



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 632 OF 2014

IN THE MATTER OF THE ESTATE OF KARIUKI KIRUTHI (DECEASED)

JACKSON WACHIRA NDEGWA.....PETITIONER/ADMINISTRATOR

VERSUS

RICHARD KEIRO MWAURA.....1ST PROTESTOR

JAMES NJOROGE MWAURA.....2ND PROTESTOR

MARY WAMBUI MWAURA (Being the administrators

of the estate of STANLEY MWAURA KEIRO

(DECEASED).....3RD PROTESTOR

JUDGEMENT

Background Facts

1. The deceased in this case died on 15/5/1971 and his grandson Jackson Wachira Ndegwa petitioned for letters of administration intestate after citing one Gachanja Kariuki to accept or refuse that he be allowed to apply for letters of administration intestate. The said Gachanja Kariuki is the only surviving son of the deceased. Notably, an earlier succession cause had been filed in the Chief Magistrate court in respect of the same estate being C.M Succession Cause No. 154 of 1989. The said cause was filed by one Wilson Ndegwa Kariuki who is the father to the petitioner in this cause. However, the said Wilson Ndegwa Kariuki died before the cause was determined and the petitioner herein filed this Succession Cause. He claims that he had no knowledge of the cause filed by his late father. On 18/11/2014, the petitioner was appointed administrator of the estate in this cause. He then proceeded to file summons for confirmation of grant dated 29/04/2015.

2. The protestors filed their Affidavit of Protest dated 4th June 2015 on the premise that their father, Stanley Mwaura Keiro, now deceased, was a purchaser for value of part of the estate namely Land Parcel No. Aguthi/Gaki/53. In the earlier succession cause CM Succession Cause No. 154 of 1989, Stanley Mwaura Keiro was one of the objectors to the grant of letters of administration. The said cause was transferred to the High Court and given a new number H.C Succession Cause No. 389 of 1999. This file was joined to this cause No. 632 of 2014.

3. Directions were given that the protest be heard by way of *viva voce* evidence.

The Protestors' Case

4. The 1st protestor Richard Keiro Mwaura testified that he is one of the children of the late Stanley Mwaura Keiro and an administrator to his estate. He stated that the 2nd and 3rd protestors are his siblings. He further testified that his father purchased 3.5 acres out of Land Parcel No. Aguthi/Gaki/53 from the sons of the deceased namely, Geoffrey Gachanja Kiruthu, the late Kiruthu Kariuki and the late Wilson Ndegwa Kiruthu. The protestor's sister Mary Wambui Mwaura was present as a witness when the sale agreement was made. He produced an agreement dated 18th February 1990 to that effect adding that in 1995, Wilson Ndegwa gave his father one acre of the land to be using pending the conclusion of CM's Succession Cause No. 154 of 1989.

5. On cross-examination, the protestor stated that the suit land was sold to his father and not to him. He said that he was not aware of any search that was done at the time of the transaction and that he does not know the acreage of the deceased's land. He said he was opposed to the confirmation of the grant until determination is made about the purchase of their portion of the suit land.

6. The protestors called two witnesses. PW2 testified that he witnessed the sale agreement in respect of the suit property between the

deceased three sons and one Stanley Mwaura the father of the protestors. He added that Stanley Mwaura purchased one acre and that currently the children of Stanley Mwaura reside on the said piece of land.

7. PW3, Mary Wambui Mwaura testified that she is a daughter of the late Stanley Mwaura Keiro and that he purchased land from Geoffrey Gachanja Kiruthu Kariuki Kiruthu and Wilson Ndegwa Kiruthu. She added that they entered into sale agreement and that Stanley Mwaura was to get the land after the completion of the Succession Cause. She further stated that she was present during execution of the agreement and that she recorded all the payments made by her father which totalled to Kshs.216,000/=

8. On cross-examination PW3 said that the family has lived on the said parcel of land since 1995 and that their quiet possession has never been interfered with.

The Petitioner's Case

9. The petitioner testified that he is the grandson to the deceased and that he filed the current Succession cause not being aware that his step uncle had filed an earlier cause in the Chief Magistrate Court.

10. On cross-examination he stated that only one child of the deceased was alive namely Geoffrey Gachanja others having passed on. He proposes that the suit land should be distributed amongst the surviving son of the deceased and the wives of the deceased sons. He added that he does not know when Stanley Mwaura settled on the land and that he is not aware of the sale agreement. He added that the land belongs to the family of the deceased and that his uncles had no right to sell the land.

11. The petitioner called one witness Geoffrey Gachanja Kiruthu DW2 who testified that he is a son of the deceased. He stated that the deceased had seven (7) sons. The 1st wife who is his mother had three (3) sons while the 2nd wife had four (4). He added that he is entitled to a share of his father's estate and so are the children of his late brothers. DW2 further testified that the 1st protestor had leased the land from him and promised to sell him the piece of land if he in future decided to sell it. He further testified that the 1st protestor has been paying him rent from leasing the suit property. The witness further stated that he did not know the 2nd and 3rd protestors.

12. On cross-examination, the witness stated that he did not file this succession cause as the only surviving child of the deceased because he did not have the required funds. He said that he signed some forms for the petitioner but he was not aware of any earlier succession cause filed in the Magistrate's court. He further testified that he only knows Stanley Mwaura now deceased and not his children the protestors herein. According to DW2, it was Stanley Mwaura who used to pay the rent in respect of the leased property. He further stated that the family of Stanley Mwaura is still on the land and that no one has tried to evict them.

13. The witness denied signing the sale agreement dated 17th September between Kariuki Kiruthu, Wilson Ndegwa Kiruthu and himself on one hand and Stanley Mwaura Keiro on the other hand. He further stated that he had no knowledge of any agreement or acknowledgement of cash for Kshs.26,000/= between Wilson Ndegwa Kiruthu and Stanley Mwaura Keiro. He also testified that he did not know about the sale agreement for the suit property measuring 3.5 acres, dated 21/12/1989 between him and his two brothers as vendors and Stanley Mwaura as purchaser. Neither was he aware of an agreement dated 4/6/1990 between Wilson Ndegwa and Stanley Mwaura. The witness further stated that he recalled that he signed the agreement dated 6/9/1989 but states that though the signature resembles his, it is not his. He later in cross-examinations said that he signed various agreements before he received monies for the sale of part of the land.

14. The protestors elected to put in written submissions but did not file them. The petitioner opted not to file any submissions.

Issues for determination

15. After careful analysis, the main issues for determination are:-

- a) Whether the protest has merit
- b) What is the applicable law in distribution of the deceased estate.
- c) Identification of the beneficiaries and their shares.

The Law

Analysis and Determination

The Law applicable

16. It is not disputed that the deceased died intestate and that he had two wives and seven (7) children. It is also not in dispute that the deceased's only asset in estate is Land Parcel Aguthi/Gaki/53. It is evident that the deceased died on 15th May 1971 which is prior to the commencement of the Law of Succession Act. The question then arises as to what law is applicable where the deceased has died prior to the commencement of the Law of Succession Act. **Section 2(2) of the Law of Succession Act** provides:-

The estate of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death but nevertheless the administrator of their estate shall commence and proceed so far as possible in accordance with this Act.

17. In this case, the law applicable would be Kikuyu customary law. The general principle in Kikuyu law of inheritance is that it is patrilineal and that distribution of the deceased's property will be equal amongst his sons. However, since the protestors claim that their father was a purchaser for value, it is prudent to establish whether this is true before embarking on the distribution of the estate.

18. On perusal of the sale agreements in respect of the suit property, it is clear that the parties to the transactions are be Geoffrey Gachanja Kiruthu, Wilson Ndegwa Kiruthu and Kiruthu Kariuki as the sons of the deceased selling land to Stanley Mwaura Keiro. The protestor produced an agreement was entered into on 6th September 1989. The said agreement provides that the grant of letters of administration at the time was issued to the three vendors however confirmation of the said grant was yet to take place at the time of the agreement. This then raises the question on whether the three vendors had the legal capacity to sell the said deceased's land to the protestor's father. **Section 45 of the Law of Succession Act** is instructive on this. It provides that:-

(1) Except so far as expressly authorized by this Act, or by any written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

(a) Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) Be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

19. The protestors' produced land sale agreements and acknowledgements of staggered sums of the purchase price dated between the year 1989 and 1999. The total purchase price is indicated to be Kshs.340,000/= and Kshs.260,000 respectively in two different documents. The protestors said that their father paid Kshs.216,000/= to the sons of the deceased but the petitioner and his witnesses deny that there was any such transaction or any money paid to them. Two of the purported vendors are deceased save for DW1. The deceased in this case died in 1971 about twenty years before the said land sale agreements were made. The agreement dated 6th September, 1999 was between DW2 and two others on one hand and the father of the protestors one Stanley Mwaura Keiro.

20. DW2's testimony was that the land in question being part of deceased's land Aguthi/Gaki/53 was leased to the father of the protestors but was never sold to them. However, both parties did not dispute that the family of the late Stanley Mwaura Keiro has been in occupation and on cultivation of one acre of the land for many years and up to the time of hearing this case.

21. The Succession Cause filed by the late Wilson Ndegwa Kariuki and which was later transferred to this court HC Succession Cause No. 289 of 1999 was never determined. Before the petitioner was issued with letters of administration intestate, five(5) objectors came on board in opposition. The case was later abandoned and dismissed by the court for want of prosecution. The purported sale of the deceased's land twenty years after his death was mere intermeddling with the estate of the deceased because the purported vendors had no authority to sell. The late father of the protestors cannot benefit from the agreements that were made between him and the sons of the deceased as a purchaser of good value.

22. However, although the petitioner denied knowing anything concerning the occupation of one (1) acre of deceased's land, this was admitted by his uncle DW2. By the time this case was filed in 2014, the late Stanley and his family had enjoyed quiet possession of the one(1) acre of land for about twenty three(23) years. DW1 admitted that the family still cultivates the land to date. This quiet and prolonged occupation, in the appropriate court would be considered as acquisition of title by prescription. In this succession court, it would defeat the sense of justice and fairness to disregard the interest of the protestors in regard to the portion their family has occupied for over twenty years. It is my considered view that the protestor's ought to be considered for the said portion in the distribution of the estate.

23. The petitioner's case was that the deceased had seven sons including his own father. All the sons except DW2 Geoffrey Gachanja Kariuki are deceased. One of the deceased sons namely Kiruthi Kariuki is said to be survived by a son though he was not married. The other deceased sons are survived by their wives, children and grandchildren. From the evidence of the petitioner, the beneficiaries herein are the survivors of :-

- a) Geoffrey Gachanja Kariuki – Son
- b) Waweru Kariuki -Son
- c) Mutahi Kariuki –Son
- d) Kiruthu Kariuki - Son
- e) Ndegwa Kariuki – Son
- f) Kingori Kariuki – Son
- g) Wilson Ndegwa Kariuki – Son

24. The summons for confirmation the names of the survivors are given as follows:-

- a) Lucy Njeri Waweru
- b) John Kariuki Ndegwa
- c) Kariuki Kingori
- d) Prisca Wambere
- e) Geoffrey Gachanja Kariuki
- f) Kariuki Ndegwa
- g) Waweru Ndegwa

25. It is imperative to note that some of the families of the children and grandchildren of the deceased's sons may have more than one child and that some of the survivors may have passed since this cause was filed in 2014. For this reason the court directs the petitioner to file a further affidavit detailing the names of the surviving beneficiaries and their respective shares.

The law applicable in the distribution of the estate is Section 38 of the Law of Succession Act which provides:-

- **Where an intestate has left a surviving child or children but no spouse the net estate shall subject to the provisions of Section 41 and 42 devolve upon the surviving child, if there be only one or shall be equally divided among the surviving children.”**

26. The children of the deceased are entitled to equal shares of the deceased's estate while the grand children are entitled to inherit the shares of their respective deceased parents to share equally with their siblings, if any

Conclusion

27. It is my finding that the protest has merit only to the extent of the one acre in the possession and use of the family of the late Stanley Mwaura Keiro. The one (1) acre portion out of Aguthi/Gaki/53 will be shared equally among the four (4) protestors.

28. The balance of the deceased's estate measuring 6.89 acres be shared equally among the surviving son of the deceased and the survivors of the six deceased sons in equal shares with each family getting 0.98 acres.

29. The grant is hereby confirmed in the said terms pending issue of the certificate of confirmation upon filing of the further affidavit within twenty one (21) days by the petitioner to provide the required details of the beneficiaries in each household and their respective shares.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 7TH DAY OF OCTOBER 2021.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 7th day of October 2021