



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

Civil Case 2080 of 1995

IN THE MATTER OF THE ESTATE OF MUNYI KANGARA - DECEASED

RULING

The land at the centre of dispute, in this application between the applicant-objector and respondent-petitioner herein is Mwerua/Baricho/245. The parcel of land belonged to one Munyi Kangara who died on 1st July 1972 somewhere in Ithiani sub-location Machakos.

The respondent Cyrus Muriuki Murathi applied for Letters of Administration intestate to the deceased estate on 29th May 1994 which was made on 3rd January 1995 and confirmed on 25th April 1995.

The applicant, Benson Mugweru Kaguongo then filed an application by Chamber Summons on 1st September, 1995 to have the letters of administration granted to the respondent revoked on ground that the said respondent had concealed from the court facts material to the case and obtained the grant fraudulently.

The applicant further wanted the court to order the District Land Registrar to strike out the name of the respondent from the Register as the registered proprietor of the Land in dispute.

The application was supported by the affidavit deposed to by the applicant and filed in court together with the application. The facts of the affidavit were that the deceased Munyi Kangara who died on 1st July 1972 was the registered proprietor of the suit property which formed his sole estate. That after his death, the applicant applied for a grant of letters of administration to his said estate in 1973 at Kerugoya Resident Magistrate's Court in Succession Cause No. 1 of 1973.

To this application, according to the applicant, no objection was filed by the respondent who instead filed High Court Civil Case No. 358 of 1973 (O.S) on 14th February 1973 which he prosecuted and obtained judgment on 2nd March 1973, which the applicant alleges was secret.

However, that the applicant learned of this judgment when the respondent presented an application for transfer of the suit land to Ndia Land Control Board and that he immediately applied and had the said judgment, which he terms fraudulent, set aside.

That after the Judgment was set aside, the applicant filed a reply to the Originating Summons on 15th September, 1987 and that he was appointed legal representative of the deceased Munyi Kangara in High Court Civil Case Number 358 of 1973 on 9th December, 1976.

In the meantime Kerugoya Succession Cause Number 1 of 1973 had been stayed pending High Court Civil Case Number 358 of 1973. That the later case was heard and dismissed by Honourable Mr. Justice Platt on 30th September, 1988.

That the respondent filed another Civil Suit No. 520 of 1986 which was heard and dismissed by Honourable Mr. Justice Shields on 4th April 1991.

That then the respondent without the knowledge of the applicant applied for letters of administration to the deceased estate which he obtained on 3rd January 1995 and that the same were confirmed on 25th April 1995.

According to the applicant's belief, after the respondent lost his claim of ownership to the suit land in the High Court, he resorted to deception to secure the ownership of the same.

The applicant avers that he never saw the Gazette Notice advertising the application for letters of administration by the respondent as he is a retired civil servant staying in his rural home near Baricho most of the time and that the respondent has all along known that the applicant is a legal representative of the estate of the deceased Munyi Kangara and that his succession case is still pending in the Resident Magistrate's Court at Kerugoya after having been stayed on his - the respondent's application.

That the respondent has no relationship with the late Munyi Kangara or at all, and that paragraphs 4 and 5 of his affidavit sworn on 15th November 1994 and paragraphs 3 and 5 of the affidavit filed in the Resident Magistrate's Court at Kerugoya on 3rd April, 1995 were not true more so as the same issues were contested before and dismissed by the High Court.

That the respondent secretly applied for and without the applicant's knowledge obtained transfer of the suit land on/or about 25th May 1995 and had even applied for consent to subdivide and sell the said land before the applicant stopped him.

That it was clear that the intention of the respondent was to secretly obtain the said land through deceit, sell the same and pocket the proceeds and so forth.

The respondent filed a replying affidavit on 31st October 1995 in which he denied obtaining the grant by concealing material facts or fraudulently.

That, by delaying in the prosecution of the applicant's Succession Cause Number 1 of 1973, he had waived his right to obtain grant of letters of administration and that he was estopped from claiming the same.

That the respondent had his application for letters of administration to the estate of the deceased property gazetted inviting objections and that the succession proceedings were open and public and that the applicant did not see the gazette notice was not the respondent's fault.

That either the respondent's father Murathi Nguchu alia Nyaga was the son of the applicant's father Kaguongo Wamae, was of the same clan as the applicant's father; the best friend of the applicant's father or that the respondent's father was initiated into the clan of the applicant's father by a ceremony known as Ngunurano, so as to be allowed to practice witchcraft, which was the preserve of the applicant father's clan.

That since the respondent's father was the son of Kaguongo Wamae, he, the said respondent, automatically became the grandson of Kaguongo Wamae, applicant's father, hence, his right to succeed to the late Munyi Kangara's estate and so forth.

The application came up for viva voce hearing on 2nd June 1998, 22nd and 23rd July 1998 and 21st October 1998 when both parties testified repeating largely what was contained in the supporting and replying affidavits.

The applicant testified that Munyi Kangara (deceased) was brother to his father - hence the applicant's uncle.

That though he was the only person entitled to obtain letters of administration to the estate of the deceased Munyi Kangara and that he made an application for such letters in Kerugoya Resident Magistrate's Court Cause No. 1 of 1973, the respondent's counsel applied for its adjournment and that the court did not call upon him to prosecute his said cause.

That during the pendency of the Succession Cause, the respondent filed High Court Civil Case Number 358 of 1973 and 520 of 1986 both of which were dismissed for different reasons.

That while the applicant awaited the result of his Succession Cause No.1 of 1973, he learned in 1995 that the respondent had inherited the land through a succession application at Kerugoya Senior Resident Magistrates Court without the formers knowledge, and on this discovery, the applicant lodged this objection application.

That on information he received, he went to Kerugoya Land Control Board where he found the respondent had presented an application to subdivide and transfer portions of the suit land to his children and third parties and inspite of his objection to the application on ground that he had a succession case pending in court and, according to him the respondent's application was deferred, he learned later that the respondent had been granted the consent, had subdivided and transferred the land to his sons and 2 other parties.

That the applicant reported this matter to the District Commissioner Kerugoya and even to the Criminal Investigations Department for investigations but that these were stopped and so he sought his lawyers advise, hence these objection proceedings.

The applicant called two (3) witnesses, namely James Mwai Njage (PW2), Gerald Mugo Kariuki (PW3) and Kamau Njiru (PW4).

The first two (2) witnesses were called to confirm that the application for Land Control Board Consent by the respondent to have the suit land subdivided and/or transferred was not passed on 6th June 1995 but that it was deferred. They said they were members of that Land Control Board and that they attended the board meeting on that day.

The third witness was summoned to testify that the respondent's family had no relationship with the applicant's family, particularly Munyi Kangara hence respondent had no reason applying for and obtaining letters of administrations and inheriting Munyi Kangara's estate.

However, he conceded in cross examination that at the time people were moving from the villages to their respective parcels of land Kaguongo gave this land to Murathi (respondent's father) to plough in 1959. That Murathi cultivated this land until Munyi Kangara died, and/or that he himself died.

That when Murathi died in 1994 he was buried on the suit land, inspite of the applicant's objection; and so forth.

The respondent Cyrus Muriuki Murathi also testified in this case and referred to the various cases by either the applicant or himself filed in court in relation to this dispute; starting with Succession Cause No. 1 of 1973, and High Court Civil Cases Number 358/73, 520/86 and 368/94 and how he was declared Successor to the deceased Munyi Kangara's estate.

The respondent denied obtaining the grant of letters of administration to late Munyi Kangara's estate fraudulently or abstructing or preventing the applicant from proceeding with his Kerugoya Resident Magistrate's Court Succession Cause No. 1 of 1973.

He testified further that he was with his father when the later entered this suit land after his said father had been initiated into Ambui Marigo clan through a big ceremony known as Ngunorano - Which his mother, respondent's two sons and their families live on this land.

That though he himself resides in land known as Mwerua/Baricho/543, this same land belongs to the applicant's clan, Ambui Marigo.

The respondent said he acquired title to the suit land by virtue of a confirmed grant, which thereafter he subdivided into 3 portions known as Mwerua/Baricho/763, 764 and 765. Title Mwerua/Baricho/763 is in the names of his children John Munene Muriuki and Michael Muthi Muriuki while Mwerua/Baricho/764 and 765 are in the names of John Karoki Kinguru and Stephen Muturi Mwenje respectively. That the latter purchased the two plots from him.

During cross-examination, the respondent answered that one Kaguongo, had given this suit land to his father as the former's adopted son in 1948 and that he made the application to inherit the suit land by way of adverse possession because he had been living on it for more than 12 years.

That Munyi Kangara - deceased had not died when Kaguongo gave this suit land to Murathi Nyaga and declared that should he die, then the same land should go to the said Murathi Nyaga and that this declaration was made in the presence of the applicant who was then the locational chief, in 1960. That Kaguongo Wamae died in 1974 leaving Murathi Nyaga on this land.

He agreed that when he presented his application for the subdivision and transfer of the suit land to Kerugoya Land Control Board the applicant objected but because he did not produce any documents to show that he had a case pending in court at the time, his objection was refused and the consent was granted; and that if any fraud was committed in that regard, then it was not him to blame for it but the District Officer 1 - Kerugoya who signed the consent.

That the applicant had even lodged cautions against land number Mwerua/Baricho/245 and even against the sub-divided plot numbers Mwerua/Baricho/763, 764 and 765, all of which were ordered removed by the court.

The respondent called Evanson Njui Nyaga (DW1) as his witness. His evidence dwelt on the relationship between the applicant and the respondent through Ambui Ambariya Kiondo and Ambui Ambari Ya Marigo whom he said were members of the same family though from different houses.

This witness also gave the interpretation of the Ngunorano ceremony which simply means - "teaching a person what one knows but what that other person does not know". In respect to the present case, Kaguongo taught Murathi Nyaga witchcraft which the latter did not know.

This witness further said that previously it was Njui - whom he was called after, who used to cultivate the suit land and that when he died in 1949, the respondent's father took over.

The witness said Kaguongo was a brother of Kangara the father of the deceased Munyi. That applicant is the son of Kaguongo, hence cousin to the deceased Munyi Kangara.

This is the evidence adduced in this application by chamber summons which the court is being called upon to consider and make a decision thereon.

A person is deemed to have died intestate in respect to free property of which he has not made a will which is capable of taking effect (see Section 34 of The Law of Succession Act (Chapter 160 Laws of Kenya).

And where he dies so intestate leaving free property then Provisions of Sections 35 to 39 of the Act apply as to inheritance of such property. These provisions are clear and exhaustive as to who is entitled to apply.

The suit land - previously known as Mwerua/Baricho/245 was registered in the name of Munyi Kangara. He died in 1972 in Ukambani, where he had emigrated to long time ago. I was not told when.

In his evidence, the respondent testified that Kaguongo had declared in 1960 that if Munyi Kangara did not come back, then the land could go to Murathi Nyaga, the respondent's father.

There, was even evidence from the applicant's side that the suit land was given the number in Munyi Kangara's name in his absence.

This evidence shows that Munyi Kangara, deceased, emigrated to Ukambani long before demarcation of land in Kerugoya District which took place in the 1960s. This must have been the reason, if at all, why Kaguongo is said to have declared at the time of demarcating this parcel of land in the name of the deceased Munyi Kangara that should he not return, the land should be given to Murathi Nyaga, the respondent's father.

The applicant, in same way, supported this allegation in an affidavit he swore in High Court Civil Case No. 358/73 in which he said his father had allowed the father of the respondent to occupy the suit land pending the return of Munyi Kangara.

However, evidence revealed that Munyi Kangara died on 1st July 1972 and that this was during the lifetime of Kaguongo Wamae who died later in 1974.

If indeed Kaguongo Wamae, uncle to Munyi Kangara, had made the declaration attributed to him by the respondent about this land and Munyi Kangara died before him, the court was even told the applicant was sent to obtain his death certificate for the purpose of Succession, the Kaguongo Wamae should have pursued his declaration during his lifetime to ensure that the land was transferred to Murathi Nyaga - who died in 1994. But this is not what happened.

Instead, the respondent made the application for succession after his father died as if this land was in the name of his said father and the court at Kerugoya proceeded to declare him heir to the deceased Munyi Kangara's estate. This is the application subject to the present objection proceedings.

From the evidence adduced it is not shown that Munyi Kangara was survived by any of the relatives stipulated under Sections 35 of 38 of the Law of Succession Act and in that case, his relationship to the applicant is covered by Section 39(d) and/or (e) of the Act.

The evidence of Evanson Njui Nyaga (DW1) brought out this relationship clearly. He testified that the father of the applicant was a brother to the father of the deceased Munyi Kangara which denotes that the applicant and the deceased fell into the relationship category of Section 39(d) of the Act and that if anybody or relative were to apply for letters of administration to the suit land, then it would have been none other than the applicant.

But the applicant filed a Succession Cause No. 1 of 1973 at Kerugoya Resident Magistrate's Court to which the respondent objected in some way by writing a letter to the court to oppose; the application.

The applicant did not proceed with that application. He told this court the respondent instituted many other applications or suits in respect to the same suit land which prevented him from pursuing his succession application at Kerugoya Resident Magistrate's Court.

The evidence revealed that apart from the application subject to these objection proceedings, the respondent filed 2 suits in respect to the suit plot, namely High Court Civil Case number 358 of 1973 in which the respondent sought to be declared proprietor of this suit land by way of adverse possession.

Though the respondent had been given this land on an *ex parte* hearing, this *ex parte* order was set aside in 1982 and on an *inter parte* hearing of the same; the suit was dismissed because he had no *locus standi* in the matter and that his father would have been in a proper position to file the suit.

In another suit, High Court Civil Case Number 520 of 1986 filed by the respondent's father against the deceased Munyi Kangara seeking the proprietorship of the suit plot by way of adverse possession too the

suit was also dismissed because the said respondent's father had sued a dead person.

However though the applicant said it is these cases which prevented him pursuing his Succession Cause No. 1 of 1973, the decisions therein were made in 1988 and 1991 respectively.

And inspite of these decisions, the applicant gave no real reason why his Succession Cause was not proceeded with.

Then the respondent filed the Succession Cause Number 36g of 1994 and was declared heir to the estate of the deceased MunyiKangara.

The letters of Administration were confirmed on 25th April 1995 and on 28th April 1995 the respondent obtained a title to the suit plot number Mwerua/Baricho/245.

Then on 6th June 1995 the respondent applied for the subdivision and/or transfer of the subdivided portions of the suit land to Michael Muriuki Muthii, John Muriuki Munene Stephen Mutuyi Mwenje and John Karoki Kinguru.

The respondent says consent was given for the suit land to be sub-divided into 3 plots, namely Mwerua/Baricho/763, 764 and 765. That he gave the first plot Mwerua/Baricho/763 to his children Michael Muriuki and John Muriuki Munene while Mwerua/Baricho/764 and 765 were sold to Stephen Muturi Mwenje and John Karoki Kinguru respectively. It would appear the sub division and transfer were done almost simultaneously; a rather hurried sort of transaction with an obvious reason that the respondent was aware of the applicant's claim over the same plots.

This application was filed in this court on 1st September, 1995 and one of the grounds in the supporting affidavit is the pendency of the applicant's Succession Cause No. 1 of 1973 of at Kerugoya Resident Magistrate's Court - (see paragraphs 1, 8 and 15 thereof).

Even during the hearing of this application *viva voce* the applicant insisted that his Succession Cause No. 1 of 1973 was still pending at Kerugoya Senior Resident Magistrates Court.

For the avoidance of doubt I called for this file and in a letter from that court dated 12th November, 1998, Gazette Notice Number 106 of 1997 dated 10th January, 1997 was attached showing that the file in respect to this Succession Cause was destroyed under the Records Disposal (court Rules) Chapter 14 Laws of Kenya.

I suspected this could have happened since it was over 20 years since the Succession Cause Number 1 of 1973 was filed at Kerugoya Resident Magistrates Court, hence my instructions to the Civil Registry of this court to call for this file.

Thus, as matters stand now, no Succession Cause for the applicant in respect to the deceased Munyi Kangara's estate is pending in Kerugoya or any other court.

However in High Court Civil Case No. 358/73 - where the respondent sued the deceased Munyi Kangara for adverse possession by Originating Summons the applicant admitted in evidence that the respondent's father had been allowed to go onto the suit land by his-applicant's-father, during 1962 or 1963. That the said respondent's father went onto the land and built there.

During the hearing of this case it was agreed that the respondent's father died in 1994 and was buried on the suit land; and further that he left his wife, the respondent's mother, who still lives on this land. These are facts which this court cannot ignore simply because the respondent is not of Ambui Mbari Ya Marigo, the applicant's clan.

Once the applicant filed his Succession Cause No. 1 of 1973, it was incumbent upon him to prosecute it whether or not the respondent filed an objection to it.

He told this court there was no objection filed to it and if this was so, this is the more reason why he should have proceeded with his Succession Cause to obtain grant of letters of administration intestate to the estate of the deceased Munyi Kangara.

The applicant was a chief for a very longtime and I was told he moved up to the rank of a Senior Chief. He was more conversant with rules pertaining to land Succession since he must have dealt with many of such cases as such chief or Senior Chief.

His father, Kaguongo, who admittedly allowed the respondent's father to occupy and built on the suit land died in 1974, after the deceased was reported dead in 1972.

For the two years the applicant's father lived after the deceased died, the applicant did not see it fit to ask his said father to institute proceedings to get the respondent's father out of the suit land. There was even no evidence adduced that the applicant's said father intimated at any time, that he wanted the respondents' father to move out or evicted from the suit land.

But with immense powers of a chief, the applicant would have influenced his father to institute proceedings to get the respondent's father and his family out of this land.

The applicant's waits 21 years after his father died and after the respondent has filed an application and obtained letters of administration intestate to the estate of the deceased in 1995, though irregularly, to file this application for objection.

This conduct on the part of the applicant gives me the view that he was aware his father had given occupation of this suit land to the respondent's father with clear intention that if the deceased Munyi Kangara did not come back from Ukambani, the same would revert to the said respondent's father; He must have attempted to coerce his father into giving him this land without success hence his non-pursuit of his Succession Cause No. 1 of 1973 at Kerugoya Resident Magistrate's Court and the long silence thereafter until 1995 when the application subject to the present ruling was made.

That the respondent and/or his father filed High Court Civil Case Numbers 358 of 1973 and 520 of 1986 is not good reason to prevent the applicant pursuing his Succession Cause.

In any event, that both these suits were dismissed by this court was the more good reason, for the applicant to pursue his Succession Cause with increased vigour.

I am also mindful of the fact that the applicant took no action in this matter during the life time of the respondent's father to whom he knows this land was given for occupation up to his death in 1994. He has also taken no action against the respondent's mother who is still alive and living on this land.

I am also mindful of the fact that the land Mwerua/Baricho/345 no longer exists. Consent was sought by the respondent from Ndia Land Control Board in June 1995, and though the applicant disputes the consent so obtained, which is not a matter for this forum any way the consent enabled the respondent to subdivide the land into 3 portions - namely Mwerua/Baricho/763, 764 and 765.

That Mwerua/Baricho/763 is now occupied in the names of Michael Muriuki Muthii and John Munene Muriuki, while numbers 764 and 765 are registered in the names of John Karoki Kinguru and Stephen Muturi Mwenje. These third parties have taken over possession of these parcels without notice of any impediments. Their occupation and/or possession cannot be disturbed.

In the unique circumstances of this application and in particular the passage of a long period of silence by the applicant and very long stay on the suit land by the respondent's family, which has changed status, I can confidently say the applicant's right to the same has been extinguished, if not abandoned.

I dismiss the objection proceedings but order that each party to the same do bear his own costs thereof.

Delivered this 19th day of November 1998.

D.K.S. AGANYANYA

JUDGE