



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO. 34 OF 2007

IN THE MATTER OF THE ESTATE OF ASITAI MABEYA MOGAKA (DECEASED)

JOSEPH MOSWAGI MABEYA.....1ST PETITIONER

ALFRED GICHANA MABEYA.....2ND PETITIONER

VERSUS

JOHN KEENEGICHANA.....PROTESTOR

RULING

1. John Keene Gichana's (the protestor) affidavit of protest filed on 27th June 2019 contests the mode proposed by the petitioners for the distribution of the deceased's estate. The petitioners filed an application dated the 15th May 2019 seeking to confirm the letters of administration issued to Alfred Gichana Mabeya and Joseph Moswagi on the 19th April 2016. The protestor, contends that the land known as West Kitutu/Mwakibegendi/1099("the suit land") does not belong to the deceased and should not be given to John Ogwaro Mokaya as proposed by the petitioners.

2. The protestor, John Keene Gichana, claimed in his affidavit of protest that his late grandfather gave each of his three wives, Moraa Mogire, Nyasuguta Mogire and Nyobori Mogire portions of land to hold in trust for their children. He averred that his grandmother, Moraa Mogire had three sons. When her last born son Mogaka Mogire died, his land parcel no. 1099 was utilized by the protestor's father and his late uncle Kinaro Mogaka until they agreed that the protestor's father should take their late brother's land. The protestor claimed that his late father had in turn given him the suit land where he had been cultivating and residing since. He stated that the deceased belonged to the 3rd house and had his own parcels of land namely land parcel no. West Kitutu/Mwakibegendi/1109 and 1197. The protestor deposed that he came to learn about the succession cause when he was sued by one John Ogwaro Mokaya. He insisted that he is entitled to the suit land and it should not be transferred to John Ogwaro Mokaya as proposed in the summons for confirmation of grant.

3. The 2nd petitioner, Alfred Gichana Mabeya, responded to the protest vide a replying affidavit filed on 30th September 2019. He averred that the suit land was registered in the deceased name as a first registration way back in 1969 thus defeating all customary claims to the land. He deposed that the protestor's father had his own land parcel no. West Kitutu/Mwakibegendi/1198 and also owned land parcel no. West Kitutu/Mwakibegendi/1177 jointly with Kinaro Mogaka. The petitioner further claimed that land parcel no. 1177 had since been subdivided and that the protestor lived on a subdivision of the land. He stated that the protestor had only recently forcefully entered into the suit land in a bid to lay claim to the land. That if indeed the protestor should lay claim to a share of property, it should be from his father's parcels of land.

4. Both the protestor and the petitioners testified and called witnesses to give viva voce evidence in support of their contesting positions.

5. The protestor (PW1) testified that he had sued the petitioner for claiming that the suit land belonged to the deceased. He stated that the suit land was initially owned by his father's brother, the late Mogaka Mogire but the deceased changed the register and worked with surveyors to acquire the land. He stated that contrary to the petitioner's claim that he had moved into the land a year prior, he had been living on the land for over 12 years after he inherited it from his father.

6. Ombati Ouma (PW2) introduced himself as the 1st petitioner's cousin and adopted his statement as his evidence. He testified that the suit land was previously owned by Mogaka but it was currently being cultivated by the protestor who had been living on the land since his parents died. He testified that the deceased had his name registered on Mogaka's land after he was chosen during a survey.

7. Francis Omosa Nyambane (PW3) also testified that the suit land belonged to Mogaka who had died without a family in 1966. He testified that Mogaka's land was supposed to be left to his brothers Keene and Kinaro but it was currently registered in the deceased's name. PW3 testified that traditionally, the deceased was not supposed to get the land because he belonged to the 3rd house. He stated that the deceased

had the land registered in his name when he was a member of the survey committee.

8. Juliana Osoro (PW4) recalled that he and another village elder had been summoned by Mzee Mogaka to assist him subdivide his shamba amongst his wives. He testified that Mogaka was given his portion of the land called the emonga. He told the court that it was improper for the son of one family to inherit land from another family as had been done in this case.

9. Having adopted his written statement as his evidence, Omosa Ochwangi (PW5) told the court that the protestor's grandfather, Mogire Mogaka had 3 wives. The 1st wife Moraa, had 3 sons namely Keene, Kinaro and Mogaka. He testified that the land in dispute belonged to the 1st wife and the children of the 3rd house could not inherit from the 1st house.

10. The petitioner, Alfred Gichana Mabeya (DW1) then testified that his father, the deceased, had owned land parcels number 1197 and 1099 at the time of his death. He stated that the protestor could not inherit land parcel no. 1099 as he was not a son of the deceased and had not laid a claim over the land from the deceased before he died in 1987. When cross examined, the petitioner testified that he was born in 1954 and could not recall when his grandfather distributed his land amongst his sons. He testified that he was aware that his father, Keene and Kinaro had a dispute over the suit land and that Kenne and Kinaro had once removed the boundaries and forcefully entered the suit land. He stated that one John had purchased the land from them in 2007 but the title deed to the land had been revoked when he made an application to have the grant revoked.

11. The 1st petitioner, Joseph Moswagi Mokaya (DW2) adopted his written statement as his evidence and stated in cross examination that suit land had been registered in his name in 2007. In that same year, he sold the land to one John Mokaya in line with the family's decision to do so. He stated that John had built on the land and was cultivating it and that the land should go to him.

12. The petitioner's step brother, Joseph Omosa Mabeya (DW3), testified that the deceased and the protestor's father Keene had no issues and it was the protestor who had brought up the dispute. He also confirmed that they had agreed to sell the suit land to John Mokaya about 11 years back. He testified that the protestor's father, Keene owned land parcels no. 1198 and 1177 but admitted during cross examination that he had not conducted a search to ascertain the ownership of those parcels of land.

13. Masau Moswagi (DW4) who described himself as a cousin of the family, testified that Mogaka Mogire had divided his shamba to his 3 wives and that land parcel no. 1099 belonged to the 3rd house. He told the court that he lived near the protestor and knew that he had started cultivating the suit land and had built a house thereon in 2018.

14. After the close of the petitioners' case, the parties complied with directions to file and exchange written submissions which I have duly considered.

ANALYSIS AND DETERMINATION

15. The protest herein was filed in line with **rule 40 (6)** of the **Probate and Administration Rules** which provides that any person wishing to object to the proposed confirmation of a grant may file an affidavit of protest against such confirmation.

16. In their application for confirmation of grant, the petitioners proposed to distribute land parcel number West Kitutu/Mwakibagendi/1197 and the suit land as part of the deceased's estate and land parcel no West Kitutu /Mwakibagendi to John Ogwaro Mokaya. The protestor is opposed to the proposal to bequeath John Ogwaro Mokaya the suit land. He claims that the parcel of land does not belong to the deceased. Although he admits that the suit land is registered in the name of the deceased, the protestor claims that the circumstances under which the deceased was registered as proprietor are questionable. In his submissions before this court, the protestor's counsel reiterated the protestor's averments that the suit land initially belonged to members of the 1st house and the circumstances under which the deceased was registered as the owner of the suit land were suspect.

17. The protestor claimed that the deceased belonged to his grandfather's 3rd house and was not culturally entitled to inherit property from the 1st house. He claimed that his father Keene Mogaka belonged to the 1st house. When the last born son of the 1st house passed away, his father and his uncle, Kinaro Mogaka, took over their brother's land as he had died without a family.

18. The protestor's counsel submitted that it was not clear from the adjudication records why the name of Kibagendi Kibagendi, who was the first owner of the land, had been cancelled in 1967. He submitted that there were numerous issues relating to the land dating as far back as 1970. That in contrast with the deceased's family who had never possessed, occupied or used the suit land, the protestor had a homestead on the land and he had been in possession of the land since time immemorial.

19. Conversely, the petitioners argue that the protestor has not proved any interest in the suit land. They deny the protestor's claim that he has been in occupation of the land. They accuse the protestor of forcefully entering into the land in 2018 and constructing an incomplete house thereon. They also state that the deceased's name was registered as the owner of the land on first registration and the same can therefore not be challenged. The petitioners point out that neither the protestor nor his father made a claim against the deceased during his lifetime and the same should be disallowed and the grant confirmed as proposed.

20. The petitioners also admitted that the suit land had been sold and transferred to one John Ogwaro Mokaya before the confirmation of the grant. A copy of pleadings in ELC Case No. 11 of 2019 which had been filed before the Chief Magistrate's Court at Kisii was annexed to the affidavit of protest. In that case John Ogwaro Mokaya, sought to *inter alia* evict the protestor from the suit land. It can be inferred from those pleadings that the protestor has been in occupation of the suit land although the length of his occupation on the land is contested.

21. In a ruling dated 19th April 2016, this court ordered that the suit land revert back to the deceased who was the first registered owner of the land. The protestor claimed that he only got to learn about the deceased's registration as the owner of the land in 2018. He claims a

