



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 374 OF 2008

**IN THE MATTER OF THE ESTATE OF JOHANNA NDURA WAKARITU ALIAS NDURA S/O WAKARITU
(DECEASED)**

DOMINICA WAMUYU KIHU

JOHN MACHARIA MUCHIRI..... PROTESTORS

VERSUS

JOSEPH WAKARITU NDURA

MARY WANGUI NDURA..... RESPONDENTS

RULING

FACTS

1. The estate relates to the late Johana Ndura Wakaritu (deceased) who died on the 11th June, 2001; the identifiable properties comprising the estate of the deceased are the following parcels;

(i) MAGUTU/GATHEHU/144;

(ii) MAGUTU/GATHEHU/53;

(iii) PLOT NO.58/A IHAWAGI

(iv) ½ share PLOT NO.42 GATHEHU MARKET

2. The Deceased intestate and was survived by one wife and eight children their particulars are as set out hereunder;

(i) Mary Wangui Ndura – widow- (now deceased)

(ii) Joseph Wakaritu Ndura - son- and Petitioner/Respondent herein and who shall hereinafter be referred to as ‘**Joseph**’

(iii) Samuel Muraguri Ndura - son

(iv) Stephen Gichuru Ndura - son

(v) Josphat Gichuhi Ndura -son

(vi) Peter Muriuki Ndura -son

(vii) Juliah Wanja Ndura - daughter

(viii) Ann Muthoni Ndura -daughter

(ix) Dainah Wangu Ndura - daughter

3. The Petitioners/Respondents are the widow and eldest son of the deceased and had jointly petitioned for Letters of Administration on the 23/07/2008' the Grant was issued on the 11th December, 2008; due to the demise of the widow this Grant was revoked and a fresh Grant was issued to Joseph; this was done with the consent of the aforementioned beneficiaries;

4. The Respondents had on the 15th January, 2011 proceeded to file Summons for the Confirmation of the Grant and therein proposed their mode of distribution; the protestor and her co-protestor being aggrieved with the proposed mode of distribution filed their Affidavit of Protest on the 18/10/2011.

5. An Order was granted on the 12th November, 2013 for the partial confirmation and distribution of the parcel numbers **MAGUTU/GATHEHU/144; PLOT NO.58/A IHWAGI and ½ share in PLOT NO.42 GATHEHU MARKET.**

6. The contentious parcel is **MAGUTU/GATHEHU/53** and being the subject matter of the Protest was left out of the confirmation and distribution; directions were given that the Protest be disposed of by way of viva voce evidence; hereunder is a summary of the respective parties cases;

THE APPLICANTS CASE

7. The protestor's evidence was that she was opposed to the distribution of **MAGUTU/GATHEHU/53** as it had been purchased by her late father Kihu Ndura who was a step-brother of the deceased; that he had bought the land in 1938 for the sum of Kshs. 310/- and during the process of land demarcation and consolidation the land was registered in the name of her grandmother Julia Wanja as her mother was deceased and father had passed on in 1953;

8. The protestor stated that she was borne in 1948 and that she and her siblings were minors at the time of her fathers' demise and also at the time of demarcation; therefore Julia Wanja who was the mother of the deceased stepped in and acted as their trustee;

9. In 1966 her said grandmother Julia transferred the land to her son the deceased herein as a gift;

10. The protestor urged the court to give her the land as it belonged to her father and that she had lived on it since 1974 and that she was also in possession of a judgment stating that the land belonged to her father;

THE RESPONDENTS CASE

11. The respondents evidence was that he was the deceased's son and the administrator of the estate; that the impugned parcel of land had been bought by his late father from Zachary Mwaniki Ngare for Kshs.100/- in 1958; since he could not own two parcels of land he opted to register this parcel in his mother's name; in 1966 his grandmother transferred the land back to the deceased;

12. He produced the consolidation documents, Certificate of Demarcation, receipt, map and the Transfer as exhibits;

13. The respondent confirmed that he knew the protestor; and that during his lifetime his late father had allowed her to enter the shamba; that she had entered it in 1987 and had been given one acre to cultivate which she did too date and had also built a house thereon;

14. Under cross-examination he stated that his late father never explained to him the relationship that he had with the protestor; nor did he give any explanation as to why he gave her one acre;

15. The respondent reiterated that the land belonged to the deceased and formed part of his estate; he urged the court to dismiss the protest as it lacked merit.

ISSUES FOR DETERMINATION

16. These are the issues framed by this court for determination;

(i) Whether the protestor is a dependant of the deceased;

(ii) Distribution of the parcel **MAGUTU/GATHEHU/53**;

ANALYSIS

17. Before the matter proceeded it was pointed out to the court that the 2nd Protestor was no longer interested in proceeding with the protest and had withdrawn his protest which was in relation to the ½ **share PLOT NO.42 GATHEHU MARKET.**

Whether the protestor is a dependant of the deceased;

18. The issue herein is whether the protestor qualifies to be a dependant of the deceased;

19. Section 29 (a) of the Law of Succession Act gives a description of a dependant and it states as follows;

“A dependant means

(a)

(b) Such of the deceased’s parents, step parents, grandparents, grandchildren, stepchildren, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half- sisters, as were being maintained by the deceased immediately prior to his death, and” (emphasis mine).

20. The evidence of the respondent was that he knew the protestor but his late father never explained to him the relationship he had with the protestor; he acknowledged the fact that in 1987 during his fathers’ lifetime his late father had allowed the protestor onto the land by giving her one acre to cultivate; that his father did not give any explanation to him as to the reason for this gesture;

21. This court has examined and considered the evidence put before it and has noted that the protestor and the respondents family have a common name that is Ndura; that it is apparent that the deceased recognized the protestor as a daughter of his late brother and took her in as his own and gave her a portion of the contentious property to occupy and utilize; by virtue of the fact that she was dependant on part of his estate, which is not disputed, qualifies her to be described as a dependant of the deceased;

22. For the forgoing reason his court is satisfied that the protestor qualifies to be a dependant and a beneficiary of the deceased’s estate.

Distribution of the estate of the deceased.

23. It was agreed that the only contentious property was **MAGUTU/GATHETHU/53**; the protestor’s proposed mode of distribution was that the whole parcel be given to her based on her claim that her late father had bought the land and that her grandmother as a trustee had wrongfully transferred the land to the deceased; that the deceased was a step-brother to her late father;

24. Section 107 of the Evidence Act places the evidential burden of proof of any particular fact on the person who makes the averments; it was therefore incumbent upon the protestor to provide witnesses to corroborate her evidence or to have produced documentary evidence in support of her late father’s right to ownership of the disputed land;

25. The respondent was better prepared and produced documentary evidence in the form of Certificate on Demarcation, receipt and a Map; **(PExb. 1A, 1B and 1C)**; the protestor had no documents to prove her claim; for those reasons this court is satisfied that the property **MAGUTU/GATHEHU/53** forms part of the estate of the deceased;

26. After making a finding that the protestor qualifies to benefit from the deceased’s estate this court is then tasked with the duty of distribution of this property; the protestor urged this court to grant her the whole parcel of land; whereas the respondent’s proposed mode of distribution of this parcel was as follows;

(iii) Joseph Wakaritu Ndura – 0.2966 Ha

(iv) Samuel Muraguri Ndura - 0.2966 Ha

(v) Stephen Gichuru Ndura - 0.2966 Ha

(vi) Josphat Gichuhi Ndura -0.2966 Ha

(vii) Peter Muriuki Ndura -0.2966 Ha

(viii) Mary Wangui Ndura -0.2966 Ha

27. It is apparent from the court record that the respondent distributed the other properties to himself and his male siblings; that he had and continues to excluded the female siblings as they are said to be married; and it is also noted that despite the fact that he had all along known that the protestor had been taken in by the deceased he did not include her in his proposed mode of distribution;

28. In excluding the protestor and his female siblings the respondents proposed mode of distribution is found to be unfair and discriminatory; and in excluding the family of the deceased the protestors mode of distribution is also found to be unfair;

29. The protestor’s evidence did not indicate the acreage given to her by the deceased; the respondent stated that all she had been given was one acre and that the remainder was used by the respondents side of the family just for cultivation; what is clear in this courts mind is the fact that the respondents family for all the years that they have owned the land have only used it for cultivation whereas the protestor has been in possession from 1987 which translates to a period of approximately 30 years and during this period she has cultivated the land and also constructed a house thereon which is indicative of permanency; it is this courts considered view that the very act of constructing thereon is a clear indication that the protestor has a greater vested interest and entitlement to the land than that of the respondents family;

30. This court reiterates the fact that in the distribution of the deceased’s estate the respondent and his male siblings have greatly benefitted from the deceased’s other properties;

31. Bearing in mind all these relevant factors together with the totality of the evidence adduced it is apparent that the protestor has no other

property to sustain her; therefore the property **MAGUTU/GATHEHU/53** shall be distributed as follows;

(i) Half of the parcel of land to be distributed to the protestor;

(ii) The other half portion to be distributed to the deceaseds children; as there is no surviving spouse, Section 38 of the Law of Succession shall apply to this other half portion; this portion to be shared equally among all the children of the deceased; that is the respondent and all his male and female siblings;

FINDINGS AND DETERMINATION

32. For the afore-going reasons this court makes the following findings;

(i) The protestor is found to be a dependant of the deceased;

(ii) The respondents mode of distribution is found to be discriminatory and unfair;

(iii) The property **MAGUTU/GATHEHU/53** is found to form part of the estate of the deceased and is found to be available for distribution and shall be distributed in accordance with the mode set out in paragraph (28) hereinabove.

(iv) The protest is found to be partially meritorious;

(v) Any beneficiary is at liberty to apply for directions;

(vi) This being a family matter each party shall bear their own costs

It is so ordered.

Dated, Signed and Delivered at Nyeri this 23rd day of November, 2017.

HON. A. MSHILA

JUDGE.