



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO. 25 OF 2017

[FORMERLY NAIROBI SUCCESSION CAUSE NO. 2301 OF 2019]

RE ESTATE OF JANET WAMBUI KIHU

LISPAH WAHU KIMANI.....1ST PROTESTOR/APPLICANT

HENRY KAMAU MACHARIA.....2ND PROTESTOR/APPLICANT

VERSUS

FRANCIS NGANGA KIHU.....PETITIONER/RESPONDENT

JUDGMENT

1. Janet Wambu Kihui (hereafter *the deceased*) died intestate on 20th October 1999. Her son, Francis Ng'ang'a Kihui (hereafter *the respondent*) petitioned for letters of administration in Thika Chief Magistrates Succession Cause No. 393 of 2007. A grant was issued to him on 24th July 2008 and confirmed on 15th April 2009.

2. Lispah Wahu Kimani and Henry Kamau Macharia (hereafter *the 1st and 2nd applicants*) were aggrieved. A *summons for revocation of grant* was lodged in Nairobi High Court Succession Cause Number 2301 of 2009. In a judgment delivered on 30th April 2015, the High Court (*Muchelule J*) revoked the grant. The learned judge further ordered that the entire estate do revert into the names of the deceased. The Court also cancelled all the transactions resulting from the annulled grant.

3. On 18th July 2017 the cause was transferred to this Court for hearing and determination. I directed that the matter be heard *viva voce*. Learned counsel for the applicants and respondents filed some brief witness statements and called one witness each. I took their evidence on 23rd October 2019.

4. PW1 was Francis Ng'ang'a Kihui. He relied largely on his witness statement filed on 8th June 2018 a bundle of documents filed on 3rd July 2017. He stated that the deceased had five children namely-

- i) Kimani Kihui (now deceased) who was the 1st applicant's husband;
- ii) Francis Ng'ang'a Kihui (the respondent);
- iii) Gitau Kihui (now deceased);
- iv) Njoki Kihui (now deceased); and
- v) Njeri Kihui (now deceased)

5. He proposed that the estate be distributed as per paragraph 6 (a) of his affidavit in support of the protested summons sworn on 3rd April 2017. That would mean that he gets 2 acres out of *Loc. 5/Gitura/120* while Macharia Njoroge (the father of the 2nd applicant) would get the remainder of 0.7 acres.

6. The basis of his claim is simple: He testified that his father, Kihui Mathari, died in the year 1962. When land in Githunguri and Gitura Sub-Location was being consolidated, his father owned two parcels of land: *Loc. 5/Gitura/120* measuring 2.7 acres; and, *Loc.5/Githunguri/414* measuring 7 acres all totaling to 9.7 Acres. He said that his father gifted Kimani Kihui 5 acres from the Githunguri land while 2 acres were given to PW1.

7. He said that *Loc. 5/Gitura/120* was registered in his mother's name (the deceased in this cause). PW1 said that contrary to the assertions by the applicants, he did not get 4.2 acres comprised in *Loc.5/Githunguri/345*. He said that his father gave him only 2 acres out of *Loc.5/Githunguri/414*. He then purchased 2.2 Acres from one Nganya Kabucu which he combined with the 2 acres to form *Loc.5/Githunguri/345* measuring 4.2 acres.
8. The respondent thus claims the 2 acres out of *Loc. 5/Gitura/120* in order to have an *equitable share* with his brother Kimani Kihui (now deceased). But on cross examination, the respondent admitted that he had no documentary evidence to show he bought the 2.2 acres. He however said that in previous proceedings at the Murang'a South Land Disputes Tribunal at Kandara, the said Nganya was present and the latter's representative confirmed the purchase.
9. The respondent in further answer said that his father's wishes were that Macharia Njoroge should only get a place to build his house. He admitted that there were other proceedings before the clan which resolved that *Loc. 5/Gitura/120* should devolve to Macharia. The respondent was dissatisfied with their findings and filed the dispute at the abovementioned Tribunal. The respondent in those proceedings was Lispah Wahu (the 1st applicant here). The Tribunal awarded the respondent 2 acres. It is instructive that the award was stayed following an appeal at Nyeri but no formal judgment was issued.
10. The applicants' case on the other hand is that *Loc.5/Gitura/120* should devolve to Macharia Njoroge (now also deceased) or his heirs. In the affidavit of protest sworn on 7th May 2017, the 2nd applicant deposed that the land should be distributed to Poline Wanjiku Nyoike (Macharia Njoroge's wife) in trust for her children.
11. The applicants' sole witness was Joel Murigi Mau. He relied on his witness statement dated 8th July 2017 and a set of documents dated 10th July 2017. He was the secretary of the clan meeting held on 1st December 2005 which resolved to give Macharia Njoroge the disputed land. He said that PW1 was present at the meeting. They also resolved that Macharia Njoroge would give his uncle's wife (Lispa) a 40 x 80 plot and to his uncle (PW1) a plot 40 x 80 (Document 1).
12. The basis of the elders' findings was that *Loc. 5/Gitura/120* was retained by the deceased. The deceased's wishes were that the land be inherited by her grandson, *Macharia Njoroge*, whose mother (*Njoki Kihui*) was unmarried and died in the year 1952. At the time of her death, Macharia was only eight years old and was raised by the deceased.
13. It is alleged in the statement that the respondent, out of an ill-motive, prevailed upon the deceased not to transfer the land to Macharia Njoroge on grounds that the latter might sell it. On cross examination, the witness could not tell whether Njoki Kihui was married. He was also unaware of the wishes of her father, Kihui Mathari. He was also unsure whether Henry Kamau Macharia (the 2nd applicant) filed for grant of letters of administration to the estate of Macharia Njoroge.
14. Learned counsel for all the parties filed written submissions on 14th November 2019 and 4th December 2019 respectively.
15. It is a cardinal precept of the law of evidence that *he who alleges must prove*. See section 107 of the **Evidence Act**. See also *Esther Wanjiru Kiarie v Mary Wanjiru Githaka*, High Court, Eldoret, P&A Cause 244 of 2002 [2016] eKLR.
16. The respondent freely conceded that he had no documentary evidence to back up his claim that he bought 2.2 acres of land from one Nganya Kabucu which he combined with the gift of 2 acres to form *Loc.5/Githunguri/345*. He did not provide the particulars of the sale or the consideration. All that is before the Court now is his bare statement that he made such a purchase.
17. To be fair to the respondent, his list of documents filed on 3rd July 2017 contain the proceedings and findings of the Murang'a South Land Disputes Tribunal at Kandara. The respondent states that Nganya was present at that sitting; and, that his representative confirmed the purchase of 2.2 acres. However, the proceedings and finding before the tribunal are not binding on this court.
18. In the end, I find that the respondent failed to *prove* that 2.2 acres were purchased from Nganya and that he consolidated them with the gift from his father into one title known as *Loc.5/Githunguri/345* measuring 4.2 acres.
19. Having failed to discharge that burden, his claim for a further 2 acres from *Loc.5/Gitura/120* lies on an evidential and legal quicksand. Firstly, there is no cogent evidence that the respondent's father, Kihui Mathari, made an *oral will* directing that Macharia Njoroge (the father to the 2nd applicant) should only get a plot to build a house on *Loc.5/Gitura/120*. See *Re Rufus Ngethe Munyua (Deceased) Public Trustee v Wambui* [1977] KLR 137.
20. Secondly, *Loc.5/Gitura/120* was registered in the name of his mother Janet Wambui Kihui (the deceased in this cause). It is not disputed that the respondent's sister, *Njoki Kihui*, was living on the disputed land; and, that she died in the year 1952. It is unclear if she was married. The applicants claimed that she was *unmarried*. The respondent on the other hand submitted that she was *married* to one *Njoroge Macharia* who was detained during the *Mau Mau* liberation war. The respondent asserted that his father's instructions were that if Njoroge Macharia resurfaced and came back for his children, then Macharia Njoroge would be given a plot to build a house.
21. But whichever the case the **Law of Succession Act** does *not* discriminate between sons and daughters; or, married and unmarried daughters. Furthermore, it is not disputed that Njoki Kihui had a son named Macharia Njoroge (the 2nd applicant's father) who was aged eight years at the time of her death. There is also evidence that he was raised by his grandmother (the deceased in this cause); and, that he later put up a hut where the deceased lived. Njoki Kihui was thus entitled to inherit land from her mother. Njoki's son in turn is entitled to what should have gone to his late mother.
22. One of the parties is obviously less than candid. But from the written statements and oral evidence, I find that during the lifetime of the

deceased, the respondent was gifted parcel number Loc.5/Githunguri/345 measuring 4.2 acres whereas his elder brother Kimani Kihiu (the 1st applicant's husband) received parcel number Loc.5/Githunguri/414 which measures 5 acres.

23. Had the respondent's father Kihiu Mathari intended that *Loc. 5/Gitura/120* be shared in the manner now proposed by the respondent, he could have done so before he died in 1962. He chose instead to leave that property in the name of his wife Janet Wambui Kihiu (the deceased in this cause). It was open to the latter to give her grandson the land.

24. Since Macharia Njoroge is now also dead, his share shall now devolve to his wife Poline Wanjiku Nyoike who will have a life interest and to hold the land in trust for her seven children-

- i) Julius Gitau Macharia - Son
- ii) Martin Ndung'u Macharia - Son
- iii) Henry Kamau Macharia - Son
- iv) Susan Njoki Macharia - Daughter
- v) Jane Wambui Macharia - Daughter
- vi) Irene Wairimu Macharia - Daughter
- vii) Beth Njeri Macharia - Daughter

25. Learned counsel for the respondent raised an important procedural issue that the 2nd applicant lacks capacity to bring these proceedings. He submitted that "*in order to qualify he must prove by way of filing succession causes in respect of his father and in turn of his great grandfather*".

26. That submission is prosaic for two reasons. Firstly, Macharia Njoroge died on 28th May 2016 during the *pendency* of this suit. By summons dated 20th June 2016, the 2nd applicant applied to be *substituted* in place of his father. The record shows that on 14th September 2016 the parties filed a *consent* dated 22nd August 2016 in which they agreed that the 2nd applicant "*be allowed to substitute Macharia Njoroge (deceased)*"

27. Secondly, this court is enjoined by **Article 159 (2) (d)** of the **Constitution** to do *substantial justice* to the disputants. The court should also maintain "*equality of arms and as far as it is practicable to place the parties on equal footing*". See **Harit Sheth Advocate v Shamas Charania** Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR.

28. The upshot is that the claim by the respondent for a share of the suit land is devoid of merit and is *dismissed*.

29. My final orders are as follows:

- i) That the respondent (Francis Ng'ang'a Kihiu) is *not* entitled to a share of *Loc. 5/Gitura/120*.
- ii) That *Loc. 5/Gitura/120* shall devolve to Poline Wanjiku Nyoike (the late Macharia Njoroge's wife) who will have a *life interest* and who shall hold the title in trust for her following children-
 - a) Julius Gitau Macharia
 - b) Martin Ndung'u Macharia
 - c) Henry Kamau Macharia
 - d) Susan Njoki Macharia
 - e) Jane Wambui Macharia
 - f) Irene Wairimu Macharia
 - g) Beth Njeri Macharia

30. Costs follow the event and are at the discretion of the court. This is a contest between family members over inheritance. In the interests of justice each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 6TH DAY OF FEBRUARY 2020.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Muchoki for the 1st and 2nd applicants instructed by Muchoki D. M. & Company Advocates.

No appearance by counsel for the respondent.

Ms. Dorcas & Ms. Elizabeth, Court Assistants.