REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE 146 OF 1999

IN THE MATTER OF THE ESTATE OF NGARI MURANDI alias ***LIVINGSTONE MBARIU (DECEASED)***

And

SAMUEL MWANGI NJOROGE…..……....…….PETITIONER

Versus

WILFRED MURANDI MAINGI…….OBJECTOR

R U L I N G

Following the death of one, **Ngari Murandi** on 27th September, 1977 hereinafter referred to as "*the deceased*", **Samuel Mwangi Njoroge** hereinafter referred to as "*the petitioner*" filed a petition for letters of administration intestate on behalf of the estate of the deceased. He stated in the petition that he was presenting the petition in his capacity as a son of the brother of the deceased. In other words he was a nephew of the deceased. He indicated also that the deceased was the registered proprietor of land parcel **Kiini/Ruiru/86** hereinafter referred to as "*the suit premises*". The petition was initially filed in the then Resident Magistrate's Court, Nyeri on 5th December, 1985. As it was the practice in those days, on 2nd September, 1986, the petitioner applied formally that a grant be issued to him following the gazettment of the petition in the Kenya Gazette for 14th March, 1986 and their being no objection raised. It would appear no action was taken on the said application.

However, on 3rd November, 1986, **Wilfred Murandi,** hereinafter referred to as "*the objector*" filed an application for leave to file his objection to the petition and other necessary documents out of time. In his application the objector claimed that the petitioner was not at all related to the deceased. That the petitioner filed the petition without his knowledge and consent. That the deceased was his uncle and had infact given him the suit premises way back in 1958 and relocated to Watuka in Nyeri District.

On 5th March, 1987 this subsequent application was by consent of parties allowed. Infact counsel for the petitioner as well as for the objector had filed a consent letter to that effect. The objector was granted leave to file his cross petition within 21 days from the date of the consent letter which was 5th March, 1988. The objector duly complied with the terms of the consent letter and filed objection to the petition, petition by way of cross-application and answer to the petition. The gravemen of the objector's objection was that the deceased left the objector being his only heir. The petitioner was not related nor does he belong to the objector's clan. When the cause eventually came up for hearing, parties had again by a consent letter dated 10th August, 1987 agreed to refer the dispute for arbitration. **Mr. Omondi – Tunya** as a Deputy Registrar endorsed that agreement on 13th August, 1987. The elders' award was eventually filed in court on 10th April, 1992 and read to the parties on 31st March, 1993. Immediately thereafter and on 9th August, 1994 to be precise, the objector filed an application to set aside the award. This application it would appear did not see the light of day. As it is therefore that award still stands. However it has never been adopted as a judgment of the court. On 27th June, 1996 in circumstances

which are unclear from the record, this cause was transferred to this court from the subordinate court. **Bauni**, Deputy Registrar (*as he then was*) directed that the cause should start de novo before the High Court. On 8th May, 2001, the cause came up for directions before **Juma J.** (*as he then was*). He directed that the cause be heard by way of viva voce evidence. Between that date and 19th May, 2009 (*a period of well over 8 years*) the cause could not be heard because of countless applications for adjournment made on behalf of the parties herein. Eventually the cause came before me for hearing. Again the parties were at their usual game. An adjournment was sought on behalf of the petitioner on the ground that his counsel had just been informed that the petitioner had been admitted in hospital. As expected and the habit having developed into a routine, counsel for the objector did not oppose the application for adjournment. Being not satisfied with reasons for adjournment I put my foot down and declined to grant the adjournment. No evidence documentary or otherwise had been tendered to support the allegation that the petitioner was admitted in hospital. I also considered that the cause was too old. I therefore directed that the cause proceeds to hearing.

Mr. Waruinge, learned counsel for the petitioner then indicated to court that he had no evidence to offer in support of the petition but reserved his right cross-examine the objector. The objector then testified as follows, that he did not know the petitioner as he was not a member of his clan. He only knew him by name and also because he was a neighbour. The deceased was his uncle and passed on sometimes on 27th September, 1977. He tendered in evidence his death certificate. The deceased had no children, wife nor brother. He only had a sister who was the objector's mother. He went on to testify that the petitioner belonged to a totally different clan. Accordingly he was not the proper person to be granted letters of administration. He prayed that the same be issued to him as he was the closest relative.

Cross-examined by **Mr. Waruinge**, he replied that he only knew the petitioner by name but not as a member of the family. That he was a stranger to the estate. That marked the close of objector's case.

Thereafter parties agreed to file and exchange written submissions. I have carefully considered them. The issue for determination in this cause is who between the petitioner and the objector is entitled to be issued with letters of administration intestate herein. In filing the petition, the petitioner had claimed that he was a nephew of the deceased. The objector claims however that the deceased was his uncle. Because of the respective positions taken by the parties herein it was desirable that each brings credible evidence to support their respective contentions. Perhaps it was for this reason that **Juma J**. had directed that the matter be settled by way of viva voce evidence. As already stated it was only the objector who testified in support of his cause. The petitioner did not. As it is therefore the evidence of the objector is unchallenged and uncontroverted. Much as the objector was cross-examined by counsel for the petitioner, his evidence was not shaken. I would therefore hold that the objector gave evidence and showed why he is entitled to the grant. He produced a death certificate of the deceased which was in his possession. He could not have come by the death certificate unless he was a close relative of the deceased. The objector too was able to demonstrate that he had been in occupation of the suit premises since 1958 to date and had established his home thereon. He could not have done so if he was a stranger to the deceased. In my view and as correctly submitted by **Mr. Mukunya**, learned counsel for the objector, the objector had laid a basis for his objection and justified why he should be issued with the grant as opposed to the petitioner.

On the other hand, the petitioner offered no evidence. There is therefore nothing to support his petition. A perusal of his submissions leaves no one in doubt at all that the petitioner has incorporated and relied on pieces of evidence that were neither led nor tendered in court. I have therefore deliberately decided to ignore and not act on such evidence. Yes, the award of elders on record seems to recognise the petitioner as a relative of soughts of the deceased. However I do not think that the elders understood the scope of their mandate. The reference was for them to decide who between the petitioner and objector should be issued with letters of administration and not to distribute the estate of the deceased. Yet this is what the elders ended up doing. To that extent the award is of no assistance to the petitioner in the circumstances of this cause.

The upshot of the foregoing is that I am satisfied that the objector as opposed to the petitioner is the right person to be issued with a grant of letters of administration intestate. I so order.

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

M.S.A. MAKHANDIA

JUDGE