



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 163 OF 2013

(IN THE MATTER OF THE ESTATE OF MATHENGE RWIGI alias MATHENGE S/O RWIGI)

JOHN MACHARIA MATHENGE.....APPLICANT

VERSUS

DOUGLAS GUANDARU MATHENGE.....PROTESTER

JUDGMENT

Mathenge Rwigig alias Mathenge son of Rwigig died intestate in 1967 aged 67. He was domiciled in the Republic of Kenya and he hailed from Kiganjo location in Nyeri County which also was his last known place of residence.

According to a petition for letters of administration of his estate lodged in this honourable court by the applicant in November 2014, he was survived by three sons of whom the applicant is one; the other two are named in the petition as the protestor and Wamwangi Mathenge. Unfortunately, the latter died in 2013 during the pendency of this cause. Apart from the applicant and the protestor, Mathenge was also survived by his widow Wanja Wamwangi and children from their marriage.

The grant of letters of administration intestate was made to the applicant and by a summons for confirmation of grant dated 10 October 2016, he sought to have the grant confirmed. In the affidavit in support of this summons, he proposed to share the deceased's estate equally between himself and Wanja Mwangi. The only asset in this is estate is a parcel of land known as **Title No. Ruguru/Gachika/595** measuring approximately 2.22 hectares.

The protestor was not satisfied with this scheme of distribution of the deceased's estate; contrary to his brother's proposal, he suggested that he gets 1.4 acres of the land while the applicant and Wanja Wamwangi get 2 acres each.

At the hearing of the protest, the protestor testified that indeed he had his own land which is known as **Title No. Aguthi/Mugaria/233** which measures approximately 6.2 acres but that, as a son to the deceased, he was entitled to a share of his estate.

It was his evidence that he was registered as the owner of **Title No. Aguthi/Mugaria/233** during the adjudication and consolidation process in the 1950's and that at that time, his elder brother Wamwangi Mathenge was in detention. He admitted that the practice then was that a particular individual could not be registered as an owner of more than one parcel of land. His father was thus registered as the owner of **Title No. Ruguru/Gachika/595** while he himself was registered as the owner of **Title No. Aguthi/Mugaria/233**. Nonetheless, it was his case that since he was the registered owner of this latter parcel of land, it was not part of the deceased's estate that should be taken into account in the distribution of **Title No. Ruguru/Gachika/595**.

As to why he opted for a lesser share than his brother and sister-in-law, it was his evidence that the deceased had a share of 0.5 acres in the **Title No. Aguthi/Mugaria/233** and that he gave him this share in his lifetime.

David Mathenge Warui (PW2) agreed with him and testified that it was the deceased's wish that his estate should be distributed as proposed by the protestor.

On his part, the applicant testified that both **Title No. Aguthi/Mugaria/233** and **Title No. Ruguru/Gachika/595** belonged to the deceased. It was his evidence that during the period of demarcation, consolidation and registration, the two parcels could not be registered in the name of the deceased as it was the practice then that no one person could be registered as owner of more than one parcel of land. It is for this reason that the protestor was registered as the owner of **Title No. Aguthi/Mugaria/233** although in actual fact the land belonged to the deceased.

He testified further that the land could have been registered in the name of Wamwangi Mathenge, the deceased's elder son apparently to hold in trust for the rest of his siblings, but he was in detention at the material time. It was his case that since the deceased had effectively given the protestor **Title No. Aguthi/Mugaria/233** where the protestor had lived all his life and which parcel was even larger than **Title No.**

Ruguru/Gachika/595 the protester should be content with what he has and leave this latter parcel to the applicant to share it with his deceased brother's widow.

Wanja Wamwangi (DW2) supported the applicant's position and reiterated that the deceased's estate should be shared equally between herself, in her capacity as her husband's widow and the applicant.

As noted earlier, the deceased died in 1967 long before the commencement of the Law of Succession Act, cap. 160. According to section 2 (1) of this Act, its application is restricted to succession of estates, whether testate or intestate, of persons dying after the commencement of the Act. That section reads as follows:

2. (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

However, subsection (2) provides a window for the application of the Act to the estates of persons who died before the Act came into force; it states as follows:

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act. (Emphasis added).

There was no evidence or suggestion of any 'written law or customs' that may have applied at the time of the deceased's demise and which therefore ought to apply to the succession of his estate. It follows that, in the absence of evidence of such a law or customs, the application of the intestacy provision of the Law of Succession Act to the deceased's estate would be quite in order.

If that is agreed the immediate provision that would apply to the distribution of his estate is section 38 of the Act which provides that:

38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

So, everything else being equal, and unless the deceased's children or beneficiaries of his estate agree on any other alternative scheme, the estate would be distributed equally between his surviving children who, in this case, would be the applicant and the protester.

But the two of them have embraced the widow of their deceased elder brother as a beneficiary of the deceased's estate as well. There was also evidence that this widow has lived on the estate with her deceased husband all her married life; granted that her husband died at the age of 84 years old, she must have spent a good part of her life on the estate. In short, she is settled on the estate together with the children she was blessed with during her marriage. Taking all these factors into consideration, it would not be out of order if Wanja Wamwangi is given the share of the deceased's estate that would have been given to her husband if he was alive.

Each of the three beneficiaries would be entitled to an equal share but the protester opted for a lesser share on the ground that he was a beneficiary of an inter vivos transfer.

Accordingly, the applicant and Wanja Wamwangi shall get 2 acres each while the protester will get 1.4 acres of **Title No. Ruguru/Gachika/595**.

As far as **Title No. Aguthi/Mugaria/233** is concerned, there was no evidence that the land belonged to the deceased and therefore forms part of his estate that is available for distribution amongst his children or beneficiaries of his estate. All I can say about this particular parcel of land is that the applicant made out what appears to be a clear case of trust in the sense that it is highly probable that as much as the protester may have been registered as this parcel's absolute proprietor, he held the land for his own benefit and in trust for his siblings. However, this court is ill-equipped to make such a declaration; the appropriate forum where this question would properly be interrogated is the Environment and Land Court which has the jurisdiction to consider this question and make the appropriate determination.

The upshot is that the protester's protest succeeds and his proposed scheme of distribution of the deceased's estate is hereby endorsed by this honourable court. Each party shall bear their respective costs.

Finally, I must apologise to the parties for the delay in the delivery of this judgment. After they filed their written submissions and a date for judgment given, the court file was erroneously misfiled amongst my records of authorities in my chambers; I only stumbled upon it towards the end of last month while I was packing my personal effects as I prepared to leave Nyeri to Nairobi where I had just been transferred. I regret any inconveniences that may have arisen.

Signed, dated and delivered on 20 November 2020

Ngaah Jairus

JUDGE