



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 272 OF 2002

IN THE MATTER OF THE ESTATE ON MUNYERIA KABUTHU (DECEASED)

KIHUMBA KABUTHU.....PETITIONER

VERSUS

LOISE WANJIRU MUNYERIA.....OBJECTOR

JUDGMENT

According to the letter of the Assistant Chief Kihatha sub location dated 24th April 2002 the land LR TETU/KIRITI/416 situated in his sub location was registered in the name of KABUTHU s/o KINDITI who died in 1972.

He was survived by his three wives and children- but the wives also died and left sons:

1st wife Wambui Kabutu: Gitai Kabuthu, Kihumba Kabuthu

2nd wife Mwhaki Kabuthu: Munyeria kabuthu

3rd wife Nyokabi Kabuthu: Kihumba Kabuthu

The green card annexed to the petition for letters of administration intestate indicates that the land was registered in the name of Kabuthu s/o Kinditi on 13th February 1958 but transferred to Munyeria Kabuthu by way of gift on 22nd April 1997.

The petition was filed on 29th August 2002 by Kihumba Kabuthu who indicated that deceased was survived by himself as a step brother, Gitahi Kabuthu another step brother and his wife Loise Wanjiru Munyeria. Grant of letters of administration intestate was made to Kihumba Kabuthu on 19th November 2002.

On 14th May 2003 the Petitioner filed summons for confirmation of the grant. He proposed to distribute the Estate to himself 3.1 acres, Loise, 1.1 acres and Gitahi, 1.1 acres.

This provoked Loise's affidavit in protest on the grounds that the petitioner was not a son of the deceased, he did not include the children of the deceased, and more importantly he did not consult her while filing the petition. She also indicated that she was the holder of a limited grant with respect to the deceased's estate vide succession cause no 267 of 2002 to pursue Nyeri CMCC award no 90 of 2001.

Kihumba Kabuthu died on 19th June 2003 and Loise applied to be issued with a fresh grant as the widow of the deceased.

Peter Kabuthu Kihumba s/o Kihumba Kabuthu came on board vide a replying affidavit sworn on the 21st June 2017 as with a limited grant issued on 17th May 2017 over the estate of Kihumba Kabuthu to enable him prosecute and finalize this cause .

He retained Kihumba Kibuthu's mode of distribution stating that the other two houses had sold 2.0 acres, which he was entitled to , and each house was entitled to 1.1 acres.

On 27th November 2017, both Loise and Peter were appointed joint administrators of the estate by consent with each having the liberty to seek confirmation of the grant.

A new summons for confirmation of the grant was filed by Peter on the 18th December 2017 with a different mode of distribution but retaining the 1.01 acres for Loise, 3.01 acres to him and his brothers, and three equal portions of 0.34 acres ostensibly to other beneficiaries.

Loise filed an affidavit in protest on 23rd January 2018 on the basis that the land Tetu/Kiriti/416 was registered in her father's name because he had bought it from Kihumba Kabuthu, and therefore she and her children were the sole beneficiaries.

It is these latter applications that were heard through viva voce evidence. The parties also filed submissions through their respective counsel.

The protester's position is that her husband Munyeria bought the land from his own father. That that is how the land was registered in his name. She however did produce documentary evidence to demonstrate that her husband had bought the land. These were said to be sale agreements dated 21st December 1966, whose Kikuyu version was not attached. The translation states that Kabuthu sold land D. South Nyeri Tetu 416 in Kiriti no X/68 approximately 4.9 acres at Ks 5940, to his son Kiroha. There is no mention of Munyeria. Another of 19th January 1968 which simply states that Loise wanjiru had given Wangui Ksh.1750/= for something but does not mention land, another one of the same date stating that Kabuthu Kindeti had sold one acre at Ksh.1000/= to Munyeria Kabuthu. No parcel number is mentioned to connect the alleged sale with the suit property herein. It is noteworthy that there is only one thumb print on the document and neither the seller nor the buyer nor the witnesses have 'signed' the same.

Peter's position is that his grandfather died in 1972 and could not have transferred the land to Munyeria his uncle in 1997 a difference of 25 years. He produced in court proceedings from the Nyeri Municipality Land Dispute Tribunal no. 12 of 2001 whose award was adopted in CMCC 90 of 2001, and an appeal to the Provincial Land Disputes Tribunal was dismissed. These two tribunals found Munyeria was not properly registered as the owner of the said land. This because the green card relied on by Loise showed that Munyeria had received the land as a 'gift'. The elders were quick to note that dead men give no gifts.

Loise did not make any effort to explain that difference. That she was relying on a registration in her husband's name as purchaser yet the same clearly states that it was a gift, raising an obvious contradiction, and question how his father could have gifted him the land from the grave 25 years after his death.

Clearly the only indisputable fact is that the parcel of land was registered in the name of Kabuthu Kindeti and after the transfer to Munyeria, though through dubious means, and without the cancellation of the title deed, the only way available to them was to file succession in the estate of Munyeria Kabuthu, otherwise it ought to have been the estate of Kabutu Kindeti.

Having considered the evidence and the submissions, the issue is: who is beneficially entitled to this property? The answer can only be three houses of Kabuthu Kindeti. There is no justification for the larger share 'taken' by the petitioners' house.

Guided by rule 41(2) of the P&A rules which states:

*The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced **or make any other order necessary** for satisfying itself as to the expediency of confirming the applicant as the holder of the grant **or concerning the identities, shares and interests of the persons beneficially entitled** and any other issue which has arisen including the interpretation of any will.*

And 73 on the inherent powers of the court to make orders in the interests of justice and prevent the abuse of the court process.

I have found as a fact that the land belonged to Kabuthu Kinditi.

He was survived by three sons:

Kihumba Kabuthu represented by Peter Kabuthu Kihumba

Munyeria Kabuthu represented by Loise Wanjiku Munyeria

Gitahi Kabuthu

Land Parcel no. Tetu/Kiriti/416 be shared into three equal shares each to be registered in the names Peter Kabuthu Kihumba, Loise Wanjiku Munyeria to hold in trust for themselves and the children of Kihumba Kabuthu and Munyeria Kabuthu respectively, and Gitahi Kabuthu.

A certificate of confirmation of the grant issued to Peter Kabuthu Kihumba and Loise Wanjiku Munyeria be issued accordingly.

No orders as to costs.

Dated, delivered and signed this 18th day of January 2019.

Mumbua T. Matheka

Judge

In the presence of:

Ms.Maina for Petitioner

Ms.Wangeci for Objector.

Court Assistant-Emmanuel

Mumbua T.Matheka

Judge

18/1/19

Right of Appeal as usual.

Mumbua T.Matheka

Judge