



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI  
SUCCESSION CAUSE 239 OF 1995

IN THE MATTER OF THE ESTATE OF WANJAU KIHARA – DECEASED

AND

JAMES NGUYO WANJAU ..... PETITIONER

VERSUS

SAMUEL MWAI WANJAU ..... 1<sup>ST</sup> PROTESTOR

WACHERA WANJAU ..... 2<sup>ND</sup> PROTESTOR

RULING

**Mr. Wanjau Kihara** hereinafter referred to as “*the deceased*” died on 3<sup>rd</sup> August 1976. He was survived according to the affidavit in support of the petition for the grant of letters of Administration intestate by **Samuel Mwai Wanjau** alias **Muthee Wanjau** son, **Wachera Wanjau**, daughter, **James Nguyo Wanjau**, son, **Joyce Wachera Gikunjo**, daughter, **Gitonga Wanjau**, son, **Cecilia Nyambura Mbuthia** daughter, **Kihara Wanjau** son and **Mary Wanjiru Wanjau**, wife. The deceased estate consisted of land parcel number **Ruguru/Gachika/660**.

On 10<sup>th</sup> November 1995, **James Nguyo Wanjau** hereinafter referred to as “*the petitioner*”, petitioned this court for the grant of letters of Administration intestate in respect of the deceased’s aforesaid estate. On 10<sup>th</sup> March 1997, he was issued with the temporary grant. Subsequent thereto and by an application dated 6<sup>th</sup> June 2000, the petitioner moved the court for the confirmation of the grant. In his distribution scheme, he proposed that the suit premises be subdivided into three equal portions and shared between himself, **Wachera Wanjau** and **Muthee Wanjau**. He made no mention of the other members of the family aforesaid. However on 15<sup>th</sup> June 2004, **Wachera Wanjau** filed an affidavit of protest claiming that the proposed distribution was unfair as it gave the petitioner undue advantage. She was later joined in the protest by **Samuel Mwai Wanjau** alias **Muthee Wanjau**. In his affidavit of protest filed on 9<sup>th</sup> November 2004 he claimed that before the deceased passed on he had shared out the suit premises between the petitioner, himself and **Wachera Wanjau** hereinafter referred to as “*the Protestors*” as follows:-

- (a) **Samuel Mwai Wanjau – 3.2 acres**
- (b) **James Nguyo Wanjau – 2.0 acres**
- (c) **Wachera Wanjau – 1.0 acre**

The two protestors did not allude to or make reference to their other siblings. The contention of the latter protestor was that the Petitioner was distributing the estate of the deceased contrary to the wishes of the deceased.

The application for confirmation of grant and the affidavits of protest aforesaid were then placed before me for directions on 6<sup>th</sup> June 2008. Directions were issued in terms that both the application for confirmation of grant and the Protests be heard simultaneously by way of oral evidence.

On 14<sup>th</sup> October 2008, the hearing commenced before me. Only the Petitioner and the Protestors were present. First to take the stand was the 1<sup>st</sup> Protestor. He testified that the deceased was his father. Prior to his death on 3<sup>rd</sup> August 1976 the deceased had been married to three wives all of whom were deceased as well. 1<sup>st</sup> Protestor's mother's name was **Mary Wanjiru**. She too was the mother to the Petitioner. In total she had seven children, two sons and five daughters. The 2<sup>nd</sup> protestor was his step sister from his father's second wife. That before he died the deceased shared out the suit premises to the petitioner, 2<sup>nd</sup> protestor and himself. The deceased even went ahead and fixed boundary features to the various portions of the suit premises that he had allocated to the three. Since then each one of them stays and have developed their respective portions of land. However it appears that the petitioner was not happy with his father's distribution. He complained to the clan elders to no avail. As far as the 1<sup>st</sup> Protestor was concerned, the Petitioner's proposed distribution would go against the wishes of their deceased father. The distribution should be as he has proposed in his affidavit of protest.

Cross-examined by **Mr. Kingori**, learned counsel for the 2<sup>nd</sup> protestor, he stated that the 2<sup>nd</sup> Protestor was from the 2<sup>nd</sup> house. That she was previously married to **Muriuki Waithanje**. That the deceased left the 2<sup>nd</sup> Protestor on the suit premises. He insisted that he should have 3.2 acres out of the suit premises as it was in accordance with the deceased's wishes. He conceded that the three stay in their respective portions of land. He further conceded that had the 2<sup>nd</sup> Protestor insisted that the land be shared according to houses, she would get more out of the estate of the deceased.

Cross-examined by the Petitioner, the 1<sup>st</sup> Protestor stated that he was given a larger portion of the suit premises by the deceased because he used to take care of the parents. That the 2<sup>nd</sup> Protestor should not be involved in this cause as she was married woman. However the deceased gave her a portion of the suit premises to enable her take care of her children.

To back up his position, the 1<sup>st</sup> Protestor called one **Nyagah Maina** as a witness. He testified that the Petitioner and 1<sup>st</sup> Protestor were brothers. However the 2<sup>nd</sup> Protestor was a step sister to them. That the 2<sup>nd</sup> Protestor was supposed to inherit land parcel No. **Ruguru/Gachika/ 510** registered in the name of **Wanjau**. He too conceded that the deceased distributed the suit premises but he did not know who got a bigger portion.

Under cross-examination by **Mr. King'ori**, the witness stated that the 2<sup>nd</sup> Protestor tills a portion of the suit premises. That he did not know whether she was married. She does stay on **Ruguru/Gachika/510**. Cross-examined by the Petitioner, he stated that he was aware that the deceased gave a portion of the suit premises to the 2<sup>nd</sup> protestor to assist her bring up her children.

The 2<sup>nd</sup> witness called by the 1<sup>st</sup> Protestor was **George Gichohi Mithigio**. He testified thus; that he was a neighbour. That the Protagonists herein were siblings of he same father. That the deceased had pointed out where each one of them should stay in the suit premises. To date they occupy those portions pointed out to them by their deceased father. That boundaries had been picked by traditional shrubs.

Cross-examined by **Mr. King'ori**, the witness stated that the suit premises were left to the three children and each was shown where to occupy by the deceased. However he could not tell the acreage of each portion. That the three were in occupation of portions pointed out to them by their deceased father. Finally, he stated that the suit premises should be distributed as per the clan decision. With that the 1<sup>st</sup>

Protestor closed his case.

It was now the turn of the 2<sup>nd</sup> Protestor to take the stand. She testified that the deceased was her father and that the Petitioner and 1<sup>st</sup> Protestor were her step brothers. That she was the only surviving member of her house whereas the Petitioner and 1<sup>st</sup> Protestor were from the other house. The suit premises were divided between them by the deceased and boundaries picked by traditional shrubs. Her wish was that the suit premises be distributed equally between them. The 1<sup>st</sup> Protestor should not get more land than the rest of them. That she was never married and had 3 adult sons residing with her on the suit premises.

Cross-examined by **Mr. Njuguna**, Learned counsel for the 1<sup>st</sup> Protestor, 2<sup>nd</sup> Protestor claimed that the deceased had 3 wives. She was never married to one **Muriuki Waithanji**. That the deceased considered her as a son from her mother's house. That the deceased planted trees to demarcate respective boundaries between the three. With that the 2<sup>nd</sup> Protestor closed her case.

For the Petitioner he testified that the deceased was his father as well as the Protestors. That it was his desire that the suit premises be shared equally between himself and the Protestors. He did not approve of the demand by the 1<sup>st</sup> Protestor that he should get more land than the rest as they were all siblings of the deceased who should be treated equally.

Cross-examined by **Mr. Njuguna**, the Petitioner claimed that when their father died in 1976, he had shared out the suit premises equally to the three. That the 1<sup>st</sup> Protestor's portion was not bigger. That clan elders sat down after the death of the deceased and told them to share the suit premises as per the deceased's wishes. Under cross-examination by **King'ori**, the Petitioner took the view that the suit premises should be shared equally between the three of them.

At this juncture the Petitioner closed his case. Parties thereafter agreed to put in written submissions. This was subsequently done. I have had tremendous benefit of reading and considering them.

So what are the issues for determination in this dispute? I think that there is basically one issue, how should the estate of the deceased be shared out amongst his three siblings. There is no need to consider the interest of the other children of the deceased mentioned in the affidavit in support of the petition for grant of letters of administration intestate as they did not at all involve themselves in the proceedings. In any event from the evidence, it would appear that the deceased was only interested with the well being of the three to the exclusion of the rest for reasons that are unclear from the record. The same goes for the alleged 3<sup>rd</sup> wife of the deceased.

It is common ground that the three children herein belong to the deceased. Whereas the Petitioner and 1<sup>st</sup> Protestor come from one house, the 2<sup>nd</sup> Protestor comes from the other house. Indeed she is the sole surviving child from that house. It is also common ground that the only property available for distribution among the three is the suit premises. It is also common ground that before the deceased passed on, he had subdivided the suit premises into three portions and given them out to the Protagonists herein. Each portion was marked by a boundary made of traditional shrubs. It is also common ground that the acreage of each portion given out as aforesaid is unknown as no survey was undertaken at the time. It is further common ground that each of the three have continued to occupy the respective portions assigned to them as aforesaid and utilised them without any interference to date. All parties herein are agreed that each one of them is entitled to inherit a portion of the suit premises. Their point of departure however is the acreage. The suit premises measure 6.2 acres. Whereas the Petitioner and the 2<sup>nd</sup> Protestor would want the suit premises shared equally, the 1<sup>st</sup> Protestor would hear none of the above. The 1<sup>st</sup> Protestor maintains that he should get the larger share of 3.2 acres purportedly because it was the deceased's oral wish and also because he took care of the parents. That the remainder should then be shared out as follows:-

**Petitioner – 2.0 acres**

## 2<sup>nd</sup> Protestor – 1.0 acres

In my view the 1<sup>st</sup> Protestor's contention that he deserves a larger parcel of the estate has no legal or factual basis. There was no evidence adduced to support such contention. Indeed even in his own evidence in chief he did not as much as allude to the fact that he was given a bigger portion of the suit premises as compared to the other two. It only came out in cross-examination. He did not even know the acreage of the portions given out by the deceased to the three. In his own words **"..... I do not know the acreage that was allocated to each one of us by our deceased father ....."** From the foregoing it is quite clear that none of the parties knew the acreage of the land allocated to them. On what basis therefore should the 1<sup>st</sup> Protestor claim more land than the rest? I do not see any basis. He did not call any evidence to back up his claim to more land than the rest. None of the two witnesses that he summoned supported his claim to more land than the rest. Indeed in his own evidence he concedes that **"..... My father never specifically told me that I should have 3.2 acres. However that is how he planted trees....."** When pushed to justify the basis of his claim to a larger portion of the suit premises in cross-examination by the petitioner, the 1<sup>st</sup> Protestor stated that he was given a larger portion of the suit premises by the deceased because he used to take care of the parents and or that, that is how the deceased wanted it. Again other than this blunt statements the 1<sup>st</sup> Protestor never adduced any other cogent evidence to beef up the claim. I am thus far from being persuaded that the 1<sup>st</sup> Protestor was entitled to more land from the suit premises than his other siblings on the basis that that was the wish of the deceased and or because he took care of his parents.

The deceased it would appear died before the commencement of the law of succession Act and therefore according to section 2(2) thereof the administration of his estate was *"subject to the written laws and customs applying at the date of death"*. The parties herein are kikuyu by tribe. The law applicable in the circumstances was enunciated by **Eugene Cotran in his restatement of African Law Volume 2 The Law of Succession**. He stated thus:

**"..... Inheritance under Kikuyu law is patrilineal. The pattern of inheritance is based on the equal distribution of a man's property among his sons, subject to the proviso that the eldest son may get a slightly larger share ....., Daughters are normally excluded, but may also receive a share if they remain unmarried....."**

From the foregoing it is quite clear that among the kikuyu that the pattern of inheritance is based on the equal sharing of the deceased estate among his sons. However, an elder son may get a little more than the rest. Unmarried daughters too are entitled to inherit a portion of the deceased estate. I did not hear the 1<sup>st</sup> Protestor claim that he was entitled to a bigger share of the estate of the deceased because he was the first born. Indeed there was no evidence that he was a first born as such. Rather he staked his claim on the basis that, that was the wish of the deceased and also because he used to take care of the parents. These are not among the recognised grounds that would afford one of the sons to get more land than the rest. The only consideration is that he is a first born. The 1<sup>st</sup> respondent has not been able to prove that he was a first born. The 2<sup>nd</sup> Protestor is unmarried daughter of the deceased. Indeed by the time the deceased passed on he had already dished a portion of the suit premises to her. She is thus also entitled to inherit a portion of the deceased estate.

There being no basis and or justification of the 1<sup>st</sup> Protestor's claim I think it is only fair and just that the estate be shared equally between the three parties. This is the only equitable way to deal with the matter. This is the proposal advanced by both the Petitioner received tremendous support from the 2<sup>nd</sup> Protestor. I see nothing wrong with the proposal at all. All three are children of the deceased. There can be no basis for one to get more out of the deceased's estate than others. They should benefit equally.

In the premises I would dismiss the protest by the 1<sup>st</sup> Protestor and confirm the grant in terms of the application for confirmation of grant filed by the Petitioner. The 2<sup>nd</sup> Protestor too is in agreement with the scheme of distribution suggested by the Petitioner. Her protest has thus been overtaken by events and is accordingly dismissed.

Thus the suit premises shall be subdivided into three equal portions and shared out between the petitioner, 1<sup>st</sup> Protestor and the 2<sup>nd</sup> Protestor respectively. However in marking boundaries regard must be had to the fact that the deceased had somehow picked boundaries between the three children. Accordingly in fixing the boundaries following the subdivision of the suit premises into three equal portions as aforesaid, each of the three must as much as possible retain the portion he/she was assigned by the deceased and currently occupies. In other words in subdividing the suit premises, it should be done in such a way that each of the three retains the substantial portion that they currently occupy.

As the Protagonists are children of the deceased, I will make no order as to costs.

*Dated and delivered at Nyeri this 10<sup>th</sup> day of February 2009*

**M. S. A. MAKHANDIA**

**JUDGE**