



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 398 OF 2007

IN THE MATTER OF THE ESTATE OF ELIZABETH NYEGERA M'ARITHI (DECEASED)

FAITH KARIMI MISHECK.....PETITIONER

VERSUS

ZIPPORAH GAITI GICHURU.....PROTESTER/APPLICANT

JANET NCEKEI MWEBIA.....PROTESTOR/APPLICANT

RAPHAEL KINYUA KIRIMI.....PROTESTOR/APPLICANT

JUDGMENT

1. Elizabeth Nyegera M'Arithi (the deceased) died on 12th April 2002. As per the evidence tendered to Court at the time of Petitioning for Letters of Administration, she had left behind only one dependant, the Petitioner said to be her daughter. The Petitioner, Faith Karimi Misheck was appointed the administrator of the estate of the deceased, and on 29th May 2009, Emukule J confirmed the grant under which the Petitioner was allocated the whole of parcel L.R No. Abothuguchi/913.

The Applications

2. By way of summons dated 8th June 2020, Zipporah Gaiti Gichuru and Janet Ncekei Mwebia, the Applicants filed the instant application seeking revocation of grant made herein. They principally seek an order for revocation of grant and/or varying of the grant and a declaration that the Petitioner holds L.R No. Abothuguchi/913 in trust for the Applicants. The Application dated 24th August 2020 by Raphael Kinyua Kirimi seeks similar orders for revocation of grant.

The Applicant's Case

3. The applications were supported by the grounds on the face of the chamber summons applications and further supported by the Applicants' supporting affidavit sworn on 8th June 2020, the Applicants' further supporting affidavit sworn on 7th August 2020 and the supporting affidavit of Raphael Kinyua Kirimi sworn on 24th August 2020. The Applicants also filed submissions dated 22nd June 2021.

4. Their case is that the grant was obtained fraudulently by making false statements or by concealment of the fact of existence of other beneficiaries. They urge that the Petitioner summoned the Applicant with a view of evicting her and has threatened to demolish the 1st Applicant's house and spray her crops with chemicals unless she vacates from the land. That the Petitioner has been psychologically tormenting the 1st Applicant, her aunt.

5. They urge that they have been living with the Petitioner on L.R No. Abothuguchi/Kithirune/913 without knowing that the Petitioner had petitioned had applied for letters of administration. They urge that the Petitioner failed to disclose that the deceased held the land in trust for her other sisters who resided on the land. They urge that following threats of eviction from the land, they went to the lands registry and saw the green card of the parcel and this is when they found out that the Petitioner, their niece had carried out a succession cause.

6. They urge that the parcel initially belonged to their late father Arithi s/o Amanja aka Misheck Ngaruro M'Amanja and that their father had 4 children including M. Ndegwa M'Arithi (deceased), Maritha Mwari (deceased), Zipporah Gaiti Gichuru, Janet Ncekei Mwebia and Elizabeth Nyegera Arithi (deceased). They urge that their brother, M. Ndegwa M'Arithi was given a gift *inter vivos* by their late father away from their homestead and that their father declared that ancestral land should belong to his daughters and that their youngest sister, Elizabeth Nyegera Arithi (deceased) got registered and held the title in trust for the sisters and account that she was not married and resided at home.

They urge that the 1st Applicant came home after her marriage collapsed in 1972 and her father showed her a piece of land on their ancestral land, and that she planted coffee on her land and her father even gave her a number to deliver her coffee at a tea factory.

7. They urge the Petitioner used to stay in Nairobi at the time of their father's demise, but she later returned with her husband and constructed on the land and that they have all lived in peace on the land even after the demise of their mother who was buried on the land. They urge that they are elderly and are ailing and are incapable of looking for other places to call home. They seek to be declared dependants of the deceased and to have the grant be varied to include them.

8. In their further supporting affidavit, they urge that the deceased had two children namely Faith Karimi Misheck and Raphael Kinyua Kirimi. They urge that the Petitioner chased Raphael from the state. They urge that the only reason the parcel was registered in the name of the deceased was because she family agreed that she holds it in trust for the daughters. They urge that as per their late father's wishes, the land was meant for the daughters who would come home. They urge that they came to live on the land even before the demise of the deceased and that it is not true that they have land elsewhere. They urge that the Petitioner has just come on the land following the economic constraints brought about by the Covid 19 pandemic.

9. In the supporting affidavit of Raphael Kinyua Kirimi, he urged that he is the brother of the Petitioner and that the deceased is her biological mother. The other averments in his affidavit support those already deponed by the Applicants. The Applicants also filed statements all dated 10th September 2020 which mirror their affidavits.

The Petitioner's/Respondent's Case

10. The Petitioner/Respondent, opposed the applications. She filed a replying affidavit sworn on 11th September 2020 and a statement dated 11th September 2020. The Petitioner also filed undated submissions stamped 2nd August 2021.

11. She states that she is the only daughter of the deceased and that her late mother was not married and that all her life, she lived at her father's home. She urges that the suit property belonged to her late mother and that the protestors have been living at their husband's homes. That his mother's late father, Misheck Ngaruro M'Amanja, during his lifetime openly transferred L.R No. Abothuguchi/Kithirune/913 on 19th September 1991 and when her late mother was issued with the title deed, no one objected to the transfer of land. That all family members were aware of how her late mother acquired the land as her grandfather during his lifetime made arrangements on how he wished the family to settle on his land. That the grant was confirmed by the Court on 29th May 2009, over 11 years ago and that on 3rd November 2014, she was issued with a title deed and has been in occupation of the land to date.

12. She states that the 1st protestor is a wife of Joseph Gichuru Kathuu and they have a parcel of land namely L.R No. Abothuguchi/Kithirune/1650 and that the 2nd protestor is a wife to Francis Mwebia, son of Mwebia Kiara Mbuchari Kaithua and their family land is Nkuene/Ukuu/91. That she has been in occupation of the suit property and the coffee and trees thereon that the protestors are claiming belong to her and that it is not true that the protestors have been living on the suit property. She states that the protestors have been influenced by 3rd parties who are seeking to purchase the land. That at the area chief, the protestor's complaint was found to have no basis and that she has never sent the police to the suit land.

13. She states that the 1st protestor and her late husband were blessed with 5 children and she has never divorced her husband Joseph Gichuru Kathuu and that during her husband's burial, she fully participated as the wife. She states that her late mother did not hold the land in trust for the daughters and that the protestor's allegations have no evidential proof. She states that it is not true that the 1st protestor came back to the suit land in 1972 as alleged and that the protestors children have been taking care of them and their allegations to the effect that they have no home is false. She states that Raphael Kinyua Kirimi is a son of John Kirimi of Karugua area and he has been taken care of by his father. She states that Raphael rushed to obtain a birth certificate recently on 7th August 2020 for purposes of this case and his intention is to assist the protestors and that he is not entitled to a share of the deceased's estate. She states that Raphael does not live on the suit property.

14. She urges that she does not hold the suit property as a trustee of the objectors and that if they have any claim they ought to file the same under a claim for trust at the Environment and Land Court.

15. The Petitioner's/Respondents other witnesses are Felix Kabiti Mbui and M'Nthaka M'Inoti who filed statements both dated 11th September 2020. Their statements mirror each other. They urge that they know that parties to the case very well; That the Petitioner is a daughter to Elizabeth Nyegera M'Arithi (the deceased) who was a daughter to the late Misheck Ngaruro M'Amanja; That the deceased was not married and she lived all her life at the suit property and that when the Petitioner filed the instant succession cause, the land was still registered in the names of the deceased; That the late Misheck Ngaruro M'Amanja during his lifetime had made arrangements on how the land should be divided and transferred the property to the deceased and all other family members were aware of this; That at the time, the Protestors were living with their husbands; That when the deceased became the registered owner of the property, nobody made any claim over the land; That the Petitioner is entitled to the land as it belonged to her mother.

Issues for Determination

16. The main issues arising for determination in this case are as follows: -

i. Whether the Court has jurisdiction to entertain the applications before the Court.

ii. Whether the Applicant/Objector was a dependant of the deceased.

iii. How should the deceased property be distributed?

Determination

Whether the Court has jurisdiction to entertain the applications before the Court.

17. In the grant issued herein, the suit property was allocated to the Petitioner, a daughter to the deceased. She urges that the land was given to her because the other sisters were married and were living with their husbands. She has extensively urged that the sisters' have been provided for in the homes they got married into. This Court does not agree that children who are married are not entitled to the property of their deceased parent. The fact that they are married and/or were once married is not a reason to find that the Objectors, the deceased's sisters, are not entitled to a share in the estate. For purposes of the law of succession, dependency is determined by the relationship of a person to the deceased, notwithstanding other relationships that the person may have.

18. This was, however, not the only point that arose with respect to the Objector's claim on the suit property. The Objectors/Applicants urged that the deceased held the suit property in trust for them as their sisters. The Petitioner/Respondent has denied that her late mother, the deceased, held the land in trust for the Objectors. She further urged in her replying affidavit that the proper forum to bring a claim on trust is the Environment and Land Court.

19. This Court finds that if the deceased was holding the land in trust for her sisters, the title deed should have stated as much. It is said that the land was transferred to the deceased during the lifetime of their late father. None of the parties has pointed towards a succession cause done with respect to their late father's estate. It is thus not clear why the 1st and 2nd Objectors/Applicants did not contest the registration of the suit property in the name of their sister, to their apparent disadvantage.

20. In the absence of direct evidence confirming the claim for trust, the Court has to look at other evidence to confirm that the sisters' late father, from whom the land in dispute was initially inherited from had actually given the land to all the sisters. This would be an appropriate inquiry to be done as a civil dispute between the estate of the deceased and the Objectors which will require a determination, before they can be found to be entitled to the property. The question that arises is whether this Court is the appropriate forum to bring the claim for trust. The Petitioner urges that the proper forum is the Environment and Land Court.

21. I respectfully agree with the decision by Musyoka J in *In re Estate of Mbai Wainaina (Deceased)*, High Court Succession Cause Number 864 of 1996 [2015] eKLR, where the learned Judge held as follows with respect to claims of trust arising in succession matters: -

“16. The applicants claim that Kiganjo/Gachika/460 was held by the deceased in trust for them, and therefore that makes them heirs to his estate.

17. Whether the deceased held Kiganjo/Gachika/460 in trust for the applicants is a matter of both fact and law. It is incumbent upon the applicants to establish that such trust did exist. The issue is that the applicants have provided material upon which I can conclude whether such trust existed or not. I have not seen material from what is deposed in the affidavit sworn on 17th April 2012 by John Ng'ang'a Wainaina in support of the application.

18. Even if there was material establishing that there was such a trust, I doubt that that would be a matter for the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declarations of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.

22. This Court thus finds that it has no jurisdiction to entertain the claim based on trust, which relates to the question of beneficial ownership of land, an aspect of 'title to the land' which is the preserve of the Environment and Land Court. Once trust has been established by the Environment and Land Court, the Objectors will then be at liberty to approach the succession cause to seek provision in the suit property.

23. The claim for trust is however only urged by the 1st and 2nd Objectors/Applicants who are sisters to the deceased. The 3rd Applicant, claims to be a son to the deceased and his claim is thus not based on trust but he claims to be a direct heir. He has annexed a birth certificate to support his claim. This Court, therefore, finds that it has jurisdiction to entertain his claim.

Whether the 3rd Applicant/Objector was a dependant of the deceased.

24. The Court has confirmed from the grant that the Petitioner/Respondent was the only beneficiary in the instant succession cause. She is a daughter of the deceased. The 3rd Applicant/Objector has annexed a birth certificate showing that he is the son of the deceased. The Petitioner/Respondent has not denied that the 3rd Applicant/Objector is a son of the deceased. She merely urges that he is a son to one John Kirimi Rukania and that he has not been living on the deceased's property. The meaning of a dependant for purposes of the Law of Succession has been defined under Section 29 of the law of Succession Act as follows: -

29. Meaning of dependant

For the purposes of this Part, "dependant" means-

a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.

b. such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death: and

c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

25. The definition of a dependant includes a child, whether or not the child was being maintained by the deceased immediately prior to the death. In the instant case, the 3rd Applicant/Objector has shown that he is the biological son to the deceased. This Court understands that his biological father may be alive and may well be providing for him. This is, however, not a reason to deny him a share in the deceased's estate. This Court thus finds that the 3rd Objector/Applicant is a dependant of the deceased within the meaning of Section 29 of the Law of Succession Act and is thus entitled to a share in the deceased's estate.

26. The above reveals that the grant herein was confirmed without the Court's knowledge of the existence of another dependant, the 3rd Objector/Applicant. Whether this was done by way of concealment or by an honest mistake, this Court finds that this was a material factor that ought to have been brought to the attention of the Court. This Court thus finds reason to revoke the grant in accordance with the provisions of Section 76 of the Law of Succession Act. The new grant will include the name of the 3rd Objector/Applicant who will get an equal share in the deceased's property.

Conclusion

27. The deceased died on 12th April 2002, leaving behind a son (the 3rd Objector/Applicant) and a daughter (the Petitioner). Her daughter petitioned for letters of administration and the grant was ultimately confirmed, allocating her the entire parcel L.R No. Abothuguchi/913. This was the only asset belonging to the deceased at the time of her death. The 1st and 2nd Objectors claim that the deceased, their late sister was holding the land in trust for them. The Court has found that their claim is based on trust which must be proven and determined as a civil dispute in the Environment and Land Court. Once trust has been established, they will then be at liberty to approach the Court in a subsequent application.

28. With respect to the 3rd Objector/Applicant's claim, the Court finds that he is a rightful heir to the deceased. He is the biological son to the deceased and thus qualifies as a dependant within the meaning of Section 29 of the Law of Succession Act. This Court thus finds that he ought to have been included in the grant, notwithstanding that his biological father may be alive and may be providing for him. This Court finds that the threshold for revocation of grant has thus been met.

ORDERS

29. Accordingly, for the reasons set out above, this Court makes the following orders: -

i. The grant issued herein and confirmed on 29th May 2019 be and is hereby revoked.

ii. The mode of distribution of the deceased's estate will be as follows: -

L.R No. Abothuguchi/913

Faith Karimi Misheck

Raphael Kinyua Kirimi To share equally

iii. There shall be no order as to costs.

Order accordingly

DATED AND DELIVERED ON THIS 14TH DAY OF OCTOBER, 2021

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Kiogora Arithi & Co. Advocates for the Objectors/Applicants

Mmboos Mutunga & Co. Advocates for the Petitioner/Respondent in person