



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE MATTER OF THE ESTATE OF PETER GATHIRU RURIGI (DECEASED)
SUCCESSION CAUSE 2079 OF 2011

JUDGMENT

PLEADINGS

The deceased died on 14th April 2011.

The widow AGNES MWIHAKI and daughter LUCY WAMBUI RURIGI of the deceased filed a petition to obtain grant of letters of administration for the deceased's estate.

The widow listed beneficiaries of the deceased's estate as follows;

- a. Agnes Mwihaki Rurigi
- b. Stephen Njoroge Rurigi
- c. John Njuguna Rurigi
- d. Lucy Wambui Rurigi
- e. Samuel Wahome Rurigi
- f. Joseph Munyua Rurigi

The asset is property title Kiambaa/Kanunga/1241.

The Petitioners obtained Grant of letters of administration intestate on 7th February, 2012. The Petitioners filed summons for confirmation of Grant on 29th February 2012.

The Respondent Peter Gathiru Rurigi filed Affidavit of Protest on 17th April 2012 and stated as follows;

He was authorised to file the Protest by his mother Hannah Muthoni Kariuki, his brothers George Kariuki Rurigi and David Munyua Rurigi.

They all contest the administration of the deceased's estate as they are the 1st Family of the deceased and they were left out in the administration process.

The Protester contended that upon his father's death, they approached the Chief who declined to issue them with a letter to confirm they are part of the deceased's family. He attached a letter marked **MGR1** that confirmed the Chief knew them as part of the deceased's family.

The Protestor attached to the Affidavit the Judgment of **High Court Civil Appeal 29 of 2009** marked **MGR2**; in which he sued the deceased and the 1st Petitioner over the suit property. The Court held the claim by the Respondent who is the Protestor against his father the deceased while he was alive was premature the claim to his father's land would crystallize upon the deceased's death.

The Protestor filed citation in **Succession Cause 2129 of 2011** marked **MGR3**.

The Petitioner filed Replying Affidavit on 28th May 2012 and opposed the Protestor's claim. She deposed that she was married to the deceased in 1979 and they had 5 children. She attached the marriage certificate marked **ARM1**.

The deceased confirmed in a sworn affidavit of 19th April 1996 attached as **ARM2** his family consists of the Respondent and their children.

The Respondent contended that the Applicant did not participate in the burial of the deceased and he was not identified as a dependent of the deceased. The attached eulogy and funeral program marked as **ARM3** and **ARM4** respectively confirms this position.

The Respondent contended that the suit property Kiambaa/Kanunga/1241 was registered in joint names of the deceased and herself as shown in the attached document and therefore the property reverts solely to her.

HEARING

During the hearing through *viva voce* evidence Michael Rurigi PW1 stated he was born in 1968 and he is from the first family of the deceased. His mother is Hannah Muthoni PW2 and his brothers are George Kariuki and David Munyi. The 2nd family of the deceased consists of Agnes Mwihaki Rurigi and 5 children as listed in the petition. He stated that the suit property Kiambaa/Kanunga 1241 is ancestral land and was inherited by their father from their grandfather. They lived with their father and mother on the said land upto 1974, when their mother was sent away. She left with them to their maternal grandparents where they have been to date.

The Objector, was in touch with his father, the deceased and he obtained his ID card using the deceased's ID card. Although he did not appear in the funeral program; he stated he had evidence to confirm he was son of the deceased. During the deceased's lifetime, the deceased showed him where to build his house on the suit property but the Petitioner refused. He attached letters from the Chief marked **MGR1 & MGR2** that confirm that the deceased acknowledged he was their father and agreed to give him a portion of land to build his house. He claimed that when their late father was sick; the widow, Petitioner pushed the deceased to have the land registered in both their names.

Hannah Muthoni PW2 stated that she was married to the deceased in 1964 and they had 3 children. They parted ways in 1972 when the youngest child was 2 months old. She went to her parents' home and raised the children and the deceased later married the Respondent. The deceased transferred the land jointly in his and the widow's names. When the deceased died her sons attended the funeral meetings but they were accosted and sent away by the widow's sons. They reported the matter to the Chief and were advised to attend the funeral as other mourners.

Joseph Githuka PW3 testified that the deceased was his Uncle; brother to his father. He stated that the deceased had discussed the issue of apportioning Michael Rurigi some land to build his home from the suit property. He stated that the deceased had divided the suit property into 2 parts each for his wives; PW2 & DW2. He was aware that the Objectors filed a case in Nyeri Land Tribunal which ruled in their favor but on **Civil Appeal 29 of 2009** the Court determined that Michael Rurigi's interest would only crystallize upon death of the father, the deceased. He confirmed that he was aware that the deceased married the 1st wife under Kikuyu customary law and the Protestors are children of the deceased. The deceased and PW2 separated but did not divorce. He stated that although the land is registered in the joint names of the deceased and widow; on the ground the deceased had divided the land for the 2 families.

PW4 Mary Gathoni Edwin informed the Court that Hannah Muthoni was her schoolmate and they went to Loreto School together. She later was married to the deceased in 1964 and they had 3 children namely, Michael Rurigi, George Kariuki and David Kanyua. They lived in Torito in Kiambu and she was their neighbour.

They separated in 1972 and she left with the 3 children and was married in the same village. The deceased married the widow and they had their children whom she did not know.

In cross examination, she confirmed that the deceased and PW2 lived together and she did not know or witness their marriage ceremony if at all either under Kikuyu customary law or a church wedding. All she could confirm is that the suit property is ancestral land that the deceased inherited from his father and cannot determine how it was transferred to the widow.

The Respondent Agnes Mwhaki Rurigi told the Court she was married in church to the deceased in 1979 and they had 5 children. The suit property though inherited by the deceased from his father, during their marriage they developed the land and therefore it belongs to her and their children only.

When the deceased died the Applicants did not attend or participate in the deceased's funeral arrangements and they were not mentioned or recognized as children of the deceased. She relied on the deceased's affidavits confirming his names and members of his family and he did not include the Applicants/ Protestors.

The Petitioner filed written submissions and list of authorities on 6th September 2016. The Protestor filed written submissions on 30th June 2016.

ISSUES

The Court considered evidence on record and submissions and identified issues for determination as follows;

- 1) Were Hannah Muthoni and Peter Rurigi married?**
- 2) Are David Munyua Rurigi, George Kariuki Rurigi and Michael Gathiru Rurigi children of Peter Gathiru Rurigi and Hannah Muthoni?**
- 3) Are the Protestors entitled to distribution of the deceased's estate?**
- 4) If so what portion of the suit property Kiambaa/Kanunga/1241?**

DETERMINATION

The law on distribution of deceased's estate is governed by Sections 29 of Law of Succession Act Cap 160 that defines a dependant as;

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

The evidence from the pleadings and testimony from Hannah Muthoni PW2 was that she was married to the deceased under Kikuyu customary law from 1964, and they had 3 children and separated in 1972. The witness did not adduce any evidence as to the process of Kikuyu customary law that was conducted.

In **Restatement of African Law: The Law of Marriage and Divorce** by **Eugene Cotran** at Pg 15 which states the essentials of a Kikuyu customary marriage as follows;

The parties must have capacity to marry each other

The parties to the marriage and their respective families must consent to the union

No marriage is valid under Kikuyu law unless the 'ngurario' ram is slaughtered

There can be no valid marriage under Kikuyu law unless a part of 'ruracio' has been paid.

ZIPPORAH WAIRIMU VS PAUL MUCHEMI HCCC1280 OF 1970 provides essentials of a Kikuyu customary marriage. In the instant case there was no evidence of any of the above processes having taken place between the deceased and PW2 to confirm marriage except evidence from PW3 & PW4 that they witnessed that the deceased lived with PW2 and they had 3 children and thereafter separated.

Therefore PW2 is not one of those described as dependant under **Section 29 of Law of Succession Act** as there is no proof of any form of marriage contracted between the deceased and her. She is not eligible to inherit from the estate of the deceased. Secondly, even if she was wife to the deceased, it is on record from the evidence of PW4 that when she separated from the deceased she was married by someone else. Therefore by virtue of the proviso in **Section 35 of Law of Succession Act** upon remarriage to any person; the life interest over the deceased's property shall determine.

The evidence on record confirms that PW2 lived together with the deceased and had 3 children namely David Munyua Rurigi, George Kariuki Rurigi and Michael Gathiru Rurigi. There is consistency of the evidence from PW2 their mother, PW3 relative and PW4 friend that they were born while the deceased and PW2 lived together. When they separated, their mother left with the 3 children who are now adults. The evidence on record confirms that though the sons resided at their maternal grandparents' home; they maintained contact with their father, the deceased.

Michael Gathiru Rurigi confirmed that he obtained his ID card from using his father's ID card where he was identified as his father. He and the deceased were embroiled in protracted litigation over the suit property Kiambaa/Kanunga/1241 from the District Land Tribunal, Provincial Land Appeals Tribunal and finally culminated in **High Court Civil Appeal 29 of 2009** whose import was as follows;

Whatever the case, any claim by the Respondent (Michael Gathiru Rurigi) against his living father is premature because such right is inchoate and crystallizes on the death of the father... the appeal is allowed.

The Protestor also lodged complaint against his father the deceased during his lifetime with the Assistant Chief Njegu Sub Location, Waguthu Location Kiambaa. After an elders meeting as outlined in the Assistant Chief's letter of 28th November 1998, Michael Gathiru told the meeting that he sent an elder to his father Peter Gathiru (deceased) to give him land to build his house. The Father told the elders in the meeting, that Michael Gathiru is his son but they were not living together. He had a dispute over the suit property with one Josphat Gathuka Njuguna. Once the matter was resolved he would give Michael Gathiru a portion of land to build his house on condition he shared expenses of the land that his grandfather incurred in subdividing and transferring land.

The Respondent, Agnes Mwihaki opposed the matter that the Applicants/Protestors are the 1st family of the deceased and entitled to any portion of the suit property. She asserted that they were not identified and recognized as his family during his funeral and burial as confirmed from the eulogy and funeral program attached to her affidavit.

The Protestors told the Court during cross-examination that on learning of their father's death, they went to the home for the funeral meetings but they were beaten up by the Respondent's sons and sent away. They reported to the Chief who advised them to attend the funeral as other mourners which they did and they were not recognized.

From the totality of the evidence and events that unfolded, it is not disputed that the deceased had the 3 children; David Munyua Rurigi, George Kariuki Rurigi and Michael Gathiru Rurigi while he lived with

PW2. It is not disputed that the 3 children left with their mother when she separated from the deceased. It is also confirmed from meetings with elders and local administration and protracted litigation between the deceased and the Objector that the deceased was in touch with the Objectors. This Court finds that the 3 Protestors are children of the deceased as they were in contact with their father during his lifetime and sought land to build on. There is evidence from PW 2 The deceased's nephew that the deceased wanted to give the Objector land.

They are eligible to inherit from their late father's estate as they are dependants, children of the deceased even if they were not maintained by the deceased prior to his death.

With regard to distribution of the estate; the Respondent stated she was married to the deceased in 1979 as shown by the marriage certificate and they had 5 children. The suit property Kiambaa/ Kanunga/1241 was ancestral land, the deceased inherited from his late father but was registered jointly in the deceased's and her name in 1996. They developed the land and have incurred expenses in protracted litigation over the land and therefore by virtue of **Section 60 and section 91(4) of Land Registration Act of 2012**; the joint tenancy can only revert to the other tenant and no one else.

The Protestors testified that through their brother Michael Gathuru Rurigi; they pursued their rightful inheritance from their father during his lifetime and he conceded to allocate them land but the Respondent adamantly refused and prevailed upon the deceased to have the suit property registered jointly in both their names.

This evidence was not controverted by any other evidence to cast reasonable doubt so on a balance of probability, therefore the joint registration over the suit property which land was not acquired during the Petitioner's and deceased's marriage but inherited by the deceased from his father as ancestral land; strongly suggests the registration was to ensure and prevent the children of the 1st family from not interfering or successfully claiming their rightful share of their grandfather's land. In the instant case a party cannot benefit from the law while violating other's legal right over the suit property. This Court is inclined to distribute the suit property equitably to the widow and her children and children of the deceased.

DISPOSITION

The Court orders as follows;

- 1) The Affidavit of Protest filed on 17th April 2012 is upheld**
- 2) Hannah Muthoni PW2 did not establish marriage between her and the deceased under Kikuyu Customary Law and after separation; she was married by somebody else. Therefore her claim to the deceased's estate fails.**
- 3) The Summons for Confirmation shall be amended and confirmed in terms of Section 71 of Law of Succession Act Cap 160 as follows;**
 - a. Kiambaa/Kanunga/1241; 5 acres distributed 50%/50% between deceased and Respondent widow thus; 2 1/2 acres to the widow Agnes Mwhiki Rurigi and 5 children and 2 1/2 acres for the deceased.**
 - b. Of the deceased's 2 1/2 acres it is divided into 2 parts; 1 1/4 acres for the children of 1st Family David Munyua**
 - c. Rurigi, George Kariuki Rurigi and Michael Gathuru Rurigi and**
 - d. 1 1/4 acres for the Respondent/ widow of the deceased and the 5 children namely Stephen Njoroge Rurigi; John Njuguna Rurigi Lucy Wambui Rurigi Samuel Wahome Rurigi and Joseph Munyua Rurigi.**

e. Each party to bear their own Costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 2ND FEBRUARY 2017

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF :

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