



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NUMBER 149 OF 2008**

**IN THE MATTER OF THE ESTATE OF KIINIKI GACHOKA (DECEASED)**

**LUCY WANDIA MURIUKI.....APPLICANT**

**VERSUS**

**ESTHER WAHU THINWA.....1<sup>ST</sup> PROTESTOR**

**DEDAN GACHOKA KIINIKI.....2<sup>ND</sup> PROTESTOR**

**JUDGMENT**

KIINIKI GACHOKA died on 25 July 1994. He was 74 years old. He was survived by 5 children; Lucy Wandia Muriuki, Esther Wahu, Alice Waruguru Mwangi, Margaret Gathoni Muriuki, Dedan Gachoka, David Mwangi. He left one property IRIAINI/GATUNDU/781 approximately 0.356 ha.

Margaret died in 1999.

On 21 April, 2008 Lucy Wandia filed this succession cause seeking to be the administrator of the estate of their father the deceased.

It would appear to these action was not acceptable to her siblings as it provoked certain disruptions leading to Lucy's counsel writing to her siblings on 6 May, 2008, warning them not to interfere with her peaceful occupation of the land until the succession cause was finally determined.

There followed an application dated 14 May, 2008, seeking the maintenance of the status quo of the occupation and use of the land as at the time of the death of KIINIKI GACHOKA in 1994. On 16 May, 2008, the court gave an order that the status quo be maintained, pending the hearing and determination of the cause.

On 4<sup>th</sup> December, the same year Lucy's siblings, Esther Wahu and Dedan Gachoka petitioned by way of cross application for a grant to the same estate. This was accompanied by a notice of objection to the making of the grant to Lucy.

By 21 January, 2010, the objection proceedings had not been filed and Justice Sergon struck out the application seeking extension of time to file the same on the ground that the only reason for the objection was a dispute on the mode of distribution. He issued the grant to Lucy to be confirmed at the expiry of 6 months. She proceeded to file Summons for the Confirmation of the grant dated 27<sup>th</sup> July 2010. The cross petitioners filed an affidavit of protest sworn on 7 October, 2010 pointing out that the deceased had shared out his land between his two daughters, Lucy and Margaret as they were both living on the land.

I heard both the protesters, Caroline the deceased's granddaughter, the petitioner and her witness

The petitioners position is that she was un married daughter of her father. When he died in 1994, he left down his portion of land which is suit property herein where she had been living with her children. That in 1992, he had subdivided his land into 5 equal portions transferring a portion each to his 3 sons, his sister, and the portion now in dispute, which according to Lucy was left to her. The others got title deeds but she never did because, according to her, she was unable to raise the transfer fees. That in any event Margaret was married, had four children including this Caroline, and never lived on the land and was only forcefully buried there by her brothers because her husband never paid dowry. It is her position that she is the sole beneficiary of that parcel of land and Margaret is not entitled to any share.

The protesters position is that that their father left out the 5<sup>th</sup> portion of land that is in dispute for his unmarried daughters and any daughter who would be divorced. Their sister, Margaret was entitled to half share of that land because although she lived a man and had children with

him, but he never paid dowry for her and at some point, he chased out from his home. She went back to her father's land where she lived until her death and was buried on this land. While at her father's place, she gave birth to daughter, Caroline Wahu Gathoni. And that it is this daughter who ought to get a share of the deceased estate in place of her deceased mother. In addition that Lucy was also married and lived most of her life in Lamu and came home after she was divorced.

The petitioner obviously disagrees with the protesters, denying that she was ever married, or that she ever lived in Lamu, stating that her sister was married, had 4 children, including the said Caroline. That her brothers had forcefully brought her sister's body to the landing bandit there by force, claiming that her husband had never been dowry. Her view is that Caroline is not entitled to her grandfather's property but ought to go to her father, her mother's husband to give her land.

The court is called upon to determine whether Margaret Gathoni Muriuki is beneficially entitled to her father's property to which Caroline to inherit through her.

Counsel for each party filed submissions which I have considered.

It is argued for the petitioner, that her sister Margaret Gathoni did not return to her parents' home either before or after her father's death. That neither she in her lifetime nor her daughter Caroline ever lived on, occupied or used the land. That it is only the petitioner lives in the houses that the parents were living in.

It is argued for the protesters that at the time the deceased died, his daughter Margaret Gathoni was living at home and gave birth to Caroline in 1993 while living there. That the petitioner was previously living in Lamu. It is also argued that at the time of her death, Margaret and the petitioner were utilising this property equal shares. That is why, on 15 July, 2008, the court made an order that the status quo that existed at the time of the death of the deceased be maintained. And when Margaret died she was buried on that land.

It is argued that since the other children of the deceased are not interested in this property, it is Margaret and Lucy who are entitled under section 38 of the law of succession Act in equal shares. Further that Caroline should be allocated her mother's share.

It is common ground that the deceased subdivided his land in 1992 and to each person he gave, each has a title deed to their portion. At the time of his death, **Iriaini/Gatundu/781** was registered in his name became his estate, available for inheritance by all those beneficially entitled to his estate, of course in this circumstances, taking into consideration what each may have received inter vivos. All the others have no interest in the property save that it be shared equally between Lucy and Margaret their deceased sister for the benefit of her daughter Caroline.

Lucy's contention that he 5<sup>th</sup> portion was meant solely for her is not supported by any evidence. According to her, unlike her deceased sister, she had been living on that land all her life. The explanation that she did not get a title deed for her portion because she had no money is not credible. There is no evidence at all that their father had intended to give this portion to her. It was in his name as borne by the title deed issued in 1992, when both Lucy and Margaret are said to have been living at home. If indeed he had intended that the portion was solely hers, there would have been no transfer forms, or other explicit evidence as in the others to support the same.

Her sister died on 26<sup>th</sup> July 1999. The certificate of death indicates that she was resident at Kaguyu, Nyeri at the time of death. She is buried on that parcel of land. Caroline was born on 26<sup>th</sup> October 1993 at Kaguyu sub location. This evidence supports the protest that by the time the deceased died, Margaret was already living on her father's land, and actually had Caroline while living there. There is no evidence that she was buried on her father's land forcefully as alleged by Lucy. The least Lucy would have done is to make an offer to her niece simply because her mother's grave is there.

It is important to point out once again that the marriage card cannot be used to disinherit a daughter who is beneficially entitled to inherit her parent's property. The Law of Succession Act does not wear those lenses, as it only speaks of the child or children of the deceased.

As a grandchild of the deceased, Caroline became a direct beneficiary the mother died. See in **Re Estate of Wahome Njoki Wakagoto (2013) eKLR** where it was held: -

*“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1<sup>st</sup> July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”*

I need not say more.

The protest succeeds.

Iriaini/Gatundu/781 to be shared equally between Lucy Wandia Muriuki and Caroline Wahu Gathoni.

I am persuaded that Margaret indeed lived and died on her father's land and is buried there. She was beneficially entitled to inherit her father's land.

Each party to bear its own costs.

**Dated, delivered and signed at Nyeri this 25<sup>th</sup> day of January 2019.**

**Mumbua T Matheka**

**Judge**

In the presence of:

Court Assistant-Jerusha

K.Wachira for applicant

Kahiga for respondent –no appearance

**Mumbua T Matheka**

**Judge**

**25/1/19**