



IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.436 OF 2003

IN THE MATTER OF THE ESTATE OF PETER

MURIITHU GACHIE [DECEASED]

SIMON PETER GACHI BENARD.....APPLICANT

VERSUS

AGNES NUNGARI MURIITHU.....1ST PET/RESPONDENT

JOHANA GACHIE KARUGIA.....2ND RESPONDENT

MARGARET WOKI.....3RD RESPONDENT

RULING

The application dated 16th January 2014 seeks orders that the body of RUGURU KARIITHI (Deceased) be unconditionally buried in her late husband's ancestral land, currently registered in the names of JOSEPH KARUGIA GACHIE as LR KIMURU/BIBIRIONI/3309 or No.LR LIMURU/BIBIRIONI/3311 now occupied by JOHANA GACHIE KARUGIA next to the grave of her late husband BERNARD KARIITHI GACHIE. Further, that JOHANA GACHIE KARUGIA and MARGARET WOKI, their children, servants, agents, and any other person, be prohibited from interfering or stopping the burial of the late RUGURU KARIITHI from the aforesaid parcels of land.

The court is requested to order the OCS Tigoni police station in Kiambu County to safeguard and enforce the orders. The grounds for seeking these orders are that, the applicant's mother died on 12/2/2013, when she had previously filed summons for revocation of granted dated 13/02/2009 and summons for reinstatement of grant dated 12/11/2013. The body of the deceased is being kept at Uplands Funeral Home as from 12/12/2013, attracts storage charges of Kshs.800/= per day. Applicant contends that his father had a share in his ancestral land being LR No.LIMURU/BIBIRIONI/324 situated in Limuru, and jointly owned parcel No. LR NAKURU/BAHATI/ 11159/8 with his late brother, PETER MURIITHI GACHIE measuring 239 acres situated in Bahati, Nakuru County. These parcels have since been subdivided and title fraudulently transferred in the names of his paternal uncles, widows and children; in disregard of the interests of the applicant and his family.

There is no other place to bury the deceased, apart from her late husband's ancestral lands now occupied by JOSEPH KARUGIA, a son of JOHN GACHIE KARUGIA - these parcels (i.e. LIMURU/BIBIRIONI/3309 and 3311) originated from LR LIMURU/BIBIRIONI/324 after succession.

The applicant's late mother had been cultivating a portion of 324 from 1960's until 2008 when she was

evicted from the suit land after fraudulent petitioning for letters of administration in Nakuru vide Succession Cause No.436 of 2003 in Nakuru High Court in respect of parcels 324 Bibirioni and 11159/8 Bahati prior to the applicant's paternal uncles filing the Succession Cause in Nakuru, the applicant's late mother filed Succession Cause No.968 of 2002 in Nairobi High Court in respect of the same parcels. Consequently, there are two certificates of confirmation of grant in respect of the same parcels of land, filed in different courts.

All the four sons of the applicant's grandmother had their distinctive portions of family land which they occupied or cultivated, the applicant's mother had been cultivating her portion where she even buried the Applicant's late father and her grand-daughter.

In the year 2012, the applicant's late mother discovered that her late husband's share in the family/ancestral land parcel No.LR324 and LR 11159/8 had been fraudulently transferred into the names of the applicant's late uncles and their children, and she filed an application to revoke the grant. However, that application was dismissed on 03/05/2012 for non-attendance. She then applied for reinstatement of the same, and it was scheduled for hearing on 18/02/14. Meanwhile JOHN GACHIE KARUGIA has declined to provide a burial site for the applicant's late mother despite repeated requests and meetings held, and there is no other place to bury the deceased.

The application is supported by the affidavit sworn by the applicant, in which he explains that the 1st respondent is a widow to his paternal uncle (the late Peter Muriithu Gachie), while 2nd and 3rd respondents are his paternal cousin, and wife to his said late paternal uncle (Peter Miriithu), and they share a paternal grand-mother, the late Nanaiyu.

The 2nd and 3rd respondents are beneficiaries of the estate of the late Miriithu, while the 1st respondent is the only surviving administrator of the said estate.

He explains that his late grand-mother registered parcel 324 in the names of Peter Miriithu Gachie to hold in trust for his three brothers and their respective families, during the process of consideration of lands in the colonial days. This was done because, although the applicant's father was the eldest son in the family, he was not regularly available at home because he worked as a tribal police for the colonial government and travelled a lot. (This is demonstrated by a copy of the colonial tribal police marching order annexed.)

The applicant's late grand-mother was the first person to occupy and farm the Limuru parcel as ancestral land until early in the year 2000, when she authorised the applicant's mother to farm on her share of land. All the applicant's three paternal uncles had their distinctive portions of family land which they occupied or cultivated. Unknown to the applicant, and his mother, his late paternal uncles and their wives and children, secretly and fraudulently transferred this land in Limuru into their names.

As for the Bahati (Nakuru) parcel, the applicant contends that this was jointly owned by his father, and the late Peter Mirrithu Gachie, the same having been purchased by his father from income obtained when he worked as a colonial chief. This parcel has also been fraudulently transferred into the names of his late uncle's sons and daughters, courtesy of secretly filed parallel Succession Causes. It is on account of this that the applicant contends that the Limuru parcels 3309 and 3311 registered in the names of Joseph Karugia Gachie and now occupied by John Gachie Karugia belong to his late mother by virtue of inheritance as a share of his late father's family land.

The applicant explains that, the other two small plots owned **by** his late mother, where he had been residing prior to her death i.e. LR Limuru/Bibirioni/T.725/10, and **17A** are commercial plots with rental houses where she cannot be buried. In any event the said commercial premises had been under the control of the deceased's brother-in-law Joseph Karugia Gachie, who had been collecting rent until October **2013**, when the rent Tribunal ordered him to vacate.

The applicant further contends that under Kikuyu custom the wife is buried at the place where her husband or parents to the husband were buried and it is in the interest of justice that his application be allowed. Another application dated 7th February 2014 seeks that this court issues orders of injunction

restraining the Land Registrar in Nakuru and Kiambu County, the respondents and beneficiaries of the estate of Peter Miriithu Gachie from registering any dealings, interest and/or selling, transferring, charging, cultivating, farming, disposing or interfering in any way with the estate of the deceased namely land parcel LR Limuru/Bibirioni/324, Limuru/Bibirioni/3309, Limuru/Bibirioni/3310, Limuru/Bibirioni/3311, Nakuru/ Bahati/ 11 159/8, and Lanet LR 11098/98. Further, that the summons for revocation of grant dated 13/2/2009 be reinstated for hearing and determination.

Alongside this is a prayer for leave to amend the summons for revocation dated 13/2/2009 and/or file a fresh summons for revocation of grant. The applicant also prays that an order of injunction issues restraining the 1st respondent, their children, relatives, agents or beneficiaries of the deceased's estate from executing and realizing the amount taxed from Party to Party Bill of costs dated 4/5/2012, being the sum of Kshs.683,221/= until further orders issue from this court.

The applicant also prays that the Registrar of Land, Nakuru County, be ordered to provide a certified copy of the green card for LR Nakuru/Bahati/11159/8 and Lanet LR No.11098/98, and the OCS Bahati police station (Nakuru) and Tigoni police station (Kiambu) do safeguard and enforce the orders. The application which is sought to be reinstated, was dismissed on 03/05/2012 for non-attendance and a bill of costs was served on the previous counsel who failed to defend it, so it was taxed at Kshs.483,146/- although it is yet to be executed.

The applicant states that his late mother was never informed about the dismissal of her application of the filing of the Party to Party Bill of Costs. She only got to learn about the dismissal in early November 2014, when she sent her grand-son to peruse the file to find out the status of her case.

She then filed an application under certificate of urgency on 12/11/2013, but died a month later before the application could be heard.

In opposing the application dated 16/12/2013, the 1st respondent deposes in her replying affidavit that the matter herein relates to the Succession Cause in respect of her husband Peter Miriithi Gachie, which was finalized and a certificate of confirmation issued.

The applicant's mother filed for revocation of the grant, but the same was dismissed. She had then sought a reinstatement of the dismissed summons which had been set for hearing on 18/02/2014. The respondent's position is that the claim filed by the applicant's mother is a chose in action, accruing to her estate either as an asset or liability, thus he ought to have obtained a limited grant. Furthermore, the respondents say they are non-suited as none of them own the parcels in question. They also state that the applicant has failed to demonstrate a right to the land and his claim that the property 324 was owned by one Nanaiyu is a travesty, it is also denied that the property was held in trust and the applicant's right to land would not accrue until the court declares such trust. The respondent's contention is that this court has no discretion to allow a party to bring his kin on private land, and if the applicant has nowhere to bury his mother, then he can bury her in a public cemetery.

In opposing the application dated 07/02/2014, the respondents through the replying affidavit by Agnes Nungari Mirithu who deposes that the application is spurious and mixed up, as applicant seeks to have execution stayed by way of an application for injunction.

The grounds supporting the claim to ownership are described as anthropologic and not factual - the fact that the applicant's father worked as a colonial tribal policeman is not proof of purchase and the receipts attached to show payment reflect a different position. The competence of the application is faulted on grounds that if the claim to the land is based on grounds of it having been held in trust, then the applicant sought to have taken out an originating summons as a *cestui que* trust. On that basis the application of 07/02/2014 ought to be struck out. It is also pointed out that there has been inordinate delay which has not been dismissed and the application ought to be dismissed.

The application was disposed of by way of written submissions. The petitioner's counsel submits that the preliminary objection is based on procedural technicalities which should not take precedence over

substantive justice. In any event he argues that prayer 6 of the summons dated 07/02/2014 has sought to either amend the summons or file a fresh one. The applicant points out that he obtained orders allowing him to be substituted as the objector in place of his late mother, so the issue of the applicant not suing the deceased can't hold.

The court is urged to expunge the affidavits purportedly sworn by the 1 st respondent on ground that the signature is forged as it differs totally from other documents signed by I st respondent, so they should be expunged from the record..

With regard to the application dated 16/01/2014, counsel submits that since 1958, the registered owner of parcel 324, never opposed the occupation and cultivation of the same by the applicant's parents and the applicant's father and daughter are buried in the portion previously cultivated by his mother. He points out that the disputes arose after the demise of the registered owner. Further, when his mother filed the Succession Cause No.968 of 2002 in Nairobi, she sought letters of administration in respect of only properties which the applicant has interest. This he says explains why most of the properties in the certificate of confirmation of grant issued in Succession Cause No.968 of 2002 are held in common. Further that parcel No.324 and several other properties in which the applicant's father held interest were not originally included in the Succession Cause No-346 of 2003 filed in Nakuru by the respondent's family, but were sneaked in, a few days before confirmation of grant, on the pretext that the 1 st respondent had forgotten to include 5 properties in the deceased's list of assets.

Counsel draws to this court's attention that there have been several land disputes and cases between the applicant's family and the respondent especially after the deaths of Peter Miriithi Gachie and the applicant's father, and at one stage, one Njoroge Gachie filed summons for revocation of grant issued in Nairobi Succession Cause No.968 of 2002, but this was not finalised as he died before it could be determined.

When Njoroge Gachie died, the applicant's mother filed an application seeking orders to restrain his burial on LR 324, and interim orders- were issued by Njagi J on 12/Q2/2012. It is argued on behalf of the applicant that LF 324 is ancestral/ customary land, and this court is urged to take judicial notice that in the colonial days, land was registered in the names of one of the sons to hold in trust of -his brothers and their families. Thus, customary trust were not registered. This he says is borne out by the fact that: -

- (1) The claims that the applicant's grand-mother being the original owner of the land is not disputed.
- (2) The applicant's father and the person registered as the owner of the parcels, were brothers.
- (3) The applicant's mother acquired and cultivated the disputed land from 1960's to 2008 without any opposition from the person now registered as the owner.
- (4) Applicant's paternal uncles occupied and cultivated a portion of LR 324.
- (5) Applicant's father and daughter were buried on that portion without any opposition.
- (6) In the 1980's Peter Muriithu obtained a loan from Standard Chartered bank using LIZ 324 as security, and when he failed to repay, the applicant's family and other paternal uncles contributed towards the repayment.
- (7) The attempt by applicant's mother to bar burial of Njoroge Gachie in the disputed land is a further indication of customary interests on the disputed land.
- (8) Applicant has nowhere else to bury his mother.

Since this claim touches on Customary Law, counsel submits that by virtue of rule 64 of the Probate and Administration Rules which recognises the application of customary law, then the applicant cannot be

faulted for filing his case through a chamber summons. In any event whether the claim is filed by way of originating summons or by chamber summons, no prejudice is occasioned to the respondents, and **Article 159(I) (d)** of the **Constitution** should be invoked to grant the Applicant refuge.

Although particulars of fraud were not pleaded, the applicant's counsel submits that the 1st respondent in collusion with other beneficiaries filed **Succession Cause No.436 of 2003** and fraudulently obtained a certificate of confirmation and grant. He points out that the pleadings in that file and even the court proceedings have been plucked from the court file in an attempt to conceal evidence on how the Succession Cause was conducted. Further, that the name of the applicant's father or the applicant was misrepresented to appear as though he was benefiting 37 acres from Nakuru/ Menengai/ 1/ 8. He argues that this inclusion was made so as to make it appear as though the applicant's family benefitted from Peter Miriithi's estate in Succession Cause No.463 of 2003.

On this basis counsel maintains that the applicant has demonstrated that he has a right to bury his mother on the disputed land.

Mr. Githui on behalf of the respondents submits that the application dated 16/01/2014 is incompetent as there is no suit pending as the summons for revocation which perhaps would have been considered as the suit, has been dismissed and has not yet been reinstated.

In any event the application seeking reinstatement of the summons was filed well after the application for injunction, so at the time no suit existed and on that ground alone the application should be dismissed.

Secondly, the application for injunction is faulted on grounds that the applicant has not established any judicature rights over the property in dispute. The copy of the green card in respect of LR 342 shows the late Peter Miriithi as the registered owner of the land and no trust has been registered in favour of the applicant or his parents. Counsel contends that interests in land are noted in the land register and no receipts issued after the death of the applicant's father, for purposes of repaying loans.

The court is urged not to say the taxation, since no reference has been filed nor has the applicant sought reasons from the taxing officer.

The claims to custom have been challenged on grounds that it needs to be proved by fact and not by asking the court to take judicial notice, in any case customary law cannot be invoked to have a person bring their own on private property.

As for claims that there has been use of forged documents because of the different signatures, Mr. Githui submits that the documents were not submitted to the document examiner for examination and a report presented confirming that the document was a forgery.

Secondly, a signature is defined as a mark, and there is nothing in law which excludes a party from having more than one signature.

As for the application dated 7th February 2014, the respondent's counsel submits that the applicant took out letters of administration and has been substituted for the deceased Applicant RUGURU KARIITHI, yet the first step should have been to establish whether the cause of action survives the deceased. He argues that there is no provision for substitution of a deceased applicant as Rule 63 of the Probate and Administration Rules, which imports certain provisions of the Civil Procedure Act, does not import Order 23 or 24 of the Civil Procedure Rules.

According to Mr. Githui, the right to sue in this cause was personal to the applicant's mother and does not survive her.

He relies on **Woodroff and Ameer Ali's Commentary** on Civil Procedure at pg 2608 which states the right to grant of letters of administration is a personal right.

He points out that the summons sought to be reinstated were filed by the late Ruguru Kariithi in her capacity as the widow of Thendeu Gachie Kariithi and therefore entitled to a share of the land. That action is described as being personal in nature and cannot survive her death. If the applicant wanted to challenge the grant and certificate of confirmation, he should have sought to file a fresh application for revocation of grant.

Further that no explanation has been given for the long delay before taking up the matter of reinstatement, and now that the parcels were duly sub-divided and titles issued in the names of respective beneficiaries, the matter should be treated as having no merit.

I will deal with the preliminary objection first which is. To the effect that the actions does not survive the applicant's late mother, as the same abated upon her death. I have considered the arguments raised by Mr. Githui.

Application dated 16/01/2014

I have considered the arguments regarding the orders sought, it is not in dispute that the issue as to whether the applicant and/or his late mother are entitled to property No.324 which has now been sub-divided to form 3309 and 3311, has not been settled. Currently the status is that the properties are registered in the names of persons other than the applicant or his late mother.

The issue which would first have to be settled is whether the grant which was issued in Nakuru Succession Cause No.436 of 2003 and which led to the sub-division of that property and subsequent registration, merits being revoked.

At this stage, I think it would be premature to order burial on land which currently is registered in another person's name.

The question of (a) Kikuyu custom in relation to burial practices (b) having no other place to bury the deceased, (c) settling mortuary bills, would all have to abide the outcome of the court's finding on whether that grant should be revoked. It is worth noting that the application seeking to reinstate the prayers for reinstatements of summons for revocation is yet to be determined.

I therefore decline to grant the prayers sought in that application and it is dismissed with costs to the respondents.

Application dated 07/02/2014

I will first deal with the preliminary objection regarding the competency of this application as raised by Mr. Githui and the compliance of the preliminary objection as raised by Mr. Musungu.

The principle behind this preliminary objection is that it is only when the right to sue survives, the deceased, that the legal representations are substituted in a matter, the right to sue was a personal matter to the widow/mother of the applicant. Indeed in the Commenting by **Woodroffe** and **Ameer Ali**; the right to grant of letters of administration is a personal right. This means that upon the death of the petitioner, the suit abated and would not survive her. To that extent the issue of substitution can't hold. That is not a technical procedural matter. It is substantive as it affects the legal status of the applicant.

As to whether the signature on the affidavit supporting the preliminary objection is a forgery is a matter of fact which requires proof. As pointed out, there is no legal requirement confining an individual to one type of signature. The applicant would have to prove such claim by presenting a document examiner's report that the same was signed by someone other than the deponent. Since nothing of the sort has been placed before this court, I would have no basis for expunging that affidavit.

Since there is no provision for substitution under Cap 160 (Law of Succession) and the suit having abated, should the application dated 07/02/2014 be dismissed?

I think not, because the applicant has sought leave to amend or file a fresh summons for revocation. I have considered the issues raised, relating to customary trust, the age of the deceased petitioner, the fall out with the previous counsel, the filing of parallel succession causes, with parallel orders. I am persuaded that in the interest of justice, the applicant should be given a chance to pursue the claim. I therefore grant leave to the applicant to file fresh summons for revocation within 14 days hereof.

The current status of the applicant in this matter inhibits me from issuing any restraining orders sought, currently; I can only consider whether the prayers sought for restraining orders have any merit once he has filed fresh summons.

Costs of this application shall be in cause.

Delivered and dated this 6th day of June, 2014 at Nakuru.

H.A. OMONDI

JUDGE