



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 880 OF 2009

(IN THE MATTER OF THE ESTATE OF MARY NYAMUTHITHI MAINA)

FELICITY NUNGARI W. MAINA.....APPLICANT/PETITIONER

VERSUS

MARY WANJUGU WACHIRA.....RESPONDENT/PROTESTOR

MAGDALENE WANGARI WACHIRA.....RESPONDENT

JUDGMENT

On 28th July, 2010, this honourable court granted the applicant letters of administration intestate to administer the estate of Mary Nyamuthithi Maina. In the affidavit in support of the petition for grant of these letters, the applicant listed herself and the respondents as the only persons who survived the deceased. They were all described as the deceased's daughters-in-law; they were wives to the deceased's two sons who were also deceased.

The only asset listed in the same affidavit as comprising the deceased's estate is a land parcel described as **Title No. Githi/Kirema/467** measuring 4.2 Acres.

By a summons for confirmation dated 18th February, 2013, the applicant sought to have the grant confirmed and in the affidavit in support of the grant she proposed to retain half of **Title No. Githi/Kirema/467** while the remaining half was to be shared equally between the respondents, Magdaline Wangari Wachira and Mary Wanjugu Wachira.

From what I gather, the basis of the proposed distribution is that the deceased was registered as the proprietor of **Title No. Githi/Kirema/467** only as a trustee; she held the land in trust for her two sons, James Wachira Maina and John Wamwea Maina. Indeed, a certificate of official search of this title, filed alongside the petition for grant of letters of administration, shows that the deceased was only a trustee and her two sons were the beneficial owners of the property.

It is common ground, and there was no dispute that James Wachira Maina was the husband to the two respondents, Mary Wanjugu Wachira and Magdalene Wangari Wachira; Magdalene was the first wife while Mary was the second wife. The applicant, on the other hand, was the wife to John Wamwea Maina.

The basis of the applicant's proposal in the distribution of the estate was that she was entitled to get her husband's share while the respondents would share, equally, their husband's share.

The 1st respondent, Mary Wanjugu Wachira protested against the distribution of the estate as proposed by

the applicant; while she had no qualms with the applicant getting her husband's share of the estate, she was opposed to the 2nd respondent getting a share of their mutual husband's allocation. According to her, her co-wife had deserted their husband, 16 years prior to his death. She also argued that she solely took care of her deceased mother-in-law in her sunset years and therefore it was the wish of the deceased herself, that she should get her husband's share to the exclusion of the 2nd respondent.

I must state at the outset that if the deceased held **Title No. Githi/Kirema/467** in a fiduciary capacity in trust for her two sons, it appears to me that the applicant and the respondents were mistaken to proceed on the assumption that **Title No. Githi/Kirema/467** belonged to the deceased and hence her estate. It is clear that this property was always trust property which, ordinarily, ought to have devolved upon the deceased's sons upon the trustee's demise or their personal representatives upon their own demise.

Be that as it may, the record shows that this honourable court confirmed the grant on 18th July, 2014 and gave the applicant 2.1 acres of **Title No. Githi/Kirema/467**; she was effectively given half of the estate. There was no mention of the fate of the remainder of the estate. I suppose my brother, Wakiaga, J., proceeded on the understanding that since the applicant's share was not in dispute, there was no reason for restricting her from enjoying her rightful portion of the estate merely because of what in effect is a dispute between the respondents.

With the court on her side, the applicant applied to have her share of the estate transmitted to herself but hold the remaining half in trust for the respondents. When the application came up for hearing before me, I was of the humble view that it was practical to deal with the respondent's protest whose determination would, no doubt, dispose of the issue of transmission of the respective shares of the estate not only to the applicant herself but to the respondents as well. This judgment is therefore in respect of the respondent's protest.

As noted there is a common understanding amongst the parties, albeit mistaken, that **Title No. Githi/Kirema/467** was the deceased's estate. The court was swayed to take this path apparently because the end result would be no different if the property was treated as trust property rather than as the deceased's estate. I say so because in the absence of any evidence to contrary, each of the beneficiaries for whom the deceased held the property in trust was entitled to an equal share of the property. As a matter of fact, both the applicant and the respondents were in agreement and testified that James Wachira Maina and John Wamwea Maina were entitled to 2.1 acres each and it is for this reason that they all agreed the latter's widow was entitled to her deceased husband's share of 2.1 acres.

I have also noted that except for Mary Wanjugu Wachira, the rest of the parties were in agreement that James Wachira Maina's share should be shared out between his two surviving widows equally. The protestor's protest against this scheme of the proposed distribution was based, as I understood her, on two grounds; first, the 2nd respondent was separated from her deceased husband at the time of his death; second, she took care of her deceased mother-in-law whose wish, in any event, was to have the 1st respondent have the entire share allocated to her deceased husband to the exclusion of the 2nd respondent.

The grounds upon which the protestor made out her case to deny the 2nd respondent a share of their husband's property appear to me to be remote and hold no water. First, in the course of her evidence, the 1st respondent herself admitted that the 2nd respondent is her co-wife and duly regarded her as her deceased's husband first wife. For avoidance of doubt, the 2nd respondent herself produced a marriage certificate showing that her marriage to the deceased was statutory and that it had never been dissolved. The fact that the 2nd respondent may have been separated from her deceased husband did not, ipso facto, deny her the right to a share of her husband's estate. The deceased's wish, on the other hand, was of no consequence because she held the property in issue in her fiduciary capacity; the equitable or beneficial owners were her sons. Her wish was, in any event, not reduced in any formal instrument and even if it had, she had no proprietary interest in property which she could possibly will away.

For these reasons, I agree with the applicant and the 2nd respondent that the remaining 2.1 acres of **Title No. Githi/Kirema/467** should be shared equally between Mary Wanjugu Wachira and Magdalene Wangari Wachira. For avoidance of doubt **Title No. Githi/Kirema/467** is hereby distributed as follows:

1. Felicity Nungari W. Maina.....2.1 acres (absolutely)
2. Magdalene Wangari Wachira.....1.05 acres(absolutely)
3. Mary Wanjugu Wachira.....1.05 acres(absolutely)

Parties will bear their own costs. Orders accordingly.

Dated, signed and delivered in open court this 18th August, 2017

Ngaah Jairus

JUDGE