



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 744 OF 2009

**IN THE MATTER OF THE ESTATE OF GATHOGO KIHIA KAGEMA alias GATHOGO
KIHIA-DECEASED**

CHARLES GATHOGO KAGEMA.....PETITIONER

VERSUS

BENSON KINYUA GATHOGO1STPROTESTOR

NAFTLARY GITHINJI GATHOGO2NDPROTESTOR

LYDIA WANJIKU KINYUA3RDPROTESTOR

SOSPETER KAGEMA GITHAIGA4THPROTESTOR

PETERSON MUNYUA KAGEMA5THPROTESTOR

JUDGEMENT

I find it rather disturbing that this case has been in court for the last seven years, yet the parties were fully aware that the distribution of the land, the subject of the deceased's estate was determined by court decision and each of the parties admitted in court that formal sub-division of the land done pursuant to the said court decree and each party in these proceedings occupies and uses their respective portion as decreed by the court.

The relevant background to this case is that **Gathogo Kihia Kagema** (herein after referred to as the deceased) died intestate on 23rd February 1998 at the age of 79 years. and on 20th day of August 2009, the deceased's nephew **Charles Gathogo Kagema**, (hereinafter referred to as the petitioner) took out citations for service upon **Benson Kinyua Gathogo, Naftaly Githinji Gathogo, Prisillah Wanjiru, Mercy Wambere, Perpetva Gathogo, Esther Gathigia** and **Wangu Gathogo**.

On 13th May 2010 the petitioner petitioned for letters of administration to the deceased's estate. He listed the above persons plus himself as a nephew as the persons surviving the deceased. He listed **LR No Iriaini/Kairia/1586** as the only estate asset. The grant was issued on 3rd March 2011 and on 13th March 2011 the petitioner applied for confirmation of the grant and proposed that the above parcel of land be transferred to him absolutely. It is not clear why the petitioner only targeted **LR No Iriaini/Kairia/1586** yet on the ground he occupies **LR No Iriaini/Kairia/1587** and as demonstrated below there were other

parcels registered in the deceased's name and all of them were created after the original title number **Iria-ini/Kairia/626** was sub-divided as explained below.

On 18th October 2011 **Benson Kinyua Gathogo**, the first protestor filed an affidavit of protest stating that the deceased sub-divided his land then known as **Iria-ini/Kairia/626** creating title numbers **Iria-ini/Kairia/1584, 1585, 1586** and **1587**. In support thereof he produced a court decree issued in High Court Civil Case number **31** of **1978**, *Charles Gathogo Kagema vs Gathogo Kihia*. In the said case it was decreed that the above land be shared as follows:- **(a)** Charles Gathogo Kagema representing Kagema Kihia--- **1.6** acres, **(b)** Symon Githaiga Kihia--**0.8** acres, **(c)** Mwangi Kihia--**0.8** acres and **(d)** Gathogo Kihia--1.6 acres. A copy of the consent of the Land Control Board for the proposed sub-division is annexed to the said affidavit.

The petitioner filed a reply to the affidavit of protest on 28th day of November 2011 in which he averred *inter alia* that the deceased herein is his uncle and after his father died he remained under the care of the deceased in this case, and that after he filed the above civil suit, the same was referred to arbitration, that after the arbitrators award the first protestor caused the land to be divided into four parcels, but the court ordered that the land reverts to its original position, that the deceased later on proceeded to cause the land to be divided into the above **4** parcels of land, namely, **1584, 1585, 1586** and **1587**. Parcel no. **1585** was registered in the petitioners name of Benson Kinyua Gathogo while the other parcels remained in the deceased's name.

On 4th November 2011, **Sospeter Kagema Githiaga**, the forth protestor herein filed an affidavit of protest in which he averred that the deceased herein held the land in question in trust for his three brothers and that the land was divided among the beneficiaries as follows **(a)** Kagema Kihia-1.6 acres, **(b)** Simon Githaiga Kihia-0.8 acres, **(c)** Mwangi Kihia-0.8 acres and **(d)** Gathogo Kihia-0.6 acres. He further averred that he is a son to Simon Githaiga Kinyua mentioned above. He further averred that the deceased had prior to his death sub-divided the land into parcel numbers **1584, 1585, 1586** and **1587**, and annexed a copy of the land control board consent mentioned earlier.

He also averred that the deceased gave his father **Simon Githaiga Kinyua** parcel number **1586** but his father died before he could transfer the said parcel. He also averred that his father's family was not informed or involved by the petitioner in filing these proceedings, hence his protest. There is a reply to the said protest but I find the contents lacking in substance and deliberately evasive.

Also on record is an affidavit of protest filed by a one **Peterson Munyua Kagema**, the fifth protestor herein who is a son to **Kagema Kihia**-deceased. He averred that parcel number **1586** was to be given to his father. He also stated that his father had three wives and all of them were not involved in filing this petition. He also objected to the confirmation of the grant. On record is a reply to this protest whose contents I find unhelpful and deliberately evasive.

On 25th March 2013 **Naftary Githinji Gathogo** the second protestor herein filed a affidavit of protest in which he states that as at the time of his death the deceased had three parcels of land registered in his name, namely, **1584, 1586** and **1587**. The deceased had already transferred **1585** to the first protestor herein, that the decree referred to above was forcefully executed against the petitioner herein and he was evicted from **1585** and **1586** as per eviction order annexed to the affidavit of protest. He further averred that parcel number **1584** was to be shared equally between the third protestor herein and himself, while **1586** was to be transferred to Symon Githaiga Kihia who is deceased, hence it ought t be transferred to his only son Sospeter Kagema Githaiga. Further the petitioner herein was awarded parcel number **1587** as per the court decree. The petitioner filed a reply to this protest on 24th December 2013 and other than raising the issue of whether or not the third protestor whom he had applied to be enjoined in these proceedings had formally been enjoined, the other averments are in my view of little substance.

On record is a notice of withdrawal filed by the petitioner seeking to withdraw the application dated 7th March 2013 in which he had sought to have the third protestor enjoined in these proceedings. The record does not show that the said notice was formally adopted as an order of the court nor was the order made

to that effect.

Notwithstanding the said notice of withdrawal, I find that **Lydia Wanjiku Kinyua** is a necessary party to these proceedings as a lawful beneficiary to the deceased estate, lawfully claiming her husband's share and consequently I invoke the inherent powers of the court and enjoin her in these proceedings as a protestor.

The applicant filed a supplementary affidavit on 15th January 2014 in which he annexed a ruling by Mwera J delivered in the above suit but which ruling I find to be of little help to the petitioner because the ruling confirms his portion measures 1.6 acres, a position that is not contested. He has also annexed the same decree referred to earlier which confirms that the court distributed the land as hereinabove enumerated. He also annexed an order stopping the earlier sub-division of the land mentioned earlier, but the evidence tendered is that the land was subsequently sub-divided into four portions stated above as per the decree. The searches he has exhibited attest to the said sub-division.

On 6th November 2015, the petitioner applied for orders that the protests be dismissed for want of prosecution. The application came before me for hearing on 1st December 2015 and after carefully analysing the dispute before the court and the need to conclusively determine the same, I refused to dismiss the protests and I directed that the case proceeds for hearing.

Hearing commenced before me on 12th October 2016. **Naftlary Githinji Gathogo**, the second protestor, a son to the deceased testified that the petitioner is his paternal cousin. He recalled that the petitioner sued his father claiming land, and the case was determined, he produced a copy of the decree issued in HCCC No **31** of **1978** referred to earlier. Distribution of the said land was ordered as per the said decree. He confirmed that the subdivision was done and new numbers issued being numbers **1584, 1585, 1586** and **1587**.

Out of the above sub-divisions **Benson Kinyua Gathogo** got his title being number **1585** as evidenced by the search produced in court but the other parcels remained in the deceased's name as confirmed by the three searches produced in court. He further stated that everyone was shown his portion and that the petitioners land is **1587** measuring **1.6** acres. Parcel number **1586** belongs to **Sospeter Kagema Githaiga**, son to **Simon Githaiga**, deceased who was given the land as per the decree. He farms part of the said land but has not build on it..

He also stated that **1584** is to be shared by himself and **Naftlary Githinji Gathogo** because it was their late father's share. He confirms that he occupies the said parcel together with **Lydia Kinyua**. He also stated that the petitioner occupies number **1587** and his children have also settled there. He proposed distribution as paragraph 2 of his affidavit.

It was his testimony that prior to the above decree the petitioner was using the entire land but was evicted by a court order a copy of which he produced in court. He was confined to his portion number **1587**.

Sospeter Kagema Githaiga, also a protestor and a son to the deceased recalled that the deceased had brothers and that title number **626** was registered in his name in trust for his brothers. The said land was subsequently divided into the above 4 portions. He confirmed that he occupies **1586**, **Naftlary Githinji Gathogo** and **Lydia Wanjiku Kinyua** occupy **1584**. He stated that the land was divided into the said portions pursuant to the court decree referred to above. He also confirmed that the said decision still stands and that the respective beneficiaries did not get their titles except for number **1585** which was transferred before the deceased died, hence the three titles are still in the deceased's name.

He proposed distribution as follows:-

- a. That number **1584** be transferred jointly to **Naftlary Githinji Gathogo** and **Lydia Wanjiku Kinyua** to own equally. The two are children of Gathogo Kihia.

b. That number 1586 be transferred to himself to own absolutely. He is a son to **Simon Githaiga Kinyua**.

c. That number 1587 be transferred to the petitioner.

He confirmed that he was involved in the process of subdividing the land and that there was a previous sub-division which was cancelled by the court. He produced a copy of the court order, but later the land was divided as per the decree referred to herein above and the above numbers issued and no appeal has ever been preferred against the said decree. He confirmed that the petitioner currently uses **1587** which was granted to him by the court but before the eviction order was issued he was using all the parcels.

The petitioners evidence was that the deceased was his uncle and that he sued him in HCC No **31** of 1978 seeking to recover land. He confirmed the court issued the decree referred to earlier, that he never appealed and that he asks for title number **1587** to be transferred to him. Upon cross examination he confirmed that he would be satisfied if he gets parcel number **1587**. He also admitted that he occupies the said parcel.

From the above evidence and documents presented in evidence, I find the protest have merits and that the petitioner has not been honest at all. He knew he sued the deceased and a decree was issued sharing the deceased land, he was aware that three titles still remained in the deceased's name and out of the three he owns and occupies 1587. He was fully aware that he was evicted from the other parcels by a court order and to date the said decree still stands. No explanation was offered as to why in the petition he only disclosed 1586. It is also on record that the respective beneficiaries on the ground occupy their respective parcels of land.

This court cannot sit as an appellate court and alter or vary the said decree nor can I grant orders that will go against the said decree. I accordingly I find that the protests filed herein have merits, I allow the said protests and order and decree as follows:-

a. ***That*** the grant of letters of administration issued to **Charles Gathogo Kagema** on 3rd March 2011 be and is hereby revoked and a fresh grant of letters of administration be and is hereby issued jointly to **(i) Charles Gathogo Kagema, (ii) Naftlary Githinji Gathogo, (iii) Sospeter Kagema Githaiga and (vi) Peterson Munyua Kagema** .

b. ***That*** the said grant of letters of administration be and is hereby confirmed.

c. ***That*** Title numbers **Iria-ini/Kairia/1584, Iria-ini/Kairia/1586 and Iria-ini/Kairia 1587** currently registered in the name of the deceased be transferred/registered as follows:-

i. **Title number Iria-ini/Kairia 1587** measuring approximately 0.65 ha. be registered in the name of **Charles Gathogo Kagema** to own absolutely.

ii. **Title number Iria-ini/Kairia 1586** measuring approximately 0.32 ha. be registered in the name of **Simon Githaiga Kinyua** to own absolutely.

iii. **Title number Iria-ini/Kairia 1584** measuring approximately 0.65 ha. be registered in the names of **Naftlary Githinji Gathogo and Lydia Wanjiku Kinyua** to own absolutely i equal shares.

d. ***That*** the administrators are hereby ordered to sign such transfer documents as may be necessary to effect the transfer of the above parcels of land as herein above ordered within 45 days from the said of this judgement.

e. ***That*** in the event any of the administrators failing to execute the said documents within the said period, the Deputy Registrar of this court is hereby directed to sign such documents upon the request of either party.

f. ***That*** the administrators are ordered to avail their respective certified copies of their national identity cards, income tax pins and pass port size photos within the said period to facilitate the aforesaid transfer and to surrender the original titles for the purpose of the said transfer.

g. ***That*** in the event of any of the administrators failing to avail any of the above documents including the origin title(s), then, the Land Registrar, Nyeri County be and is hereby ordered to dispense with the said document of documents and effect the said transfers such absence notwithstanding.

h. That the petitioner shall pay the costs of this cause to the protestors.

Right of appeal 30 days

Signed and Dated at Nyeri this **8th** day **November** of 2016

John M. Mativo

Judge

Delivered at Nyeri this **8th** day of **November** 2016

Hon. Justice Jairus Ngaah

Judge