

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Succession Cause 277B of 1997

In The Matter of the ESTATE OF JOHN MUGAMBI MUTAHI (DECEASED)

AND

JULIUS MAINA WARUI.....PROTESTER

VERSUS

MAGDALINE MUTHONI MUGAMBI.....ADMINISTRATOR

JUDGMENT

This judgment is in a protest filed by the protester following an application for confirmation of a grant of letters of administration intestate filed by the Administrator on 4th October, 1999. The protester's affidavit of protest was filed under Rule 40 of the Probate and Administration Rules on 14th October 2004. Although I have not been told so, I must in the circumstances assume that the Objection under Rule 17 of the Probate and Administration Rules, has either been decided or is deemed by the parties to have been overtaken by events. The protester who is represented by counsel Mr. Kiminda, called three witnesses including himself while the Administrator represented by counsel Mr. Kebuka Wachira, also called three witnesses including herself.

The Administrator is the widow of the Deceased. The Protester is not related to the family of the Deceased John Mugambi Mutahi but the Protester has filed his protest in this matter on the basis of his claim that he has half share interest in parcel of land No. GITHI/KIHARO/52 which is an asset in the estate of the Deceased being administered by the Administrator. His case is that his father called Warui Kinogu (deceased) was a brother to one Wanjohi Kinogu (also deceased) who was the original registered proprietor of the suit parcel of land. The protester asserts that the late Wanjohi Kinogu had been registered proprietor in trust for himself and for the protester's late father in equal shares. In 1974 Wanjohi Kinogu sold the land to John Mugambi Mutahi without the knowledge of the father of the protester and/or the knowledge of the protester plus his brother Mwangi Warui. The Protester and his brother were by then young-boys. Although the Protester tried to say that at the time of that sale transaction, his father was mentally sick, he could not establish that allegation as there was evidence that by then the father of the protester who was living on the same parcel of land was mentally sound and that if he had a mental problem it developed in the year he died which was 1977.

During the sale transaction, the whole land was transferred to John Mugambi Mutahi and when the protester's father died, the said John Mugambi Mutahi prevented the protester's family from burying the protester's father on the suit parcel of land and subsequently evicted the protester's family from the suit parcel of land.

After John Mugambi Mutahi died and the Administrator filed the petition in this succession cause, the Protester approached the petitioner for a settlement but the petitioner refused insisting that her deceased husband had bought the whole piece of land and that stand precipitated this dispute.

On the other hand, the Administrator's case is that her husband bought the whole piece of land from the sole registered proprietor Wanjohi Kinogu and there was no evidence of an existing trust. She produced evidence of the application for consent of land control board and the consent thereof as well as the transfer of that land to John Mugambi Mutahi by Wanjohi Kinogu showing that John Mugambi

Mutahi bought the whole piece of land and was issued with the relevant Land Certificate for the whole land showing he was the absolute registered proprietor. The transfer was registered on 14th February, 1974 and the land certificate issued same day.

A certified copy of the relevant land register filed in support of the petition for grant of letters of administration shows that Wanjohi s/o Kinogu was registered as the absolute owner on a first registration dated 11th September, 1959. The land register has the word "ABSOLUTE" written prominently in capital letters to signify the nature of the title the said Wanjohi s/o Kinogu held and that is the title he passed over to John Mugambi Mutahi on transfer on 14th February, 1974.

There was evidence that although Warui Kinogu was elder to Wanjohi Kinogu and Warui Kinogu lived on the suit parcel of land until he died, the said Warui Kinogu never claimed ownership any portion of that land from his younger brother Wanjohi Kinogu and after John Mugambi Mutahi bought the land, Warui Kinogu never claimed ownership of any portion of that land from John Mugambi Mutahi until Warui Kinogu died in 1977 and John Mugambi Mutahi refused burial to take place on that piece of land. Warui Kinogu's body had to be buried on a piece of land belonging to another brother and the protestor's case is that that was the time they knew Wanjohi Kinogu had sold the land. But they never took any action to recover the land from John Mugambi Mutahi until he died on 2nd June 1981. There is no evidence that members of the protestor's family made any complaint to or against Wanjohi Kinogu whom they knew was in Nairobi where people like Machau Wa Maguru who was the Administrator's third witness were friendly to him.

Terascisio Iregi Gathanga who was the Administrator's second witness told the court he was a member of the local land Consolidation committee charged with ascertaining the rights of land owners in Kirerema and Kiharo sub locations during land demarcation and land consolidation from 1958 to 1959 and that he remembers his committee dealing with the interest of Wanjohi Kinogu when the said Wanjohi Kinogu presented his land claim. The committee looked into the matter and found that the claim Wanjohi Kinogu was making agreed with what Wanjohi Kinogu's clansmen had sent to the committee in documents then before the Committee from the clansmen, that Wanjohi Kinogu was to be the sole owner of the suit piece of land. The committee granted that claim and therefore no question of a trust arose as there was nobody saying anything to the contrary of what Wanjohi Kinogu had said. This witness told the court that at that time Wanjohi Kinogu's father had died. The witness came from the same area and even knew where the suit piece of land was. He told the court that his committee did not allocate land to Warui Kinogu either at Kirerema or at Kiharo. He explained that that was because Warui Kinogu's land was at Huho-ini and Warui Kinogu said that it be demarcated in the name of his uncle Kariuki Gathandi and that was done. Warui Kinogu was therefore supposed to remain in the village and when he died he was buried in his brother's land.

From what I have been saying above, I do not find the protest of the Protester justified in these succession proceedings. There is sufficient evidence pointing to the fact that the piece of land in dispute in these proceedings was wholly owned by Wanjohi Kinogu as the sole and absolute registered proprietor under the REGISTERED Land Act when he lawfully sold it and transferred it to John Mugambi Mutahi who lawfully and absolutely owned the whole of it until he died and his widow, as the Administrator of his estate is perfectly and lawfully entitled, not only to administer it as an asset in the estate of her deceased husband but also to be registered as a beneficiary of that land as proposed in her affidavit in support of her summons, dated 4th October, 1999, for confirmation of grant.

Accordingly the Protesters protest raised in his affidavit of protest dated 14th October 2004 is hereby dismissed in its entirety and the Administrator's Summons dated 4th October 1999 for confirmation of grant allowed as prayed. The protestor to pay costs of the protest and costs of the summons for confirmation of grant.

Dated at Nyeri this 29th day of May, 2006.

J. M. KHAMONI

JUDGE