administrator Joseph Kamau was not a party to the agreement. The finding of this court is that Eustace Muga Theuri is not entitled to claim any property from the deceased's estate. The bank account which was produced by the bank manager is in the name of Onesmus K. Wanjohi and Joseph Kibira. It is a joint account. Evidence was not adduced to show the mandate of transacting that account. Further questions were not put to the bank manager on whether any money in that account could be identified as belonging solely to the deceased. I therefore find that the prayers sought by Lucy Gathoni that Joseph Kamau be ordered to refund the monies withdrawn to the estate cannot be granted. Further even though I find that Joseph Kamau was not the biological son of the deceased, I find that he is entitled to be regarded as the deceased dependant as provided under section 26 of the Law of Succession Act. There is no doubt that there is acrimony between Joseph Kamau and Lucy Gathoni. Joseph Kamau stated and it was supported by other witnesses that he is in sole occupation of the Karia property. I am of the view that that property where he has settled with his family should be given to him. The other children will be given the other remaining properties with their mother Lucy Gathoni having a life interest. The judgement of this court is as follows:-

1. *Thegenge/Karia/1937 to Joseph Kamau Kibira absolutely.*
2. *Lucy Gathoni Wambugu shall have a life interest in Tigithi/Matanya Block V/1006 and thereafter to her surviving children who are as follows; Boniface Maina Kibira, Symon Mwai Kibira, David Macharia Kibira. Miriam Wangechi Kibira, Michael Wanjohi Kibira and Rahab Njeri Kibira.*
3. *Any monies due in respect of civil cases NYERI CMCC NO. 125 OF 2001, NYERI CMCC NO. 531 OF 2001, NYERI CMCC NO. 605 OF 2001 AND NYERI CMCC NO. 480 OF 2001 to be shared equally amongst all the beneficiaries of this estate namely, Lucy Gathoni Wambugu, Joseph Kamau Kibira, Boniface Maina Kibira, Symon Mwai Kibira, David Macharia Kibira. Miriam Wangechi Kibira, Michael Wanjohi Kibira and Rahab Njeri Kibira.*
4. *Account with credit society Nyeri Branch shares with Kenya Breweries and shares with Thegenge Umoja Company to Lucy Gathoni Wambugu.*

5. *There shall be no orders as to costs.*

Dated and delivered at Nyeri this 7th day of October 2008.

MARY KASANGO

JUDGE