



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE NO. 1718 OF 2000 (O.S.)

IN THE MATTER OF APPLICATION TO VEST THE PROPERTY
KNOWN AS LAND REFERENCE NUMBER 3734/451 IN THE APPLICANT

AND

IN THE MATTER OF THE DECLARATION OF TRUST DATED 8TH JULY, 1987

AND

IN THE MATTER OF THE TRUSTEES ACT (CAP 167)

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT (CAP 281)

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT (CAP 21)

IN THE MATTER OF THE CIVIL PROCEDURE RULES
ORDER XXXIV RULE 1,2,5,7

CHARLES KARIUKI NDUNGU APPLICANT

AND

THE ESTATE OF ELIAS WARUNGU KARIUKI (DECEASED)

RESPONDENT

R U L I N G

By an ex parte originating summons dated 19th October, 2000, the applicant Charles Kariuki Ndung'u sought an order to vest the property known as L.R No.3734/451 in him absolutely pursuant to the Declaration of Trust by Elias Warungu Kariuki, dated 8th July, 1967. The application was heard by Mulwa, J who granted the prayer sought, ex parte, the same day as the application was filed.

After several months on 20th March, 2001, Charles Ndung'u Kariuki, moved the court, under a Certificate of Urgency praying that 1. The ex parte order made by this Hon. court on 19th October, 2000 be stayed, pending the hearing and determination of the application he filed,

2. Secondly, the applicant prayed further that the said ex parte order of 19th October be set aside together with all and/or any subsequent orders.

The application was based on the fact that the applicant Charles Ndungu Kariuki was on 5th March, 2001 issued with a grant of letters of administration to the estate of his father, the late Elias Warungu Kariuki and further that the property in question formed part of the deceased's estate, of which he was an administrator. He denied that his father had a son by the name of Charles Kariuki Ndungu and a wife Gladys Gitau. He prayed the court to set aside the vesting order so that the property in question can be returned to the deceased's estate.

The application was served on Messrs Walker Kontos advocates who obtained the vesting order on behalf of Charles Ndung'u Kariuki.

Mr. Akiwumi, of Walker Kontos advocates appeared in court on 10th April, 2001 and said that he did so, simply out of courtesy but he did not have any instructions to act in the matter. Mr. Oluoch representing Charles Kariuki Ndung'u submitted that the property in question was still registered in the deceased's name.

Having considered the submissions on record and the pleadings, I delivered a Ruling on 17th day of April, 2001, setting aside the vesting order. Gladys Njeri Gitau, the mother of Charles Ndungu Kariuki, who obtained the vesting order was aggrieved by my orders, and she filed an application to be joined in the proceedings as an interested party, which order I granted by consent of all parties. There was a further prayer for injunction to stop her eviction from the suit premises being L.R. No.3734/451, and further, that "This Hon. Court do appoint the Trustee of Trust Deed dated 8.7.1987 and/or/vest the property No. L.R. 37 34/451 in the beneficiary entitled under the Trust, absolutely".

Several affidavits were filed by members of the family of the late ELIAS WARUNGU KARIUKI, because they were interested in the proceedings. Mrs. Alexander Kontos of Messrs Walker Kontos advocates whose legal firm prepared the DECLARATION OF TRUST, document also filed an affidavit. Because of this, I directed that all the deponents, of the various affidavits be cross-examined on the contents thereof.

Gladys' application was supported by her affidavit as well as the affidavit of her son Charles Michael Kariuki Ndungu.

Her application was also supported by the affidavit of Mrs. Alexander Kontos, an advocate of the High Court of Kenya, and a Senior partner in the law firm of Walker Kontos advocates. Her affidavit is dated 20th June, 2001. it was filed in court the same day. In paragraph 4 of Mrs. Kontos' affidavit she averred, "I confirm that I prepared the said DECLARATION OF TRUST, dated 8 th July, 1987, and witnessed the execution there of by ELIAS WARUNGU KARIUKI (deceased), and that at the time, I was a partner with the firm of Archer & Wilcox advocates". The affidavit goes further to say that upon the death of Elias Warungu Kariuki, Gladys Gitau and her son Charles Kariuki, instructed her firm, "to obtain a vesting order in favour of Charles kariuki Ndungu, as the late ELIAS WARUNGU KARIUKI, died before appointing another trustee".

Mrs. Alexander Kontos confirmed the contents of her affidavit in court and added, "I am aware that t he Trust Deed was not registered against the Title. I have an explanation for it that is, at the time Mzee Kariuki was told by me that he would have to pay stamp duty, and as he had only recently acquired the property and paid stamp duty, he chose not to proceed with the registration of the Declaration of Trust, but asked Archer and Wilcox to release documents of title to the boy's mother Gladys Gitau". Gladys' affidavit in support of the application is dated 24th April, 2001.

She described herself as the biological mother of CHARLES MICHAEL KARIUKI NDUNGU the beneficiary of L.R No.3734/451 under the DEED OF TRUST dated 8th July, 1987.

In paragraph 2 she said, "That my son was born on 20 th September, 1980 and his biological father is ELIAS WARUNGU KARIUKI (deceased).....". Gladys goes on in her affidavit to talk about her relationship with the late ELIAS WARUNGU KARIUKI, and how he bought various properties for her. In paragraph 12 she says, "That although my son's names in the passport read CHARLES MICHAEL KARIUKI he is also known as CHARLES KARIUKI NDUNGU, which name refers to one and the same person and I verily believe that the respondent misled this court when he said my son does not exist". There was a further affidavit sworn by Gladys Njeri Gitau on 3rd April, 2002.

Annexed to this further affidavit were a bundle of photographs of Gladys, her son and the deceased Elias Warungu Kariuki. Part of para 2 of the affidavit reads, "The said photographs are just a sample of the life and relationship that I shared with the deceased since 1975 until he passed away. (annexed herewith and marked GNGA are 8 different photographs)".

Gladys confirmed the contents of both her affidavits in court. She stated further that the deceased used a Post Office Box No.52672 for receiving his bank statements and even after his death, the bank continued to send bank statements to the same address. She produced several such statements in court. Gladys lived with the deceased for 25 years, according to her evidence and for that period, "the deceased visited her everyday and also ate dinner at her house".

Some of the annexures to Gladys' affidavit was a birth certificate of her son Charles Kariuki as well as his Baptismal certificate which gives his name as MICHAEL CHARLES KARIUKI, but identity card gives his name as CHARLES MICHAEL KARIUKI. His driving license on the other hand gives his name as CHARLES MICHAEL KARIUKI. Gladys confirmed that all these documents belong to her son and all the names appearing in them are his.

Gladys' son is a student in the USA. He went in 1999 and the deceased paid all his fees for that year. Unfortunately the deceased died the following year 2000, and Gladys has been struggling to pay the school fees, that is why she has filed a claim for dependency in the Succession Case, which is still pending in this court. Looking at the Declaration of Trust, created by the deceased ELIAS WARUNGU KARIUKI as Trustee, article 2 thereof reads, "The TRUSTEE purchased the above property as TRUSTEE for his grandson CHARLES KARIUKI NDUNGU, as hereinafter appears ". Gladys explained that this was so because the deceased did not want his identity known, and at times he even introduced her to people as his sister, and not his wife. That the deceased said that he did not want to put his name or Gladys' son's name because of the relationship with his wife. That the deceased also said that once Gladys' son became of age, i.e. 18 years old he could now transfer the property into his name.

Gladys and her son started living in the suit premises in August, 1986, to date. She urged the court to find that the suit premises was invested in her son. Gladys explained in court that from about 1998 the deceased notified her that he wanted to sell this house because, "he came to find out that his family knows about me and my son, according to his first wife (Monica Wanjiru) who had sued him for division of matrimonial property". According to Gladys, the search for a buyer for the house started in 1998. She got a buyer in 1999, but the deceased advised her to first take her son to the USA for studies, which she did. On her return back in September, 1999, the deceased said he had matters pending in court, as such they had to wait before selling the house, but unfortunately the deceased died the following year, 2000, before the house was sold. Gladys said that the purpose of selling the house was to meet her son's educational expenses, and again, "the deceased thought I would be lonely living alone in the house once her son was gone as the deceased used to come and leave at about 2.00 a.m".

The deceased's first wife Monica Njeri did not claim this property in the Originating Summons, HCCC No.1924/90 which she filed to have the deceased divide half share of the matrimonial properties to her. This property is again not part of the Succession Cause to the deceased's estate. About the deceased's other wives Gladys said, "I do not know when the deceased's second wife (Speranza Wamuyu) was married but when I met him, she was already married. Monica Wanjiru (the deceased's first wife) has

acknowledged me as a mistress”. Gladys’ further evidence about the deceased and his family reads, “I was surprised that Monica knew about me and my son. The deceased told me to keep off from his family since he has provided for me and my son. That I should not claim anything from the family”.

When asked why she had now put a claim in the Succession Cause she answered, “I have put a claim in the Succession Act because the family want my Lavington House, which was meant for the education of my son. I have not been working since I met the deceased, because he was providing for me as a husband”.

On re-examination by her own counsel Ms. Martha Koome advocate, Gladys said, “It is Charles Kariuki who has brought me to court. The other family, i.e. the 2nd wife (Speranza Wamuyu) is aware that her husband bought me the house where I live with my son, and she said she has nothing to do with it. My son is called Charles Kariuki, the name of the deceased’s (Elias) father”. Mr. Oluoch advocate for Charles Kariuki, questioned Gladys about the photographs and cards she annexed to her further affidavit. Her answer was, “The photographs show that we were living together. I believe d that I was a wife. I never went through a marriage. He (the deceased) used to call me wife and darling”. Joe Gatimu Kariuki is a co-administrator in the estate of the late Elias Warungu Kariuki, his deceased father. He is a son of the deceased’s second wife Speranza Wamuyu. The other administrators to the deceased’s estate is Charles Ndungu kariuki, the deceased’s son by his former first wife who was divorced.

Joe’s affidavit is dated 2nd May, 2001. First he complains that his co-administrator Charles Ndungu Kariuki did not inform him that he had filed an application in this file to challenge the vesting order made in respect of Charles Kariuki Ndungu, in respect of the suit premises known as L.R. No.3734/5/246 Convent Drive Lavington Nairobi. His affidavit follows at paragraphs 6.7 and 8. Paragraph 6, “That the property in question L.R No.3734/451 does not form part of the estate of Elias Warungu Kariuki”, and Para 7, “That I am aware that Gladys Njeri Gitau was my late father’s friend and that she has a son called Charles Michael Kariuki Ndungu ”. and Para 8, “That I am also aware that my late father had adequately provided for GLADYS NJERI GITAU and her son CHARLES MICHAEL KARIUKI NDUNGU by purchasing for them, among other things, the said prope rty known as L.R. No.3734/34/451. situated in Lavington”. In court during cross examination, Mr. Gatimu answered that it was his late father who told him that he had bought the Lavington house for Gladys and her son. He also said that he was aware that his late father had a child with Gladys, and for sometime they lived together.

Monica Wanjiru Elias Warungu, was the deceased’s first wife, but was divorced form him on 16th May, 1973. She is the mother of Charles Ndung’u kariuki. She filed an affidavit on 30th September, 1999 in proceedings relating to an Originating Summons No. HCCC 1924 of 1999 filed against the deceased then still her husband, for division of matrimonial property.

In paragraph 33 of that affidavit, Monica averred, “That apart from Speranza Wamuyu the defendant has another mistress named Gladys Njeri with whom he has a son called Charles Kariuki. He has bought for her a house where she resides with her son in Lavington Green, with a market value of over Kshs.15 million. In additio n to this, he has bought for her two flats at Delamere flats Ltd with a combined market value of approximately kshs.9 million from which she enjoys a monthly rental income of approximately Kshs.30,000/= per month. She also has a healthy fixed deposit bank account placed for her by the defendant”. In court during the hearing of the Originating Summons, Monica said that she saw Gladys for the first time to court, but she knew about her existence in the life of her late husband. She was also aware that Gladys had a son called Charles Kariuki. Charles Kariuki swore an affidavit dated 25th May, 2001, but he was not cross examined on its contents because he lives in USA, where he is studying. In paragraphs 7 and 10 of the said affidavit he said, “That I am a son of the deceased Elias Warungu Kariuki by Gladys Njeri Gitau and I was named after the deceased’s family at the deceased’s personal instance”. “That I have always known that my late father had another family which he always desired to keep my mother and myself separate from”. and para 10 “That I was born on 29th September, 1980 and given the name Charles Kariuki and upon receiving the sacrament of confirmation at St. Austins Parish on 1.11.93 I was given the name of Michael Charles Kariuki”. and para 11 “That on 21.7.99 I was issued with a Republic of Kenya, National iD No.22648536 in my true names CHARLES MICHAEL KARIUKI, and I have also been issued a Driving Licence serial No.009244 in the names of KARIUKI

(MR) CHARLES MICHAEL, copies of which are attached to the affidavit of GLADYS NJERI GITAU”.

It was Charles Ndungu Kariuki a son of the deceased by Monica Njeri, who had moved the court to set aside the vesting order issued by Mulwa, J to vest the suit premises in the name of Charles Kariuki Ndungu. In defence of this application seeking an order to “vest the suit premises in the beneficiary entitled under Trust, absolutely”, Charles Ndungu Kariuki, filed an affidavit on 26th July, 2001, headed “Further Replying Affidavit” in which he denied and challenged the averments in the www.kenyalawreports.or.ke 20 affidavits of GLADYS NJERI GITAU, and her son CHARLES MICHAEL KARIUKI NDUNGU. He filed other affidavits, which are in the court file.

Of the affidavit of Charles Michael Kariuki, he averred, “By admitting that he is the son and not the grand son of the deceased, the applicant has disqualified himself as a beneficiary under the Trust, so I verily believe”. In court during cross examination, Charles Kariuki Ndung’u, said that he rushed to court to set aside the vesting order because the suit premises, which was still registered in his late father’s name was advertised for sale for Kshs.12 million. According to him, he believed that he acted in the best interest of his late father’s estate. He did not, however, discuss the matter with his co-administrator because he could not trace him. At the conclusion of the oral evidence by the parties, the advocates made brief submissions.

In fact, M/s Martha Koome made detailed oral submissions at the beginning of the hearing of the application. It was after her submissions that I decided that the deponents of the various affidavits be cross-examined on the contents of their affidavits. I recorded a lot of evidence from the parties, except for Charles Michael Kariuki, whose affidavit is on record and I will consider it along with the other affidavits. For purposes of clarity, I would like to once more give the sequence of events in this case, as pertains to the suit premises.

1. The late Elias Warungu Kariuki purchased the Property in dispute, and a transfer registered in his name on 11th November, 1986 as L.R No13984/20
2. On 8.7.1987 he executed a “Declaration of Trust”, which reads in part “NOW THIS DEED WITNESSETH” “That the said ELIAS WARUNGU KARIUKI, does hereby declare that he holds the said property absolutely as aforesaid UPON TRUST for the said CHARLES KARIUKI NDUNGU”.
3. This DECLARATION OF TRUST was unfortunately not registered on the title to the property, and Mrs Alexander Kontos advocate who prepared the document explained in court the reasons why this was so.
4. The deceased ELIAS WARUNGU KARIUKI, died on 14th April, 2000.
5. As at that date, the title to the suit premises was still in the his name.
6. May be this, or the fact that the deceased ELIAS WARUNGU KARIUKI, was a sole Trustee who had now died, prompted Gladys Njeri Gitau, and her son to instruct Messrs Walker Kontos advocates, to obtain a vesting order in favour of Gladys’s son Charles Michael Kariuki Ndungu.
7. Such a vesting order was issued ex parte by MULWA, J on 19.10.2000.
8. As the record shows, the deceased’s son CHARLES NDUNGU KARIUKI was aggrieved by that order, for the reasons which appear in his affidavit, and in evidence he adduced in court. He discovered about the vesting order having been obtained, when the property was up for sale, yet the same was still registered in the deceased’s name. This shows that the vesting order too had not been registered on the title.
9. The said order was subsequently set aside vide my Ruling of 17th April, 2001. Messrs Walker Kongos, advocates who obtained the order from court were served to appear in court, which they did but only to say that they had no further instructions to act after obtaining the vesting order.

10. Finally Gladys Njeri Gitau moved the court to restore the vesting order once more and invest the property in her son as the deceased held the property in question in trust for him. It is this application which resulted in the long protracted legal battle before me.

I have considered the pleadings on record and the submissions of all learned counsel who appeared before me. I want to say that though a lot of evidence was adduced by the deponents of the various affidavits, I believe that the issues relevant to the application before me include such issues as, one, whether the DECLARATION OF TRUST, by the deceased was made in favour of the son of GLADYS NJERI GITAU, whom she had with the deceased, and secondly, whether the person who got a vesting order in his favour on 19th October, 2000, was actually that same 'son', who was said to be the intended beneficiary of the property in dispute.

I consider this second point to be very important in view of the description of the beneficiary in the DELCARATION OF TRUST, as "a grandson", and again, the fact that the above description of "grandson", according to GLADYS NJERI GITAU and her son was a "typographical error". That part of their evidence which was averred in their affidavits, was attacked vigorously by Mr. Oluoch, in his submissions, when he called the gift by the deceased an "imperfect gift", which is no declaration of trust and must revert back to the estate.

I wish to restate some facts, which are not in dispute in this case, i.e. that GLADYS NJERI GITAU, was and still is, the biological mother of CHARLES KARIUKI NDUNGU also known as CHARLES MICHAEL KARIUKI NDUNGU. Another point, which does not seem to be in dispute, is that GLADYS NJERI GITAU had "a relationship" with the deceased out of which a son was born.

Fortunately for me, the parties did not ask me to define the nature of that relationship which has been referred to as, either "a friend", or "a mistress", or "a wife". I will not therefore concern myself with that point, but what I think is important is to establish whether GLADYS' son with the deceased, by whatever name he was called, was the intended beneficiary of the DECLARATION OF TRUST dated 8th July, 1987, executed by the deceased in the presence of Mrs. Alexander Kontos, advocate. This makes Mrs. Kontos' evidence very important in this case. See para 5 of her affidavit dated 20th June, 2001, where she averred, "That at the time the said DECLARATION OF TRUST was executed, the late ELIAS WARUNGU was accompanied by GLADYS GITAU, who was introduced to me by the late ELIAS W ARUNGU KARIUKI, as the mother of CHARLES KARIUKI NDUNGU, the beneficiary of the trust.....".

The above contents of the affidavit were confirmed by Mrs. Kontos in her answers to questions put to her in court. Gladys confirmed in court that she accompanied the deceased to his lawyers offices. But one may ask why? Could it be because of this transaction or why did she accompany him?

The evidence I have analysed above, coupled with the fact that there is no evidence on oath to contradict the averments in Mrs. Kontos affidavits, makes me come to the conclusion that the beneficiary in the DECLARATION OF TRUST, must have been Gladys' son, that is why Gladys accompanied the deceased to the offices of his advocates. Mrs. Kontos' further testimony why the TRUST DEED was not registered, not having been controverted by any evidence cannot in my view be controverted by submissions, as was done in this application.

But one may ask, what about the "discrepancies" in the names and description of the beneficiary in the DECLARATION OF TRUST?

It is only the evidence of Gladys which gives insight into the deceased's "secret life", i.e. that he did not want his family to know about Gladys and her son, and when his first wife got to her about their existence, and the fact that they were living in a house in Lavington, the deceased's reaction was that the house must be sold. Would this "secret life" of the deceased be a good enough reason to warrant him to have described Gladys' son as his "grandson" in the DECLARATION OF TRUST?

What about all the correspondence which is annexed to the affidavit of Gladys said to be between the

deceased and Gladys' son, in which the deceased called and referred to him as "son" and the son in turn called him "Dad". These letters were not challenged as not having been written by the deceased.

In fact one of the letters written by the deceased to apply for admission for Gladys' son to Peninsula College in USA reads,

"Dear Sir, This is to let you know that my son Charles Kariuki is planning to join your college to study for 2 years (the above underlining is mine)". This letter too has not been challenged. From this evidence as well as the evidence of other witnesses as it appears in the affidavits filed, I find that Charles Kariuki was the "son" whom the deceased had with Gladys Njeri Gitau. I find further that the deceased's description of him as a "grandson" in the DECLARATION OF TRUST was for his own personal reasons to hide the identities of his "son" CHARLES KARIUKI and his "mistress" or "friend" or "wife Gladys Njeri Gitau. The explanation given by Gladys that this was a typographical error cannot be true. I find that the description of Gladys' son as "grandson" by the deceased in the DECLARATION OF TRUST was deliberate.

But how did Charles Kariuki become Charles Michael Kariuki?

The answer is found in his own affidavit, dated 24th May, 2001 at paragraphs 10 and 11. That evidence is supported by the averments in his mother's affidavit of 24th April, 2001, which has, annexed to it, his "sacrament of confirmation" certificate dated 1st November, 1993, bringing in for the 1st time, the name "MICHEAL" thus making his names read "MICHEAL CHARLES KARIUKI". Finally, I want to say something about the deceased's first-born son Charles Ndungu Kariuki, who is also an administrator of the deceased's estate, jointly with his step brother Joe Gatimu.

I want to say that his coming to court to set aside the vesting order was an act in the best interest of his late father's estate. I say this because the property in question, which was still registered in his father's name, was, being sold. He acted quite naturally in my view. It was not his mistake, I think that the Declaration of Trust was never registered against the title to the property. Neither was it his mistake that the vesting order obtained from court had not been reflected on the title to the property. I do not want to read any sinister motive in his action. I only consider it unfortunate that he did not involve his co-administrator, Joe Gatimu Kariuki. May be they are having problems between them as he said in court.

From the evidence, which I have considered in such great detail, I find that Gladys and her son have proved on a balance of probabilities that the DECLARATION OF TRUST by the deceased was made in favour of Gladys' son CHARLES KARIUKI, also known as MICHAEL CHARLES KARIUKI. For this reason, I grant a permanent injunction order to stop the eviction of Gladys and her son from the suit premises. Further, I direct that the said premises known as L.R. No. 3734/451 be vested in CHARLES KARIUKI absolutely, as was intended by the deceased.

Dated at Nairobi this 3rd day of October, 2002.

JOYCE ALUOCH

HIGH COURT JUDGE