



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT SUCCESSION NO. 1050 OF 2009**

***IN THE MATTER OF THE ESTATE OF MUCHINA MURIUKI***

***alias GABRIEL MUCHINA MURIUKI (DECEASED)***

**PETER MACHARIA MUCHINA.....APPLICANT**

**VERSUS**

**WANGUI MWANGI KIBUI.....PROTESTOR**

**JUDGMENT**

The applicant and the protestor are respectively the administrator and administratrix of the estate of the late Muchina Muriuki who died of cardiopulmonary arrest on 16<sup>th</sup> December, 2003 aged 87. He was domiciled in Kenya and his last known place of residence was Iriaini location in Nyeri County.

The deceased died intestate and had no family of his own; his immediate survivors were his three sisters two of whom were named in the affidavit in support of the petition for letters of administration of his estate as Wacuka Gichohi Kamau and Wangui Mwangi Kibui; the latter is the protestor in the present application.

The identity of the deceased's third sister emerged only after the applicant filed a summons for revocation of grant of letters of administration of the deceased's estate which had been made to the protestor on the sole ground that she had been omitted from the petition in which the grant was made. This sister was identified as Mary Njoki Muriuki, who happens to have been the mother of the applicant; according to a copy of the certificate of death exhibited to the affidavit in support of summons for revocation of grant, the applicant's mother died on 9<sup>th</sup> May, 2007.

On 15<sup>th</sup> July, 2011, this Court (Sergon,J) ruled that instead of revoking the grant, he would rather appoint the applicant and the protestor as joint administrators of the deceased's estate. The judge further allowed them to file summons for confirmation of grant either jointly or severally.

The applicant took the initiative and filed the summons dated 19<sup>th</sup> January, 2012 for confirmation of the grant that had been made in their joint names. He proposed to have the deceased's estate whose only asset was Title No. Iriaini/Kiaguthu/1075 measuring approximately 0.7486 ha shared equally amongst the deceased's surviving sisters Wacuka Gichohi Kamau, Wangui Mwangi Kibui and himself, apparently representing his late mother. If his proposal is accepted, he is to hold his share in trust for himself and on behalf of his six other siblings.

The protestor protested against the confirmation of grant in these terms; in her affidavit of protest sworn on 22<sup>nd</sup> February, 2012 and filed in court on 24<sup>th</sup> February, 2012 she suggested that the deceased's estate be shared equally between herself and her sister Wacuka Gichohi. Her only reason for omission of her late sister Mary Njoki Muriuki from benefitting from the deceased's estate was because she is alleged to have been given her share of land known as **Title No. Iriaini/Kiaguthu/1074** apparently during deceased's lifetime.

The protest was heard viva voce and it is the subject of this judgment.

The parties were in agreement at the hearing that indeed the deceased was survived by three sisters one of whom was the applicant's mother. According to the affidavit in support of the petition, his only asset that now comprises his estate is a parcel of land which as noted, is registered as Title No. Iriaini/Kiaguthu/1075.

The primary contention between the parties is whether this property should be shared equally between the deceased's two sisters or whether

the applicant, should also benefit from a share of the estate on behalf of his late mother.

It emerged from the protester's testimony that her sister Wachuka Gichohi with whom she sought to share the estate had also passed on; however, unlike Mary Njoki Muriuki who died before the institution of this petition, Wachuka died during the pendency of the petition. She testified that she was also survived by a number of children.

It was also her evidence that the deceased owned two parcels of land one of which was the land that now comprises his estate while the other parcel is Title No. Iriaini/Kiaguthu/1074. This latter parcel, according to the protester, was given to the Mary Njoki Muriuki in the lifetime of the deceased; in other words, as I understand the protester, the deceased made an inter vivos transfer to his sister and this gift ought to be taken into account in distribution of the remainder of his net intestate estate. In her view, having benefited from the deceased before, she is not entitled to a share of his estate.

On her cross-examination, she appeared to depart from her earlier testimony that Mary Njoki Muriuki was given this parcel of land by the deceased. She instead said that the entire parcel of land was 3 acres and subdivided into three parcels of an acre each. She initially suggested that each of the three sisters of the deceased was given a share of the land but in what appeared to me to be a contradiction of this statement, she testified that her deceased sister, Mary Njoki Muriuki, got one and half acres. She, however, disposed of her parcel and moved elsewhere. The subdivision, according to her evidence, was done by the elders upon the deceased's demise.

The witness denied that the land was given to Njoki by their late father since he died when Njoki was a minor. It was her evidence that the land originally belonged to their father who bequeathed to his son, the deceased herein.

Juliana Njeri Gichohi testified in support of the protester's protest and testified that the late Wachuka Gichohi was her mother but died while this succession cause was pending in court. Apart from herself, her mother was survived by six other children. She undertook to hold her mother's share in trust for herself and the rest of these children. She denied that Mary Njoki was given her parcel of land by her grandfather, the deceased's father.

The applicant on the other hand admitted in his testimony his deceased mother Mary Njoki Muriuki was given **Title No. Iriaini/Kiaguthu/1074** but not by the deceased; according to him, this land which measures one and half acres, was given to her by his maternal grandfather in 1987. The deceased was also given his share at the same time. The titles to the properties were issued after the deceased's demise. He also admitted that he, together with his siblings sold their mother's parcel in 2010 and bought another land in Mwea where they are currently settled.

The applicant produced copies of title deeds showing that his mother was registered as the absolute proprietor of Title No. Iriaini/Kiaguthu/1074 on 7<sup>th</sup> November, 2007 while the deceased was registered as the absolute proprietor of Title No. Iriaini/Kiaguthu/1075 on 3<sup>rd</sup> October, 2007. Both copies show that each of these parcels is a "subdivision of 601". It is also apparent on the face of these titles that they were registered and issued in the names of deceased persons after their demise. Nothing turned on this discrepancy and so I will not venture into it.

Having died intestate and in the absence of any surviving spouse or children, the law applicable to the distribution of the deceased's estate is definitely **section 39** of the **Law of Succession Act, (cap.160)**. That provision of the law states as follows:

***39. Where intestate has left no surviving spouse or children***

***(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority***

—

***(a) father; or if dead***

***(b) mother; or if dead***

***(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none***

***(d) half-brothers and half-sisters and any child or children of deceased***

***half-brothers and half-sisters, in equal shares; or if none***

***(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.***

***(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.***

Of particular interest is **section 39(1)(c)** which stipulates that if the mother and the father of the deceased are themselves deceased the estate devolves upon his brothers and sisters and any child or children of the deceased's brothers or sisters in equal shares.

As noted earlier, it is common ground between the parties that the deceased was survived by three sisters. It was also common ground that of

the surviving sisters, only one, the protestor, is left as at the time of hearing of the protest. There is evidence, and there was no dispute that the other two had also died and were survived by their own children.

Except for the protestor, the applicant and Juliana Njeri Gichohi sought to have a share of the deceased's estate as representatives of their respective mothers. The trouble with the approach they adopted is that none of them obtained grant of letters of administration of whatever nature to represent their respective mothers' estates. **Section 79** of the Law of Succession Act is clear in whom the property of the deceased vests; it states:

***79. The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.***

No grant of representation can be made until an application in a prescribed form has been made under **section 51** of the Act. And section 80(2) of the same Act is particular when the grant of representation takes effect; it states as follows:

***(2) A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant.***

It follows that in the absence of a grant of representation none of the children of the deceased's sisters has any legal standing to pursue their respective mothers' rights in their uncle's estate.

However, all is not lost for these children; they can still benefit from this estate in their own right independent of what their mothers' rights. Section 39(1) (c) to which reference has already been made makes this possible and expressly provides that it is not only the brothers and sisters of the deceased who are entitled to a share of his estate if he is not survived by either of his parents, a spouse or children. The children of his brothers or sisters have equal rights to such an estate.

Based on this understanding, I find the proposal by the applicant to divide land known as **Title No. Iriaini/Kiaguthu/1075** into three shares to be distributed equally amongst the deceased's surviving sister and each of the two houses of his late sisters to be consistent with the law and thus more acceptable. In the same vein, I reject the protestor's protest solely for the reason that there is no evidence to support her allegation that the registration of Mary Njoki Muriuki as the absolute proprietor of Title No. Iriaini/Kiaguthu/1074 was as a result of an inter vivos transfer from the deceased. The available evidence is that the two parcels comprised a single title and in the absence of any contrary evidence, it is more probable that not that, as suggested by the applicant, his grandfather who was also the protestor's father was the registered proprietor of the original parcel. His explanation that he divided the parcel into two portions each of which he gave to his mother, Mary Njoki Muriuki, and the deceased also appeals to me to be more plausible.

If this is the case then the protestor's protest would have made some sense but it is not; the estate, the subject of this cause, is her brother's and not her father's estate.

In the ultimate, I order that the land parcel comprising **Title No. Iriaini/Kiaguthu/1075** shall be divided into three equal shares and each of these shares shall be registered in the names of the following people:

1. **Wangui Mwangi Kibui** (absolutely)

2. **Peter Macharia Muchina**

To hold for himself and in trust for the rest of the children of Mary Njoki Muriuki who have been named as follows:

- (i) Mwangi Muchina
- (ii) Ann wanjiku Muchina
- (iii) Mary wangui Muriuki
- (iv) James Muchina
- (v) Grace Wairimu Muchina
- (vi) Selifa Mumbi
- (vii) Charity Nyawira

### 3. **Juliana Njeri Gichohi**

To hold for herself and in trust for the rest of the children of Wacuka Gichohi who have been named as follows:

- (i) Mwangi Gichohi
- (ii) Gachie Gichohi

(iii) Wambui Gichohi

(iv) Wanjiku Gichohi

(v) Wangui Gichohi

(vi) Muthoni Gichohi

The summons dated 19<sup>th</sup> January, 2012 shall be confirmed in the foregoing terms. Parties will bear their own costs. It is so ordered.

**Signed, dated and delivered in open court this 16<sup>th</sup> day of March, 2018**

Ngaah Jairus

**JUDGE**