IN THE MATTER OF THE ESTATE OF THE LATE PHARIS MWANGI NGIGE [DECEASED]

JUDGMENT

This matter involves the Estate of the late **PHARIS MWANGI NGIGE** who died on 30th April 1988. He was survived by his two widows **PHILLIS KABURA MWANGI** and **TABITHA WANGARI MWANGI** who petitioned for grant of letters in 1999. They listed the following persons as his survivors:

1. Phillis Kabura Mwangi

2. Tabitha Wangari Mwangi

3. Gibson Gacheru Mwangi

4. Wilson Macharia Mwangi

5. Sam Karuga Mwangi

6. Irene Njeri Mwangi

7. Gatura Wamwangi

8. Samuel Gacheru Mwangi

9. Joseph Kanyanywa Mwangi

10. Eunice Njeri Mwangi

11. Mary Wambui Mwangi

12. Stephen Maina Mwangi

13. David Wachuma Mwangi

14. Timothy Kirika Mwangi

These being No.2-14, sons and daughters of the deceased as were also listed by the area chief in his letter dated 15/1298. The petition was gazetted on 01/04/09 and grant intestate issued to the petitioners and the same was confirmed on 22/03/2000 – making the petitioners administrators of deceased's estate which comprised of Title **No.Nyandarua/Kahura/104** purportedly shared out by both houses equally and registration made into **Nyandarua/Kahuri/3345, 3346, 3347** and **3348** in respect of the 1st and 2nd house respectively.

Title No.3343 for the 1st house was later subdivided into No.3345, 3346, 3347 and 3348 in the names of the 1st widow PHILIS KABURA and her three sons. It is the sub-division of this portion within the first house that has a problem among themselves.

The objector GIBSON GACHERU MWANGI now seeks for revocation and annulment of the grant on grounds that he was excluded from the entire process yet he is the 1st born in the 1st house and being an heir, is rightfully entitled to a share of the deceased's estate. He laments that, the beneficiaries were not present during confirmation – so he challenges the proceedings giving rise to issuance of grant as to claim a share of his father's estate in his capacity as an heir.

It is his case that the resultant five titles emanating from distribution of the estate pursuant to issuance of the grant were illegally and fraudulently obtained and should be cancelled.

In response, TABITHA WANGARI MWANGI, a joint administrator with PHILLIS KABURA MWANGO who passed away on 14/9/2009 states in her replying affidavit that, upon the death of PHARIS MWANGI NGIGE (the deceased) she and her co-administrator obtained the relevant Probate and Administration forms from Nyahururu court, duly filled and returned them to court. At no stage during the proceedings in Nyahururu court, did the applicant raise the issue about missing or omitted forms. The applicant was always present with them throughout the Succession Cause and did not raise any objections. The confirmation of grant was made in the applicant's presence and according to the agreement the family reached and to which the applicant was a signatory – the same is annexed and marked TWM II.

The family sat again, when the applicant's mother passed away, and agreed on 20th September 2009, that the land **3345** which belonged to **PHYLLIS KABURA MWANGI**, would be given to **GIBSON GACHERU** (the applicant) – a translated copy of that agreement is annexed as TWM III.

Even at the time of his mother's death, the applicant had no issue with distribution as it had been carried out by the court.

The issue regarding sharing out of the land had also come into play through a case **No.246/62/91** and an agreement was written by the deceased PHARIS MWANGI NGIGE, which was followed during the Succession Cause.

The applicant was present during the confirmation of grant and never objected to the proposed mode of distribution. The applicant's claim that his mother was not present is termed as untrue, and that applicant is just bitter because he wanted his share of eight acres to be registered in his second wife's son's name so as to disinherit the children of his first wife who is estranged.

The family upon learning that the applicant/objector did not wish for his share to be registered in his name, suggested that the same be registered in his mother's name and it was as a consequence of these on goings that, upon the death of his mother, the applicant's brothers wrote the agreement stating that parcel No.3345 belonged to the applicant. It is pointed out that, applicant has waited for six years from the date of confirmation (in which he had participated) to challenge the same.

The petitioner administrator urges this court to take note that applicant has waited for the death of his mother before challenging the grant which all the other parties had agreed upon. It is contended that the application for cancellation of grant and the resultant Titles is misguided and made in bad faith, there is no reason why the grant should be annulled.

The matter proceeded with hearing *of viva voce* evidence. The objector told this court that the deceased PHARES MWANGI NGIGE was his father, who had two wives PHYLLIS KABURA and TABITHA WANGARI. He is the eldest son of PHYLLIS who had four sons and one daughter named IRENE NJERI MWANGI. The petitioner (TABITHA) whom he refers to as his step-mother, had children too. The objector's complaint is that his three brothers sub-divided the land, registered three portions in their names, and one portion in his mother's names, leaving out his sister and himself. Even before the expiry of six months, the family secretly went to Nyahururu and obtained grant of letters of administration and arranged the distribution of his late father's property. Meanwhile, the objector had been living with his mother, and the family kept the on goings from her. The objector only got to learn about their **"scheme"** when he saw his siblings sub-dividing the land. It is his evidence that, his father had kept a letter saying

that upon his demise, the land was to be divided into two portions of 32 acres each – one portion for the first wife, and another portion for the second wife.

It is the objector's evidence that, when he was called to Nyahururu court, he realised that his mother was absent, and upon query by the court, the information given was that she was unwell. The court then ordered that the land be divided according to his father's wishes and each wife would give her children equal shares. A police officer later informed him that the land was not divided as had been recommended as he had been left out. He denies ever signing any document.

Objector explains that the original land was **Nyandarua/Kahuru 104** but after the confirmation of grant, the number changed so that the 1st wife got **plot 3343** and the 2nd wife got **plot 3344**, then he says:-

"My mother's share was 3344. The plot number was changed and only my step mother's green card was held at the land's office and not my mother's. I was told that my step mother had taken over distribution and shared out the land to the children and that she had delegated the task of distribution to the children, i.e., my mother's sons and my step brothers."

Objector further states that the land was sub-divided into four portions, so he rushed to Nyahururu to lodge a caution, only to realise that the plot numbers had been altered using a pen, at the Land Registrar's office. He felt that there was some mischief, so he filed this objection contesting the distribution because it had left out his sister and himself. He received a letter from a Nairobi advocate, directing him to vacate the portion he had lived on since 1974 without being given an alternative plot, yet he was the deceased's first born child. It is his contention that his late father had given him the portion which he was living on, in 1974 and he has lived there ever since, and even developed it. He showed the court a photograph of the said portion, adding that he has developed 4 acres, then left the other portion so as not to cause inconvenience at the time of distribution. According to him, his father left a will indicating that his sister should get a share of one acre of land, as she was married. According to the objector, the land was forcefully divided into 4 yet he is entitled to 8 acres.

His other concern is that after survey, some numbers were given which are not reflected in the Green Card produced as Exhibit 3 because the sub-division of his mother's portion into 4, ought to have had No.3345 in his mother's name, yet this is nowhere.

His evidence is that the 32 acres were divided into 8 acre portion and shared out to:

1. SAMMY MACHARIA

2. WILSON MACHARIA

3. GATHURA MWANGI

4. PHYLLIS KABAURA (his mother)

He denies knowledge of an agreement to the effect that he was to take over the 8 acres apportioned to his mother, and in any event he rejects such an offer because, what then happens to his sister's share. Curiously, the objector then states:

"My brothers decided to evict me from the portion I lived on – what I do not know is whether my mother was involved in that, because my siblings took her away from me and the next I learnt was she had died . . . . ."

The objector prays that the four titles be cancelled and he be allowed to remain with the portion he occupies and his sister ought to be given her share of 1 acre saying if that doesn't happen, then there will be chaos as he will be evicted and will not have anywhere to go.

On cross-examination the objector declared that his mother was not involved in the Grant of letters, and

he knows that because he was in court. He disputes the application for Grant and proposed distribution which bears his mother's signature, saying he doesn't know whether she is the one who signed it. He further states:-

"I obtained the copy of this confirmation when the same was confirmed in Nyahururu and my mother was absent but I was present. I did not object to that mode of distribution. . . ."

He further stated on cross-examination he is not aware that it is his mother who divided the land into four portions and signed the mutation forms (D.Exhibit 1).

He however concedes that when the land was subdivided, his mother was still alive, although he was not aware of the sub-division. He confirms that he had a wife by name Annah Wangari with whom he had two sons, but he divorced her.

His current wife has 8 children. Both wives had sons named after their grandfather PHARES MWANGI. Objector denies the claims that he is the one who insisted on his share, i.e., 3345 being registered in his wife's name instead of his, so as to ensure that he would disinherit the 1st wife's children or that he wanted the 2nd wife's son PHARIS, to get that share.

Objector however admits that following his mother's death, the children of the 1st house had a meeting in which it was agreed that he would be given his mother's share of land and his brothers would not stake a claim on the portion registered in her names, and they all signed the agreement (D.Exhibit 3). The objector confirmed in court that:-

"Yes the D. Exhibit 3 states that plot No.3345 in the names of PHYLLIS KABURA MWANGI, is the inheritance of GIBSON GACHERU MWANGI, and no one else would claim it. That is what we agreed on and we all signed plus MARY NJERI."

Despite this, the objector says:

"I do not wish plot No.3345 to be registered in my name because the effect will be to remove me from the portion I have always lived on and developed. I do not object to getting 8 acres, but let it be on the portion that I have done development, then I can have the 4 acres plus three and they take the lower portion."

The objector also confirmed that his sister IRENE has not filed an affidavit saying she also claims a portion of the land, but says he is making the claim on her behalf because the whole land for the 1st house has been under his custody and use. He is unwilling to let his other brothers onto the portions, until he gets what he believes is his rightful portion, i.e., the one he has always occupied and developed. He admits that he did not contribute towards payment of survey fees because as far as he is concerned he had no share on the land. He denies being the trouble maker in his mother's house saying the portion he occupies was given to him by their late father, and he is not willing to transfer the Title which had been registered in his mother's name to any of his brothers.

On re-examination the objector states:

"Yes No.3345 is registered in my mother's name and that is where I live . . . . What they propose will divide my portion into two – let them retain the boundaries our father had placed. I have developed 3345 and 3346 and those are the portions I want."

It is to be noted that Title No.3346 is in the name of SAMMY KARUGA.

The objector also confirmed to this court on cross-examination by the court, that he does not have a problem with the contents of D. Exhibit 3, except that it was not drawn by an advocate. He confirmed signing the said agreement, fully aware of the contents.

The petitioner in her evidence told this court that after the death of their husband, she petitioned for grant of letters of administration, jointly with her co-wife, they each listed their respective children and the same was gazetted. The objector participated in the process and indeed each house ended up with 32 acres out of the 64 acres owned by the estate of the deceased. The two wives involved a surveyor to carry out the sub-division of the land and both she and her late co-wife signed the mutation forms dated 18/06/2002. The petitioner then obtained Title for plot No.3344. She is adamant that the objector was involved in the entire process and there was no illegality to obtaining the letters of administration. What she knows is that the 1st house sub-divided their land just as she too did but she cannot tell how they did the distribution. What she recalls is that even when the survey went to sub-divide the land, police had to be present because the objector was causing some commotion.

She also re-confirmed that during the survey, the objector was present, but his mother was absent as she was sick and in Nairobi.

SAM KARUGA (petitioner's 2nd witness) recognises the objector as his elder brother from their biological mother PHYLLIS KABURA. He too confirms that when the Succession Cause was filed in Nyahururu, they had no problem about who was to apply for Grant, and the objector was always with them. The family had agreed on the mode of distribution of property and since his mother's house got its share, they requested the District Surveyor to sub-divide the portion into four. He confirms that each one of his mother's sons was given 8 acres except for the objector. This is because according to SAMMY:

". . . . My mother in her wisdom, because Gibson had separated from his wife Hannah Gacheru Mwangi who had four sons, and who my father loved very much, had said, she must be given a portion . . . . My mother said 4335 belonged to Gibson Gacheru Mwangi, but it would come out in her name so that Hannah's children are not disinherited. Gibson had wanted the land registered in the name of the 2nd wife's son PHARES MWANGI GACHERU (named after our father) but as a family, including my mother, we objected because it was bound to cause friction in future and that is where the whole saga begun. The Title Deed therefore came out in mymother's name, it measures 8 acres and tallies with what each son got."

The witness explained that after their mother's death, they met to discuss about the tragedy, but the objector changed the agenda insisting that they discuss about land. The objector informed the rest of the family that their mother would not be buried unless he first got his portion. There was a heated disagreement and they finally drew an agreement dated 20/09/09 confirming that the three brothers had no interest in his portion and they (including the objector) all signed the agreement. The objector then said that one cannot trust a piece of paper and demanded that the agreement be stamped by an advocate/lawyer. The rest of the family had no problem with that, and they agreed to meet at an advocate's office in Kikuyu before going to collect their mother's body at the mortuary.

The objector now made fresh demands, that the burial permit must be in his name, and his advocate produced some succession papers requiring the other brothers to sign – they refused and realised that some mischief was a foot. There was such acrimony at their mother's burial to the extent that the objector had his own pastor and his brothers had another pastor. After the burial, all the other brothers left because they did not want a fracas. None of the sons from the first house has been able to use their portion because the objector has vowed to see to it that no one uses the land saying **"Ni panga tu."**

In 2010, Sammy and his wife approached the objector, saying they wished to cultivate their portion, because all along the objector was cultivating the whole land and renting out some portion. The objector said no one would enter the land until he gets what he wants. Although the other brothers did not attend court, Sammy says they sent him to represent their interests, they could not attend court due to an assortment of official commitments. Their sister Irene is NOT interested in the land and swore an affidavit giving up her share. He clarified that none of them has an interest in parcel No.4335 nor are they evicting the objector from his residence where he has always lived.

He explains that the land was divided in that manner because the middle portion is a marshy area, so people normally construct their houses at the respective ends of the land, not in the middle. Even his step

brothers like Samwel Gacheru has constructed at the southern tip and Gibson (Objector) has constructed on parcel 4335. He never constructed on 4336 and Sammy explains that the house which stands on 4336 was constructed by the family. After demarcation of the land, the objector constructed rental houses thus denying his siblings access to the land.

Objector has then planted trees on all the 4 parcels and is the one utilising the land. Sammy explains that he has suffered emotional and financial stress and urges this court to dismiss the objection.

On cross-examination this witness denied suggestions that the objector's house stands in parcel No.4335 and 5336.

On cross-examination by the court, this witness explained that when the 1st house met to decide on how to divide the portion distributed to them, the objector announced that he would not participate in balloting for the subdivision because he might be thrown out from the portion where his house stood – this was because the family had suggested balloting. The objector said the community would find it awkward if he was removed from his portion where he had lived. So the siblings decided not to touch him. The other two brothers opted to be on the southern part of the land and Sammy agreed to be on the northern portion, neighbouring the objector.

According to Sammy, there was a time the objector took the 2nd family to court over land issues. He says the objector's interest is to have a bigger portion of land.

Counsel for the respective parties filed written submissions.

The Objector's counsel submits that the objector was never involved in distribution of the land and his mother and three brothers conspired to sub-divide the land amongst themselves at the expense of the objector.

He argues that the distribution of the first house's share was never done consensually particularly with regard to the objector and that is why PW2 let it slip that in the wisdom of their mother the objector was not registered as the proprietor of the Title.

It is Mr. Njoroge's contention that, the only reason why PW2 came to testify against the objector, is because the objector has partly settled on parcel No.3346 registered in favour of PW2 and which PW2 was vehemently opposed to ceding the portion already developed to the objector.

Counsel also asks court to consider that at all the family meetings referred to, the Objector consistently expressed dissatisfaction at the distribution among dependants of the 1st house.

The petitioner's counsel Miss Njoroge submits that the objector's problem does not seem to be with regard to the distribution of the estate between the houses, rather it is the distribution of the 1st house's share among the siblings. She points out that when the distribution was done and objector's share registered in his mother's name, so as to protect the interest of his children by the estranged wife, for as long as his mother was alive, the objector had no objection.

It is to be noted that Grant was confirmed in 1999 and Miss Njoroge draws this court's attention to the fact that for 10 years, the objector raised no opposition, until his mother died, then the lion in him begun to roar. She also urges the court to consider the reason why the surveyor carried out the demarcation in the manner he did, taking into account the marshy area and the objector's rejection of plot 3345 is termed a mere afterthought. Miss Njoroge further urges court to find it reasonable that the only reason why the parcel 3345 was registered in the name of the objector's mother was so that she could hold it in trust for the objector's other children.

She requests this court to disregard the objector's claims that he is pursuing this cause on behalf of their sister Njeri, saying she is not an objector and objector has only added her name to the proceedings as a

way of curry – flavouring his otherwise weak case.

She points out that the objector's mother signed the consent for mode of distribution, all the mutation forms and documents necessary for the conveyancing to be actualised and the objector's claims that the mother never took part in the confirmation has no basis.

It is submitted that the objector should bear the burden of transferring LR 3345 from his mother's name to his own name by way of transmission, and he should also bear the costs of this case since he is solely the cause of the status he finds himself in. It is argued that, even if the objector had lived on LR No.3346, he cannot claim he won't move since the distribution has now been done and it should be effected. He should be ordered to cease using parcels No.3346, 3347 and 3348 as these belong to his brothers and he has no right to continue using the 32 acres inherited by the 1st house alone.

Although the objector pleaded concealment, misrepresentation and fraud in obtaining of the letters of administration and then confirmation, he did inform the court that he attended court in Nyahururu when the two administrators petitioned for the letters, and he was even aware of the distribution apportioning 32 acres to each house.

Indeed in the affidavit in support of the petition for letters of administration intestate, the petitioners listed the objector as one of the persons surviving the deceased PHARES MWANGI. A notice of that petition was gazetted as per the Kenya Gazette Notice No.1826 of 1st April 1999. This grant was confirmed after the lapse of six months, on 22nd March 2000. The confirmed grant distributed **plot No.Nyandarua/Kaharu Scheme** to be sub-divided equally between the two houses. Up to that point it is not clear to me what constituted an act of concealment, fraud, misrepresentation or any defect in the substance of the petition and the affidavit in support thereof. The deceased's dependants were all listed, and the property of interest was also listed and proposed mode of distribution between the two houses was equitable.

All these claims of falsehoods, concealments etc. relate to the subsequent distribution among the children of the first house regarding the 32 acres. Although the objector claims he is pursuing this cause in his interest and that of his sister Irene, I note that Irene has neither sued as an objector, nor sworn an affidavit authorising the objector to pursue the claim on her behalf. In fact she has sworn an affidavit indicating she does not wish to get involved in this matter. So the 32 acres is available for the 1st house, minus IRENE who is not keen on getting anything.

Of course when the 1st house shared out the 8 acres, only three sons had their names registered in the 24 acres – each having 8 acres of 3346, 3347 and 3348.

On the face of the record, the objector was left out – instead, his mother was the one registered on the 4th eight acre portion being No.3345. The objector says he is not demanding more than 8 acres, BUT it must be in the portion which he has always occupied and on which his house stands, and to include the portion where he has carried out certain developments. His objection to taking any other portion other than what he demands is two fold:

1. That is where he has always lived since the year 1974, the same having been given to him by his father.

2. According to Sammy, the objector is concerned about his esteem in the eyes of the community, whatever will his fellow villagers think if he is removed from his home to a new location.

This second phase of the distribution of the deceased's estate was not done on orders of the court, indeed even the objector admits that the children of the first house convened a meeting and agreed on this re-distribution and he even signed D.Exhibit 3 whose contents he doesn't seem to have a problem with. This redistribution which had apparently shared against the objector is explained as having been done so as to protect the interests of the children of the 1st wife – never mind that the objector had another set of family

capped with 8 children. Had matters rested there, then I would have no hesitation in agreeing with the objector that the whole process shut him out as a beneficiary of the deceased's estate. However this scenario was reversed with the death of his mother when the sons of the 1st house again convened a meeting following protestation from the objector about his share of the estate. That is when it was agreed that the 8 acre portion which had been registered in his mother's name should go to him. One would think that resolved matters – but not for the objector who had his terms cut out. So it is in this redistribution that the court has to determine whether there was concealment, fraud, misrepresentation. Of course the question arises, why did it take the objector ten years to raise his objection, when all along he confirms being aware of the redistribution of the 32 acres. This redistribution was by the administrator of the estate. Why didn't he dare raise his voice during his mother's time. Both his step mother and his blood brother paint a picture of **"bad boy image"** of the objector, always opposing other family members on land issues and bulldozing his way. Why for instance does he block out the other two brothers whose portions have no link with the portion he claims? Why does he even in his evidence say that if Title are not cancelled there would be chaos ? Where exactly does his house stand, does it straddle 3346 and 3345 ? If he is allowed to get the portion he seeks, then what happens to Sam Karuga, what portion does he get? The court has been given a reasonable explanation as to why sub-division was done in the manner allowed, i.e., there is a marshy portion which cannot be used for construction – the objector doesn't deny that state of the land. The evidence of the objector with regard to the location of his house is this – that his brothers have decided to evict him from the land where he lives. Sammy on the other hand says, nothing can be further from the truth, when the objector voiced his concerns, the whole family decided they would not touch his house, which stands on 3345.

The objector indeed confirms that before his mother could be buried he set a condition that he had to be given the Title document which was in their mother's name and that none of his siblings would stake a claim on that portion – that is what gave birth to the contents of D.Exhibit 3 which he acknowledges and which he says:

"That is what we agreed on and we all signed plus May Njeri."

Incidentally, Mary Njeri is their cousin, a daughter to their father's younger brother. He then changed his mind, because he realised that the effect of D.Exhibit 3 would be to remove him from the portion he has lived on and developed. It would appear to me, this is the sole reason why the objector now complain about the issuance of grant, saying he had been left out as an administrator – because if he became an administrator he would dictate exactly how the property given to his mother's house should be shared, to the last detail – in his favour – this can be gleaned from his answer in cross-examination when he says:

"The whole land for the first house has been under my custody and use – I am only using the portion I have developed – the other portion is free. I have never chased away any of my siblings from the land. I am not willing to let my brothers onto their portion until I get my rightful portion. . . ."

Then comes the biggest paradox, he insists on remaining on the portion he is occupying and also says:

" I am not willing to transfer the Title registered in my mother's name to my brother."

So the objector wants to have both his cake and eat it and keep the extra piece, if his objection does not fit into the description of being made with malicious intentions, then the least I can say is that it is out rightly selfish.

It became very difficult to even accommodate the objector's concerns because on re-examination he actually confirms this:

"Yes No.3345 is registered in my mother's name and that is where I live. . . . What they propose will divide my portion into two, let them retain the boundaries our father had placed. I have developed 3345 and 3346."

Surely if each portion measures 8 acres and the objector wants both, then he is claiming 16 acres – I think what is equitable and just is that he relinquishes 3346 and retains 3345 where he lives. He also has no justification using the other portions whose Titles are in the names of his other brothers. I think I have a duty to caution the objector that the chaos he promises because he has not had his way, may result in him facing legal action spanning from contempt of court, to other criminally related charges arising from such chaotic conduct.

The objector is indeed the author of the situation he finds himself in, the best option is to take steps towards transferring the plot No.3345 to his own name by way of transmission. He shall bear the costs of this suit.

Delivered and dated this 18th day of May, 2012 at Nakuru.

H.A. OMONDI
JUDGE

Mr. Karu holding brief Miss Njoroge for petitioner

N/A for Objector at 10.00 a.m.