REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE 746 OF 1994

IN THE MATTER OF THE ESTATE OF KANYITA GITAU (DECEASED)

NDUNGU GITAU ……..…….. APPLICANT

VERSUS

JOSEPH KINYITA GITAU ……..…….……. RESPONDENT

RULING

This is an extremely old succession matter first filed in the High Court in 1994.

This litigation is between two brothers. At the centre of the dispute, is a parcel of land known as Ngenda/Wamwangi/625 (hereinafter "the suit land") which was owned by their father Gitau wa Kinyika. The father died in 1946 leaving behind two wives – essentially "two households". The first household comprised his first wife Nyambura Gitau (since deceased) and three sons, of whom the Applicant is one. The second household comprised his second wife Margaret who had only one son – the Respondent.

The central issue in the hearing before this Court was whether the suit land should be divided equally between the two households; or equally between the four sons. The reason is obvious – if the two households share equally, then one son ends up with half while the three sons from the other household share the balance.

On 13th August, 1992, the Principle Magistrate's Court in Thika Succession Cause No. 26 of 1998 confirmed the Letters of Administration to Ndungu Gitau (3rd son of the 1st household and Joseph Gitau (the Respondent from the 2nd household) and ordered that the suit land be divided equally between the two households.

This prompted the application before this Court, filed on 17th December, 1999 – seven years after the letters of administration were confirmed. Of course, a lot happened in the intervening period, and according to the respondent's replying affidavit, the estate is fully distributed, and that there is nothing left to distribute. The delay of seven years in bringing this application, which I find is highly inordinate, has not been explained.

In any event, coming back to the application before this Court, the Applicant seeks revocation of the grant of letters of administration issued to Ndungu Gitau and Joseph Gitau on 13th August, 1992 in Succession Cause No. 26 of 1988 on the following 2 grounds:

"***1. The confirmation of the grant and the division of the estate of the deceased is contrary to the succession Act and the proceedings to obtain the same were defective in substance and were based on***

colluded material facts and at the law.

2. The distribution of the estate is unequal and therefore unfair and contrary to natural justice."

The application is supported by the Applicant's affidavit. The respondent has filed grounds of opposition and a replying affidavit. On 9th February, 2000 this Court ordered that the application be heard by way of ***viva voce*** evidence, and the hearing commenced on 12th April, 2000. Both parties presented two witnesses each. The Applicant was represented by an advocate, while the Respondent acted in person.

The Applicant testified that the division between 2 households led to inequity, in that the respondent took half the suit land, leaving the other half to be shared by three other brothers. This is contrary to what the elders had recommended – that all four sons share equally. That evidence was corroborated by Joseph Mwaura Ndambo, his witness.

The Respondent's first witness Peter Kibbiah, a neighbour of the parties testified that the suit land had long been sub-divided and portions of it sold to third parties. Contradicting the Applicant's witness, he said the elders had made no such recommendation to subdivide the suit land equally among the four sons. His evidence was corroborated by the Respondent's second witness Joseph Mugo Njoroge, who was one of the elders who made the decision that the suit land be divided into two households.

In his written submissions before this Court, the Applicant states, among other things, that:

"…***Land parcel No. Ngenda/Wamwangi/625 is an agricultural land and therefore not subject to the Succession Act Cap 160 of the Laws of Kenya, as stipulated by Section 32 of the said Succession Act. The Magistrate proceeded to grant the said parcel of land to both household, ignoring that the said parcel of land was subject to the law or custom of the deceased's community or tribe.***

The applicant's witnesses testified that indeed, the parcel of land in question was agricultural land."

This is the first time this Court heard that the suit land "is an agricultural land and therefore not subject to the Succession Act…". In any event, there is no such evidence before this Court. This application was based on the two grounds outlined earlier. The first ground stated that the grant was contrary to the Succession Act and "the proceedings to obtain the same were defective in subsistence (sic) and were based on colluded material facts…".

There was no such evidence before this Court. We do not know how the "proceedings" to obtain grant were defective, and how and in what way it was based on "colluded material facts" – whatever that means!

The second ground that the distribution was unfair and "contrary to natural justice" was not established.

Finally, there was unexplained inordinate delay in bringing this application.

Accordingly, for all those reasons this application cannot succeed. The same is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 6th day of October, 2005.

ALNASHIR VISRAM

JUDGE