



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Succession Cause 308 of 2003**

***IN THE MATTER OF THE ESTATE OF NJOGU GITHIOMI (DECEASED)***

***And***

**ALI NDIRITU NJOROGE.....PETITIONER**

**Versus**

**JOHNSON KIRAGU WACHIRA.....PROTESTER**

**R U L I N G**

On 17<sup>th</sup> March, 1997, one **Njogu Githiomi** hereinafter referred to as "*the deceased*" passed on. **Ali Nderitu Njoro**ge, hereinafter referred to as "*the petitioner*" and describing himself as the son of the deceased petitioned for grant of letters of administration intestate. He indicates that the deceased died intestate but left the following surviving him:-

- (a) **Esther Wangui Njogu**
- (b) **Asumani Ngugi Kiragu**
- (c) **Said Salim**
- (d) **Ali Nderitu Njoro**ge and
- (e) **Johnson Kiragu Wachira**

That petition met resistance from **Johnson Kiragu Wachira**, hereinafter referred to as "*the protester*" as well as one, **Daniel Maina Murugi**. The objection of **Daniel Maina Murugi** was on the basis that the deceased was his grandfather and he was entitled to apply for the grant in priority to the petitioner. The petitioner was his uncle though and had not in his petition included his name nor that his old grandmother, the deceased's wife. Contemporaneously with the filing of the objection the said **Daniel Maina Murugi** also filed petition by way of cross-application for grant, answer to petition for a grant. As for the protester, he replied to the citation claiming that he was the lawful heir and the only beneficiary of the estate of the deceased. The deceased was brother of his father and held his entire estate in trust for him having been given the same by his father.

On 14<sup>th</sup> July, 2005, a temporary grant was however issued in the joint names of the petitioner and protester. Subsequent thereto, the petitioner applied for the confirmation of the

grant. He proposed that land parcel number **Mahiga/Kihome/177** hereinafter referred to as “*the suit premises*” be shared as follows:-

- **Esther Wangui Njogu - 1.04 Hectares**
- **Petitioner - 1.02 Hectares**

The protester in no time filed a protest claiming that the deceased was his uncle. He had no child surviving him at the time of his death. That the deceased left him and his wife, **Esther Wangui Njogu** occupying the suit premises and had in fact already subdivided the same between the two of them. Since then he had planted tea, coffee and crops. The petitioner was a cousin who had never occupied the suit premises nor expressed any interest therein. The protester too had bought 0.8 acres from the deceased by paying off one, **Wariari Wanjuna**. He proposed that the estate be distributed as follows:

- (a) **Himself – 3 acres**
- (b) **Esther Wangui Njogu - 2.09 acres**

On 24<sup>th</sup> May, 2007 directions were given that the protest be heard by way of viva voce evidence. Thereafter the cause came up for hearing on 5<sup>th</sup> December, 2007 but could not take off on the protester was absent. The cause next came up for hearing on 7<sup>th</sup> October, 2008. Again the protester was absent. This time around **Kasango J** refused to grant any further adjournment and proceeded to dismiss the protest and confirmed the grant. However by an application dated 23<sup>rd</sup> October, 2008, the protester sought the setting aside of the order dismissing the protest and reinstatement of the same for hearing of the same on merits. On 26<sup>th</sup> January, 2009, that application was by consent of the parties allowed.

Thereafter the hearing commenced before me on 20<sup>th</sup> May, 2009. The protester testified that the deceased was his paternal uncle. The deceased had a wife, **Esther Wangui Njogu** who was alive. He had not known the petitioner before these proceedings. He was not a son of the deceased. Though the deceased had a wife, they had no children. The deceased was the registered proprietor of the suit premises. The petitioner had never stayed on the suit premises. He only came to the suit premises following the death of the deceased. However he has not put up any house on the same. However the protester stays on the suit premises with the wife of the deceased which he has developed by planting coffee, tea and fodder crops. The suit premises he suggested should be inherited by him and the widow of the deceased as it had been bought by his father on behalf of the deceased whereas he occupies 3 acres, the widow occupies the other 2 acres and there is a boundary on the ground.

Cross-examined by the petitioner, he answered that he did not know whether the 2 parcels of land belonged to their grandfather and had not been shared out. He maintained that he did not know the petitioner. That marked the close of the protester’s case.

As for the petitioner, it was his case that the deceased was his young paternal uncle. He proposed that the suit premises be shared between **Esther Wangui Njogu** and **Asman Ngudi Kiragu**, his elder brother. The suit premises originally belonged to their grandfather though it is now registered in the name of the deceased. He was so registered as a trustee to their father and his family. The grandfather had 2 parcels of land at Kihome and Kagonye. He had 3 sons, his father, protester’s father and the deceased. A family meeting was called following the death of the deceased. However the protester refused to attend. It was then decided that Kihome 391 be given to the protester where currently stays whereas the deceased’s widow was given Kihome 177 out of which she was entitled to 1.04 hectares. His brother **Asman Ngugi Kiragu** was to get 1.02 hectares out of the same representing their father’s share.

Cross-examined by **Mr. Kiminda**, learned counsel for the protester, he readily concede that he was not a son of the deceased and had lied in the petition when he stated so. He was staying in his own parcel of land in Naivasha which he had bought. His father died long time ago and was buried in cemetery. His mother was alive and also staying in Naivasha. The petitioner did not want anything from the estate of the deceased. He wanted his brother to inherit 2.7 acres from the suit premises. He conceded to that neither his brother nor himself had stayed on the suit premises. The suit premises were however occupied by the protester and the widow of the deceased. Indeed the protester has planted coffee, tea and fodder crops in the suit premises and cultivates a bigger portion of the suit premises. The petitioner nor his brother have ever cultivated the suit premises nor stayed thereon. They all stay in Naivasha. She maintained that the 2 parcels of land should be shared equally among the 3 brothers. The protester though was not present when she sat with the petitioner and decided on how the suit premises should be distributed. With this evidence, the petitioner closed his case.

Thereafter, parties agreed to file and exchange written submission which was subsequently done. I have carefully read and considered them. The issue for determination is whether the petitioner or protester is entitled to a share of the suit premises besides **Esther Wangui Njogu**, the deceased's widow. It is common ground that the deceased's was the husband of **Esther Wangui Njogu**. It is also common ground that the suit premises were registered in the name of the deceased. It is also common ground that though the deceased was married to **Esther Wangui Njogu**, there were no resultant issues from the coverture. It is also common ground that the deceased was a brother to the protesters father as well as petitioner's father. In other words both the petitioner and protester were nephews of the deceased. The petitioner's position was that the deceased's estate be shared between his widow and his brother (**Asuman Ngugi**) at the ratio of 3.2 and 3.1 acres respectively. However the protester's position is that the same be shared between himself and widow at the ratio of 3 acres and 2.09 acres respectively. From the foregoing it is quite apparent that there is no dispute at all as to the widow's entitlement to the estate.

I have problem understanding the petitioner's entitlement to a portion of the estate. The evidence on record is that the petitioner and his siblings have stepped or stayed on the suit premises all these years. Indeed they seem to have relocated to Naivasha where they settled with their father and mother. When their father passed on, he was buried in a cemetery presumably in Naivasha and not on the suit premises. Their mother though is alive. One would have imagine that perhaps she was the best person placed to claim the suit on account of her husband since the petitioner's claim was anchored on family trust. One also wonders whether the petitioner obtained letters of administration in respect of his father's claim to enable him successfully mount this claim.

I do not believe that the petitioner was a honest truthful and believable witness. In his petition for letters of administration intestate, he described himself as a son of the deceased. That was a lie and he knew it. Yet he proceeded to perpetuate that he until he was confronted on the issue in cross-examination. It was then that he conceded that the deceased was not his father, rather, he was his paternal uncle. His witness (DW2) **Esther Wangui Njogu**, a widow of the deceased too confirmed that the petitioner was not her son nor indeed a son of the deceased. It is common ground that the deceased passed on childless. If the petitioner can lie on such mundane thing, what else has he not lied about.

In his application for confirmation of grant, the petitioner proposed that portion of land from the suit premises which would otherwise have gone to his father's estate should instead go to his brother, **Asuman Ngugi Kiragu**. Why the petitioner wants his brother aforesaid who did not at all feature in court proceedings is indeed strange. There is no denying that the said **Asuman Ngugi Kiragu** is an adult person. He can be able to mount and fight his battles. He does not need a proxy to fight his battles. He never appeared in court to confirm that he wanted for himself 1.02 hectares out of the suit premises to himself as proposed by the petitioner. Supposing the court agreed and went along with the petitioner's proposal only for the said

**Asuman Ngugi Kiragu** to turn around and say I did not ask for the said portion of the suit premises. The petitioner in his own evidence categorically stated that he had no interest in the suit premises. Much as the widow was in agreement with the scheme of distribution proposed by the petitioners, it turned out that she did not even know how the petitioners had done the distribution. The net effect of the proposal of the petitioner is that a stranger who has not expressed a desire or interest in the estate is being commandeered into the estate by the petitioner. He is unwilling suitor. This court cannot make an order in favour of a person who has not been a party to the cause.

The petitioner, his siblings have never occupied, utilized or developed even a portion of the suit premises. Evidence is galore on that aspect of the matter. Indeed it is the petitioner who surfaced after the deceased passed on and without consulting the widow commenced the instant proceedings. Initially the widow did not support the petitioner's sad action as according to her he was too fast for her. I do not know what has happened to change the widow's attitude towards the petitioner as exhibited in her evidence. It is however not in contention that the suit premises are occupied by the widow and protester. The latter occupies a bigger portion which is marked on the grounds. He has in fact planted coffee, tea and cattle fodder. In the circumstances if the proposal by the petitioner was to be functioned, it would be harsh and unconscionable as it will perhaps entail the petitioner uprooting the said coffee, tea and fodder crops. One even wonders, why the petitioner never pursued his entitlement to the suit premises in the life time of the deceased. There are boundary features on the ground separating the portion of the suit premises occupied by the protester and the widow. Those boundary features must have been placed by the deceased manifesting his intention that only the protester and his widow should inherit the suit premises. The widow has all along respected that partition and never realized any eye brows. Why should she now all of a sudden go into bed with the petitioner over the issue and against what her old man had intended. The widow never raised any objection as the protester went about developing the portion of the suit premises assigned to him as aforesaid. She never warned him that the petitioners family was entitled to a portion of the suit premises. She left the protester to extensively develop his portion of the suit premises. The petitioner and his family seem to have lost interest in the suit premises through out until the deceased passed on. In the circumstances of this case, I think that the most equitable way of going about this issue is to maintain the status quo.

For all the foregoing reasons, it is my finding that based on the evidence availed the petitioner is not entitled to a portion of the suit premises. Accordingly the grant is confirmed as per paragraph 11 of the affidavit of protest dated 7<sup>th</sup> may, 2007 and filed in court on the same day. I make no order as to costs.

***Dated and delivered at Nyeri this 22<sup>nd</sup> day of July 2009.***

**M.S.A MAKHANDIA**

**JUDGE**