



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
IN THE MATTER OF THE ESTATE OF CHEGE MACHARIA(DECEASED)
SUCCESSION CAUSE 2555 OF 1997

RULING

PLEADINGS

Chege Macharia died on 23rd July 1989.

The Applicant Margaret Nduta Chege filed application on 27th January 2014 brought under Section 76 of Law of Succession Act and Rules 49,63 & 73 of Probate and Administration Rules. The Applicant sought that ;

- a) pending hearing and determination of this application the Court restrains the Respondent Mbugua Miruru by himself , servants employees or by 3rd parties not to interfere with the Applicant's quiet enjoyment of the suit property;
- b) The Court orders of 19th July 2004 to be set aside varied and all consequential orders;
- c)The Court orders nullification of L.R. Dagoretti/Waithaka 2771,2772,2773 and to restore them to Title Dagoretti /Waithaka 181
- d) The Court orders subdivision and/or distribution of Dagorretti/Waithaka/181 be in accordance with the written wishes of the late Chege Macharia; late Kamau Kibirichu and Mbugua Miruru and title deeds be issued accordingly.
- e) The certificate of confirmation of grant be rectified in the said manner to reflect the 3 brothers written wishes.

The Respondent filed Replying affidavit on 26th January 2015 and opposed the application and stated that the suit property L.R Dagoretti /Waithaka 181belonged to their father Karubichu Kiarie and he had 2 wives, namely Wangare Karubichu who had 2 sons Chege Macharia (the deceased herein)and Mbugua Miruru. Wanjiku Karubichu had 1 son Kamau Karubichu.

The suit property was subdivided into 4 portions as ordered by Hon Kamau J of 19th July 2004 and Hon Onyancha J in 2007. The subdivision was done in consultation with all parties and the Applicant was allocated 0.60 acres. The Applicant has obtained her share of the suit property and has no basis clinging to his land without justification and ought to be evicted.

HEARING

On 7th April 2015, the Applicant testified she was 2nd wife and is a widow of the deceased and lived on the suit property from when she was married to date.

She relied on the substance of the application filed and Further affidavit filed on 11th February 2015 as her evidence. The witness stated that the suit property is family and ancestral land. She reiterated that she is aware that the 3 brothers agreed and resolved their dispute over the suit property that each of them would have their respective share over the suit property as follows; Chege Macharia 130 points, Mbugua Miruru 80 points and Kamau Karubichu 160 points as evidenced by letter dated 22nd June 1981 from Office of District Officer Dagoretti D.M.L.S. Case No 16 of 1968 Assistant Land Registrar Nairobi Parcel Number Dagoretti /Waithaka/181. The 3 brothers went to the Land Consent Board and obtained consents to subdivide the suit property as agreed as shown on the land Board Consent form marked **MNC3** attached to her application dated 11th July 1988.

The widow of the deceased contended that she was not consulted, involved and did not consent to obtaining grant over Chege Macharia, her late husband's estate. She did not sign or thumbprint any of the documents filed in Court. She was not served with the various applications and did not participate in court proceedings that culminated to orders of 10th July 2000 by Hon Justice Visram, 19th July 2004 by Hon Justice Kamau, 9th October 2006 by Hon. Justice Rawal and 18th December 2007 by Hon Justice Onyancha. There are on record 2 orders of Certificates of Confirmation; in **Succession Cause 2554 of 1997** estate of Wangare Karibuchu (wife to the deceased's father) and in **Succession Cause 2555 of 1997** (instant case) both deal with the distribution of the same suit property but with different and varied modes of distribution.

The Applicant deposed that she was not aware of the manner and method of sub-division and distribution of the deceased's estate. The sub division was done irregularly, fraudulently and in total secrecy. The subdivision deprived her of the 20 points that were due to the deceased's husband. She delayed in filing the instant application because she was in the dark about what was happening with regard to the deceased's estate. The Respondent has served her notice marked **MNC1** as attached to the application to evict her and family from the suit property.

In cross examination, the widow of the deceased stated that when she was married to the deceased in 1965, she did not find the 1st wife Veronica as she left the matrimonial home. She came back 2-3 years after their husband's death. She asserted that contrary to the agreement filed in Court as to the distribution of their late husband's share amongst the 2 wives, she was not involved and did not participate in the meeting that culminated in the agreement drawn and allegedly signed by her and co wife in the presence of family members. Yet despite the fact that she did not sign the said Agreement, the co wife Veronica obtained her share of the suit property and has title documents for the share from the suit property.

Daniel Kamau Kinina Karigichu, brother to the deceased relied on the affidavit filed

26th January 2015 in which he stated that the suit property Dagoretti /Waithaka/181

belonged to their father Karubichu Kiarie. He had 2 wives, Wangare Karubichu mother to Chege Macharia (deceased) and Mbugua Miruru and Wanjiku had 1 child that is him. The suit property was subdivided pursuant to the orders of Hon Justice Kamau in 2004 and Hon. Justice Onyancha in 2007 as attached as **KK1**. The suit property was subdivided with consultations of all parties and the Applicant widow to the deceased was allocated 0.6 acres. The detailed literature of how the land was subdivided and the family history was attached and marked as **KK2**. He obtained his portion 1.6 acres and sub divided into 6 pieces. Therefore the Applicant's application is malicious, frivolous and she has no basis clinging on his portion.

In his testimony, the witness denied that the deceased, himself and brother Miruru agreed and settled their dispute of the suit property. He claimed he did not attend the meeting and did not sign the letter dated 22nd June 1981. He stated that the meeting was to transfer the suit property from their father's name to their joint names. He admitted they all went to the Land Consent Board and sought consent to subdivide the land and in portions as they agreed.

Daniel Karigichu confirmed that upon their brother's death, he pursued the death certificate and Miruru obtained his ID card from the family and they filed Succession Cause without consent of the deceased's widow. They confirmed the grant and Hon Justice Visram ordered the suit property be distributed in the following manner;

Chege Macharia 130 points

Mbugua Miruru 80 points

Kamau Karigichu 160 points

This order was not implemented. he confirmed that by the letter dated 17th July 1999; it was agreed that the suit property would be registered in the names of all beneficiaries of their late father in the following manner;

Chege Macharia 80 points

Mbugua Miruru 80 points

Wangare Karibuchu 50 points

Kamau Karibichu 80 points

Kiarie Miruru 80 points

When his brother Kiarie died he took over his share and now had 160 points. When his stepmother Wangare Karibuchu died the 50 points were taken over by Chege Macharia and no share was given to Mbugua Miruru and is a bone of contention.

the witness stated that the Petitioner /Applicant refused any discussion, consent or participation regarding distribution of the estate. She refused everything. He and his brother got elders and decided to proceed with distribution, subdivision of the land and allocated her the rightful share of the suit property. They got elders who determined that the 50 points of Wangare Karugichu be divided into 30 points to Chege Macharia and 20points to Miruru. They appealed Hon. Justice Visram's order and Hon Justice Kamau reviewed the orders in their favour.

Mbugua Miruru the Respondent relied on his Replying affidavits of 11th December 2013 as stated above. His testimony was that the deceased is his late older brother and husband to the Petitioner/Applicant. He stated that he was brought to Court because he insisted and hived off some land from the suit property as he is also entitled to a share of the portion of land left to their mother. Instead of the Deceased being allocated all of their late mother's 50 points on the said land, he demanded and gave himself in the presence of elders 20 points and left the Petitioner/Applicant 30 points. So he processed the obtaining of grant, confirmation of grant and subdivision without the Petitioner/Applicant's consent as she refused to take out letters of administration participate in the proceedings. They subdivided the land and he did not take anyone's property but his share only; 1 acre and the Applicant 1.10 acres. Each party has a title document which the Applicant refused to pick from him and pay the rates.

In cross examination, he confirmed that the deceased kept the title document of the suit property and on his death from a road accident, he went to his house took the key to the place where he kept the title document and took it and his identity card. He processed the burial permit and got the death certificate of his late brother.

At the time , the deceased lived in the adjacent house and his daughter took care of him and the Applicant lived separately.

Veronichah the deceased's first wife had left the matrimonial home with 6 children and later the deceased

asked him to bring her back home.

In cross examination, he said that the Petition for letters of administration was not signed by the Applicant, she was not present during confirmation of grant . He had the orders of Hon Justice Visram that the Deceased was entitled to 50 shares of the suit property from their mother alone reviewed.

He proceeded to subdivide the suit property Dagoretti /Waithaka/181and the Applicant objected and her daughter called the Chief to stop the subdivision. there are graves on the land of about 7 family members and the Applicant refused to leave the burial site. the applicant lives on his land, she built a house. She has a shamba and lives on the land with her children. She has built houses for rent. The subdivision was not completed. All beneficiaries want land near the road and the Surveyor stated that it is not possible. He confirmed that he obtained grants from the estate of their late mother in **Succession Cause 2554 of 1997** and from the estate of his late brother in **Succession Cause 2555 of 1997** and combined both in the process of subdivision.

He reiterated that he did not take advantage of the deceased's family now that he is deceased instead he is pursuing his share of the land from the father and his mother.

He did not sign the letter of 22nd June 1981and is of the view that the 50 points from their mother should be shared between him and his late brother which is what the Applicant refused. He wants the Applicant to vacate his part of the land.

Joseph Kamau Chege is the son of Chege Kamau and Veronicah Chege , the deceased's first wife and widow. He informed Court that he took both wives of his father to FIDA for legal assistance. Their matter was determined by Hon. Justice Rawal on 6th December 2006. they went to Land Consent board and were allowed to subdivide the land. He alleged that the Applicant was in Court at all times. The portion allocated to his mother Veronicah Chege be left intact.

In cross examination he stated , the dispute is between the Applicant and Respondent, the Respondent claims the Petitioner is on his land and claims a bigger share , which if allowed will affect his share from his mother Veronicah which is also ashare from the Deceased's portion divided between both wives.

He confirmed that the Applicant was left out in the court proceedings to obtain grant of letters of administration. He investigated and found that the Respondent filed Succession 2554 of 1997 for his mother's estate over the same suit property. When subdivision was conducted, they were allocated land near the flood area, and not near the Main road. The witness and Applicant filed an application in Court on 4th May 1999, but the Respondent and his brother proceeded to subdivide the land as they wished. The widows of the deceased were not involved in the distribution of the suit property. They had agreed that the land be distributed according to the deceased's wishes and what they had agreed but the Respondent changed this position.

He confirmed that he took the Applicant to FIDA and various affidavits were filed in Court by the Applicant, he could not tell if the signatures were forged or not. The witness contradicted his earlier statement that he , his mother and the Applicant objected to the subdivision and now changed to the fact that he agreed to the subdivision.

Each of the parties filed written submissions on the matter and reiterated the evidence on record.

ISSUES

- 1. Was the Applicant involved in the process of obtaining grant of letters of administration for deceased's estate?**
- 2. Were the grants and confirmed grants obtained in compliance with Section 76 of Law Of Succession Act Cap 160?**

3. What share of the suit property Dagoretti /Waithaka/181 was the Deceased and his brother and Respondent entitled to?

4. Was the Petitioner involved in the subdivision of the suit property?

5. Should the Court orders of 19th July 2004 be upheld or vacated?

6. Should the Petitioner/Applicant and her family vacate their part of the land?

DETERMINATION:

The Applicant brought the application under Section 76 of Law of Succession Act Cap 160;

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

a) That the proceedings to obtain the grant were defective in substance;

b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.....

From the evidence on record the Petitioner Applicant contended that although she was appointed one of the administrators of the deceased's estate she did not participate in the succession proceedings.

This Court perused the Court file and found as follows;

a) The widows and children of the deceased were not appointed administrators of the deceased's estate as required under **Section 66 of Law of Succession Act Cap 160**. The administrators are Mbugua Miruru and Kamau Karubichu brothers of the deceased. They on their own evidence admitted to obtaining the deceased's identity card, title deed for the suit property from the deceased's house without knowledge and/or approval of the widow. So their claim that the widow refused everything they told her and to file petition for grant of letters of administration is not borne out by evidence. They could have filed and served her with citation and default of appearance after the requisite period then file the petition for grant of letters of administration for the deceased's estate.

b) The Administrators nominated and appointed themselves administrators of the deceased's estate without consents from the beneficiaries of the deceased's estate as required by **Part VII rule 26 of Probate and Administration Rules**. The administrators are appointed with consents from family of the deceased by family or by the Court as prescribed by **Section 66 of Law of Succession Act Cap 160**.

c) The Widow of the deceased did not participate and consent to the confirmation of grant of 14th January 1999 of the deceased's estate. The summons for confirmation stipulated the portion the deceased was entitled to from the suit property and the distribution between her and co -widow. This proposed modes of distribution were not discussed and or agreed upon. It is confirmed from the record that there are 2 subsisting confirmation of grants over the same suit property L.R. Dagoretti /Waithaka/181 one for the deceased's estate in the present Court file and another confirmed grant from the estate of Wangare Karibichu (their late mother) in Court file **Succession Cause 2554 of 1997** which belonged to the deceased's father and now was transferred to the administrators, brothers of the deceased and the deceased himself.

d) Despite notes on record to indicate that the family met and agreed on subdivision and distribution of the deceased's estate between first the 3 brothers, and then between the 2 wives of the deceased, the

Applicant confirmed that she was not a party and she did not participate and sign that she agreed to the distribution of the deceased's estate. If she did, she would have withdrawn the instant application.

e) The Applicant stated that she is advanced in age and not literate but she did not sign the filed documents at all. Curiously, the Court finds that some documents are signed Margaret Nduta (alleged family agreement and Supporting affidavit of 10th June 1998), others Margaret Nduta Chege (Replying affidavit filed on 13th December 2007 surely such diverse signatures cannot all be from the same person and hand.

For the above mentioned reasons, this Court finds that the grant issued on 12th January 1998 and confirmed on 14th January 1999 is revoked as the proceedings to obtain grant were defective and there was concealment of material facts to the Court.

The second issue is with regard to the subdivision and distribution of the suit property Dagoretti/Waithaka/181. The Petitioner /Applicant testified in court and this Court observed the Claimant's demeanor was one of a calm deliberate and consistent testimony as she relied on the pleadings and evidence on record. The gist of her case is that before her husband died in 1989, Chege Macharia (deceased) had 130 points, Mbugua Miruru 80 points and Kamau Karibuchu 160 points agreed by letter of 22nd June 1981 on how to distribute the suit property that was registered in their late father's name. They agreed and went together to Lands Control Board as shown by the annexed document and consented to subdivision of the agreed terms. Attached is also a letter from the Executive Officer of the District Magistrate's Court dated 28th April 1970 confirming to the deceased that the matter of their land was resolved on 24th October 1968 and was advised to file certificate of Succession. Also annexed, is the list of cases heard by the Land Control Board on 3rd February 1988 among these listed is the Application 20 of 1988 Dagoretti /Waithaka/181 and the agreed portions to the 3 brothers. This Court perused the Court file and testimony from witnesses on record, there is no evidence that the Applicant was informed, involved in the process of subdivision of the suit property and subsequent issuance of titles to the subdivided portions. There is no document signed by the Applicant that she agreed to the subdivision. It is curious to note that she ought to be an administrator of her late husband's estate.

After Chege Macharia died in 1989 that is when the Respondent Mbugua Miruru pursued his share of 50 points formerly of their late mother Wangare Karubichu who died in 1978 and her 50 points were taken over by Chege Macharia. Hence the letter of 22nd June 1981 that confirmed the agreement of subdivision of the suit property Dagoretti /Waithaka/18. The letter is signed by all 3 brothers. The letter was from the 3 brothers to the District Officer Dagoretti. The 3 brothers went to the Land Control Board and obtained consents to subdivide the suit property into 3 portions; Kamau Karubichu 1.60 points, Chege Macharia 1.30 points and Mbugua Miruru 80 points. The Application for Land Consent board is signed on 11 July 1988. Kamau Karubichu denied signing the letter of 22nd June 1981 but the same information is contained in the Application for Consent of Land Control Board. Yet the Respondent Mbugua Miruru and Kamau Karubichu did not challenge these processes and documents until after the deceased died, now from the deceased's estate. The letter of 22nd June 1981 was unchallenged except by Kamau Karubichu who claimed that he did not sign the letter. The same subdivision was upheld by Hon. Justice Visram in July 2000. In his Ruling, the judge noted as follows;

It is deposed that despite the inclusion of deceased's wives as co-administrators of the 1st deceased's estate, Mbugua Miruru and Kamau Karubichu unilaterally subdivided Title Dagoretti/Waithaka without accordance to an earlier agreement which is annexed MNC1.....

it has not been hard for me to see that previous transactions were more favorable to the 1st deceased's family. now his wives are left to 'negotiate' with his brother and step brother. from their objections which have been fairly consistent they did not pretend to trust favor from his brother and step brother. If this land had been divided during the 1st deceased's lifetime, he was clearly to receive 130 points. This what his widows can accept. Is this the reason they are refusing to act with other administrators? If so, I agree with them that unless this is rectified, they are justified to refuse to lend their hand to a transaction likely not to effect their right. That seems fair.

Despite this order, the brothers moved to similar Courts of equal and competent jurisdiction and sought review of Hon. Justice Visram's Orders. Hon Justice Kamau set the orders aside and instead set the ruling with subsequent orders aside and ordered that the widow obtains 1.1 acres as 'agreed' in the confirmed grants of 14th January 1999 in **Succession Cause 2554 and 2555 of 1997** and not 130 points as confirmed earlier between the brothers when the deceased was alive. As considered above the confirmed grants were not regularly and legally obtained as required under **Section 71 of the Law of Succession Act Cap 160**. The subsequent orders from Hon . Lady Justice Rawal of 9th October 2006 and Hon Justice Onyancha of 18th December 2007 were to authorize Deputy Registrar to sign transfer forms for and on behalf of the Applicant, widow of the deceased.

The brothers did not raise any issue regarding ownership and subdivision of the suit property until after their late brother's death. The Respondent in his testimony in court, admittedly confirmed that after his brother's death, he obtained the title document to the suit property and the deceased's Identity card from the deceased's house and unknown to the widow and he did not inform her and with his brother undertook the process to obtain grant of the deceased's estate. From 1981 to 1989, the Respondent DW1 and brother DW2 should have raised any concerns they had with the deceased regarding their portion of the suit property. To do so after his death amounts to harassment and vindictiveness on their part to his family.

The Respondent through Counsel submitted that the distribution of the suit property was unfair and unjust to him by allocating the 50 points that belonged to their mother Wangare Karubichu to Chege Macharia the deceased instead of distributing the said points in half to each son as required under Section 35 of Law of Succession Act. If there was a dispute as to portions of land amongst the brothers over the suit property; the same ought to have been resolved amongst them while deceased was alive. Alternatively, if the suit property is to be shared equally under Section 35 Law of Succession Act; then it ought to be the total points $130+80+160=370$ points and each would have 1.25 points of the land. This was not canvassed and agreed. the agreed portions before deceased's death were 80 points for Mbugua Miruru, 160 for Kamau Karibichu and 130 points for Chege Macharia. I have found no evidence of fraud or forgery of the said documents that depict the stated subdivision, or evidence that there was a subsisting dispute over the distribution during the deceased's life. it is unconscionable for the Respondent to visit his claim to the deceased's family at this point.

Lastly, this Court takes issue with the evidence of DW3 Joseph Kamau Chege son of Veronicah Chege 1st widow of the deceased, whom they parted ways and she came back after the deceased's death to the suit property. When testified in examination in chief, he stated that the Applicant Margaret Nduta Chege, his stepmother, was demanding more land but he was satisfied with the portion they got from the suit property as the Applicant did not deny or refuse his mother and since she is ill he did not want further litigation as they had all agreed.

Yet in cross examination he admitted he took his mother and stepmother the Applicant to FIDA and they swore affidavits and filed matter in Court contesting the 130 points that belonged to their father and not the 110 points they had been allocated. He admitted that he cosigned affidavits with the Applicant and contended that they were not involved in the distribution of the suit property. they did not participate in any family meeting on the issue and they did not consent to subdivision. They wanted the land subdivided as per their father's wishes. He had also complained that after subdivision they were allocated land in the flood area and there was no road access.

From the evidence above the witness testimony is contradictory and inconsistent. he started of claiming their rightful share from the suit property as per their father's portion. Upon being lured by the Respondent and his mother was allocated a portion of the suit property; he abandoned his quest and is now satisfied and not claiming their rightful share. his testimony is unreliable and of no probative value as he is an unreliable witness.

DISPOSITION

The court after considering pleadings filed and evidence adduced finds as follows;

1. The application filed on 27th January 2014 is granted. the grant is revoked and annulled under Section 76 a) of Law of Succession Act Cap 160.

2. The eviction notices and demands are null and void.

3. The administrators of the deceased's estate Mbugua Miruru, Kamau Karubichu, Margaret Nduta Chege and Veronicah Chege shall jointly agree and subdivide the suit property Dagoretti/Waithaka/181 as per the agreed portions as shown by letter of 22nd June 1981 during the deceased's life as follows;

a) Chege Macharia 130 points

b) Mbugua Miruru 80 points

c) Kamau Karubichu 160 points

4. The 4 administrators shall file for rectification of confirmed grant to include the stated portions and with consents of all beneficiaries.

5. The subdivision of the suit property Dagoretti/Waithaka/181 shall be by consents and participation of all beneficiaries in appointment of surveyor, sharing of expenses and be present or represented during the subdivision.

6. The subdivision shall ensure as much as possible preservation of permanent structures and developments of each beneficiary residing on the suit property.

7. Any aggrieved party may apply or exercise right of appeal

8. Each party to bear own costs

DELIVERED DATED SIGNED IN OPEN COURT IN NAIROBI ON 20TH JULY 2017

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

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