



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 733 OF 2012

In the Matter of the Estate of M' Mutunga M' Mukiri (Deceased)

FLORENCE KARIMI MUTUNGA.....PETITIONER

-VERSUS-

GLADYS CIONCHEBERE MUTUNGA.....PROTESTOR

RULING

Wife inheritance

[1] By Summons for Confirmation of Grant dated 19th January 2015, the Petitioner Florence Karimi Mutunga sought the Confirmation of Grant of Probate (or Letters of Administration or with will annexed issued to her on 10th September 2014. But on 18th May 2015 the Protestor herein, one Gladys Cionchebere filed a Protest to the confirmation. The protest was in form of an Affidavit of Protest and she deposed inter alia; (1) that she was a beneficiary of the deceased estate; (2) that when her husband died, the deceased who was a brother to her late husband took her over as his wife together with her children; her said children have known the deceased as their father; (3) that the deceased then sold all the property of her late husband and together moved in as a family and settled at Ciothirai in Giaki in the year 1957; (4) that by 1958 she resided in and made use of five acres of the L.R NO Nyaki/Giaki/1601 with full knowledge of her co wife. She averred further that the suit land being L.R NO. Nyaki/Giaki/1601 measuring five acres was a subdivided from the parent land known as L.R NO Nyaki/Giaki/378 (approximately 15 acres. Other resultant subdivisions thereof include; parcel Numbers Nyaki/Giaki/1603 and Nyaki/Giaki/1602 both measuring approximately 10 acres were awarded to his co wife Zipporah Kathuku and her children. The Protestor stated that she together with her children has had an uninterrupted stay on parcel no Nyaki/Giaki/1601 for more than 50 years, and so, she should be allowed to remain on the said parcel without any interruptions.

Protest opposed

[2] The Protest was opposed by the Petitioner via an affidavit filed in court on 6th July 2015 wherein she deposed inter alia that:

- (1) The Protestor was not the wife of the deceased. She was simply assisted by the deceased herein with a piece of land for use;
- (2) That, as a matter of fact, the Protestor has another parcel of land in Nyambene that she had

been using but only came back to claim the deceased was her husband after he had passed away;

(3) That it was not true that the Protestor came on the suit land in 1957 as she actually came to the land in 1969 and therefore it is also not true that she has used the said parcel of land since 1958; and

(4) That the fact of the matter is that the 5 acres had been transferred to George Koome and that there has always been conflict with George Koome.

DETERMINATION

[4] I have carefully considered the Protest and the rival contentions by the parties. I note that parties herein kept on changing positions as to how the protest should be canvassed and determined. When the matter came up for hearing on 10th November 2015, the parties agreed that the protest herein shall be disposed of by way of *viva voce* evidence. But, when it came up for hearing on 11th February 2016, the parties changed the earlier position and resolved that the matter shall now be canvassed by way of written submissions. Again, when it was scheduled for mention on 6th September 2016, the parties discarded the notion of submissions and intimated to court that they will rely on the affidavits filed. It is this court's opinion that this matter should have been best resolved by way of *viva voce* evidence. Be that as it may, this court will proceed and determine the Protest on its merit or otherwise.

[5] The Protestor contended that when her husband died, the deceased who was a brother to her husband took her over as his wife together with her children. She also stated that the deceased sold all the property of her late husband and together moved in as a family and settled at Ciothirai in Giaki in the year 1957. The Petitioner on the other hand denied that the Protestor was the wife of the deceased. She however admitted that the Protestor had been assisted by the deceased with a piece of land for use. She also seemed to agree with the Protestor that there was a dispute on the suit property during the lifetime of the deceased and elders unanimously awarded her five acres.

[6] Now, taking into account the totality of the circumstances of this case, I am satisfied that the Protestor lived on the suit land together with her children for a considerable period of time. When I take any of the periods admitted by each party, that is either 1957 or 1969; it is a period of over 47 years. The evidence before the court shows that she has had uninterrupted possession and use of the five acres in issue for all those years. Although the Petitioner argued that she was only allowed to use the land, the overwhelming possibility is that she had been given the said land by the deceased for herself and her children. A claim of "wife inheritance" was raised but I wish much more was given in evidence towards that union. However, the evidence available is sufficient for the court to make a finding, which I hereby do, that there was a much deeper relationship between the Protestor and the deceased which was the basis for giving her the land in question. There is no dispute that there are children involved. Accordingly, I find that, on a balance of probability, the Protestor is entitled to the five acres of land from the deceased. Accordingly I do hold and find the Affidavit of Protest filed in court by the Protestor on 18th May 2015, to be meritorious and I allow it. She will have L.R NO Nyaki/Giaki/1601 measuring five acres. The evidence also shows that the other two parcels of land namely L.R NO Nyaki/Giaki/1602 and L.R NO Nyaki/Giaki/1603 were to go to the Petitioner and her children. I so hold. The Petitioner is now directed to file another affidavit showing distribution of the two parcels of land namely L.R NO Nyaki/Giaki/1602 and L.R NO Nyaki/Giaki/1603 among the rightful heirs to the deceased estate for purposes of confirmation of the grant. I will assign this case a date for confirmation in order to avoid any further delay. As this is a succession cause, I order that each party shall bear own costs of the protest. It is so ordered.

Dated, signed and delivered in open court at Meru this 16th day of November 2016

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F. GIKONYO

JUDGE

In the presence of:

Mr. Wamache advocate for the petitioner

Petitioner in court

Mr. Kaimenyi advocate for Mr.Otieno for respondents.

F. GIKONYO

JUDGE