



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 155 OF 2002

IN THE MATTER OF THE ESTATE OF NJAGI KANDII (DECEASED)

TERESIA MUTHANJE NJAGI

JULIETA CIAUMWARI NJAGI..... PETITIONERS

VERSUS

NICETA RUNJI NJAGI

SALESIO MWANIKI NJAGI.....PROTESTORS

RULING

1. This protest is against the petitioners/administratrix for obtaining letters of administration intestate in respect of the estate of the deceased without consulting the protestors. Additionally, the protestors testified that the house of the 1st protestor was not consulted before the filing of this succession cause.

2. The evidence of the protestors through Niceta Runji Njagi (P.W.1) is that her late husband distributed all the land to his family. She also testified that the deceased husband retained 3 acres for himself, his 3 co-wives and their two sons namely David Murage and Njanerio. It is her further evidence that the suit land should remain the property for herself, her two sons and the two co-wives, who are the petitioners.

3. The evidence of Niceta Runji Njagi is supported by that of her son Salesio Mwaniki (P.W.2). It is the evidence of PW 2 that his mother's house was not consulted by the petitioners before the filing of this succession cause. It is also his evidence that the petitioners gave David Murage, land Parcel Ngandori/Kiriari/3418. He testified that this parcel of land was given to him by his deceased father. It was also his evidence that his deceased father showed each of the beneficiaries their parcels of land in regard to which he prepared 11 title deeds. The complaint of P.W.2 is that the petitioners gave David Murage his parcel of land Reference No. Ngandori/Kiariari/3418, which he testified was given to him by his deceased father in 1978.

4. The petitioners led evidence through Teresia Muthanje (RW1), Juliet Ciamwari (RW2) and Anderson Njeru (RW3). The evidence of R.W.1 is that her deceased husband had told her that he had distributed all the land to all his children except for his son Njaneiro who was living in Nairobi at the material time. It is her further evidence that the deceased retained some land for his daughters. It is also her evidence that the deceased bought land for Salesio Mwaniki (P.W.2). It also her further evidence that Salesio Mwaniki was to get a point meaning a plot in the market. Furthermore, R.W.1 testified that the portion of land that Salesio Mwaniki is claiming belongs to Njaneiro. She also testified that Salesio Mwaniki was also claiming the land of the deceased Muriithi, who was the son of Niceta Runji. R.W.1 further testified that deceased bought land for Salesio Mwaniki, because their clan had given land to her son, Patrick

Mbogo. It is also her evidence that the deceased was not given the land in dispute. Finally, she testified that Salesio Mwaniki began to cultivate the land in dispute after the death of her husband by force.

5. Her evidence is supported by that of Anderson Njeru (R.W.3). R.W. 3 is a retired assistant chief. He testified that the deceased had told him in 1994 that he wanted to subdivide his land to avoid problems in his family, after his death. He proceeded to subdivide the land with the assistance of a surveyor. It is at that point in time that Salesio Mwaniki chased the surveyor away from the suit land. She further testified that the deceased approached him for assistance in surveying and subdividing land. R.W. 3 further testified that the deceased decided to survey and subdivide the land without the assistance of all his children and wives. His further evidence was that land parcel No. Ngandori/ Kiriari/3418 was given to David Murage Njagi and land parcel No. Ngandori/Kiriari/3408 was given to Njaneiro Mugendi Njagi, who was then a minor. It was also his evidence that Salesio Mwaniki and his step brother Mbogo Njagi were not entitled to any share in the suit land which had been subdivided into 11 portions. The reason being that these two step brothers had their own parcels of land.

6. Furthermore R.W.3 testified that the parcel of land which the deceased retained was to be shared equally among his 3 wives after Njaneiro had carved out his equal share of the land. R.W. 3 further testified that the rents that were due to the estate of the deceased were to be shared equally. R.W.3 further testified that he witnessed the survey and subdivision of the land by the deceased. It is his evidence that David Murage was given Land parcel No. Ngandori/ Kiriari/3418. It is important to point out that this witness produced as exhibit 1 the list of the beneficiaries and their land parcel Numbers which were as follows:-

1. Land Parcel No. Ngandori/Kiriari/3409 was given to Edward Njue Njagi, his son.
2. **Land parcel Ngandori/ Kiriari No. 3410 was given to Simon Rutere Njagi**
3. No. 3411 was given to Francis Mugo Njagi
4. No. 3412 was given to Peter Mucira Njagi
5. No. 3413 was given to Lawrence Mucangi Njagi
6. No. 3414 was given to Felisina Wanjovi Njagi
7. No. 3415 was given to Elias Njeru Njagi
8. No 3416 was given to Joseph Kariuki Njagi
- 9.No. 3418 was given to David Murage Njagi
- 10.No. 3417 was given to all the deceased daughters, so that whoever was divorced could come and settle there
11. **No.3408 was left for the three wives and the last born who was underage**, namely Njaneiro Mugendi Njagi.

7. The 2nd petitioner testified by adopting the evidence of R.W.3.

8. In the light of the foregoing evidence the following are the issues for determination. First, whether or not Salesio Mwaniki was bought land by his deceased father. Second, whether or not Salesio Mwaniki has a right to claim the parcel reference No. Ngandori/Kirairi /3418. Third, whether or not the petitioners consulted the protestors before filing the current succession cause. Fourth, the effect of the combined evidence of both parties, in the light of the issues raised for determination. Fifth, who should bear the costs of this application.

9. I have considered the entire evidence of both parties. I find that the evidence of the petitioners (R.W.1, 2 and 3) is credible, in that Salesio Mwaniki was bought land by the deceased during his life time. According to R.W.1 the deceased bought land for Salesion Mwaniki, because Patrick Mbogo had been given land by the clan. The evidence of the retired Assistant Chief R.W. 3) supports that of the two petitioners, that both Salesio Mwaniki and Patrick Mbogo had their own parcels of land and for that reason they were not entitled to a share of the 3 acres which the deceased had retained for his use, for the use of his 3 wives and David Murage together with Njaneiro Mugendi. In the circumstances, I find that Salesio Mwaniki has no right to claim that his deceased father gave to him land parcel Ngandori/Kiriari/3418. Salesio Mwaniki testified before me and I found him to be a very intelligent witness but was not a truthful witness. I find as a fact that he chased away the surveyor brought by his deceased father. I also find as a fact that he forcefully entered and started to cultivate land parcel No. Ngandori/Kiriari/3418 claiming it to be his land.

10. The evidence of the 1st protestor (P.W.1) supports the evidence of the petitioners that their deceased husband had subdivided his parcel of land before he died. This explains why the deceased did not make provision for both Salesio Mwaniki and Patrick Mbogo, because they had their own parcels of land. In the case of Salesio Mwaniki the deceased had bought for him a parcel of land. In the case of Patrick Mbogo, he had been given land by the clan apparently through the influence of the deceased.

11. Furthermore, I find that the two petitioners did not consult the protestors in respect of filing this succession cause. Following the evidence tendered by both parties its clear that the fact that they were not consulted was not prejudicial to the protestors. The reason being Salesio Mwaniki was not entitled to any share in the estate of his father. Furthermore, the 1st protestor was provided for. This is clear from the evidence of two petitioners and the evidence of the retired Assistant Chief. In the circumstance I find that the subdivision and distribution of the land by the deceased was fair and reasonable to all the beneficiaries including the first protestor.

12. The final issue for determination is as to who bears the costs of this application. I find that this is a family dispute and for that reason I make no order as to costs.

In the circumstances, I hereby dismiss the application of the protestors.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **27th** day of **SEPTEMBER, 2016**

In the presence of both the petitioners and the first protestor and in the absence of the second protestor.

Court clerk Njue.

J.M. BWONWONGA

JUDGE

27.09.16