



REPUBLIC OF KENYA

High Court at Nyeri

Succession Cause 91 of 1992

WERU GATERE..... DECEASED

AND

JOHN WACHIRA.....PETITIONER

JUDGMENT

1. On 7th August 2009 the applicants filed an application for confirmation of grant issued herein and proposed that KIRIMUKUYU/NGANDU/108 be shared equally among Thumbi Weru, James Gitari Weru, Stephen Mwangi, Wangechi Weru and Savorida Gakuhi.
2. The protester John Wachira Mwaniki filed a protest on 16th April 2010 in which he deponed that he had always been in occupation of KIRIMUKUYU/NGANDU/108 where he occupy a portion of two acres and has extensively developed the same. He proposed that the estate of the deceased be divided into four houses of the deceased wives.
3. He further deponed that KIRIMUKUYU/NGANDU/207 has never been part of the estate of the deceased but the estate of his father MWANIKI WERU deceased.
4. Directions were given that the protest be heard by way of oral evidence.
5. On 4th November 2011 the protester filed supplementary affidavit wherein he deponed that it was the norm that one could not have been registered as the owner of two parcels of land in the same location and therefore the deceased decided to register parcel number KIRIMUKUYU/GACHUIRO/565 in the names of MWANGI S/O WERU in the year 1953.
6. That the said Mwangi s/o Weru the 3rd applicant was then aged 11 years and was only able to obtain the title thereto in the year 1975 and therefore this was an inter viros gift from the deceased.
7. John Wachira Mwaniki the protester testified that WERU GATERE was his grandfather and had the following wives with children:
 - i. Muthoni Weru - his grandmother
 - ii. Nyamuiru Weru – petitioners mother
 - iii. Kanyari Weru - Mary Wangechi
 - iv. Wakonya Weru - Savarida Gakuyu
8. He further testified that the subject land is 11.8 hactres and that he together with Saverida Gakuhi and Mary Wangechi are in physical occupation of the land while the applicants have leased out

their portions. He stated that he uses about 2 acres. He further stated that he lives in Ngandu/207 which was registered in his father's name whereas Savarida and Mary Wangechi lives in Ngandu/108.

9. He stated that Thumbi Weru lives at Warazo scheme, James Gitahi Weru has a farm in Nakuru and Stephen Mwangi Weru lives in Nairobi but has a farm at Gachuiro/565 given by the deceased while alive.

10. P.W.2 Peterson Muriuki Mwaniki testified that the applicants have not built at the suit premises and that their father bought Ngandu 207. He testified that their grand mother was buried in Ngandu 207.

11. The Petitioner Thumbi Weru testified he would like the subject property to be divided between himself Stephen Mwangi Weru and the two daughters and that the protesters father was given land at Kirimukuyu/Ngandu/438 and as first born was given many farms and that when his mother died she was buried there because the land belonged to his father.

12. He testified that all the rest are buried in Kirimukuyu/Ngandu/207. He further confirmed that Stephen Weru was given farm by their father.

13. Under cross examination he confirmed that the protester utilised the dispute farm and that he stayed at Munyu a settlement scheme while Gitari lives at Kabaraka.

14. Based upon the aforesaid evidence the advocates for the parties herein chose to file written submissions and on behalf of the protester it was submitted that the deceased had four wives and hence four houses. It was submitted that the applicants belong to one of the houses while the protester belongs to one house and the two other houses are represented by SAVARIDA GAKUHI and MARY WANGECHI.

15. It is the protesters submission that the proposed distribution is not equitable. He therefore proposes that the suit land be shared into four amongst the four houses and each to get their respective share from their house.

16. On behalf of the applicant it is submitted that the issue for determination is whether Mwaniki Weru had been given a parcel of land prior to the death of the deceased and the mode of distribution of L.R.Loc. KIRIMUKUYU/NGANDU/108.

17. It was submitted that the protester have confirmed that his father was given Ngandu 207 he is therefore not entitled to Ngandu/108.

18. On the issue of distribution of Ngandu/108 the applicant submitted that the land be shared equally among the family of the deceased in support thereof I was referred to the cases of (1) MARY RONO V JANE RONO & ANOTHER ELDORET CACA NO. 66 OF 2002 to support distribution in houses according to the number of children under the provision of section 40 (2) IN THE MATTER OF THE ESTATE OF BENSON NDIRANGU MATHENGE DECEASED NAKURU HCSC No. 231 OF 1998 wherein the principle of units was also used (3) IN THE MATTER OF THE ESTATE OF MWANGI GITURE DECEASED HCSC NO. 1033 OF 1996 wherein Koome J as she then was held that the court had no discretion in the matter and was bound to use section 40 of the Act which provides that the estate be divided between the houses taking into account the number of children in each house.

19. I must point out that the property in dispute has been identified as Ngandu/108 and the dispute is the mode of distribution thereof.

20. It is also very clear from the evidence tendered before me that almost all the parties before the court were provided for either directly among the life time of the deceased and that the only property in dispute is 108 which to my mind was the family house as confirmed by the fact that almost everybody is buried thereat save for the protesters mother.

21. The issue therefore is the applicable law and to this I note that the deceased died before the the enactment of succession Act and therefore the applicable law is the customary law which in this case is the Kikuyu customary law as per the provision of section 2(2) of Cap 160.

22. As I understood the Kikuyu customary law the deceased estate is distributed amongst the house where he is polygamous notwithstanding the number of children in the said houses. This might not be equitable and might go against the express provisions of section 40 of Cap 60 but having found as fact that the operational law herein is the customary law of the deceased I will therefore agree with the proposed mode of distribution put forward by the protester.

23. I am guided by the fact that there is evidence on record to prove that all the parties herein were provided for by the deceased in his life time as per his customary law. I also note that the authorities provided by the applicants are in respect of the deceased person governed by the provisions of the succession law whereas the deceased as stated herein died before the enactment of the said law.

24. I therefore allow the protest herein and order that the deceased estate identified as KIRIMUKUYU/NGANDU/108 be divided into the deceased four houses and to be inherited respectively by each identified house.

25. Each party shall bear their own cost this being a family dispute.

Dated and delivered at Nyeri this 14th day of February 2013.

J. WAKIAGA
JUDGE

Judgment read in open court in the presence of the advocates for the parties herein.

J. WAKIAGA
JUDGE