



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**SUCCESSION CAUSE NO. 10 OF 2018**

**(FORMERLY MERU HIGH COURT SUCC. CAUSE NO. 5 OF 1999)**

**MUGAMBI NYAGA.....APPLICANT/PETITIONER**

**VERSUS**

**JUSTUS NJAGI KANAMPIU.....RESPONDENT**

**J U D G M E N T**

1. This cause relates to the estate of the late **NYAGA MBURUGU** (deceased) who died on 10<sup>th</sup> September 1996 domiciled at Murugi Location, Tharaka Nithi County.

The deceased, as per the petition filed herein, died intestate leaving behind the following dependants:-

- (i) Alice Mbere Nyaga (spouse)
- (ii) Wambeti Micheni
- (iii) Jiakinyua Mbae
- (iv) Muthoni Kithuci
- (v) Mugambi Nyaga
- (vi) Kageni Waheinya
- (vii) Kimandi Nyaga
- (viii) Makena Nyaga
- (ix) Kanjiri Nyaga
- (x) Karimi Nyaga &
- (xi) Bundi Nyaga

2. The assets left behind by the deceased are as listed as follows:-

- (i) L.R. No. Mwimbi/Murugi/1410 &
- (ii) L.R. No. Mwimbi/Murugi/1411

3. The petitioner herein, Mugambi Nyaga was appointed the administrator of the estate of the deceased herein on 4<sup>th</sup> June 2012 and issued with a fresh grant after the initial grant issued to him on 8<sup>th</sup> September, 1999 was revoked. The administrator vide Summons for Confirmation of Grant dated 14<sup>th</sup> September 2012 sought for confirmation of grant and proposed to have the estate of the deceased distributed as follows:-

(a) **L.R. No. Mwimbi/Murugi/1411**

(i) Alice Mbeere Nyaga

(ii) Mugambi Nyaga

(iii) Kimandi Nyaga

(iv) Bundi Nyaga

(b) **L.R. No. Mwimbi/Murugi/1410**

(i) Alice Mbeere Nyaga - 1.30 acres

(ii) Justus Kenneth Riungu - 1.20 acres

4. The administrator's proposal elicited a protest by one Justus Njagi Kanampiu who protested at his exclusion claiming he had purchaser's interests over parcel No. L.R Mwimbi/Murugi/1410 which interests had been recognized vide a ruling dated 13<sup>th</sup> July 2007 by Hon. Justice Emukule.

5. This court set down the protest for hearing by way of oral evidence. The Protestor, Njagi Kanampiu told this court that he purchased 2 1/2 acres out of L.R Mwimbi/Murugi/1410 and that he took possession in 1978. He further stated that the deceased died in 1996 before the process of transfer was completed. He relied on Land Control Board consent (exhibit 9) and a duly executed transfer form to back up his claims. He further drew this court's attention to a court ruling by **Hon. Emukule J** dated 13<sup>th</sup> July, 2009 where the Hon Judge (now retired) recognized his interests on parcel No.1410.

6. The petitioner on his part denied knowledge of the objector's interests. According to him the protestor entered into the estate (Parcel No.1410) by force in 1997. He further denied that the protestor bought the portion from the deceased stating that he had not seen a consent from Land Control Board approving the transaction between the deceased and the protestor.

7. This court has perused through the proceedings in this cause with a view of determining the veracity and legitimacy of the protestor's claim on L.R No. Mwimbi/Murugi/1410. This court has noted from the evidence tendered in the proceedings leading to revocation of the initial grant that the estate of the deceased was initially one block L.R. Mwimbi/Murugi/19 (as per Exhibit No.18). Upon subdivision the resultant parcels became parcel No. Mwimbi/Murugi 1410 and 1411. Parcel No.1410 measures exactly 2.5 acres while parcel No.1411 measures about 2.8 acres.

8. The protestor has claimed that he purchased the entire parcel No. Mwimbi/Murugi/1410. The petitioner has denied the protestor's claim but looking at the ruling of **Hon. M.J. Anyara Emukule** delivered on 13<sup>th</sup> July, 2009, the Hon. Judge (now retired) made findings which backed the protestor's claim. The evidence tendered before the said Judge clearly show that the protestor's claims are legit. The consent to transfer the land from the deceased to the protestor was tendered (P. Exhibit 9) and a transfer form (P.Exhibit 6) duly executed in favour of the protestor was tendered in evidence and hence the court's finding that;

***" ..... the necessary consents having been obtained for the transfer of the land purchased by the applicant (read protestor) and the applicant (read the protestor) being also in possession of the land, the petitioner will be well advised to acknowledge the applicant's interest and execute the transfer to the applicant once a new grant of letters of administration is taken."***

The question posed is did the petitioner abide by that finding in his summons for confirmation of grant now before me? The answer is obviously in the negative. The petitioner as per the record tried to review **Hon. Judge Emukule's** findings above but his application was dismissed by **Hon. Makau J** on 30<sup>th</sup> January, 2012. The petition in this application for confirmation attempts to fake ignorance of the protestor's claim despite the obvious fights they have had over the years in various courts in this cause. That in my view is misleading and does not lead to ends of justice. The interests of the protestor is legitimate and this court finds that the property known as Mwimbi/Murugi/1410 though technically is still in the name of the deceased, it is actually not part of "**free property**" of the deceased as described under **Section 3(1) of the Law of Succession Act**. The deceased had sold the said property to the protestor and perhaps that is why he subdivided his property into two in the first place before applying to the Land Control Board to transfer the property to the protestor herein. All the legal Procedures in effecting transfer was followed save that the transfer had not been concluded by the time the deceased herein passed on.

9. Furthermore this court cannot be told to overturn the said finding and decision of **Hon. Emukule J** because this court enjoys concurrent jurisdiction and therefore cannot sit on appeal on a decision or a finding made by concurrent jurisdiction. The petitioner/administrator did not prefer an appeal against the said findings and decision and besides that they also did not appeal against the decision by **Hon. Justice Makau** who declined to review the decision recognizing the protestor's interests. That decision therefore is unchallenged and stands. In my own view the decision was well grounded that even if the decision had not been made, this court would have arrived at the same conclusion given the circumstances and evidence presented in this matter.

10. Finally this court has noted from the proposal given by the administrator that he left out some of his siblings particularly the sisters. He has not given justification for doing that. I have noted that the daughters of the deceased have not renounced their rights to inherit their father's estate. Children of a deceased person are equal in law and should not be discriminated in view of their gender save where they consent or formally express their disinterest on the estate. The estate herein therefore shall be distributed in accordance with **Section 35 of Law of Succession Act**.

In view of the foregoing this court allows the Summons for Confirmation of Grant dated 14<sup>th</sup> September, 2012. The grant issued on 4<sup>th</sup> June, 2012 is hereby confirmed under the following terms:-

(a) L.R. Mwimbi/Murugi/1410

Justus Njagi Kanampiu - whole

(b) **L.R Mwimbi/Murugi/1411**

(i) Alice Mbeere Nyaga - life interest in the whole property

(ii) Wambeti Micheni

(iii) Jiakinyua Mbae

(iv) Muthoni Kithuci

(v) Mugambi Nyaga

(vi) Kageni Waienia

(vii) Kimandi Nyaga equal share

(viii) Makena Nyaga

(ix) Kanjiru Nyaga

(x) Karimi Nyaga

(xi) Bundi Nyaga

I shall make no order as to costs at this stage. However in order to bring this long standing dispute to an end I direct the Deputy Registrar of this court to execute requisite documents on behalf of any party in this cause who may have been reluctant to cooperate to facilitate transmission as per the certificate of confirmation. On the same note I direct the Registrar of Lands to dispense with production of original title deed or any other document like Pins and Identity cards to facilitate transmission of the properties forming the estate in accordance with the certificate of confirmation to be issued in the cause.

**Dated, signed and delivered at Chuka this 17<sup>th</sup> day of December, 2018.**

**R.K. LIMO**

**JUDGE**

**17/12/2018**

Judgment signed, dated and delivered in the open court in absence of parties.

**R.K. LIMO**

**JUDGE**

**17/12/2018**