



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, GATEMBU & ODEK, JJ.A)

CIVIL APPEAL NO. 191 OF 2016

BETWEEN

CHARLES KAHENDE KINUTHIA..... 1ST APPELLANT

SERAH WAIRIMU MUKIRI.....2ND APPELLANT

AND

NAOMI NYABAE KAMUYU.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Kimaru, J.) delivered on 26th September, 2014

in

High Court Succession Cause No. 521 of 2008)

JUDGMENT OF THE COURT

1. Ex-Senior Chief John Kinuthia Wanyee, deceased, (the deceased) to whom the succession proceedings giving rise to this appeal relate, died on 18th November 2007 in Nairobi aged 81 years. Approximately seven years prior to his death, he had executed a Will dated 7th July 2000 by which he appointed two of his children, namely, Charles Kahende Kinuthia and Serah Wairimu Mukiri, the appellants, as the executors and trustees of his Will.
2. Following the death of the deceased, the appellants petitioned the High Court at Nairobi, in Succession Cause No. 521 of 2008, for probate of written will. By an ‘objection to making of grant’ dated 20th June 2008, the respondent Naomi Nyabae Kamuyu, who is a sister to the deceased objected to the petition.
3. That objection was based on the grounds that the respondent, “Naomi Nyabae Kamuyu, and the family of her deceased sister, Nditiai Kamuyu are lawful beneficiaries of LR No. Dagoretti/Riruta/3598, Dagoretti/Riruta/3599, Dagoretti/Riruta/3600, Dagoretti/Riruta/3601, Dagoretti/Riruta/3602, Dagoretti/Riruta/3603, and Dagoretti/Riruta/3604, arising out of LR Dagoretti/Riruta/56”. The respondent asserted that she and her late sister Nditiai Kamuyu were not married and have been living on LR Dagoretti/Riruta/56 (the property) with their families and are entitled to all the parcels arising out of the subdivision of the property. The respondent complained that neither she nor her late sister Nditiai Kamuyu had been named in the Will of the deceased as beneficiaries of the subdivisions arising from the property.
4. On 25th May 2009, the parties recorded a consent order before the High Court that a grant of probate in favour of the appellants be issued in accordance with the Will of the deceased, and that the appellants, as the executors of the Will of the deceased, be at liberty to administer the entire estate of the deceased with the exception of the property. It was agreed that the parties would adduce oral evidence to enable the court resolve the dispute over the property. The Probate of Will made to the appellants was subsequently confirmed except as concerns the property.
5. The task of hearing the matter fell on **Kimaru J.** In support of her claim over the property, the respondent who testified as PW1, called her brother, George Nganga Kibue (PW2) and her daughter, Salome Wanjiku Arrol (PW3) as her witnesses. Serah Wairimu Mukiri, the 2nd appellant, testified for the appellants. The record shows that the trial was protracted and persons who would have been called as witnesses in the matter passed on during the pendency of the case.

6. After considering the evidence and written submissions, the learned Judge delivered the impugned judgment on 26th September 2014 in favour of the respondent and held that the property was previously owned by the father of the deceased and the respondent and that the respondent and her late sister were therefore entitled to inherit portions of it.

7. The Judge also ordered that the family of Nditiai Kamuyu shall inherit parcel No. Dagoretti/ Riruta/3599 in addition to 3598 while the respondent shall inherit parcel No. Dagoretti/Riruta/3603 in addition to 3604 whilst the appellants, on behalf of their siblings shall inherit parcels No. Dagoretti/ Riruta/3600, 3601 and 3602.

8. Aggrieved, the appellants, in their memorandum of appeal in this appeal cited 21 grounds of appeal which learned counsel for the appellants **Mr. Njoroge Regeru** in his written submissions that he orally highlighted condensed into four complaints, namely, that the Judge erred: in holding that the deceased held the property in trust; in redistributing the deceased's property in disregard of his Will; in holding that the respondent and Nditiai Kamuyu have rights over the property; and in failing to give reasons for redistributing the property.

9. With regard to the finding by the Judge that the deceased held the property in trust, counsel urged that there was no evidence to support that finding; that on the strength of the decisions of this Court in **Salesio M'Itonga vs. M'arithi M'athara & 3 others [2015] eKLR** and **Charles K. Kandie vs. Mary Kimoi Sang [2017] eKLR** the onus lay with the respondent to establish, through evidence, the existence of a trust but the respondent failed to discharge that burden; that based on a finding by the Kikuyu African Court, the deceased acquired exclusive ownership of the property having inherited it from his father as the sole heir; that the fact that the respondent and her sister were allowed to reside on the property by the deceased is not evidence of trust or dependency.

10. It was submitted it was not open to the trial court, given the nature of objection proceedings, to consider the distribution of the estate; that the only issue that could properly be entertained under objection proceedings was the question regarding who is suitable to take out letters of administration; that in any event, the court could not, on its own motion determine that the respondent and her sister were dependants of the deceased within the meaning of Section 26 of the Law of Succession Act.

11. It was submitted that the court had no mandate to interfere with the deceased's wishes as it did by redistributing his estate contrary to his wishes as expressed in his Will. Referring to the decision of this Court in **John Gitata Mwangi & 3 others vs. Jonathan Njuguna Mwangi & 4 others [1999] eKLR**, counsel submitted that it is not the function of the court to re-write wills for deceased persons and that the court had no valid reasons for redistributing the estate of the deceased in this case.

12. Furthermore, counsel submitted, it was not for the respondent to purport to lay claim over the property on behalf of her sister's adult children.

13. Opposing the appeal learned counsel for the respondent **Mr. Ngata Kamau** relied on his written submissions which he highlighted. He submitted that the decision by the learned Judge is properly founded on the law and the facts; that based on the decision of the Kikuyu African Court, the deceased was registered as the proprietor of the property as the eldest son in the family to hold in trust for the family; that the fact that the respondent, who is a sister to the deceased and her late sister Nditiai lived on the property throughout the lifetime of the deceased is further evidence that the deceased held the property in trust; that the respondent, who is over 80 years old has lived on the property for over 53 years and the Judge properly found that the existence of Kikuyu customary trust had been established to the required standard; and that the decision of the trial court is consistent with the decisions of this Court in **Salesio M'Itonga vs. M'arithi M'athara & 3 others** (above) the case of **Charles K. Kandie vs. Mary Kimoi Sang** (above).

14. It was submitted that contrary to the claim by the appellants that the Judge had no basis for ordering redistribution, the nature of the objection by the respondent and the evidence tendered justified the re-distribution; that the Judge did not, as claimed by the appellants, redistribute the estate on his own motion and neither was the redistribution based on dependency as submitted by the appellants but on the existence of a Kikuyu customary trust.

15. Counsel urged, that in the event the Court finds that a Kikuyu customary trust was not proved to the required standard, this Court is entitled to make a declaration of dependency in favour of the respondent and her sister; that the respondent and her late sister and their families qualify as dependants of the deceased having lived on the property for over 53 years and the deceased did not make provision for them as he should have done under Section 26 of the Law of Succession Act.

16. We have considered the appeal and submissions by learned counsel. The central question in this appeal is whether the respondent and her late sister are beneficiaries of the property as the Judge found and whether the deceased held the properties in trust for the family of Kamuyu Kinuthia. In that regard, the Judge stated:

“This court therefore holds that the Objector, established to the required standard of proof on a balance of probabilities, that she and the children of her late sister are entitled to part of the suit parcel of land on the basis of the fact that the suit parcel of land was previously owned their father. According to the evidence adduced, it was established that the family of Nditiai Kamuyu (deceased) reside on the parcel of land registered as LR. No. Dagoretti/Riruta/3598 while the Objector and her children reside on parcel No. Dagoretti/Riruta/3604. They shall inherit these two parcels of land.”

17. We are enjoined on a first appeal of this nature to reevaluate the evidence and to draw our conclusions. See **Selle vs Associated Motor Boat Company Ltd [1968] E A 123**. There is no dispute that the respondent, her sister Nditiai and the deceased, among other siblings are the children of Kamuyu Kinuthia in whose name the property was originally registered. The respondent, (PW1) a sister to the deceased who at the time of hearing this appeal was said to be in her 80's testified that she has lived on the property since she was born; that she was married but separated from her husband whereupon she returned to her father's home on the property, and the dowry that had been paid by her estranged husband's family refunded.

18. She went on to say that she has since resided on the property with her children; that following the death of their father, Kamuyu Kinuthia, the deceased became registered as the owner of the property; that their father's estate was the subject of succession proceedings before the Kikuyu African Court in Succession Cause No. 18 of 1963 on the basis of which the deceased was appointed as the administrator of the estate of their father, Kamuyu Kinuthia; that she was involved in that succession cause as she wanted a piece of the land to be given to her so that she could live with her sister's children. She stated that she was aware that the deceased had since subdivided the property but that she and her late sister's children continued to occupy about 4 acres of the same. She went on to say that neither her children nor those of her sister were dependants of the deceased as she is the one who brought them up with her own resources.

19. George Nganga Kibue, (PW2) a brother to the deceased and to the respondent, testified on behalf of the respondent and stated that the respondent has resided on the property since demarcation was done; that the property belonged to their late father Kamuyu Kinuthia but he was unaware whether letters of administration in respect of his father's estate were obtained; that he attended court at Kikuyu "to case over the land" and that his mother Esther Nyiha wanted to administer the estate of their father Kamuyu Kinuthia but they "agreed that our deceased brother would be the administrator of the estate of our father". He stated that he wanted "the land to be distributed equally between all the children of our deceased father" and that the respondent and Nditiai did not inherit any land from "our father" and that they "should inherit land of their father."

20. Kibue testified further that he was not aware that the deceased had subdivided the land and that they (presumably the family members) were supposed to be present when the land was being subdivided. He maintained that all his father's children should inherit the property.

21. Salome Wanjiku Arrol, (PW2) the respondent's daughter aged 46 years at the time of her testimony testified that her mother, the respondent had resided on the property since she (Salome) was born; that she and her two brothers also reside on the property since their birth; that she heard that the property was going to be sold whereupon she went to the Lands Office and learnt that it had been subdivided into 6 portions; and that her family occupy one of the portions Plot no. 3604. She stated that she has never been dependent on the deceased.

22. Serah Wairimu Mukiri, (DW1) the 2nd appellant, a daughter of the deceased and one of the administrators of the estate of the deceased testified in defence of what she said was "in the interest of our family". She stated that the property belonged to the deceased and was subdivided in the year 2001; that in 1963 the respondent had objected to the deceased becoming registered as owner of the property and took the issue to Kikuyu African Court which determined the case in favour of the her father the deceased as "the sole beneficiary of the property"; and that no one lodged a claim over the property during the lifetime of the deceased; that the family of the respondent, including her sons who are over 40 years old, live on plots 3604 and 3598 together with other tenants but that it is not true that she has always lived there; that she is aware that her "father was initially registered as the owner of the land because he was the eldest son in the family" but denied that he was to hold the land in trust for the family. She was categorical that "the deceased never held the land in trust for her sisters" and that the property "was not a trust land" and that "it was the agreement of the family" for the deceased to be registered as owner.

23. That was the evidence on the basis of which the learned Judge concluded that the respondent had indeed established that the deceased held the property in trust and proceeded to redistribute it as already indicated. Was that conclusion well founded?

24. The record shows that the proceedings before the Kikuyu African Court in Succession Case No. 15 of 1963 related to "application for certificate of succession for determining the heirs of Parcel-Dagorretti/Riruta No. 56. Approximately 4.2 acres situated at Riruta, registered by the name of Kamuyu Kinuthia". The claim before that court was filed on 1st April 1963. An order was endorsed on the record of 19th September 1963 that "John Kinuthia to be registered heir of parcel No. Dagorretti/Riruta No. 56."

25. The record of proceedings in that court on 31st May 1963 indicate that the court was acting on information that Kamuyu Kinuthia, who was the registered proprietor of the property was said to have died on 7th January 1962. His wife, Esther Nyiha informed the court that,

"I am the only wife. The parcel in question shall be re-registered in the name of my son John Kinuthia."

26. On his part, the deceased John Kinuthia is recorded as having informed the court that, "I am the heir to be registered. We have unanimously agreed on this." The respondent, on her part, is recorded as having informed the court that the, "the shamba in question was bequeathed to me". Other children of Kamuyu Kinuthia also testified before that court.

27. After considering the evidence before it, the Kikuyu African Court delivered judgment as follows:

"This is this is an application succession of certificate (sic) which was brought in this court so that the court may consider who is the rightful heir of the parcel No. Dagorretti/Riruta/56..."

The court having heard the evidence from the mother who is the only wife of Kamuyu (deceased) John Kinuthia (first son) George Nganga 2nd son) Nyabae d/o Kamuyu (and daughter) and Salome Wanjiku w/o William (1st daughter) the court finds that the land in question should be registered under the name of John Kinuthia the 1st son. (Emphasis added).

28. Based on that judgement, it seems to us that the basis upon which the deceased became registered as proprietor of the property was an account solely of his being the first son of Kamuyu Kinuthia. As already noted the widow of Kamuyu Kinuthia made the request to that court to have the deceased "re-registered" as the proprietor of the property. The deceased himself is recorded as having indicated that it had been "unanimously agreed" that he be registered as the owner of the property. What emerges is that the deceased was registered as the proprietor of the property for no other reason but the fact that he was the eldest son of Kamuyu Kinuthia.

29. We do not construe the judgement of Kikuyu African Court as a prohibition or determination that the other children of Kamuyu Kinuthia were not entitled to inherit the property. Indeed, although she denied that her father was to hold the land in trust for the family, the second appellant, the daughter of the deceased readily accepted under cross examination before the High Court that, "I am aware my father was

initially registered as owner of the land because he was the eldest son in the family".

30. We are therefore in agreement with the learned Judge of the High when he stated in reference to the judgment of the Kikuyu African Court that:

“this court takes cognizance of the fact that the basis upon which the decision was reached was Kikuyu Customary Law which recognized the primacy of the position of a first born son when it came to registration of land which was being inherited.”

31. In conclusion therefore, we are satisfied that the evidence tendered reached the threshold of a balance of probabilities consistently with the decisions of this Court in Salesio M’Itonga vs. M’arithi M’athara & 3 others (above) the case of Charles K. Kandie vs. Mary Kimoi Sang (above). The Supreme Court of Kenya has recently pronounced itself on the concept of the customary trust in Isaac M’inanga Kiebia vs. Isaaya Theuri M’lintari & another [2018] e KLR. It is necessary to quote from that judgment at length:

“... a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

- 1. The land in question was before registration, family, clan or group land***
- 2. The claimant belongs to such family, clan, or group***
- 3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.***
- 4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.***
- 5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”***

32. Guided accordingly, it is our view that it was established to the required standard that the deceased was registered as owner of the property on behalf of the family of Kamuyu Kinuthia for the benefit of the members of the family. The High Court was right in its determination that the respondent and her late sister Nditiai are entitled to inherit their late father’s property in the manner that the court directed. We have no basis for interfering with the decision of the learned Judge, supported as it is by cogent evidence.

33. Although we were addressed at length on the question of dependency under Section 26 of the Law of Succession Act, that is not the basis upon which the decision of the High Court was arrived at.

34. The result of the foregoing is that we uphold the decision of the High Court. The appeal therefore fails and is accordingly dismissed. Considering that this is a family matter, we order that each party shall bear their own costs.

Dated and delivered at NAIROBI this 6th day of August, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original*

DEPUTY REGISTRA