



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 149 OF 1999

IN THE MATTER OF THE ESTATE OF NGARI

MURANDI alias LIVINGSTONE MBARIU (DECEASED)

WILFRED MURANDI MAINGI.....APPLICANT

VS.

STEPHEN MURIMI MWANGI.....PROTESTER

JUDGMENT

1. Ngari Murandi died on the 27th of September 1977. He had neither wife nor children. He had land KIINE/RUIRU/86.

2. Samuel Mwangi Njoroge (deceased) filed succession cause no 283 of 1985 at the RM's Court Nyeri after obtaining a certificate of death for the deceased in the name of Livingstone Mbariu. He explained in an affidavit that the deceased though named Ngari Murandi in the title to his property, he had changed his name to Livingstone Mbariu when he was baptized. In the form P&A 5 he listed the persons related to the deceased

- a) Himself as brother's son
- b) James Whittington Njoroge –brother's son
- c) Antony Wanjohi- brother's son
- d) Elishipher Wagithi Muriuki -Married Daughter
- e) Margaret Nyakinyua- Married daughter
- f) Charity Watha Mbogo- deceased

3. On 3rd November 1986 Wilfred Murandi Maingi came into the matter as an objector seeking time to file his cross petition and other documents claiming that the deceased was his uncle and that the petitioner was not related to the deceased.

4. It is common ground that when Wilfred came on board the matter was referred for arbitration and an award dated 21st March 1991 was made by the district officer Ndia after he and elders heard the dispute. The DO concluded that the land belonged to the father of Samuel Mwangi Njoroge but because Wilfred had lived there for more than 15 years he deserved something small. He was awarded 3 acres and Samuel 7.5 acres.

5. In a ruling dated 22nd July 2009, Makhandia J (as he then was) found that the award by the elders and the DO was beyond their mandate because they were only expected to determine who between the two could be granted letters of administration over the estate of the deceased. He also found that Wilfred had lived on the land since 1958. That the objector was the right person to be issued with grant of letters of administration. The same was issued to Wilfred on 22nd July 2009.

6. He filed summons for confirmation of the grant dated 25th January 2010. Samuel Mwangi Njoroge filed an affidavit of protest on 5th March 2010. The protest was on the grounds that he was the rightful heir because the deceased was a brother to his father, that Wilfred's

mother was a sister to the deceased, that she was married, and a hence he could not come back to his maternal uncle to claim land, that in any event there was an Award by the D.O Baricho giving him Samuel 7.5 acres and Wilfred 3 acres, which award he wanted the court to adopt.

7. Samuel died and was substituted by his son Stephen Murimi Mwangi who filed a further affidavit of protest on 28th January 2016, affirming reliance on the same award. He also raised a red flag on the description Wilfred had given himself as a child of the deceased yet the deceased died without leaving any children. That this was clan land and Wilfred not being a member of the clan was not entitled to inherit, and that the children of Samuel would be rendered homeless if the land was not given to them.

8. The Protest and Summons were heard by way of oral evidence.

9. In his testimony the protester reiterated the contents of the affidavits of protest. He urged the court to confirm the award. In cross examination he confirmed that his father and the deceased were cousins. He was not aware that the award had been set aside by Makhandia J (as he then was). He claimed to have planted coffee on the land but had no documentary proof for the same. He also said that his father did not inherit the land from his father but was given land by the clan. His witness could not recall whether he had ever met the deceased. He did not know to whom the coffee on the land belonged, but that part of the land was utilized by the family of the protester.

10. The Petitioner testified he was the son of Wagithi Murandi sister to the deceased. She died in 1967 and was buried at a friend's place in Harage because she was never married. She also had 5 other children who live in various other places. The deceased left that land in 1958 and he had occupied it since then. That he died on 9th July 1976. He denied that the mother of Samuel Mwangi was buried on that land and testified that she was buried on KIINE/RUIRU/94 in the name of Njoroge Mugeru, father to Samuel. He did not call any witness.

11. Each party filed submissions which I have considered.

12. The issues for determination is who is beneficially entitled to the estate of Ngari Murandi.

13. First things first, there is no award capable of being adopted by this court. The ruling by Makhandia J which is still in force was clear; that the DO and the elders had no mandate to distribute the estate of the deceased.

14. The deceased died on 9th July 1976 before the commencement of the Law of Succession Act which commenced on 1st July 1981.

(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.

I take guidance from Musyoka J who in applying this **in Re Estate of Nduati Mbutia (Deceased) [2015] eKLR** Musyoka J in stated:

24. Under the Kikuyu Customary Law of intestacy, succession is patrilineal. Devolution is in favour of the male relatives of the deceased. Where a male deceased person is survived by a widow and male and female children, the land devolves upon the sons with the widow being entitled to life interest. Daughters are not entitled to inherit, they play their part in the family or clan in which they married, but it is permissible for daughters who attain the age of marriage but never marry to inherit from their parents. Where the deceased person has daughters only and the said daughters are all married, the property will pass to his brothers or their sons, with the widow having life interest.

15. However, he proceeded to point out that with the Constitution of Kenya 2010 in place such customs that favored men to the detriment of women were discriminatory and that ***'any law, including customary law, which is inconsistent with the Constitution, 2010, is void to the extent of the inconsistency.'***

16. It would therefore fly in the face of the Constitutional values and principles to uphold any customary law whose purport would be discriminatory. Hence the argument that the applicant would be disqualified from inheriting from his maternal uncle simply because his mother, his uncle's sister was married to another clan is not tenable. She still remained his sister and the closest relative compared to the protester's father who was the deceased's cousin. This position is clearly recognized by the law of succession which juxtaposed with the customary law, does not carry with it that sense of discrimination.

30. **I go with what Musyoka J stated in the case cited above.** *Succession to land held by Africans in the 1960s and 1970s was subject to two separate legal regimes. If the land was held under African Customary Law, that is if it was not registered under the Registered Land Act, its inheritance was subject to African Customary Law and the procedural law governing succession to such land would be the Magistrate's Courts Act, Cap 10, Laws of Kenya...* By virtue of Section 2 of the Magistrates Courts Act, land held under the Registered Land Act could not fall under a claim under customary law, and a claim to inherit it could not be subject to Sections 2 and 9 of the Magistrates Courts Act. The law regulating succession by an African to such property was stated in Section 120(2) of the Registered Land Act to the effect that the Land Registrar, after satisfying himself of the death of the proprietor of the land, was obliged to apply to the court for the determination of the heirs, and the court was to determine the persons entitled... The process being that the land registrar upon being informed of the death of the proprietor of the land and that he had died intestate, applied to the relevant court to determine the matter on who was entitled to the land according to the Customary Law applicable to the deceased proprietor. The High Court had stated similarly previously in ***Mbuthi vs. Mbuthi (1976) KLR 120, (1976-80) 1 KLR 145***, adding that the provision in Section 120 of the Registered Land Act did not preclude the taking out of letters of administration.

17. The land herein is not owned under a customary law regime. It is registered land. No proceedings were taken out under the RLA in the six years before the Law of Succession Act came into force after the deceased died. And there was no bar in taking out letters of

administration. In fact, it is the protester who took out letters of administration under the Law of Succession Act

18. The evidence on record is clear that the father to the protester, the deceased and others each had land registered in each in his own name. During the arbitration proceedings, Samuel Mwangi Njoroge testified “...my father’s land is no 96, the land in dispute is no. 86, and mine is no. 84”. Obviously therefor it cannot be true that his children would be rendered homeless in the event they did not get their father’s cousin’s land. He had his own, and ought to have also inherited from his own father.

19. The uncontested evidence is that the applicant/ petitioner has occupied and utilized that land since 1958 and still lives there with his family. The protesters have never lived on that land.

20. Having found that any culture or custom that enhances the discrimination of persons because of their sex is contrary to the Constitution, I would go by the evidence that the applicant petitioner is the closest relative of the deceased, being the son of the deceased sister. He has been on that land for 50 years. What other evidence is required to confirm that he is the rightful heir to the deceased?

21. The grounds for the protest- that his mother was married, that there was an award by the DO and elders and that the children of Samuel Mwangi Njoroge would be rendered homeless do not hold water and do not dislodge the facts of the applicant petitioner’s entitlement.

22. The protest is therefore dismissed. The Summons for confirmation of grant dated 25th January 2010 is allowed to the effect that the KIINE/RUIRU/86 to devolve to Wilfred Murandi Maingi

23. Each party to bear its own costs

Dated, delivered and signed at Nyeri this 25th day of January 2019.

Mumbua T Matheka

Judge

In the presence of:

Kinuthia for Applicant

Ms.Mwikali for G.K.Kibira for protestor

Mumbua T Matheka

Judge

25/1/19