



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2822 OF 2012

IN THE MATTER OF THE ESTATE OF NDUNGU MUTURI (DECEASED)

PETER NDUNGUAPPLICANT

VERSUS

FRANCIS MBUGUA NDUNGU.....1ST RESPONDENT

PATRICK KARIUKI MBURU2ND REPSONDENT

JUDGMENT

PLEADINGS

The deceased, Ndungu Muturi died intestate on 7th December 1993. The deceased had 3 wives namely; Muthoni Ndungu who had 9 children, Wangui Ndungu who had 2 children and Wambui Ndungu who had 1 child Peter Mbugua and left home.

Wanjiru Kibai of 2nd house and Peter Mbugua only child of 3rd house children to the deceased petitioned and were granted the Grant of letters of administration on 27th August 2002 in **Succession Cause 118B of 2002** Thika Chief Magistrate's Court. The deceased was survived by 3 beneficiaries namely;

- i. Peter Mbugua Ndungu (son)
- ii. Patrick Kariuki Mburu (grandson)
- iii. Wanjiru Kibai (deceased)

And 2 assets namely;

- i. Loc. 4/Ngararia/1049
- ii. Loc.4/Ngararia/1074

Later, the administrators via application dated 8/4/2003 petitioned for confirmation of the said grant and proposed the same to be shared out as follows;

- i. Loc. 4/Ngararia/1049- to go solely to Peter Mbugua Ndungu
- ii. Loc.4/Ngararia/1074 to be shared as follows;

Patrick Kariuki Mburu -1 acre

Wanjiru Kibai (deceased) – 1.3 acres Francis Mbugua Ndungu

Peter Mbugua Ndungu opposed to the said mode of distribution and filed affidavit of protest dated 12th May 2003. He alleged that he was not consulted on the distribution of the estate and that the said mode of distribution was not agreed upon. He further stated that the deceased left behind 4 beneficiaries namely;

- i. Peter Mbugua Ndungu – Adult son
- ii. Nicholas Mburu Ndungu –Adult son
- iii. Francis Mbugua Ndungu –Adult son
- iv. Wanjiru Kibai – (deceased) -married daughter

Wanjiru Kibia died on 14th June 2008 before the conclusion of these proceedings and Mary Wangui Kariuki her daughter via her application dated 4/5/2008 sought to substitute her. Unfortunately, Mary died before conclusion of the succession proceedings. Peter Mbugua Ndungu in his application dated 14/6/2008 sought to substitute the late Mary Wangui Kariuki with her husband Kariuki Mukundi.

In her judgment dated 14/7/2010 the learned Magistrate L.W.Gicheha dismissed the said protest and ordered that the grant be confirmed as per the application dated 8/4/2003. The said grant was confirmed and issued with a certificate of confirmation dated 2nd August 2010.

Francis Mbugua Ndungu filed Notice of motion dated 9/10/2012 and sought the court to allow the Executive Officer to be authorized to sign all the necessary documents for registration and issuance of title.

Peter Ndungu in his application dated 21/11/2012 challenged the jurisdiction of the Magistrate's Court then in conducting the proceedings of the deceased's succession cause on grounds that the estate of the deceased was beyond their pecuniary jurisdiction which was at the time was 100,000 while the deceased's estate was said to be 300,000/-. By a consent recorded in this court on 11/8/2013 before Hon Justice Luka Kimaru in the instant file; the matter was transferred to this court.

Later, parties recorded a consent before Hon. Justice Muchelule on 11/3/2015, which revoked the grant of administration issued on 27/8/2002 and confirmed on 2/8/2010. Further, the learned judge issued a fresh grant to Peter Ndungu, Francis Mbugua Ndungu and Patrick Kariuki Mburu as joint administrators. Peter Ndungu was authorized to file a proposal of mode of distribution and confirmation of grant indicating the beneficiaries and how the deceased's estate should be subdivided between them. Peter Ndung'u in his application dated 21/4/2015 sought confirmation of the said grant. In his proposal he recognized the beneficiaries as follows; Peter Ndungu, Patrick Kariuki Mburu and Wanjiru Kibai (deceased) who was represented by Francis Mbugua Ndungu. In his proposal Peter Mbugua Ndungu proposed that he solely inherits both Loc.4/Ngararia/1049 and Loc. Ngararia/1074.

HEARING

The respondents were opposed to the said mode of proposed mode of distribution is opposed. Hannah Wambui(PW2) and Patrick Mburu (PW3)in their affidavits of protest and testimony in Court averred that she purchased 1 acre of land from the deceased for Kshs. 18,000. That he wanted to sell to her another acre but his family objected and she was refunded Kshs. 5,700 she had paid as deposit for the same by Seraphine Wanjiru and Patrick Kariuki Mburu. Later the deceased sold the said land to Patrick Kariuki Mburu and the other 1.3-acre to his daughter Seraphine Wanjiru. She avers that Peter Mbugua Ndungu threatened the deceased with a panga for selling the land and demanded back all the help he had given him. That Patrick Kariuki Mburu built a permanent house after purchasing the said parcel of land and the late Seraphine Wanjiru stayed in the said parcel she purchased until her demise.

Francis Mbugua Ndungu (PW1) in his affidavit dated 11th July 2014 avers that his late father had 5.6 acres of land in his name. That the applicant started menacingly demanding land from the deceased and even caused him bodily harm which led him to be imprisoned for 6 months by the Kandara Law Court. That in the 1970's the deceased sold 1.3 acres to George Thuo, In 1978 he sold 1 acre to Hannah Wambui. The deceased reconciled with the applicant and he gave him 1 acre Loc.4/Ngararia/1049. That later he wanted to sell more land for his sustenance but the family objected and Kshs. 5,700/- he had received from Hannah Wambui as deposit was reimbursed by Patrick Kariuki Mburu and Seraphine Wanjiru. He then sold 1 acre to Patrick Kariuki Mburu and 1.3 acres to Seraphine Wanjiru. After this Patrick Kariuki Mburu built a permanent house where he lives to-date and Seraphine Wanjiru lived there until her demise.

Patrick Kariuki Mburu avers that he reimbursed the Kshs. 5,700 and paid Kshs. 12,000 for the said 1 acre while Seraphine Wanjiru Kibai paid Kshs.7,200/- for the said land upon which the deceased gave them the land and he built his permanent house before the deceased's demise. That Seraphine Wanjiru was a beneficiary to the deceased and was also entitled to inherit. He confirmed that the applicant was given 1 acre by the deceased before his demise in loc.4/Ngararia/1049. That he and the 2 other objectors are entitled to Loc.4/Ngararia/1074 as purchasers for value.

The Petitioner Peter Mbugua Ndungu (DW1) reiterated his proposed mode of distribution and claimed that the 1st wife Muthoni Ndungu and children were allocated their land in 1963 by the deceased and they re not involved in this matter. In his house, he was the only child and in a book the father, the deceased wrote that the remaining land would be inherited by the Petitioner if the wives did not give birth to any other son. He was not at the meeting when Hannah Wambui bought land and was refunded the deposit she gave for the 2nd land purchase by Seraphina Wanjiru and Patrick Kariuki Mburu. He was charged in Court In Nyeri on allegation that he killed Seraphina Wanjiru. He was acquitted in 2006. He stated in cross examination that 1st wife of his father Muthoni Ndungu had 9 Children and they were allocated 4 acres. 3.3 acres remained for him and his mother 3rd wife Wambui Ndungu and 2nd wife Wangui Ndungu who had 2 children Nyambura and Seraphina. George Thuo bought 1.3 acres and Hannah Wambui 1 acre and what remained is 1 acre which he built on. Francis Mbugua Ndungu built on Parcel 1074 while he was in remand. The remainder is 1074 2 acres and 1049 1 acre.

Joseph Mwaura Njuguna (DW2) now retired teacher, stated that in 1965, the deceased called a elders ' meeting as there was oncoming demarcation of land and they disclosed how the land would be divided. The deceased said that the land would be divided between 2 wives and 1 son Mbugua Ndungu; and meant Peter Mbugua Ndungu. He stated in cross examination he did not know Francis Ndungu who claimed to be 1 st son of the deceased.

Nancy Nyambura Njenga (DW3) Land Registrar –Muranga testified as follows;

- a) Loc 4 /Ngararia /42 was registered in 1966 in the name of Ndungu Muturi. It was in 1981 divided into;
- b) Loc 4/Ngararia/1050 & 1051; 1050 in the name of Hannah Wambui & 1051 in the name of Ndungu Muturi.
- c) Loc 4/Ngararia/1051 was subdivided in 1982 into 1074 & 1075; 1075 was transferred to Agrippina Wangare and 1074 remained in Ndungu Muturi's name.
- d) Loc 4/Ngararia/1049 was registered in Ndugu Muturi's name in 1981.

She produced copies of the green card as exhibits in Court.

SUBMISSIONS

APPLICANT'S SUBMISSIONS

The applicant in his written submissions submitted that the cause commenced by way of revocation of grant to the petitioners in Thika **Succession Cause no.118B of 2002**. The revocation was done on 11th March 2015 and a new one was granted to the petitioners Francis Mbugua Ndungu, Patrick Kariuki Mwaura and the respondent Peter Mbugua Ndungu Jointly. Peter Mbugua Ndungu was given liberty to file confirmation of the said grant within 30 days. He filed the same on 22nd April 2015 in which he proposed he be allocated 2 titles Loc. Ngararia/1074 and loc.4 Ngararia/1049 in line with the wishes of the deceased communicated in his deceased's father presence of the clan elders, family and friends. The two administrators objected to the mode of distribution and made a counter proposal that the applicant Peter Mbugua Ndungu be granted a parcel of land Loc. Ngararia/1049 measuring one(1) acre and the other parcel of land Loc. 4/Ngararia/1074 be bequeathed to the two of them to be shared as follows Patrick Kariuki one(1) acre and Seraphine Wanjiru Kibai (deceased) 1.3 acres. The matter preceded viva voce which saw the Registrar of Land Muranga County summoned to shed light on the ownership and registration of the land parcels Loc. Ngararia/1049 and 1074.

The applicant raised 5 issues for determination as follows;

- i. Did the deceased Ndungu Muturi express his wish or will in 1965 in writing in the presence of the clan elders his family and friends?
- ii. Did he declare that the available land then to go to his son Peter Mbugua Ndungu in case his two wives Wangui Ndungu and Wambui Ndungu if they did not bear him a son?
- iii. Did the two objectors Seraphine Wanjiru Kibai (now deceased) and Patrick Kariuki Mburu (deceased) buy land from the deceased if true which land and what size of the land?
- iv. Are the objectors bringing up this cause as purchasers or as rightful heirs to the estate?
- v. Did the deceased allocate the applicant herein Peter Mbugua Ndungu a Parcel of land loc. 4 Ngararia/1049 during his lifetime as alleged by the objectors ?

Peter Mbugua Ndungu testified that in 1965, his late father the deceased called a family meeting and expressed his wishes that his land be shared among three people; Wangui Ndungu, Wambui Ndungu and Peter Mbugua Ndungu. That he stated that should the two wives not bear sons then Peter Mbugua would inherit the whole piece of land as other sons of Muthoni Ndungu had their respective shares of land. This was being done during the second demarcation which led to grant of the first titles of the land to the inhabitants of Muranga and its environs. It was stated that the sons of Ndungu had been given their parcels of land during the deceased's lifetime and had no interest in the parcels of land as stated by the objector's witness Francis Ndungu. It was submitted that the meeting was indeed held and the deceased's wishes should be honored. That the selling of land to one Wangare Thuo and Hannah Wambui does not water down his express-wish because he was still the absolute owner of the land and could deal as he deemed fit. That the deceased's wishes could only take effect after his demise hence whichever land he left was subject to his wish as expressed in writing that both pieces of land should be inherited by the Applicant Peter Mbugua Ndungu as a whole.

The Applicant refuted claims that Patrick Kariuki Mburu and Francis Mbugua Ndungu for Seraphine Kibai had purchased parcel Loc.4 Ngararia/1074 measuring 2.3 acres from the deceased. That Patrick claims to have bought the parcel of land in 1980 yet he was born in 1968; This means, he purchased the parcel of land at the age of 12 years at the said time he could not have had capacity to purchase land if at all. That the two never produced any sale agreement and no proof of payment or consideration or any witness adduced in regards to the said sale. That the objector raises claim as a purchaser for value but has failed to prove the same. It was submitted that the ingredients of a valid contract for purchase of land is missing and as such the argument on purchase of land is untenable. That the applicant built his house after the demise of the deceased. It was submitted that the objectors never laid claim to the said parcel of land as dependents' and have since failed to prove their claim as purchasers and as such he urged the court to dismiss the entire objection.

It was submitted that the deceased never gave the Peter Mbugua Ndungu Loc.4/Ngararia/1049 and if he had done so he would have

processed a title in his name adding that the parcels of land were never subdivided the said parcels of land until 1981 when Hannah Wambui purchased 1 acre and intended to purchase more land. Hence it was submitted that the deceased died intestate and left 2 parcels of land as part of his estate. He urged the court to dismiss the objection and grant him Loc.4 Ngararia/1049 and loc.4/Ngararia/1074 as a whole.

RESPONDENTS SUBMISSIONS

The respondents in their submissions raised 2 issues for consideration;

- i. Does the applicant qualify to have the two parcels of land Loc.4/Ngararia/1049 and Loc.4/Ngararia/1074 registered in his name
- ii. Do the respondents deserve to be registered as the proprietors of Loc.4/Ngararia/1074?

It was submitted that the applicant knowingly misled the court by claiming that there is no other beneficiary to the deceased whilst omitting the 2nd respondent. That the applicant only named 2 wives to the deceased Wambui Ndungu and Wangui Ndungu leaving out Muthoni Ndungu who was the deceased's third wife. That the applicant despite the deceased wishes to divide his land among his two wives there is no proof that any of them ever got land. That no evidence was led that they ever got any land. That Wangui was not considered and the land was given to his two sons but does not state the size of the said parcels of land. Which leads to the conclusion that the land was given to the sons but the wives and daughters were not considered. That in 1965 the deceased is said to have been left with 5.6 acres which he went ahead to deal with personally. That in 1976 he sold part of the land to Agripine Wangare Thuo and in 1981 further sold another piece Loc.4/Ngararia/1981 which created Loc.4/Ngararia/1049 which he gave the applicant where he lives to-date and Loc.4/Ngararia/1050 which he sold to Hannah Wambui Kamau and Loc.4/Ngararia/1051 which he retained. That Hannah Wambui Kamau in her evidence stated that she bought her land for Kshs.18,000/- and the same is supported by the green card entry of Loc.4/Ngararia/981 and was also the one who financed the subdivision and the applicant was never to her his portion of costs. It was submitted that the applicant was provided from by the father and therefore cannot lay claim. It was submitted that the 1st respondent as a is a brother to Wanjiku Kibai a daughter of the late Ndungu Muturu who paid for her parcel while the 2nd respondent a grandson to the late Ndungu Muturi. That despite the two respondents being dependants of the deceased went ahead and paid for their parcels of land. That the issue of purchase to the 1st and 2nd respondents is well corroborated by the 1st and 2nd respondents. They proposed that the said estate of the deceased be distributed as follows;

- i. Peter Mbugua Ndungu Loc.4/Ngararia/1049 – 1acre
- ii. Patrick Kariuki Mburu Loc.4/Ngararia/1074 - 1 acre
- iii. Francis Mbugua Ndungu Loc.4/Ngararia/1074 - 1.3 acres

DETERMINATION

I have carefully considered the parties pleadings, evidence before this court and their submissions. In my view the issues for determination are

- i. Who are the beneficiaries of the deceased?
- ii. Have the objectors Wanjiru Kibai and Patrick Kariuki proved that they are purchaser for value of the suit parcel of land?
- iii. What is the ideal distribution of the deceased's estate?

Who are the beneficiaries of the deceased?

From the evidence tendered before this Court it is clear that the deceased was polygamous and had 3 wives. From the evidence tendered here there is no mention of the said wives whether they are alive or deceased. It is however mentioned that some of the deceased beneficiaries were gifted their share of the land by the deceased when he was alive. Going as per the information given to this court the applicant and 1st respondent are children of the deceased and as such are beneficiaries of the deceased. Patrick on the other hand is a grandson to the deceased however he does not raise a claim as a beneficiary but as a purchaser for value having paid Kshs.12,000/- for 1 acre to the deceased.

This Court finds that the parties have not fully disclosed all family members of the deceased. It emerged from evidence of Applicant and 1st Respondent that the deceased had 3 wives and 12 children. No mention or detail was given of these members of the deceased's family. It is not clear whether it is by design or default to omit relevant and crucial information as regards the estate of the deceased.

Secondly, Patrick Kariuki Mburu (PW2) states on the one hand he s grandson to deceased being son of Nicholas son of the deceased. He does not shed more light on who Nicholas is and from which house. Interestingly , he is not claiming beneficial interest from the deceased's estate of his late father's share but claims as a purchaser and states that he helped refund the deposit Hannah Wambui (PW2) paid KSH 5,700/- and Seraphina Ksh.

7,200/- and they were given by the deceased 1 acre and 1.3 acres respectively. Patrick claimed he bought land in 1980s and was born in 1968; surely by 1980 he was 10 -12 years old, he could not possibly have bought land. Secondly, there is silence as to where his father Nicholas was in 1980. Curiously, there is no witness to the oral sale. From the inconsistency of his testimony and the fact that Hannah Earlier bought 1 acre for 18,000/ it could have been that refund of her deposit would have been the purchase price for an acre. To my mind, this is a blatant lie. Patrick did not/could not buy land from the deceased in 1980 and not at the price of the refund of deposit.

With regard to Francis Mbugua Ndungu he claims to be eldest son of the deceased and curiously, he did not divulge his mother or from which house he is from nor name his siblings. He said that he is claiming his late sister's share of the estate, late Seraphina Wanjiru, yet the Applicant stated that Seraphina had a sister Nyambura and they were the only children of the 2nd wife Wangui Ndungu. If this be the case, how then is Francis claiming his late sister's share yet he may be step brother just like the Applicant of Seraphina Wanjiru? This would mean that they are both entitled to inherit the share if they are step brothers of the deceased's step sister.

Thirdly, it has been submitted that the 2 wives Muthoni Ndungu and Wangui Ndungu and their children were not allocated any land by the deceased. If this is the correct position, then all children of the deceased should be listed and surviving spouses to obtain a share of deceased's estate. This did not/ has not happened.

Finally, from the evidence of Joseph Mwaura Njuguna (DW2) who was present when the deceased discussed demarcation of land with elders in 1965, he was alleged to have stated that the land would be divided between 2 wives and 1 son unless the wives bore him son(s). If the Applicant was born in 1946, by 1965, Francis Mbugua Ndungu who claimed to be 1st son of the deceased was already born. Patrick Kariuki's father Nicholas was already born. So why would the deceased say as at 1965 he had 1 son the Applicant if the 1st Respondent and 2nd Respondent's father were born?

The totality of the evidence on record is that there are material non disclosures, that cast doubt on the Respondents claims as beneficiaries and/or purchasers.

On the other hand the Applicant's claim as only son of the deceased is not contested and therefore in the absence of full disclosure of family members of the deceased; spouses and children and/or family tree; and confirmation of the Respondents as beneficiaries, dependents or *bonafide* purchasers;

DISPOSITION

1. I find that the suit properties LR Loc 4/Ngararia/1074 & Loc & Ngararia/1049 are to be inherited by the Applicant Peter Mbugua Ndungu.
2. Each party to bear own Costs
3. Any aggrieved party to lodge an appeal

DELIVERED DATED & SIGNED IN OPEN COURT ON 14TH DECEMBER 2018

M.W.MUIGAI

JUDGE FAMILY DIVISION HIGH COURT

IN THE PRESENCE OF

MR MORIASI FOR APPLICANT

MR KINYANJUI FOR RESPONDENTS