



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
SUCCESSION CAUSE 730 OF 1995

IN THE MATTER OF THE ESTATE OF THOMAS KAMUYU THUO – DECEASED_

JUDGEMENT

The deceased herein had three wives – the first wife had seven children, the second wife had eight children who are represented by M/s G. Kamonde and Co. Advocates.

The third wife has nine children. The first one Samuel Thuo Kamuyu is represented by M/s Mwiti and Co. Advocates, 2nd son Edward Kimba Kamuyu is represented by M/s D.K. Thuo and Co. Advocates. The third to 7th children are in person and 8th and 9th children (Margaret Wambui Kamuyu and Tabitha Wanjira Kariuki are represented by M/s Kinuthia Wandaka and Co. Advocates.

Out of the above children Paul Thuo Kamuyu and Peter Karanja Kamau filed the petition for grant of letters of representation in the estate of the Deceased. It also enclosed consent from 11 sons of the deceased. The daughters were not involved at that stage.

On the summons for confirmation dated 25th February, 2001 the protests were filed by way of affidavits.

Johnstone Kimani Kamuyu has filed his affidavits sworn on 23rd September 2002 (filed on 3rd October, 2002), that sworn on 17th December, 2004 (filed on the same date), that sworn on 20th February, 2006 (filed on 21st February, 2006).

Edward Kirumba Kamuyu swore an affidavit of protest on 24th February, 2005 filed on 2nd March, 2005.

David Gitau Kamuyu, Reuben Kamau Kamuyu and Daniel Chege Kamuyu swore an affidavit of protest on 11th March, 2005 filed on the same date.

Margaret Wambui Kamuyu swore her affidavit of protest on 4th June, 2002.

They all aver inter alia that the estate consist of two properties i.e. Dagoretti/Waithaka/336 and Dagoretti/Waithaka/322 and all the three houses should share the two properties. They claim that the Petitioners have omitted to include the second property as well as the beneficiaries of the 3rd house in their petition and summons for confirmation.

The case of the Petitioners is that the deceased distributed 11 acres to each widows' houses and left 8 acres as his own land. According to them the property No.322 was given to the third house and thereafter the third widow with all her children moved out of property No.322. It is not in dispute that property No.322 does admeasure 11 acres and the property No.336 was also divided and the houses of two senior widows accordingly settled their families respectively on their own portions. They also relied on the Elders' award in Land Dispute dated 5th April, 1984 in respect of property No.336 which award was

made a judgment of the court vide ELC No.4 of 1984 before Principal Magistrate's Court, Nairobi. The judgment was so entered by the order of the court dated 28th May, 1987.

The preliminary point raised by Mr. Kamonde the learned counsel for the Petitioner and other beneficiaries to the effect that the protests cannot be considered in view of the said judgment pursuant to the Elders' award was not upheld and hence the parties adduced evidence before the court.

Edward Kirumba in his evidence on behalf of the 3rd house relied on his affidavit sworn on 24th February, 2005. He reiterated the family details, and stated that Samuel Thuo Kamuyu (now deceased) was given property No.322 and thus it is not an asset of the estate of the deceased. The only property No.336 available should be shared amongst the three houses. He is the son of the third wife.

However, he stated that in 1971 when they moved to property 322 from 336 their houses and shops on the latter property were demolished.

I may pause here and note that it is thus shown by him that the family moved with the third wife on property 322. In cross-examination by Mr. Wandaka appearing for his two sisters he testified that despite the fact that the family moved to stay on plot 322, their mother was cultivating her portion on property No.336. But he did not state which portion of the said property she was cultivating, considering specially the fact that the deceased had retained eight acres as per the case of the Petitioners.

In cross-examination by Mr. Wandaka he also testified that the deceased sought to sub-divide 336 by giving 6 acres to him in trust for his mother, 3 acres to the two daughters (Objectors) 8 acres to the senior wife and 6 acres to the second wife. But consent was not given due to caution placed by George Njenga a son from the second house.

He also agreed that the late Samuel Thuo had filed a H.C.C.S. No.1726/02 against him and his other brothers to evict them from property No.322 which is stayed by the court order. I must note that the said number is changed to read as H.C. ELC. NO. 869/07 as I had perused the said file.

The witness agreed that they have built permanent houses on property No.322 after they moved there and the land was divided in three portions and that he was excavating and seeking red-soil to show to their deceased brother that they have rights over that land. He further testified that the caution on property 336 was put because "**the land was given to wives and not sons**".

It is very interesting to note that in response to the questions asked in cross-examination by Mr. Kamonde, he stated, namely:-

"I do not live on 336 – I live on 322. It was supposed to be my mother's land though registered in the name of Thuo. I built permanent house in 1986. I did so as the land as per me was for my mother. I was living with my mother. My sisters were also living with my mother. The children of the other two houses were living on 336 The others also live on that land. The other house members have not lived on 322".

He agreed that as per the award of elders each wife was given 11 acres.

That was evident from the third house.

On behalf of the 1st House, Peter Karanja testified that in 1969 the deceased called all his three wives with their children. He (the deceased) said that the two senior wives are aged but the third wife was still young. In the event of his demise he could foresee some problems in the family. Thus he wanted the young wife to move with her children to a different land which is property No.322 and other two wives to stay on property 336 where he kept his own portion of eight acres in the middle of the said property. Thus the deceased, in his life time, apportioned the two properties to three houses, and the respective houses, since 1969 are living on those three apportioned portions of 11 acres each. In cross-examination he agreed that 322 was registered in the name of Samuel Thuo who is the eldest son of the third house.

He denied having knowledge of any suits from the said late Samuel Thuo to evict his brother from 322 and that the deceased wanted to sub-divide 336 during his life time and due to cautions such sub-divisions were stopped. The deceased died in the year 1990. He also agreed that the said land was in trust for the family of 3rd house.

On behalf of the Administrators, Paul Thuo Kamuyu gave evidence. He reiterated that as per wishes of the deceased each house was to have 11 acres and was so given and settled accordingly in their respective portions during the life time of the deceased. Thus the net estate is 8 acres which were kept by the deceased. He agreed in cross-examination, that property 322 was registered in the name of the eldest son of the 3rd house which was a separate land while property 366 was kept in the name of the deceased who was the original owner thereof and the deceased together with two houses were occupying and living on the said property. In 1971 the deceased tried to register but caution was placed by Edward and Johnson. He insisted that 322 was registered in the name of the eldest son of third home in trust for the whole family.

He agreed that in his life time the deceased wanted to sub-divide but the said sub-division did not go through. He denied that 9 acres were kept by the deceased in trust for third house and that he sold 1.5 acres to city council.

Johnson Kimani Kamuyu from third house, though has filed affidavits, did not testify and presumably relied on his affidavits.

In the affidavit sworn on 20th February, 2006 by him, he has averred as under in its paragraphs 4 to 10:-

4. **THAT prior to his death the deceased had declared to us how he wished his land to be shared among his three Houses.**
5. **THAT the Petitioner who lodged the petition/application dated 27th February, 1998 has failed to disclose to the court the interest of the objector in the estate of the above named deceased thereby leaving him out of the deceased's property known as L.R. Dagoretti/Waithaka/322.**
6. **THAT the idea behind the intended petition for letters of Administration secretly is to make sure we don't get any share from our father's property.**
7. **THAT the above stated parcel in the name of Samuel Thuo Kamuyu is held in trust for the benefit of deceased dependants, the third (3rd) house.**
8. **THAT the same is held in trust to be shared equally among the five male children of Mineh Waithera Kamuyu referred to as the third House.**
9. **THAT the deceased's property known as L.R. Dagoretti/Waithaka/336 measuring 31.7 Acres to be subdivided as follows:- 1st House to get 13 acres, 2nd House to get 13 acres the remaining four (4) acres to be subdivided to children of 3rd House, Mineh Waithera, each son getting $\frac{1}{2}$ acre and each daughter to get $\frac{1}{4}$ acres .**
10. **THAT one of the sons by name Daniel Chege is deceased, the remaining sons to the 3rd House to get 2.2 acres each, from L.R. Dagoretti/Waithaka/322.**

He has also reiterated the same in his earlier affidavit sworn on 17th December, 2004.

The evidence before me is as specified hereinbefore.

There are thus some undisputable facts before the court:-

1. The 3rd House has been moved to and settled in property No.322 since 1969. The property was registered in the names of the eldest son Samuel Thuo who is now deceased.
2. The children of third house have built their houses on property 322 and have never put up any structure on the property No.336.

3. The petition was filed by representation of 1st and 2nd Houses and has included all the sons from the three houses excluding daughters and that is why two daughters Margaret Wambui Kamuyu and Tabitha Wanjira Kamuyu, have protested. The petition has not included property No.322 as an asset of the estate.

4. All the beneficiaries mentioned have given notices of the petition. Hence the protests and objection from the third house.

The issues to be determined is:-

(a) whether the intervivos registration of property No.322 in the names of the eldest son of the 3rd house was in trust for all the children of the said house.

(b) Whether the judgment of the lower court adopting the Elders' award can be relevant factor in the determination of the present succession cause.

(c) Whether the occupation by the respective houses on property No.322 and portions of acres on property No.336 create overriding interest in each house.

I shall deal firstly with the last issue, the determination whereof can be on the admitted facts and provisions of law.

I have already observed that since 1969 the 3rd house (all members thereof) has moved to the property No.322 and similarly the other two houses have occupied 11 acres each on property no.336 and members of other houses did not disturb that respective occupation of those lands. Obviously, the possessions and/or occupation are continuous since 1969.

Thus individual 3rd members of house acquired prescriptive right under Section 7 of the Limitation Act (Cap 22) provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims to that person” (*emphasis mine*).

Section 30 of Registered Land Act (cap 300) provides that unless the contrary is expressed in the register, all registered land shall be subject to overriding interests mentioned therein. Section 30(f) stipulates one of such overriding interest, namely:

“(f) rights acquired are in process of being acquired by virtue of any written law relating to the limitations of Actions or by prescription”

Thus I do agree with Mr. Kamonde the learned counsel for two houses, that the members of 3rd house have acquired overriding interest on 11 acres each against the title held by the deceased, owner of property No.322.

I rely on the case of the **Public Trustee and Mrs. Beatrice Muthoni vs. Kamau Wandaru (1982 – 88) I KAR 498**, wherein the Court of Appeal recognize the prescriptive rights under Section 7 of the Limitation of Actions Act as an overriding interest.

I am observing as aforesaid, as the owner of the property No.322 has filed an action of eviction against the members of the third house.

In addition or in the alternative, I also get support by the provisions of Section 29 of the Registered Land Act (cap 300), which provides:

“Every proprietor who has acquired land, or lease or a charge by transfer without valuable

consideration shall hold it subject to any unregistered rights or interests subject to which the transferor held it but save as aforesaid the transfer shall in all respects have the same effect as a transfer for valuable consideration.”

The facts on record do unhesitatingly point that the registered proprietor of property No.322 held the same in trust for his mother’s family.

Now I shall deal with the occupation of 11 acres each by the 1st and 2nd house of the deceased in property No. 336. It is clear and not disputed that the two families were in exclusive possession of 11 acres each on property No.336. The deceased gave them the possession thereof. They are till to-date in the possession thereof.

Section 9(3) of the Limitation of Action Act (cap 22) provides:

“3. where a person brings an action to recover land, being an estate or interest in possession assured otherwise than by will, to him, or to some person through whom he claims, by a person who, at the date when the assurance took effect was in possession of the land, and no person has been in possession of the land by virtue of assurance, the right of action accrues on the date when the assurance took effect.”

With these clear wordings of law the 1st and 2nd houses of acquired overriding interest as per section 30(g) of the Registered Land Act (cap 300) which stipulates:

“(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”

The inquiry of their rights have been made vide Land Dispute by panel of Elders, whose award was made a judgment of the court in Elc.No.4 of 1984. It is undisputed that their right of occupation was inquired and accepted.

This occupation has been recognized by Section 42 of the Law of Succession Act (cap 160), which stipulates:

“where –

(a) an intestate has, during his life time or by will, paid, given or settled any property to or for benefit of a child, grand child or house, or that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”

With the above provisions of law and facts on record, I have no option but to find, which I hereby do, that the three houses have been given 11 acres each by the deceased during his life time and thus the net estate is eight acres in property No.336 which were occupied by the deceased for himself, and which shall be divided as per Section 40 of the Law of Succession Act (cap 160).

The units of each house has been mentioned in the affidavit of Johnstone Kimani Kamuyu sworn on 17th December, 2004.

As disclosed therein, the first wife had five children, the 2nd wife had eight children and 3rd wife has 9 children. Thus the total units are 22 in the estate.

The eight acres thus shall be divided as per the units mentioned hereinbefore and it shall be simple to find which I hereby do, that each member shall have 1/22 share of the portion of the land.

I shall not make any order on costs.

Orders accordingly,

Dated and signed at Nairobi this 21st day of November, 2008.

K.H. RAWAL

JUDGE

21.11.08