



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL CASE (ELC) NO. 2270 OF 2007 (O.C)

RUTH WANGARI GATHOGO.....1ST
PLAINTIFF
SAMUEL NJUGUNA.....2ND
PLAINTIFF
JOHN KIBE.....3RD
PLAINTIFF
MARGARET NYOKABI.....4TH
PLAINTIFF

VERSUS

JOSEPH GATHUNA
GATHOGO.....DEFENDANT

JUDGMENT

The parties herein are related in that the defendant Joseph Njuguna Gathogo is the brother of the four plaintiffs herein. At the centre of this dispute is a parcel of land known as title No. Kikuyu/Kikuyu Block 1/287 currently registered in the name of the defendant. The plaintiffs brought this suit by way of Originating Summons under Section 45(f) and 57 of the Trustees Act, Rules 2 and 4 of the Trustees Rules, Order XXXVI of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act for the determination of the following questions;

- a) Was the respondent registered as the proprietor of **LR No. Kikuyu/Kikuyu block 1/287** (the suit land) in trust for himself and the applicants?
- b) Are the applicants entitled to equal shares of the property?
- c) Should an order issue vesting equal shares of the suit property in the applicants or in such other just manner?
- d) That the costs of this application be in the cause.

The Originating Summons is supported by an affidavit of the 1st plaintiff Ruth Wangari Gathogo and several grounds set out on the face of the summons.

These grounds are;

A) That the said suit land is family land and that all parties herein are beneficiaries thereof.

B) That the applicants and the respondent are all children of Peter Gathogo Gathuna (deceased).

C) That the respondent holds a certificate of lease to the said suit land in trust for the applicants in accordance with Kikuyu customary law.

D) That the respondent is guilty of fraud and or fraudulent breach of trust in refusing to transfer and or share out the property to the rest of the family.

E) That the applicants would suffer irreversible damage and loss if the respondent is not prohibited or stopped from dealing and or selling the said suit land.

The respondent filed what is said to be a statement of defence and stated inter alia the following;

“4. The respondent admits the said suit land LR No. Kikuyu/Kikuyu Block 1/287 was bought by my late father from Kidfarmaco Farm and was the registered owner of the share and after he died in 1980, I was given the said shares by my mother Nancy Wanjiku Gathogo and since she could not have been able to pay the balance of the shares, I cleared the balance in 1988 and I was issued with a receipt and share certificate no. 3373 with my name as my late mother had already agreed with the transfer of the said share and the certificate of lease which is approximately 0.0593 hectares was issued by the Land Registrar Kiambu on 6th day of May 1992

5. The Respondent denies paragraph 5 of the Originating Summons supporting affidavit and during 1992 when my late mother was still alive I developed the plot and built two bungalow houses of which one I gave to the 1st and 4th applicants who are my younger sisters and they were still young, which they still live until today and have no any intention whatsoever of refusing them to stay and I used to assist them when they were young and I assisted them with education together with my late sister Elizabeth Wambui Gathogo.

6. That the 2nd and 3rd Applicants who are my brothers still lived on the land which was given to my late father by my grandfather and Ruthimitu, Waithaka which is approximately ¼ acre of which I do not demand any share from there as the land was allocated to them before my late mother died in 1994 but it has never been transferred to them as the succession cause has never been done but the subdivision has already been done and we are intending to embark on it.

7. The Respondent denies paragraph 7 and 8 and put the applicants into strict proof thereof and I urge this honourable court to restrain the applicants, their agents or servants from interfering in any manner with the respondents quiet enjoyment, occupation and possession of the said suit property as the respondent has already built/erected permanent premises.

8. That if the applicants want equal share of the property in the said suit, then the respondent must

be compensated fully”.

The respondent then asks that the applicants’ suit be dismissed with costs. Upon directions being given, this suit was heard by way of oral evidence and the parties subsequently filed their written submissions.

It is clear from the pleadings and evidence on record that prior to the registration of the suit property in the name of the respondent it belonged to their late father Peter Gathogo Gathuna. It is also clear from the evidence that the transactions leading to the registration of the suit property in the name of the said deceased father took place after his death. The respondent says that this was facilitated by their late mother and that there was nothing wrong with that.

It will be noted that both the respondent and their late mother were dealing with a property of a deceased person. Both the mother and the respondent had not applied for and did not have letters of administration to do so. In effect, the respondent took over the property of their deceased father without any authority in law. Such authority can only be conferred by a grant of letters of administration. The process therefore was void *ab initio*.

A beneficiary of an estate of a deceased person cannot distribute the assets of the deceased without authority, even where he or she is entitled to a share thereof. It is not therefore necessary for me to go beyond this observation because the property belongs to the estate of their late father which has not been put together and distributed according to the law. And so, notwithstanding the defence raised by the respondent it is clear that the respondent holds the property in trust for himself and the applicants. I can only say as much because since the estate has not been gathered, I cannot say that they are entitled to equal shares, noting at the same time that there are several dependants all beneficiaries of the said estate and that there is mention of yet another property belonging to the deceased.

There is also a claim by the respondent that if the applicants want an equal share of the suit property then he should be compensated fully. That is an issue that can only be addressed when the assets of the said estate are gathered and distribution addressed at the right time.

For now I can only state that the applicants’ case succeeds to the extent that the respondent holds the suit property on behalf of himself and the applicants. It is now upon this family to meet and agree on the appointment of the administrators with a view to resolving the disputes amongst themselves.

Considering the relationship of the parties herein, each party shall bear their own costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 5th day of March, 2011.

A. MBOGHOLI MSAGHA

JUDGE