



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Succession Cause 2 of 2000

**IN THE MATTER OF THE ESTATE OF JOHN MUNYUA MIGWARI ALIAS ISMAEL
MUNYUA MIGWARI (DECEASED)**

R U L I N G

The records in this suit confirm that the Grant of representation to the estate of the late John Munyua Migwari alias Ismael Munyua Migwari (deceased) issued to his two wives Joyce Ncee John and Beatrice Miriam Ismael, was confirmed by Meru High Court in Meru Succession Cause No. 46 of 1999 on 28th March, 2001.

The schedule of distribution adopted and confirmed by the court then was that the 1st wife Joyce Ncee John together with all her children, were given L.R. No. Timau Settlement Scheme/128 comprising of 20 acres together with L.R. Plot no. 46 Pumwani, Nairobi and Plot No. 577 Dol Dol, Laila, Laikipia.

The 2nd wife with her children were on the other hand given L.R. No. Gaiti/1224/1566 (same as Gaiti, Plot 1353, Anjeru, Meru) comprising of 15 acres in addition to plot No. 59, Dol Dol Laikipia and Plot No. 5/94 Dol Dol, Laikipia.

Apparently both wives of the deceased who were also co-Administrator were not contented with the distribution. The first wife filed a protest on 14th March, 2006 against the aforementioned certificate of confirmation of Grant. The protest eventually led to the Grant being set aside by Rawal, J who then ordered for a fresh Grant of representation to issue. The confirmation thereof was ordered to be sought after both administrators had filed additional affidavits as well as fresh proposals for distribution of the deceased's estate.

There was no disagreement concerning the assets forming the estate, which included the following: -

- 1) L.R. Timau Settlement Scheme Plot No. 128 – 20 acres
- 2) L.R. No. 1353 Athiru Gaiti Plot No. 1224/1566 – 15 acres
- 3) L.R. Plot No. 46, Pumwani, Nairobi
- 4) L.R. Plot No. 577 Dol Dol, Laikipia

5) L.R. Plot No. 59 Dol Dol , Laila, Laikipia

The deponements from Joyce Ncee John were that before the deceased died, he called two clan elders Luben Muroki and Joseph Kiriamburi before whom he wrote some note with his wishes as to how his estate should be divided between his two wives incase he died. This is because he had just then undergone an operation at the hospital and was not feeling very well. That he had signed the note stating clearly his wishes which directed that the first wife would occupy L.R. Timau Settlement Plot No. 128 with her children, while the 2nd wife should with her children, take up the Athiru L.R. Plot no. 1353. The other properties would be equitably distributed to the two houses. There is evidence also that two or so months after the deceased's death his clan elders and members of the deceased's family met to discuss the deceased's wishes as stated above. They appear to have thoroughly discussed the issues which were apparently minuted and they seem to have endorsed the wishes shown in the note, purportedly drawn and executed by the deceased as witnessed by the two witnesses. Joyce Ncee John accordingly pressed that the deceased's wishes, as later confirmed by the elders, be followed.

On the other hand the second wife Beatrice Miriam Ismail (administrator) proposed that the two pieces of land at Timau Settlement Scheme and at Anjiru, Meru, be equally divided between the two houses. She also introduced a new dimension by acknowledging that four acres of the 20 acres of Timau parcel had been sold to two other persons by the deceased. She took the position that the four acres sold to one Samuel Gikunda and Munyua Migwati should first and foremost be given to the alleged buyers before the balance of 16 acres is equally divided between the two wives.

The record confirms two other events which related to the dispute. First, Joyce Ncee M'Munyua – the first wife, had in 1990 in Meru HCCC No. 68 of 1990 sued her deceased husband while he was alive, together with the two alleged intended purchasers, with a view to evict them when her husband settled them on the Timau Settlement Scheme Plot 128, aforementioned. The High Court in Meru, in response to an application for injunction orders, made certain temporary orders. The orders which abided the final hearing and determination of the suit, allowed the two would-be-purchasers, to stay on in the land undisturbed until the suit is decided on proper tested evidence. It was admitted by both sides that the suit never went to hearing and has therefore never been finally resolved.

Secondly, the two would-be-purchasers or one of them filed a suit in the Land Disputes Tribunal at Meru claiming the piece of land of 5 acres being part of the aforesaid Timau Settlement Scheme Plot No. 128, now in dispute. His claim was dismissed. He appealed to Nyeri Provincial Land Disputes Tribunal. This gave him two acres. The award is allegedly subject of an Appeal in this court being Nairobi Civil Appeal No. 603 of 2003. One of the grounds therein is that the Provincial Land Disputes Tribunal had no jurisdiction to substantively award a piece of land which is contrary to Section 3(1) of the relevant Act.

A third issue argued herein is that the sale of part of the L.R. Timau Settlement Scheme plot 128 aforementioned, was invalid and should be disregarded because the transaction never obtained the Local Land Control Board consents.

I have carefully considered the submissions made by both sides.

There is no denial that the Meru HCCC No. 68 of 1990 is still pending. In it Joyce Ncee John, the first wife wants to prove that the land Timau Settlement Scheme Plot 128 is hers on the basis that she has from inception struggled to pay to the Settlement Land Trustee to purchase it even though it was allotted in the name of her deceased husband herein. She exhibited many payment receipts towards the purchase which although issued in the name of the deceased, clearly indicated the payer to be her. Although her husband is now deceased, the suit still stands against the two purchasers. In my view the suit is still relevant since under it, the purchaser's are either capable of salvaging the sale or not. This court should in my view be careful not to anticipate the result of the case which is likely to invoke various facts and law.

Furthermore this court cannot comment about the result of this Courts Appeal No. 603 of 2003. The position this court takes is that whichever party will win, will have the right to assert by executing the decree that may be given, notwithstanding the mode of distribution this court will order presently. That is

to say that the would-be-purchasers will have a right to get their 4 acres from either wife or whoever ends up inheriting Timau Plot No. 128 if the pending suit ends up in their favour. If in the process either party herein loses some acreage of which she might be entitled, then the same can be adjusted from Gaiti-Anjaru plot No. 1353 otherwise referred to as 1224/1566 Athiru Gaiti.

Going back to issues before me, it is my view and finding, that the best mode of distribution in the circumstances of this case is that one suggested by the deceased in his note, two months before his death, which position was discussed and adopted by the elders of the clan. It is not denied by Beatrice John otherwise called Beatrice Mariam Ismail, that she herself never at any time settled and never lived on Timau Settlement Scheme Plot no. 128. It was her co-wife Joyce Ncee John who resided there. Beatrice did not controvert the fact that it was Joyce Ncee who majorly paid to the Settlement Fund Trustee to purchase the plot even though their deceased husband occasionally also paid, especially after he received some purchase funds from the would-be-purchasers. I also accept the fact that the deceased, noticing the poor relations between his two wives, wanted them to live apart, hence his decision to indicate so in his wishes in the Note aforementioned soon before his death.

It therefore appears proper to keep the two wives of the deceased apart for the good of the families by ordering that Joyce Ncee John keeps Timau Settlement Scheme Plot no. 128 to herself and her children while Beatrice Mariam Ismail, keeps Gaiti Plot no. 1224/15566 otherwise referred to as 1353. It is not clear if 1224/1566 is different from 1353. If it is, both still go to Beatrice. The other plots will go to each party as earlier agreed since there was no dispute.

ORDERS

1. L.R. Timau Settlement Scheme Plot No. 128 concerning 20 acres, plot No. 46 Pumwani, Nairobi and plot no. 5/94 at Dol Dol Laikipia shall go to Joyce Ncee John.
2. L.R. No. 1353 (1224/1566) comprising of 15 acres at Lunya, Athiru, Gaiti and Plot No. 59 Dol Dol Laikipia to go to Beatrice John also known as Beatrice Mariam Ismail
3. Either party at liberty to apply to this court under this cause if necessary after Meru HCCC No. 68 of 1990 and Nairobi High Court Appeal No. 603 of 2003 are each decided.
4. Each party to bear own costs.

Dated and delivered at Nairobi this 9th day of November, 2009.

.....

D A ONYANCHA

JUDGE