



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

SUCCESSION CAUSE NO.64 OF 2016

ESTATE OF WAGAKI MATHINJI alias ALIMA JOSEPH SAKO - DECEASED

AND

MIRRIAM WANGUI JOHN.....PETITIONER

VERSUS

JOSEPH MURIITHI MATHINJI.....RESPONDENT

JUDGMENT

1. **ALIMA WAGAKI MATHINJI alias JOSEPH SAKO** (deceased) had three children in her life time. They were:

1. **Daniel Mathinji (deceased)**
2. **Miriam Wangui John**
3. **Eileen Wanjiru George Tomlinson.**

2. Although Daniel Mathinji died in the year 2005 he left surviving him a wife Irene Nyaruai Mathinji (**now deceased**) and children; the exact number of those children however was not proved in this cause, although there was evidence adduced of six names of those children.

3. Miriam Wangui John (**hereinafter referred to as Miriam**) petitioned for a grant of letters of administration intestate for the estate of her deceased's mother Wagaki Mathinji alias Alima Joseph Sako. In that petition she set out the surviving beneficiaries of that estate as herself, Eileen Wanjiru George Tomlinson (**hereinafter referred to as Eileen**) and Irene Nyaruai Mathinji, deceased, (**hereinafter referred to as Nyaruai**). Miriam only petitioned grant after citing Nyaruai and after Nyaruai failed to petition. Miriam listed one property, namely plot **No. 350 Marmanet Forest Settlement Scheme**, as the only asset of the estate.

4. A grant was issued dated 10th May, 2014 and which grant was confirmed on 10th June, 2014. The confirmed grant distributed the one asset of the estate as follows:

- (i) **Miriam and Eileen four acres.**
- (ii) **Nyaruai one acre.**

5. Even though that was the mode of distribution Miriam obtained a transfer and title reflecting as follow:

- (i) **Miriam and Eileen four acres jointly.**
- (ii) **Miriam one acre.**

6. By a summons dated 28th July 2015 Nyaruai sought revocation of the grant, issued to Miriam, on the grounds the grant was obtained fraudulently by making false statement or by concealment of material facts.

7. The fraud and concealment referred to in that application was that Miriam failed to include, amongst the assets, their deceased's mother's plot in Rumuruti town. Nyaruai by the supporting affidavit stated that the deceased had two pieces of land, namely:

(i) Plot No. 350 Marmanet Forest Settlement Scheme

(ii) Plot No. L2 Rumuruti Town Council.

8. When the summons for revocation was fixed for hearing Nyaruai had died and she was substituted by her son Joseph Muriithi Mathinji

9. The court ordered the revocation be heard by viva voce and affidavit evidence.

10. The applicant's case, in summary is that the deceased's estate has the two properties, one in Marmanet and the other in Rumuruti. That the petitioner, Miriam, failed to list the property at Rumuruti. That the family of Nyaruai are settled on the Marmanet property and it is just that the said property be distributed to Nyaruai's family.

11. The petitioner's case is that it was her who balloted and obtained the Rumuruti plot on behalf of their deceased mother and similarly that she purchased the Marmanet property. That in case of both pieces of property they were registered in the name of their deceased mother. For that reason the petitioner sought that her said purchase of those pieces of land be recognised and that distribution of the property be as follows:

(a) MARMANET PROPERTY

(i) 4 acres to Miriam and Eileen jointly

(ii) 1 acre to Nyaruai's family

(b) RUMURUTI PROPERTY

(i) The whole to be distributed to Miriam

12. Miriam, the petitioner argued that Daniel (deceased), her brother and husband of Nyaruai, had been given land by their deceased mother, five acres in Sipili. That Daniel (deceased) sold that land and settled at Marmanet with his family. That accordingly having benefited from the Sipili land, that Nyaruai's family should not get more than one acre in Marmanet property.

ANALYSIS AND DETERMINATION

13. I had an opportunity to hear the witness testify. In my view both side were not entirely sincere in their testimony.

14. I did not believe Miriam that she solely purchased the land in Rumuruti and Marmanet. If she did, she did not explain why they were not registered in their deceased's mother's name. Since the intention, according to her, was to give their deceased mother land to live on, she did not need to have that land registered in her late mother's name. And if she had the land registered in her late mother's name then she relinquished her right to ownership of the same since she gave it to her late mother. This understanding is supported by Miriam response to her Learned counsel's question, this:

"I gave it (the Rumuruti land) to my mother.

I wanted her to occupy that plot."

15. Miriam gave her mother Rumuruti plot. Having given it to her she, Miriam, ceased to have an interest in that plot. It belonged to her late mother. That understanding also applies to Marmanet property.

16. I did not believe that Daniel deceased was given land by their late mother, in Sipili, and thereby forfeited his right to inherit their late mother's property.

17. Nyaruai through her son failed to give a basis why Miriam and Eileen should not receive land from Marmanet property.

18. I am grateful to Mr. J M Mwangi, Learned Counsel for the petitioner, and Mr. Chweya, Learned Counsel for Nyaruai for the well-argued and researched submissions.

19. I am persuaded by the case In re **ESTATE of JOYCE KANJIRUNJIIRU (Deceased) [2017] eKLR** where the court:

"...grandchildren can only inherit their gran parents indirectly through their parents, the children of the deceased.

The children inherit first and thereafter the gran children inherit from the parents. The only time gran children inherit directly from their grandparents is when the gran children's own parents are dead. The grand children step into the shoes of their parents and take directly the share that ought to have gone to the said parents."

20. That decision rings true in this matter. Nyaruai's children are grandchildren of the deceased in this matter. Their father Daniel (deceased) was a son to the deceased in this estate. The grandchildren, that is the children of Nyaruai, since their parents are deceased can inherit

directly the estate of the deceased in this matter – who was their grandmother.

21. Before finalizing on the distribution of the estate it is necessary to respond to the petitioner’s submission that the summons must fail because it was supported by an affidavit of the Learned Counsel of the applicant, Mr Chweya. The petitioner therefore sought that this court will find the summons incompetent.

22. This court will not accede to the prayer that the summons be found to be incompetent. This is because the son Nyaruai gave oral evidence to advance the prayer in the summons. Since that oral evidence is on record then the requirement that justice be administered without undue regard to procedural technicality becomes applicable. Since the petitioner did not say that she was prejudiced by the reliance of an advocate’s affidavit there would be no basis to find the summons were incompetent.

23. In conclusion I find that the application has merit because Miriam failed to list the Rumuruti property when she petitioned. **Accordingly I order as follows:**

(a) The grant issued to Miriam Wangui John on 10th May, 2013 and the confirmed grant issued on 10th June 2013 are hereby revoked. To that end the title LAIKIPIA/MARMANET 350 (EXTENSION) issued to MIRIAM WANGUI JOHN and EILEEN WANJIRU GEORGE TOMLISON is hereby revoked and a title over that property shall issue as herein below.

(b) LAIKIPIA/MARMANET/350 (EXTENSION) which is 2.7 HA. shall be distributed as follows:

(i) Four (4) acres to be shared equally between the following persons:

Ø JOSEPH MURIITHIMATHINJI

Ø PAUL MWANGI MATHINJI

Ø DICKSON NGUTHEROMATHINJI

Ø PETER KAGURUMATHINJI

Ø MARY WARAKIMATHINJI

Ø STEPHEN NDERITUMATHINJI

(ii) TWO POINT SIX SEVEN (2.67) acres to be shared equally between MIRIAM WANGUI JOHN and EILEEN WANJIRU GEORGE TOMLISON

(C) RUMURUTI PLOT L 2 to be shared equally between MIRIAM WANGUI JOHN and EILEEN WANJIRU GEORGE TOMLISON.

(d) There shall be no orders as to costs.

Dated and Delivered at Nanyuki this 19th April, 2018

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant: Njue

Petitioner

Respondent

For petitioner

For Respondent

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE