



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 145 OF 2007

PHILLIP MATHENGE MURAYA DECEASED

AND

DAVID NDUNGU MWEMA..... PETITIONER

JUDGMENT

1. The petitioner DAVID NDUNGU MWEMA filed a petition for grant of letters of administration in the matter of estate of PHILLIP MATHENGE MURAYA alias PHILIP MATHENGE named the assets of the estate as TETU/THATHA/41 and the following survivors:

First Wife

- | | | |
|-----------------------------|---|------------------|
| 1. Monica Waihuini Mathenge | - | Widow (deceased) |
| 2. Timothy Wahome Mathenge | - | son |
| 3. Nathaniel Kibui Mathenge | - | son |
| 4. Sospeter Thumbi Mathenge | - | son |
| 5. Dickson Ngatia Mathenge | - | son |
| 6. Richard Mwema Mathenge | - | son |
| 7. Esther Muthoni Mathenge | - | son |
| 8. Bilha Wambu Mathenge | - | married daughter |
| 9. Reuben Nderitu Mathenge | - | deceased |

Second Wife

- | | | |
|-----------------------------|---|------|
| 1. Philis Waihuini Mathenge | - | Wife |
| 2. Newton Muthui Mathenge | - | son |
| 3. Meshack Mwangi Mathenge | - | son |
| 4. Waweru Mathenge | - | son |

5. Andrew Maina Mathenge - son
6. Geoffrey Wambugu Mathenge - son
7. Benjamin Muthui Mathenge - son
8. Samuel Muriithi Mathenge - son
9. Tabitha Wangari Mathenge - married daughter
10. Susan Gathegu Mathenge - married daughter
11. Gakenia Mathenge - married daughter

2. On 24th June 2009 Summons for confirmation of grant was filed and the proposed mode of distribution given as follows:

TETU/THATHA/41 measuring 8.85 Ha as follows:

3.28 ha to be regisitered in the names of

1. David Ndungu Mwema
2. Samuel Wanjohi Mwema
3. Fred Ndirangu Mwema
4. Philip Mathenge Mwema
5. Paul Ndiritu Mwema
6. Stephen Muriithi Mwema - Jointly and undivided shares

5.57 ha to the survivors and beneficiaries of the estate named in form N40(1)
(1)

3. On 8th July 2009 Newton Muthui Mathenge filed an affidavit of protest wherein he deponed that the petitioner is not a son of the deceased and has brought the petition with bad faith since the petitioner has his own land TETU/THATHA/126 where he occupies it was further deponed that the grant of letters of administration was fraudulently and wrongly issued to the petitioner without the knowledge of the real sons of the deceased.
4. On 4th February 2014 the petitioner filed a further affidavit in which he deponed that the sought acres were awarded to Mwema Muraya on 15th November 2000 by the Provincial Appeals Committee as confirmed by the High Court in HCCC No. 21 of 2002 Nyeri.

SUBMISSIONS

5. By consent of the parties direction was given that the protest be heard by way of written submission which have now been filed. On behalf of the protester it was submitted that the grant was obtained fraudulently on the basis of a mere award which did not take effect at all and that the petitioners father had filed a civil case in High Court Civil Suit No. 107 of 1978 against the protestor's father and both parties have since died.
6. It is submitted that the suit was referred to arbitration to determine if any trust had been established and that no trust was established and the elders did not award the protestor any land.
7. Having looked at the submissions herein and in particular the submission by the protestor which to my mind amounts to tendering evidence without the same being tested by way of cross

examination together with submission by the petitioner I take the considered view that this protestor ought to be heard by way of oral evidence so that all the issues in dispute can be brought before the court in proper manner.

8. Whereas the parties had consented that the protest be determined by way of written submissions In the interest of justice I hereby order that the protest be heard by way of viva voce evidence and in view of the age thereof the matter to be fixed for mention before the Resident Judge on 20th November 2014 for further directions.

Dated, signed and delivered at Nyeri this 19th day of September 2014.

J. WAKIAGA

JUDGE

Court: Judgment read in open court in the presence of the advocates for parties and in the presence of the parties.

J. WAKIAGA

JUDGE

19/9/2014