



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE 182 OF 2003

IN THE MATTER OF THE ESTATE OF MUCHIRI MWENJE – DECEASED

AND

LOISE WAMUYU MUCHIRIPETITIONER

VERSUS

GERALD WAMBUGU WANJIRUPROTESTOR

R U L I N G

Muchiri Mwenje hereinafter referred to as “*the deceased*” passed away on 28th December 1967. His wife, **Loise Wamuyu Muchiri** hereinafter referred to as “*the Petitioner*” on 20th May 2003 petitioned for the grant of letters of Administration intestate. In the affidavit in support of the application, she indicated that the deceased died intestate and left the following surviving him;

- (a) **Herself**
- (b) **Grace Wangui Kamau – married daughter**
- (c) **Gladys Wangechi Ngunjiri – married daughter**
- (d) **Margaret Ngima – unmarried daughter**
- (e) **Kesiah Njeri – unmarried daughter**

The only asset of the deceased’s estate was indicated as L.R. No. **Ruguru/Sagana/178** hereinafter referred to as “*the suit premises*”.

On 4th December 2003 **Gerald Wambugu Wanjiru** filed an application seeking leave to file objection to the petition aforesaid out of time. It would appear that the said application never saw the light of day for on 14th October 2003, a grant of letters of Administration intestate had already been issued to the Petitioner. On 25th March 2004, the Petitioner took out an application for confirmation of grant. She proposed that the suit premises go to her absolutely. **Gerald Wambugu Wanjiru** again entered the fray. He filed an affidavit of protest against the confirmation

of grant alleging that he was related to the deceased by being his nephew. Besides himself, he also had

two brothers namely **Peter Gichuhi** and **Paul Mwenje Muchiri** who were all adults and two sisters; **Mary Muthoni Wanjiru** and **Esther Wangui Wanjiru** all adults as well but unmarried. That their mother **Teresa Wanjiru Mwenje** who was a blood sister to the deceased had died on 14th September 1998. She was unmarried and did not have any other estate and they were therefore dependants of the deceased. That they had always lived on the suit premises utilising 1.8 acres thereof that was clearly and physically demarcated on the ground and had planted 284 coffee stems, installed irrigation water through Sagana Water Project and finally had their residences in their portion of the suit premises. It was his proposal therefore that the suit premises be subdivided into two equal portions measuring 1.8 acres each. One portion should go to the Petitioner whereas the other portion should go to the Protester and his siblings.

On 7th April 2005, **Okwengu J.** gave directions that “..... **The issue of confirmation of grant to be disposed off by way of viva voce evidence....**” On 16th November 2005 the hearing commenced before the said judge. The protester was first off the blocks. He testified that the deceased was his maternal uncle. His unmarried mother **Teresa Wanjiru Mwenje** was a sister of the deceased. Besides the Protester, she had 4 other children who were all adults. The Petitioner was her aunt and a wife of the deceased. He confirmed that the deceased’s only asset was the suit premises. Their mother passed on in 1992. Before then the deceased had subdivided the suit premises into two equal portions. He gave one portion to

his wife, the Petitioner and the 2nd portion to his mother jointly with the Protester’s mother. He was brought up on the suit premises. Currently the protester and his siblings were utilising 1.8 acres of the suit premises after their grandmother had passed on. The portion occupied by them is physically demarcated on the ground by a trench. They have connected water to their portion and planted 280 coffee stem. He therefore urged the court to adopt his proposed scheme of distribution.

Cross-examined by **Mr. Wahome**, learned Advocate for the Petitioner, he answered that where the suit premises are located is a settlement scheme. That the deceased and their mother had initially come from Mukurweini. He did not know whether his mother had another piece of land known as **Muhito/Gaturia/643**. He conceded though that the suit premises had prior to being allocated to the deceased belonged to the Government. That the deceased did not inherit the suit premises from his parents. He also conceded that he had nothing in writing to confirm that the deceased had given his mother a portion of the suit premises. Not even a consent from the land control board for subdivision and transfer. He denied however that he entered the suit premises forcefully after the year 2000. He also denied having gone to the chief to seek assistance and or that he is the one who ordered them into the suit premises.

The 2nd witness called the by Protester was **Joseph Kaniaru Wahi**. He came to know the deceased when he moved to Sagana around 1965. He was then given the suit premises by the D.O. and he moved into it. By that time, the deceased was living with his sister, **Waruguru** who had a baby. He recalled that the deceased had once called him and one, **Kabugu** and told them that he was going to subdivide the suit premises so that he could reside on one portion and his mother and sister on the other. They proceeded to subdivide the land equally and planted trees in those terms. The reason for the subdivision was that the petitioner and her mother in law used to quarrel over the same. Since then the occupation of the suit premises has remained that way. He confirmed that the Protester, his brothers and sisters have planted coffee trees and bananas on the suit premises.

Under cross-examination he stated that he was not related to the deceased in any way. His role had been to put marks to show the portion the deceased’s mother would occupy and the one the Petitioner would occupy. He was never told that the Protester’s mother would inherit the portion occupied by her mother. He had no idea about the deceased’s ancestral land at Mukurweini. He remembered though a time when the Protester’s and his siblings were chased from the suit premises and they rented some residence at a shopping centre. The chief however intervened and they were returned to the suit premises.

On 12th October 2006, when the cause came up for further hearing, **Okwengu J** directed that since she

was proceeding on transfer she would no longer hear the cause. Instead proceedings in the cause would be typed and a hearing date fixed before another judge. On 12th November 2007 parties agreed that the cause proceeds from where **Justice Okwengu** had left. On 17th July 2008 the hearing recommenced before me with **Mr. Karingithi**, learned advocate for the Protester closing his case.

It was now the turn for the Petitioner to tell her story. It was along these lines; the deceased was her husband. The Protester was her late husband's sister's son. The protestor could not inherit a portion of the suit premises as the deceased had bought the suit premises with his own money. She denied that the Protester had ever resided on the suit premises. That his mother had been married but later came back and began residing with her mother who was then staying with them. As far as she was concerned, the protestor stays on a plot at shopping centre at Kibugu. He does not utilise 1.8 acres of the suit premises. Neither has he planted 284 coffee stems. Much as water had been installed in a portion of the suit premises claimed by the protestor it was forcefully done by the local chief. Prior to the death of the deceased the protestor was not depending on him as he was born in 1977, 10 years after the death of the deceased. There was ancestral land in Muhito registered in the name of **Ndirangu Mwenje**, a brother of the deceased. That is where the protestor should direct his claim. The deceased died on 28th December 1967. The title deed was issued in 1968. The deceased could not thus have given out the suit premises when he was dead.

Cross-examined by **Mr. Karingithi**, she responded thus; that the deceased was the D.O's driver. The D.O. gave him the suit premises in or about 1962. Later his mother came and joined them in the suit premises. She was allowed by the deceased to plant potatoes and thereafter she would go back to Muhito. The protestor's mother came to the suit premises long after the deceased had passed on. The suit premises were never demarcated as claimed by the protestor and his witness. The Protester's stay on the suit premises is on the authority of the local chief. She conceded though that the protestor delivers coffee to the same factory as herself. Further much as they have connected water to a portion occupied by them, they were forced into the suit premises by the same chief. When she tried to evict the Protester and his siblings, they were brought back by force by the chief. When the protestor's mother passed on she was buried on a portion occupied by the protestors. The same goes for the deceased's mother.

Following the close of the Petitioner's case, parties agreed to file and exchange written submissions. The same were subsequently filed and I have carefully read and considered them. To my mind however there are basically two issues for determination in this cause to wit, whether the protestor and his siblings are entitled to a share of the deceased's estate and secondly, costs.

It is common ground that the suit premises is not family and or ancestral land. It was purchased by and or allocated to the deceased by the then D.O. for the area. It is also common ground that the family land is at a place called Muhito. Having obtained the suit premises through his own means, it cannot be said that the deceased held the suit premises in trust for himself and his sisters, one of whom was the protestor's mother. It is also common ground that once the deceased obtained the suit premises he invited his mother to come and stay with him on the suit premises only to be joined later by the protestor's mother. It is also common ground that the suit premises are registered in the name of the deceased. It is also common ground that the petitioner and protestor reside on the suit premises. Finally it is also common ground that the petitioner is the surviving widow of the deceased whereas the protestor is his nephew.

It would appear however that the Protester's claim to a portion of the suit premises is anchored on the fact that they reside on the same and therefore they are or were dependants of the deceased. However and as correctly submitted by **Mr. Wahome**, Section 35(1) and (5) of the Law of Succession Act would appear to lock out the Protester's claim. These sections of the law deal with situations where the deceased has left a surviving spouse and a child or children. Where an intestate has left one surviving spouse and a child or, children, the surviving spouse shall be entitled to a life interest in the whole residue of the net intestate estate. On the other hand section 35(5) provides interalia **"..... subject to the provisions of section 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children....."** The Petitioner is therefore entitled to a life interest in the estate and

upon her death, the net intestate shall devolve equally among her surviving children. The Protester and his siblings are not the children of the deceased and accordingly their claim to the estate of the deceased cannot be sustained.

What consists of the estate of the deceased? According to the Law of Succession Act, estate “..... **means the free property of a deceased person....**” Free property is further defined in the said Act “..... **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.**” As already stated, the deceased acquired the suit premises by his own means. It was not family and or ancestral property that he would otherwise have inherited. The suit premises are registered in his name. Accordingly he was legally competent to freely dispose it of in his lifetime. It does not matter that the protester, and his mother were staying in a portion of the suit premises that he had given them. It does not matter that when the protester’s mother and Petitioner’s mother in law passed on, they were all buried in a portion of the suit premises. Had the suit premises been family or ancestral land at Muhito then perhaps the story would have been different. The Protesters would then be perhaps entitled to a share of the same on the basis that their mother who was unmarried was entitled to inherit a portion thereof on the basis that it was family or ancestral land and had been unmarried daughter entitled to inherit her father’s estate. The situation here is however different. It is that the suit premises were acquired by the deceased by his own means and he later invited their mother to join them. The protester’s mother soon thereafter joined her mother on the suit premises. Further the deceased was a mere brother and not father to the Protester’s mother. The deceased did not acquire the suit premises in trust for the Protester’s mother. The evidence is not clear as to when the protester’s mother entered the suit premises. The alleged subdivision of the suit premises was between the deceased and his mother and not the protester’s mother. The Protester’s claim, if any, therefore can only be the subject of other proceedings perhaps with regard to family/ancestral land and not in this cause.

Much as the Protester claims to have occupied a portion of the suit premises all his life, there is evidence however that at some point the protester, his brothers and sisters were evicted from the suit premises and it took the intervention of the local chief to force them back into the suit premises. This was the evidence of the Petitioner which received some support and or boost from the Protester’s own witness **Joseph Kaniaru Wahi**. Yes, the Protester may have planted coffee and may also have connected irrigation water to a portion of the suit premises they occupy. However, that does not alter the position in law. The suit premises belonged to the deceased. Indeed the Protesters and his siblings would appear to be mere licensees to the suit premises. If anything it should be their late mother who should be pursuing the claim if at all.

The Protester and his siblings if they are pursuing the claim on behalf of their deceased mother then their claim is bound to fail, for they have no grant of letters of administration intestate for their late mother’s estate.

Looking at the affidavit of Protest as well as the evidence of the protester, it would appear again that they are claiming a portion of the suit premises on the basis that they were dependants of the deceased. However this cannot possibly be true. The deceased passed on in 1967. Yet the Protester was born in 1977. How then could the Protester and his siblings have been dependants of a deceased person? In any event going by the definition of a dependant in section 29 of the Law of Succession Act, the Protester and his siblings do not pass for dependants of the deceased for they are neither wife or wives, or former wife or wives of the deceased nor his children. They are also not parents, step parents, grand parents, grand children, step-children, children whom the deceased had taken into his family as his own, brother, sisters, half-brothers and half-sisters.

The upshot of the foregoing is that I find no merit in the protest and accordingly dismiss it. The Protester and his siblings have no legal right or otherwise to claim a portion of the suit premises. They should direct their grievances to ancestral land situate at Muhito initially registered in the name of **Ndirangu Mwenje**, the brother of the deceased as well as the Protester’s mother. Going by documents of title tendered in evidence, the said parcel of land **Muhito/Gaturia/633** was ancestral land which was transferred into the name of the **Eva Wangechi Ndirangu** the wife of **Ndirangu Mwenje**. Since then the

said **Eva Wangechi Ndirangu** has subdivided the land and transferred portions thereof to her sons.

As for costs, I am of the view that this being a family dispute, no party should be condemned in costs. Accordingly there shall be no order as to costs in this cause. Otherwise the grant is confirmed in terms of the application for confirmation of grant filed by the Petitioner dated 8th March 2004.

Dated and delivered at Nyeri this 18th day of June 2009

M. S. A. MAKHANDIA

JUDGE