



IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CASE NO. 468 OF 2005

IN THE MATTER OF THE ESTATE OF NGANGA NJUGUNA (DECEASED)

JAMES NJUGUNA NGANGAPETITIONER

VERSUS

JOSEPH NGANGA NGIGEOBJECTOR

JUDGMENT

Nganga Njuguna died intestate on 16/7/1978. He was survived by two widows namely, Mary Woki, 1st widow and Freshia Wambui Nganga, 2nd widow. The children of the 1st house are:-

- 1. Damaris Wanjiru Chege**
- 2. James Njuguna Nganga.**

The 2nd widow had seven children namely:-

- 1. James Ngige Nganga – deceased**
- 2. Damaris Wanjiru Nganga – married**
- 3. Wallace Karanja – deceased**
- 4. Minah Mumbi – unmarried**
- 5. Mbugua Nganga**
- 6. Joseph Nganga**
- 7. John Ndungu**

The 1st widow, Mary Woki died in 1988 whereas the 2nd widow, Wambui Nganga died in 2006.

James Njuguna Nganga petitioned this court for letters of administration on 25/8/05 and grant of letters of administration were issued to him on 31/10/05. The petitioner then took out summons for confirmation of grant and on 7/7/2006 when the said summons came up for confirmation, Wallace Karanja filed an objection. The said Wallace Karanja also died on 12/7/2006 and was substituted by Joseph Nganga Ngige who was made a co-administrator with the petitioner. On 9/3/07, J. Koome directed that the summons for confirmation and affidavit of protest be determined by way of oral evidence.

Joseph Nganga Ngige filed an affidavit dated 9/11/06 in support of his proposed mode of distribution of

the deceased's estate and on the same date, the petitioner also filed his affidavit on the mode of distribution and a supplementary affidavit dated 8/2/2011.

The petitioner called three witnesses in support of his case. PW1, Mbugua Gichuhi aged 90 years testified, the younger brother of the deceased. He produced a letter allegedly written by the deceased before his death, in which the deceased indicated how he wished his estate to be distributed. The letter was written in the Kikuyu Language and translated to English and was produced as Ex.1(a) and (b). The letter was read to PW2 since he could not read or write. He recalled that the deceased had land in Kabatini and he left the bigger share to the 2nd wife who had 7 children while the smaller portion was given to his grandson, Nganga Ngige, the son of the petitioner; that the petitioner was given land at Wanyororo while the land in Kitale was sold to Chege Nduguga, the husband to Damaris Wangui and a son in law to the deceased; that the said Nduguga had been in occupation even at the time of the deceased's death. PW1 denied that the deceased had any plot in Nairobi or Githunguri. As for the tractor left by the deceased, the deceased's wish was that it be sold and proceeds be shared between the petitioner and the 2nd widow. He also testified that the deceased's sheep and goats were shared between the petitioner and the children of the 2nd house but the cows were left with the 2nd wife.

The petitioner, James Njuguna Ng'anga testified as PW2. He did confirm that the deceased had two wives; the 1st wife had 2 children while the 2nd wife had 7 children, 3 are dead and 4 are alive. He identified the deceased's properties as:-

1. **Kabatini land – 36.78 acres;**
2. **Plots in a Nakuru company, Shabab in Nakuru;**
3. **Plot at Kabatini trading centre – 50 X 100 ft;**
4. **Plot 179 Cherangani, Kitale;**
5. **Tractor;**
6. **Cattle and goats.**

He testified that before the father died, he called PW2, his sister Damaris Chege, the two widows, Chege Kariuki now deceased, Chege Nduguga (deceased) when he made his wishes known as to how his property would be distributed as indicated by PW1. PW2 said that land in Kitale had been purchased by the deceased and Chege Nduguga, but that later Nduguga paid the deceased off and it was all Nduguga's land though it had not been transferred to Nduguga's names by the time the deceased died. PW2 was supposed to effect the transfer to Nduguga. PW2 denied that there was any plot in Nairobi which belongs to deceased or plot in Kague Kiambu. It was his evidence that there is nothing left to distribute because the land in Kabatini was shared out as per the deceased's wishes, 10 acres to his son and 26.78 to Freshia Wambui's household. Freshia then distributed her share during her lifetime to her sons who include the objector, who have sold off all of it except for 5 acres. His prayer is that the Cherangani land do devolve to Nduguga's estate as he lived on the land since 1967. Nduguga's father and his other siblings are all buried on the said land. PW2 said that he did not include the Nakuru Shabab plot and the Kabatini plot, in this application because they had already been given to the mother of the objector during her lifetime. He sold the tractor and shared the proceeds with Freshia Wambui.

PW3, Damaris Wanjiru the sister to the petitioner recalled that she too had been called to the hospital by her father before he died. PW3 testified that Chege Nduguga, her husband, and his family started living in Cherangani in 1967; that Nduguga's father who lived on the same plot was buried there in 1984, Nduguga's brother and wife were also buried there. She recalled that her husband used to pay for the land to the Settlement Fund Trustee though the land was in the deceased's name. according to PW3 they finished paying in 1989 but the receipts produced show that payments continued till the year 2000 over 10 years since the deceased's death. She was aware that the father's plot in Shabab Nakuru and Kabatini

trading centre were given to her step mother, Freshia Wambui.

Two witnesses testified in support of the objector's case. Joseph Nganga Ngige (DW1) who belongs to the 2nd house testified that his father died when he was only three years old. He confirmed that his three siblings also died leaving only 4 of them while the 1st house still has the 2 children, the petitioner (PW2) and Damaris (PW3), are alive. According to DW1, his father left behind the following properties:-

1. **Bahati/Wendo 13/150 – 136 acres;**
2. **Cherangani Settlement Scheme No. 179 – 21 acres;**
3. **Muguathe/Wanyororo Block 1/1488 – 0.9 acres; and 1/1489;**
4. **Muguathe/Wanyororo Block 3/115;**
5. **Tractor;**
6. **Livestock.**
7. **Plot at Kague, Kiambu;**
8. **Plot at Nakuru Shabab;**
9. **Nairobi plot.**

PW1 got a receipt from Kitale Lands Office which confirmed that the Cherangani land belongs to the deceased (EX.6). He further said that the deceased had another plot in Nairobi but he does not know where it is. He produced in evidence a photograph of his family and himself as a baby, a search from Lands office in respect of Bahati (Wendo) Block 3/115 (DEX31) Dundori/Muguethi Block 1488 (DEX.4) and 1489 (DEX 5). He also produced a receipt for payment of the plot in Kitale. DW1 also testified that the father owned a tractor KLC 312, livestock, which should all be shared between his children. He admitted that the land that the houses shared, has been sold by his brothers and only 5 acres are left.

PW1 a brother to the deceased testified that he was given a will written by his brother before he died. It was written in the Kikuyu language and translated to English (Ex.1). The people present when the deceased made the will were the deceased's two wives, Woki and Freshia, Ngige Nganga (PW2), Damaris Wanjiru (PW3) Chege and Ngige, chege Kairuki and Flora Wambui whom the court was told are now deceased. The objector, DW1 admits that his mother distributed the land left to her house amongst the children in accordance with the will before she died in 2006. They got titles and they have since sold most of that land save for 5 acres. DW1 and DW2 did also admit that the mother never objected to 10 acres of the land at Kabatini being hived out of the plot to be given to PW2's son, Nganga Njuguna who was named after the deceased, in accordance with the will. The petitioner alleges that objector's mother was given the plots in Kabatini shopping centre and Nakuru which she sold during her lifetime. The objector denied knowing about the plots in Nakuru Shabab and Kabatini shopping centre.

The conclusion I come to is that the deceased seems to have left a will regarding the distribution of his estate and it seems that the objector's mother who was present at the deceased's death bed when the will was made complied with the wishes of the deceased in the said will. That is why she did not raise any issues with the estate during the 28 years that she survived the deceased.

The main contention in this case is the Cherangani Plot No.179 – comprising 21 acres. The question is whether it belongs to the deceased's estate or did the deceased sell his share to his son in law, Chege Nduguga before he died? PW1, Mbugua Njuguna Githinji said that the Cherangani Plot is not included in the will. PW1 was aware that the land in Cherangani had been sold to Chege Nduguga. The petitioner PW2 and PW3 said likewise. PW3, the wife of Chege Nduguga also testified that Chege and his family started living in Cherangani in 1967 till his death in 1997. His father also lived there till his death in 1984,

Chege's brother and wife lived there and were all buried on that land. She also produced receipts of Settlement Fund Trustees to confirm that her husband repaid the loan to the Fund. Some of the receipts are dated 2006, paid way after the death of the deceased in 1978. The objector's mother died in 2006, about 28 years after the deceased's death. The objector's mother never made any claim to the land in Cherangani, She had distributed the share of land given to her by the deceased as per the will produced herein by PW1, (Ex.1B) and she never made any other claim.

DW2 has admitted that she has never been to Cherangani. DW1 claims to have been to Cherangani and that he lived there but he was unable to tell whether or not Nduguga and his family have been buried on that land. I am convinced that DW1 was not truthful; he was also unable to produce any evidence to prove that his mother ever paid for the land in Cherangani as he had alleged. The said land is said to have been bought jointly by the deceased and Nduguga in 1966 and that the deceased then sold his share to Nduguga who then completed payments to the Settlement Fund Trustee and has been in possession of the said land with his family since. I am persuaded to believe that to be the position. It is no wonder the objector's mother never raised the issue with Nduguga's occupation of the said land in Cherangani during her lifetime. I believe that the inclusion of the Cherangani Plot in the petition by the petitioner in this cause was for purposes of the deceased's names being removed from the register so that that of the family of Nduguga could be entered in the register. The family of Nduguga could only be registered after succession proceedings.

The objector proposes that Plot No. Muguathe/Wanyororo Block 1/1488 be given to the first house while Block 1/1489 is given to the second house. The objector admitted that the said plots were not listed in his affidavit of protest as belonging to the deceased's estate. I have seen the certificates of search produced by the objector (Dex.3) in respect of Bahati/Wendo Block 3/115 it is in the name of James Njuguna Nganga (PW2). The certificate was issued to PW2 on 15/7/1992 and there is no evidence that the land was originally owned by the deceased. As respects Dundori/Muguathi Block 1/488 measuring 0.9 acres, it is registered in the name of James Njuguna Nganga (PW2), the title having been issued on 15/2/1985. There is no evidence that it belonged to the deceased before the transfer. DEx.5 is the Search Certificate in respect of Dundori/Muguathi Block 1/1489 (Wanyororo). It is registered in the name of James Njuguna Nganga (PW2) and there is no evidence that it ever belonged to somebody else. The same was subdivided into several plots on 23/7/1993. Again I find no evidence to show that the plot ever belonged to the deceased. I find no evidence to demonstrate that the above named plots belong to the deceased's estate and therefore subject to distribution. The fact that the objector never included the above plots in his list of the properties belonging to the deceased's estate is telling. It is an afterthought because they never belonged to the deceased's estate.

Although the objector claimed that there are other pieces of land in Nairobi and Kague Kiambu, he did not avail any evidence to support that contention. PW1 denied that the deceased had any land in his ancestral home in Kiambu nor had he heard that the deceased had a plot in Nairobi.

As regards the plot in Nakuru, the objector was unable to avail any evidence to show that it exists. PW2 and PW3 testified that the plots in Nakuru and Kabatini Shopping Centre were given to the objector's mother who disposed of them. That is why they were not indicated in the deceased's properties. Again the objector could not confirm whether or not his deceased mother was given the land in Nakuru and Kabatin and sold them. So far, there is no evidence of its existence.

The objector also claims that the petitioner drove away all the deceased's livestock and took the tractor which was supposed to be shared between the two houses. PW2 on the hand testified that the objector's mother took all the cows but they shared the goats and that the tractor was sold and proceeds shared between PW2 and the objector's mother. The objector came to court well after the mother's death. The objector's mother never raised these claims against PW2 in her lifetime. It seems that when the elders met, after the demise of the deceased, the deceased's estate was distributed as per his wishes. The objector's mother died 28 years after the deceased. I doubt that she just sat back as PW2 took over what her entitlement and squandered it. Just like the deceased's mother was given the land which she distributed to her children, I believe she was also given the plot at Kabatini, Nakuru, and the livestock and a share of the proceeds from the tractor. Otherwise these claims should have been made during her

lifetime. The objector's claim is an afterthought. It seems that the objector and his siblings have squandered their entitlement from the estate and they now hope to benefit from what they hope is still outstanding. I find that the objector has not demonstrated that there is anything left of the deceased's estate to be distributed. The distribution was completed after the will was read to the family soon after the deceased's death. The objection lacks any basis and is dismissed.

In the end, I hereby confirm the grant issued to the petitioner and objector in terms of paragraph 5 of the supporting affidavit dated 8/2/2011, so that the whole of the land parcel Cherangani Settlement Scheme Plot No. 179 be confirmed to Damaris Wanjiru Chege, the widow of David Chege Nduguga. This being a family dispute, each party to bear their own costs.

DATED and DELIVERED this 15th day of December, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Githui holding brief for Mr. Ndubi for the petitioner.

N/A for the objector.
Kennedy – Court Clerk.