



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO.534 OF 2001

IN THE MATTER OF THE ESTATE OF:

MUGO WANGARU alias MUGO S/O WANGARU DECEASED

AND

LAWRENCE WAWERU MUGO PETITIONER/RESPONDENT

VERSUS

HARRISON KIONGO MITI OBJECTOR/APPLICANT

JUDGMENT

The petitioner Lawrence Waweru Mugo petitioned for Grant of Letters of Administration in respect of the estate of Mugo Wangaru alias Mugo s/o Wangaru which grant was issued on 5th November 2001. On 20th December 2001 the objector Harrison Kiongo Miti appointed M/s Kebuka Wachira & Co. Advocates and filed an answer to petition for grant and a petition by way of cross application for a grant in his capacity as a nephew of the deceased.

On 12th February 2002 the objector filed a chamber summons under **Rule 73** for the transfer of Karatina SRM Succession cause No.65 of 2001 for consolidation with this cause.

On 8th November 2005 the objector filed an affidavit in protest to summons for confirmation of grant and deponed that he was the petitioner in Karatina SRM Succession Cause No.65 of 2001 and that the deceased was his paternal uncle who died unmarried with no children or Dependants. It was deponed that the petitioner herein was just an impostor.

4. The objector proposed that the deceased's estate known as Muhito/Gaturia/
5. 10 should be shared as follows:-
 - a) *Harrison Kiongo Miti*
 - b) *Mungau Karuma*
 - c) *James Githaiga Gacheru*
 - d) *Mary Wachuka Gathungu in equal shares.*

The petitioner in his application for confirmation of grant dated 17th July 2002 had deponed that

the deceased was survived by the following:-

- a) *Lawrence Waweru Mugo – son*
- b) *Teresa Nyambura Mugo – Daughter*
- c) *Veronica Wathanji Mugo – Daughter*
- d) *Mary Muthoni Mugo – Daughter*
- e) *Wangaru Mugo – son*

He proposed that the deceased estate known as LR MUHITO/GATURIA/10 be shared equally amongst the survivors.

Directions were given that the parties be heard by way of oral evidence.

Protestor's case

The protestor testified on oath that the deceased was his father's brother. He had never married and lived in Nairobi where he had to visit him. He was brought back to Mukurweini during the Mau Mau war and he never married. He was of unsound mind but owned the suit land. He died in 1987 and the protestor's family planned for his funeral. Nobody came to claim that he was a child of the deceased.

He further testified that he was not aware that the deceased had children and that they had been utilizing the said land. In cross examination he stated that he was not aware that the deceased was married to Wairimu alias Kamama neither did he know the petitioner herein. He confirmed that he had filed succession cause No.65 of 2001 at Karatina having been given a letter by the area Chief. He stated that they had built a house for the deceased's mother on the suit property.

PW2 Francis Kimari Karuma testified that Mugo Wangaru was the family member and he did not see a wife or children anytime he visited him. When he died the land was left to Kiongo to inherit but in his lifetime he used to lease it to people. In cross examination he stated that in 1968 the deceased was arrested for trafficking. He stated that the deceased did not have any wife or children and that the name Mugo was a common name.

PW3 Cyrus Wanjohi Ndirangu the area assistant chief from 1987-2000 testified that the deceased was from his sub location and came from the same family with the protestor. He stated that when the deceased died he gave out a burial permit to James Githaiga and Harrison Kiongo Miti and he attended the burial. He confirmed that the deceased did not have any family. He stated that he did not issue the letter of introduction to the petitioner. In cross examination he stated that he had never known the deceased to be with a family neither did he know Wairimu alias Kamama. He stated that the letter dated 28th August 2001 was signed by one Samuel Mathenge chairman of Aithiegeni clan and that the name "Mugo" was a common name.

Petitioner's case

DW1 Lawrence Waweru Mugo testified that the deceased was his father and his mother was called Elizabeth Wairimu Mugo who died in 1993 while the deceased died in 1987. He stated that their house was demolished by the protestor and his brothers in 1997, he produced copies of his identity card and an introduction letter dated 29th August 2001 by Francis Kiama. He stated that he attended the burial of the deceased and saw the Assistant Chief address mourners. At that time he was aged 16 years. At the time of the death they were living with their grandmother.

He further testified that his mother comes from Aithiegeni. Under cross examination he stated

that he did not have any documents in support of his mother's death and that he did not know why his mother was not buried in the deceased's land. He further stated that Samuel Mathenge then clan elder gave out their names to the area chief.

DW2 Symon Mathenge Wagemu testified that he was a retired Education Officer. He came to know the deceased who was married to their daughter called Wairimu Waweru alias Kamama. He stated that the deceased died in 1997 while his wife died in 1993 and that when he went to the chief to get for the petitioner a letter of introduction he was told that the protestor had already been given the letter. He stated that since the petitioner's mother was not mentally unsound she went to her parents and that when she died the deceased requested that she be buried in her father's land but he attended the burial. He stated that the children of the deceased were not recognized by the clan and were chased away.

In cross examination he stated that he came from the same clan with the Wairimu. He stated that one of the brothers of Wairimu was still alive. He stated that he could not tell when the deceased married Wairimu neither could he tell why she was buried in her father's land.

DW3 Josephat Itote Kahilia stated that he knew the deceased. He had married a lady from Kaheti and they had five children. In cross examination he stated that the evidence he has given is what he heard from other people. He stated that the deceased got married in 1996. He further stated that he did not attend the engagement of the deceased.

Submissions

On behalf of the protestor it was submitted that the dispute is who were the nearest relatives of the deceased to inherit his estate. It was the protestor's claim that the deceased being his paternal uncle he is the nearest relative while the petitioner claims that the deceased was their father and that the deceased married their mother in 1990. It was submitted that there was no evidence of the existence of the said marriage.

It was submitted that there was no evidence tendered to show that the deceased at any time recognized the petitioner and his siblings as his children or Dependants. It was therefore submitted that the protestors are the nearest in the degree of consanguinity in terms of **Section 39 1(e) of Law of Succession**. It was further submitted that the applicants did not fit the definition of a child in **Section 3 (2) of Law of Succession** and therefore the protest should be allowed.

On behalf of the petitioner it was submitted that the only issue for determination was whether one Wairimu alias Kamama was a Legal Wife of the deceased for purposes of succession and whether the four children are of the deceased. It was submitted that **Section 3 of Law of Succession** defines a wife to include a wife who is separated from her husband. It was submitted that the petitioner exhibited copies of their identity card bearing the name "Mugo".

From the proceedings and submissions herein, the following issues have been identified for determination:-

- a) *Whether the deceased was married and if so to who.*
- b) *Whether the petitioner is a child of the deceased for purposes of succession.*
- c) *Whether the protestor is the nearest living relative of the deceased and as such entitled to his estate.*

For record purposes I must point out that this matter was heard by my brother Justice Sergon who proceeded on a transfer and by consent of the advocates on record it was placed before me for purposes of writing the judgment. I therefore did not have the benefits of hearing and seeing the witnesses who testified in this matter.

It was the petitioner's case that his mother Wairimu alias Kamama was married to the deceased. However all the petitioner's witnesses testified that they did not witness any marriage ceremony between the deceased and the petitioner's mother. The petitioner did not therefore tender in any evidence to support the marriage between his mother and the deceased. It was the petitioner's evidence that they moved to their grandmother's place in 1997 after the deceased's death and that they were chased away by the protestor.

I have noted the evidence of PW2 who under cross examination stated that some of the identification cards of the petitioner and his siblings were issued after the death of the deceased and that in their clan they did not have the names like Waweru and Waithaga which evidence was not rebutted by the petitioner. Further the petitioner failed to tender evidence as to why his mother who is alleged to have been the wife of the deceased was never buried at the deceased's farm whereas she died in the life time of the deceased. There is also evidence on record that she was of unsound mind and therefore would not have legally contracted any form of marriage.

I therefore find as a fact that the petitioner has failed to prove the existence of any marriage between his mother and the deceased and therefore held that she was not a wife of the deceased for purposes of succession. I further find that the petitioner failed to prove that he was a Dependant of the deceased as at the time of his death and neither did the deceased recognize him and his siblings as his children during his life time.

The protestor on the other hand has tendered evidence which stands unrebutted that he was the nearest relative of the deceased as per the evidence of PW2 and PW3 who confirmed that whereas the deceased used to lease his land to people after his death the protestor took effective control and possession of the same and is in possession as at the time of the judgment.

I would therefore allow the protest herein and order that the suit property be and is hereby distributed to the four protestors equally.

In view of the letter of the chief dated 29th August 2001 and who should have been called by the petitioner as his witness but was not called

Each party shall bear their own costs.

Signed and dated this day of 2014

J. WAKIAGA

JUDGE.

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November 2014

J. NGAAH

JUDGE.

In the presence of:

----- for Protestor

----- for Petitioner