

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 139 of 1999

DUNCAN GICHANE MATHENGE..... PETITIONER

VERSUS

PAUL WANJOHI MATHENGE OBJECTOR

JUDGMENT

The deceased had two wives. Agnes Nduta Mathenge was mother to Duncan Gichane Mathenge hereinafter called Duncan and Nyambura Mathenge who was mother to Paul Wanjohi Mathenge who shall hereinafter be called Paul. Duncan and Paul are step brothers. By the time their deceased father died the properties registered in his name were Gatarakwa/Gatarakwa/BlockIII/785 and Thegenge/Karia/645. The latter property according to the evidence of Duncan was sub-divided by Paul into two parcels namely parcel No. 1693 and 1694. That subdivision was after the death of their father. In this matter a grant was issued in the joint names of Duncan and Paul. Paul by an application for confirmation of grant dated 13th June 2005 sought to distribute to himself parcel No. 1693. He did

not indicate how the other property of the deceased was to be distributed. Duncan has filed a protest against that distribution. The protest was heard by way of viva voce evidence. Paul in evidence stated that the property 645 which was subdivided into 1693 and 1694 was given to him by his late father. That the property was taken by Duncan and he prayed that the court would get it back for him. He showed to the court the original titles of parcel Nos. 1693 and 1694. On being cross examined he accepted that the subdivision of 645 took place after the death of his father who was the registered owner. He exhibited a letter of consent by the land control board which related to parcel No. 1693. He accepted that by 1992 that parcel number 1693 did not exist. He accepted that he was arrested over the issue of the subdivision of parcel No. 645. He accepted that his brother Muthee Mathenge occupies property Thegenge/Kihora/292. That that property is registered in Muthee's name. His other brother who he did not name occupies Gatarakwa/Gatarakwa/Block III/785. He did not accept that the portions occupied by Muthee and his other brother were the portions given to their house by their late father. Duncan in evidence stated that it was his mother who began the succession cause. At that time the parcel 645 had not been subdivided. It was later that he discovered that

Paul was holding two titles in respect of that parcel number. He reported the matter to the police and Paul was arrested and released within a week. He said that Paul does not cultivate parcel 645.

I have considered the evidence tendered before me. I concluded that Paul was not an honest witness and his evidence could not be relied on. He said that his father subdivided parcel number 645 before his death. He later accepted that the subdivision was after death. He is in possession of the original titles in respect of those subdivisions. Even though he relied on those titles in evidence he was even unwilling to leave behind the original titles and the court had to order that the photocopies be made. Although he refused to admit it I do accept that the deceased gave the property Thegenge/Kihora/292 to Paul's brother. Gatarakwa property is still registered in the deceased's name. Paul refused to state who resides there. I accept the evidence of Duncan who was a more believable witness that Paul resides at the Gatarakwa property. The judgment of this court is as follows;-

1. That the grant be and is hereby confirmed as follows;-

(a) That the property Thegenge/Karia/1693 and 1694 to go to Duncan Gichane Mathenge.

(b) That Gatarakwa/Gatarakwa/Block III/785 to go to Paul Wanjohi

Mathenge.

2. That there shall be no order as to costs in respect of this protest.

Dated and delivered at Nyeri this 21st day of April 2008.

MARY KASANGO

JUDGE