



**IN THE HIGH COURT OF KENYA AT EMBU**

**MISC. SUCCESSION CAUSE NO 202 OF 2009**

**IN THE MATTER OF THE ESTATE OF THE ESTATE OF MUCHIRA GACHARI WANGAI  
ALIAS MUCHIRA GACHARU-(DECEASED)**

EUNICE WANGECI MUCHIRA.....PETITIONER

VERSES

JOSEPH MURIITHI GACHARI.....RESPONDENT

**R U L I N G**

1. The petitioner filed summons for confirmation of grant and an affidavit in support thereof on 4th April, 2012. She averred that the deceased was her husband and owner of land parcel NO. INOI/KARIKO/405. They did not have any children and as such she was the only dependent of the deceased's estate. She urged the court to confirm the grant with consideration that she was the sole dependant and to therefore grant her the whole share of INOI/KARIKO/405.
2. The protestor in his affidavit of protest alleges that the deceased was his step brother and owner of land parcel NO. INOI/KARIKO/405 measuring about 5.4 acres. He confirmed that the deceased was married to the petitioner but they did not have any children. The protestor also stated that the deceased had on 8th March, 2008 indicated the way land parcel NO. INOI/KARIKO/405 should be distributed. The deceased had indicated his wish in a meeting held on 8th March, 2008 in the presence of witnesses. The protestor produced minutes of the said meeting/Will. According to the minutes produced it was the deceased's wish that the petitioner holds a life interest over the said parcel of land and to lease out the same if she wished. Upon the Petitioner's death, it was the deceased's wish that the said parcel of land be distributed equally among his nephews.
3. In the replying affidavit to the affidavit of protest, the petitioner denied the allegation that the deceased wished his estate to be shared equally by his brothers' sons. She claimed that the copy of the deceased Will produced by the protestor was invalid and drafted by the respondents with the sole aim of disinheriting her. She claimed that the deceased's father had two wives who had sons. All the sons had been given their inheritance. However, the deceased's step brothers had sold their inheritance and hence the reason why they wanted to prey on their deceased brother's inheritance land parcel INOI/KARIKO/405. She claimed that she should not be disinherited just because she is childless.

**THE PROTESTOR'S CASE**

4. When the matter came up for hearing the Protestor stated that prior to the deceased's death a meeting to discuss the subdivision of land No. INOI/KARIKO/405 had been held on 8th March, 2008. Present at the meeting were the clan chairman Mr. Stephen Gathara, the protestor, his brother Stephen Muriithi and the petitioner (the deceased's wife). The deceased stated during the meeting that the children of the protestor and those of the protestor's brother Stephen Muriithi

would inherit INOI/KARIKO/405. He however stated that the wife would be at liberty to continue leasing out the portion of land out of INOI/KARIKO/405 that was already being leased, during her life time. The discussions were reduced into writing and the petitioner never raised any objection to the agreed mode of distribution. The protestor stated that he did not have a problem with the petitioner having life interest but the six beneficiaries should eventually inherit the parcel of land as per the deceased's wish. During cross examination, the protestor denied that his father had two wives and that the deceased was the only child. The protestor also denied that he is the one who made up the deceased's Will. He however admitted that the deceased was his brother. I have noted that the Affidavit of protest is allegedly sworn by the petitioner. I find this to be a typographical error which I will not take into account.

5. The Protestor's witness Gatura Miano (PW2) stated that he was the chairman of the Onjiro clan and that he knew the deceased well since he was a member of their family. He confirmed that the petitioner was the deceased's wife. He confirmed that there was a meeting at the deceased's home on the 8th March, 2008. The meeting had been called by the deceased. Five people were present at the meeting namely petitioner, protestor, Stephen Muriithi, the deceased and himself. During the meeting the deceased said he was experiencing problems farming and wanted to discontinue it. He stated that he wanted the land to go to the protestor's sons and his other brother Njogu's sons. He recognized the minutes/Will and his signature. He said he did not know who had typed the agreement but that the deceased dictated the same to Muriithi who typed it. He also stated that he witnessed all the people signing the agreement. The agreement was signed after typing. The petitioner was very drunk on that day and lied that the deceased's ID was lost. He also stated that the petitioner has given the land to her relatives. He confirmed that Njogu and the protestor had already inherited their fathers land.

## **PETITIONER'S CASE**

6. The Petitioner testified that the deceased was her husband and that her father in law had two wives Zippora Wagature and Wacera Gachere. The protestor and his brother Njogu were children of Zippora while the deceased was the only child of Wachera Gachere. She states that her husband was given land NO. INOI/KARIKO/405 which was clan land. The protestor and his brother inherited their late father's land INIO/KARIKO/102 but the deceased did not get any inheritance from his fathers' land. The protestor and his brother have since sold their land. She stated that her late husband's land is now hers and that she should be left to distribute it. She denied knowledge of any Will written by her husband.
7. She confirmed that after the Kerogoya Court gave her the land she had sold part of it to get money for her subsistence. Upon cross examination she confirmed that her husband was a member of the Onjiru clan but denied knowledge of whether PW2 was the clan chairman. She denied that she was drunk during the meeting and confirmed that she had the deceased's ID during the meeting. She denied that the deceased said she only had a life interest in the land which should go to Mureithi's and Njogu's sons after her demise. She said she knew Ephantus who bought one acre of land as his nephew who currently takes care of her. She denied giving her husband's land to anyone.

## **8. UNDISPUTED FACTS**

- (a) That the petitioner was the deceased's wife
- (b) That the deceased had been given INOI/KARIKO/405 by his father.

## **9. DISPUTED FACTS**

- (a) That the deceased died testate
- (b) That the distribution of INOI/KARIKO/405 had been determined by the deceased during his lifetime.

## **ISSUES FOR DETERMINATION**

- (i) Whether the deceased died testate.
- (ii) The distribution of INOI/KARIKO/405

**ISSUE NO. (i)**

10. *Section 11 of the Law of Succession Act provides that no WILL shall be valid unless;*

- (a) The testator has signed or affixed his mark to the Will or it has been signed by some other person in the presence and direction of the testator.*
- (b) The signature or mark of the testator, or signature signing for him is so placed that it shall appear that it was intended to give effect of the writing as a Will.*
- (c) The Will is attested by two or more persons each of whom must have seen the testator sign or affix his mark on the will, or have seen some other person sign the will in the presence and direction of the testator.*

Where there are allegations of forgery, the burden of prove squarely lies on the person alleging it. This position was held in both **NAIROBI Civil Appeal No. 128 OF 1995** and **NAIROBI HCSC NO. 341 OF 1998**.

11. In the present case, the petitioner has denied that the deceased died testate. She claims to have been present at the meeting in which the alleged Will was made but denies knowledge of the same. Both the protestor and PW2 who were also present at the meeting confirm that the deceased was very drunk during the meeting. The protestor and PW2 say they witnessed the signing of the Will.

In my opinion, the Will appears to be valid as it meets the conditions set out under Section 11 of the Law of Succession Act. This is because the deceased thumb printed on the will and it was also signed by the the protestor, PW2 and another witness. It is also important to note that PW2 stated that he has no interest in the estate as he was just a clan chairman.

Further, in the case of **WAMBUI & ANOTHER VS GIKONYO & OTHERS [1988] KLR 445**, the court of appeal held that *"the signature or mark could be placed anywhere including as the last signature after the witnesses signature as the testator need not sign on his behalf and still valid "*

In view of the above, I opine that the deceased died testate.

**ISSUE NO. (ii)**

12. *The deceased died testate since there is a valid will. According to section 5 of the Act every Kenyan adult has an unfettered testamentary freedom to dispose of his or her property in a manner he or she deems fit. The distribution should therefore be done according to the last will of the deceased. This must however be done with the responsibility to the dependants in mind.*

*Section 26 of the Law of Succession Act provides recourse for Dependants who may be left out in the will. This section therefore puts limitation on the testamentary freedom given by section 5. The effect is that the court may make provision for the disinherited dependants even though the deceased died testate. The above position was the position held by the Court of Appeal **NAIROBI CIVIL APPEAL NO.128 OF 1995**.*

13. *In the present case, it is undisputed that the petitioner was the wife to the deceased. She therefore qualifies to be a dependant under Section 29 of the Law of Succession Act. The fact that he did not have any children with her did not make her a lesser wife or lesser dependant as is insinuated by the WILL and the Protestor. The deceased like his two brothers had been given inheritance by*

their father. This is very relevant evidence because it simply confirms that the land NO. INOI/KARIKU/405 was sole property of the deceased and not the subject to relatives inheritance.

14. However because the deceased had an intention of giving some help to his nephews, this Court will respect that wish to the extent that the deceased's widow is not left a destitute. It is also not the duty of protestor and or his brothers to supervise the Petitioner on what she does with her lawful share.

15. From the evidence on record, the land in issue measures 2.20 hectares which is about 5.5 acres. To ensure that the widow is adequately provided for and that the deceased's nephews also get a portion of land, I do make the following orders: \_

(I) The Petitioner/Applicant will get 3.5 acres out of the land INOI/KARIKO/405.

(II) The balance to be shared equally by the persons mentioned in paragraph 5 of the protestor's affidavit.

16. The result is that the protest partially succeeds by and I order that each bears his/her own costs as they are family members.

Right of appeal explained.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JULY, 2014.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Mr. Ithiga for Maina Kagio for Protestor**

**Parties**

**Njue CC**