



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE 5 OF 2001

IN THE MATTER OF THE ESTATE OF GEOFFREY NJORI S/O GACHOYA (DECEASED)

And

DAVID KARANJA NJOORI BENJAMIN MWANGI NJOORI.....PETITIONERS

Versus

LYDIA WAMUCII NJOORI.....PROTESTER

RULING

Pursuant to the death of one, **Geoffrey Njooi Gachoya**, hereinafter referred to as “*the deceased*,” **David Karanja Njori** and **Benjamin Mwangi Njooi**, describing themselves as the deceased’s sons hereinafter referred to as “*the petitioners*” on 5th January, 2001 took out a petition for Letters of Administration Intestate in regard to the estate of the deceased. In the affidavit in support of the petition, they indicate that the deceased had been married to 2 wives; **Lydia Wamucii Njooi** and **Susan Warigia Njooi**. Whereas he was blessed with 5 children from **Lydia**, he however had 8 children with **Susan**. The estate of the deceased consisted land parcel numbers:

- Ø **Tetu/Muthuani/329**
- Ø **Nyandarua/Ndaragwa/Kianjogu/199**
- Ø **Nyandarua/Ndaragwa/Kianjogu Block.1/125**
- Ø **Nyandarua/Ndaragwa/Kianjogu Block.1/126**
- Ø **Mutara/Kahutha**

In time a temporary grant was issued to the petitioners on 29th March, 2009. Through **Messrs Muhoho Gichimu & Co. Advocates**, the petitioners applied for the confirmation of the grant. In the affidavit in support thereof, they proposed that the estate of the deceased be shared as follow:-

“a) Shares in Muririchwa Land Buying Company equivalent to 70 acres.

- (i) David Karanja Njooi – 20 acres**
- (ii) Martin King’ori Njooi – 20 acres**
- (iii) Benjamin Mwangi Njooi – 15 acres**
- (iv) Ruth Wanjiru Njooi – 7.5 acres**
- (v) Elizabeth Wanjiku Njooi – 7.5 acres**
- b) TETU/MUTHUANI/329 – 13.3 acres**
 - (i) Meshack Kahuthia Njooi – 9 acres (absolute)**
 - (ii) Mary Njeri Njooi – 4.3 acres (absolute)**
- c) Shares in Muhotetu Land Buying Company equivalent to 31 acres**
 - (i) George Wachira Njooi – 19 acres**
 - (ii) Washington Maina Njooi – 11 acres**
 - (iii) James Migunda Njooi – 11 acres**
- d) Shares in Muhotetu Land Buying Company equivalent to 24 acres.**
 - (i) Peter Karani Njooi – 12 acres**
 - (ii) John Wachira Njooi – 12 acres**
- e) Muhotetu Land Buying Company Plot in Nyeri**
 - (i) James Migunda Njooi**
 - (ii) Martin King’ori Njooi**
- f) Muhotetu Land Buying Company Plot in Nyahururu**
 - (i) George Wachira Njooi**
 - (ii) David Karanja Njooi**
- g) Shares in East African Breweries Ltd.**
 - (i) Meshack Kahuthia Njooi”**

That proposal did not go down well with **Lydia** who apparently was the 1st wife of the deceased. Accordingly she banged in an affidavit of protest. According to her, the estate of the deceased consisted of the following:

- (i) Shares in Muririchwa Land Buying Company comprising of seventy (70) acres.**
- (ii) Tetu/Muthua-ini/329 comprising of 13.3 acres.**
- (iii) Shares in Muhotetu Land Buying Company comprising of 41 acres.**

(iv) Shares with East African Breweries.

It was her contention that following the death of the deceased on 18th may, 1987, the clan met in 1993 and it was agreed that the deceased's estate be shared equally among the 2 houses. Following that decision the deceased estate was shared as follows:

“(i) Shares at Muhotetu Land Buying Company:

- (a) Washington Maina Njooi (son) – 2nd house 11 acres**
- (b) Dan Migunda a grandson and son to James Migunda Njooi – 1st house 11 acres**
- (c) George Wachira Njooi (son) – 2nd house 19 acres**

(i) Shares at Miririchwa Land Buying Company (70 acres).

- (a) Susan Warigia Njooi (2nd house) – 40 acres**
- (b) Martin King'ori Njooi (1st house) – 23 acres**
- (c) Elizabeth Wanjiku Njooi (1st house) – 7 acres**

(ii) Shares at Kiriti.....24 acres were to be shared equally between the two houses.

(iii) Tetu/Muthuaini/329 (13.3 acres) were to be shared equally between the co-wives (Lydia Wamuchii Njooi and Susan Warigia Njooi).

(iv) Shares with East African Breweries – To be shared equally between the Co-wives.

(v) Pension was shared equally between the co-wives in 1993 at Kenya Shillings Thirteen thousands eight hundred and twenty seven only (Kshs.13,827.00) each.”

She also deponed that:

“1. That the following properties have already been disposed-off by the respective recipients and therefore not available for distribution.

- (a) Eleven (ii) acres out of the shares with Muhotetu Land Buying Company by Daniel Migunda.**
- (b) Thirty (30) acres out of the shares at Miririchwa Land Buying Company by Martin Kingori Njooi and Elizabeth Wanjiku Njooi.**

2. That the plots at Nyeri and Nyahururu are still owned by the Muhotetu Land Buying Company and the respective shares have not been determined and are therefore not available for distribution.

3. That it had been agreed that Tetu/Muthua-ini/329 be shared equally between the co-wives.

4. That I have lived on the said Tetu/Muthua-ini/329 since 1993 together with my deceased husband.

She further protested that the proposed distribution of **Tetu/Muthua-ini/329** was grossly unfair as the two beneficiaries all belong to the 2nd house yet she resides on the suit premises. If allowed, it will mean that she will have to relocate. She proposed that the same be shared equally between herself and her co-

wife.

On 27th February, 2007 directions were given as to the hearing of the application as well as the protest. It was to be by way of viva evidence. When the cause eventually came before me for hearing on 5th June, 2008 counsel sought the variation of the previous directions. They now wished to have the cause heard and determined on affidavits. Their wish was granted and they were also granted leave to file further affidavits. Such further affidavit was indeed filed on 26th June, 2008 by the 1st wife.

When the cause next came up for hearing, the parties yet again sought the variation of the earlier directions. They now wished to have the cause determined on oral evidence. That wish too was granted.

On 29th January, 2009, the hearing commenced before me. The protester testified and called 2 witnesses. Her evidence was that the deceased was her husband to whom she was married in 1946 at Mahiga. Soon thereafter they moved to Muthua-ini. The deceased married 3 other wives though she was the 1st wife. Two of these other wives abandoned the deceased. He was however left with **Susan Wariga Njoori** as 2nd wife. She knew the petitioners as children of the 2nd wife. The two wives stay on **Tetu/Muthua-ini.329**. Indeed for her she has occupied the same since 1940. She conceded that the deceased had land in Kieni and Ndaragwa which he gave out to his sons. The intention of the deceased was to subdivide those parcels of land and give them to his sons equally. However **Tetu/Muthua-ini/329** was to be left to the wives. It was her evidence that the wishes of the deceased were effected with regard to the 2 parcels of land aforesaid. Those wishes should be respected. As for Muthua-ini land, her wish was that the same be shared equally between the 2 wives. The clan had indeed subdivided it after the death of the deceased. According to the application, the petitioner wanted this piece of land to go to **Meshack kahuthu Njoori** and **Mary Njeri Njoori** who are all from the 2nd wife. This will mean that she moves out of the said parcel of land yet she had nowhere to go.

Cross-examined by **Ms Mwai**, learned counsel for the petitioners she stated that the deceased was a teacher. He had livestock at Ndaragwa numbering 200 heads. He asked the protester to go to Ndaragwa so as to take care of them. She did so until he passed on. She thereafter came back to Muthua-ini after 10 years. She denied that she had been relocated to Ndaragwa by the deceased. She never had a house at Ndaragwa. She was staying in a house belonging to one, **Solomon**, who had passed on. During the burial of the deceased, the Assistant Chief read out the wishes of the deceased contained in the blackbook but she could not remember the details. She denied having gone back to Muthua-ini forcefully after the burial of the deceased.

The witness called by the protester was **James Njoori Kigunda**, her son. He testified that the petitioners were from the 2nd house. That there was no dispute as to the dependants. He confirmed that the deceased had land in Tetu, Ndaragwa and Muhotetu. He denied that his father had indicated how his estate should be distributed. However after his death, a family meeting was held chaired by an uncle, **Kahuthia Gachoya**. A disagreement arose when the 2nd wife produced a blackbook which she purported was the will of the deceased. In the subsequent meeting the chairman reported that having studied the blackbook, he had decided to ignore the contents thereof. He opted to distribute the estate in accordance with Kikuyu custom. Each of the 3 parcels of land were to be split equally between the 2 houses. His mother had briefly relocated to Ndaragwa to take care of the deceased's livestock but came back following his death. The subdivision of Muthua-ini land was done a year after the death of the deceased and after a family meeting. Ndaragwa land was to be allocated to the co-wives by Board of Directors of the Company. Muhotetu land too was to be shared in that manner.

Cross-examined, he stated that the protester moved to Ndaragwa in 1975 to take care of the deceased livestock. He never saw the black book. However the contents therein were read. The Chairman of the family meeting gave reasons why he ignored those contents.

The final witness called by the protester was **Hebron Kinyua Kiongo**, secretary of Muriihchua Farm Company, a land buying company. The deceased was a member and had shares registered in the name of his 2 wives. Subsequent to his death the land held by the company as per the shares of the deceased was

subdivided between his 2 wives. He tendered in evidence a letter to that effect.

Cross-examined, he conceded that he could not tell who had said that the land be shared among the deceased's 2 wives and who should get which portion. That marked the close of the protester's case.

The petitioners testified along these lines; that the protester was their stepmother. They prayed for the adoption of the scheme of distribution proposed by them in the application since it captured the wishes of the deceased. It was the 1st petitioner who had written down in the blackbook, the wishes of the deceased. However the blackbook could not be availed in evidence as it was taken away by the Assistant Chief during the family meeting. The deceased wishes had been captured in their scheme of distribution. The protester had never stayed in Tetu. She had relocated to Ndaragwa. She only came back to Tetu following the death of the deceased. The intention of the deceased was to keep his wives apart. They did not know that the Muririchua Land had been registered in their mother's and protester's names.

Cross-examined by **Mr. Nganga**, learned counsel for the protester he stated that the deceased only stayed in Tetu for 4 years and then moved to Ndaragwa. It was the intention of the deceased that the protester stays permanently at Ndaragwa as she had disagreed with their mother. They were of the view that the protester should move in with any of her sons or daughters in the event that she is forced out of Tetu Land. He conceded though that when the protester relocated to Ndaragwa her house on Tetu land was never demolished. Instead it became family house. The blackbook was taken away by their uncle and Assistant Chief during the family meeting. He denied that the blackbook was a figment of his imagination. Finally he stated that the protester bulldozed herself into Tetu Land following the death of the deceased. With that the petitioners closed their case.

Parties then agreed to file and exchange written submissions. It was subsequently done. I have carefully read and considered the same. From the evidence on record, what are the issues for determination in this case? I think that there are essentially two; distribution of the deceased's estate as well as costs. There is no dispute as to the beneficiaries and or dependants of the estate of the deceased. According to the petitioners the distribution proposed by them in their application is in tandem with the wishes of their deceased father which he had reduced in writing in a black book. However the said blackbook was never tendered in evidence. Accordingly, the evidence tendered with regard to the contents of the blackbook is hearsay which a court of law cannot act on. In any event the petitioners did not come to court for grant of probate if indeed a will in the form of the blackbook existed.

On the part of the protester however, she claims that her proposed scheme of distribution in the protest is in tandem with resolutions of the family and or clan meeting held after the death of the deceased. The petitioners did not dispute the fact of their having been a family meeting subsequent to death of the deceased chaired by their uncle, one **Kahuthia Gachoya**. Indeed under cross-examination by **Mr. Nganga**, the petitioner did admit that the blackbook was taken away during the family meeting. However the problem is that apart from the protester and her son testifying on the issue, they never called any other person who participated in that meeting. Their evidence is most likely to be self serving. For instance, why couldn't they have called the person who chaired the meeting **Kahuthia Gachoya** to backup their claim. This omission somehow casts doubts to the efficacy of this evidence.

However my careful reading and evaluation of the evidence leaves me in no doubt at all that the intention of the deceased was to subdivide his estate between the two houses. Essentially there are 3 parcels of land apart from shares in East African Breweries that belong to the estate of the deceased. The 3 parcels of land are:

- (i) **Nyandarua/Ndaragwa/Kianjogu Block 1 (Muririchua) otherwise referred to as Ndaragwa Land.**
- (ii) **Shares in Muhotetu Land Buying Company (otherwise known as Muhotetu land) and**
- (iii) **Tetu/Muthua-ini/329 (otherwise known as Tetu Land)**

From the evidence on record, there is no dispute as to the distribution with regard to Ndaragwa as well as Muhotetu Land. They were all shared between the 2 houses. **Hezron Kinya Kiongo** testified that the land at Ndaragwa had infact been subdivided into two between the co-wives equally. He further went on to produce a letter from Muririchua Farm Co. Ltd dated the 7th March, 2009 confirming this fact. He also testified that titles deeds arising from the said subdivision, have been issued and expenses involved paid for by the two wives. That evidence was neither challenged nor controverted. I therefore see no reason to disturb that fact.

There is no dispute at all as regards Muhotetu Land either. Both parties are in agreement on this. Indeed when the 1st petitioner was testifying in examination in Chief, he stated that the wishes of the deceased had been complied with except for Tetu and Ndaragwa lands. In the application for confirmation of grant as well as affidavit of protest the distribution of Muhotetu Land is all agreed. There is therefore no need to disturb that arrangement. However as I have been able to demonstrate, Ndaragwa Land is no longer a subject of dispute as it has been subdivided between the two wives of the deceased. The protester has already collected her title deed. The one for 2nd wife is pending her collection.

The protester did depose that some properties which had been given to **Daniel Migunda, Martin Kingori Njoori** and **Elizabeth Wanjiku Njoori** out of the deceased shares with Muhotetu Land Buying Company had been disposed-off by the respective recipients. This fact was not challenged nor controverted. It must then be true. How that was done in the absence of a confirmed grant is difficult to fathom. It may have amounted to intermeddling with the estate of the deceased. However none of the parties took up the issue perhaps out of the knowledge that they may have been accomplices as well.

The protester also deponed that the plots at Nyeri and Nyahururu were still owned by Muhotetu Land Buying Company and the respective shares have not been determined and are therefore not available for distribution. Again this averment was not challenged or disapproved. It must therefore be true.

It would appear then that the only property of the estate in contention is the Tetu property. It is not in dispute that both the protester and her co-wife reside on the premises. It is also not in dispute that the said suit premises has been subdivided into two on the ground. However the petitioners wish to drive the protester from the same on the basis that she all along stayed away in Ndaragwa. That she only came to the suit premises after the death of the deceased. That the protester should relocate to Ndaragwa therefore. However the uncontroverted evidence on record was that upon marriage she moved with the deceased from Mahiga to Tetu where they settled. She had her residential house thereon. However at the request of the deceased she moved to Ndaragwa to take care of the deceased livestock. However her residential house on Tetu Land remained intact. Neither did the deceased put up a house for the protester at Ndaragwa. When the deceased passed on, the protester came back to her house. Following family resolution which led to the subdivision of the suit premises on the ground, the protester herself pulled down her former house and used the material therefrom to put up her new house in the portion of the suit premises allocated to her by the clan. Contrary to the evidence of the petitioners, the deceased had not permanently relocated the protester to Ndaragwa because of her misunderstanding with their mother. I am persuaded on the evidence on record that the deceased had no such intention. I think the Tetu Land should be shared equally between the co-wives since that appears to have been the preferred mode of distribution going by the evidence on record.

In the upshot I find the distribution proposed by the petitioners unfair and reject it. Instead I prefer that proposed by the protester in paragraph 6 of the affidavit of protest dated 14th June, 2006 and filed in court on 16th June, 2006. The grant shall be confirmed along those lines. As parties involved are members of the same family, I decline to make any order as to costs.

Dated and delivered at Nyeri this 22nd day of July, 2009.

M.S.A. MAKHANDIA

JUDGE

