



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 326 OF 2001

In the Matter of the Estate of Ambutu Mbogori (Deceased)

ERASTUS GITONGA.....PETITIONER

VERSUS

DAVID KIMATHI.....OBJECTOR

JUDGMENT

[1] These proceedings were filed on 27th November 2001 by the petitioner, the grandson of the deceased, for letters of administration of the estate of the deceased. He stated in the pleadings that he is the only survivor and Land No. Nyaki/Mulathankari/440 (**hereinafter ‘the disputed land’**) was the only asset of the deceased. The cause was gazetted on 5th July 2002 but on 15th November 2002 an objection to the making of grant was raised.

[2] The gist of the objection is that the Petitioner: (1) concealed material facts; and (2) instituted this petition without involving all family members. The objector is a grandson of the deceased for he is the only son of John Mwenda, son of the deceased and brother to the petitioner. Therefore, he holds an interest in his father’s capacity who is now dead having lived and developed on the estate. What’s more the petitioner came to this court with bad faith since he did not seek grass root requirements such as the chief’s letter authorizing him to take out the petition hence making the whole petition bad in law.

[2] The Petitioner opposed the application through a replying affidavit sworn by him and filed on 3rd December 2002. He deposed that it is not true that the objector is a grandson of the deceased but he agreed with the proposition that the objector is his brother’s son. He admitted that he did not seek permission from the objector as he is not entitled to any interest in the estate. He stated that the objector and his sister Chritsine Kajuju sold land No. Nyaki/ Mulathankari/551 measuring 0.04Ha to Michael Ndumba Mwithimbu at a consideration of Kshs. 210,000/- which belonged to the deceased’s brother. He was also entitled to hold a share of the proceeds but they refused to do so. Therefore, the objector is not entitled to any share of the Disputed Land since he sold the other land. He denied there being any fraud in filing the succession cause. He explained absence of letter from the chief; that he approached the chief for a letter but the Chief demanded money from him and he declined. He declared that it is not mandatory to have the said letter in process of filing as long as you attach the death certificate. That the allegations are baseless and the same ought to be dismissed.

[3] Thereafter on 21st January 2003, the objector filed a petition by way of cross-petition and an answer petition. On 7th August 2008 it was agreed by consent that objection and cross-petition be fixed for hearing.

Viva voce evidence

[4] The objection and cross-petition were heard via viva voce evidence. The objector called three witnesses. **OW1 David Kimathi** told the court that the deceased had four children namely: Nkoroi, Tabitha, M’Igweta and M’Rukunga. M’Igweta was the father of his father John Mwenda hence, the deceased was his great grandfather. When his father died they were living on the Disputed Land. But his uncle chased him away in 2000 with a panga. He also demolished his house and that the petitioner swore that he should never step foot on the said land lest he will kill him. He reported the matter to the council of elders and a meeting was held which was attended by the D.O and chief of the area (**minutes marked MFI 1**). The council of elders decided that he should continue living in their house and also demarcated his area. But the petitioner uprooted the fencing posts immediately. He averred that the estate should be shared equally among him and the petitioner, so that he takes his father’s share. The two brothers were each given land. The land that was sold has nothing to do with it. There is no land that the three of them sold and knows nothing about the land.

[5] **OW2 Alexander Murithi** tendered the statement he recorded on 25th February 2016. The deceased is his grandfather as he is his mother’s father and the petitioner is his cousin. He affirmed that the deceased had four children: Rael Nkoroi, Gervasio Gotorukunga, M’Igweta and Tabitha Gachoga and two pieces of land at Kaaga and Mulathankari. The Kaaga land was given to Gervasio and the other was given to M’Igweta and John Mwenda. That the two sons of M’Igweta settled at Mulathankari. Consequently, it should be divided equally among the brothers. With regard to land parcel No. 551 he does not know about it or whether it belonged to M’Ambutu.

[6] **OW3 Raphael Mbotania** recorded a statement on 22nd January 2018 which he adopted as his evidence. He was the assistant chief of Mulathankari. He produced **OB Exh. 2 (a) to (f)** which were photographs of the clan meeting and **OB Exh. 3** which were the minutes recorded. The chairman of the meeting was the D.O. and it was convened at the petitioner's home but he stayed away deliberately. Thereafter, David was taken to his father's house on the Disputed Land and the clan members opened the house for him as he was to live there.

[7] At the close of the objector's case, the petitioner gave his testimony. **PW1 Erastus Gitonga** recorded a statement on 28th February 2016 which he adopted into evidence. He stated that the land in dispute is registered in the name of the deceased. His father Igweta Ambutu died when he and his brother John Mwenda were young. They were raised by their grandfather, the deceased. His grandfather had one brother called Nguthari Mbogori and by mutual consent they agreed that he be allocated the Disputed Land and his brother John to get parcel No. 551 which belonged to Nguthari as he had no son. All his life John Mwenda lived and is buried on land parcel No. 551. He has solely with his family lived on the Disputed Land. That the two children of John, that is Christine Kajuju and the objector ganged up and sold Land parcel 551 to one Michael Ndumba which was a subject of litigation in Meru H.C Succession Cause No. 121 of 1996. He affirmed that it is not true that they had dwelled on the Disputed Land. That on 14th June 2018 he was told that the house on the Disputed Land should not be demolished of which he did not

Submissions

[8] The matter was canvassed by way of written submissions. The objector in his submissions reiterated what he had stated in evidence and exuded confidence that the evidence he has adduced has shown that he is entitled to an equal share of the estate. On Nyaki/Mulathankari/551 he asserted that it belonged to Nguthari Mbogori and cannot be available to the objector or the family of Murithi M'Igweta (deceased).

[9] The petitioner in his submissions submitted that the objector's claims are unfounded. He further clarified by submitting that he and his brother John Mwenda known by the name Igweta Ambutu (Objector's father) were raised by their grandfathers Ambutu Mbogori (the deceased in this cause) and Nguthari Mbogori as a result of their parents' death as toddlers. By mutual consent their grandfathers who had no sons agreed to share their properties to their grandsons with each grandson inheriting from one grandfather. Mwenda was allocated LR Nyaki/Mulathankari/551 and he was allocated LR Nyaki/Mulathankari/440; each of them took possession and quiet possession of their respective lands. Therefore, the objector approached the court wrongly and prematurely in seeking to have him denied the grant of letters of administration. He relied on the case of **Eric John Mutemi & another v Agnes Mumbanu Kinako [2016] eKLR**. The objector is unqualified to be the suitable person to be given the grant as he is not a dependant.

ANALYSIS AND DETERMINATION

Issues

[9] Out of the issues of determination filed on 19th November 2015, the court discerned the following four (numbers 4, 5, 7 and 10) to be the issues for determination:

- 1. How is land parcel No. Nyaki/Mulathankari/440 to be shared?**
- 2. Who was the registered owner of land parcel No. Nyaki/Mulathankari/551?**
- 3. Under what circumstances did land parcel No. Nyaki/Mulathankari/551 become the late John Mwenda's property?**
- 4. What orders ought to be made in the circumstances?**

Invitation to distribute another person's property

[10] Under the Law of Succession Act and the Rules thereto, the court ought to determine and identify the assets of the deceased, the beneficiaries of the deceased, and subsequently, distribute the assets amongst rightful beneficiaries of the estate. Therefore, this court ought to collect and preserve the estate and to identify the beneficiaries. Emphasis here is that the court will be concerned only with the estate of the deceased and not any other property. In this case, the court has been invited to inquire into the ownership of land parcel No. Nyaki/Mulathankari/551 and whether it became the late John Mwenda's property. The evidence show that this property belonged to Nguthari Mbogori. These proceedings do not relate to the estate of Nguthari Mbogori but to the estate of Ambutu Mbogori. These two were brothers and had their distinct lands. Their estate would also be different. The deceased herein never owned land parcel No. Nyaki/Mulathankari/551. He only owned land parcel No. Nyaki/Mulathankari/440. Accordingly, land parcel No. Nyaki/Mulathankari/551 is not the free property of the deceased and therefore, it is not the estate property herein. See interpretation section of the Law of Succession Act that:-

"estate" means the free property of a deceased person;

And:-

"free property", in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death;

This court cannot even attempt to distribute property which does not belong to the deceased or is somebody else's. Any action to the contrary would be outside the function of this court. I reject the invitation thereto. This answers issues two and three.

Identification and Distribution of estate property

[11] From the certificate of search and the green card of land parcel No. Nyaki/Mulathankari/440 it shows that the owner is the deceased. This fact had not been disputed. The singular issue now is how should the estate be distributed? First things first: the identity of the rightful beneficiaries of the estate. According to the petitioner he is the only beneficiary of the estate. His reason is that his brother, the late John Mwenda was allocated land parcel No. Nyaki/Mulathankari/551 and he was allocated the Disputed Land. On this basis, he is of the view that the objector should not seek a share from the Disputed Land but from land parcel No. 551. The objector took a different view. He stated that, he and his father used to live on the deceased's land but upon his demise the petitioner kicked him out and destroyed their house.

[12] The record show that the dispute between the two parties was brought before the council of elders who instructed that the objector to repair the house, take care of his father's grave, back gate reopened and subdivision process be carried between the two. Photographs marked **OB Exh 2 (a) to (f)** and minutes marked **OB Exh 3** were produced. When the petitioner was asked about it he told the court that his brother John is not buried on the Disputed Land and that he did not dig out his grave. He also said that he does not recognize the photos although his wife is in those photos. The court was prompted to order and ordered a site visit. According to the scene visit report dated 21st June 2018 the conclusion reached was that a structure or a disused house had been demolished from the Disputed Land and all material removed from the spot. The surrounding area had been dug and planted with mature sugar cane stems to conceal the effects of the demolition.

[13] One of the maxims of equity that hold dear hitherto is that *he who comes to equity must come with clean hands*. This is an expression of good faith. I found the Petitioner to be untruthful and was feigning ignorance of matters he knew especially on the house where the Objector lived and the burial of the late John Mwenda. John Mwenda was his own sibling. I also note that the petitioner's main ground was that their grandfathers raised him and his brother John Mwenda and that each was given a parcel of land by one grandfather. He did not adduce any evidence to corroborate his assertion. He alluded to the testimony of Gerald Mbwiri in his submissions, but, this person did not testify. That notwithstanding, land number 551 is not the estate property. On the other hand, the objector called two witnesses to corroborate his testimony and his exhibits. The scene report also shows that the petitioner demolished a house on the Disputed Land and attempted to cover up his misdeeds by planting mature sugar cane stems on the site where the house stood. Although the petitioner refuted claims that he demolished the objector's home, evidence adduced shows otherwise. Secondly, the minutes of council of elders and photographs support the Objector's claims.

[14] In the premises, I find that the beneficiaries of the estate of the deceased are the petitioner and John Mwenda whom he took in and raised as his children. The share of John Mwenda would devolve to his family which include the objector through the principle of representation. Therefore, the objector was entitled to be notified of these proceedings and his consent was necessary in law. The petitioner neither notified of these proceedings nor sought consent from the objector before filing the cause. The Petitioner committed other sins; he initiated these proceedings without a letter of introduction from the chief. This letter serves an important purpose in the ascertainment of deceased, dependants as well as properties of the deceased. His explanation that the chief demanded for a bribe was hollow statement without any basis. Secondly, the certificate of death of the deceased is not in the record. The deceased is said to have died in 1964. The date of death has not been ascertained. Therefore, according to the Law of Succession Act the estate property should be divided equally among his children. Accordingly, although the petitioner and his brother, John Mwenda, are grandsons of the deceased, they were regarded as sons for he took them into his family and raised them as his children. The objector has proved that he was living on the Disputed Land before he was kicked out by the petitioner. The foregoing analysis leads me to one conclusion; that the estate of the deceased namely LR. NO Nyaki/Mulanthakari/440 shall be divided equally among the petitioner and the late John Mwenda. The share of John Mwenda shall devolve to his children in equal shares. I also appoint both the petitioner and the Objector as joint administrators of the estate of the deceased. As this is a family dispute I will make no order as to costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 2nd day of October 2018

F. GIKONYO

JUDGE

In the presence of:

M/s. Gitonga advocate for M/s. Lawrence advocate for Petitioner

Mr. Kithinji advocate for Objector

F. GIKONYO

JUDGE