



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE 186 OF 1997

**IN THE MATTER OF THE ESTATE OF MWORIA GITUGIRI *alias* MUORIA GITUGIRI
(DECEASED)**

Between

STEPHEN MWORIA THEURIPETITIONER

And

ANDREW WAHOME THEURI

CHARLES MWANGI THEURIPROTESTORS

PETER MUNYOGO THEURI

J U D G M E N T

The dispute herein relate to the estate of **Mworia Gitugiri *alias* Muoria Gitugiri** who died on 6th August, 1976. Following the death aforesaid, his grandsons **Charles Mwangi Theuri** and **Peter Munyogo Theuri** jointly petitioned this court for the grant of temporary letters of administration on the 29th July, 1997. In the affidavit in support of the petition aforesaid they indicated that the deceased had died intestate and left the following surviving him:-

- (a) **Theuri Mworia - son - aged 70 years**
- (b) **Stephen Mworia Theuri - grandson – aged 50 years**
- (c) **Andrew Wahome Theuri - grandson – aged 48 years**
- (d) **Charles Mwangi Theuri – grandson – aged 45 years**
- (e) **Peter Munyogo Theuri – grandson - aged 30 years**

The only asset of the estate was given as **Thegenge/Karia/208** hereinafter referred to as “*the suit premises.*”

On 18th January, 1999, one, **Gakuu Mworia Gatuguri**, a son of the deceased objected to the making of the grant stating that the petitioners were the sons of **Theuri Mworia Gatugiri** who was still alive and

stepbrother to the objector. That the objector and the father of the petitioners aforesaid were the only sons of the deceased and both are the rightful heirs of the estate of the deceased. As required he followed up his objection with his own petition by way of cross-application for a grant of letters of administration.

It would appear however that the objection did not see the light of day since on 3rd December, 2001 a temporary grant was issued to **Charles Mwangi Theuri** and **Peter Munyoro Theuri**. Subsequent thereto and on 7th July, 2006, **Stephen Mworio Theuri**, applied for confirmation of grant and proposed that the suit premises be shared as follows:-

(a) **Stephen Mworio Theuri - 0.35 Ha.**

(b) **Andrew Wahome Theuri – 0.07 Ha.**

(c) **Charles Mwangi Theuri – 0.07 Ha.**

(d) **Peter Munyoro Theuri – 0.07 Ha.**

Andrew Wahome Theuri, Charles Mwangi Theuri and **Peter Munyoro Theuri** hereinafter referred to as “*the protestors*” would hear none of the above. Accordingly and as required, they filed affidavits of protest. In essence they deponed that the objector, **Gakuu Mworio Gatugiri** had died on 6th July, 2000 leaving them as his dependants. That they were protesting the **Stephen Mworio Theuri’s** scheme of distribution and wanted the suit premises shared among the four of them equally at 0.14 Ha each. That decision had been informed by the fact that all of them had contributed equally in purchasing objectors portion of the suit premises, hence it should be shared equally among them.

On 23rd may, 2007, the cause came up for directions before me. I directed that the protest and the summons for confirmation of grant be heard together by way of Viva Voce Evidence.

On 11th March, 2009, the hearing commenced before me. For ease of reference, I will refer to **Andrew Wahome Theuri, Charles Mwangi Theuri** and **Peter Munyoro Theuri** as protestors whereas **Stephen Mworio Theuri** as the petitioner.

On behalf of the protestors **Andrew Wahome Theuri** testified. His evidence was as follows. The deceased was their grandfather and the petitioner was their brother. The deceased was the registered proprietor of the suit premises. They disagreed with the mode of distribution suggested by the petitioner as he would get more land than themselves for no apparent reason. They were all grandsons of the deceased. Accordingly the suit premises should be shared equally. They denied that the petitioner solely bought the portion of the suit premises belonging to the objector **Gakuu Mworio Gatugiri** as claimed by the petitioner. As far as they were concerned, they sat as a family and agreed to contribute Ksh.6,000/= towards the purchase of objector’s interest in the suit premises. That money was given to the petitioner for onward transmission to the objector. The witness tendered in evidence a bundle of documents in verification of that fact. He concluded his evidence by stating that during the deliberations before the local Chief on the issue it was agreed in the presence of the petitioner that the suit premises be shared equally.

Cross-examined by **Mr. Njuguna**, learned advocate for the petitioner, he stated that in 1978, **Gakuu Mworio Gatugiri**, the objector had approached the petitioner with a view to selling his a portion of the suit premises at Ksh.5,000/=. The petitioner agreed to do so on behalf of himself and the protestors much as the note dated 2nd May, 1978 tendered in evidence spoke of the objector selling to the petitioner the portion of the suit premises. The amount paid on that occasion of Ksh.600/= was actually paid by the 1st protestor. On 16th March, 1985 a further Ksh.4,000/= was paid by the petitioner through the protestor on the understanding that the protestors would refund him their contribution. That refund has since been made. Because of the delay in finalizing the transaction, the objector demanded an extra 1,000/= as penalty. That amount was paid by the witness who withdrew the amount from his account with HFCK, Nyeri branch on 18th March, 1985. It was not therefore true that the protestors demanded a share of the

objector's land after the petitioner had bought it solely as claimed by the petitioner. They all contributed towards the purchase price. Infact according to the witness the petitioner only paid Ksh.1,300/=, whereas himself paid Ksh.1,600/= and the remaining 2 protestors paid Ksh.1,550/= each. He denied that the petitioner refunded Ksh.2,300/= to the protestors through their father.

The 2nd witness called by the protestors was **Peter Ndirangu Gitahi**, the local Assistant Chief. Both the deceased and the antagonists herein were known to him as they came from his sub-location. He had arbitrated over this dispute before. His findings were that the petitioner had not disputed the protestors contention that the land had been bought jointly. He also confirmed that he had been refunded by the protestors monies he had paid to the objector as purchase price on their account. He actually agreed that the land be subdivided equally into 4 portions. The witness reduced the agreement in writing.

Cross-examined, the witness confirmed that he had written a letter dated 5th August, 2004 confirming that **Gakuu** had sold his land to the petitioner.

The last witness called by the protestor was their mother, **Maria Wangari**. She testified that the petitioner and protestors were her children. The objector was her brother in law. She confirmed that the objector's portion of the suit premises had been bought by his sons jointly. The purchase price was raised by her sons. The petitioner used his own money to buy the land initially but was later refunded by the protestors.

Cross-examined, she stated that though the petitioner paid the purchase price, he was however refunded the amount due from the protestors. Her husband sanctioned the deal. That marked the close of the protestor's case.

The petitioner testified as follows, that the deceased was his grandfather. He had 2 wives. His father was the son of the 1st wife whereas the objector was the son of the 2nd wife. Their grandfather was the registered owner of the suit premises. He claimed that he was entitled to 0.35 Ha. of the suit premises because he bought the portion of land in the suit premises belonging to the objector at ksh.5,000/=. He produced the agreement of sale dated 2nd May, 1978. The protestors never assisted him or contributed any money towards the purchase price as claimed. In total he paid Ksh.6,000/= including a penalty of Ksh.1,000/= imposed by the objector for the delay in completing the transaction. He produced documents in support of this contention. The land was being sold to him personally by the objector and not on behalf of his brothers. The objector had no wife or children. He claimed that his proposed distribution takes care of the land he had bought from the objector as aforesaid and his share in the grandfather's estate. That later on the protestors approached him and requested to be given a share of the objector's portion of land. However when his father and objector got wind of what was happening they warned him against such an undertaking lest he be cursed for going against the wishes of his grandfather. By then he had already taken Ksh.1,500/= from 1st and 2nd protestor respectively. He refunded the amount to them through their father. The balance of Ksh.700/= was refunded to the 2nd protestor through a money order. He tendered in evidence the customer's copy of the money order.

Cross-examined by the 1st protestor, he admitted that the protestor had built a hut in the portion of the objector's land. However it was the Assistant Chief who had allowed him to do so. He conceded having received money from the protestors towards the purchase price. However he had since refunded the same to the protestors through their father and the post office. He denied having agreed before the Assistant Chief that the land be subdivided in four equal portions.

The petitioner then called **Wanjohi Kanyeki** as his last witness. He was a witness to the transaction between the petitioner and the objector. He tendered in evidence the agreement dated 2nd May, 1978. Cross-examined, the witness stated that the petitioner gave him Ksh.600/= for onward transmission to the objector on that occasion. However he never told him that the amount had been contributed by the petitioner and the protestors. That marked the close of the petitioner's case.

Thereafter the protestors and petitioners agreed to file written submissions in support of their various

positions in the case. Those submissions were subsequently filed. I have carefully read and considered them.

In my view there is basically one issue for determination in this dispute. The issue is whether the petitioner bought a portion of land comprised in the suit premises and which belonged to the objector.

From the evidence, it is apparent that the deceased was the registered owner of the suit premises which measures 1.383 acres. The deceased had 2 sons, **Theuri Mworia**, the father of the petitioner and the protestors and **Gakuo Mworia**, the objector. The objector apparently did not marry nor did he have any children. When the deceased passed on, the petitioner, protestor and their father petitioned for the grant of letters of administration. They completely left out the objector as a son of the deceased. The objector then filed an answer to the petition and a petition by way of cross-application wherein he stated that the suit premises should only be inherited by himself and his brother, the father of the petitioner and protestors. However both brothers passed on during the pendency of these proceedings.

It is therefore common ground that the parties herein agreed that they were all entitled to jointly inherit the suit premises. However the bone of contention is the acreage. To the petitioner, he feels that he should inherit 0.35 Ha. whereas his other siblings should inherit 0.07 Ha each. Reason, he had bought from the objector his half share in the suit premises for a sum of Ksh.6,000/=. The protestors agree that indeed the petitioner bought out the objector. However he did so on his own behalf and on their behalf. They all contributed towards the purchase price.

In support of his contention, the petitioner produced in evidence an agreement dated 2nd may, 1978, which stated that the objector had sold to the petitioner his land for Ksh.5,000/= and had received Ksh.600/= as part purchase price. The witness to the agreement was the 2nd protestor as well as DW2. Subsequently the objector received a balance of the purchase price and a written document to that effect was tendered in evidence. That is all fine. The protestors have no quarrel with the fact that on the face of it, it would appear that the petitioner was buying the property in his name. It is all well that the document exhibited show that the petitioner was buying the property in his individual name. However to them, the truth of the matter is that he was buying the property on his and on behalf of the protestors. The documents tendered notwithstanding, the protestors are asking this court to go round those documents and find that the property was bought jointly by the petitioner and protestors.

I watched the petitioner as he testified and I was persuaded that he was not a witness of truth. He appeared determined to hide certain aspects of this transaction. He was therefore not a candid witness. Compared to the protestors I found them to be candid and truthful. Their evidence was ably supported and buttressed by the evidence of their mother and the Assistant Chief. I have no reason to believe that their mother and the Assistant Chief would gang up to falsely testify against the petitioner. They had nothing to gain. In particular, I do not think that the mother would wish to have and or encourage discord in her family by ganging up with her other sons against the petitioner. There was no evidence on record that there was bad blood between the petitioner and his mother as would have driven her to testify in favour of the protestors as against the petitioner. I would say the same with regard to the evidence of the Assistant Chief. His evidence to the effect that he arbitrated over the dispute and an agreement reached between the petitioner and protestors that the suit premises be shared equally between the protestors and the petitioner was not seriously challenged and or rebutted.

There is evidence of the petitioner having received money from the protestors to the tune of Kshs.3,000/= or thereabouts by his own admission. Much as **Mr. Njuguna** has submitted that the protestors had not stated when they paid for the purchase price, who actually paid and how much was paid and that they did not produce any documentary evidence to prove such payment, this submission has no merit at all. The petitioner himself admitted having received money from the protestors. The money was part of the purchase price of the objectors land by the protestors as well as the petitioner. There is no denying therefore that the petitioner had in principle agreed to purchase the land jointly with the protestors. The only reason why he backed out and which to my mind is unbelievable is that when the objector got wind that the petitioner was bent on purchasing his land jointly with the protestors, he told him that the deceased owner of the land would curse him if he went through with the transaction. That the deceased

had stated that if and when the objector wished to sell the land, he would only sell it to a person who was named after him i.e a person who bears his name. That is why the objector sold his share to the petitioner because he was named after the deceased. On realizing this the petitioner then chose to refund the amount he had already received from the protestors in two installments of Ksh.2,300/= through his father and Ksh.700/= vide a money order. A part from the word of the petitioner on this issue, no other evidence was tendered in support thereof. His own witness said nothing on that aspect of the matter yet he was present during the initial transaction. Further much as he claims to have refunded the amount, there is no evidence that the protestors received the Ksh.2,700/=. He claims to have made a refund through his father. However no evidence, documentary or other wise was tendered in support of that contention. The refund of Ksh.700/= was through the post office. The money was payable to the 2nd protestor. There is no evidence that the 2nd protestor received the refund. The authenticity of the note from the post office indicating that the money order issued at Ruringu on 30th October, 1997 for Ksh.700/= by **Stephen Mworia Theuri** payable to **Charles Mwangi Theuri** was paid at Nyeri GPO on 5th November 1997 is doubtful. First it is hand written, undated, and not on an official letter head. It might have been self generated for purposes of this case. I have also carefully perused the various written notes tendered in evidence. They are all in English. However the objector was illiterate as he thumb printed them. The evidence is not clear as to who drew them. Besides payments were always being made on behalf of the petitioner by one of the protestors.

Finally, the objector's land parcel formed a portion of the suit premises which then were registered in the name of the deceased. No letters of administration of the estate of the deceased had been issued to the objector as would have enabled him to dispose of his alleged share in the suit premises. In any event such portion had not been identified, transferred and registered in the name of the objector. Accordingly he was purporting to dispose to the objector a portion of the suit premises which in law still belonged to the deceased. The issue as to whether the objector was entitled to a portion of the suit premises was the subject of his objection proceedings. The issue had not been determined by the time he passed on. As at the time he was selling his portion aforesaid, the suit premises were in the names of the deceased who had passed on, on 6th August, 1976 and a grant of representation to his estate had not been issued. By the objector, petitioner and even the protestors going a head with the transaction, they were in effect intermeddling with the estate of the deceased in terms of *section 45 (1)* of the Law of Succession Act.

The upshot of all the foregoing is that the petitioner did not buy from the objector a portion of the suit premises solely. Further, no such portion would have been available to be disposed off by the objector in the absence of a grant of letters of administration to him with regard to the estate of the deceased. The answer to the issue framed is therefore in the negative. That being my view of the matter I would dismiss the application for confirmation of grant filed by the petitioner without costs. In substitution thereof I would confirm the grant in terms of paragraph 7 of the affidavit of protest filed by **Andrew Wahome Theuri** with no order as to cost as well. I further hold that the objection proceedings have abated following the death of the objector.

Dated and delivered at Nyeri this 21st day of May, 2009.

M.S.A. MAKHANDIA

JUDGE