



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

SUCCESSION CAUSE NO. 94 OF 2012

IN THE MATTER OF THE ESTATE OF OF MARK KIMANI KAGO – DECEASED

BETWEEN

JANET WANJA KAGO 1ST PETITIONER/RESPONDENT

ALBERT NDEGWA KIMANI.....2ND PETITIONER/RESPONDENT

VERSUS

JAMES MUCHEMI KIMANI ...APPLICANT /INTERESTED PARTY

J U D G M E N T

1. By his ruling dated 12/3/2014, Karanja J stated that;

“ ----- Consequently, the objectors status viz a viz the deceased became one of a former wife who may therefore apply to the court under Section 26 of the Law of Succession Act for reasonable provision from the estate of the deceased for herself, her children if they depended on the deceased, may likewise apply to the court for reasonable provision or otherwise derive any provision from their mother's provision if they are blood children of the deceased -----”.

2. When this court ordered that the same be canvassed by oral evidence, it became clear from the evidence of the objector that she was brought in by the deceased in 1985. By then the suit property which was bought by the deceased first wife Grace Kimani and registered in 1966 in the name of the deceased had long been settled by his first family.

3. From the objectors evidence, save to state that she resided in Central Province Karithe, there was no evidence adduced that she sired children with the deceased. PW1, the objector herein was born in 1973 and he believed the deceased to be his father. Nothing was demonstrated that the deceased married the objector's mother. No customary rites under the tenets of Kikuyu customary law was produced .

4. DW2 Rahab Nganga who was well advanced in age knew the deceased family very well. She stated that it was the deceased wife who balloted for the land under Settlement Funds Trustees and later had it registered in the deceased name. This fact was not disputed.

5. Clearly therefore by virtue of the obtaining traditions at the time the land was registered in the names of the deceased.

6. The retired chief equally weighed in in his evidence, namely that there were wrangles between the deceased and his wives which ended up at the chief's office and it was sorted out by the Kikuyu elders whom he called to arbitrate.

7. One feature though that came out and infact admitted by the petitioner was that the deceased did build a house for the objector although she left and came after he had died.

8. What then is the position of the objector. One cannot claim that she was a wife in terms of any known statutory marriage. She however cohabited with the deceased. The children born cannot be ascertained that they belonged to the deceased. All of them were born in central province. No evidence was adduced to show that they were born of the deceased. Nobody came forward to demonstrate that the deceased stayed with the objector in central province as husband and wife.

9. In the premises, and bearing in mind that the applicant infact saved the land from being sold by the deceased, when they repaid a sum of kshs 46,000/= to the purchaser, the deceased for all intent and purposes did not buy the land but one can assume that he held in trust for his wife and the family.

10 Needless to say, it is on record that there was a clear consideration that the objector be given 2 acres out of the suit property. This in my view would be an exgratia consideration. The objector should take the offer and nothing else.

11. Consequently, for the above reason I do order as follows:-

Land parcel number Trans Nzoia/Suwerwa/278 be divided into two namely, the objector Mary Wambui Kimani be given 2 acres and specifically where she resides and work todate. The remainder of the land to the household of Grace Mukuhi Kimani.

12. In the event that the suit land has been subdivided and fresh titles issued the said title be cancelled and the same reverts to Trans Nzoia /Suwerwa/278 for purposes of dividing as aforestated.

13. This court shall not venture into Lari/Kirenge/882 parcel of land as there is no evidence that the same was held by the deceased.

14. Let the certificate of grant confirmed on 19th March 2015 be amended to reflect the above position. Should there be evidence that the Lari/Kirenga/882 land is available, then the parties shall be at liberty to apply.

15. The two administrators Wanja Kago Mundia and Albert Ndegwa Kimani to remain in their positions.

16. This being a family dispute, each party shall bear their respective costs.

Delivered, signed and dated at Kitale this 10th day of December, 2018.

H.K. CHEMITEI

JUDGE

10/12/18

In the presence of:

Arunga for the objector

Wanyonyi holding brief for Kaosa for the Petitioner.

Court Assistant – Kirong

Judgment read in open court.