

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 3664 OF 2004

IN THE MATTER OF THE ESTATE OF GEORGE WAIGANJO MBURU (DECEASED)

JUDGMENT

1. On 31st January 2014, I delivered a ruling wherein I revoked the grants made in the two causes that had been initiated in the estate of the deceased, and appointed the brother and the widow of the deceased administrators of the estate of the deceased in the consolidated cause. I also cancelled a certificate of confirmation, and directed the parties to a fresh application for confirmation of the grant.

2. I have carefully perused through the court file, but I have not come across a fresh confirmation application. The parties, however, did conduct a trial on the distribution of the estate that notwithstanding, I shall presume that the trial was founded on the confirmation application on record filed in HCSC No. 5 of 2007, dated 22nd November 2007 and filed herein on 13th December 2007.

3. The application of 22nd November 2007 was brought before the consolidation of the causes on 1st December 2008 and the orders made on 31st January 2014 revoking the grant made to the administrators who had brought that application. The administrators identified the survivors of the deceased as the widow and her nine (9) children. They also identified the three (3) assets that made up the estate, being Karai/Gikambura/677, Karai/Gikambura/705 and Nachu/Ndacha/180. It was proposed that Karai/Gikambura/677 be given to the widow to hold in trust for her children, while Karai/Gikambura/705 was to go to Margaret Wambui Waiganjo, absolutely, and Nachu/Ndacha/180 to Mary Muchiku Muroki.

4. To that application, Peter Ndungu Mburu, filed an affidavit of protest, sworn on 19th June 2008. His protest centres on Karai/Gikambura/677. He argues that the said parcel of land was family land; therefore it did not belong to the deceased, who was his blood brother, exclusively. He states that the same belonged to their late father, and therefore the deceased held the same in trust for him.

5. The widow of the deceased and the deceased's brother had brought separate causes in respect of the estate of the deceased. The said causes were consolidated, the grants made in both revoked and the widow and the brother of the deceased appointed joint administrators. The current proceedings ought to be seen in that light.

6. The parties recorded a consent on 1st March 2016 on disposal of two of the parcels of land, being Karai/Gikambura/705 and Nachu/Ndacha/180, to Margaret Wambui Waiganjo and Mary Muchiku Muroki, respectively. That left Karai/Gikambura/677 undistributed, and it was agreed by consent that oral evidence be taken on its distribution.

7. The oral hearing commenced on 11th May 2016. The first on the witness stand was Peter Ndungu Mburu, hereafter referred to as the protestor. He testified that the property in question belonged to his late father, Mburu Nduma, who died in 1953 before land demarcation was done. Demarcation was done in 1957, and the property was registered in the name of the deceased herein as the protestor was still a small child. He testified that the said land was part of a larger piece of land measuring ten (10) acres. At demarcation, it was allotted to the father's three wives, each getting three acres, with an additional acre to the protestor's mother, making four for her. She later bought another one acre, making a total of five acres. All these were registered in the name of the deceased, as women were then not entitled to inheritance from their husbands. He said that Kagone and Godfrey Mburu were registered as proprietors for the property due to their mothers. Their mother had three sons, being the protestor, the deceased and another. The other was given another piece of land situated at Muguga, and therefore he had no claim to

the land in dispute. The protestor allegedly asked the deceased for his share of the land, but the former refused. A dispute erupted which ended up at the office of the Chief of Karai Location. It was ruled that the protestor be given two and half acres out of the land. The deceased passed on before that could happen. Upon that death, the protestor obtained representation to the estate and had the property subdivided and shared equally between himself and the widow of the deceased. It was that distribution that the court cancelled. On cross-examination, he stated that he lived at Loitokitok on land that he had bought in 1978. He denied being assisted by his brother to acquire the Loitokitok property. He also denied that at customary law the deceased, as elder brother, was entitled to a larger share of the property.

8. The protestor called his half-brother, Godfrey George Mburu, as his witness. He stated that Karai/Gikambura/677 was part of the larger land of the deceased. The original land was said to be ten acres that was divided equally between the witness's father's three wives, with the protestor's mother, being the senior wife, getting four acres, while the other two wives got two acres each. He testified that the three portions were registered in the names of the first sons in each house, being the deceased, the witness himself and Kagone alias Njenga. He explained that it was common practice then for property to be registered in the name of only one son instead of the widow. He stated that he became the sole proprietor of his mother's share for he was the only child of his father's second wife. For the deceased, he said his first step-mother had three sons. One of the sons got land at Muguga, leaving the deceased to share Karai/Gikambura/677 with the protestor. He stated that the deceased held the property in trust for the protestor, and since the land was five acres, for his stepmother had bought an additional acre, the land should have been shared at the ratio of two and half acres between the two of them. He explained that the protestor was in school at the time of land registration, and when he sought his share after school, the deceased declined. The matter was referred to the local Chief, where it was directed that the deceased ought to cede half share of the land to the applicant. That never happened. The protestor then bought land at Loitokitok and settled there even as he fought for his share of Karai/Gikambura/677.

9. The widow of the deceased did not call or adduce evidence to support the confirmation application.

10. At the conclusion of the proceedings, the parties invited me to decide the matter on the basis of the evidence adduced.

11. As the widow did not call any evidence, the protestor's case was not challenged, and the evidence adduced was not contradicted or controverted. In the absence of counter evidence, I shall hold that the version of events as narrated by the protestor and his witness represents the true state of affairs. The protestor is entitled to half share of Karai/Gikambura/677, for the deceased held the property in trust for himself and the protestor. The grant that I made herein on 31st January 2014 shall be confirmed in those terms. Orders accordingly.

12. I note that the estate comprises of assets situated at Karai/Gikambura of the Kikuyu Sub-County of Kiambu County. The matter shall subsequently be transferred to the High Court of Kenya at Kiambu for final disposal.

DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE