



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 145 OF 2009**

**IN THE MATTER OF THE ESTATE OF KOSIADO GATERU MWANIKI (DECEASED)**

**SIMON MWANIKI GATERU.....ADMINISTRATOR**

**VERSUS**

**CEASAR WAWERU GATERU.....PROTESTOR**

**JUDGMENT**

1. These proceedings relate to the estate of the late Kosiado Gateru Mwaniki (hereinafter referred to as the deceased) who died intestate on 8<sup>th</sup> August 2008 at Dundori.
2. The deceased had four properties, namely:
  - (a) NYANDARUA/SABUGO/960;
  - (b) NYANDARUA /SABUGO/959;
  - (c) NYANDARUA/SABUGO/2854; and
  - (d) NYANDARUA/SABUGO/510.
3. He was survived by the following beneficiaries:
  - (a) Wanjerica Waturi Gateru.....widow
  - (b) Simon Mwaniki Gateru.....son
  - (c) Elizabeth Wangechi Kimani.....daughter
  - (d) Joseph Waruthi Gateru.....son
  - (e) Caesere Waweru Gateru.....son
  - (f) Jemima Wacheke Murage.....daughter
  - (g) Margaret Muthoni Kamau.....daughter

(h) John Ndugu Gateru.....son

(i) Thomas Gatimu Gateru.....son

4. Following his death Simon Mwaniki Gateru, (hereinafter referred to as the administrator), successfully petitioned for a grant of letters of administration intestate which was issued to him on 20<sup>th</sup> September 2011.

5. He subsequently applied for confirmation of the grant by the summons for confirmation of grant dated 20<sup>th</sup> June 2012 to which he attached an affidavit indicating how he intended to distribute the property.

6. On 6<sup>th</sup> July 2009, Caesare Waweru Gateru (the protestor) who is also a beneficiary of the estate filed an affidavit of protest to the proposed confirmation of grant under Rule 17 (1) of the Probate and Administration Rules.

7. Joseph Waruthi Gateru also filed a statement dated 29<sup>th</sup> April 2015 also expressing dissatisfaction in the manner in which the administrator had distributed the estate.

8. By a consent dated 29<sup>th</sup> April 2015 and adopted by the court on the same day, the parties agreed on the manner of distribution of all the properties save for NYANDARUA/SABUGO/2854 which the petitioner allocated to himself on the basis that he had purchased it from his father.

9. Accordingly, the parties agreed that the sole issue for determination and on which evidence would be adduced was whether the Petitioner purchased this land from the deceased and was therefore entitled to receive the entire parcel of land.

10. The parties filed affidavits and also led *viva voce* evidence to support their claims. The dispute was regard to the rights over NYANDARUA/SABUGO/2854 (hereinafter referred to as the suit land). The protestor alleged that this property was originally part of Plot No. 510 situated in Sabugo Settlement Scheme. In the late 1990 the deceased subdivided this property which measured 19.8 acres and sold some of the demarcated plots to third parties while the rest were distributed to the beneficiaries including the administrator.

11. The only plot that was not sold was the suit land which measures 1.85 acres. The administrator later purchased half of this land from the deceased for a sum of Kshs. 50,000/= although he was not issued with a Title Deed. The deceased intended that the remaining part of the land would be divided into equal shares of 0.45 acres among the administrator, the protestor and Joseph Waruthi Gateru. To this end an agreement was made between the deceased and his sons on 13<sup>th</sup> June 2008. (See the original agreement and its English attached to the Protestor's Reply to the Replying Affidavit and marked as translation exhibit "1a" and "b"). The Protestor's wish was that these wishes be upheld.

12. PW2 was Joseph Waruthi Gateru, the deceased's son. He conceded that the deceased sold a portion of the suit land to the administrator. He and the protestor were present during the negotiations between the deceased and the administrator for the sale of the land. It was agreed that the administrator would purchase the property for a sum of Kshs. 50,000/=.

13. After the death of the deceased, another agreement was entered into by the brothers that half of the suit property would be given to the administrator and the other half would be divided equally among the administrator, protestor and Joseph Gateru. However the administrator failed to honour the agreement and instead filed this cause without the knowledge and consent of the others and with the intention of pursuing his claim for the entire parcel of land. PW2 too wanted the property to be divided according to the deceased's wishes.

14. The administrator was DW1. His case was that on 6<sup>th</sup> November 2001 the deceased agreed to sell him one acre of land at a consideration of Kshs. 50,000/= payable in installments. The original agreement was produced and marked “DEX1”). He continued making payments as per the agreement. The acknowledgements from the deceased were produced as “DEX 2, 3 and 4”.

15. Thereafter, the deceased sold to the administrator another half-acre out of the suit land for Kshs. 50,000/=. The agreement to this effect was made on 30<sup>th</sup> June 2008 and was witnessed by the protestor and Joseph Waruthi Gateru. It was his case that at the time of the death of the deceased, the entire plot of land had already been sold to him. Therefore, there is nothing left to divide and the protest should be dismissed for lacking merit.

### **ANALYSIS**

16. In support of his claim, the administrator produced several documents which were written in Kikuyu language but did not produce their translation. The only document which was translated is the one headed “will” dated 13<sup>th</sup> June 2008 which was made in regard to the suit land.

17. In that agreement the deceased expressly stated that the remaining parcel of this land after deducting the half-acre that was purchased by the administrator will be shared among the administrator, the protestor and Joseph Waruthi Gateru. The original handwritten copy is executed by all the parties.

18. The administrator alleged that this agreement was set aside by a latter agreement made on 30<sup>th</sup> June 2008 wherein the deceased agreed to sell to the administrator another half-acre of land for Kshs. 50,000/=.

19. This contention is contradicted by the agreement dated 5<sup>th</sup> December 2008 on the subdivision of the suit land. In this agreement which was made after the deceased’s death, the administrator, protestor and Joseph Waaruthi Gateru agreed that the administrator would get his half-acre which he had bought from the deceased and the remaining portion measuring slightly above one acre be divided equally among the three.

20. The evidence is very clear that the deceased did not sell the entire plot of land to the administrator. He only sold him a half-acre and his intentions with regard to the remaining portion was very clear, that it be divided equally among the three.

### **DETERMINATION**

21. From the foregoing, I find the administrator only purchased half-acre of the suit land. The deceased’s wishes with regard to the remaining portion should be upheld.

22. Accordingly, I allow the protest order that the property known as NYANDARUA/SABUGO 2854 shall be distributed as follows:

- (a) Simon Mwaniki Gateru.....0.95 acres being the 0.5 acres purchased from the deceased plus his equal share of 0.45 acres
- (b) Caesare Waweru Gateru.....0.45 acres
- (c) Joseph Waruthi Gateru.....0.45 acres

23. Being a family matter, each party shall bear its own costs.

**Dated, Signed and Delivered at Nakuru this 31st day of July, 2015.**

**A. MSHILA**

**JUDGE**