



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 683 OF 2014

IN THE MATTER OF THE ESTATE OF JOHN JACK WAMATHAI (DECEASED)

ROBERT NDERITU WAMATHAI..... APPLICANT

-VERSUS-

ESTHER NJOKI WAMATHAI.....PETITIONER/RESPONDENT

RULING

1. The applicant herein **Robert Nderitu Wamathai** who is the son of the deceased herein filed summons for revocation of Grant of Letters of Administration issued on 30th December, 2014 to petitioner herein **Esther Njoki Wamathai** and confirmed on 6th November, 2015 in respect to the estate of the late **John Jack Wamathai**.
2. The applicant further seeks an order of inhibition do issue inhibiting any dealings in respect of title **No. Nyandarua/Ol'joro Orok Salient 20561** pending the hearing and determination of the main application and that the registration of **Esther Njoki Wamathai** as the absolute proprietor of title **No. Nyandarua/Ol'Joro Orok Salient 20561** pursuant to the certificate of confirmation of grant issued in matter be cancelled.
3. The application is supported by the sworn affidavit of **Robert Nderitu Wamathai**. He avers that the grant was obtained fraudulently without disclosing material facts to the Court. She further averred that the petitioner is a step mother of the applicant but she failed to disclose to the Court that the deceased had two wives and failed to include other surviving beneficiaries of the deceased namely: -
 - a. **Robert Nderitu** - son
 - b. **Daniel Kimotho** - son
 - c. **Mary Wanjiku** - daughter
 - d. **Mary Wanjiru** - daughter
 - e. **Leah Wambui** - daughter
4. He further averred that the petitioner failed to inform him and the other beneficiaries when petitioning for a grant of letters of administration; that the petitioner is in the process of disposing of the deceased property to other 3rd parties.
5. In response to the application herein, the petitioner filed an application dated 16th March 2018, seeking to have the inhibition issued on 1st December, 2017 vacated.
6. The petitioner averred that prior to the death of the deceased herein, he subdivided **Nyandarua/Ol'joro Orok Salient 8368** which measured 2.93 hectares into two parcels namely, **Nyandarua/Ol'joro Orok Salient 10758** 1.21 hectares which was allocated to **Grace Njeri Wamathai** (deceased mother of the applicant); and **Nyandarua/Ol'joro Orok Salient 10757** was jointly registered under the names of **Esther Njoki** and the deceased herein **John Jack**.
7. She further averred that the respondent together with the deceased prior to his demise sold part of parcel No. Nyandarua /Ol'joro Orok 10757 and they obtained a new title No. Nyandarua/Ol'Joro Orok Salient 20561 which was jointly registered in her name and the deceased's name **John Jack Wamathai**. She attached a copy of the mutation form showing the subdivisions from the mother title and the title deed

issued to the Applicant's mother and herself jointly with the deceased and said in this subdivision, the deceased exercised his wishes before his death.

8. The petitioner further stated that the applicant is not entitled to Nyandarua/ Oljorok orok 20561 but he is entitled to a share of his late mother's estate being Nyandarua/ Oljoro orok /10758 and the grant was obtained rightly.

9. She opposed application for revocation of grant by filing a replying affidavit dated 11th September 2018.

10. Directions were given and that the application do proceed by way of *viva voce* evidence.

PROTESTOR'S EVIDENCE

11. The protestor **Robert Nderitu** who is the son of the deceased adopted his affidavit dated 29th November, 2017 together with the documents attached thereto.

12. In cross examination, he confirmed that the petitioner is his step mother and stated that his biological mother **Grace Njeri** died in the year 2005. He confirmed that before the demise of his father, he subdivided the property **Nyandarua/OlJoro orok 8368** in two portions and registered one in his(deceased's) name and the other **Grace Njeri's** name. He confirmed that **Esther Njoki** the petitioner herein had no children and that the deceased was buried in the land registered in his name and he is opposed to the land being sold as it is a family inheritance.

13. On re-examination, he stated that they were excluded from the estate of the deceased and the petitioner failed to disclose they were entitled as beneficiaries of the deceased. He further stated that the letter used by petitioner in filing this petition was not written by the area chief as they live in Kiwanja Location and not in Nyahururu.

PETITIONER'S CASE

14. The petitioner adopted her replying affidavit dated 11th September 2018 as her evidence and relied on the documents attached thereto. On cross examination, she stated that she was married to the deceased in the year 1998 and parcel number 20561 was allocated to her and jointly registered in her name and that of the deceased, where the deceased lived. She confirmed that **Grace Njeri** was her co – wife and she was given parcel number 10758. She stated that she never forged any documents in obtaining the grant of letters of administration as the letter she obtained from the chief in Nyahururu.

15. On re-examination, she confirmed that the deceased subdivided the parcel of land number 8368 into two portions before his demise and allocated her co-wife **Grace Njeri** (deceased) parcel number 10758 and registered the remaining portion parcel 10757 in his name, he later sold a portion of 10757 and what remained was 20561 which was registered in the deceased name and her name in the year 2010.

16. The petitioner stated that she never included the deceased children as they had their own title. She confirmed that the deceased was buried in the land she is living in parcel number 20561 and that the same contains a borehole that is used by the family.

PROTESTOR'S SUBMISSIONS

17. The protestor submitted that the grant made to **Esther Njoki** be annulled or revoked as the same offends **Section 76 of the Law of Succession Act**; that it was obtained by concealing material facts the petitioner indicated to be the only beneficiary of the deceased yet there were surviving children of the deceased. Further the grant was obtained without the consent of all the beneficiaries of the deceased. Further that the gift that was given to her mother was not for the benefit of the applicant and her siblings. He argues that if that was the case, the deceased would have registered the property in their names since they were already adults.

PETITIONER'S SUBMISSIONS

18. The petitioner submitted that the deceased in his lifetime, distributed his properties to his two wives and each got a share in their names. That her co-wife **Grace Njeri** was buried in parcel No.10758, while the deceased was buried in parcel No.20561 and jointly owning the parcel with the deceased she was entitled to petition for letters of administration after the demise of the deceased. She submitted that the grant was obtained rightfully and the applicant and his siblings are not entitled to her share of the inheritance from the deceased as they cannot inherit twice from the deceased. In her submission she invoked the provisions of **section 91 (i) 4 (a) of the Land Registration Act No. 3 of 2012** on the issue of co-tenancy.

ANALYSIS AND DETERMINATION

19. From averments and evidence adduced, it is not disputed that the deceased **John Jack Wamathai** had two wives and that the petitioner herein had no children while his second wife **Grace** had 5 Children two sons 3 daughters.

20. It is not also disputed that the deceased divided his land **LR number Nyandarua/Ol Joro Orok Salient/8368** measuring 2.93 hectares into two and registered one half in the name of his first wife who is the mother of the objector herein and from the other half he divided into two portions, sold one then he jointly registered the remaining half jointly in his name and the name of the petitioner.

21. From the mutation form filed, I see the mother title **LR number Nyandarua/Ol Joro Orok Salient/8368** divided and given numbers 7057 and 7058. The late **Grace Njeri Wamathai** was issued title deed for 7058 on 12th October 1998. Title number Nyandarua/Oljoro

Orok Salient/20561 was registered in the names **John Jack Wammathai** and **Esther Njoki Ngunjiri** on 9th August 2010.

22. Land Title number **Nyandarua/Olgoro Orok Salient/20561** is the portion that the objector is opposed to being inherited by the petitioner herein. From the above analysis it is clear that the said portion is a quarter of the mother title and it was registered jointly in the names of the deceased and the petitioner since 9th August 2010. The deceased died on 15th January 2014.

23. The question that follow is, what is the implication of registering land jointly in the names of spouses? What happens when one spouse died?

24. The objector's argument is that Land Registration Number **Nyandarua/Olgoro Orok Salient 20561** is family land and they have no objection to the petitioner living in it but they object to her selling the land.

25. The petitioner's argument is that the objector and his siblings have already gotten their inheritance being the land registered in the name of his mother and if the deceased wanted them to benefit from the portion she is occupying he would not have registered in her name.

26. In her petition the petitioner listed **Nyandarua/Olgoro Orok salient 20561** as the only property left by the deceased and grant was issued on 30th December, 2014 and confirmed on 6th November, 2015

27. **Section 60 of the Land Registration Act** provides as follows: -

“If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of death delete the name of the deceased tenant from the register by registering the death certificate.”

28. In the case of **Isabel Chelangat –v- Samuel Tiro (2012) eKLR**, the principle of survivorship also known as *‘jus accrescendi’* was expounded as follows: -

“A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities.” The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant as long as there is a surviving joint tenant as the right of survivorship takes precedence.”

29. And in the case of **Mwangi Gakuri –v- Bernard Kigotho Maina & Another, H. C Nairobi, Succ. Cause No. 2335/2011, Achode J** stated as follows: -

“Property is capable of passing upon death other than by will. It may pass by survivorship... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship..... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants.”

30. **Further to the above, W. M. Musyoka** in his book, **Laws of Succession at page 3** states as follows: -

“Property is capable of passing upon death other than by will. It may pass by survivorship... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship..... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants.”

31. From the foregoing, it is clear that where property is registered in the names of joint owners, upon death of one, the surviving owner automatically becomes the owner upon presenting evidence of the death of the joint owner; the property automatically passes to the surviving joint tenant. This principle therefore exclude the property jointly owned from properties of the deceased subject to intestate succession.

32. By the principle of survivorship land owned jointly passes automatically to the surviving owner when one dies without the need to file a Succession Cause. In view of the above, the petitioner being the surviving spouse, is entitled to LR Number **Nyandarua/Ol Joro Orok/20561** and argument by protestor to the effect that it forms part of the estate of their deceased father cannot be right.

33. FINAL ORDER

i. Application by objector dated 29th November 2017 is hereby dismissed.

ii. Petitioner was rightfully registered as the owner of LR Number Nyandarua/Ol Joro Orok/20561.

iii. Costs to the petitioner.

Ruling dated, signed and delivered via zoom at Nakuru This 29th day of April 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola - Court Assistant

Ms. Nyaberi counsel for Petitioner

No appearance for counsel for objector