



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE 310 OF 1998

IN THE MATTER OF THE ESTATE OF MACHARIA WANYEKI (DECEASED)

And

MARY MUMBI GITUNDU.....PETITIONER

Versus

PENINAH WANJIRU MACHARIA.....OBJECTOR

RULING

Mary Mumbi Gitundu, hereinafter referred to as “*the petitioner*” on 17th December, 1998 petitioned this court for the grant of letters of administration in respect of the estate of his brother-in-law, **Julius Macharia** who had passed on intestate on 2nd January, 1994 hereinafter referred to as “*the deceased.*” In the affidavit in support of the petition, she indicated that the deceased left the following surviving him.

- (a) **Herself as a sister-in-law**
- (b) **Peninah Wanjiru Macharia – wife**
- (c) **Njeri Wanyeki – sister**

She also indicated that the only asset left behind by the deceased was land parcel No.Muhito/Ruthanji/236 measuring 3.6 acres, hereinafter referred to as “the suit premises.”

When **Peninah Wanjiru Macharia** was cited as required, she responded by filing an objection to the making of the grant claiming that the petitioner had no interest to inherit in the estate and was indeed a stranger to the family of the deceased as she was not even a real wife of the deceased’s brother. She contemporaneously with the filing of the objection filed petition by way of cross application for a grant and answer to petition.

The matter was then placed before **Juma J. (as he then was)** on 6th March, 2000. Having heard both parties he stated;

“.....Parties advised that objector in whose husband’s name the land is registered should take out letters of administration in respect of her husband’s estate, the present petitioner shall then lodge a claim.....”

Thereafter the matter never took off for one reason or another until almost 10 years later when it came up before **Kasango J.** on 19th February, 2008. The Judge then directed that a grant be issued in joint names of the petitioner and objector and because of the age of the matter, the court dispensed with requirement of 6 months statutory period before the grant could be confirmed.

Through **Messrs Gathiga Mwangi & Company Advocates**, the petitioner on 12th June, 2008 filed an application for confirmation of grant. In the affidavit in support of the application, she proposed that she gets 1.6 acres whereas the objector gets 2.0 acres out of the suit premises respectively. That application elicited an affidavit of protest from the objector filed on her behalf by **M.K. Kiminda Esq, Advocate**. She deponed that the suit premises were registered in the name of her deceased husband. That the petitioner’s husband was a brother to the deceased and who though staying on the suit premises, had not laid any claim though she was not averse to giving him a portion measuring 0.9 acres being that portion wherein the petitioner’s husband had constructed and cultivated. She proposed that the suit premises be shared in the following ratio; Petitioner – 0.9 acres and herself – 2.7 acres.

On 15th July, 2008, **Kasango J.** directed that the protest and summons for confirmation of grant be heard simultaneously by way of viva voce evidence.

On 13th May, 2009, the hearing commenced before me. It was the objector’s case that the deceased was her husband who had 3 brothers and sister – **Gitundu, Wachira, deceased** and **Njeri**. The suit premises were registered in the name of the deceased. She knew the petitioner by seeing her in Gitundu’s home. She proposed that the suit premises be subdivided into 4 equal portions and shared between herself, **Gitundu, Wachira** and **Njeri**. **Wachira** left his portion of the suit premises to the deceased when he relocated to unknown place and has never come back. **Njeri** stays at Nyaribo. However her portion was intact. The suit premises were actually subdivided by her father-in-law.

Cross-examined by **Mr. Mwangi**, learned counsel for the petitioner she stated that the suit premises initially belonged to her father in law though registered in her husband’s name. She confirmed that **Njeri** and **Wachira** were not claiming anything from the suit premises. She did not want the petitioner to get 1.6 acres because she was not the one who partitioned the land. She denied that she had demanded for 2.7 acres in her affidavit of protest. She now only wanted what had been allocated to her on the ground. **Wachira** had left his portion of the suit premises to the deceased and that is why she did not want it shared out with the petitioner. She conceded though that the heirs to the estate were herself and the petitioner.

The objector called a sister-in-law, **Gladys Njeri Wanyeki**, as a witness. She testified that the deceased was her elder brother. She confirmed that they were 4 children in the family and she was the only daughter. **Wachira**, a brother relocated from the village and had never been seen since. She proposed that the suit premises be shared equally among the four. Nonetheless she was surrendering her share to the objector. She also stated that her brother who disappeared had left his share to the deceased.

Cross-examined by **Mr. Mwangi**, she responded as follows that the land belonged to their father. The deceased never gave her any money but brought her up. **Gitundu** utilized a portion of the suit premises assigned to him by their father and that is what the petitioner should get. Finally she stated that her brother’s portion who disappeared should not be shared with the petitioner. She wished that it be left intact or the court should decide to whom it should go.

The last witness called by the objector was **Jeffers Mwangi Macharia**, her son with the deceased. His evidence was along the same lines as his mother and aunt. However he confirmed that the suit premises should be shared equally among the 4 children of the deceased. **Wachira’s** portion should go to them since he had surrendered it to the deceased in 1963. In 1965, **Wachira** had come back and told the deceased to retain his portion of suit premises until he come back. He has never come back.

Cross-examined by **Mr. Mwangi**, he answered that the suit premises have boundary features which were not fixed by clan elders. That he had visited **Wachira** in Kigumba District, in Western Uganda where he had settled.

That marked the close of the objector's case.

The petitioner testified that she was the wife of Gitundu, a brother of the deceased. She preferred that she gets 1.6 acres whereas the objector gets 2 acres out of the suit premises. This is how it had been apportioned by clan elders in 1987. The land had been subdivided in 3 portions. However she only utilizes 1 acre as PW3 had interfered with the boundary marks. She concluded her testimony by stating that the suit premises should be subdivided into 2 equal portions.

Cross-examined by **Kiminda**, learned counsel for the objector, she stated that the suit premises were apportioned by clan elders in 1994. That **Gitunda** died 2 years after she had married him. That **Wachira's** portion was subdivided into 3 portions. **Njeri** has a portion of the suit premises which she does not however utilize.

The only witness called by the petitioner was **Joseph Njombuu Macharia**. However this witness was in court through out the proceedings. Though I allowed him to testify, his evidence has to be dealt with abundant caution. He testified that he was a nephew to the deceased. He was among those who subdivided the suit premises into 3 portions that were meant for **Gitundu, Wachira** and deceased. The sub-chief, **Wachira Mukunya** was present. The subdivision has been maintained to date. He now proposed that **Wachira's** portion be subdivided between the petitioner and objector.

Cross-examined by **Mr. Kiminda**, he claimed that the suit premises were subdivided after land consolidation and demarcation. That **Njeri** was not given a portion of the suit premises as she did not ask for it. She cannot now claim the same. With that the petitioner closed her case.

Thereafter parties agreed to file and exchange written submissions. They subsequently did so. I have carefully read and considered them. The issues for determination herein were correctly framed by **Mr. Mwangi**. These are who is entitled to the suit premises and in what proportion? Secondly, who is entitled to **Wachira's** share if any?

It is common ground that the protester is a wife of the deceased. It is also common ground that the petitioner was a wife of the brother of the deceased by the name of **Gitundu** although initially the protester had disputed that fact. It is common ground as well that the deceased was registered as the proprietor of the suit premises in trust for his two brothers and a sister. It is also common ground that one of the deceased's brother disappeared long time ago and he has never resurfaced. It is also common ground that the petitioner and objector are agreed that the suit premises ought to be shared among them. The only outstanding issue being the proportions. Whereas the objector in her affidavit of protest claimed 2.7 acres, in her evidence, she made an about turn and now wanted the suit premises divided into 4 equal portions and shared among the deceased's sibling. However the portion meant for **Wachira** should go to her as he had surrendered the same to his deceased husband. PW1 too indicated that her portion should go to the objector. If this scheme of distribution is adopted it will mean that the objector will end up with 2.7 acres whereas the petitioner will end up with 0.9 acres. On the other hand the petitioner proposed in her affidavit in support of the application for confirmation of grant that she gets 1.6 acres whereas the objector gets 2.0 acres. However in her evidence, she also beat a hasty retreat and now demanded that the suit premises be shared among them equally. This will mean that the petitioner and objector each gets 1.8 acres each.

From the onset I must say that I found both the petitioner and the objector unreliable witnesses. They were not candid with the court. They all departed from their initial pleadings that they had filed with regard to distribution. In particular I found the evidence of the objector and her son untruthful and quite intriguing. The objector when she filed her objection to the grant indicated that the petitioner was a stranger to the estate of the deceased as she was not even a wife of the deceased's brother, **Gitundu**. Of course she knew this was a lie. In her evidence she maintained that she just sees the petitioner in

Gitundu's compound, meaning that she was not a wife. However under cross-examination she stated that **"the heirs to the estate is myself and the petitioner."** In her protest, she had demanded 2.7 acres. However, when cross-examined on her evidence she pleaded ignorance as to what she had actually claimed in the affidavit of protest. She went on to claim for herself, **Wachira's** portion on the basis that he had left it to her deceased husband. However she tendered no compelling evidence in support thereof. She was not present when Wachira allegedly gave his portion to the deceased. Her evidence on this aspect of the matter was purely hearsay. Her son (PW2) fared no better. He was the only one to claim that after **Wachira** disappeared in 1963 he resurfaced in 1965 and told his father, the deceased to mind his portion of the suit premises until he came back. His own mother, the objector made no reference to such an encounter. Neither PW1, the sister to the said **Wachira** could testify to that aspect of the matter. If indeed it was true that **Wachira** had resurfaced as claimed by PW3, the two would have known and it would not have escaped their attention in their evidence. Similarly PW2 claimed to have visited **Wachira** in Uganda sometimes. However he did not indicate when this was and the purpose of the visit. To my mind, the evidence of PW3 was self-serving and make believe.

The petitioner recanted in her evidence what she had proposed in her application for confirmation of grant for no apparent reason. That goes to the credibility of her evidence as well. She claimed that the suit premises had in 1987 been subdivided into three portions by clan elders and shared out to them. So that by the time she was filing the petition as well as application for confirmation of grant she knew that her entitlement going by her said evidence would have been 1.2 acres. So on what basis did she demand 1.6 acres?

The only evidence I am left with and on which I should act is that of PW1, sister-in-law to both the petitioner and protester. However, her evidence is acceptable limited to the issue as to how the suit premises should be sub-divided. She proposed that the same should be subdivided into four equal portions and shared among the deceased's siblings, i.e. the deceased, herself, **Wachira** and **Gitundu**. That sounds sensible to me and accords with justice and fair play. However, PW1's offered her share of the same to the protester. She said so in her testimony.

Who then should take **Wachira's** share? Ordinarily, since there is no evidence that **Wachira** passed on his share of the suit premises should be left intact. However it is possible that he may as well have passed on. In the premises, if his share is left intact, it may in future be a source of further friction between the petitioner and objector. The decision on the issue which best commends to me is that **Wachira's** share of the suit premises should be shared equally between the petitioner and protester. However the two will hold **Wachira's** portion aforesaid in trust for him just in case he resurfaces and lodges his claim.

In the end the grant shall be confirmed on these lines

- **Petitioner - 1.35 acres**
- **Protester - 2.25 acres**

There shall be no order as to costs in view of the petitioner's and objector's relationship.

Dated and delivered at Nyeri this 31st day of July, 2009.

M.S.A. MAKHANDIA

JUDGE