



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

Succession Cause 36 of 1986

RULING

JOSIAH GATIMU MIGWI APPLICANT

VERSUS

ESTHER MICHERE GATIMU RESPONDENT

RULING

A chamber summons dated 28th November 2000 is brought by Joseph Gateri (Hereinafter called the applicant). In that application the applicant prays for the following orders:-

1. *That the court be pleased to order that the applicant JOSEPH GATERI MUTUANGURU be substituted as the sole beneficiary of land parcel No. Mwerua/Kiandai/51 in place of the late MOSES MUTUANGURU KANGETHE who died on 15/8/94.*

2. *The court be further pleased to order the deletion of the name of MOSES MUTUANGURU KANGETHE from item number 16 in the inventory annexed to the certificate of confirmation of grant dated 7th February 1991 and replace it with the name of JOSEPH GATERI.*

3. *The administrator ESTHER MICHERE GATIMU be ordered to transfer the said land parcel Mwerua/Kiandai/51 to JOSEPH GATERI and in default the Deputy Registrar of the court be authorized to sign all documents for the said transfer on her behalf.*

In support of that application the applicant deponed that the deceased Moses Mutuanguru Kangethe was his father. His deceased father was a beneficiary of this estate of Josiah Gatimu Migwi deceased. The grant in this succession was confirmed to the effect that Moses Mutuanguru Kangethe deceased was apportioned property **MWERU/KIANDAI/51**. The applicant deponed that his brothers had renounced their right to inherit that property of their deceased father. Although in this court file there is indeed such a consent dated 25th November 2000. It does not seem to have been paid for before being placed in this file. In my view it is therefore not properly filed. The applicant has prayed that he be substituted in the inventory of the confirmed grant to represent his deceased father and inherit property **MWERU/KIANDAI/51**. That application was opposed by Samuel Kagiri Gateri. He is the son of the applicant. He swore an affidavit on his behalf and on behalf of five other members of the family. In argument before me the applicant argued that the authority by those five members of the family was a forgery. The court, without any documentary evidence cannot ascertain whether that is indeed correct. However, since Samuel in his affidavit deponed that he had the authority of the family members. That authority annexed to his affidavit is superfluous. He deponed in his affidavit dated 17th July 2008 as

follows:-

4. *THAT as was stated by our Advocate we have no objection whatsoever with JOSEPH GATERI MUTUANGURU, who is our father, from being substituted with the late MOSES MUTUANGURU KANGETHE.*

5. *THAT further we have no objection with Land Parcel No. MWERU/KIANDAI/51 being registered in the names of JOSEPH GATERI MUTUANGURU save that we would wish that the same be registered in his name to hold in trust for his family for the following reasons.*

6. *THAT as a family we have settled on the said land parcel and each of us has extensively developed and settled with another wife.*

7. *THAT our father, JOSEPH GATERI MUTUANGURU, since left the matrimonial home and opted to settle with another wife.*

8. *THAT from his conduct he has shown no care whatsoever to us and has on several occasions threatened to evict us and thus having to register the land solely in his name he may dispose off the land and/or acquire finances with the same*

9. *THAT it would thus be in the interest of justice that the said land parcel be registered in his name to hold in trust for the family.*

10. *THAT if the said orders are granted the Applicant shall not suffer any prejudice.*

After alleging that the replying affidavit of Samuel had forged documents the applicant stated that his children and his family had no claim over his father's estate. He alleged that there had been dispute between him and Samuel. I do need to consider the prayers that are brought before me by the applicant. From the court record it is clear that Moses Mutuanguru Kangethe deceased was a father in law of Josiah Gatimu Migwi deceased who is the subject of this succession. Moses deceased was the father of the wife of Josiah Gatimu Migwi. At the initial stages Moses deceased was not included in the list of beneficiaries. He filed an objection to making grant which objection was dismissed by the court. It is at confirmation that he was included amongst the beneficiaries. As a consequence of that inclusion he was given the suit property herein. The grant was confirmed on 7th February 1991. After that confirmation it does seem that Moses was not registered as the owner of that suit property. It therefore follows that no interest was conferred to him and therefore this estate is not seized of that property. At his death therefore that property was not part of his estate. Section 27(a) of the Registered Land Act provides:-

“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Since Moses had no registered land over that property I find that both the applicant and the respondent have equal rights to lay a claim of that property. Getting back to the application the learned counsel Mr. Mbutia in submission stated there was no objection to prayer I and prayer 3 of the application. It should however be noted that the respondent in his replying affidavit which is quoted here above stated that there was no objection to prayer 1 and 3 being granted subject to the property being registered in the applicant's name in trust for the family. It is clear therefore that the respondent's concession to those two prayers was conditional to a trust being established. Since the applicant is not agreeable to the trust being established it becomes clear that there is no consent over those two prayers. It therefore follows that those two prayers are before court for consideration. For the prayers sought by the applicant to be considered by this court the court cannot ignore the depositions of the respondent Samuel. The respondent stated that he had his family members of that property where they have carried out extensive development. The applicant however does not reside on that land. Bearing that in mind and balancing the rights of the parties in my view the interest of justice would be best served by the property being held by the applicant for his life time thereafter to go to Samuel absolutely. The order of this court is as follows:- The confirmed grant dated 7th February 1991 is amended in the inventory by deleting the name

of Moses Mutuanguru Kangethe as beneficiary of property **MWERU/KIANDAI/51** and instead it is to read that that property shall go the Joseph Gateri Mutuanguru for his lifetime and thereafter to Samuel Kagiri Gateri absolutely. There shall be no orders as to costs of chamber summons dated 28th November 2000.

Dated and delivered at Nyeri this 15th day of December 2008.

MARY KASANGO

JUDGE