REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 31 of 2007

IN THE MATTER OF THE ESTATE OF KAHUTHU WAMUHU alias KAHUTHU S/O MUHU (Deceased)

And

JOSEPH MWANGI WAHOME……..…...…….PETITIONER

Versus

PETER MAINA KAHUTHU……..……PROTESTER
R U L I N G

These proceedings relate to the estate of one, **Kahuthu Wamuhu alias Kahuthu s/o Muhu;** *"deceased"*. The estate of the deceased consisted of land parcel Konyu/Ichuga/805 the *"suit premises"*. Following the death of the deceased, **Joseph Mwangi Wahome**, *"petitioner"* petitioned for a grant of letters of administration intestate with regard to the deceased estate. He presented the petition in his capacity as a brother of the deceased. **Peter Maina Kahuthu**, *"protester"* got wind of the petition when it was gazetted in the Kenya Gazette of 28th March, 2008. Through **messrs Nderi & Kingati Advocates** he raised his objection to the making of the grant to the petitioner on the grounds that him alone and his other siblings were rightful heirs and the petitioner had no right whatsoever to the estate. That the petitioner had his own parcel of land to wit; **Konyu/Ichugu/658** which he had inherited intervivos and there is no claim of trust.

Contemporaneously with the filing of the objection aforesaid, the protester filed petition by way of cross-application for a grant on the grounds that he was the son of the deceased who was entitled to inherit the estate of the deceased. He also filed an answer to the petition.

On 4th July, 2008 the petitioner and protester were by consent appointed joint administrators of the estate of the deceased by **Kasango J.** The judge also granted liberty for each of them to apply for the confirmation of grant before expiry of 6 months period required under the law.

Through **messrs Lucy Mwai & Company Advocates**, the petitioner by an application dated 24th July, 2008 sought the confirmation of the grant intestate issued as aforesaid. He proposed that the suit premises measuring approximately 4.0 acres be shared equally between himself and the protester at the ratio 2.0 acres each. However the protester will have to hold his share of 2.0 acres in trust for himself and his 9 siblings.

The protester would hear none of the above proposal. He accordingly filed an affidavit of protest. He deponed that the petitioner had no basis of seeking to have the suit premises subdivided as the same was registered in the deceased's name as absolute owner way back on 1st March, 1974. That the protester has his own parcels of land given to him by his father being **Konyu/Ichuga/658 and 1009**. There was therefore no valid claim to the deceased estate by the petitioner. The protester therefore sought that the suit premises be registered in the names of the children of the deceased as sole dependants of the deceased.

When the cause came up for hearing before me on 25th November, 2009, **Ms Mwai** learned counsel for the petitioner and **Mr. Nderi** learned counsel for the protester entered a consent in these terms:-

"(1) By consent the acreage of the following parcels of land be ascertained

- Konyu/Ichuga/658
- Konyu/Ichuga/805

- Konyu/Ichuga/1009

(2) Upon such ascertainment parties to file and exchange written submissions by 22nd January, 2010 when the cause shall be mentioned with a view to giving a date for ruling."

The consent order was duly complied with. I have carefully considered them. From the submissions of the petitioner which have not been controverted by the protester the acreage of the 3 parcels of land aforesaid have been ascertained as follows:

- **Konyu/Ichuga/805 - 1.25 Ha. Approximately 3 acres**
- **Konyu/Ichuga/858 – 0.43 acres**
- **Konyu/Ichuga/1009 – 0.42 acres**

Whereas **Konyu/Ichuga/805** is the registered in the name of the deceased, the remaining two are registered in the name of the applicant.

The petitioner's case appears to be that the suit premises is family land and that the deceased was merely registered as a trustee for the benefit of himself and the applicant. He concedes also that the two parcels of land registered in his name are so registered in trust for himself and the children of the deceased. According to him therefore the 3 parcels of land ought to be shared equally between him and the protester. This proposal is informed by the fact that the parties are both living on the suit premises having established their homesteads thereon. The petitioner wants to be given ½ of the suit premises. He is also prepared to give the protester and his siblings 1.2 of the other 2 parcels of land under his name. Further his proposal is informed by the fact that one of the parcels of land in the petition's name is in a swampy area while the other one is at a hilly area.

On the other hand, the case of the protester appears to be that the suit premises was given to the deceased by his father while the petitioner was similarly given the other two land parcels. The protester is of the view that the petitioner has no claim over the suit premises and should instead be content with his two parcels of land.

Between the two versions espoused by the petitioner and the protester, which is more credible? I think I would go with the protester. I cannot see any rational basis upon which the deceased father of the petitioner and deceased would have decided to register his three parcels of land in the names of his two sons separately and each one was to hold the portions registered in his name in trust for himself and his brothers. It does not make any rational sense at all. I would understand if their deceased father would have registered all three parcels of land in the name of either the petitioner or the deceased to hold in trust for himself and for his brother and not vice versa. In my view, I think that their deceased had made up his mind as to how his estate should be distributed in his lifetime. The petitioner and deceased were given their separate parcels of land as a gift intervivos by their deceased father. It matters not that petitioner's are situate in a swampy and hilly area. The petitioner never protested to his father about that scheme in his father's lifetime. He cannot now be heard to claim that as both his lands and suit premises were family land they should be distributed afresh. He should have done so in the lifetime of his father or even the deceased. He did not do so. He only waited for his father to pass on as well as the deceased to express his displeasure about the treatment accorded to him by his late father. The children of the deceased led by the protester are innocent. Both parties agree that the parcels of land are family lands. However their deceased father had a right to deal with the parcels of land as he pleased. After all they were registered in this name. He decided as a family man that the family land be shared between his two sons; the suit premise to go to the deceased and the other two to go to the petitioner. He made his intention known in his lifetime and that position must be respected. It is that intention that the petitioner is bent on undoing in these proceedings. It cannot be allowed. The deceased father must have had a reason when he opted to distribute his estate in his lifetime as he did. It cannot therefore be an excuse that what was given to the petitioner is in a swampy and hilly area. It can also not be an excuse that the petitioner has established his homestead on the suit premises.

It is against this backdrop that I am in compete agreement with the protesters submissions that the petitioner has no valid claim against the estate of the deceased and his claim should be disallowed. I would have proceeded to do so but for the magnanimity exhibited by the protester in his submissions. He stated that purely on humanitarian grounds he was willing to make up the acreage with regard to the parcels of land in the names of the petitioner as aforesaid. Whereas the suit premises measure 1.25 Ha, the total of the parcel of land for the petitioner however measure 0.85 Ha, in aggregate. The protester is therefore willing to have 0.2 Ha, hived off from the suit premises and given to the petitioner. Hopefully this will take care of his homestead. As correctly observed by the protester, this would allow a measure of equity especially for the petitioner who would otherwise not be entitled to a share of the estate.

In the result, I would disallow the scheme of distribution proposed in the application for confirmation of grant by the petitioner. Instead I will allow the protest and direct hat the entire suit premises save for 0.2 Ha should go to the protester to hold in trust for himself and his siblings. 0.2 Ha thereof shall however be hived off and given to the petitioner. In doing so care should be taken such that the said 0.2 ha should encompass his homestead. The costs of excision however shall be borne by the petitioner. This being a close family dispute, I make no order as to costs.

Dated at Nyeri this 22nd March, 2010.

M.S.A. MAKHANDIA
JUDGE

Delivered on 22nd day of March, 2010,

By:

J.K. SERGON
JUDGE