



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**SUCCESSION CAUSE NO. 1183 OF 2013**

**[FORMERLY NYERI HIGH COURT SUCCESSION CAUSE NO. 1002 OF 2009]**

**RE ESTATE OF NJERI WANJOHI (DECEASED)**

**SUSANA NYAMBURA GATHIGI.....PETITIONER**

**VERSUS**

**EVANS KIMONJO KANJL.....PROTESTOR**

**JUDGMENT**

1. The deceased, *Njeri Wanjohi*, died *intestate* on 20<sup>th</sup> January 1981. From the evidence, she was survived by only *two daughters*; Susana Nyambura Gathigi (the petitioner); and, Violet Wambui Maina. The protestor is a *step-grandson* of the deceased.
2. The deceased was the *registered* owner of a parcel of land described as *Loc. 15/Gakuyu/789* [hereafter *the suit land*].
3. The petitioner applied for a grant of letters of administration to the estate. She named herself and her sister as the sole heirs. The protestor lodged an *affidavit of protest* sworn on 2<sup>nd</sup> July 2012.
4. The petitioner and Violet Wambui Maina assert their right to inherit their *mother's* estate. The protestor on the other hand claims that *his* father gave the land to him and his brother, *Maina*. The *two step-grandsons* are in possession; and, have buried close relatives there. The protestor's view is that the petitioner and her sister are *married* and have no right to the land.
5. On 26<sup>th</sup> July 2016, the court directed that the protested summons for confirmation of grant proceed by *viva voce* evidence.
6. The petitioner testified that she is a daughter of the deceased. The deceased was the second wife of *Wanjohi* who died earlier in 1948. The petitioner's mother was a co-wife to *Wanjiku Wanjohi*. *Wanjiku* was the mother to *Githiona* alias *Kanji*. *Githiona* is the father to the protestor. The petitioner said the protestor is thus a step-grandson of the deceased.
7. The petitioner said the suit land is registered in the name of her mother, the deceased. She produced a certificate of search (exhibit 1). She said her father had another piece of land in Gikarangu/Kabui which was shared between *Githione* and his brother *Maina*. She proposed that the suit land should be shared between her and her sister, Violet Wambui Maina.
8. Upon cross examination by the protestor, she said her father had other land in at Mathioya, Kabui Gikarangu, Weruini and Gathima. The only land purchased by the father to the protestor was at Wodimai and Gakuyu. She said that the protestor and his siblings *Maina* and *Waigumo* are children of *Wanjiku*. She denied that her mother gave any land to the protestor or his brother.
9. The petitioner conceded she is married and owns some land in Meru. She has never farmed on the suit land since her marriage. But she said her sister was cultivating the land. She was however evicted by the protestor's father, *Githioni*.
10. The protestor testified that his mother was known as *Muthoni Githioni*. His father was *Githioni Wanjohi*. He said that *Njeri Wanjohi* (the deceased) was his step-grandmother. His grandmother was *Wanjiku Wanjohi*.
11. He testified that the suit land was given to him by his father who pointed out to him the place to build a house in 1975. He has lived there throughout. He occupies half of the property. The other half is occupied by his brother, *Maina Wanjohi*.
12. He said that the petitioner and her sister only visited the homestead occasionally; like during burial ceremonies. The dispute was referred to clan elders on 21<sup>st</sup> May 2009. The petitioner attended. He produced the minutes (Exhibit 2). The dispute was also referred to the Chief

and District Officer. He did not have the proceedings before the Chief or District Officer.

13. The protestor said that seven close relatives are interred on the land including his father and mother; his brothers Mwangi and Maina; his daughter Wambui. Njeri Wanjohi (the deceased) is also buried there.

14. He said the petitioner married and resided in Meru. Her sister Violet had resided on the land but was chased away because she practiced witchcraft. When pressed about the matter, he said she came to the homestead carrying a lit lantern on top of her head. He could not recall the exact date. He also conceded that the petitioner's matrimonial home was in Murang'a but she had some land in Meru.

15. Under further cross examination, he said that his father was given a place to build by Njeri (the deceased). He denied that it was a temporary arrangement before his father could move to his own land. He could not explain why the suit land was still registered in the name of the deceased.

16. I have considered the evidence. It is not disputed that the protestor is a *step-grandson* of the deceased. He ranks very low in *priority* to the two children of the deceased. It matters little that the two children are daughters or married. The land is registered in the names of their mother. Their father predeceased their mother. The petitioner and her sister Violet Wambui Maina are now first in the line of succession.

17. To demonstrate how far the protestor is removed, his mother was Muthoni Githioni. His father was Githioni Wanjohi. Njeri Wanjohi (the deceased) was his *step-grandmother*. The protestor's *grandmother* was Wanjiku Wanjohi. That reasoning applies equally to his brother Maina Wanjohi who occupies the other half of the property.

18. True, the deceased was in a polygamous union. Kikuyu customary law is relevant. That is why the dispute was referred to the clan. I have studied the minutes of the meeting held on 21<sup>st</sup> May 2009 (Exhibit 2). The elders resolved that the true heirs were *sons* of Wanjohi or their descendants. The protestor did not produce the proceedings before the Chief or District Officer.

19. The position taken by the clan would automatically *disinherit* the petitioner and her sister in favour of a step-grandson. I hold the view that such a custom is discriminatory and repugnant to justice. It would not be *in conformity* with section 3 of the Judicature Act. See Re Estate of Mwangi Ngamba [2015] eKLR. It would be to turn logic onto its head to say that property registered in the name of the deceased should bypass her *own* children merely because they are *girls or married*.

20. I agree that the protestor and his brother Maina have lived on the suit land for many years; and, that close family members are interred there. But there was no cogent evidence of *adverse possession*. In any case, the protestor or his brother has never moved the court for such a *declaration*.

21. From both an evidential and legal standpoint, I find that the protestor or his brother Maina failed to *prove* they are entitled to the suit land. The protestor's father *may* have shown the protestor a place to build. But it was meaningless because he never *owned* the land: the land was *registered* in the name of his step-mother (the deceased). I find it even more difficult to comprehend how the registered land would bypass her *own* children to go to *step-grandsons*.

22. I find that the *petitioner* and her sister *Violet Maina* have established, on a balance of probabilities, that they are the *only children* of the deceased ranking *first* in priority to inherit the suit land.

23. The upshot is that the property known as *Loc. 15/Gakuyu/789* registered in the name of the deceased shall be distributed in *equal* shares to *Susana Nyambura Gathigi*; and, *Violet Wambui Maina*. The grant shall be confirmed accordingly.

24. Costs follow the event and are at the *discretion* of the court. Considering that this is a *succession cause* involving close family members; and, in the interests of justice, each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A this 31<sup>st</sup> day of July 2018.**

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of:**

Petitioner (in person)

Protestor (in person)

Ms. Dorcas and Mr. Kiberenge, Court Clerks.