



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
SUCCESSION CAUSE NO.131 OF 2015
(FORMERLY CHUKA SUCCESSION CAUSE NO. 7 OF 2007)
IN THE MATTER OF THE ESTATE OF THE LATE NJIEMA NJERU M'CHIMBA
(DECEASED)

AND

FESTUS GITINGA MUKIRI.....PETITIONER

- VERSUS -

PATRICK JEVIEV KANGA..... OBJECTOR

J U D G M E N T

1. This cause relates to the estate of the late **NJIEMA NJERU M'CHIMBA** (deceased herein) who died intestate on 15th November, 2006 at Chuka Hospital in the now Tharaka Nithi County (then referred to as Meru South). As per the petition for Letters of Administration herein, the deceased died and left the following dependants surviving him,

- (i) Festus Gitonga Mukiri (Petitioner)
- (ii) Bedford Kinyua Mukiri
- (iii) Francis Mugambi Mukiri
- (iv) Asford Mugambi Mukiri
- (v) Douglas Mugambi Mukiri
- (vi) Elosy Cianthuni Mukiri
- (vii) Euriter Ciambuba Mukiri
- (viii) Milliah Kaari Mukiri
- (ix) Kesia Kagendo Mukiri
- (x) Dorothy Kawira Mukiri

2. The assets comprising the estate in this cause are as follows:-

a) **Parcel of land LR No. KARINGANI.MUGIRIRWA/1755**

b) **L.R. KARINGANI/MUGIRIRWA/1756**

3. The Petitioner/Respondent, **FESTUS GITONGA MUKIRI** was appointed the administrator and issued with the Letters of Administration in respect to the estate of the deceased herein on 18th April, 2007 and when he applied for confirmation of the said grant vide summons dated 24th December, 2007, the Objector, **PATRICK JEVIEW KANGA** filed an affidavit of protest sworn on 24th March, 2008 claiming that he was entitled to a share in the estate as a nephew to the deceased. At the time of filing the protest, he also deponed that there was a pending civil matter vide **Embu HCC No. 49 of 2004** where he alleged that the deceased had sued him over the ownership of Parcel No. **KARINGANI/MUGIRIRWA/1756**.

4. At the hearing of the protest canvassed through oral evidence, the Objector adopted his Affidavit of protest above and further denied that the deceased was a brother to Grace Kagige- Objector's mother. On cross-examination the Objector claimed that he was claiming the estate because he was a dependant as the deceased took care of him since childhood. He admitted that he had his own father who however died landless. He further conceded that he lost a case against the deceased in a Tribunal which determined that **KARINGANI/MUGIRIRWA/1756** belonged to the deceased.

5. In his written submissions dated 5th June, 2017 the Objector has contended that the Land Disputes Tribunal ruled in his favour that he should take his possession of **KARINGANI/MUGIRIRWA/1756** together with his brother and mother. He has further argued that her mother Grace Kagige was the administrator of the estate of his grandfather where parcel No. **KARINGANI/MUGIRIRWA/569** was subdivided into **KARINGANI/MUGIRIRWA/1755** and 1756. He submits that parcel No.1755 was sold by his mother to one **DELFINO MURITHI** who in turn sold it to the deceased herein. It is his contention that parcel No. 1756 should be distributed to him, his mother Grace Kagige and his brother Benson Mukuru. He contends that they three should benefit as '**dependants**' within the meaning given under **Section 29 of Law of Succession Act (Cap160) Laws of Kenya**. He has further urged this court to hold that the deceased held the parcel **No.1756** in trust for him, his mother and the named brother. He has further submitted that he has been in occupation of the said parcel as long as he could remember and knows no other home apart from that parcel. He has claimed that the Petitioner should be contended with parcel No. **KARINGANI/MUGIRIRWA/480**.

6. The Petitioner, Festus Gitonga Mukiri on his part testified that he was a son of the deceased and that prior to his demise he had divided his properties and gifted his children their respective shares as per his proposed mode of distribution in his affidavit sworn on 27th June, 2016. He further stated that the deceased had even called a surveyor to formalize the subdivision but that the same was not finalized as they did not acquire their respective title deeds. He argued that he did not include the Objector as a beneficiary because he was not a child of the deceased. According to the Petitioner, the Objector should claim a share from his parents including his mother who is still alive. He denied that the Objector was brought up or taken care by his father. He also confirmed that parcel

No. KARINGANI/MUGIRIRWA/1756 was carved out of the original parcel **No. KARINGANI/MUGIRIRWA/569** and that the subdivision of the original parcel saw the creation of two parcels **No.1755** and **1756**. He stated that parcel **No.1755** was initially sold to one Delfino Murithi who in turn sold it to the deceased.

7. Grace Kagige (DW₂) a mother to the Objector gave evidence before this court and stated that the Objector was her son and that his father was one **NJOKA M'KANGA THUMBI** (deceased). She further told this court the deceased herein was her brother and that she was the one who petitioned for Letters of Administration of the estate of the late Macharia M'Chimba who was their father and that she was the appointed administratrix. She further added that the estate of her late father comprised

KARINGANI/MUGIRIRWA 569 and tendered a copy of the green card as D Exh 1 in support of her claims. According to her when the said estate transmitted to her, she sub-divided the same into two portions parcel **No.1755** and **1756**. She then transferred parcel No. 1756 to the deceased herein as his share and retained parcel No.1755 which she later sold to Delfino Murithi after her son the Objector herein allegedly disturbed her. Later Delfino Murithi later sold the same parcel No.1755 to the deceased herein.

8. According to DW₂, her son the Objector herein took her and Delfino to a Land Disputes Tribunal which ruled in his favour. She tendered the proceedings of the tribunal as D Exh 2. She however added that she appealed to Appeals Tribunal who overturned the decision and ruled in her favour and that of Delfino. She produced the court proceedings capturing the adopting decision of the Appeals Tribunal as D. Exh 3. The court then decreed that the Objector be evicted from parcel **No.KARINGANI/MUGIRIRWA/569**. The witness added that the Objector had no right to claim anything from the estate herein because he was not a child of the deceased and that the children of the deceased should be the ones benefitting from the estate.

9. The Petitioner in his written submissions has contended that the deceased herein was the sole owner of the property comprising the estate and pointed out that the Objector was neither a child nor the dependant of the deceased. The Petitioner has pointed out that the Objector was a trespasser as demonstrated by a civil suit in *Embu Civil Suit No.49 of 2004* where he was ordered to be evicted.

10. The court has considered the evidence tendered by both parties to the dispute herein and the written submissions by both the objector and the Petitioner's Counsel. The only issue for determination in the protest filed is whether or not the Objector is a beneficiary on account of being a child or a dependant within the meaning of **Section 29** of the **Law of Succession Act** (Cap 160 Laws of Kenya).

11.The objector admits that he was not a child of the deceased. This therefore means that there is no dispute that he cannot claim an automatic right to inherit a share of the estate by virtue of **Section 29 (a)** of the **Law of Succession Act**. His right to the estate can only accrue by virtue of **Section 29(b)** of the **Law of Succession Act** which provides that a relative of a deceased person as described therein can be considered a '*dependant*' if the deceased prior, to his demise took care of him and provided for him. The Objector herein at the hearing did not allude to this fact. Infact he swore an Affidavit on 4th March, 2008 alluding that the deceased did not relate to him well and that he had sued him vide *Embu H.C Civil suit No. 49 of 2004*. Although he did not provide evidence of existence of that suit and its outcome, the nature of his claim in the estate going by his own affidavit is ownership rather than a right to inherit from the deceased.

12. This court finds a contradiction in his submissions when he claims that he was a dependant to the deceased. The submissions made are in conflict with the contents of his own Affidavit. Furthermore the evidence tendered by his own witnesses clearly shows that he is not claiming a share of the estate as a dependant. Infact the witnesses were categorical that the parcel which should be handed to the Objector was **KARINGANI/MUGIRIRWA/1756**. The Objector states that the deceased held the said property in trust for him and his mother Grace Kagige. If that is true then the claim by the Objector takes his claim beyond the preview of the Law of Succession Act and this court sitting as a probate court. Besides that Grace Kagige herself in her evidence disputed this fact.

13. The Law of Succession Act Cap (160 Laws of Kenya) was enacted to define and consolidate the law relating to intestate and testamentary succession and the administration of the estate of deceased persons. The application of the Act only relates to estates of deceased persons and purposes connected therewith and incidental thereto. There is no dispute and this court finds it as a matter of undisputed fact that the estate in this cause comprises the following properties:-

a) **KARINGANI/MUGIRIRWA/1755**

b) **KARINGANI/MUGIRIRWA/1756**

The copy of the title and official searches provided to this court demonstrates this factual finding. The Objector's claim in parcel No.1756 clearly show that his claim is based on ownership of that parcel and this is explained by the history of the land disputes at that Land Disputes Tribunal as per the proceedings tendered as **D. Exh 2** and **D. Exh.3**. The Objector's protest clearly shows that the same is a furtherance of that claim which as I have said is beyond the jurisdiction of this court sitting as a probate court. The jurisdiction to deal with disputes relating to land is donated to Environment and Land Court established under **Article 162(2)(b)** of the **Constitution of Kenya 2010**. That court is given exclusive jurisdiction to deal with all disputes relating to land by **Section 13** of **Environment and Land Court Act** (Cap 12A Laws of Kenya).

14. This court finds that this court lacks jurisdiction to entertain the Objector's claim in so far as the same is anchored on claims of ownership over part of the estate (parcel No.1756). In so far as his claim is based on dependency, this court finds that his claim is not supported by the evidence tendered. The Objector's own mother clearly told this court that the Objector was not entitled to the estate because the estate belongs to the children of the deceased. This court has considered the evidence tendered and finds that the Objector's claim over the estate is unsustainable in law.

15. The Protestor's claim is not supported by either the law or evidence tendered and must therefore fail.

The upshot of this is that the protests against the confirmation of grant herein fails. The grant issued to the Petitioner on 18th April, 2007 is hereby confirmed and in the view of the fact that the children of the deceased are in consensus on the question of distribution of the estate, the estate shall be distributed as per the proposed mode by the administrator under paragraph 3 of his Supporting Affidavit sworn on 24th December, 2007. The Objector shall pay costs of the protest.

Dated and delivered at Chuka this 20th day of July, 2017.

R. K. LIMO

JUDGE

20/7/2017

Judgment signed, dated and delivered in open court in the presence of Mugo for Petitioner and Protestor in person.

R.K. LIMO

JUDGE

20/7/2017