



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Succession Cause 664 of 2002**

**IN THE MATTER OF THE ESTATE OF WAMBUI KIMOTHO (DECEASED)**

**RULING**

On 16.12.03 Nyambura Gicharu and James Mbage Maina as petitioners/administrators of the estate of Wambui Kimotho (deceased) filed summons under section 71 of the Law of Succession Act, Cap. 160 applying for confirmation of grant issued to them on 07.04.03. The applicants described themselves as the deceased's daughter aged 75 years and grandson aged 55 years, respectively. In their joint summons, each claims  $\frac{1}{2}$  of the property known as Loc.19/Rwathia/912.

On 23.02.04 a protestor describing himself as Daniel Kiragu Gatune filed an affidavit of protest to the confirmation of the grant to the applicants. The affidavit was sworn on 18.02.04. Subsequently, on 03.03.04 the protestor (objector) filed a supplementary affidavit deposing that he had in the earlier affidavit sworn ON 18.02.04 been erroneously referred to as Daniel and that his correct first name is Joel. As the said protestor's/objector's deposition in his further affidavit that his first name is Joel has not been controverted, he will hereafter be referred to as Joel Kiragu Gatune.

The petitioner were represented in these proceedings by learned counsel, Mr D.M. Kibicho while the objector was represented by learned counsel, Mr G. Kamonde.

The petitioners contended that they are the only known dependants of the deceased, hence their claim that each gets  $\frac{1}{2}$  of Land Parcel No. Loc.19/Rwathia/912 (suit land) said to have belonged to the deceased.

On the other hand, the objector's case is that the deceased was not the owner of Land Parcel No. Loc.19/Rwathia/912, measuring approximately 1.74 Hectares. He (objector) annexed to his affidavit of protest sworn on 18.02.04 a Title Deed to the suit land showing the registered proprietor thereof as himself, i.e. Joel Kiragu Gatune – ID/0907370/63 – and that the Title deed was issued to him on 13.0691. The Title Deed is under the Registered Land Act. Cap.300 and it indicates in the column for consideration and remarks overleaf that the Title was acquired through succession.

Among documents annexed to the objector's affidavit of protest is a photocopy of an arbitral award said to have been made by a panel of elders at Kangema on 01.09.87 relating to Loc.19/Rwathia/912 (suit land). The parties to the arbitration proceedings before the Kangema elders are given as Joel Kiragu -vs- Wambui Kimotho. The award ("DGK – 4") states:

**'The panel of elders after considering the available evidence established the defendant agreed to divide her land with an intention to give the plaintiff land. She changed her mind later. This was done in the presence of the clan and village elders. It is therefore recommended that this disputed**

**land be subdivided into three equal portions of 1.4 acres each so that the plaintiff can get 1.4 acres, while the defendant gets 1.4. acres and Gichere Chege 1.4 acres.'**

The D.O. Kangema is shown in the award as umpire among the panel members.

There is also annexed to the objector's affidavit of protest certified copy proceedings in Murang'a Resident Magistrate's Court Arbitration Case No.30 of 1987 wherein the parties are also Joel Kiragu -vs- Wambui Kimotho. Those proceedings are shown as having taken place on 29.10.87 when the award of Kangema panel of elders was read out. Objections were to be raised thereto within 30 days. That means by around 29.11.87 any objections should have been raised. However, the Murang'a court proceedings show that the next time the matter went before that court was on 17.03.88, i.e. about 3½ months later when the defendant/applicant attempted to challenge the validity of the Kangema elders award previously read out before the Murang'a court on 29.10.87. In his response, the plaintiff reminded the court that the defendant/applicant had been given 30 days (on 29.10.87) within which to object to the award; that she did not do so within the prescribed period; that it was then late and that the Murang'a court should enter judgment as per the award. The court, which found no fault with the award, proceeded to enter judgment in terms of the award on 07.04.88.

On the basis of the panel of elders award confirmed by the Murang'a Resident Magistrate's court arbitration proceedings on 07.04.88, the objector has urged this court to grant him 1/3 share of the suit land.

Opposing the objector's protest, the petitioners drew attention to a further affidavit by one of them, i.e. James Mbage Maina sworn on 23.03.05, denying that the protestor (objector) Joel Kiragu Gatune was awarded part of the suit land Parcel No. Loc.19/Rwathia/912. Maina deposed at paragraph 6 of his further affidavit as follows:

'THAT if the protestor's claim was true he would have caused his name to be registered at the lands offices pursuant to the court order awarded. The protestor was only registered as proprietor on the succession cause which has since been annulled by this Honourable Court. Annexed herewith and marked "JMM1" is a copy of the Title Abstract.'

The Title Abstract alluded to shows that the deceased was the first registered proprietor and her registration was on 17.04.63. There then followed various entries, mainly cautions registered against the Title, until 13.06.91 when Joel Kiragu Gatune ID/0907370/63 (objector) became registered as proprietor of the land through succession. Other than registration of encumbrances, e.g. a charge on 26.05.92, against the Title, the objector's proprietorship of the suit land does not, according to the Title Abstract, seem to have been altered.

Petitioners counsel did, however, point out that the succession cause which led to the objector being registered as proprietor was revoked by orders of the High Court made on 07.04.03. Petitioners' counsel maintained that even the objector's Title has been revoked and that he is no longer the registered owner of the suit land.

With regard to the arbitration proceedings alluded to by the objector, petitioners' counsel maintained that the petitioners are strangers thereto and that the petitioners deny that such proceedings took place. Alternatively, petitioners' counsel contented that even if such proceedings took place, the same have no bearing on the matter now before this court. It was petitioners' counsel's position that the Title Deed issued to the objector Joel Kiragu Gatune on 13.06.91 was obtained through Murang'a Court Succession Cause No.224 of 1989, not the arbitration proceedings alluded to by the objector. Petitioners' counsel also submitted that the arbitration proceedings are not before this court and, therefore, this court cannot enforce them. He added that even if this court finds the arbitration proceedings relevant to the present case, the court would still be incapable of enforcing them as they were made more than 12 years ago and are caught by limitation, unless the objector validates the orders made therein by seeking court's leave under the Limitation of Actions Act, Cap.22 to enforce them.

Petitioners' counsel pointed out that the deceased died on 25.12.88; that the objector had the Title transferred to himself on 13.06.91 pursuant to court orders which have subsequently been revoked; and submitted that in the circumstances the suit land forms part of the deceased's estate and should be distributed between the petitioners/administrator on 50 - 50 basis as proposed in paragraph 5 of their joint affidavit sworn on 05.12.03.

In response, objector's counsel asked it to be recorded that the parties had agreed that a certified typed copy of proceedings in Murang'a Resident Magistrate's Court Arbitration Case No.30 of 1987 between Joel Kiragu as plaintiff and Wambui Kimotho as defendant be treated as original. This statement was not controverted.

Objector's counsel then proceeded to submit that what was revoked by the High Court was the grant but that the issue of cancellation of the Title as required by section 143 of the Registered Land Act was not gone into. He said that as matters stood at the hearing of the present proceedings (21.11.06), the Title to the suit land at Murang'a Land Registry was in the name of the protestor (objector). He (counsel) noted that revocation of the grant to the objector was in 2003 but that nothing was done to cancel the objector's registration as proprietor and he still remained the registered owner. Objector's counsel pointed out that the arbitration proceedings at Murang'a court were between the objector and the deceased and cannot be dismissed as irrelevant, pointing out that the arbitral award was made an order of the Murang'a court on 07.04.88 and that no appeal was lodged against it. He drew attention to the definition of 'estate' in section 3 (1) of the Law of Succession Act, Cap.160 as meaning the free property of a deceased person, and submitted that once the objector got judgment in his favour at the Murang'a court on 07.04.88, which judgment has not been appealed against, the deceased ceased to have legal competence to dispose of the entire suit land; and that all she could competently dispose of was her 1/3 share. Objector's counsel submitted that the objector had not come to this court to seek enforcement of the Murang'a court judgment but merely to ask that the deceased's property to be shared by the beneficiaries, i.e. the petitioners/administrators, is 1/3 of the suit land and that the Limitation of Actions Act has no application to the matter now before this court. In objector's counsel's view, the Limitation of Actions Act may have relevance if other suits are filed to nullify the Title at Murang'a.

In reply, petitioners' counsel stated from the Bar that the order made by the High Court on 07.04.03 has been registered, contrary to the objector's statement that he is still the registered owner. Petitioners' counsel reiterated that the arbitration proceedings at Murang'a are not relevant to the matter now before this court. In his view, the objector should have waited for the grant to be confirmed and then move the High Court for orders to enforce the orders given in the Murang'a arbitration proceedings. According to petitioners' counsel, as at the time of her death, the deceased was the sole proprietor of the suit land. He (petitioners' counsel) invited the court to refer to the Title Abstract "JMM1" in this regard and submitted that the deceased having been the first to be registered as proprietor of the suit land, she had an indivisible Title thereto which was incapable of defeat.

I have duly considered the rival submissions of the parties.

At the outset, I note that on 07.04.03, the High Court (Aluoch, J) recorded the following consent orders:-

By Consent:-

1. The grant issued to Joel Kiragu Gatune (i.e. the objector herein) on 30.05.91 and confirmed the same day in succession Cause No.224 of 1989 be and is hereby revoked under section 76 of the Succession Act.
2. The grant issued to James Mbage Maina (i.e. 2<sup>nd</sup> petitioner/administrator herein) on 16.12.89 and confirmed the same day in Succession Cause No.132 of 1989 in Murang'a Resident Magistrate's Court be and is hereby revoked under section 76 of the Succession Act.

Thereafter the High Court directed that new letters of administration intestate of the estate of Wambui

Kimotho (i.e. deceased herein) be issued to her surviving daughter Nyambura Gicharu (i.e. 1<sup>st</sup> petitioner/administrator herein) jointly with the deceased's grandson James Mbage Maina (being son of Nancy Wanjiro) (i.e. 2<sup>nd</sup> petitioner/administrator herein). It was the High Court's further order that once the new grant was issued, the two petitioners/administrators should work out the mode of distribution of the deceased's property and that when the time for applying for confirmation of the grant came, the summons for confirmation must be served on Joel Kiragu Gatune (i.e. present objector) to enable him to file an affidavit of protest if he so wished.

The new grant dated 07.04.03 was duly issued to Nyambura Gicharu and James Mbage Maina as directed by the High Court. Subsequently, the two petitioners/administrators filed this summons dated 05.12.03 for confirmation of the grant. For his part, the present objector Joel Kiragu Gatune filed his affidavit of protest on 18.02.04. The essence of the affidavit of protest is to oppose the distribution of the deceased's Land Parcel No. Loc.19/Rwathia/912 (suit land) between the petitioners/administrators exclusively and to demand that he, the objector gets 1/3 of the suit land.

Petitioners' counsel submitted that the Murang'a court arbitration proceedings are not before this court. That is not correct as they were made part of this court's record by the objector's counsel when he put a certified copy of the proceedings of Murang'a Resident Magistrate's Court Arbitration Case No.30 of 1987 between Joel Kiragu as plaintiff and Wambui Kimotho as defendant. There was no opposition to the placement of those proceedings in this court's record and I deem them as part of the evidence in the case before me.

The Murang'a court arbitration proceedings adopted earlier arbitration proceedings between the same parties herein before Kangema elders to the effect that the deceased had decided to divide the suit land into 3 portions as follows:-

- a) Joel Kiragu (objector herein): 1.4 acres.
- b) Wambui Kimotho (deceased herein): 1.4 acres.
- c) Gichere Chege: 1.4 acres.

Opportunity was afforded to raise or file objections within 30 days. Nobody seems to have raised any objections within the stipulated period. Some 3½ months later, i.e. on 17.03.88 the deceased made an attempt to challenge the elders award. She was promptly reminded that she was out of time. The Murang'a magistrate's court where the deceased lodged her challenge to the award found nothing wrong with the award and that court made it a judgment of the court. The deceased lodged no appeal against the judgment entered on 17.03.88 until she died on 25.12.88, i.e. about 9 months later.

In the further affidavit of James Mbage Maina (2<sup>nd</sup> petitioner) sworn on 23.03.05 he denied the objector's claim that he was awarded part of the suit land. In view of the finding of fact by the Murang'a court that the objector was awarded 1/3 of the suit land, which finding was not appealed against, James Mbage Maina's denial of the objector's claim is in my view unsustainable.

Although the court record shows that the High Court (Aluoch, J), *inter alia*, revoked the objector's grant of letters of administration of the deceased's estate, no evidence was tendered before me that the registration of the objector on 13.06.91 as proprietor of the suit land was cancelled. In absence of such evidence, I cannot find that ownership or proprietorship of the suit land reverted to the deceased.

It was contended by petitioners' counsel that no arbitration proceedings took place between the objector and deceased herein. This argument cannot stand in the face of Murang'a court arbitration proceedings which were put in evidence without objection. I find that the arbitration proceedings took place and that the deceased and objector herein made themselves parties thereto.

Petitioners' counsel maintained in the alternative that even if the arbitration proceedings took place, the petitioners are strangers thereto. In this regard, it has to be borne in mind that to the extent that the

petitioners rely on the deceased's Title to the suit land as a basis of their claim, then to the extent that the deceased entered into arrangements that encumbered her Title, the encumbrance, must affect the petitioners' derivative title. In other words, since the deceased who is supposed to be the petitioners' predecessor in title was a party to the arbitration proceedings which have not been successfully challenged, the petitioners cannot disown those proceedings in so far as their derivative Title is concerned.

It was contended by petitioners' counsel that this court should not concern itself with enforcement of the lower court orders arising from the arbitration proceedings of 1987 and 1988 as they are caught by limitation. I think the central issue before this court is: What is the deceased's estate to which the petitioners can legitimately lay claim? In this regard, I note from section 3 (1) of the Law of succession Act that "estate" means the free property of a deceased person. I agree with objector's counsel's submission that the free estate of the deceased which in the circumstances of this case she was legally competent to dispose of or bequeath was 1/3 of the suit land, i.e. 1.4 acres. Accordingly, I uphold the objector's protest to the proposed distribution of the suit land equally between the two petitioners. I make the following orders:-

1. The grant issued on 07.04.03 sought to be confirmed vide summons dated 05.12.03 and filed on 16.12.03 is confirmed, subject to the suit land Loc.19/Rwathia/912 being distributed as under –

- a) 1.4 acres going to the objector JOEL KIRAGU GATUNE.
  - b) 1.4 acres going to GICHERE CHEGE.
  - c) 1.4 acres going to the petitioners NYAMBURA GICHARU and JAMES MBAGE MAINA jointly.
2. Costs shall be borne by the deceased's estate.

Orders accordingly.

**Delivered at Nairobi this 28<sup>th</sup> Day of March, 2007.**

B.P. KUBO

JUDGE