



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 509 OF 2012

(IN THE MATTER OF THE ESTATE OF IKOU GATUNGO (DECEASED))

WILSON MTHUI MUTUNGU.....OBJECTOR/APPLICANT

VERSUS

1. BEATRICE GATHONIPETITIONERS/RESPONDENT

2. NYAGUTHI IKOU.....PETITIONERS/RESPONDENT

RULING

The deceased in this cause died on 23rd November, 1990 and the grant of letters of administration intestate to his estate was made to his daughter and his surviving wife who are respectively the 1st and 2nd respondents in this application; the grant was made on 5th March, 1992 and was subsequently confirmed on 19th April, 2013.

Amongst the assets comprising the deceased's estate were landed property described as **Parcel No. Kirimukuyu/Mbogoini/521** and **Parcel No. Ruguru/Karuthi/287**. Each of these parcels was shared out equally between the administratrixes who apparently represented the deceased's two houses.

By an application dated 14th May, 2015, the applicant sought to have the grant revoked on the grounds that the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case; that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant with an intention to deliberately mislead this Honourable Court; that the administratrixes deliberately misled the Honourable Court by refusing to disclose that both parcels of land were family land and that while the deceased settled on **Parcel No. Ruguru/Karuthi/287** he held **Parcel No. Kirimukuyu/Mbogoini/521** in trust for the applicant and his family; and that the administratrixes misled the Honourable Court by their failure to disclose that the applicant and members of his family have lawfully been residing on **Parcel No. Kirimukuyu/Mbogoini/521** for over 50 years and therefore they are entitled to the said parcel by virtue of adverse possession.

In the affidavit in support of the summons, the applicant swore that the deceased was his father's younger brother and that the two parcels of land comprised family land. According to him, the adult members of his family were in detention during the land consolidation and demarcation and it was therefore agreed that the family land be registered in the name of the deceased to hold it in trust for the rest of the family members.

When the applicant's family members were released from detention, so the applicant swore, it was agreed that the deceased would settle on **Parcel No. Ruguru/Karuthi/287** and hold **Parcel No.**

Kirimukuyu/Mbogoini/521 in trust for the applicant's father and his children who include the applicant; following the agreement, the applicant and his family have settled on this parcel since 1957.

The applicant has also sworn that before the deceased's demise, the trust had not yet been determined. To his amazement, the applicant and his family were ordered by their local chief to vacate the land **Parcel No. Kirimukuyu/Mbogoini/521** on 19th April, 2015. It is at that point that the applicant became aware of this succession cause because it is only then that he was served with the certificate of confirmation of grant.

According to the applicant, the grant should be revoked and the estate be redistributed taking into account the fact of trust under which **Parcel No. Kirimukuyu/Mbogoini/521** is being held. Charles Kibira who described himself as the applicant's step-brother swore an affidavit in response to the applicant's application; in that affidavit, he swore that the land in issue was always their deceased father's and the applicant's father had no share in it. According to him, the applicant's father had been given his share by their grandfather.

The respondents also filed a preliminary objection to the application based on the ground that this court lacked jurisdiction to entertain the application and that the application was in any event incompetent and an abuse of the due process of the court. It is this preliminary objection that is the subject of this ruling.

There is no dispute that **Parcel No. Kirimukuyu/Mbogoini/521** was previously registered in the deceased's name prior to his death; he was so registered as the first registered proprietor in 1959 under the now repealed Registered Land Act, Cap. 300.

The applicant's claim against this property is clearly not based on his right to inheritance of the deceased's estate or any part thereof; it is a claim that is independent of any right that a survivor or beneficiary of a deceased person's estate would ordinarily claim in a succession cause under the Law of Succession Act, Cap. 160. The applicant is claiming part of the deceased's estate as an owner and whose ownership rights are largely founded on a customary law trust though he also cited adverse possession as the basis of his claim. It follows that it is the sort of claim that the applicant would have properly lodged against the deceased prior to his demise for a declaration of his ownership rights either under the trust concept or under the concept of adverse possession. This concept of customary law trust was previously acknowledged more in judicial precedents or judge-made law than in statutory law; Justice Madan made reference to it in **Gatimu versus Muya Gathangi (1976) KLR 263** that:

As regards section 126, there was no need to register the defendant 'as trustee'. He was registered as owner as the eldest son of the family in accordance with Kikuyu custom which has the notion of trust inherent in it. Ordinarily, in pursuance of Kikuyu custom he would have transferred a half share in 'marango' (Land) to the plaintiff. In any event this section does not make registration 'as trustee' obligatory. It states a person may be described by that capacity.

The learned judge was quoting his own statement in **Mwangi Muguthu versus Maina Muguthu (unreported)** where the same issue arose. **Section 126** which the learned judge referred to in this paragraph is a provision in **Registered Land Act (Cap 300)** (now repealed). Referring to **section 143 (1)** of the same **Act**, the learned judge held that the registration of the title in the name of the defendant was done in pursuance of custom and by consent of everybody involved. The court held that the law did not exclude recognition of a trust as long as it can be established; the learned judge held:

Parliament could not have intended to destroy this custom of one of the largest sections of people of Kenya. It would have required express legislation to enable the courts to so hold.

The court held that the plaintiff held the parcel of land in issue in trust for himself and the defendant as tenants in common in equal shares and ordered the defendant's name to be entered in the register.

This concept of land tenure is now statutorily recognised; it is so recognised under **section 5 (1) (d)** of the **Land Act, No. 6 of 2012** and **section 28 (b)** of the **Land Registration Act, No. 3 of 2012**.

Now, whether there is any merit in the applicant's claim against the deceased's estate either on the basis of a customary trust or adverse possession, it is not for this court to make such a declaration; the jurisdiction to determine any dispute relating to use, occupation of and title to land is vested in the Environment and Land Court which is established for that purpose under **section 4** as read with **section**

13 of the Environment and Land Act, Cap 12A.

It must be noted that the establishment of the Environment and Land Court was based on a constitutional requirement under **article 162 (2)** of the **Constitution**; for better understanding it is appropriate to reproduce the entire article here; it states:-

162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

a. employment and labour relations; and

b. the environment and the use and occupation of, and title to, land. (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

The jurisdiction of this court is prescribed in **article 165** of the Constitution and under **article 165(5)** this court is excluded from exercising jurisdiction on disputes reserved for the courts referred to

in **article 162(2)** and which in this instance include the Environment and Land Court; that article states:-

165.(5) The High Court shall not have jurisdiction in respect of matters— (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

A claim over ownership of land is obviously a claim that falls within the jurisdiction of the Environment and Land Court and for which this court is expressly excluded from entertaining. I am therefore persuaded that the proper forum for the applicant to agitate for his rights is the Environment and Land Court; this Court is ill-equipped to determine such rights and cannot even purport to do so in the context of a succession cause. I am inclined to rule that the respondent's preliminary objection is well taken and it is hereby sustained; accordingly, the applicant's application dated 14th May, 2015 is struck out with costs.

Dated, signed and delivered in open court this 3rd June, 2016

Ngaah Jairus

JUDGE