REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 2775 OF 2004

IN THE MATTER OF THE ESTATE OF GATHUKU MUCHAI (DECEASED)

JUDGMENT

1. The deceased person the subject of these proceedings died on 28th March 1973. Representation to his estate was sought in Kiambu SPMCSC No. 113 of 2002 by Harrison Gathuku Muhia and Joseph Peter Kamande Muhia, in their purported capacities as grandsons of the deceased. In their affidavit in support of the petition they aver that the deceased died on 24th July 1964 and was survived by themselves, and two other grandchildren, being Monica Wanjiku and Susan Nyambura. The deceased is said to have had died possessed of a parcel of land known as No. 194 Lari/Magina Sub-Location. The consents in support were executed by Monica Wanjiku and Susan Nyambura. The petition was gazetted on 12th July 2002. A grant of letters of administration intestate was made to the petitioners on 20th August 2002. It was confirmed on 29th April 2003 on an application dated 25th February 2003. The estate was shared out at between the four grandchildren at uneven portions. A certificate of confirmation of grant was issued on 3rd September 2003.

2. The cause herein opened on 13th September 2004 when a summons dated 8th September 2004 was lodged herein seeking revocation of the grant made in Kiambu SPMCSC No. 113 of 2002. The application was brought at the instance of Gathuku Mwangi Kamau, another one of the grandchildren of the deceased. He avers in his supporting affidavit that the deceased had three wives, and his mother was a daughter of the deceased's second wife. He states that he has been living on the estate's land for over forty (40) years. He complains that the administrators had only shared out the land amongst the grandchildren of the first wife of the deceased. He pleads that his side of the family be represented in administration so that they do not get sidelined.

3. There is a reply to the application by Harrison Gathuku Muhia through an affidavit sworn on 22nd April 2005. He says that the applicant's mother was married and lived at Njoro with her family. He asserts that the applicant was not a dependant of the deceased and he could only inherit through his father. He denies that the applicant had lived continuously on the estate land, saying that he only used to visit occasionally to keep his uncle, the brother of his mother, company and then go back to his father's land at Njoro. He is said to have begun to live on the land continuously after his uncle died, for he began to live in his house. He says that they allowed him to bury his son on the land to obviate the cost of transporting the body to Njoro.

4. The reply provoked a rejoinder by the applicant, through an affidavit he swore on 29th April 2008. He states that after he started living on the estate property the respondents did not raise any objections thereto. He claims that he put up a structure on the land in 1970 with the full knowledge of the respondents who did not object. He says that he got married and started a family on the land with no objection from the respondents. He asserts that he was to be the heir to his grandmother's share of the estate, and that he was taking the place of his mother. He claims that even if the petitioners were registered as owners of the law he would still have a claim in adverse possession.

5. The rejoinder provoked the filing of a further affidavit by the administrators through an affidavit sworn on 3rd June 2008 by Harrison Gathuku Muhia. He contests the claim by the applicant that he had constructed a house on the land asserting that the house that the applicant lived on had been put up by the applicant's uncle and that the applicant merely moved in to it. He sets out their family tree, which indicates that the deceased was a maternal grandfather of the applicant. He avers that the applicant only recently moved into the land and brought in his wife in a scheme to get a share of the land.

6. Directions were given that the application be disposed of by way of examination of the deponents of the affidavits on record. The oral hearing commenced on 25th February 2013, with the applicant on the witness stand. He stated that the administrators did not involve him when they obtained representation to the estate in Kiambu SPMCSC No. 113 of 2002. He described the deceased as his grandfather on the maternal side. He testified that his mother was married. He claimed that he had lived on the estate land for over fifty (50) years, having moved into it as a child, at the invitation of his maternal relatives to live with and assist his maternal grandmother, who wanted him to stay with her as her son did not have any children. While he lived there he would take care of the deceased's cattle. When his grandmother died, he was left at the home taking care of his crippled uncle. When his uncle died he was left on the land, and when his child died, he buried his remains on the land. He complained that his mother was not listed as one of the survivors of the deceased. Susan Nyambura followed. She was a cousin of the applicant. She said that the applicant had been on the estate land for all the while that she knew him. She stated that he ought to have been listed as a beneficiary. She said the applicant's mother was married and lived at Nakuru with her husband and children.

7. Harrison Gathuku Muhia took the stand on 2nd March 2016. He testified that his late father was a son of the deceased. He identified the applicant as his cousin, being a son of his aunt. He stated that the applicant never put up a house on the land, saying that he only moved into a house that his late uncle had put up. He stated further that a child of the applicant who drowned in a bucket was also buried there, after they requested to bury the body there instead on a no man's land at Kimende. Joseph Peter Kamande Muhia Muchai and Stephen Mbugua Muchai testified next. Their testimonies mirrored in material particulars that of Harrison Gathuku Muhia.

8. After the oral hearings the parties were directed to file written submissions. They have complied. I have read through the written submissions and the authorities cited, and noted the arguments made therein.

9. The deceased herein died intestate before the Law of Succession Act, Cap 160, Laws of Kenya, came into force in 1981. The exact date of death is not clear. The petition talks of 1973, while the affidavit sworn in support thereof mentions 1964. Whatever the case, the substantive provisions of the Law of Succession Act on intestate distribution do not apply to his estate. Section 2(1) of the Act states that the Act applies to estates of persons who died after the commencement of the Act. Section 2(2) of the Act states that the estates of persons dying before the commencement of the Act, such as the deceased herein, are subject to the written law and customs that were in force as at the date of the death of the deceased.

10. There can be no dispute that the deceased herein was Kikuyu by ethnicity. At the time of his death, the intestate estate of a Kikuyu was subject to Kikuyu customs. The said customs are notorious, as they are well documented in such texts and treatises as Jomo Kenyatta's *Facing Mount Kenya* and Eugene Cotran's restatements of African customary law. Various judicial pronouncements on the law have also been made, such as those in *Wambugi w/o Gatimu v Stephen Nyaga Kimani* (1992) 2 KAR 292, *Kanyi v Muthiora* [1984] KLR 712 and *Koinange and thirteen others v Koinange* [1986] KLR 23. Succession was patrilineal. The deceased herein is a maternal relative of the applicant, which, according to Kikuyu customary law, disqualifies him from benefit. The applicant's claim to the estate is inferior to that of the descendants of the deceased from his sons.

11. I note that the applicant appears to found his claim on the fact that he had lived on the estate property for many years. He claims to have married his wife on the land and to have buried one of his child there. He has even submitted that he is entitled to a share of the estate on the basis of adverse possession. Adverse possession is a concept of land or property law, it does not apply to succession law. It does not confer on anyone any inheritance rights. The fact that the applicant might have been allowed to live on estate land and to even bury his children on the land, did not grant him any inheritance rights whatsoever. He has not cited any law that would suggest that he acquired any such rights on account of the longevity of his stay on the deceased's land.

12. The application I am determining is for revocation of grant. The applicant argues that he was not consulted before the cause at Kiambu was initiated. The application is therefore grounded on section 76(a) (b) and (c) of the Law of Succession Act. I have already stated that the applicant was not entitled under customary law to a share in the estate of his maternal grandfather. Consequently, there was no need for him to be involved in the process.

13. I do not find any merit in the application dated 8th September 2004 for the reasons given above. The same is hereby dismissed with costs. The court file in Kiambu SPMCSC No. 113 of 2002 shall be returned to the Chief Magistrate's Court at Kiambu for final disposal. The cause herein shall be closed. Should the applicant be aggrieved by the orders that I have made in this judgement, there is liberty to challenge the same on appeal at the Court of Appeal within twenty-eight (28) days of the date herein.

DATED, SIGNED and DELIVERED at NAIROBI this 20TH DAY OF SEPTEMBER, 2018

W. MUSYOKA

JUDGE