



REPUBLIC OF KENYA

High Court at Nyeri

Succession Cause 669 of 2009

GATUCHI MUHU *alias* JACKSON NDUCI.....DECEASED

AND

MWANGI MAINA.....Petitioner

versus

NELIUS NJOKI WACHAI.....Protester

RULING

1. The Petitioner herein MWANGI MAINA filed summons for confirmation of grant on 13th November 2008 and in the said application identified the following as having survived the deceased:

MUHU ISAAC WACAI	- GRANDSON
KAMAU ISAAC WACAI	- GRANDSON
MWANGI ISAAC WACAI	- GRANDSON
NJUGUNA ISAAC WACAI	- GRANDSON
NELIUS NJOKI	- DAUGHTER IN LAW
MWANGI MAINA	- PURCHASER

2. The Petitioner proposed to share the deceased property known as Loc. 19/RWATHIA/1269 as follows:

MWANGI MAINA	-	3.00 Acres
NELIUS NJOKI WACAI	-	0 4.8 Acres.

3. Nelius Njoki Wacai a co- administrator filed an affidavit of protest on 20th November 2009 wherein she stated that the said Petitioner is a stranger to the deceased estate as he is neither a survivor nor a dependent to the estate within the meaning of section 29 of the Succession Act and that the deceased estate comprising of L.R. 19/RWATHIA/7.345 and Loc. 19/RWATHIA/1249 should be divided between the children of he deceased equally.

HISTORY

4. The history of this matter is that the Petitioner filed a petition in Murang'a Succession cause No. 54 of 1993 for the grant of letters of administration in respect of the estate of GATUCHI MUHU *alias* JACKSON NDUCI deceased and named himself as a purchaser.

5. The said petition was protested to by FRANCIS KAMAU WACHAI and JOSEPH MUHU WACHAI but from the record it seems that the same was granted and confirmed.

6. FRANCIS KAMAU WACHAI who was a Protester above seems to have subsequently filed another petition for the grant of letters of administration to the same estate in Kangema R.M.'s court being succession cause No. 20 of 2002 which was also subsequently issued and confirmed.
7. The Objector herein thereafter filed Nairobi High Court Succession Cause No. 1611/03 for the revocation or annulment of the grants herein above which was subsequently allowed by Justice Rawal as she then was and appointed both the Petitioner and the Objector as administrators.
8. It is the Nairobi cause which was transferred to this court for determination.

DETERMINATION

9. It must be pointed out that directions were given herein on 29th November 2010 that the protest be heard by way of viva voce evidence since justice Rawal had identified the issue in dispute as to whether the Petitioner had purchased the estate of the deceased.
10. When the Advocates for the parties appeared before me on 15th March 2012 Mr. Gacheru submitted that the issue in dispute was simple and that the matter be heard by way of affidavit evidence and submissions which was confirmed by Mr. Kiminda for Mr. Kirubi.
11. The submission have been filed before me and I must confess that this is not a matter to be determined by way of affidavit evidence and written submissions but best handled by way of oral evidence.
12. Be that as it may and since the parties have consented to the above approach I have looked at the petition filed by JACKSON KAMAU WACHAI in Kangema R.M. COURT Succession cause No. 20/2002 wherein the subject property is indicated as Loc 19/RWATHIA/1269 and the survivors identified as:

FRANCIS KAMAU WACHAI - GRAND SON

NELIUS NJOKI WACHAI - DAUGHTER IN LAW

MWANGI WACHIRA MUHU - GRAND SON

JOSEPH MUHU WACHAI - GRAND SON

SAMUEL NJUGUNA WACHAI - GRAND SON
13. I have also noted that the chief's letter in support thereof confirms the beneficiaries and state that JOSEPH MUHU WACHAI had put caution as a beneficial interest and note that the interest of the Petitioner is not indicated thereat by the chief's letter dated 28th February 2002.
14. I have also looked at the application filed by the Petitioner in Murang'a P.M's succession cause No. 54/93 and note that there is no chief's letter in support thereof and that the Petitioner when he filed his application for removal of caution filed by JOSEPH MUHU WACHAI on 21st February 1989 did not disclose how his interest rank against the interest of JOSEPH MUHU WACHAI.
15. It is also clear from the record herein that Mr. Kamau Wachai and Mwangi Wachai were /are in actual occupation of the land known as Loc. 19/RWATHIA/1269 when the Petitioner filed an application for their eviction on 19th November 2001.
16. I am therefore unable to be persuaded by the submission by the Petitioner that he was in possession of parcel No. Loc. 19/RWATHIA/1269 for 26 years for if he was then there would have been no need to seek an order for eviction.
17. It is unfortunate that the Petitioner has introduced new evidence in his submission which to my mind

is not procedural and will therefore disregard the same.

18. I agree with the submissions by the Protester that that the Petitioner has been changing his position as regards the estate herein as in his first petition he petitioned for both Loc. 19/RWATHIA/T345 and 1269 whereas in summons for confirmation dated 11th November 2008 he only talks of Loc. 19/RWATHIA/1269.

19. Based upon the evidence placed before me I find that the Petitioner has not established that he purchased the suit land from the deceased and therefore dismiss the Petitioner's mode of distribution.

20. I therefore allow the protest herein and confirm the grant in terms of the Protesters paragraph 6 of the affidavit of protest.

21. Each party shall bear their own cost.

Dated and delivered at Nyeri this 18th day of April 2013.

J. WAKIAGA

JUDGE

Court: The ruling is read in open court in the absence of parties.

J. WAKIAGA

JUDGE