



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 238 OF 2013

THEGEMA MAGUTA DECEASED

GACHAU MURANGO BERTIMEO.....PETITIONER

V E R S U S

LINUS MUCHIRI KANGANGIPROTESTOR

JUDGMENT

1. This matter relates to the estate of Thegema Maguta,(deceased) who is presumed dead having disappeared without trace way back in 1960s. An order presuming the deceased dead was issued in the Principal Magistrate's Court Gichugu on 29/2/2012.
2. The deceased had no known nuclear family. Letters of Administration in his estate were issued to Linus Muchiri Kangangi, a nephew to the deceased by virtue of being a son of the deceased cousin Kangangi Kaburu. This was vide Embu High Court Succession Cause No. 467/2011 which was transferred to this court and was issued with No. 53/2013 on 2/11/2012.
3. The petitioner then proceeded to file a summons for confirmation of grant. The estate of the deceased is comprised in land parcel No. Kabare/Ngiroche/420. The petitioner proposed the distribution of the estate as follows:-
 - **Linus Muchiri Kangangi - 1 acre.**
 - **David Karimi Muchira - 2.5 acres.**
 - **Raphael Mbabu - 2.5 acres.**
4. A protest to the Confirmation of the Grant and the proposed distribution of the estate was filed by Gachau Murango Bertimeo in his affidavit of protest sworn on 15/11/13.
5. His claim is that the petitioner's father Kangangi Kaburu and the deceased Thengema Magutu were given land Parcel's No. Kabare/Ngiroche/312 and 420 respectively in their absence. The Petitioner's father reserviced at around 1975 and was taken to Embu Land's Office and officially paid for his certificate. However the protestor's father was not given land since he was deceased at the time of land demarcation and the protestor being a young son was not given as it was claimed the estate was not enough.
6. The protestor lodged a complaint to the clan elders and it was resolved that he redeems Kabare/Ngiroche/420 from Mutura Gachoki. He gave Mutura Gachoki 2 he goats and an axe and thereafter occupied the suit land. He left his son to utilize the land but he was later chased out by Kangangi Kaburu. The Chief Subdivided the land into two and directed succession be filed to determine who to inherit the estate.
7. The protestor filed statements of his witnesses Cyrus Gachoki Kiura and Gachoki Mutura in support of his contention.
8. I have considered the evidence adduced. The issue for determination is whether the protestor is a beneficiary of the estate of the deceased and distribution of the estate. The petitioner and the protestor are not direct siblings of the deceased. The petitioner claims as a 1st cousin of the deceased while protestor claims as a 3rd cousin of the deceased.
9. When this matter came up for hearing the parties agreed to proceed by way of written submissions and the court to rely on the pleadings, affidavits and witness statements.
10. For the petitioner submissions were filed by Morris Njage & Co. Advocates. It is submitted that the protestors case is not properly before this court as it is a land dispute which ought to be heard and determined in the Environment and Land Court.
11. For the protestor it is submitted that the cause is bad in law for failing to comply with the decision by Justice Makhadia (as he then was)

in Nyeri Civil Appeal No. 68/2000. That the protestor had redeemed the estate of the deceased, Kabare/Ngiroche/420 as he had not resurfaced. It is submitted that the protestor did redeem the subject land and he should therefore inherit it as he missed to have a share of the clan land.

12. I have considered the averments in the affidavits the witness statements and the submissions. The dispute herein is the succession of the estate of the deceased. The **Law of Succession Act, Cap 160 Laws of Kenya** applies. The preamble to the Act provides:-

“An act of Parliament to Amend, define and consolidate the Law relating to intestate and testamentary succession and the administration of estates of deceased person and for the purpose connected therewith and incidental thereto.”

13. This states clearly the jurisdiction of the court when dealing with matters of succession of estates of deceased persons whether intestate or testate succession.

14. The deceased has been presumed dead. There is on record an order in Misc. Application No. 1/2012 in the Principal Magistrate’s Court at Gichugu dated 16/4/12 which states Thegema Muguta is presumed dead. The presumption of death is rebuttable and so where a person is presumed dead and the court orders that he be presumed dead person beneficiary to his estate can then file succession. **Section 118A of the Evidence Act Cap 80 Laws of Kenya** provides:-

“where it is proved that a person has not been heard of for seven years by those who might be expected to have heard of him if he were alive there shall be a rebuttable presumption that he is dead”.

15. The presumption of the death of the deceased has not been rebutted. The court has jurisdiction to entertain the succession cause in the estate of the deceased. Though it is only the order issued by the Magistrate presuming the deceased as dead, it is expected that material evidence was tendered before the Magistrate in order for her to arrive at the conclusion that the deceased was presumed dead. This court has jurisdiction to proceed with the cause as an intestate succession as there is an order presuming the deceased dead. **Rule 10 of the Probate and Administration Rules** provides:-

“An application for an order presuming the death of a person of whose death there is no sufficient written evidence and to whose estate a grant is sought shall be made by summons to the court and shall be supported by an affidavit setting out the grounds of the application.”

16. The application was made before the Magistrate. Therefore it is only where the presumption is rebutted that it can be said the court is without jurisdiction. This is not the case here. Once the application envisaged under **Rule 10 of Probate & Administration** is made an order is issued. The court is entitled to proceed with the cause which is subsequently filed. The law of Succession Act requires that the court entertains causes where the person is dead or has been presumed dead. I hold that since an application to presume the deceased dead was made in court and an order issued and the presumption that the deceased is dead has not been rebutted, the court has jurisdiction to proceed with the matter on the strength of the order presuming the deceased dead. The court has jurisdiction.

17. The respondent obtains a Chief’s letter confirming that the deceased is presumed dead and identifies his cousin Gachau Murungo Bertimeo as the only surviving relative.

18. The deceased is deemed to have died intestate as provided under **Section 34 of the Act**. Where a person dies intestate, his estate devolves to his beneficiaries in the order of priority. From the averments by the petitioner and the objector, the deceased is not survived by a spouse or children. **Section 39 of the Law of Succession Act applies:-** It provides:-

“(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”

18. It makes provision on how the estate of the deceased who has not left behind immediate family should devolve. The immediate family or the nuclear is the wife and children. Where such do not exist other relatives are considered in the order of priority. This means the next closest family members. The first to be considered are the parents. If the intestate left surviving parents, the estate devolves to them. If the parents are dead, brothers and sisters of the deceased are considered and if none exists any of their child or children inherit the estate in equal shares. The next are half brothers and half sisters and if none exists their child or children in equal shares.

19. If none of these survive the deceased, then the relatives in the nearest degree of consanguinity.

20. These must be considered on priority basis. That is to say that if the father and mother survive the deceased who died intestate, the estate will devolve to them to the exclusion of the others who are mentioned under the Section. The first listed under the Section. The first listed under the Section takes precedence and have to be considered as the beneficiaries before others. Priority comes from the word prior which means to come before anybody else.

21. The petitioner in this case is the nephew of the deceased by virtue of being the son of the brother to the deceased – Thegema Maguta. The protestor submits that the petitioner’s father was a 1st cousin to the deceased while the protestor is a 3rd class cousin. The protestor’s contention is that he ought to inherit the estate by virtue of the fact that he redeemed the land in question by paying or returning two (2) goats and an axe to Mutura Gachoki in the presence of the Agathigia clan elders. The protestor is therefore not claiming the land as a beneficiary entitled to the estate of the deceased but by virtue of having redeemed the land. In his submission the protestor states that the petitioner’s father is a 1st cousin to the deceased. This means the petitioner has priority. He is the closest living relative of the deceased being a Nephew. His claims falls under **Section 39(c) of the Law of Succession Act**. The relative who has priority over the estate is entitled to inherit. The court need not consider other relatives who are in the nearest degree of consanguinity. The closest surviving relative takes priority. The estate of the deceased should therefore devolve to the petitioner and other beneficiaries listed on the affidavit. There was no objection to the mode of distribution.

22. The protestor’s claim is based on redemption. He claims that he bought the land back by paying two goats and one axe. In his affidavit of protest he stated as follows:-

‘The Petitioner’s father Kangangangi Kaburu and Thegema Maguta were given parces No. Kabare/Ngiroche/312 and 420 respectively --- The protestor’s father Mirango Gachau was not given land as he was deceased by the time of land demarcation ----- . I lodged a complain(sic) to clan elders and after deliberations it was resolved that he redeems land parcel No. Kabare/Ngiroche/420 from one Mutura Gachoki. That I gave Mutura Gachoki two goats and axe ----- after redeeming the land he occupied the land and developed it.’

23. From the averment, the land parcel No. Kabare/Ngiroche/420 was allocated to the deceased Thegema Maguta. There is a green card on record showing that the land parcel No. Kabare/Ngiroche/420 was registered in the name of Thegema Maguta on 8/12/1958 and has never changed hands. It is not clear how the protestor had to redeem the land from one Mutura Gachoki who was not the registered owner. The protestor has also not disclosed who Mutura Gachoki was.

24. The protestor filed statements by Cyrus Gachoki Kiura one of his witness. His statement is that the father of protestor did not get clan land as he was deceased. When the protestor demanded land, the elders decided that the protestor should redeem the land from Gachoki Mutiria who had bought the said land from the protestor’s father Murango Gachau long before demarcation of land with two goats and an axe. The protestor paid two goats and an axe in 1958 during land demarcation.

25. Though the witness states that he was referring to the suit land, the statement is self contradictory as he states that the land which the protestor was redeeming was his father’s land which had been sold to Gachoki Mutiria. It was not the suit land.

26. The statement by Gachoki Mutura is that his uncle Gachoki Mutiria had bought the said land. The land was bought from Mirango Gachau who is the father of the protestor. The protestor redeemed the land. Though the witness did not state which suit land. Land he was referring to as he did not give the land parcel number, it is clear from the witnesses that if there was any land which protestor redeemed, it is land which was allocated to his father Mirango Gachau and he had sold it. There was contradiction in the affidavit of protest as the protestor stated that the land he redeemed was the land of the deceased while his witnesses stated that the land belonged to protestors father. Where there are contradictions in the evidence, it is clear that the witnesses were not truthful. It has not been proved that the protestor had redeemed the land of the deceased. The land parcel No. Kabare/Ngiroche/420 has remained the property of the deceased from 1958 to date.

27. Be thus as it may what is before this court is a succession matter brought under the provisions of the **Law of Succession Act**. The jurisdiction of the court is to determine issues relating to testamentary ad intestate succession and the administration of the estates of deceased(s). The preamble to the **Act** states:-

“ An Act of Parliament to Amend, define and consolidate the law relating to intestate and testamentary succession and the administration of the estates of deceased persons, and for purposes connected therewith and incidental thereto.”

28. The Act clearly defines the scope of the disputes which this court has to entertain when dealing with succession matters filed under the Act. Disputes touching on land are the serve of the Environment and Land Court as provided under **Article 162(2)(b) of the Constitution** which has been given effect under the Land Act. It provides:-

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

The environment, and the use and occupation of and title to land.”

29. To give effect to this provision. Parliament enacted **Land Act** which states in its pre-able –

“An Act of Parliament to give effect to Article 162(2)(b) of the Constitution, to establish a superior court to hear and determine disputes relating to the environment and use and occupation of, and title to land and to make jurisdiction, functions and powers and for connected purposes.”

30. The jurisdictions are clearly cut out and a party is obligated to file the dispute in the relevant court which has jurisdiction.

31. The protestor urged the court to be guided by **Article 60 of the Constitution** which provides for principles of land policy. This court is bound by the Constitution as provided under **Article 2** which states that the constitution is the Supreme Law of the Republic and binds all persons and all the State Organs ----- However jurisdiction as it has been stated in various precedents, is everything and the 1st consideration by the court is whether it is seized of jurisdiction before entertaining the dispute. If the court has not jurisdiction, it must down its tools.

32. The protestor clearly stated his claim, not as a beneficiary but on the basis that he redeemed the land forming the estate of the deceased. His claim where filed in the succession cause is clearly misplaced. This court lacks jurisdiction to entertain the claims to occupy and title to land.

33. In Conclusion:-

1. I find that the protest lacks merits.

2. This court lacks jurisdiction to entertain the protestor's claim.

3. The petitioner being the closest surviving relative of the deceased has a right to petition for Letters of Administration.

4. I dismiss the protest.

5. The summons for confirmation of grant is allowed.

6. The estate of the deceased comprised in land parcel No. Kabare/Ngiroche/420 shall be distributed as prayed at Para 5 of the Supporting Affidavit, that is to say:-

- *Linus Muchiri Kangangi – 1 Acre.*
- *David Karimi Muchiri – 2.5 Acres.*
- *Raphael Mbabu – 2.5 Acres.*

7. I award the costs to the petitioner.

Dated at Kerugoya this 18th day of June 2019.

L. W. GITARI

JUDGE