



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 475 OF 2013**

**IN THE MATTER OF THE ESTATE OF WAITATHU KAGWAI alias WAITATHU KAGUAI-DECEASED**

**REGINAH NYAMBURA**

**WAITATHU.....PETITIONER**

**VERSUS**

**TARCISIO KAGUNDA**

**WAITHATU.....1<sup>ST</sup>PROTESTOR**

**TERESA MUMBI**

**GAKURU.....2<sup>ND</sup>PROTESTOR**

**JOHN WANGOMBE**

**WAITHATU.....3<sup>RD</sup>PROTESTOR**

**SIMON MUCHIRI**

**WAITATHU.....4<sup>TH</sup>PROTESTOR**

**JUDGEMENT**

**Waithatu Kagwai** (herein after referred to as the deceased) died intestate on 3<sup>rd</sup> August 1990 at the age of 71 years. On 8<sup>th</sup> August 2013, **Reginah Nyambura Witathu**, (herein after referred to as the "**Petitioner**") took out citations under Rule 21 of the Probate and Administration Rules and served **Tarcisio Kagunda Waithatu, Teresa Mumbi Gakuru, John Wangombe Waithatu and Simon Muchiri Waitathu** (hereinafter referred to as the "**Respondents**"). The record does not show that an entry to the citation was filed.

On 2<sup>nd</sup> October 2013 the petitioner herein petitioned for letters of administration intestate to the deceased's estate. The **petitioner** named the persons surviving the deceased in her affidavit in support of the petition and these included the deceased sons and daughters and grand children.

There is no consent by all the beneficiaries pursuant to Rule **26 (2)** of the Probate and Administration Rules. The only property listed in the affidavit in support of the petition comprising the deceased's estate is **Aguthi/Gathaithi/278** measuring approximately **6.8 acres**.

The petition was gazetted on 11<sup>th</sup> October 2013 and the grant was issued on 12<sup>th</sup> October 2013. On 30<sup>th</sup> January 2015 the **petitioner** applied for confirmation of the said grant and proposed distribution of the

above property to be shared **equally** among the following:-

- i. *Kagunda Waitathu*
- ii. *John Wangombe Waitathu*
- iii. *Regina Nyambura Gakuru*
- iv. *Teresa Mumbi Gakuru*
- v. *Simon Muchiri Waitathu*
- vi. *Joseph Waitathu Wangombe-To hold in trust for the children of Samuel Wahome Waitathi.*

The consent to the confirmation pursuant to Rule **40 (8)** of the Probate and Administration Rules was not signed by any of the beneficiaries.

When the matter came for hearing before me on 24<sup>th</sup> September 2015, I noted that the protestors had not filed an affidavit of protest and I directed them to file. On 4<sup>th</sup> November 2015 **Tarcisio Kagunda Waitathu**, a son to the deceased filed an affidavit of protest whose contents are *inter alia*:-

- a. *That the deceased was survived by the following, Kagunda Waitathu, John Wangombe Waitathu, Regina Nyambura Gakuru, Teresa Mumbi Gakuru, Simon Muchiri Waitathu and Samuel Wahome Waitathi-deceased.*
- b. *That prior to his death the deceased had sub-divided his land parcel number **Aguthi/Gathaihi/278** into 5 portions among the following, Samuel Wahome Witathu, Tarcisio Kagunda Witathu, John Wangombe Witathu, Simon Muchiri Waitathu and his mother Philomena Nyokabi Witathu-deceased.*
- c. *That his late mother sub-divided her portion in 1993 into 2 portions belonging to Simon Muchiri Witathu and the other portion to the petitioner herein.*
- d. *That the petitioner herein was allocated land at Gatarakwa measuring about 15 acres in 1996 where the deceased obtained a loan which he gave to the deceased to buy the shares and that the petitioner settled on the portion allocated to her by her mother.*

Hearing commenced before me on 11<sup>th</sup> December 2015. The protestor's evidence was essentially a repeat of his above referred affidavit. He stated that he had filed the affidavit of protest on behalf of himself and the other protestors, that they have never sat as a family to grant consent to the petitioner to institute these proceedings, that the deceased asked their mother to give her a small portion to construct a house, which she did in 1993, that the said portion is 1/2 an acre. He insisted that they do not agree to her proposed mode of distribution.

Upon cross-examination by the petitioner the protestor stated that title number **Aguthi/Gataithi/278** belongs to the deceased in these proceedings, that they never petitioned for letters of administration because they were satisfied with what they got from their father, that he had no documents to show that the petitioner was given the Gatarakwa land except his fathers' word.

**PW2 Teresa Mumbi Gakuru**, also a daughter to the deceased testified that she knows her father divided his land, that he called her and informed her. That was in 1973 and named the persons who were in the said meeting. She stated that the deceased divided his land into 5 portions, gave his four sons a portion each and retained the 5<sup>th</sup> portion to decide which son or daughter to give. She proceeded to state that later he wished to give it to the petitioner and **Simon Muchiri Waitathu** if the petitioner never got married.

She stated that the petitioner has build on the portion given to her by her mother. She also stated the deceased said he had bought the petitioner land at Gatarakwa.

Upon cross-examination she was not able to explain why if at all such a meeting took place involving the

entire family, the reason why the petitioner was not called to the said meeting.

**PW3 John Wangombe Waitathu** reiterated that the deceased divided the land into 5 portions as explained by the others, he was not present when this was done, but later they were called and shown their respective portions and that there was nothing in writing. He also said the daughters were not given land, but later his mother gave the petitioner a portion of land to settle. Like the others he said the deceased gave the petitioner land at Gataragwa.

**PW4 Simon Muchiri Waitathu**, the last born in the family also testified that the deceased divided land into 5 portions before he died, and like the others who testified before him, he insisted that the last portion was for their mother, and that one other portion of what was his mothers land is used by him and added that his mother had the right to give the land to him the way she did.

**PW5 Francis Gakuru Kimotho** testified that he knew the deceased who was his in law, that the deceased called them for a meeting, told them to divide his land into 5 portions and he said he would allocate to his children, the 4 sons, and the 5<sup>th</sup> portion to his wife, and added that he does not know why other children like the petitioner herein were left out.

The petitioner testified that she is a daughter to the deceased, the deceased had 4 sons and two daughters, one of whom is married. She never got married and that the deceased died intestate. The deceased owned land parcel no. 278, that she issued citations to her brothers, that they never petitioned for letters of administration, hence she applied for the same. She was categorical that the deceased never left a will. She stated that her father called her in the presence of her mother and told her that she had given the portion she had reserved for their mother because she was not married and that her brothers were given their respective portions. She also stated that her father told her if she got married, then she will return the portion. She also stated that **Simon Muchiri Waitathu** divided he portion into two after their father and mother died. She asked that the court grants her the entire portion. She was categorical that it is not true that her father never gave her land as alleged by her brothers.

She also disputed that her father gave her land at Gatarkwa. She insisted that she purchased the title number **Gatarakwa/Gatarakwa/ Block 1 /211** measuring **8.09 Ha**. She produced the title in her name and receipts also in her name showing that she paid for it.

At the outset, I find it necessary to reiterate that cases are decided on evidence and the law applicable. This court in *Lewis Karungu Waruiro Vs Moses Muriuki Muchiri* citing authorities held that:-

*"All cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in Rhesa Shipping Co SA vs Edmunds remarked:-*

*"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."*

*Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd* :-*

*"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"*

*With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person."*

It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. The standard determines the degree of certainty with which a fact must be proved to satisfy the court of the fact. In civil cases the standard of proof is the balance of probabilities. In the case of *Miller vs Minister of Pensions*, **Lord Denning** said the following about the standard of proof in civil cases:-

*‘The ...{standard of proof}...is well settled. It must carry a reasonable degree of probability....if the evidence is such that the tribunal can say: ‘We think it more probable than not’ the burden is discharged, but, if the probabilities are equal, it is not.’*

It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court before a fact can be said to exist or not exist.

Turning to the facts of this case, the first issue to address is whether or not the deceased divided his land into 5 portions and secondly whether the petitioner is entitled a portion of the deceased land and if so to what extent, and if not why?

I am fully aware that it is possible for a person to distribute properties during his/her lifetime, but there are certain elements which must be demonstrated as prove that indeed a deceased person gave out a gift *inter vivos*. This position brings into play the provisions of Section 42 of the Law of Succession Act which provides:-

“42. Where-

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or.....

*That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.”*

In my view this Section of the law seeks to protect, respect and preserve the wishes and acts executed and undertaken by deceased persons during their lifetime. Such acts or settlements effected are not subject to disruption, change or frustration. They are to be honoured and effected.

**Section 42** provides that during the distribution of the estate, previous benefits or gifts *inter vivos* be taken into consideration when determining the share of each child. My understanding of this provision is that whatever property belonged to the deceased, and which had not yet been transferred to the individual children during the deceased’s lifetime, had to be subject to the provisions of this **Act** and the court would then take cognizance of the gifts given during the deceased’s lifetime. If indeed the deceased had already given the other beneficiaries their share, then that would be taken into account at the time of distribution. But it must be proved beyond doubt that indeed the deceased gave out the property or gift during his/her life time. Guidance can be obtained from the following passage from *Halsburys Laws of England* dealing with incomplete gifts, where it is stated as follows:-

*“... If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”*

Three conditions must be met for a gift *inter vivos* to be valid. **(a)** *the individual making the transfer actually intends to make a gift; it must be demonstrated that the donor's objective was to make a gift when he or she transferred the property.* Though the parcels of land in this case were not formally transferred to the individual beneficiaries, there is evidence that the deceased had four sons and one unmarried daughter making a total of five and that he divided his land into five equal portions and allowed each son to occupy their respective portion and the daughter who happens to be the petitioner to continue living in the fifth portion with her mother. However the protestors insist that the fifth portion

belonged to their mother who gave a small portion to the petitioner. The only reason offered by the protestors is that the deceased gave the petitioner another portion of land at a place called Gatarakwa measuring about 20 acres. It is not clear why the deceased could give the daughter 20 acres (if at all he did) and share 6.8 acres into 5 pieces effectively giving the sons approximately 1.36 acres each. Such level of inequality leaves serious doubts as to whether the deceased could give one person 20 acres as aforesaid and disadvantage the others. There is more logic in the view that the deceased divided his land into 5 portions to accommodate his 4 sons and one daughter making a total of 5 hence accommodating all of them.

*(b) The second condition for a gift inter vivos to be complete is that the donee accepts the gift made to him or her; the donee must agree to the transfer of property that the donor made in his or her favour.* There is evidence that the 4 sons accepted what was given to them, and the petitioner also accepts her portion. That explains why each one of them settled in their respective portions.

*(c) The other condition for a gift inter vivos to be complete is delivery of the property that is the subject-matter of the transfer by the donor to the donee.* As stated above, there is evidence that each of the five persons occupy the portion given by the deceased. The only contested issue is that the petitioner is not entitled to the whole portion she claims her father gave her. On the contrary, the petitioner asserts that **Simon Muchiri Waitathu** curved off the portion he is claiming with the support of the others after the mothers' death. This assertion was not challenged during cross-examination.

Also for a gift *inter vivos* to be complete, it is also a requirement that the donor has to divest him or herself of the property; he or she has to place it in the possession of the donee. To me this requirement was satisfied the moment each of the beneficiaries was shown his or her portion. Clearly, the evidence adduced confirms the deceased's intent to gift all his children and that his actions were voluntary.

Even if we were to disregard the above evidence to the effect that the deceased divided his land and shared it out among his children *inter vivos* as aforesaid, and maintain the position that the deceased never divided his land at all, then on the question of distribution, the starting point is to refer to the relevant applicable law. Section **38** of the Law of Succession Act provides that:-

*"Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children"*

In my view, the spirit of Part **V** of the Law of Succession Act is equal distribution of the estate amongst the beneficiaries of the deceased. My reading of these provisions is that they envisage equal distribution. The word used in Section **35 (5)** and **38** is "*equally*" as opposed to "*equitably*." This is the plain language of the provisions. The provisions are in mandatory terms- "*the property shall.....be equally divided among the surviving children.*" Equal distribution is envisaged. Guided by the above provisions I find that the petitioner and the protestors herein are entitled to equal shares of the deceased's estate. That is the law as quoted above. It matters not that a child is a man or a woman, a boy or a girl. All are equal in the eyes of the law and distribution must be in conformity with the law.

I must emphasise that the estate to which these proceedings relate is that of the deceased **Witathu Kagwai** and not his wife **Reginah Nyambura Waitathu** who is also deceased. An attempt was made by the protestors to argue that the deceased left the fifth portion to himself and his wife and upon his death the wife assumed ownership and in that capacity she gave a portion to the petitioner and the rest to her son **Simon Muchiri Witathu**. The said portion was never formally transferred to her and even today, the title is in the name of the deceased. These proceedings relate to the estate of the late **Witathu Kagwai** and not his wife the late **Reginah Nyambura Waitathu**. Thus, the deceased's estate comprises of properties that were in his name as at the date of his death.

Further, the wife only had a life interest in the said portion as provided under the law and this needs to be considered together with the rest of the evidence, that is there are 5 children, the deceased divided the land into 5 portions and gave the sons a portion each and what he retained for himself and the wife is

what the petitioner states was given to her. As mentioned above, the petitioners position is that **Simon Muchiri Waitathu** only moved into the said portion after the death of their mother. I reiterate that this piece of evidence remains un rebutted.

Alternatively, if we are to take the position that the deceased never divided his land at all, then the provisions of the law relating to equality cited above will apply and each of the 5 siblings will be entitled to an equal portion.

On the assertion that the deceased gave the petitioner money to buy land at Gatarakwa, no evidence was tendered to support this allegation. On her part the petitioner produced receipts in her name showing that she paid for the said land and even produced the original title in her name. Further, as observed above, I find it highly unlikely that the deceased could give one child such a large parcel of land comprising of almost 20 acres and leave the rest of his family with barely 1.36 acres each.

I find the protest has no merits. I accordingly dismiss the protest and order as follows:-

- a. ***That*** the Protest filed herein by **Taracisio Kagunda Waithatu** on 4<sup>th</sup> November 2015 be and is hereby dismissed.
- b. ***That*** the certificate of confirmation of Grant of letters of Administration to the deceased's estate issued to **Reginah Nyambura Waithatu** on 12<sup>th</sup> November 2013 be and is hereby confirmed.
- c. ***That*** Title number **Aguthi/Gathaithi/278** measuring approximately **6.8 Ha.** be divided into Five equal portions to be shared among the following:- **Tarcisio Kagunda Waitathu, John Wangombe Waitathu, Regina Nyambura Gakuru, Simon Muchiri Waitathu and Joseph Waitathu Wangombe**-To hold in trust for the children of **Samuel Wahome Waitathi**.
- d. ***That*** the distribution herein ordered shall maintain as reasonably as possible the boundaries marked or fixed by the deceased when he divided the said land into five portions.
- e. ***That*** **Simon Muchiri Waitathu** is hereby ordered to relinquish the portion of land he excised from the portion belonging to the petitioner and stick to the portion allocated to him by the deceased.
- f. ***That*** the petitioner herein is ordered to execute such documents as may be necessary to cause sub-division and transfer of the above portions to the respective beneficiaries.
- g. ***That*** in the event that the petitioner does not execute the requisite documents to facilitate the said sub-division and transfer as aforesaid within 60 days from the date of this judgement, then the Deputy Registrar of this court shall at the request of any party sign the said documents.
- h. ***That*** each beneficiary shall pay the requisite survey fees and transfer charges for their respective portion(s)
- i. *No orders as to costs.*

Right of appeal 30 days

**Dated at Nyeri this 24<sup>th</sup> day March of 2016**

**JOHN M. MATIVO**

**JUDGE**

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