



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCC CAUSE NO 202 OF 2010

In the matter of the estate of Isaac Njeru Macuru (dsd)

PATRICK NJIRU NJERUAPPLICANT

VERSES

BERNARD NYAGA NJERU RESPONDENT

AND

BERAS CIUMWARI..... 1ST PROTESTOR

LUCIA MUTHONI 2ND PROTESTOR

NANCY NJOKI 3RD PROTESTOR

REDEEMED GOSPEL CHURCH.....INTERESTED PARTY

R U L I N G

1. The letters of administration intestate were on 1st February 2012 issued jointly to the Applicant and Respondent. The Applicant filed summons for confirmation of grant on 19th October 2012. At paragraph 8 of his supporting affidavit he proposed to distribute the estate as follows;
 - a. KAGAARI/KIGAA/4650 be given to Beras Ciumwari Njeru, Lucia Muthoni Njeru and Nancy Njoki Njeru in equal shares.
 - b. KAGAARI/KIGAA/4651 be given to Redeemed Gospel Church Inc. (The interested Party herein) in full, having bought it, on payment of the balance of kshs.40,000/=.
 - c. KAGAARI/KIGAA/4652 be given to Patrick Njiru Njeru and Benard Nyaga Njeru in equal shares.
 - d. Ksh.40,000/= be shared equally among Patrick Njiru Njeru, Benard Nyaga Njeru, Beras Ciumwari Njeru, Lucia Muthoni Njeru and Nancy Njoki Njeru.
2. His Co-administrator the Respondent, filed a replying affidavit objecting to the Interested Party being given a share in the estate.
3. On 24th February 2014 the three Protestors who are daughters of the deceased filed a joint affidavit of protest. Their proposal is at paragraph 9a-c of their affidavit. It's as follows;
 - a. KAGAARI/KIGAA/4650 be given to Beras Ciumwari Njeru, Lucia Muthoni Njeru, Nancy Njoki Njeru, Grace Makena and Dennis Mwaniki jointly.
 - b. KAGAARI/KIGAA/4651 be shared between Patrick Njiru and Benard Nyaga jointly.
 - c. KAGAARI/KIGAA/4652 be shared between Patrick Njiru $\frac{1}{3}$, Benard Njaya – $\frac{1}{3}$ and

Beras Ciumwari, Lucia Muthoni, Nancy Njoki, Grace Makena, Dennis Mwaniki – $\frac{1}{3}$ jointly.

PROTESTORS' CASE

4. Beras Ciumwari gave evidence on behalf of her sisters. She testified that their father had three parcels of land which he shared out as follows;

Land Parcel No.4650 - For daughters

Land parcel No.4651 – for sons

Land Parcel NO.4652 – $\frac{2}{3}$ (sons), $\frac{1}{3}$ (daughters).

She denied that the father sold land to the Church (Interested Party). Infact she said the deceased had told her the Church had refused to pay for the land. In cross-examination she admitted that the Church has been on the land since 1995 and her father received money from the Church. She was however not aware if any refunds had been made.

INTERESTED PARTY'S CASE

5. The Interested Party relied on the replying affidavit of Samuel Njagi Nginyi the presiding Bishop. He insists they bought the land and the agreement was witnessed (SNN1). The Church he said has been in occupation for over nineteen (19) years. The land is developed.

APPLICANT'S CASE

6. The Applicant stood by his mode of distribution. He dismissed the documents in the possession of Beras as they were not signed. He said the Protestors are married and that's why their father gave them land parcel No.4650. He further said the Interested Party gave them money for filing the Succession Cause.

THE RESPONDENT'S CASE

7. The Respondent Benard Nyaga Njeru testified that the deceased only received shs.69,000/= from the Church and the rest was received by the Applicant. He further said since the Church has built they should be given $\frac{1}{8}$ acre and he gets $\frac{1}{16}$ of an acre. He even demanded for shs.231,000/= from the Church though he did not say what it was for.
8. All the parties filed written submissions with each expounding on the position taken by them. I have carefully considered the evidence and the submissions. I find the following to be issues for determination.
 - i. How much land did the Interested Party buy from the deceased?
 - ii. Can the doctrine of adverse possession apply in this case?
 - iii. Should the children of the deceased's daughters benefit from the Estate?
 - iv. What is the fair mode of distribution?

9. ISSUE NO (i)

The evidence shows that the parcel in issue is KAGAARI/KIGAA/4651 measuring 0.10 hectares. The Interested Party first entered into an agreement with the deceased in 1994 for sale of half of this portion. The Interested party moved onto the land and started developing it. In 2001 there was yet another agreement between the deceased and the Interested Party for purchase of the second portion. The deceased died in 2002 before the Interested party completed payment.

10. When the Interested Party fenced the whole portion in 2004 Bernard Nyaga Njeru filed a dispute before the District Officer Runyenjes. The dispute was heard and it was ruled that Bernard Nyaga Njeru refunds the interested party shs.162,450/= by 10th March 2004. The finding was made on 18th February 2004. The District Officer and his panel did not however indicate what should happen if there was no compliance as was the case here.
11. The Interested Party has stated that out of the total of shs.360,000/= for the whole parcel they have paid a total of shs.320,000/= to both the deceased and the administrators herein. From the minutes of the Land dispute before the District Officer Runyenjes on 19th February 2004, Bernard Nyaga (Respondent) did not contest the purchase of the first half of this parcel. His concern was the 2nd portion over which he was willing to refund shs.160,450/= paid. It is therefore deceitful of him to now assert that even for the first portion the Interested Party must pay a balance of shs.213,000/= owed to the deceased in respect of the said first portion. Why was he asking to refund shs.160,450/= in respect of the 2nd portion if indeed the Interested Party owed shs.213,000/= in respect of this first portion?
12. He says he was not able to refund the shs.162,450/= because of the short notice. It is now over ten years since he was directed to refund the money and from what he says the notice is still short. Had he been genuine he could have refunded the money long time ago but he has not.
13. The Applicant and the Protestors are not claiming anything in Land No.4651. They are aware that there was a sale arrangement between the deceased and the Interested Party who moved onto this land during the lifetime of the deceased person. He did not object to their being there. Its only two years after his demise that the Respondent came up to oppose their presence on the parcel. There is an unsigned alleged demand letter written by the deceased on 24th August 2002 filed with the Respondent's submissions. The letter is unsigned and the Respondent never produced it during the hearing so that he could be cross-examined on it. It is therefore of no value in this matter.
14. After the demise of the deceased there are documents filed herein showing that both the Applicant and the Respondent continued receiving money in respect of this sale arrangement from the Interested Party, even though they had not been appointed administrators. They have so far received shs.260,000/= in purchase price.
15. My finding on issue No. (i) and (ii) is that there was a clear intention by the deceased and Interested Party for the sale and purchase of the whole of land No.4651. The payment for the 1st half was cleared but the one for the 2nd half was not cleared before the death of the deceased. There must be consent from the Land Control Board by virtue of section 6 of the Act for the transfer of the portion to the Church.
16. This consent was not sought by the deceased but the family of the deceased have no issues with this 1st portion. I therefore find that they are obliged to transfer this half (½) portion to the Interested Party. For the 2nd portion which is contested and where no consent was sought, section 6 of the Land Control Act applies. The remedy to the Interested Party would be section 7 of the said Act which provides;

“If any money or other valuable consideration has been paid in the cause of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22”.

But before I make a finding on that I wish to consider the submission on adverse possession.

17. The Interested Party had submitted that the doctrine of adverse possession would apply in this case. The case of ***VIRGINIA WANJUKI MWANGI –VS- DAVID MWANGI JOTHAM KAMAU [2013] eKlr*** lists conditions which should be met before adverse possession can be applied. They are as follows;
 - i. Open and notorious use of the property – For this condition to be met the adverse party use of the property must be visible and apparent that it gives notice to the owner that someone may assert claim. If the legal owner has knowledge, this element is met.

- ii. Continuous use of property –The adverse party must for statute of limitation purposes hold the property continuously for the entire limitation period and use it as a true owner would for that time. Occasional activity with long gaps of activity in between fails to demonstrate continuous use. If the true owner ejects the party from land verbally or through legal action and the adverse party returns and dispossesses him, then the statute of limitation starts over again.
- iii. Exclusive use of the property –The adverse party holds the land in exclusion of the true owner.
- iv. Actual possession of the property – The adverse party must physically use the land as a property owner would in accordance with type of property location and uses. The actions of the adverse party must change the state of the land for instance by constructing buildings.
- v. Non permissive, hostile and adverse use of the property –The adverse party must have used the land without permission of the owner. The objectives of the adverse party may be viewed by court in different ways i.e. objective view-used without true owner’s permission, bad faith-used with adverse possessors subjective intent and state of mind, good faith-where a party mistakenly thinks the land is his.

18. Has the Interested Party met the conditions as stated above? Conditions No.(i) – (iv) have been met. However in condition No.(v), the Interested Party’s occupation was interrupted in 2004 when the matter was taken before the District Officer for arbitration where the Respondent was ordered to refund shs.162,450/= and the Interested Party leaves. This did not happen as the refund was not paid. Failure to refund the money as ordered and the continued receipt of money by the Applicant and the Respondent in respect of the same agreement clearly shows that the Respondent was not serious in his quest to remove the Interested Party, who has continued to stay on the land and develop it uninterrupted to date.

19. In my opinion the period of non-permissive or adverse use of the property then started in 2004 had the Respondent paid shs.162,450/=. But since he refused to pay to date then the Interested Party is put back where it was in 2001 when entry was gained into this portion of the land during the deceased’s life time. I therefore find that the Interested party meets the condition for non-permissive hostile or adverse use of the property which has been developed by the Interested Party.

20. I find that land No.KAGAARI/KIGAA/4651 does not form part of the deceased’s estate. I however order for the payment of shs.70,000/= by the Interested Party to the estate of the deceased within 45 days from today before any transfer is effected. The figure of shs.70,000/= includes the balance of shs.40,000/= plus interest on the same because of the delays in paying the said balance.

ISSUE NO III and IV

What then remains for distribution are land numbers KAGAARI/KIGAA/4650 and KAGAARI/KIGAA/4652. From the evidence adduced it is clear that the deceased had indicated that land No.4650 goes to his daughters while No.4652 goes to his sons. The daughters got a lesser share because they were married and are well settled where they are. Even the deceased’s daughter who died was married and the children were settled at their home.

21. The Protestors have not stated which of their sisters is not married and was not catered for by their father’s distribution. Form P&A 5 shows that the deceased was survived by four (4) daughters and two (2) sons. The deceased sister is therefore Jane Wanjiru, as the three daughters appeared before me for the Protest.

22. I would also wish to caution the Protestors that it is wicked and sin to deny being married just because of inheritance of a deceased father’s property. They have lied to the Court about their marital status. There is no dispute at all that land number 4650 was for the daughters. Therefore the deceased daughter’s share in it would go to one of her children to represent the rest.

23. The dispute is whether the daughters are also entitled to a share in the land No.4652. Given that they are married and settled in their homes and considering the acreage of land No.4652 which is 1.76 hectares, I find it noble that the distribution by the deceased remains. I therefore distribute the estate as follows;

LAND PARCEL NO.KAGAARI/KIGAA/4650

To the deceased's daughters jointly

LAND PARCEL NO. KAGAARI/KIGAA/4652

To the deceased's two sons in equal shares

LAND PARCEL NO. KAGAARI/KIGAA/4651

To the Interested Party subject to payment of shs.70,000/= within 45 days. Each party to bear his/her own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 9TH DAY OF SEPTEMBER 2014.

H.I. ONG'UDI

J U D G E

In the presence of;

Mr Gacharia for the Interested Party

All other parties

Mutero/Kirong – C/c