



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**SUCCESSION CAUSE NO. 262 OF 1999**

**IN THE MATTER OF THE ESTATE OF NJUEINI WANG'OMBE (DECEASED)**

**DAVID GITAHI NJUEINI .....PETITIONER**

**-VERSUS-**

**BENEDICT MURIITHI WANG'ONDU .....OBJECTOR**

**AND**

**JANET WOTHAYA NJUEINI**

**RAPHAEL KING'ORI NJUEINI**

**PAUL WAHOME NJUEINI**

**JULIUS GITONGA NJUEINI**

**MICHAEL NGARI NJUEINI**

**SAMWEL MWANGI KARURI .....PROTESTERS**

**RULING**

NJUWEINI WANG'OMBE died on the 14<sup>th</sup> December 1986 aged 82 years at Karaini –Karia 'B' according to death certificate issued on the 27<sup>th</sup> Day of July 1987. He left one property L.R THENGENGE/KARIA/872 measuring 4.84 hectares.

At some point a green card for the above portion of land was filed showing that it was a product of subdivision of THENGENGE/KARIA/590 where NJUEINI WANG'OMBE was issued with a land certificate on the 2<sup>nd</sup> May 1975.

From the initial form P&A5 filed in SRM's Court Karatina Succession Cause no 189 of 1987, he was survived by three wives-the Petitioner Joyce Wanjiru who was the 2<sup>nd</sup> wife, Tabitha Wanjiru the 1<sup>st</sup> wife and Janet Wothaya the 3<sup>rd</sup> wife.

Vide a cross petition application dated 9<sup>th</sup> day of August 1988 Benedict Muriithi Wangondu , brought on board a claim by his father Stephen Wangondu that he was a bona fide purchaser of a portion of THENGENGE/KARIA/590 of one acre purchased at the agree price of Ksh 5000.

In a replying affidavit sworn on the 30<sup>th</sup> September Janet Wothaya avered that the said Stephen Wang'onde had bought three acres from the deceased, and was issued with a title deed Thengenge/Karia/871 as per the sale agreement 18<sup>th</sup> December 1974. That there was no other transaction that the family was aware of and that the objector was only bent on getting land from the deceased survivors.

Matter was referred to arbitration on 17<sup>th</sup> March 1989

The original petitioners died.

On the 9<sup>th</sup> March 2009 letters of administration intestate were issued to **DAVID GITAHI NJUEINI**

On the 8<sup>th</sup> October David filed summons for confirmation of the grant. He proposed that the Estate be share equally among the three houses.

On 17<sup>th</sup> November 2009 the protesters who included Janet Wothaya the only surviving wife of the deceased filed their protest dated 12<sup>th</sup> November 2009. They complained that David Gitahi had obtained the letters of administration without involving them. That they represented the other two houses of the deceased, and the last protester being a grandson of the deceased. They sought to have the estate distributed among the protesters and David that is 7 equal portions.

On 15<sup>th</sup> March 2010, Benedict Mureithi Wang'onde also filed his affidavit of protest dated the same day. His complaint was that the mode of distribution was in violation of the elders award to the effect that his father had indeed purchased a portion of the deceased estate, at Ksh 430, and the recommendation of the tribunal that that portion be given to him upon his paying additional sums to the purchase price.

On the 30<sup>th</sup> April 2010, parties appeared before Sergon J. This was after the date was taken on the 10<sup>th</sup> of March 2010 for the hearing of the summons for confirmation of grant dated 5<sup>th</sup> October 2009 and the affidavits of protest. It was agreed that the dispute be determined by way of affidavit evidence and submissions.

On the **9<sup>th</sup> July 2010**, the judge, after considering the summons for confirmation of grant filed by David Gitahi Njueini, the objection by Benedict Mureithi Wang'onde, delivered his judgment. It was submitted for the objector that *'the award of Tetu Land Disputes Tribunal had been entered as a judgment of the court on the 10<sup>th</sup> November 1993, that the objector was expected to top up the purchase price according to the current value of the portion of accept a refund of Ksh 430 paid as a deposit'*.

He also considered the protest by the other members of the family who wanted the estate shared among themselves. In his view the dispute between these protesters and the applicant was the easy one to settle. That the difficult part was that between the objector and the applicant. In his view it was admitted that the deceased had sold one acre of land to be excised from LR THENGENCE/KARIA/872 to the father of the objector. The applicant had stated that he had sent the Ksh 430 to the Public Trustee but the judge found that that was in unclear circumstances as the Public Trustee was not a party to this cause.

He found the *'the award or judgment is liability to the estate of Njueini Wang'ombe, deceased. Let the liability be settled first before the grant can be confirmed'*. He ordered applicant to sort out the issues of the objector and deferred the confirmation of the grant for six months. The estate was ordered to meet the costs of the Objector.

There is nothing in the record, unless I missed it, due to the state of the file, to show that the parties made attempts to comply. Instead what I found is that after this judgment on the 1<sup>st</sup> February 2012, a date was fixed for hearing of the affidavit of protest dated 15<sup>th</sup> March 2010 before the judge on the 8<sup>th</sup> November 2012. It did not proceed and on 16<sup>th</sup> January 2014 another date was fixed by the parties for hearing of the affidavit of protest sworn on the 28<sup>th</sup> May 2010 on the 30<sup>th</sup> September 2014. The matter did not proceed

and on the 20<sup>th</sup> February 2015 another date was taken by the parties for hearing on the 2<sup>nd</sup> November 2015, on which date the matter was placed before Mativo J. All counsels were present. They sought an early date for hearing considering the age of the matter.

After several aborted take offs, everyone was ready to proceed on the 24<sup>th</sup> March 2016. Counsels for the parties were Mr. A the Kariuki for protesters, Mr. C.M King'ori for the petitioner, Mr. Ng'ang'a for the objector.

PW1 Janet Wothaya Njueini was heard.

The matter was adjourned and by the time it came for hearing again Mativo J had been transferred out of Nyeri and the matter was on my cause list on the 10<sup>th</sup> April 2017. Parties through their counsel agreed to proceed from where the matter had stopped. I heard one more witness for the protesters, then petitioner, and finally the objector. All the parties filed written submissions.

At this point I must out of necessity express my utter disappointment frustration and disapprobation at the manner in which the record in this matter has been kept. The fact that court records are key to access to justice cannot be over emphasized. The court is considered the secure custodian of the court record of the parties' case, and that the record will be available throughout the process of trial and appeals. That is why a missing file causes a lot of agony to the litigants and the court. That is why it can amount to gross misconduct for the person involved or even lead to criminal prosecutions. For a succession cause, it is even more critical because of the nature of the issues involved.

Perusing this file was not only torturous but annoying at the fact that at some point in the life of the matter there would be no proper records to read. Torn pages, half pages, mixed up pages, faded pages, missing pages, pages fallen out of the file's binding. What is the role of the clerks in the registry if they cannot maintain the integrity of court records? I have had at times to call upon a registry to sort out a file, or to find mis- filed pleadings, or to just raise issue with the manner in which the record file has been maintained. To say the least, the integrity of the pleadings and proceedings in this file have been compromised by the manner in which this file has been maintained. It is a state of affairs that ought not to be tolerated for as long as the Judiciary continues to maintain paper, hand written/typed records manually to avoid tattered files and proceedings. Files must routinely be taken through 'maintenance' procedures which should include the to ensure that they are well maintained. It is the burden we must carry but which we must carry well in the interests of justice.

That said, it is clear that this court (Sergon J) delivered a judgment on the issues that the parties are now litigating before Mativo J and I through vive voce evidence. Surely that is untenable.

When I took over the matter, I perused the proceedings and saw that it was part heard before Mativo J. I notice now that nobody brought to his attention the fact that a judgment had been delivered. Sergon J suspended the confirmation of the grant to allow the applicant time to sort out the objector's claim. He found as a fact that the estate owed the objector one acre of land. Despite taking oral evidence, (which he did not have the opportunity to do at the behest of parties), and forming my own opinion, that is all I can do in the circumstances. I cannot sit here and make different findings of fact in these same proceedings. The parties herein have an obligation to abide by the judgment. It has not been set aside or appealed from.

Granted, the six months given for the sorting out of the objector's issues are over. No fresh application was filed. Obviously the problem here is the award made by the elders on 11<sup>th</sup> January 1990. From its record it is apparent that only one member of the family supported the elders' finding that the parcel of land was sold to the father of the objector. The wives and children of the deceased objected to the alleged 'sale agreement' between the deceased and the objector's father.

Herein lies the problem *'In conclusion the elders, and the wives of the deceased, and the children of the late Wang'ombe agreed that the shamba was sold to the late Wangondu ...but requested the elders to recommend to the court, to ask the family of the late Wangondu to add them something small on top of the Ksh 430 which was paid to their father by the the late Wangondu. ..I therefore recommend that the*

*parcel in dispute be given to Wangondu's son, Benedict Mureiithi ...and that the court look into the additional payment on top of the Ksh. 430 ...'*

Each party tried in its own way to have that issue settled. By an application dated 20<sup>th</sup> February 1992, before the Deputy Registrar, the petitioners sought an order for the objector to pay an additional Ksh 49,570 '*assessed as costs to complete the purchase price*'. That application was thrown out as it would amount to a variation of the elders' award, and that there was no provision for making such an application. Then the objector brought his dated 16<sup>th</sup> October 1992 seeking the modification of the award to remove the part requiring him to add more money towards the purchase of the land. That was also dismissed, for similar reasons.

That award with its recommendations hangs out in this matter and stands in the way of its finalization. Its legal effect cannot just be dealt with in the submissions. My view is that it must be addressed in a substantive application where all the parties address their minds to it. As it is, Serгон J's made findings about it in his judgment. That judgement still stands. Let the parties deal with it.

**Dated, delivered and signed this 26<sup>th</sup> Day of January 2018 at Nyeri**

**Teresia M Matheka**

**Judge**

Ms. Mwangi holding brief for Nganga Munene for the objector

CM Kingori for petitioner N/A

Ms. Macharia holding brief for Mr. A. K. Kariuki for the protesters

Beatrice Muthoni on behalf of the Objector

Paul Wangombe

David Gitahi Petitioner

Judge

Further Orders;

1. This Judgment be served in the Deputy Registrar to deal with the issues of the maintenance of the integrity of this file and others in that condition
2. The proceedings in this file be typed for purposes of preserving the court record. Mention in three months on 26<sup>th</sup> April 2018 to confirm compliance.

Judge