



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 549 OF 2013
IN THE MATTER OF THE ESTATE OF GIBSON BOITHI MUNYIRI-DECEASED

Susan Wangechi Eklow..... Petitioner

VS

Robert Mwangi Boithi.....Protestor

JUDGEMENT

Gibson Boithi Munyiri (herein after referred to as the deceased) died intestate on 3rd February 2003 at the age of 90 years. On 7th day of August 2013, a daughter to the deceased (herein after referred to as ("**the Petitioner**") petitioned for letters of administration intestate to the deceased's estate and named the following persons as persons surviving the deceased:-

- i. Robert Mwangi Boithi-----Son*
- ii. Winfred Muthoni Gichuki-----Daughter*
- iii. James Maina Mathenge-----Son.*
- iv. Mary Muthoni Mathenge-----Daughter.*
- v. Nomi Wangari Boithi-----Daughter.*

There is a consent signed by all the above named persons. The only properties listed in the affidavit in support of the petition is **Gatarakwa/Gatarakwa Block 111/432 and shares whose number has not been disclosed.**

The grant was issued on 14th October 2013. On 22nd February 2016 the **petitioner** applied for confirmation of the said grant and proposed that the above parcel of land be transferred to her absolutely. There is no mention of the shares. There is a consent to confirmation signed by all the beneficiaries.

When the application for confirmation came for hearing before me on 17th March 2016, **Robert Mwangi Boithi** (herein after referred to as the protestor) stated that he was opposed to the application for confirmation and I directed him to file an affidavit of protest which he did on 4th March 2016 claiming that he was not involved in the filing of the petition, that no consent was obtained from the family and that the grant was obtained by fraud.

At the hearing of the protest the protestor stated that the deceased said that the said land was to be divided

into two portions, one portion for himself and the other portion for the petitioner. He also confirmed that the other beneficiaries were given land by the deceased. This information is not contained in his affidavit of protest whose details are stated above.

In particular the protestor stated that **Winfred Muthoni Gichuki** was given land at Ihururu, Kanjora, **James Maina Mathenge** was given 3.9 acres plus a house worth Ksh. 8,000,000/=, **Mary Muthoni Mathenge** is married and was given a plot together with **Nomi Wangari Boithi** at Gatagragwa. He stated that his wife was given the land that he would have been given, hence his problem is that he has no land. He claimed that he had developed the land at Gatarakwa since 1990. He also stated that he lives at his wife's home in the land she was given by the deceased. He insisted that no one else was present when the deceased allegedly gave him the land at Gatarakwa. He however admitted that ordinarily a Kikuyu man would call the clan when making such a decision to give land but in his case he said that it was only himself and the deceased who were present when the deceased gave him the said land and that no other family member was present.

Also, notwithstanding that in the affidavit of protest he averred that he was not involved in filing this petition, he admitted in court that he signed the consent but claimed that he did not know what he was signing.

In cross-examination he admitted that from the year 2012 he leased the land he claims belongs to his wife with the latest lease having been signed as late as 2016 and that he has been receiving the money for the said lease. He also admitted in cross-examination that the deceased distributed his properties before he died.

The petitioner did not testify, but in support of her case **Mary Muthoni Mathenge** testified that the deceased had said that the Gatarakwa land be given to the petitioner because she was taking care of him and had build a house on the said land and that she was supporting their parents financially. She stated that the protestor was given land at Ihururu which was registered in his wife's name, that the protestor has a house on the said land and lives there. She also stated that he farms a small portion of the said land and has rented the rest of the land to the petitioner. She denied that these proceedings were filed fraudulently and asserted that the protestor did not want to participate in the process. She also stated that when they were discussing the process, they gave the petitioner shares and a posho mill and he signed the consent.

Also on record is the testimony of **Nancy Muthoni Mwangi**, the protestors wife who confirmed that the deceased gave her land and that the land is meant to be for her, the protestor and their children. She also denied that she has ever chased the protestor from the land and confirmed that she has no intention of chasing him.

There is sufficient evidence that the deceased distributed his two properties among his children prior to his death and that each of his children was given land by the deceased. The protestor admits that position but states that it is his wife who was given land not him, hence he was left out. That may be so, but his wife was categorical that the land given to her was meant to be hers, her husband (the protestor) and their children and that she has no intention of chasing him from the land. There is also evidence that at the time the deceased distributed the land, the protestor was not available, hence the deceased decided to give the land to his wife. I find nothing wrong with that nor can I fault the deceased for making such a decision. He knew his son more than any other person and he must have taken such a decision cautiously to protect the interests of the protestor, his wife and their children.

Further, the protestors' testimony that the deceased gave him part of the Gatarakwa land is not only improbable, but is not supported by any concrete prove. I hasten to support my view by noting that the protestor stated that no one else was present when the deceased allegedly gave him the said land. This contrasts sharply with the fact that all are aware about the distribution done by the deceased as stated above and that each person is fully aware which land was given to each person, a confirmation that the deceased communicated his decision to all his children, hence it is ironical that no one was present or heard or witnessed the deceased give a portion of the Gatarakwa land to the protestor. It is unlikely that the same deceased person who gave parcels of land openly to each child could secretly gave the protestor

a parcel of land without informing the others.

In the instant case, the deceased expressed his intention in a very clear manner. He gave each child a piece of land and transferred. He stated that the suit premises would go to the petitioner. The petitioner was not given any other land when the deceased distributed the properties. I find nothing in the protestors' evidence or the affidavits of the protestor to negate the clear intentions of the deceased.

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

*a. That the Protest filed herein by **Robert Mwangi Boithi** on 4th April 2016 be and is hereby dismissed.*

*b. That the certificate of confirmation of Grant of letters of Administration to the deceased's estate issued to **Susan Wangechi Eklow** on 14th October 2013 be and is hereby confirmed.*

*c. That Title number **Gatarakwa/Gatarakwa Block 111/432** measuring approximately **10.88 Ha** be transferred to **Susan Wangechi Eklow** to own absolutely.*

d. That the protestor do pay the costs of this protest.

Right of appeal 30 days

Signed, Delivered and Dated at Nyeri this 24th day October of 2016

John M. Mativo

Judge