



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 686 OF 2013

IN THE MATTER OF THE ESTATE OF NJERU MWITANJAO(DCD)

AND

FRANCIS NJUE NJERU.....PROTESTOR

VERSUS

PETER STEPHEN NJIRU KATHAMBARA.....PETITIONER

J U D G E M E N T

The deceased in this case **NJERU MWITANJAU** died intestate on 14/12/2010 and was survived by several children from his two houses. The widows had predeceased him.

The Petitioner/Administrator Peter Stephen Njiru Kathambara was appointed the Administrator of the estate on 14/04/2014.

The deceased left only asset **LR.GATURI/NEMBURE/10212** measuring 0.20 ha equivalent to ½ an acre which is now the disputed land in respect to inheritance.

The Petitioner filed an application for confirmation of grant dated 30/06/2014 bequeathing the entire estate **LR. GATURI/NEMBURE/10212** to one of the daughters of the deceased **ANISELEMINA WANDATHI**. This was followed by a protest by his step-brother **FRANCIS NJUE NJERU** dated 07/01/2015 opposing the mode of distribution adopted by the petitioner. The petitioner filed an amended application for confirmation of grant dated 24/11/2015 in which he proposed that the daughters of deceased namely:-

1. *Teresina Gitiri Njagi*
2. *Anselimina Wandathi Kithaka*
3. *Jacinta Marigu Ndwiga*
4. *Anastasia Gitiri*
5. *Nicerate Wegoki*
6. *Teresiah Wegandu*

7. **Anjelina Marigu** and grandsons being children of his two deceased daughters should inherit **L.R.GATURI/NEMBURE/20212** jointly in equal shares.

The protestor filed further grounds of protest against the amended application for confirmation. He deposed that one **ANISELEMINA WANDATHI** daughter of the deceased is deceased and that her children are not interested in the land of the deceased. He further stated that his grounds in the protest still stood in support of his case.

The protestor's evidence was supported by two witnesses PW2 and PW3. It was to the effect that during his lifetime, the deceased had declared that **LR. GATURI/NEMBURE/10212** was to be given to the protestor who was his youngest son by his second wife. During his old age, the Protestor said he looked after the deceased and it is for that reason that he was being rewarded.

The deceased attended the land board together with the deceased for consent to transfer the land to the Protestor. The application was booked in the Land Control Board agenda but it was not discussed because the Petitioner raised an objection. PW2 said he was present at the Land Board meeting which was frustrated by the petitioner who is PW2's elder and real brother.

The protestor further testified that the deceased called a meeting of his family members before the Assistant Chief of the area. He told them that the Land LR.GATURI/NEMBURE/10212 was to go to his son the protestor. The protestor said the meeting was also attended by the petitioner.

The petitioner's evidence was that the deceased had shared out his land to all his sons and one married daughter FELISTA WEGOKI. It is the petitioner's case that the other daughters though married deserved a share of their late father's land. The petitioner further stated that two of the daughters ANISELEMINA WANDATHI and JACINTA MARIGU are deceased but are survived by their children who should take the shares of their deceased mothers.

The petitioner said the land LR.GATURI/NEMBURE/2012 is cultivated by the children of ANISELEMINA WANDATHI. He added that the family is poor and they have no land at the place Wandathi got married. As such they are deserving of shares in the land of the deceased.

The petitioner called two witnesses DW2 and DW3 to support the case being his sister and nephew.

It is not in dispute in this cause that the deceased distributed his land during his lifetime to all his sons in his two houses one unmarried daughter as follows:-

1. **Peter S. Njiru Kathambata** - *petitioner* - **6.00 acres.**
2. **Nazario Ndwiga Njeru** - **8.5 acres**
3. **Paul Njuki Njeru** - **4.0 acres**
4. **Salesio Peter Jomo Njeru** - **4.0 acres**
5. **Patrick Njeru Matenguri** - **3.4 acres**
6. **Francis Njue Njeru(protestor)** - **3.4 acres**
7. **Felister Wegoki** - **1.5 acres.**

The protestor admits he was given 3.4 acres of land by the deceased as the youngest son by his first wife. It is also not disputed that he looked after his aged father and that he may have been promised a reward of the only land that remained in the name of the deceased in the year 2010 just before he died. He produced the agenda of the Manyatta Land Control Board for 24/10/2010 showing that the relevant application appeared as agenda No. 32 worded thus *LR. GATURI/NEMBURE/10212- transfer by Njeru Mwitanyao to Francis Njue Njeru.*"

The protestor says the original title of the land which he produced in court was handed over to him by the deceased for safe custody because the land was his.

In this regard, it is unfortunate for the protestor that the deceased was not able to make his wishes a reality. He never succeeded in giving the land to the protestor during his lifetime. The deceased therefore died intestate as regards LR.NO.GATURI/NEMBURE/10212. The law applicable to intestate succession is therefore application in the distribution of the said asset.

The petitioner argued the case of his sisters who did not appear in court to defend their interests except DW2 his elder sister and DW3 the son of the late SELEMINA WANDATHI. On these arguments I wish to make a few observations as relates to the Law of Succession.

The fact that some heirs of the deceased are poor or disadvantaged financially than the others does not give them any legal right to inherit more shares than those others. It also does not matter either some children were educated by the deceased better than others and are at the time of his death more financially empowered than their siblings, neither does it matter that some of the children worked harder or performed distinguished family chores than others.

The Law of Succession treats all the children of the deceased equally. It does not discriminate on the basis of status, education, sex, religion or any other areas.

Article 27 of the Constitution outlaws discrimination based on those aspects.

The deceased had a pattern of giving land to his children. The elder sons PETER STEPHEN NJIRU K and NAZARIO NDWIGA were given bigger shares, followed by the second senior son in age. The youngest sons got smaller shares.

Section 42 of the Law of Succession Act provides that in distributing assets of the deceased, the court shall take into consideration any property given to the children during his lifetime.

I find this case unique in the application of the provisions of Section 42 of the Act. The deceased left an asset of half ($\frac{1}{2}$) an acre of land. He

had fourteen (14) children among them six (6) sons. In the event that the court was to apply Section 42 in the distribution, the sharing of the small parcel of land among the children of the deceased would add no value to their shares of the respective beneficiaries.

The deceased gave only one daughter FELISTER WEGOKI land of 1.5 acres on the ground that she was unmarried. The seven (7) married daughter's six (6) of whom are living did not get any shares. The law does not discriminate between married and unmarried daughters.

None of the children has complained about what they were given. The only disputed asset is the one in the name of the deceased. It is my considered opinion that the shares distributed to the deceased's sons and one married daughter should not be distributed.

The law applicable in the distribution of LR.GATURI/NEMBURE/10212 is

Section 40 of the Law of Succession Act which provides:-

Where intestate was polygamous

(1) 1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

I am of the considered opinion that the only asset should be inherited by the daughters of the deceased in equal shares except FELISTER WEGOKI. The modes of distribution proposed by the protestor is not supported by the law that he inherits that deceased's one and only asset solely. The mode of the petitioner was not far from the provisions of the law because he considered his five (5) surviving sisters and the children of his deceased's sister ANISELEMINA WANDATHI.

I find it reasonable and fair for it includes the daughters of the deceased from both houses.

Consequently, the protest is dismissed for lack of merit. The grant issued to the petitioner is hereby confirmed in the following terms:-

1. Felister Gitiri

2. Anastasia Gitiri

3. Nicerate Wegoki

4. Teresiah Wegandu

5. Angelina Marigu In equal shares.

6. Aniselemina Wandathi – Deceased (her shares to go to her children in equal shares)

i. Florence Wegandu

ii. Catherine Muthoni

iii. Wakina Kithaka

iv. Kathuri Kithaka

v. Njeru Kithaka

vi. Nyaga Kithaka Equally

A certificate of confirmation to issue.

It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT EMBU THIS 26TH DAY OF SEPTEMBER, 2018.

F. MUCHEMI

JUDGE