



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 243 OF 2005**

**IN THE MATTER OF THE ESTATE OF WAINAINA**

**NDEGWA alias WAINAINA s/o NDEGWA**

**WATHATU MUGAMBI.....PETITIONER**

**-VERSUS-**

**MWANGI NDIBOE WAINAINA.....1<sup>ST</sup> PROTESTER**

**PHERISHINA WANGARE MUTURI.....2<sup>ND</sup> PROTESTER**

**JUDGMENT**

Wainaina Ndegwa died on the 2<sup>nd</sup> August 1975. He was the registered proprietor of title no. Muhito/Mbiuni /532 approximately 1.6 acres.

According to the letter dated 23<sup>rd</sup> December 2004 from the Chief Gakindu Location he was survived by his daughter Pherishina Wangari, the only daughter from his 2<sup>nd</sup> wife, Mwangi Ndiboe Wainanina, and others and Wathatu Mugambi his sister in law.

Wathatu Mugambi applied for and was granted letters on 23<sup>rd</sup> February 2006. On 14<sup>th</sup> September 2006 she filed a summons for confirmation of grant seeking that the estate be shared equally between her and Pherishina Wangari. According to her affidavit in support of the summons she deponed that she and her husband had lived on that land '*all our years*', and the deceased and her husband Clement Mugambi Ndiboe '*were owners of land parcel Muhito/Mbiuni/532*'.

Pherishina Wangari filed an affidavit of protest sworn on the 9<sup>th</sup> March 2007 on the same date against the summons for confirmation of grant.

She deponed that she and Mwangi Ndiboe Wainaina were the children of the deceased, and the ones entitled to both the letters of administration and the entire estate of their father. That the petitioner being a sister in law to the deceased was not at all entitled to his estate.

In response to the affidavit the petitioner filed hers on the 17<sup>th</sup> April 2008. She averred that her husband died on 29<sup>th</sup> March 2002 and was buried on the said parcel of land where they had been living before his death. That she continued to live there even after his death.

She confirmed that the deceased had two wives, Njeri, the mother to Pherishina, and Waigumo, who never got any children of her own but 'married' Agatha Wanjugu the mother to the 2<sup>nd</sup> protester.

The hearing of the protest began on the 16<sup>th</sup> October 2012 before Hon Justice Wakiaga. However, it had to start afresh on the 25<sup>th</sup> October 2016 before the Hon. Justice Mativo.

In her testimony the 2<sup>nd</sup> protester confirmed to the court that the petitioner and her family lived on the parcel of land. However, that the clan had only given the petitioner's family a portion of that land to only build and live on but not to own or farm. Her proposal was that the land be shared between herself and the children of Agatha. She had no problem with the petitioner maintaining the portion the clan had given her.

The 1<sup>st</sup> protester John Mwangi Ndiboe, confirmed the 2<sup>nd</sup> protester's testimony.

The protesters' witness John Ngunjiri Mbogo's testimony was that he knew all the parties involved as he grew up in the same village with all of them. He was present in a meeting held in 1983 where the widows of the deceased were as by the clan to allow their brother in law, the husband to the petitioner to put up a place to live. There was no agreement, the elders made a determination, allowing the petitioner's husband a portion on which to put up his house. According to this witness that decision aggrieved the 1<sup>st</sup> wife so much that she died a week later. He produced the original document on which the writings were made in the Kikuyu language and an English translation. He further told the court that the ancestral land was in a place called Gikondi which the deceased, the petitioner's husband and her brother sold and shared the proceeds therefrom.

In her testimony before me, the petitioner testified that her brother in law had no child of his. That the 2<sup>nd</sup> protester came with her mother, and the 1<sup>st</sup> protester was the child of the 'wife' of the 1<sup>st</sup> wife of the deceased. She contended that the parcel of land belonged to her father in law, that the land ought to be share equally between herself and the child of the deceased. She testified that before moving to that land her husband worked for Kenya Railways and they lived in Nairobi.

In cross examination she confirmed that her family had lived with the deceased and her husband's sister one Gathoni Githatu. She confirmed that a clan meeting was held where it was agreed that her family could have a portion on which to put up their home, but if they got their own money they would buy their own parcel. According to her the land would thereafter be divided in to two portions.

Her son Richard Ruiru Mugambi testified that his father told him that the land belonged to his grandfather. He too was aware of the land in Gikondi which had belonged to his grandfather. However, he insisted that even this parcel of land belonged to his grandfather. He confirmed that his family had at some point lived with his Aunt Gathoni. According to him it was because of disagreements between the two brothers, his father and his uncle due to drunkenness.

DW3 David Karori Mbuthi a neighbour testified that he knew the land belonged to the two brothers because both had constructed houses there.

Upon closure of the petitioner's case, parties were given the time to put in

Written submissions. It was agreed that they would all be in on or before the 15<sup>th</sup> January 2017. The petitioners were not there as at the time of writing this judgment.

Be that as it may. I have carefully considered all the evidence and the submissions on record. The issues arising for determination are;

1. Who is the rightful administrator of the deceased's estate?
2. Who is beneficially entitled?
3. What are the shares?

On the 1<sup>st</sup> issue section 66 of the Law of Succession Act provides for the order of priority on it;

When a deceased has died intestate, *the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—*

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

According to part V the persons with a higher priority would be the spouse, then the child, then any others.

In this case it is not in dispute that the 2<sup>nd</sup> Protester is the child of the deceased. The petitioner added a twist to it that she was not the biological child of the deceased, but the rest of the evidence supports her claim that she was the daughter of the 1<sup>st</sup> wife of the deceased hence it. The petitioner's position was that her brother in law did not have any biological child of his own. She also brought in the angle that the 2<sup>nd</sup> protester was married but left her husband and came back to the land. All this in my view points to one direction that the petitioner would like the court to find that the deceased had no children and therefor his estate should go to her. However, that is in contradiction with her own affidavit in support of the summons for confirmation of the grant where she says that the land be shared equally between them. I find that the evidence on record does show that the deceased had two wives. One gave him a daughter. The other one had no children and

married a wife who came with children, who are represented by the 1<sup>st</sup> protester. In terms of hierarchy, the 2<sup>nd</sup> protester stands above the petitioner in terms of being the administrator of the estate.

To determine this issue it must first be determined as to whose land this was. It is not in dispute that the land is registered in the sole name of the deceased. There is evidence there was ancestral land in Gikondi. The insistence by the petitioner and her family that the land that is the deceased's estate belonged to the father of the deceased is not supported by any evidence. There is evidence that when the petitioner's husband needed somewhere to live he went to the sister's place, and it is the clan that forced the deceased's widows to let the petitioner's husband put up a house on that parcel of land. This gives some credence to the evidence that there was ancestral land elsewhere and the deceased's land did not belong to his father.

The meeting by the clan is not contested, the petitioner contests the contents of the agreement. The document produced by one of the elders who was present is clear. The husband to the petitioner was given somewhere to live. There is nothing on that piece of paper saying that the land belonged to both brothers, or that it would later be shared equally. If that had been the case the clan elders would have just said so.

Hence, from the evidence before me the land that is the estate herein belonged to the deceased herein and he died intestate. Secondly it is not him who gave the petitioner's husband part of his land, but the clan members who made his widows accommodate their brother in law. The whole estate would therefore be free for distribution.

On the third issue, it is clear that it is the protesters who are beneficially entitled to their grandfather's and father's estate respectively. Essentially the estate ought to be shared between the two houses of the deceased as provided for under section 38 of the Law of Succession Act. However, those beneficially entitled acknowledge the fact that the husband to the petitioner was given a portion of land where his family has lived since. They have no objection to her continuing to occupy that portion. They have proposed 0.1 acres. The petitioner stated in her evidence that she occupies about ½ an acre of the land.

It is noted from the document written by the elders in 1983, the specific share is not mentioned. It only says that the elders had demarcated a place for him and he was not to demand anything beyond that. As I have pointed the deceased did not himself give out his land. It was given out by the clan, despite the objections of one of the beneficiaries. Since the beneficiaries have no issue with maintaining that status quo, then, then the court will share the estate amongst them.

In conclusion I make the following orders;

1. The grant issued to the petitioner herein be and is hereby revoked.
2. A fresh grant to issue to PHERISHINA WANGARI MUTURI
3. The estate of WAINAINA NDEGWA alias WAINAINA s/o NDEGWA be shared as follows.
  - i. PHERISHINA WANGARI MUTURI 0.675 acres absolutely
  - ii. JOHN MWANGI NDIBOE 0.675 acres jointly with his siblings
  - iii. WAITHATU MUGAMBI 0.25 acres in trust for herself and her children
4. Each party to bear its own contests.

**Dated, Delivered and Signed at Nyeri this 13<sup>th</sup> day of February 2018**

**Teresia M Matheka**

**Judge**