



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 488 OF 2003.

IN THE ESTATE OF THE LATE ZACHARIA ICAURA (DECEASED).

PHILESTER NJOKI KARANJA.....1ST PETITIONER

JOHN KITUNDU KARANJA.....2ND PETITIONER

VERSUS

SUSAN SALOME WAMBUI.....PROTESTOR

JUDGMENT

BACKGROUND

1. The Petitioners herein filed this petition in respect of the estate of the late **Zacharia Icaura** who died on 24th January 1999. The protestor **Susan Salome Wambui** filed protest being the former wife of the deceased. From the record property registered in the name of the deceased at the time of his death are as hereunder:-

1. **LR Nakuru Municipality Block 2/290 (Pangani)**
2. **West Pokot/Sioi/57(West Pokot Farm)**
3. **Chinga/Gikigie/1800 with tea bushes**
4. **Motor vehicle KAA 679A**
5. **Motor vehicle KAA 402S**

2. From the judgment dissolving marriage between the protestor and the deceased, it is evident that they married under the Kikuyu customary law in the year 1991. The order for divorce was issued on 7th August 1997. The 1st petitioner evidence is that she got married to the deceased in 1986 and was blessed with three children namely **Margaret Wamaita** born in 1986, **Simon Kariuki Icaura** born in 1991 and **Kennedy Karanja Icaura** born in 1993. The protestor has no surviving child with the deceased.

PROTESTORS CASE

3. The protestor testified that the deceased was her husband having celebrated their marriage on 12th February 1974 and lived together up to 1997 when divorce was issued. She testified that while married, they purchased property together; that they purchased land in West Pokot, LR No. WEST POKOT/SIGOR/57(WEST POKOT FARM) and built.

4. She testified that in the year 1978, they purchased one cow and a calf at a cost of kshs 1200 and in 1979, they reared chicken starting with 200 chicks. In her recorded witness statement dated 12th December 2018 which she adopted as her evidence, she stated all she purchased with the deceased. She also adopted her bundle of documents dated 19th December 2018.

5. She stated that she wants to be given her share being: -

- a. **1 1/4 acres of tea bushes.**

b. Death gratuity and unpaid salary of approximately 700,000.

c. Moto vehicle KAA 679A which she stated was purchased after sale of maize which she planted. She stated that the deceased was sick when the vehicle was purchased and she therefore wants the vehicle alone.

d. Minibus KAA 402S purchased from sale of maize and did matatu business.

6. She said she sired two children with the deceased but unfortunately, they both died one at 3 months and the other was a still birth. She stated that she had one child at the time of the marriage but the child does not belong to the deceased.

7. She stated that she wants the property divided into two and she be given her half and a half of the second half making $\frac{3}{4}$ of the estate. She said she contributed kshs.1,000 for WEST POKOT/SIGOR/57(WEST POKOT FARM) while the deceased contributed kshs1,400. She said she wants Plot No.290 Pangani Nakuru to be given to her alone because they purchased the plot using a loan and when the deceased died, she continued paying the loan alone.

8. In cross examination, the protestor confirmed that she divorced with the deceased as shown by judgment in Divorce Cause No.20 of 1995. She said she is the one who filed the divorce cause and that she has no surviving child with the deceased. She said Plot 290 Pangani is developed as they built residential house and 2 one bedroomed houses for rent; that the rent is Kshs 6,000 and it's her renting out the houses however it's the deceased who is registered in the plot. She said the plot has no title but allotment letter is in the deceased's name.

9. She further stated that in WEST POKOT/SIGOR/57 (WEST POKOT FARM), it's the deceased who is indicated as the purchaser and she never signed as a witness; that there is nothing to show that he contributed for its purchase. She said they built their first house in the plot in 1974; she said it was a mud house but it has 2 semi-permanent rental houses now; but they are registered in the deceased's name.

10. The protestor also stated that she wants tea bushes in to be shared. She said that it's registered in the deceased's name but she planted tea in the land though she has no record that she planted tea.

11. She also testified that the vehicle which was doing matatu business was in the deceased name. She said they had leased 20 acres of land where they harvested 400 bags of maize and the estimated yield per acre was 20 bags but all the payments were in the deceased name.

12. She said that the mini-bus was purchased by the deceased and one **Joseph Gatundu**. She does not know where the mini-bus is, but Joseph was using it at the time the deceased died. She said that Philister is managing the land in Chinga Nyeri and that they went to live in the land after the death of the deceased died. So, she said she wants a share on the land and that she wants the portion with the tea bushes and not where the petitioner lives.

13. She also said that she does not wish WEST POKOT/SIGOR/57(WEST POKOT FARM) to be sold and shared and wishes to be given the Pangani land alone if Philister does not object.

14. She said that she has no objection to Philister remaining in the land but she wants to be given the value of tea bushes which she planted. She said that she planted 5000 bushes in 1975 and she was divorced in 1997. They used to pay somebody to take care of the tea though she never produced anything to show she had a caretaker. She said the proceeds of the tea bushes were going to the deceased account. She confirmed that it is Philister who has been taking care of the tea.

15. She said that motor vehicle KAA 679A was with the brother of the deceased.

16. In re-examination she stated that she continued paying the Pangani plot after the death of the deceased. So she has been living in Nakuru but farmed in WEST POKOT/SIGOR/57(WEST POKOT FARM). She said she purchased the property with the deceased but she trusted him and had the properties registered in his name and did not know that they will be divorced. She said in Court that she wanted to be given her share and Philister to be given her share.

17. She said she has allotment letter of the Pangani plot and also confirmed that Philister had 3 children with the deceased who she saw in the funeral for the first time.

18. She said that motor vehicle KAA 402S, the deceased contributed half and her share was in the deceased contribution and they used money from maize to purchase Nissan KAA 679A.

19. She said that after the death of the deceased she never received any advice slip from KTDA but Philister was receiving them.

20. The protestor availed one witness **John Ruta Kariuki** who adopted his witness statement dated 12th December 2018 as evidence.

21. In cross examination, he said he is the brother of the deceased and that motor vehicle KAA 670A was given to him by his brother in the year 1990. He said the deceased told him to use the vehicle to pay the loan and give any money he got to his wife **Salome Wambui** who is his wife. He said he did not know about the divorce. He said the loan was cleared in 3 years and at the time he was still alive. PW2 said he used the vehicle for one year after the death of the deceased then he parked it in his brother land in Chinga and that it is Philister who knows where she took the vehicle. He admitted that it was generating income and he used to give the money to Philister, the petitioner. He showed Court the record that he kept.

22. PW2 admitted that it is him and Salome who filed succession in the year 2003 and he does not know if his brother divorced Salome. She

said Salome is listed as former wife of the deceased. He confirmed that Philister is the second wife of the deceased and that she is living with her children in the deceased's share of their family land. He said Salome lives in the Kapenguria land which belongs to the deceased.

23. PW2 confirmed that the deceased had a plot in Nakuru town and that Salome lived and was collecting rent in two rental units. He further stated that Salome farms in West Pokot.

24. In re-examination he said he was advised by Salome that the vehicle was for Philister following an order from Kangema Court and after he parked the vehicle, Philister has not complained about it.

25. PW2 stated that they accept Philister's children as children belonging to the deceased.

PETITIONER'S CASE

26. **Philister Njoki Karanja** testified that she filed objection to succession cause filed by the objector and PW2 to administer her husband's estate.

27. She testified that the deceased has property in West Pokot and produced search certificate showing that Salome, the objector had filed caution. She stated that WEST POKOT/SIGOR/57(WEST POKOT FARM) is 2.95Ha and the deceased's land in LR CHINGA/GIKIGIE/1800 measures 0.60Ha.

28. The petitioner stated that the deceased had plot No. Nakuru Municipality Block 2/290 in Nakuru and showed Court letter of allotment.

29. The petitioner further stated that motor vehicle registration number KAA 402S was registered in the deceased's name and showed Court the logbook. She also showed Court share certificate for the tea. The petitioner testified that she started living in Chinga since 1999 when her husband died. She said the land has residential house and tea and that Salome has never gone to the land.

30. Petitioner testified that the Nakuru plot has self-contained residential units; two with 2 bedrooms and one with one bedroom. She confirmed that Salome lives in the plot and collects rent of about kshs 10,000.

31. She further stated that WEST POKOT/SIGOR/57(WEST POKOT FARM) has 2 residential houses and 6 rentals. She said they are semi-permanent buildings with mud but plastered and rent is approximately kshs 3000 per month. She said Salome has been collecting rent since the deceased died and has also been planting maize.

32. The petitioner testified that she sired three children with the deceased and produced their birth certificates and confirmed that she lives with the children. She proposed that she remains in LR CHINGA/GIKIGIE/1800 and Salome remain in Nakuru plot and WEST POKOT/SIOI/57(WEST POKOT FARM) be sold and shared. She said that the land in Chinga is ancestral land and she was told tea was planted by her mother in-law. She said she will not agree to have the objector be given tea bushes as she has been collecting rent from Nakuru plot and WEST POKOT/SIOI/57(WEST POKOT FARM). She confirmed that his brother in-law returned motor vehicle registration no. KAA 679A when she complained that she needed money to educate her children. She said the vehicle got wasted and the engine was removed and sold.

33. The petitioner testified that she got married to the deceased in 1986. She said the family of the deceased recognized her children as belonging to the deceased. She said her wish is to remain in the deceased's land in Chinga Nyeri while the objector remains in Nakuru and WEST POKOT/SIGOR/57(WEST POKOT FARM) be sold and shared.

34. On cross examination, she testified that she got married to the deceased under customary law. She further stated that she cannot explain how objector and deceased contributed to purchase of property but she never contributed to purchase. She said the deceased used to collect rent from the West Pokot land but she could not recall when the rental units were built but they had been built at the time the deceased died. In cross examination she restated that she has no objection to the objector being given the Nakuru plot and said she be given land. She said that she takes proceeds from the tea bushes because she is the one who manages it. She said that she is not aware of the loan paid by Salome.

ANALYSIS AND DETERMINATION

35. There is no dispute that the objector was married to the deceased but divorced on 7th August 1997 as shown by judgment produced in Court. It is not also disputed that the objector does not have living children with the deceased as from her testimony one died at 3 months and the other was still birth.

36. It is not also dispute that the petitioner is the second wife of the deceased and that she had three children with the deceased. It is also not disputed that the deceased had the following properties:

- a. WEST POKOT/SIGOR/57(WEST POKOT FARM) measuring 2.95Ha.
- b. CHINGA/GIKIGIE/1800 measuring 0.60Ha.
- c. LR NAKURU MUNICIPALITY BLOCK 2/290

37. From evidence adduced the two vehicles listed are not available for distribution. It is the objector's evidence that motor vehicle registration number KAA 697A was given to the petitioner following a Court order from Kangema Court.

38. In her testimony, the objector testified that she will not be interested in the deceased's land in Nyeri but wants to be paid the value of 5000 tea bushes she planted. On the other hand, the petitioner testified that she learnt that the tea was planted by her mother in-law. The objector however failed to avail evidence, to demonstrate that she planted the tea. Her contribution in the planting and management of the tea was not proved.

39. In respect to WEST POKOT/SIGOR/57(WEST POKOT FARM), the objector stated that she contributed 1000 and the deceased contributed 1400. She however never disputed the fact that since the death of the deceased she has been collecting rent from the rental units and farming on the land. She stated that she does not live in the land but farms there. The petitioner proposed that it be sold and shared equally. In my view, since the objector has exclusively utilized the land since 1999 when the deceased died; I agree with the petitioner that the land and developments be shared equally between the objector and the petitioner's house. They can agree to sell and share or one buys of the other.

40. In respect to the Nakuru plot, the petitioner indicated that she has no objection to it being given to her and Land in Nyeri LR CHINGA GIKIKIE/1800 to her and since the objector expressed no interest in land save for value of tea bushes, it is appropriate allow the objector have the Nakuru plot.

41. FINAL ORDERS

- a. LR NAKURU MUNICIPALITY BLOCK 2/290 to be inherited by the objector Salome Wambui.
- b. LR CHINGA GIKIGIE/1800 to be inherited by the petitioner and her children.
- c. WEST POKOT/SIGOR/57(WEST POKOT FARM) to be valued and shared equally between the protestor on one part and the petitioner Philister and her children on the other part.
- d. Each party to bear own costs.

Judgment dated, signed and delivered via zoom at Nakuru This 19th day of November, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jenifer - Court Assistant

Mr. Waweru holding brief for Mrs. Mukira for the petitioners

Mr. Bichanga for Protestor