



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

**Succession Cause 370 of 2000**

**IN THE MATTER OF THE ESTATE OF GITHUA S/O WAREKU – DECEASED**

**BETWEEN**

**LEAH MUTHONI WAMBUGU ..... PETITIONER**

**AND**

**PETER MUTURI WAITHUO ..... PROTESTER**

**J U D G M E N T**

**Leah Muthoni Wambugu**, hereinafter referred to as “the Petitioner” did on 12<sup>th</sup> October 2000 petition this court for the grant of letters of administration intestate. On the 5<sup>th</sup> May 2004, this court duly obliged and granted the Petitioner the grant of letters of administration intestate. Subsequent thereto and by application dated 6<sup>th</sup> December 2004 and filed in court on 9<sup>th</sup> December 2004, the petitioner prayed that the grant of letters of administration intestate issued to her on 5<sup>th</sup> May 2004 be confirmed. In the affidavit in support of the application the petitioner deponed that there was no dependant of the deceased within the meaning of section 29 of the Law of Succession Act living other than herself. That the identification and shares of all persons beneficially entitled to the Estate of the deceased had been ascertained and determined that “**John Maingi King’ori**” be the sole heir of the estate of the deceased in respect of land parcel No. **Othaya/Gura/148**. When the application was served, one, **Peter Muturi Waithuo** hereinafter referred to as “**the protestor**” filed an affidavit of protest claiming that the parcel of land, **Othaya/Gura/148** hereinafter referred to as “**the suit premises**” was registered in the name of the petitioner’s husband’s brother (deceased) who was a step brother to the protestor’s father also deceased. That the Protester’s father’s interest in the suit premises is what he was claiming. That the protestor and the petitioner were the sole surviving persons entitled to a share of the Estate of the deceased and same should be shared equally. Finally, the Protester deponed that he lives, occupies and cultivates a portion of the suit premises where he has constructed a house and planted coffee.

On 29<sup>th</sup> March 2006 the matter was placed before court for directions. The directions given were to the effect that the protest do proceed to hearing by way of viva voce evidence.

On 28<sup>th</sup> March 2007, the hearing of the cause commenced before me. All in all, the Petitioner called a total of 4 witnesses. Her story seems to be as follows.

The deceased, **Githua Wareku** died in 1977. At the time of his death, he was the registered proprietor of the suit premises measuring 3.9 acres or thereabouts. The father of the deceased, one **Wareku** had only one wife known as **Mugure** who gave birth to the deceased as well as **Wambugu**, the Petitioner’s

husband. The deceased was the eldest among the two brothers. The Petitioner's husband passed on sometimes in 1993. The deceased however never got married and therefore had no offsprings who survived him. Similarly, though **Wambugu** was married to the Petitioner, they were never blessed with any children.

During land consolidation, the deceased's land and that of his brother was amalgamated, consolidated and registered in the name of the deceased as the elder brother to hold the same in trust for himself and his brother, the petitioner's husband. Both men were living on the suit premises. After the deceased passed on, the Petitioner's husband continued living on the land with the petitioner until he also passed on in 1993. That being the case, it is the petitioner's case that she was left on the suit premises as a sole beneficiary. Accordingly nobody else was entitled to the suit premises and that as the nearest living relative of the deceased, she was entitled to inherit it to the exclusion of any other person and to choose to whom to bequeath the suit premises.

As far as she was concerned, she did not know the protester as he did not belong to her husband's clan. All that she knew was that she had been hiring the wife of the protester to assist her in tiling the suit premises. That the protester and his wife later on took advantage of her advanced age, blindness and lack of children to claim a stake to the suit premises. That when she lost her eyesight, the protester's wife came and chased away the other people she had hired to cultivate the land and fenced off the portion that the Petitioner had authorised her to cultivate. Thereafter the protester proceeded to plant coffee in that portion surreptitiously mostly on Sundays when everybody else had gone to church. The petitioner denied that the protester's father was a step brother to the deceased or her husband. Finally, it was the petitioner's wish that the suit premises be transferred and registered in the names of **John Maingi King'ori**, her helper and whom she described as a gift from God.

On the part of the protester, he called a total of 2 witnesses. In summary, his story appears to be that he is entitled to a portion of the suit premises as of right because at the time of land consolidation, demarcation and registration, his father's land was registered together with the deceased's piece of land. The Protester's father, the deceased as well as the Petitioner's husband were step brothers. His only interest in the estate of the deceased was to inherit that portion of the suit premises that belonged to his father since his father's land was consolidated with that of the deceased and registered in the deceased's name. He testified that he resides on the land and has planted coffee and macadamia. He has also constructed a house on the portion that he occupies. The Protester further testified that in 1994, the Petitioner called him to the suit premises so that she could give him his father's portion of the suit premises. He denied that the petitioner had employed his wife. He also denied that he had planted coffee on Sundays as claimed by the Petitioner. In fact he planted the coffee in her presence and she even congratulated him. He stated that he occupied  $\frac{3}{4}$  of an acre of the suit premises and the petitioner occupies the rest. It was his prayer that he be granted  $\frac{3}{4}$  of an acre out of the suit premises.

This then is the Summary of the evidence tendered by the petitioner and her witnesses as well as the Protester and his witnesses. Following the close of their respective cases **Mr. Njuguna**, learned counsel for the Petitioner and **Mr. Kiminda**, learned counsel for the Protester, with the permission of the court tendered written submissions in support of their respective positions. I have carefully read and considered the same.

From the pleadings, the evidence tendered as well as written submissions the issues which emerge and call for determination are as follows:

- (a) **Whether the Protester's father, the Petitioner's husband and the deceased were related.**
- (b) **Whether the Protester's father's land was amalgamated and or consolidated with the deceased's land to become the suit premises.**
- (c) **Whether the Protester is entitled to a share of the suit premises by virtue of the fact that he was the son of the deceased step brother.**

#### (d) Costs

As the first and second issues are interrelated, I will address them jointly. It is the contention of the Protester that he is a son of the deceased step brother. He is entitled to a portion of the suit premises because at the time of land consolidation, demarcation and registration, his father's land was registered together with the deceased's piece of land. He claims that in recognition of this fact, the Petitioner allowed him to occupy and build on the portion of the land in 1994. The evidence of the Protester received some boost from the evidence of his only witness **Herman King'ori** who is also a relative of the Petitioner. She is actually an aunt to him. He was supervisor to the land consolidation committee. He testified that the deceased had land registered in his name out of the various portions which were amalgamated. Some of the portions belonged to **Waithua Makumi**, the Protester's father. The two agreed that the portion be amalgamated and registered in the name of the deceased and thereafter should the Protester's father have children then the deceased will pass to them the portion of land belonging to him. According to this witness this is what the two told the land consolidation committee in which he was a member and a supervisor at the time. This witness contrary to the evidence of the Petitioner and her other witnesses confirmed that the Protester's father was a member of the clan. That the law at the time of land consolidation could not have allowed a stranger to be registered as a proprietor of a parcel of land. It was further the testimony of this witness that the Petitioner went to him and informed him that she had given back to the Protester a share of his father's land and he had planted coffee therein. This evidence was not seriously challenged by the Petitioner. The witness is a close relative of both the Petitioner as well as the Protester. He knows better what transpired between the deceased and the Protester's father. The Petitioner and her witnesses contend that the Protester is a stranger to the Estate of the deceased and that he and his father were not clan members. That the Protester took advantage of her not having children, poor eyesight and advanced age to stake a claim to the suit premises. PW4 in attempt to show that the Protester is not a clan member produced in evidence what he dubbed the family tree which the protestor was not part of. However, as correctly observed by **Mr. Kiminda**, it was a self-serving undertaking. After all this witness stood to gain greatly and would be a sole beneficiary of the suit premises in the event that the Petitioner was successful in locking out the Protester. Further, it is not even clear whether he is a member of the family.

I have no doubt at all that the deceased and the Protester's father were related. He may have been the deceased's stepbrother. It is hard to imagine that a mere stranger without more would simply walk into someone's land and stake a claim to a portion thereof. Yes, the Petitioner claims that the Protester took advantage of her childlessness, senility and blindness to grab a portion of the suit premises which ideally belongs to her. From the evidence it is clear that the Petitioner has relatives. If indeed the Protester was a stranger how could PW2, a committee member of the clan, PW3 a clan member and PW4, the would be beneficiary of the estate, have allowed the stranger to extensively develop the portion of the suit premises that does not belong to him. The Petitioner and all her witnesses have admitted that the protestor had planted coffee, put up a house in which he resides with members of his family. He could not have done so without any resistance from the Petitioner and her witnesses if at all they believed he was a stranger. If indeed he was a stranger how possible was it that a mere stranger should enter a parcel of land and claim it yet the rightful owner do not as much as approach the provincial administration for assistance. I think there is much more to the relationship between the deceased and the Protester's father than meets the eye. The Protester's sole witness although it was insinuated that his evidence was tainted as he was interested in purchasing the portion of the suit premises that may end up with the protestor, which allegation he vigorously denied is as already stated a clan member and clearly explained the relationship between the Protester's father and the deceased and the reason why his parcel of land was registered together with the deceased. He also stated that the Petitioner even after the Protester entered the land with the permission of the Petitioner, went ahead to inform DW2 that she had given the Protester's father's interest in the Estate to his children meaning the Protester, which fact was confirmed by the Protester. DW2 had nothing to gain by lying to court. Having observed his demeanour as he testified, he struck me as a truthful witness. I cannot say the same of the Petitioner and her witnesses. They struck me as witnesses who lacked candour. They appeared as though they were hiding something from this court. I think and I am prepared to accept the evidence of the Protester and his sole witness with regard to the relationship between the Protester's deceased father and the deceased. They must have been step brothers and or they must have been related in one way or another. Land being such a sensitive and emotive commodity in

this part of the world, it is not possible to have a stranger staking a claim to a parcel of land which he knows does not belong to him one way or another. Accordingly the answer to the first two issues are that the deceased and the Protester's father were related and most likely they were step brother's. Further from the evidence on record it is clear that the Protester's father's piece of land was amalgamated with the deceased's land during consolidation which eventually became **Othaya/Gura/148**, the suit premises.

Though there is evidence that the Protester's father has another parcel of land **Thegenge/Karia/297** which measures 1.9 acres and which according to the Petitioner, the Protester's inheritance lies, it is clear however that the Protester's father bought this land with his own resources. There is evidence that the Protester's father claimed his portion of the suit premises whilst alive in 1980 and he was given. It was then that the Protester settled on the portion of the land. The mere fact that the Protester's father had another parcel of land elsewhere cannot disentitle the Protester from inheriting that portion of land, belonging to his father and comprised in the suit premises.

With regard to issue number three, the answer must be that the Protester is entitled to a share of that portion of the suit premises which he occupies by virtue of the fact that it belonged to his late father. Accordingly the deceased held that portion of land in trust for the Protester's father and his off-springs.

In his evidence, the Protester has stated that he should be granted  $\frac{3}{4}$  acre of the suit premises that he occupies. I also note that the Petitioner has without prejudice stated that should I not agree with her position in the matter that there was no trust created, then I should grant the Protester the  $\frac{3}{4}$  acre he allegedly occupies. I have already held that a trust in favour of the Protester's father was created. The Protester is entitled to that portion of his father's land that was amalgamated with the deceased's now the suit premises. Since in his evidence he asked for  $\frac{3}{4}$  acres from the suit premises, I would grant him his wish. Accordingly the Protester shall inherit  $\frac{3}{4}$  acre from **Othaya/Gura/148**. The Petitioner shall take the remainder. However, the Protester's portion shall be excised from the suit premises on the basis of the portion he occupies.

This being a family dispute, I will make no order as to costs.

*Dated and delivered at Nyeri this 25<sup>th</sup> day of January 2008*

**M. S. A. MAKHANDIA**

**JUDGE**