



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**SUCCESSION CAUSE NO.227 OF 2008**  
**IN THE MATTER OF THE ESTATE OF THE LATE VERONICA NDUTA MACHARIA**  
**(DECEASED)**

**JUDGMENT**

The grant in respect of the estate of the late **Veronica Nduta Macharia** was issued to her two sons, Daniel Mwangi Macharia, her eldest child and Joseph Thiong'o Macharia, (Joseph) the last born. Daniel Mwangi Macharia (the protestor) was dissatisfied with the proposed mode of distribution of one of the properties namely NYANDARUA/OL JORO OROK WEST/1835 measuring 2.9 acres. In that proposal, in which the protestor was altogether excluded, the following was the mode proposed:

- i) Joseph – 1 acre
- ii) David Macharia – 1 acre
- iii) Isaac Mwangi Mwebia – 0.25 acres
- iv) Virginia Njeri Muraya – 0.25 acres
- v) Grace Wanjiru Muraya – 0.25 acres

In his protest, Daniel Mwangi Macharia is aggrieved not only by the fact that he has been excluded but also that David Macharia Wacera and Isaac Mwangi Mwebia are not beneficiaries of the estate. That Isaac Mwangi Mwebia is not a relative of the deceased and further that David Macharia Wacera is only a grandson of the deceased, whose mother, Mary Wacera Macharia, has benefited from the estate, NYANDARUA/OL JORO OROK WEST/1838.

Parties agreed that the protest be determined by oral evidence. The protestor testified that he was in agreement with the proposed distribution of the estate except that of NYANDARUA/OL JORO OROK WEST/1835, (the suit property). He maintained that the deceased distributed to all her children her properties in her lifetime, except the suit property. In his view, David Macharia being a grandson whose mother is a beneficiary of the estate does not qualify to inherit the suit property. He also denied that David Macharia had purchased the portion earmarked for him from the deceased. Similarly he denied the existence of any sale transaction between the deceased and Isaac Mwangi Mwebia, who is not a relative.

In his evidence, Joseph Thiong'o confirmed that David Macharia is their nephew, the son to their sister, Wacera. But according to him, the deceased called a meeting which was attended by her children, including the protestor, at which meeting, the deceased informed them that she had sold the suit property

to David Macharia; that none of those present protested to that decision. Rachael (Rakeli) Wambui who had been allocated  $\frac{1}{4}$  acre of the suit property introduced Isaac Mwangi Mwebia who had purchased it from her. But before the Land Control Board's consent was obtained, the deceased died. He also explained that he had left out the protestor because the deceased had given him land in a place called Ngorika, which the deceased had purchased but was registered in the name of the protestor.

He further confirmed that although the deceased had given him NYANDARUA/ OL JORO OROK WEST/1827, he was also entitled to one acre of the suit property. That the proposed mode of distribution was based on the wishes of the deceased. Gideon Githua Njoroge, the deceased's son-in-law (husband to one of her daughters, Virginia Njeri Gideon) testified for Joseph Thiong'o saying that the deceased confided in him many things, including on 22<sup>nd</sup> August, 2007 when she informed him that she intended to sub-divide the suit property and to distribute it. She explained that she would not distribute any portion to the protestor on account of the parcel, measuring 2 acres in Ngorika which she had given him. Subsequently, the deceased took the beneficiaries of the suit property to the Land control Board but before the matter was concluded she died. The witness maintained that when the deceased called him on 22<sup>nd</sup> August, 2007, the protestor was present.

I have considered the evidence presented by both parties. The dispute, as I have explained, relates to the distribution of only one property. The issues involved are:

- i) whether Joseph Thiong'o was justified to exclude the protestor;
- ii) whether Isaac and David are entitled to the suit property;
- iii) how should the suit property be distributed?

Two reasons have been advanced why the protestor was excluded from inheriting the suit property.

The first reason was because he had been allocated a parcel of land at Ngorika and secondly that the deceased had expressed her wishes on the distribution of the suit property. Joseph Thiong'o did not prove that the land in Ngorika was given to the protestor by the deceased. He did not give the particulars of the land, for instance its reference number or the acreage. He did not state when the alleged transfer was effected. For his part, the protestor has shown through receipts issued in his name by Wiumiririe Farmers Co-operative Society that he purchased the land.

Regarding the wishes of the deceased, what Joseph Thiong'o and his witness, Gideon Githua Njoroge told the court cannot amount to an oral will in terms of **Section 9** of the **Laws of Succession Act**. It is alleged by the latter that the deceased called a meeting at which she expressed her wishes regarding the suit property on 22<sup>nd</sup> August, 2007.

An oral will is only valid if the testator dies within a period of three months from the date of making the will. The deceased died on 1<sup>st</sup> January, 2008, some nine (9) months after the alleged will.

Secondly, it is necessary for an oral will to be valid that there be no conflict in the evidence of the witnesses as to what the testator said. Thirdly, the witnesses to an oral will must be competent and independent. Unlike Gideon Githua, Joseph Thiong'o did not give the date when the alleged oral will was made. Joseph Thiong'o being a beneficiary of the suit property was not an independent witness to the alleged will.

Turning to the question whether David and Isaac are entitled to the suit property, it is in evidence that Isaac's claim to the suit property is premised on an alleged sale agreement between him and Wacera. It must be noted that Wacera had no capacity to sell her portion following the death of the deceased who was the registered proprietor. It is only upon the portion allocated to her devolving to her that she can dispose of it. Secondly, there is no written evidence, attested by witnesses to signify a sale of land as required by **Section 3** of the **Law of Contract Act**. Thirdly neither Rakeli nor Isaac were called to

confirm the existence of the alleged transaction.

Regarding David, it is common ground that he is a grandson of the deceased, whose mother, Wacera is a beneficiary of NYANDARUA/OL JORO OROK WEST/1838. His claim, according to Joseph Thiong'o, is that he purchased a portion of the suit property from the deceased. Once more David did not testify, there was no documentary evidence of the sale and finally it has not been shown that he was a dependant of the deceased as defined in **Section 29** of the **Law of Succession Act**.

On distribution, the protestor has made the following proposal to all the children of the deceased:

- i) Daniel Mwangi (Protestor) - 0.716 acres
- ii) Grace Wanjiru (Married) – 0.25acres
- iii) Rakeli Wangui (Married) – 0.25acres
- iv) Virginia Njeri (married) – 0.25 acres
- v) Mary Wacera (unmarried) – 0.25acres
- vi) Joseph Thiong'o – 0.716 acres

It is clear from the proposal that the sons and an unmarried daughter are getting more than married daughters.

Taking into account any prior benefits or gifts, the net estate of the deceased is to devolve upon her surviving children equally. **Section 38** of the **Laws of Succession Act** does not draw a distinction between married and unmarried, son and daughter. The court, however, retains a discretion in the distribution of the intestate estate in order to achieve equity.

For the reasons that the married and unmarried daughters have not protested the modes suggested by both sides, it will be equitable to adopt the protestor's proposal. It is ordered that L.R. NO. NYANDARUA/ OL JORO OROK WEST/1835 be sub-divided and distributed as follows:

- i) Daniel Mwangi – 0.716 acres
- ii) Grace Wanjiru – 0.25 acres
- iii) Rakeli Wangui – 0.25 acres
- iv) Virginia Njeri – 0.25 acres
- v) Mary Wacera – 0.716 acres
- vi) Joseph Thiong'o – 0.716 acres

I make no orders as to costs.

**Dated, Signed and Delivered at Nakuru this 14<sup>th</sup> day of February, 2012.**

**W. OUKO**  
**JUDGE**