



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Succession Cause 55 of 2008

IN THE MATTER OF THE ESTATE OF THE LATE JULIANA NJERI MACHARIA AND

**IN THE MATTER OF NYAHURURU SENIOR RESIDENT MAGISTRATE'S COURT
SUCCESSION CAUSE NO.83 OF 1991**

LUCY MUMBI KAMAU.....APPLICANT/PROTESTOR

VERSUS

PETER MACHARIA NYOTA.....RESPONDENT/PETITIONER

JUDGMENT

The facts in this dispute are fairly straight forward and largely uncontroverted. Those facts may briefly be stated as follows:

Juliana Njeri Macharia, the deceased in this cause, and her husband, who predeceased her, were not blessed with children. In accordance with customs and traditions of the Agikuyu, she adopted the children of her brother in-law, Joseph Rureri with his first wife, Zipporah. There is no dispute that she adopted the administrators herein, Mary Muthoni Nyota (Mary) and Peter Macharia Nyota (Peter) in their early years.

The deceased and the two administrators lived on the former's only parcel of land No. NYANDARUA/SABUGO/566 measuring approximately 7.3 Hectares (about 18 acres). Peter and Mary had three other siblings, Francis Maina (Muthee) Rureri, Mercy Wangu and Jane Gathoni.

It was Peter's evidence that apart from himself and Mary, their other siblings remained with their parents in a place called Ng'arua where they were all born.

On 22nd December, 1990 the deceased died whereupon Peter and Mary petitioned for and obtained a grant of representation for her estate in Nyahururu Principal Magistrate Succession Cause No.83/1991, Peter and Mary were to share the suit property equally. Their elder brother, Francis Maina (Muthee) Rureri, who appeared to have also moved to live with the deceased also passed away on 17th September, 1996. His widow, Lucy Mumbi Kamau (the protestor) filed two summons for revocation of grant on 26th October, 2007 and subsequently on 9th June, 2008 in which she contends that the grant issued to the

administrators was obtained fraudulently by concealment of the fact that some dependants were not disclosed; that the administrators filed the cause secretly; that the proceedings to obtain the grant were defective; that the administrators failed to obtain consent from the protestor's husband and their two other siblings.

In both her pleadings and testimony before me, the protestor maintained that her husband along with Peter and Mary were adopted by the deceased and ought to have had equal share of the suit land as the administrators. Indeed, according to the protestor, all the administrators' three siblings (or their representative) ought to get a share of that property.

During the pendency of this dispute, Mary died. Peter in his evidence categorically maintained that the deceased only adopted him and Mary while the other siblings remained in Ng'arua with their parents. The deceased raised him and Mary living on the suit land, with their biological parents and siblings only visiting occasionally. On one such visits, the protestor's husband was gifted part of the suit property measuring 1.85 acres by the deceased. The area was clearly demarcated. The protestor's husband sunk a borehole, a toilet and built his house there. The deceased also donated ½ acre to a local Catholic church while the administrators shared the remainder equally.

Mary's daughter, Alice Nduta Muthui, 32 years old, confirmed that she has lived on the suit property all her life and could attest to the fact that the protestor and her family have always occupied 1.85 acres given to her husband by the deceased. On behalf of her mother, Mary, she cultivates approximately 7 acres of the suit property of the portion set aside for her mother. She also confirmed that at some point, Zipporah moved from Ng'arua to live with Mary on the suit land until she (Zipporah) died and was buried on the suit land. Even as she grew up, Alice recalled only seeing the protestor's husband visiting from Ng'arua.

Another sister of the administrators, Jane Gathoni Rureri similarly dismissed the protestor's claim that her husband was also adopted by the deceased. In her evidence she maintained that the protestor's husband lived in Ng'arua with their parent and further that the deceased only adopted Peter and Mary, who at no time ever returned to Ng'arua.

The only broad issue falling for determination in this dispute is whether the protestor's husband, Francis Maina Muthee Rureri, was also adopted by the deceased and hence is entitled, like the administrators to inherit the suit property on equal share basis.

The protestor's evidence that the deceased adopt her husband along with his four siblings including the administrators has no support in the evidence of all those siblings, who have stressed that they are not interested in the suit property as they were not adopted by the deceased. The protestor gave evidence that she met her husband in 1984 in Nyahururu where he worked and that they lived there after they got married. But she also said that she did not know the deceased (Juliana) well. At the same time, she could not recall when she met her first.

When she went to the suit land for the first time, her husband showed her his two-roomed mud house. It had no roof but eventually it was completed. That is where the protestor lives todate. From the forgoing, it is clear that the protestor cannot tell how her husband first got to occupy the portion of the suit land where he put up his houses or even the period when he occupied the land.

The deceased died on 22nd December, 1990, some seven years before the death of the protestor's husband (in 1997). As the succession cause in respect of the estate of the deceased was being filed in Nyahururu court in July, 1991, the protestor's husband was alive yet he did not protest, perhaps because he understood the history of the suit property better than the protestor. Indeed if he was also adopted by the deceased, being the first born, he would have insisted in filing the petition for the grant instead of the administrators, who were younger.

I am persuaded by the evidence on record that the decease adopted the administrators only and that the protestor's husband only visited the deceased. The protestor was the second wife to Francis Maina

Muthee and came too late in the family. Her claim is not supported by any evidence.

I find also that the deceased, in her generosity in her lifetime gifted the protestor's husband with a clearly demarcated portion where he and his 20 year old son were buried. The protestor and her late husband have confined their activities within this portion, where the protestor's husband had sunk a well and planted a hedge. The protestor was duty bound to prove the grounds she relies on in her affidavit of protest. For instance, she was to demonstrate fraud on the part of the administrators.

Although the administrators acknowledge her entitlement to 1.85 acres gifted to her late husband by the deceased, that entitlement was not included in the grant, the effect of which would have been to exclude the protestor and her family from the suit land entirely. The allegation that the administrators did not disclose other beneficiaries of the deceased has merit as there were three beneficiaries, themselves and the protestor's husband, yet they did not disclose the latter. I stress that the protestor's husband's beneficial interest arose from the 1.85 acres gifted *inter vivos* to him by the deceased

The protestor's prayer for the rendering of accounts is not proved as the protestor has not shown that other than the suit land, the deceased had other assets.

To the extent explained, the protest succeeds with the result that the Certificate of Confirmation of Grant issued on 10th June, 1992 is revoked.

A fresh grant shall be issued giving the protestor 1.85 acres of the suit property and the balance shared equally between Peter Macharia Nyota and the children of Mary Muthoni Nyota.

I make no orders as to costs.

Dated, Signed and Delivered at Nakuru this 18th day of June, 2012.

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W. OUKO

JUDGE