



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO 1064 OF 1994

IN THE MATTER OF THE ESTATE OF THE LATE ISAAC KIRERU NJUGUNA DECEASED

JUDGMENT

1. Evans Kimani Njuguna, the 1st administrator, has filed a summons for confirmation of grant dated 29th August 2016 seeking that the grant issued to him, together with Patrick Njuguna Kireru and Hannah Mwhaki, on the 13th October 1994 be confirmed. In his affidavit he listed the following as the survivors of the deceased, namely: the wife, Hannah Mwhaki Kireru; the sons, Patrick Njuguna Kireru, Peter Githiu, John Kimani, Francis Kiarie and George Maina; the daughters, Sarah Nduta and Mary Wangari; and brother, Evan Kimani Njuguna. He has indicated that the estate of the deceased comprised of the following assets: LR No.36/III/1150 Eastleigh Nairobi, Chania/Kanyoni 643/24, Ngenda/Nyamangara/220, Thika Municipality Block 19/744, Kiganjo/Gatei/1354, LR No. 21009/15 South West of Thika Municipality and motor vehicle registration mark and number KRA 161.

2. He has further proposed the estate be distributed as follows: -

- a) LR No.36/III/1150 Eastleigh Nairobi. - to be shared equally between him and the widow to hold in trust for herself and her children in equal shares;
- b) Chania/Kanyoni 643/24 - to be shared equally between him and the 3rd administrator who holds the share in trust for herself and her children in equal shares;
- c) Ngenda/Nyamangara/220 - to be held by the widow in trust for herself and her children in equal shares;
- d) Thika Municipality Block 19/744 - to be given to the widow;
- e) Kiganjo/Gatei/1354 -To be shared equally between him and the widow to hold in trust for herself and her children in equal share;
- f) LR No. 21009/15 South West in Thika Municipality - to be shared equally between him and the 3rd administrator who holds the share in trust for herself and her children in equal share; and
- g) Motor vehicle registration mark and number KRA 161 - to be given to the applicant as the sole beneficiary.

3. The 2nd administrator protested at the the application by the 1st administrator, more specifically toon the mode of distribution of the estate proposed by the 1st administrator. His affidavit in protest was sworn on the 28th October 2016. in it he agreed that the estate of the deceased had the assets listed by the 1st administrator, however, he contested the mode of distribution advanced and proposed that the estate be distributed as follows: --

- a) Chania/Kanyoni 643/24, Ngenda /Nyamangara/220, Thika Municipality Block 19/744, Kiganjo/Gatei/1354 and LR No. 21009/15 South West of Thika Municipality – be devolved upon to the widow to hold in trust for herself and her children;
- b) LR No. 36/III/1150 Eastleigh Nairobi. - to be shared equally between the applicant and the widow; and
- c) Motor vehicle registration mark and number KRA 161 - to devolve upon the applicant.

4. From the pleadings, the main issue of contention is as to the distribution of the following assets - Chania/Kanyoni 643/24, Ngenda /Nyamangara/220, Thika Municipality Block 19/744, Kiganjo/Gatei/1354 and LR No. 21009/15 South West of Thika Municipality.

5. Directions with regard to hearing of the application were taken on the 28th February 2017, when it was directed that the application proceeds by way of oral evidence. The matter was eventually heard *viva voce*. The parties testified and called witnesses.

6. The applicant's case was that he was a brother of the deceased. He stated that they used to invest together with the deceased and operated a business together in Thika Town. He gave evidence that they acquired LR No. 21009/15 South West of Thika Municipality measuring approx. 31 acres through a loan facility that they had obtained from a self-help scheme into which both of them had made contributions. He explained that they opened a joint account at the Standard Chartered Bank where they kept their savings towards the purchase of the land. He stated that the property was bought at Kshs 2,500,00 in the year 1965. He further stated that the same was then registered in the deceased's name as they trusted each other. He also stated that the deceased's family was staying on the land and utilizing it. He stated that he has not been using the land since the death of the deceased as the other administrators had not allowed him to. With regard to land Kiganjo/Gatei/1354, he stated that he had also bought the land with the deceased from one Njoroge Gacaca or Njoroge Waweru at Kshs 10,000.00. He stated that the deceased registered it in his name. He stated that they developed the land together and later leased it to teachers. He stated further that they agreed with the deceased that he would take care of the property in Nandi, while the deceased took care of the property in Kamungi and Gatei. He testified that the property was in control of the deceased's wife, and that the property comprises of two shops and six rooms at the back. He stated that they used to share the money collected from the rent with the deceased but since his death the other administrators had denied him that right. He testified further that Chania/Kanyoni 643/24 belonged to their mother, who later transferred it to the deceased to hold it in trust for the two of them. He stated that they both developed the land and build a shop and three rooms, and just like in the other properties, they would share the rent proceeds. He urged the court to give him half-share of each parcel as he shared interests in the land with the deceased. He produced a black book that showed how they used to share profits.

7. In cross examination, he stated that LR No. 21009/15 South West of Thika Municipality was bought 1966 and the title came out on 18th July 1988. He stated that the property was bought when they were both working independently. He clarified that there was no sale agreement and that they bought the land at Kshs 2,500.00 from a white man whose name he could not remember. He stated that the title deed in respect of Kiganjo/Gatei/1354 came out in 1983. He clarified that there was no sale agreement for the same and that the plot was bought from one Njoroge at Kshs 2,000.00. He stated that the same was developed using the money from the shop. He clarified that the deceased's family use the land. With regard to LR No. 36/III/1150 Eastleigh Nairobi he stated that the same was bought in 1983 and jointly registered in the names of himself and the deceased. He reiterated that Chania/Kanyoni 643/24 belonged to their mother who later transferred it to the deceased to hold it in trust for the two. In reexamination he stated that he had not claim in property that the deceased bought independently but on those he participated in the purchase and development.

8. He called as his witness one Joshua Kirogo, the Chief for Gathuthei Location. He stated that he had deliberated on a dispute between the parties herein. He stated that it was resolved that land parcel LR No. 21009/15 South West of Thika Municipality be subdivided into two equal shares between the deceased's family and the applicant. He stated that it was also agreed that the same be done for the developments on the parcel. a similar agreement was reached for LR No. 36/III/1150 Eastleigh Nairobi. The rent collected by the applicant was to be shared equally. The land parcels Chania/Kanyoni 643/24, and Kiganjo/Gatei/1354 were to be shared equally. During cross examination, he confirmed that he did not know whose name the properties were registered in. He also clarified that the elders in their deliberation did not refer to any documents and therefore they could not tell how the parcels of land had been bought and registered.

9. The protestors on their part denied the claim. The 2nd administrator, a son to the deceased, stated that LR No. 21009/15 South West of Thika Municipality was bought by the deceased and the same was thereafter registered in his name. He stated that the deceased and his uncle, the 1st administrator, used to have a shop business from which they each bought land. He stated that the 1st administrator had land that they were not claiming. He stated that LR No. 21009/15 South West of Thika Municipality was bought in 1964 and the title of the same was in the name of the deceased. He stated that Kiganjo/Gatei/1354 was purchased sometime in 1978 by the deceased, and the same had a shop which the widow rented out. Ngenda/Nyamangara/220 was also bought by the deceased, and the same registered in his name. He further stated that Chania/Kanyoni 643/24 was also registered in the name of the deceased name and the same had a shop that was being rented out by the widow. one of the children of the deceased also resided there. He stated that LR No.36/III/1150 Eastleigh Nairobi was registered in the names of both the deceased and the 1st administrator. He stated that the same was developed and that the 1st administrator had been collecting rent from the premises since the death of the deceased and had refused to share it with the deceased's family. He confirmed that he was not party of the deliberations on 8th March 2005, and that he did not agree with them. He stated that the rent collected per month from the said property was about Kshs 180,000.00 monthly. He prayed that the parcel be distributed as he had proposed. In cross-examination, he confirmed that the deceased ran a shop with the 1st administrator until his demise. He stated that at the time of his death the business had a loan which was paid by the business. He stated that LR No. 21009/15 South West of Thika Municipality was purchased when he was four years old. He stated that he was not aware that the property was jointly purchased by the deceased and the 1st administrator.

10. From the forgoing, the issues that I have identified for determination are whether the 1st administrator had a claim over the estate and on the mode of distribution.

11. It is the 1st administrator's claim that Chania/Kanyoni 643/24, Kiganjo/Gatei/1354, and LR No. 21009/15 South West of Thika Municipality, though registered in the names of the deceased, were being held in trust for the 1st administrator and the deceased. He demands an equal share of each of the parcels and any development thereto. In determining whether the 1st administrator has a claim in the estate of the deceased, the court has to determine whether the property was held in trust as alleged by the 1st administrator.

12. Jurisdiction of this probate court in determining issues of creation of trusts is entrenched in the case of *Zipporah Wanjiru Mwangi vs. Zipporah Wanjiru Njoroge* [2017] eKLR, where the Court of Appeal held: -

'In succession proceedings where, as here, existence of a trust is alleged in respect of land claimed to be family land, it is appropriate to the court to give directions as to the procedure to be followed ...Where, as here, the issue (of trust) arises in succession proceedings whether the land is family land and therefore is subject to trust or whether it is owned absolutely by the deceased and therefore is not subject to distribution, the court hearing the succession proceedings has jurisdiction to determine the issue and to give appropriate directions on the hearing. This is in line with the jurisdiction vested in the High Court by Article

165(3) (a) of the Constitution and Section 47 of the Law of Succession Act, Cap 160.’

13. It is the 1st administrator’s assertion that he contributed to the purchase of the above property. In his evidence he produced a black book showing that he used to share profits from the business with the deceased. He did not produce any documents of sale to show that he participated in the purchase thereof and to which extent.

14. Section 107 of the Evidence Act, Cap 80, Laws of Kenya, is worded as follows: -

‘107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof has on that person.’

Section 109 of the same Act also provides thus: -

i. ‘109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on my particular person.’

15. It is trite law that he who alleges must prove. In the case of *In Re Estate of Musyoka Ngaia (Deceased)* [2018] eKLR, the court held that -

‘The dispute is not per se revolving on distribution or administration of the deceased estate but ownership of the suitland. In the Matter of Estate of Gachuru Kabogo Nai Succ No 2830 Of 2001 the court held that, during confirmation of grant hearing, if ownership of a property of an estate is contested, the property not contested is confirmed and the contested is heard under Order XXXVI (36) CPR as separate.

46. In another matter Charles Murithi Kungu vs Ann Njoki Njenga Nai HCCC 19 of 2004 the court ordered that a dispute as to whether a particular asset formed part of the estate of deceased or belonged to the applicant be dealt with through an originating summons brought under Order XXXVI Rule 1.

Section 107 of the Evidence Act, Cap 80 Laws of Kenya is worded as follows: -

“107(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof has on that person.”

Section 109 of the Evidence Act, Cap 80 laws of Kenya also provides thus: -

“109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on my particular person.”

47. The claim by the protesters did not meet the threshold set out in the above provisions of Evidence Act.

48. The fact that the Protestors never called a witness or produce documents on sale of subject land, can only mean that they are wrong on their unproven allegations and actually they are unsure of the sources of funds which paid for the suitland.’

16. The 1st administrator did not explain why the said property had not been registered in his name as a joint owner. I have noted that LR No. 36/III/1150 Eastleigh Nairobi was bought by both the deceased and the 1st administrator, and registered in their both names. One then would wonder why the deceased did not register the other property in both their names. It is my view and finding that in the absence of any documentation and evidence to show that the 1st administrator participated in the acquisition of the said parcels, the 1st administrator has failed to prove his claim to a share in those assets of the estate.

17. Further, the 1st administrator claimed that Chania/Kanyoni 643/24 belonged to their mother, and that the same had been transferred to the deceased to hold it in trust for the two of them. As stated earlier, he who alleges must prove .in the case of in the case of *Felista Muthoni Nyaga vs. Peter Kayo Mugo* [2016] eKLR, court stated that -

‘While it is the law that the registration of a party as the proprietor of land does not defeat a claim of trust nor relieve such proprietor of his obligation as a trustees, there must be evidence upon which a court can conclude that in fact the registered proprietor of the land subject of the suit before it is in fact holding the same as a trustee for the benefit of others.’

18. In *Susan Gacheri Mugambi vs. Maureen Florence Kagwiria & 2 Others*, [2016] eKLR the court stated that -

‘From the evidence of record in this case save for the interested parties merely stating that the deceased had agreed with his father to subdivide LR NO. Abothuguchi/Kithirune/528 into 4 portions and have the same transferred to the interested parties, their brother and father there was no evidence to support these facts. There was also no cogent evidence to prove that the deceased was

holding the land in trust for them. As was rightly submitted by the Protestor the alleged letters of consent produced by the interested parties were dated 6th August 1987 and 2nd July 1987, whereas the deceased died in 1990. This was period of three years since the said letters of consent were issued to the interested parties. The interested parties did not demonstrate the steps that they took to have the land registered in their favour during these three years. The contention by the interested parties that they were working in Nairobi and western province could, therefore, be an afterthought.

[10] Trust is a powerful institution and a substantial question of law. But its existence is largely a matter of fact unless it is presumed. Thus, he who alleges existence of a fact must prove. On this see section 109 of the Evidence Act that: -

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

From the circumstances of this case the interested parties' have not tendered any evidence to prove that indeed the deceased was holding the land in question in trust for them and so they have not discharged this burden. The photocopies of the land control board consents produced are not enough as the transaction was not completed within the time prescribed in the Act. More specific evidence of the transaction and perhaps the minutes of the board were required. Therefore, the point fails.'

19. In *Patrick Mathenge Gachui vs. Karumi Wambugu & Another* [2010] eKLR it was observed that: -

'The burden of proving trust rests on the protesters. In my view, they have failed miserably to prove such trust. Their entire evidence was hearsay which a court of law cannot act upon. The mere fact that the protesters are in occupation of the suit premises is no proof of trust. In any event it is apparent that the 2nd protester only came to the suit premises in 1986. It is also instructive that the deceased got registered as the proprietor of the suit premises in 1978 when the 1st protester's father and 2nd protester were all adults. One wonders then, why the two could not at the time claim their portion of the suit premises if indeed they were clear in their minds that their deceased brother held the suit premises in trust for himself and themselves. The trust having not been proved, there is no basis for the protests. Accordingly, they are dismissed.'

20. The 1st administrator herein has not demonstrated the trust he alleged the brother held on his behalf. He did not all anyone to give evidence on the same. It also does not make sense that he never asked his brother to have the same transferred to him .it is my conclusion therefore that the 1st administrator has failed to prove his claim on the three parcels of land in estate and thus his mode of distribution cannot be adopted.

21. Having established that the 1st administrator has no claim in LR No 21009/15 South West of Thika Municipality, Chania/Kanyoni 643/24 And Kiganjo/Gatei/1354, the final orders that I make hereto are -

- a) That the estate of the deceased shall be distributed as proposed by the 2nd administrator as set out in paragraph 3 of this judgement;**
- b) That the grant of letters of administration intestate is hereby confirmed, and a certificate of confirmation of grant shall issue in those terms;**
- c) that the 1st administrator to render an account of the rent collected from LR No. 36/III/1150 Eastleigh Nairobi from the date of the death of the deceased, and that the amount due to the estate from 2015 to date to be paid out to the 3rd administrator;**
- d) That each party shall bear their own costs; and**
- e) That any party aggrieved by the orders that I have made herein has a right to move the Court of Appeal on appeal appropriately within twenty-eight (28) days of this judgement.**

DATED AND SIGNED AT KAKAMEGA THIS 11 DAY OF APRIL, 2019

W MUSYOKA

JUDGE

DELIVERED DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 3RD DAY OF MAY, 2019

A ONGERI

JUDGE