



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE 102 OF 2003

IN THE MATTER OF THE ESTATE OF MURIITHI WANGAI – DECEASED

BETWEEN

ELIZABETH WAMAHIGA MURIITHI.....PETITIONERS

AND

JOHN KARONJI WANGAI.....OBJECTOR

R U L I N G

On 8th January 1976, **Muriithi Wangai** hereinafter referred to as “*the deceased*” passed on. Sometimes in 1993, his widow, **Elizabeth Wamahiga Muriithi** hereinafter referred to as “*the Petitioner*” took out a Petition for the grant of letters of administration intestate in the principal magistrate’s court, Nyeri. That Petition was resisted by one, **John Karanji Wangai** hereinafter referred to as “*the Objector*” by way of objection proceedings claiming to be a brother of the deceased. On the application of the Objector, the said cause was on 9th May 2001 transferred to this court for hearing and final determination. On 22nd June 2005, **Okwengu J** directed that the Petitioner and Objector be appointed joint administrators of the estate of the deceased and further that the objection do proceed to hearing by way of viva voce evidence.

On 27th June 2007, the petitioner filed an application for confirmation of grant. In the affidavit in support of the application, the petitioner deponed that the deceased was survived by the following children:

Joseph Maina Muriithi

Paul Wanjuki Muriithi

Leah Nduta Muriithi

Charity Muthoni Muriithi with

herself as a dependant.

She further deponed that the only asset of the estate being Land parcel No. **Nyeri/Warazo/77** hereinafter referred to as “*the suit premises*” currently registered in the name of the deceased be transferred to her absolutely.

That application was met with an affidavit of protest by the Objector. In pertinent paragraphs, the objector deponed that the Petitioner was the widow of his elder brother, the deceased. That it was true that the children named in paragraph 2 of the affidavit in support of the summons were the siblings of the deceased. He was however protesting because the suit premises were never supposed to be owned by the deceased absolutely, so his widow, the petitioner could not claim the entire parcel absolutely. According to him the suit premises were initially owned by their mother, **Mariam Wangari Wangai** who passed away on 2nd December 1991. She had been given the suit premises in 1962 by the Government when their village was being settled by the Government to hold it on her own behalf and on behalf of her two sons, the deceased and objector. To the present date, the suit premises are still in the name of the Government of Kenya. That in 1963, they settled on the suit premises and it was subdivided into two equal portions by their mother and each one of them shown their respective portions. To the present day, the objector lives on his half portion whereas the family of the deceased lives in the other portion. On 18th April 1989, their late mother dictated a will in which she directed that the two sons together with their families should continue staying in their respective portions aforesaid. Later the Petitioner stealthily started to seek to get the entire suit premises through the District Officer, Kieni East Division. This resulted in a dispute which was settled before the chief. That it was grossly unfair for the Petitioner to seek to be registered as the absolute owner of the suit premises when there is overwhelming evidence that she was only entitled to half a portion of the same. He therefore prayed that the suit premises be divided equally between him and the Petitioner.

Following directions given by **Kasango J** on 25th October 2007 that the protest be heard by way of viva voce evidence, the hearing commenced before me on 18th November 2005. First to take the stand was the Objector. He testified that the deceased was his brother and owned the suit premises on which he stayed with his family. That the Petitioner was the wife of his deceased brother and also stayed on the suit premises with her family. Initially the suit premises belonged to their late mother who had subdivided it in 1964. Their late mother had 2 other sons, **Wangai Mwangi** and **Nderitu Wangai**. They however had their own separate parcels of land in Rift Valley and were not beneficiaries of the suit premises. The suit premises though were still registered in the name of the Government. The boundary between the two families had been picked. The Petitioner was married to the deceased in 1965 after the deceased, the objector and their mother had settled on the suit premises. The suit premises did not therefore belong to the Petitioner wholly. Before her death their mother called a family meeting and directed as to how the suit premises should be subdivided. Their mother's intention was reduced into writing which note he tendered in evidence. He desired that the suit premises be divided into 2 portions as their deceased mother had intended and his portion be transferred to him.

Cross-examined by **Mr. Mugo**, learned advocate for the Petitioner, he stated that he was aged about 64 years. Though the deceased was his elder brother, he died when he was only 35 years old. Their mother was given the suit premises by the Government whilst they were still staying at Konyu in 1962. The deceased accompanied their mother to the chief for purposes of getting the suit premises. The deceased was given the suit premises on behalf of their family. In 1963, the deceased came for the objector and their mother and took them to the suit premises. Since then they had been residing thereat. Their mother had a right to subdivide the suit premises as it belonged to her.

The 2nd witness called by the Objector was **Michael Nderitu Wairegu**. He claimed to know both the deceased, the objector and the Petitioner. He had known the deceased and objector since childhood as they grew up together. They are also related through their grandfather. It was his evidence that the suit premises were given out in 1962 to the mother of the deceased and protestor through the chief. The mother of the deceased requested that the deceased should go to Warazo in her place. The deceased got the suit premises and later came for their mother, Objector & his wife and relocated them to the suit premises. Whilst in the suit premises, their mother picked a boundary between her 2 sons. The deceased was given a bigger portion though as he was the eldest son and also registered owner. During the lifetime of their mother, there was no dispute between the objector and the deceased. It was after the death of the deceased, that other people started confusing the petitioner with offers to buy the suit premises. That is when the dispute arose. In 1989, their mother summoned a family meeting and told them how the suit premises should be shared upon her death. The witness attended the meeting. The Petitioner was present

initially but was not keen on the proceedings. She left subsequently. The witness is the one who reduced into writing the wishes of the mother aforesaid. In 1993, the dispute ended up with the chief and D.O. of the area. The dispute was about threats to throw out the objector from the suit premises. It was resolved that the objector should not be evicted from the suit premises as a portion thereof belonged to him. Finally he testified that the dispute had been heard by the family and resolved. The Petitioner should respect the wishes of the family.

Cross-examined by **Mr. Mugo**, he responded that he was aged over 60 years. That he was aware that some people had been given land to hold in trust for their families. The deceased's mother accompanied by the deceased went to the chief as requested for purposes of being allocated land. On coming back, they told him that they had agreed that the deceased be given the suit premises on their behalf. The deceased mother was given the suit premises so as to move her family from the village. The suit premises were given to the deceased in trust for his mother's family.

The last witness called by the Objector was **Margaret Wanjiku**. She came from Warazo and knew the deceased, Petitioner and Objector as well. In fact the objector was her husband. She knew about the suit premises in 1962 when they were staying in Konyu village. One day the deceased's mother came to her and told her together with her sister to escort the deceased to Othaya as he had to be given land on her behalf. They did so and left the deceased waiting for the lorry to ferry him to Warazo. Later they relocated to Warazo and stayed in the deceased's house as they cleared the bush in the suit premises. They cultivated the suit premises knowing that it belonged to the family. Later on the objector put up a house and his family moved in. The suit premises were subsequently divided into 2 and a boundary picked. Since then they have been residents on the suit premises. Finally she testified that before the deceased passed on she had summoned a family meeting and told them that the suit premises belonged to her and should be shared between her 2 sons.

Cross-examined by **Mr. Mugo**, she replied that they were staying in the same concentration camp with the family of the deceased. The mother was given the suit premises but caused it to be registered in the name of the deceased's name. The deceased's mother could not make it to Warazo as she was too old. After about 2 years the deceased came for the family. In between, they used occasionally to go to the suit premises to clear; plant, harvest and come back to the camp. As far as she was concerned the suit premises belonged to their deceased mother. With that evidence, the Objector closed his case.

The case for the Petitioner then opened. The Petitioner testified as follows; that the deceased was her husband. The suit premises belonged to the deceased having been given to him by the Government. By then she was not married to him. She was told by the deceased that he had been given the suit premises by the government. She exhibited documents given to the deceased allowing him to occupy and cultivate the suit premises. She also claimed to have paid Kshs.600/= for the title deed for the suit premises.

Cross-examined by **Mr. Mugambi**, learned advocate for the Objector, she stated that she had never had any dispute with the Objector that was arbitrated upon by clansmen. She got married to the deceased on the suit premises. The same was being cultivated by his brothers though. She went on to claim that the deceased had told the objector to vacate the suit premises. However, she had nothing to show for that effect. She conceded though that the suit premises were occupied by her and the objector. She denied however that there was a marked boundary. The deceased did not have a title deed to the suit premises either. However she had since paid Kshs.600/= for the same. To date she had yet to obtain the same as she had been advised to take out letters of administration first. Thus the suit premises still remain in the name of the Government. She denied that her mother in law was too old to travel to Warazo and that is why she had left the deceased to chase the title to the suit premises.

Amos Mwangi was the first witness called by the Petitioner. His testimony was to the effect that he was given land by the government in 1962. He met the deceased at Warazo. The land he was given by Government at Warazo was not on behalf of his family. He denied that the deceased's mother was given land at Warazo. A total number of 117 allottees were given land at Warazo. The deceased's suit premises was number 77 whereas his was 65.

Under cross-examination by **Mr. Mugambi**, he maintained that he was involved in trying to resolve the dispute between the Objector and the Petitioner. The land was not being given according to families. He could not tell whether there was an agreement between the deceased and members of his family with regard to the suit premises. That the objector and his mother came to the suit premises in 1963. He could not tell whether the deceased attempted to evict the objector. He confirmed that by the time the deceased passed on, he had not received his title deed to the suit premises.

The 2nd witness called by the Petitioner was **John Ndirangu**. In 1962 he was a corporal staying with D.O. The D.O. was in charge of Warazo, Kieni and Sagana Settlement Schemes. On 21st March 1962 people were transported at night from Othaya for purposes of re-settlement in Warazo. The land belonged to the Government. He was not given land in the scheme though his mother was. The deceased was given the suit premises as an individual.

Cross-examined, he stated that the deceased was given plot No. 77 whereas his mother got plot No. 78. He stays on his mother's plot. He conceded that the objector had put up a house on the deceased's suit premises. He also had not heard the deceased trying to evict the objector.

At this juncture, **Mr. Mugambi** applied to have the Petitioner recalled for purposes of further cross-examination in view of the issues that had arisen during the hearing of the Petitioner's case. Since the application was not opposed, I allowed it. In further cross-examination, the Petitioner stated that she was present during the burial of the deceased's mother. She denied that her mother in law wrote a will that had been tendered in evidence by the Objector. The alleged will was never read during the burial service of the deceased mother. Shown photographs taken during the burial service, the Petitioner exclaimed that she should not be asked questions on the photographs because she knew few members and in any event they were taken outside her house. She could not therefore tell whether PW2 was in the photographs.

The last witness called by the Petitioner was one **Paul Muriithi Ndegwa**, a former chief of Kabaru Location. He was the chief of Warazo location between 1969 and 1990. He chaired the committee that was allocating the land from the Government. The deceased was among those allocated. He produced in evidence a list of all the recipients of the land. Land was being allocated to individuals and not families. The deceased's mother was not among those allocated land.

Questioned by **Mr. Mugambi**, he responded that he did not know the circumstances under which the deceased was registered as owner of the suit premises. That brought to a close the Petitioner's case. Thereafter parties agreed to file and exchange written submissions. I have since carefully read and considered them together with cited authorities.

In my view the resolution of this dispute will turn on a very narrow but important legal consideration which is whether the suit premises formed part of the estate of the deceased and therefore available for distribution. From the evidence both documentary and oral tendered by respective parties, it is not in dispute that the suit premises are still registered in the name of Government of Kenya. Indeed the green card tendered in evidence has one and only entry dated 25th July 1997. It is the first and only entry. The name of the registered owner is given as "**GOVERNMENT OF KENYA.**" This is the registered proprietor of the suit premises to date. The same information is contained in the certificate of official search tendered in evidence as well. As at that time the deceased passed on therefore, the suit premises had not been transferred and registered in his name. To date the said suit premises have not been transferred and registered in the name of the deceased. The Petitioner and Objector agree that much. Now if the suit premises are not registered either in the name of the deceased or their deceased mother, on what basis can the Petitioner and the Objector claim that it belongs to the estate of the deceased whether whole or partially and therefore available for distribution? I cannot think of any. Yes the Petitioner and Objector have been in occupation of the suit premises since 1963 courtesy of the deceased and the Government. However that fact of occupation does not alter the legal position that the suit premises do not belong to the estate of the deceased. Instead it still belongs to the Government of Kenya. For now, both the Petitioner and Objector are mere licensees. They occupy the suit premises courtesy of the Government. The Petitioner cannot therefore claim superior rights over the suit premises as compared to the Objector.

According to the interpretation section of the law of succession Act, that is to say, Section 3(1) thereof “Estate” **means the free property of a deceased person.**” And what is “free property”? It is defined in the same Section as “..... **In relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.....**” Going by this definition can it be really said that the suit premises formed part of the estate of the deceased and or that it was free property of the estate of the deceased. The answer is of course a resounding NO. The property having been registered in the name of the Government, it did not belong to the deceased. In other words it was not free property of the deceased. Secondly, the suit premises having been registered in the name of Government, the deceased could not in his lifetime have legally, competently and freely disposed off the same.

The suit premises were registered under the Registered Land Act. Section 27 thereof is very emphatic. The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. How about Section 28? It provides that the rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in the Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever. So there it is. As of now the suit premises are vested in Government absolutely and neither the Objector, the Petitioner and or the deceased have a right to claim it.

Much as the deceased or his mother may have been allotted the suit premises, allotment perse as understood in law does not confer right of title to the suit premises. It is common knowledge that allotments come with conditions. If those conditions are not fulfilled by the allottee within a specific period of time, the allotment may be recalled. In other words what I am saying is that there is no guarantee that the suit premises shall eventually be transferred and registered in the name of the deceased in as much as the Petitioner has paid for the title deed.

All said and done I am satisfied that the suit premises did not form part of the estate of the deceased and therefore available for distribution to the beneficiaries and or dependants of the deceased. Since this was the only asset for which the application for confirmation of grant had been made, I find that there is nothing left to distribute. Accordingly I would for what it is worth allow the application for confirmation of grant however with a rider that **Nyeri/Warazo/77** does not form part of the estate of the deceased and therefore available for distribution among the beneficiaries and dependants of the deceased if any. Otherwise the Protest is dismissed. I make no order as to costs.

Dated and delivered at Nyeri this 30th day of June 2009

M. S. A. MAKHANDIA

JUDGE