



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1275 OF 2014

CATHERINE GACHIKU KIHARA (Suing as the Administrator

of the Estate of Antony Kihara Gicheru).....PLAINTIFF

=VERSUS=

HANNAH WAMBUI KIHARADEFENDANT

J U D G M E N T

1. The Proprietorship Section of the Land Register for Land Parcel Number Gatamaiyu/Kamburu/2419 **(suit property)** reads: **Hannah Wambui Kihara in trust of Gicheru Kihara**. The plaintiff contends that she is the biological mother of Gicheru Kihara (the named beneficiary) who is also identified as **Antony Gicheru alias Antony Gicheru Kihara alias Antony Kihara Gicheru alias Antony Kihara Gichuru**. She also contends that she is the administrator of the estate of the named beneficiary. She further contends that the named beneficiary was a grandson of the defendant, sired by the defendant's son, John Kihara Gicheru.

2. The suit property is a subdivision out of Land Title Number Gatamaiyu/Kamburu/805 **(Parcel No 805)** which belonged to the defendant's late husband, **Gicheru Kihara alias Peter Gicheru Kihara**. It is one of the fourteen parcels that were subdivided out of Parcel No 805 pursuant to a certificate of confirmation of grant issued on 19/12/1997 and amended on 3/11/1998 **in Kiambu SPMC Succession Cause No 144 of 1989; In the Matter of the Estate of the late Gicheru Kihara alias Peter Gicheru Kihara**. It is contended that three years after the estate of the late Gicheru Kihara alias Peter Gicheru Kihara had been distributed as spelt out in the said certificate of confirmation of grant, the named beneficiary died on 24/2/2002. Subdivision of Parcel No 805 was nonetheless processed and the resultant fourteen titles issued in the names of the persons named in the certificate of confirmation of grant.

3. On 1/10/2014, the plaintiff, contending to be acting in her capacity as administrator of the estate of the named beneficiary, instituted this suit through an Originating Summons dated 30/9/2014 seeking the following orders:-

a) A declaration that the trust made in favour of Antony Kihara Gichuru alias Gicheru Kihara (deceased) to the respondent herein Hannah Wambui Kihara in relation to LR No Gataimaiyu/Kamburu/2419 became fulfilled and/or terminated upon his attaining the age of majority.

b) That the respondent as the trustee for Antony Kihara Gacheru alias Gicheru Kihara (deceased) be ordered to transfer the trust property to the Estate of Antony Kihara Gacheru alias Gicheru Kihara for administration and distribution by the Administrator of the said Estate, Catherine Gachiku Kihara, the applicant herein.

c) That the title deed issued to Hannah Wambui Kihara be cancelled and a new one be issued to Catherine Gachiku Kihara, the applicant herein by the Land Registrar, Kiambu.

d) That the cost of this application be provided for.

4. The Originating Summons is supported by an affidavit sworn by the plaintiff on 30/9/2014 in which she contends that the defendant holds the suit property in trust for the estate of her late son, **Antony Gicheru alias Antony Gicheru Kihara alias Gicheru Kihara alias Antony Kihara Gicheru alias Antony Kihara Gichuru** because the defendant was registered as proprietor in trust of her deceased son (the named beneficiary). She contends that the defendant has refused to surrender the parcel of land to the estate of the named beneficiary.

5. The originating summons was canvassed through *viva voce* evidence. At trial, the plaintiff adopted her witness statement filed on 13/11/2015. The plaintiff's evidence was that the named beneficiary was a grandson of the late Gicheru Kihara alias Peter Gicheru Kihara and was given the portion that would have gone to his late father, John Kihara Gicheru. She also contended that when succession proceedings in respect of the estate of the late Gicheru Kihara alias Peter Gicheru Kihara were initiated, the named beneficiary's father, John Kihara Gicheru, was deceased and the named beneficiary was a minor and that is how his share of his grandfather's estate was registered in the name of the defendant as trustee for the named beneficiary. She contended that her late son died while pursuing the transfer of the said parcel of land into his name. She stated that when the named beneficiary died, she approached the defendant to allow her bury the named beneficiary on the suit property but the defendant declined.

6. On her part, the defendant testified that the beneficiary named in the land register is her late husband and that she is surprised that the certificate of confirmation of grant captured her late husband as a beneficiary of his own estate. She contended that the suit property is what would have gone to her late son, John Kihara Gicheru and to herself if her son had been alive. The defendant stated that she resides on the suit property. The defendant further contended that she would not hold the suit land in trust of her late husband because he was deceased at the time the certificate of confirmation of grant was issued and it is his estate that was being distributed. She further contended that she would not hold the suit land in trust of her late son, John Kihara Gicheru, because he was similarly deceased at the time the certificate of confirmation of grant was issued. Lastly, she contended that she would not be Anthony Kihara Gicheru's trustee because the grant was confirmed in 2003 and Antony died in 2002.

Determination

7. I have considered the parties' pleadings, evidence and submissions. The single issue for determination in this suit is whether the suit property is part of the estate of the plaintiff's deceased son, **Antony Gicheru alias Antony Gicheru Kihara alias Gicheru Kihara alias Antony Kihara Gicheru alias Antony Kihara Gichuru**.

8. Among the documents presented to the court in support of the originating summons is a certificate of birth showing that on 3/1/1978, at Pumwani Hospital, a child by the name **Antony Gicheru** was born to John Kihara Gicheru and Catherine Gachiku Muhuri. Also presented in evidence is a certificate of confirmation of grant showing that on 18/12/1997, the Senior Principal Magistrate Court at Kiambu distributed the estate of the late Gicheru Kihara alias Peter Gicheru Kihara to fourteen beneficiaries. One of the fourteen beneficiaries was Gicheru Kihara whose share of the land was to be registered in the name of Catherine Wanjiku Kihara. The plaintiff contends that she is the Catherine Wanjiku Kihara named in the Grant. There is also evidence that subsequently, on 3/11/1998, the distribution was varied and Gicheru Kihara's share was increased from 2.00 Acres to 2.30 Acres and Gicheru Kihara's trustee was changed from Catherine Wanjiku Kihara to the defendant herein, Hannah Wambui Kihara.

9. It is common ground that the plaintiff worked for the defendant's daughter, Elizabeth Wanja, as a house worker. The plaintiff testified that subsequently, she lived with Elizabeth Wanja's brother, John Kihara Gicheru [son to the defendant] as husband and wife and they got a child, **Antony Gicheru alias Antony Gicheru Kihara alias Gicheru Kihara alias Antony Kihara Gicheru alias Antony Kihara**

Gichuru. She further testified that together with the defendant, they attended succession proceedings at Kiambu Senior Principal Magistrate Court in 1997 during which time she was designated as a trustee of her son who was alive at the time. She further stated that her son was given his paternal grandfather's name in accordance with the Gikuyu naming traditions where one's first born son is given the name of the child's paternal grandfather.

10. Having considered the totality of the evidence presented in this suit, the court is convinced on a balance of probabilities that the person identified as Gicheru Kihara, captured in the certificate of confirmation of grant and subsequently registered as beneficiary of the suit property is not in the land register by mistake as the defendant would want the court to believe. If that person were put there by mistake, those entitled to the estate would have moved the court immediately to redistribute that portion of the estate. The court is convinced that the person identified as Gicheru Kihara existed at the time of distribution of the estate and was deliberately put in the certificate of confirmation of grant because the said beneficiary was a son to John Kihara Gicheru and a grandson to the late Gicheru Kihara alias Peter Gicheru Kihara. The court is also convinced that the said Gicheru Kihara is the deceased son to the plaintiff herein, sired by the defendant's son, John Kihara Gicheru as evidenced by the certificate of birth.

11. It is improbable that a mysterious person by the name Gicheru Kihara was named as a beneficiary in the estate involving administrators and fourteen beneficiaries and none of them noticed that a non-existent beneficiary was allocated 2.3 Acres out of the estate. It is equally improbable that the administrators and the fourteen beneficiaries proceeded to undertake transmission without raising any queries and to-date none of them has moved the court to vary the distribution concluded 20 years ago.

12. It therefore follows that the suit property, Land Parcel Number: Gatamaiyu/Kamburu/2419 forms part of the estate of the late **Antony Gicheru alias Antony Gicheru Kihara alias Gicheru Kihara alias Antony Kihara Gicheru alias Antony Kihara Gichuru.** The defendant's contention that the grant was confirmed after Antony had died is incorrect. I say so because the estate of the late Gicheru Kihara alias Peter Gicheru Kihara was distributed and a certificate of confirmation of grant issued on 19/12/1997. Subsequently, variations were made to the certificate on 3/11/1998. Subdivision of the land and opening of new land registers followed on the basis of the distribution of the estate and the certificate of confirmation of grant issued during the life time of the named beneficiary. The position in law is that, the estate of a deceased person is distributed at the time of confirmation of the grant. In the present suit, the named beneficiary was alive at the time of distribution of the estate of Gicheru Kihara alias Peter Gicheru Kihara and the named beneficiary got his share of the estate. He subsequently died in 2002. It therefore follows that the suit property which was given to the named beneficiary properly belongs to his estate.

13. Before I give the court's disposal orders, I want to express the court's concern about the parties' failure to present to the court the entire proceedings and filings in the succession cause at the Senior Principal Magistrate Court at Kiambu. The parties similarly did not call as witnesses key players in the succession cause yet there were known administrators and a total of fourteen beneficiaries. The work of the court would have been easier if the proceedings and filings in the Succession Cause File were produced as evidence and the key players in the Succession Cause called as witnesses.

14. In light of the above findings by the court, the Originating Summons dated 30/9/2014 is allowed in terms of Prayers 1, 2 and 3. In view of the family relation between the plaintiff, the named beneficiary and the defendant in this suit, parties shall bear their respective costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF MARCH 2018.

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B M EBOSO

JUDGE

In the presence of:-

No appearance for the Plaintiff

Mr. Thuku holding brief for Kimani for the Defendant

Halima-Court clerk