



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 265 OF 1994

IN THE MATTER OF THE ESTATE OF KAIYA IHWAGI-DECEASED

Francis Ihwagi Kaiya.....Applicant

versus

Douglas Muchiri Kaiya..... Protestor

JUDGEMENT

This case has been in court for 22 years which to me is unacceptable. It began at the lower court as SPMC Succ cause No. **18** of 1994. The record shows that a grant of letters of administration was issued in the said cause to **Douglas Muchiri Kaiya, Alex Kaiya Ihwagi** and **David Maina Muchiri** and confirmed on 4th October 1994. The court ordered that title number **Loc. Gikondi/Thimu/150** be registered in their names and shared the land between the three of them, that is of 2.0 acres for **Douglas Muchiri Kaiya** , 2.0 acres for **Alex Kaiya Ihwagi** and 1.0 acres for **David Maina Muchiri**.

The record also shows that on 15th July 1994, **Thiga Ihwagi** petitioned for letters of administration in the present case.

On 7th March 1995 **Francis Ihwagi Kaiya** and **Nthiga Ihwagi** successfully applied in Misc HCC No. **54** of 1995 for an order prohibiting any dealings on the said land. The applicants also applied for the revocation of the grant issued in the lower court. On 12th June 1996, the High court called for the lower courts file.

On 3rd July 2009 by consent of both parties, the second applicant **Francis Ihwagi Kaiya** and the first Respondent **Douglas Muchiri Kaiya** were appointed as joint administrators to the deceased's estate and on 13th January 2010 **Francis Ihwagi Kaiya** (hereinafter referred to as the applicant) applied for confirmation of the said grant and proposed distribution as follows, **(i) Francis Ihwagi Kaiya-- 2.35 acres, (ii) Douglas Muchiri Kaiya --2.35 acres and (iii) Wanjiru Thiga--0.9 acres.**

On 20th April 2010 **Douglas Muchiri Kaiya**, (hereinafter referred to as the protestor) filed an affidavit of protest stating that only himself and the applicant **Francis Ihwagi Kaiya** were entitled to benefit from the deceased's estate, the entitlement being **2** acres and **3.6** acres respectively and objected to the inclusion of **Wanjiru Thiga** a wife to a brother to the deceased.

Hearing began before **Sergon J** on 10th March 2011. The protestor testified that the deceased owned the above parcel of land measuring approximately **5.6** acres, that the said **Wanjiru Thiga** is the wife of a brother to the deceased, the late **John Nthiga**. He averred that his proposal is as per the deceased's

wishes. He insisted that his father distributed his land in 1980 and that the land was divided into three portions. His brother, the applicant was given the portion comprising 2 acres on the eastern side, and himself was given a portion measuring 2 acres on the western side and that his father retained 1.6 acres for his own and his wife. He insisted that the applicant **Francis Ihwagi Kaiya** abandoned his father since the days of emergency and that his father insisted that the land he left for himself would be bequeathed to the person who would take care of him and his wife. He added that **Francis Ihwagi Kaiya** build a house for his mother on **L.R. No. Gikondi/Thimu/152**. He also stated that he took care of his father together with his wife and that he has been tilling the land since then. He stated that his father summoned him together with the applicant **Francis Ihwagi Kaiya** and expressed his wishes. He also produced a letter dated 7th February 1981 from his father which talked of sharing the land and a second letter referring to a previous meeting and also a third letter in support of his position. However, all the letters were produced in evidence are from the applicant and not the deceased.

He stated that prior to his death on 10th April 1993, his father summoned **Mzee John Muturi** and **Mzee John Maina** and stated that he was giving the portion he retained to **David Maina**, his first born son, that he wanted to ensure that the land is transferred to his grandson, and that the applicant was given 2 acres.

Upon cross examination he insisted that his father had a brother called John and that the said John sold his share of Land measuring 1.5 acres to his father during the period of land demarcation in 1958/59, and that the said portion forms part of the land in dispute. He admitted that he was not a witness to the said transaction. I note that this information only came out during cross-examination. He also admitted during cross-examination that the court had at one point confirmed the grant and he caused the land to be shared the land as follows:-

1. Himself.....2 acres.
2. Alex-2 acres
3. David-1.6 acres

and that he left out the applicant from the said sharing. He insisted that the said sub-division was per his father's wishes. He also admitted that his father was the eldest brother and that it was normal for the oldest son to be registered as the registered owner of land. He also admitted that in his previous application for confirmation, he did not disclose that he had a brother called Francis and that John sold his share to his father.

He called as a witness a one **John Muturi Iguthia** who testified that he was very close to the deceased and that on 10th April 1993 the deceased told him that he wanted to share his land to the following, namely; David Maina (grandson) s/o Douglas-1.6 acres, Alex Kaiya son of Francis -2 acres and Muchiri-2 acres. He claimed that himself and John Njomo were present. He also claimed that John Nthiga left in 1960- for Mathira and had not resided on the land. He also claimed that he was aware that John sold land to the deceased.

The trial Judge was transferred from the station and on 3 June 2014 Wakiaga J directed that the case proceeds from where it had reached.

Hearing of the protestors case proceeded before me on 1st September 2016. A second witness called by the protestor a one **John Maina Kimari** stated that he knew the deceased, that the deceased had two wives, that the first wife had two children, namely Douglas Muchiri and Wambura while the second wife was mother to Ihwagi. He also stated that Thiga Ihwagi is a brother to Kahia and that Douglas Muchiri, his wife and son took care of his parents at their advanced age. He also testified that Ihwagi Kihia went to Nyahuru with his mother leaving Douglas, his mother and children. He claimed that he worked for the deceased as a shamba boy. He claimed that in 1993 he was present when the deceased stated that Muchiri would get 2 acres and Kaiya two acres and that the remaining 1.6 acres would go to the one who used to take care of him. At the said time it was Douglas who was taking care of him, and he opted to give the said portion to his grandson. He also claimed that the deceased went with his mother

who was separated with the deceased.

At this juncture, I find it appropriate to point out that much of the evidence of the protestor and his witnessed as enumerated above differs with the contents of his affidavit of protest filed in court on 20th April 2010. For example, in the affidavit of protest, the protestor did not mention that the deceased gave his grandson 1.5 acres being the portion the deceased allegedly reserved for himself and his wife. He swore on oath that the said portion was bequeathed to him. Also in his affidavit of protest he did not state that the deceased gave his brother 2 acres and himself 2 acres. Paragraph 5 of the said affidavit clearly states that himself and the applicant are the only ones entitled the deceased's estate. He never stated in his affidavit that his father gave them the said parcel during his life time, hence the aspect of the deceased sharing out his land during his life time was not stated in the affidavit of protest yet it is a crucial issue and one wonders why it was left out. Paragraph 7 of the affidavit of protest is very clear that the protestor was talking about his proposal and not the deceased's wishes. The aspect of the deceased's wishes was introduced during his oral evidence in court.

Further, in his evidence in court, he stated that the land was divided into three portions during the deceased's life time. It is not clear why this was not included in the affidavit of protest. The said omission casts doubts as to whether it was an afterthought.

Another noticeable omission is the allegation that the deceased summoned himself and the applicant and expressed his alleged wishes. This crucial evidence if at all it existed must have been within the knowledge of the protestor. No explanation was offered as to why it was omitted from the affidavit of protest. The letters he produced in court were not mentioned in his affidavit of protest. Again, one wonders why they were left out if at all they existed.

Another noticeable omission is the testimony that the deceased summoned **Mzee John Njogu** and **Mzee John Muturi** and stated how he wished to give land to the protestors son. Also omitted from the affidavit is the allegation that the deceased's brother, a one John sold his land to the deceased.

To my mind, the above omissions cannot be ignored. They are serious allegations if at all the information existed, then one would have expected the said information to have been included in the affidavit of protest. The inconsistencies highlighted above between the oral evidence and the contents of the affidavit of protest raise serious doubts on the credibility and reliability of the protestors evidence. Regarding the inconsistencies and or contradictions in the protestors evidence cited above, it is settled law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.^[1] The question to be addressed is whether the contradictions cited above are grave and point to deliberate untruthfulness or whether they affect the substance of the protestors case.

Contradiction has judicially been defined to mean lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.^[2]

Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial.^[3] Its only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court. I find that the contradictions cited in this case are substantial, fundamental and material to the main issues. No explanation has been rendered as to why the above issues were not mentioned in the affidavit. To me such inconsistencies are sufficient to the extent of creating doubts in the mind of the court because they cast serious doubts as to the credibility of the protestor. The court cannot shut its eyes to such serious contradictions and inconsistencies emanating from the same person.

The petitioners stated that the deceased was his father, that he went to live at Nyahururu. His father had two wives, and that his mother was the second wife and that from his mother's side there were two, namely, himself and his sister Wairimu-deceased. The first wife had two children, namely, Douglas Muchiri and Wambura. He stated that Alexander Kaiya Ihwagi is his son while Douglas Maina Muchiri is a son to Douglas Muchiri Kaiya. He gave the history of the disputed land as follows, that part of the land belonged to Thiga Ihwagi-deceased who was detained during the emergency. At the time of the emergency, the applicant stated that he was about 20 years old, that the deceased in this case asked for the land to be consolidated on the understanding that once Thiga Ihwagi came of detention he will get his land back, but after he came out of detention he did not get the land back, but the government gave him land at Kiganjo where he settled. He allowed the deceased to continue using the land on the understanding that he would get it back. His evidence was that the deceased used to say that a portion of his brother's land was added to his land at the time of consolidation and that he was not aware that the deceased gave out his land as alleged by the protestor. He knows John Maina Kimari, the protestor's witness whom he stated was too young to know anything about the land in dispute and that he never attended any family meetings. He insisted that he was never told nor was he aware that the deceased shared the land as alleged.

His proposal was that he shares one portion equally with Douglas Muchiri and the other portion belonging to Thiga Ihwagi-deceased be awarded to his wife Wanjiru Nthiga. Upon cross-examination he insisted that Nthiga Ihwagi never sold his portion to the deceased. He denied that his father gave land to his son Alexander Kaiya Ihwagi. He stated that Alexander lives at the portion he owns which he gave to him.

Wanjiru Nthiga testified that Thiga Ihwagi was her husband, he died in 2000, that her interest was to claim her husband's share. She also testified that her husband informed her that he had a portion of land measuring 0.9 acres which was consolidated to the deceased's land, and that the deceased sub-divided the land and kept the said portion aside and that the said portion is currently used by the protestor. She also stated that at one time her late husband went to claim the said land.

The first issue for determination is whether or not the deceased land was consolidated with his brother's portion during the land demarcation/consolidation in the late 1950's. I note that the protestors insisted that the said Thiga Ihwagi sold the said portion to the deceased in this case. However, no tangible evidence was tendered to prove the alleged sale. No one witnessed the said sale nor was it documented. The parties alleging the existence of the said sale did not witness it nor did they offer any documents to support the said allegation. To me, their evidence can safely be construed to mean that Thiga Ihwagi indeed owned a portion of land which was consolidated with the deceased's land and that after his brother was released from prison, he settled elsewhere but never got his land back from the deceased.

The second issue is whether or not the deceased distributed his land during his life time. I am fully aware that it is possible for a person to distribute properties during his/her lifetime. However, sufficient evidence to prove that a deceased person distributed his properties during his life time is necessary. Such proof cannot be mathematically precise and certain and so the test should be one of satisfaction of a prudent mind in such matters. The onus must be on the person alleging and there must be clear and convincing evidence and absence of suspicious circumstances surrounding the case.

Where, however, there are suspicious circumstances, the onus would be on the person alleging to explain them to the satisfaction of the Court before the court can accept such evidence. Where there are doubts or suspicious circumstances, it is the duty of the person alleging to satisfy the conscience of the court.

What are suspicious circumstances must be judged in the facts and circumstances of each particular case. The **burden of proof** is the duty of a party in a trial to produce the evidence that will shift the conclusion away from the default position to that party's own position. In the present case it was necessary to adduce sufficient evidence such as involvement of clan elders, family members or local administration evidently demonstrating the deceased's unequivocal desire and actions to distribute his properties as alleged. Such evidence must be clear, cogent and must demonstrate evidence of absence of suspicious circumstances.

If the distribution of the property is unfair or skewed in such a manner that the person so alleging gets a prominent part in the alleged distribution of the estate which confers substantial benefits to him or his children to the exclusion of the other beneficiaries like in the present case, then, unless the contrary is sufficiently proved, that itself is a suspicious circumstance and in appreciating the evidence in such a case, the court should proceed with an open but nevertheless vigilant and cautious mind.[4]

Secondly, the evidence adduced must be clear and there should be no inconsistencies at all like in the present case as enumerated above. The inconsistencies and contradictions cited above in the evidence of the protestor raise serious doubts on the question of the alleged distribution. In fact, there is nothing to show that the deceased divided his land during his life time. In fact, no evidence was tendered establishing this fact to the required standard.

The burden of proof always lies with the person who lays charges. I find that the evidence tendered by the protestor falls short of the required standard to clear the doubts in the mind of the court that the deceased ever distributed his land during his life time.

There is no tangible evidence to demonstrate that the deceased divided his land during his life time or gave the land to the grandson as alleged. The evidence tendered by the protestor is manifestly inadequate to warrant this court to conclude that the deceased divided his land during his life time. I conclude that the deceased in this case died intestate. Section 34 of the Law of Succession Act[5] provides that:- "A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.

I am satisfied that the deceased's land was consolidated with his late brother's parcel of land during the period of land consolidation, hence Wanjiru Nthiga wife of Thiga Ihwagi-deceased is entitled to the portion that belonged to her deceased husband that was consolidated with the deceased land.

I have analyzed the applicants evidence, and I find it truthful, it was not shaken during cross-examination, and that it did not contain glaring contradictions like the protestors evidence. I find that the distribution proposed by the applicant at paragraph 5 of his affidavit in support of the application for confirmation of grant is reasonable.

I find the protest has no merits. I accordingly dismiss the protest and order as follows:-

a. That the Protest filed herein by **Douglas Muchiri Kaiya on 20th April 2010 be and is hereby dismissed.**

b. That the certificate of confirmation of Grant of letters of Administration to the deceased's estate issued jointly to **Francis Ihwagi Kaiya & Douglas Muchiri Kaiya on 3rd July 2009 be and is hereby confirmed.**

c. That Title number **Gikondi/Thimu/150 measuring approximately **5.6 acres** be divided into three equal portions to be shared equally among the following:-**

i. Francis Ihwagi Kaiya..... 2.35 acres absolutely

ii. Douglas Muchiri Kaiya.....2.35 acre absolutely

iii. Wanjiru Thiga..... 0.9 acres.

d. That Title administrators are hereby directed to within **60 days from the date of this order to sign such documents as may be necessary to facilitate the sub-division and transfer of the said land to the above beneficiaries AND further in the event of either of them failing to sign the said documents within 14 days of being requested to sign, the Deputy Registrar of this honourable court is hereby directed upon being requested to execute such documents as may be necessary to effect the said sub-division and transfer.**

*e. **That** further the administrators are directed to avail certified copies of their national identity cards, income tax pins, pass port size photos and the original title for the above land to facilitate the said sub-division and transfer and in the event of one of the administrators or both of them failing to avail the said documents, the Land Registrar Nyeri County is hereby ordered to dispense with production of any such documents and effect the said sub-division and transfer such absence notwithstanding.*

f. That the protestor shall pay the costs of this case to the applicant.

Right of appeal 30 days

Dated at Nyeri this **14th** day November of 2016

John M. Mativo

Judge

Delivered at Nyeri on the 14th day of November 2016

Hon. Justice Jairus Ngaah

Judge