

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 99 of 2004

**IN THE MATTER OF THE ESTATE OF DAVID MUCHIRI THEURI - DECEASED
ESTHER MIWHAKE MACHARIA.....PETITIONER**

VERSUS

ESTHER WAMWERE NYORI.....PROTESTOR

RULING

A Grant of Letters of Administration intestate in respect of the Estate of David Muchiri Theuri, deceased, was made to ESTHER MUIHAKI MACHARIA, hereinafter referred to as the petitioner, on 14th may 2004. In the Summons dated 22nd September 2004, the Petitioner applied for the grant to be confirmed. ESTHER WAMWERE NYORI, hereinafter referred to as the Objector, filed an affidavit of Protest to oppose the Summons. This Court gave directions to have both the Summons and the Protest determined by affidavit evidence and by written submissions.

I have considered the affidavit evidence and the written submissions. In the summons for Confirmation of Grant the Petitioner listed Ziffora Nyambura Macharia as the only child surviving the deceased. She named herself and one Peter Macharia Wachira as the deceased's dependants. The Petitioner further identified parcel No. THEGENGE/IHITHE/53 to be the only Estate asset available for distribution. In fact the aforesaid parcel of land was given to one Joseph Maina Wachira. In the affidavit of Protest, the Objector alleged that the aforesaid parcel of land had been sold to her and her co-wife, Gladys Wanjiru Nyori in 1958. She claimed she has been using the land since then. She proposed that the property be shared equally between her and her co-wife, Gladys Wanjiru Nyori. It is also alleged in the affidavit of Protest that L.R. NO. THEGENGE/IHITHE/53 registered in the name of Gitari s/o Theuri to whom these proceedings do not relate to. The Protestor alleged that the late Gitari s/o Theuri was the one who necessitated the sale of the aforesaid parcel of land to the Protestor and her co-wife in 1958 after the duo refunded the purchase price to another person who had earlier bought the land who in turn gave them exclusive possession. The Petitioner was of the view that the deceased did not sell his land. She, however, admits that the Protestor and her co-wife have been cultivating the land.

I have taken into account the affidavit evidence and the written submissions filed herein. The issues raised in the affidavit of Protest are three fold.

First, is that the Protestors purchased the land from the late Gitari s/o Theuri in 1958.

Secondly, that the Protestors have been in occupation of the suit land since 1958, hence they may have acquired the land by adverse possession.

Thirdly, that Gitari s/o Theuri is not the same as David Muchiri Theuri.

The Petitioner has vehemently denied the first issue. In fact it has been alleged that the agreement relied upon by the Protestors is a forgery. On the second issue, the Petitioner admits that the Protestor has been cultivating the land. The petitioner did not address this Court on the issue as to whether or not Gitari s/o Theuri refers to David Muchiri Theuri. Though, there is evidence in form of the Chief's letter, still the same is doubtful. The question as to whether or not the Protestors have acquired the land by adverse possession cannot be determined through these proceedings. It would appear there is need to interrogate by a trial the other issues. I find the Protest to have raised serious issues which should be sorted out in other forums and not through these succession proceedings. Consequently, I decline to confirm the grant and direct the parties and their legal advisers to take out the necessary proceedings to determine the issues raised. The Summons for

Confirmation of Grant is adjourned generally for 90 days to enable the parties sort out the issues raised in the protest. Costs shall abide the outcome of the succession cause.

Dated and delivered this 7th day of April 2010.

J. K. SERGON

JUDGE

In open court in the presence of Miss Kabethi holding brief Kiminda for Petitioner. No appearance Kingori for Protestor.