



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
SUCCESSION CAUSE NO. 56 OF 2012

**IN THE MATTER OF: THE ESTATE OF THE LATE WAINAINA MICHARA GIKUNYA
(DECEASED)**

AND

JOSEPH MURIITHI WAINAINA.....PETITIONER

VERSUS

BEATRICE WANJIRU MBURU.....OBJECTOR

J U D G M E N T

The late Wainaina Michara Gikunya died on 26th March 2012. His son Joseph Muriithi Wainaina petitioner this court for letters of administration intestate and was issued with a grant of letters of administration on 23rd March 2015. he filed an application to have the grant confirmed. Beatrice Wanjiru Mburu, the Petitioner's sister in law filed her objection to the issuance of the grant to the petitioner. The matter proceeded by way of oral evidence.

The objector, Beatrice Wanjiru Mburu testified that her late husband Samuel Mburu was an elder brother to the Petitioner. The deceased herein was her father in law. She had petitioned this court for letters of administration and was issued with a grant on 25th May 2012. The deceased herein had three children, her husband, the petitioner and Felister Wanjiku. The deceased left plot number Lamu/Lake Kenyatta/32. The deceased had directed that the land be divided into three portions for the three children. The petitioner did not include her name in the Succession Cause.

It is her further evidence that her late husband had his own land, plot number Lamu/Lake Kenyatta/62 measuring about 10 acres. When adjudication was done Joseph, the petitioner, was still young and could not get land.

PW2, FELISTER WANJIKU WAINAINA is the deceased's daughter. She is a young sister to the Petitioner. It is her evidence that they were five children. Her brother, Laban died while he was only two years. Her sister Teresia died when she was about 50 years. Her other brother, Samuel, husband to the objector died when he was about fifty years. Samuel had seven children with the objector. It is her position that her father left plot number 32, Lamu/Lake Kenyatta. Herself, Samuel and Joseph are the beneficiaries. The land is about ten acres. Joseph lives on the land. She does not live there. The land

was allocated through a ballot process. Her late father called Samuel who was in Nairobi to go to Lamu and get land. According to her, Joseph was below 18 years that time. She was 13 years in 1970s. She would like to be given two acres. Her late father had promised her one acre and the objector half an acre.

The Petitioner, JOSEPH MUREITHI WAINAINA informed the court that he went to Mpeketoni in 1973. He was 18 years old that time. His father had gone to Mpeketoni earlier with his brother Samuel Mburu. Samuel returned to Nairobi after two weeks. He was immediately employed by Cotton Board. The area District Commissioner, Mr. Karia told them to register and engage a surveyor. They had to pay for the registration. Samuel was in Nairobi and was not married that time. His father, himself and other villagers registered and engaged a surveyor. The survey work was done for three months.

It is his evidence that on 9th October 1973 balloting for the land was done. He picked plot number 62 while his late father picked number 32. They were given one month to develop their respective land. He built a house on plot number 62 and planted coconut trees. Before building a proper house, his father advised him to go back to school as there was free education. He had dropped out in class. He had started school when he was fifteen years before he dropped out in class four.

Joseph further evidence is that his father asked him to give plot number 62 to his brother Samuel while he was to take plot number 32. They sent fare for Samuel to travel to Nairobi. When registration was done later, Plot number 62 was registered in Samuel's name while plot number 32 was registered in his father's name. He has nine children while Samuel has seven. Felister is married and lives on plot number 257. She has nine children.

According to Joseph, in September 2004, his father called village elders. Samuel attended. He explained how they had changed the plots with Joseph to the elders. Samuel told the elders that he did not want to get land from plot number 32. All along he has lived on plot number 32 with his parents. His mother is alive but paralysed. His children have built on the land. When adjudication was done, no documents were issued. The allotment letters were issued after sometime. The arrangement to give plot no. 62 to Samuel was oral and he had to comply with his father's request. Her deceased sister had her own land but later it was taken away as she did not develop it.

DW2, NJUGUNA WAMBUGU is a farmer from Mpeketoni. His evidence is that the Petitioner owned plot number 62. He was then told to live at his father's land and Samuel Mburu took over plot number 62. Joseph had already built a house and planted coconut trees on plot number 62. DW3 KARIUKI KIMANI also comes from Mpeketoni. He went to the Settlement Scheme in 1973. He owns plot number 39 which borders plot number 32. he was present when balloting for the plots was done. Joseph, the Petitioner, was present and he picked plot number 62 while Joseph's father picked plot number 32. later, the deceased called his first son, Samuel and asked Joseph to give him plot number 62. Joseph was to move to plot number 32 and he has been living with his parents on that plot since then.

The main issue for the court's determination is how the deceased estate should be distributed. From the evidence of both parties, it is clear that the only assets comprising the estate is plot number LAMU/LAKE KENYATTA 1/32 measuring 4.4 Hacters. It is evident that the objector's husband, Samuel Mburu Wainaina was registered as the proprietor of plot number LAMU/LAKE KENYATTA 1/62. The plot is equal in size to plot number 32.

From the evidence on record, I am satisfied that Samuel Mburu obtained plot number 62 out of the exchange directive by his father. Samuel was living in Nairobi and was not present when the balloting of the plots was being done. I am equally satisfied that the Petitioner, Joseph Muriithi Wainaina was an adult during the adjudication of the land and is the one who picked plot number 62. The evidence of John Kariuki Kimani and Njuguna Wambugu is quite clear. The objector herself was not present when the adjudication was done. Felister admitted that Samuel was in Nairobi. The contention that Joseph was in school during adjudication is not proved. Although the title deed for plot number 32 indicate that the land register was opened on 23rd July 1998, I believe adjudication must have been done quite earlier. However, I am still satisfied that Joseph was an adult during adjudication. He was born in 1955.

From my above conclusion, I do find that the objector is not entitled to a share of the deceased property. She is already benefiting from plot number 62 that was given to her husband by the deceased herein. She cannot benefit twice from the deceased. The petitioner was made to surrender his plot number 62 in favour of his brother, Samuel. I do find that the objector's husband got his share of inheritance during the deceased's lifetime.

The next issue is how plot number 32 should be distributed. The evidence shows that there are only two beneficiaries, Joseph and Felister. In his replying Affidavit sworn on 20th August 2015, the Petitioner stated that the estate should benefit himself and his sister, Felister. It is also indicated that that was the wish of their father. However, in the affidavit in support of the application for Confirmation of the Grant, Joseph proposed to distribute the land to himself only. No share is indicated for Felister. According to Felister, her late father told them that she should get one acre. The objector filed an alleged handwritten will but they did not attempt to officially produce it. The alleged will seems to have been written after the deceased's death and was not witnessed by anyone. It cannot pass as a will.

The petitioner maintains that Felister lives on plot number 257. She is married and has nine children. I understand that had the deceased not asked Joseph to surrender plot number 62 in favour of Samuel, Joseph would be the proud owner of his own land. He would not be called upon to share his land with anyone else. However, plot number 32 was registered in favour of the deceased herein. Felister is the deceased's daughter. She lives on plot number 257 courtesy of her marriage. I do find that Felister is entitled to a share of plot number 32. Even Joseph in his affidavit of 20th August 2015 acknowledge this fact.

Felister informed the court that she was to get one acre out of plot number 32. I do find that awarding her that request would be fair in the circumstances I do proceed and distribute the deceased estate as follows:

plot number Lamu/Lake Kenyatta 1/32

(a) Felister Wanjiru Kimani- 1 acre

(b) Joseph Muriithi Wainaina-9 acres (remainder)

In the end, the objection by Beatrice Wanjiru Mburu is dismissed. The grant issued on 23rd March 2015 is hereby confirmed in the above terms. A confirmation certificate of the grant to be issued to Joseph Muriithi Wainaina. Each party to bear their own costs.

Dated and delivered in Malindi this 17th day of **March**, 2016

S.CHITEMBWE

JUDGE