



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO.96 OF 2017

IN THE MATTER OF THE ESTATE OF WANJIKU NJOROGE GICHERE (DECEASED)

NAOMI WAITHIRA NJOROGE.....PETITIONER

VERSUS

MARGARET WANGARI KAGUKU.....OBJECTOR

J U D G M E N T

Wanjiku Njoroge Gichere died on 21/02/95 at Silibwet in Nyandarua. **Naomi Waithira Njoroge** petitioned the court for grant of letters of administration through a petition filed in PM's Court Nyahururu on 14/03/1992. Grant of letters of administration were issued to Naomi, on 18/03/1998 and she filed a summons for confirmation of grant on 29/09/1998. The petitioner filed a further affidavit dated 14/02/2007 in which she made a proposal on how the estate should be distributed. She proposed that the deceased's estate be shared equally between her and **Margaret Wangari Kaguku**.

Margaret Wangari Kaguku had been issued with letters of administration ad litem in respect of **Sisto Kaguku's estate** on 21/08/2007 in Succession Case 160/2007.

On 23/08/2007 a consent order was recorded to the effect that **Margaret Kaguku** would represent the said of Sisto Kaguku estate in Succ. Cause 35/1997 and 140/1998. In Succession 140/98, Sisto Kaguku had a filed petition in respect of the estate of his late mother Wanjiku Njoroge Gichere, the deceased. Succ. Cause 140/1998 was treated as objection proceedings in the Succ. Cause 35/1997 which later became Nakuru Succ. Cause 440/2009. When the case was transferred to Nyahururu High Court, it became Succ. Cause 96/2017, the instant case.

On 11/12/2007, the objector (**Margaret Kaguku**) filed a further affidavit sworn on 11/12/2007 in which she deponed that she was the wife of the late **Sisto Kaguku Njoroge**, who died on 31/07/2006 and was the son of the deceased – **Wanjiku Gichere**; that the deceased's estate comprised **Nyandarua/Silibwet/420** measuring about 13.2 hectares or 32.6 acres; that **Naomi Waithira** the petitioner was the deceased's co-wife; that their husband did not leave them with any land; that the deceased had acquired the subject land, Silibwet Plot 420 and had been issued with a title on 29/04/1992 after making all the payments to the Settlement Fund Trustee; that the deceased invited the petitioner, Naomi to temporarily settle on the said land as she looked for her own land but when the petitioner was unable to get her own land, the deceased bequeathed her 5 acres in the presence of the District Officer Oljoro orok, the Chief of Githanji Location and elders, on humanitarian grounds because she had an unmarried daughter with children; that the petitioner was therefore a licensee as she did not contribute to the purchase of the land; that at her death, the deceased indicated that the land be divided into three portions with the petitioner getting 5 acres while the late Sisto Kaguku and Mburu Njoroge got 13.8 acres each; that her husband (Sisto) had submitted a consent with Oljoro orok Land Control Board for subdivision (MWK2); that the deceased was survived by Mburu Njoroge, Priscilla Wanjiru and Anjerica Mumbi; that the daughters are married and do not claim any part of the estate while the petitioner has two daughters Priscilla Nyaruiru and Cecilia Wanjiru.

Directions were taken on 14/12/2009 that the issue of distribution to be determined by way of viva voce evidence. By then, the matter was in Nakuru High Court. The matter was transferred to Nyahururu High Court. The petitioner Naomi Waithira Njoroge's evidence and her witness Zacharia Kahari Githanguru had been taken by Hon. Justice Ndung'u.

PW1 testified that the deceased was her co-wife and that the plot 420 was allocated to both of them by the District Officer Mandara and each was also given a cow. They planted pyrethrum and monthly deductions were made from their milk and pyrethrum deliveries towards repayment of the loan to Settlement Fund Trustee (SFT); that the two wives were given the land that should have been given to their husband, the late Njoroge and was registered in the deceased's name; that she cultivated 10 acres while the deceased cultivated the balance; that at one time, she had to sell her cow to repay the balance of the loan. PW1 said that the deceased had four children and all are deceased except one by name Mumbi; that Sisto was deceased's son and the objector's husband. PW1 prays that the land be shared into two equal parts. PW1 said that the title documents were kept by the deceased who gave them to the objector. PW1 said that they used to pay equal amounts towards the SFT loan.

PW2 was a treasurer of Mukeu Farmers Society to which the petitioner and deceased belonged. He stated that allocation of land was to men

and where the man was deceased, the wives had to share; that the land would be registered in the name of the first wife if they were more than one. PW2 was aware that the deceased and PW1 were allocated plot 420 and the deceased was registered as the owner on 06/4/1965 being the first wife of one Njoroge. PW2 was allocated parcel 454 in that same scheme; that deductions towards the SFT loan were made through Mukeu Cooperative Society. He produced a payment journal showing deductions in relation to parcel 420A and B given in 1967. He produced the net payment Journal 2617 and letter from Augustine Ngirubiu the Honourable Secretary of Mukeu Farmers Sacco, who authored the letter dated 13/5/2010 confirming that the land was allocated to both the deceased and PW1 (P.Ex.No.1). PW2 said that receipts were issued to each of the payees. He said that the cards show that the land had been subdivided into 420A for deceased and 420B the petitioner for purposes of payments and that payments of the loan were equal. He could not tell how much was paid in total because there were numerous changes in officials of the Cooperative and upheavals that they were lucky to get what was produced in court – Exhibit 1.

Mr. Okeke who had appeared for the objector during the hearing attended this court several times while awaiting the typing of proceedings. When the proceedings were typed and ready, the firm of Ogolla Okeke was served with the hearing notice but neither the objector nor the counsel appeared. Since the petitioner had closed its case, the objector's case was closed and the court directed that submissions be filed. The objector's counsel did not file any submissions.

Mr. Njuguna Kamanga, Counsel for the petitioner filed submissions. He stated that the objector having failed to attend court and adduce evidence, the court should go by PW1's evidence that it is only the petitioner and objector who have laid claim to the deceased's estate; that though the objector had named one Mburu Njoroge Gichere as a beneficiary with herself, the said Mburu Njoroge is said to be deceased in 2007 and nobody came up to substitute Mburu Njoroge Gichere. Counsel therefore proposed that the estate be subdivided into two equal parts of 6.6 hectares each and the objection be dismissed.

I have duly considered the evidence on record, affidavits filed. No doubt the petitioner and the objector represent two houses of one Mr. Njoroge who died even before the subject land was allocated to the deceased.

Both PW1 and 2 told the court that the land was registered in the name of the deceased as the first wife of Njoroge who had died earlier. PW2 stated that it was the practice adopted then that where the man was deceased and left wives, the property would be registered in the names of the first wife to hold in trust on behalf of herself and the other wife or wives. There is no evidence contrary to the petitioner's averment that the land did not belong to both of them as wives of one man. Although the objector had alleged that the deceased had merely given part of the land to the petitioner, she did not testify and her averments were not tested on cross examination. The objector's statements remained mere allegations unsupported by any other evidence.

It was not an uncommon practice in Kenya for land to be registered in the names of the eldest son of a home or one person who would hold the land as trustee on behalf of the larger family and later distribute it to the respective owners. The fact of registration did not extinguish the rights of the other interested parties to the land. In *Kanyi v Muthiora (1984) KLR 712*, the court when considering Kikuyu Customary Law held that registration of land in the name of a proprietor under the Registration of Land Act did not extinguish rights under Kikuyu Customary Law and neither did it relieve the proprietor of the duties or obligations as a trustee.

PW2 corroborated PW1's evidence that the land belonged to both the deceased and PW1; that they shared the loan repayments equally and are entitled to equal shares as evidenced by P.Ex.No.1 payment journal. At present, only PW1 and the objector are in possession and occupation of the land. There is no evidence that anybody else lays claim to the deceased's estate. In absence of any other claim, it is my view that the distribution of the estate should be according to the two houses of Njoroge. I therefore find that PW1 will be entitled to half of the deceased's estate while the other half will remain with the objector. This being a family dispute, the costs of the proceedings will be borne by each party.

Dated, Signed and Delivered at NYAHURURU this 28th day of May, 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Kamanga for petitioner

Okeke – absent

Eric – Court assistant