



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 580 OF 2008

IN THE MATTER OF THE ESTATE OF THE GITHIOMI KIMANI – (DECEASED)

SAMUEL KIMANI GITHIOMI.....APPLICANT

VERSUS

JOSEPH MUIRURI MAINA.....OBJECTOR

JUDGMENT

BACKGROUND

1. Githiomi Kimani died on the 3rd March, 2004. Letters of administration Intestate were issued to Samuel Kimani Githiomi (hereinafter Kimani). On the 30th March, 2009 Kimani subsequently took out a summons for confirmation of grant dated 18th March, 2014. This summons elicited a protest from Joseph Muiruri Maina hereinafter (Muiruri) *vide* his affidavit of protest sworn on the 21st August, 2014. The protest was heard by way of *viva voce* evidence.

THE PROTESTOR'S CASE:

2. The protestor called four (4) witnesses. He was the 1st on the stand. He said that he is a son of the deceased. In 1991, there was a sitting where their father (deceased) distributed land to five (5) people.

They were:

- | | | |
|---------------------------------|---|---------|
| 1. Kimani Githiomi | - | 7 acres |
| 2. Wanjiku Githiomi | - | 7 acres |
| 3. Joseph Muiruri Maina | - | 7 acres |
| 4. Wanjiru Githiopmi (2nd wife) | - | 8 acres |
| 5. John Macharia Maina | - | 7 acres |

Total land was 36 acres.

The protestor is opposed to the 2acres that the Kimani proposes to give him. He said that records were kept by Kimani.

3. P.W.2 told the court that in 1991 their father called a meeting at home. she was present. He gave out eight (8) acres of land to 2nd wife. Macharia Muiruri and Kimani got seven (7) acres each.

4. P.W.3, a brother to the deceased told the court that when the deceased got very sick, he called him (P.W.3). A meeting was held. The deceased directed that his land at Engashura was to go to four (4) persons namely:

i) Kimani Githiomi

ii) Muiruri githiomi

iii) Waithera Githiomi and

iv) Wanjiku Macharia.

He gave eight (8) acres of land to his younger wife, Wanjiru.

5. P.W.4 said that the deceased decreed that Kimani and Muiruri were to get equal shares of the land. Eight (8) acres was to go to the young wife.

PETITIONER'S CASE

6. The petitioner called 1 witness in addition to his testimony. He said that there was land at Engashura. There was agreement that the land be sub-divided among four (4) children.

There was Mwaragania farm. It was registered in the name of Githiomi Kimani. It is 37 acres. The petitioner's father and mother had raised Kshs.800/= to buy the land. The petitioner added Kshs.400/=. He added more money and in total he paid Kshs.1400/=. He had no receipts. He said they were burnt in 1992. The land was registered in the names of their father as society rules did not allow the name of the petitioner to be registered.

7. D.W.2 said the land in issue belonged to Githiomi Kimani (deceased). All receipts were in his names. If anyone gave any money, that was their own arrangement. When cross-examined by the petitioner, he said he never saws the petitioner bring money to their offices.

CONSENT

8. At the close of the cases the parties recorded a consent over parcel of land LR. NO.Bahati/Kabatini Block1/1773 which was to be subdivided in equal shares to Patrick Githiomi, Rose Wanjiku Macharia, Stephen Githiomi Muiruri and Paul Mwaura Muritu.

ANALYSIS AND DETERMINATION

9. I have had occasion to consider the evidence on record. There is no dispute as to the beneficiaries of the deceased. The only dispute is over distribution. The issue for determination is thus what share should each of the beneficiaries get.

In his affidavit in support of the summons for confirmation of grant, the petitioner indicated under paragraph 5 thereof that parcel of land – Bahati/Kabatini Block 1/1773 should go to him entirely and land parcel No.Molo South/ Keriso Block 4/346(MWARAGANIA) should go to him (30 acres) and to Naomi Wanjiru Githiomi (7 acres).

10. The parties have agreed on the sharing out of Title No. Bahati/Kabatini Block 1/1773 to Patrick Githiomi, Rose Wanjiku Macharia, Stephen Githiomi Muiruri and Paul Mwaura Muritu. It is presumed that the parties named herein have no other claim to the estate.

11. That leaves parcel No. Molo South/Kerisoi Block 4/346 (Mwaragania) as the estate of the deceased available to other beneficiaries.

12. The attempt by the petitioner to claim ownership of this land through alleged contribution of money during its buying is not supported by evidence. Indeed, his witness, D.W.2 laid everything bare indicating that the land belonged to Githiomi Kimani (the deceased). All receipts for payment of the land were in deceased's name. He confirmed not seeing the petitioner pay any money at the offices.

13. Section 107 of the Evidence Act states:

“1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

It was incumbent upon the petitioner to prove ownership of land.

14. Even then, he would have to institute a separate suit against the estate of the deceased to ventilate his claim of proprietary rights.

15. As it were, it is my finding that land parcel No. Molo South/Keresoi Block 4/346 forms part of the estate of the deceased and is available for distribution to:-

1. Wanjiru Githiomi – wife
2. Kimani Githiomi - son
3. Rosemary Wanjiku Macharia – Daughter to John Macharia Maina–(Son)
4. Joseph Muiruri Maina- Son

16. The first house share of the estate was settled vide the consent already recorded herein.

The House of Wanjiru Githiomi should accordance with section 40 of the Succession Laws of Kenya share out land parcel number Molo South /Kuresoi Block 4/346 equally with the wife being considered as a unit

17. With the result that the grant herein is confirmed with distribution as follows:-

1. Parcel No. Bahati/Kabatini Block I /1773 as per the consent recorded on the 25/7/2016.
2. Parcel number Molo South Kuresoi Block 4/346 (Mwaragania) to be distributed in equal shares to:-

1. Wanjiru Githiomi
2. Kimani Githiomi
3. Rosemary Wanjiku Macharia
4. Joseph Muiruri Maina

Each party to bear its own costs.

Orders accordingly.

Ruling delivered in open court on 19th day of January, 2017 in the presence of both parties.

A. K. NDUNGU

JUDGE