



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE 113 OF 1994
IN THE MATTER OF THE ESTATE OF MUMENYA NJOGU – DECEASED

AND

MUGO MUMENYA NJOGU PETITIONER

VERSUS

ELIZABETH WAMUYU KABURU)

ESTHER WAMAITHA MUTHURU)

MARY WANJIRA GITHINJI)

PETER MAINA KANYUA) OBJECTORS

J U D G M E N T

On or about 17th July 1993, one **Mumenya Njogu** passed on living behind **Mugo Mumenya**, son, **Elizabeth Wamuyu** daughter (married), **Esther Wamaitha Muthuru** daughter (married), **Mary Wanjira Githinji** daughter (married) and **Mwangi Mumenya** son, surviving him. Consequent upon his death **Mugo Mumenya** and **Wamaitha Muthuru** on application were appointed joint administrators of the estate of the deceased. Initially **Mugo Mumenya** had alone petitioned for the grant of the letters of administration intestate. However **Wamaitha Muthuru** objected and on 19th September 1996 **justice Osiemo** recorded a consent order in which the two protagonists were appointed joint administrators of the Estate. It was further ordered by consent that the issue of distribution of the estate of the deceased be referred to the District Commissioner, Nyeri for arbitration to be presided over by the District Officer, Mathira. The arbitration was to be conducted in accordance with order 45 of the civil procedure rules. The award was to be filed within 90 days. Apparently attempts at arbitration proved futile as **Mr. Mugo Mumenya** right from the beginning stated that the deceased property was his and therefore could not discuss anything to do with it with the respondent (see letter from the District Commissioner dated 19th November 1996). That being the scenario, on 12th October, 2000, **Justice Juma**, by consent of the parties vacated the consent order referring the matter to arbitration and directed that the matter to be heard by court by way of viva voce evidence.

On 24th June, 2003, hearing of the dispute commenced before **Justice Okwengu** and was concluded on 19th September 2003 when counsel for Respective parties filed written submissions. Judgment was then scheduled for 10th October 2003. However before the judgment could be delivered, the learned judge

realised that one, **Peter Maina Kinyua** had filed an objection by way of a Petition and cross-petition and since the same had never been disposed off the hearing that had already taken place was declared a mistrial. Accordingly **Peter Maina Kanyua** was directed to serve the Petitioner and objectors with his Petition and cross-petition within 14 days. Thereafter parties were to take further action in the matter as may be appropriate.

On 28th September 2005 the learned judge gave further directions in the cause. She ordered that hearing of the cause do start de novo and to include both objectors. It would appear that these directions were given following the failure by **Peter Maina Kanyua** to comply with the order of 27th May 2004.

On 27th June 2006, further directions were given to the effect that the petitioner do file summons for the confirmation of grant and the objectors be at liberty to file a protest if need be. These directions were occasioned by the fact that the objections had been overtaken by events following the appointment by consent of the joint administrators by court.

On 28th June 2007 the matter came before me for hearing of the application for confirmation of the grant. However since a protest had been filed the previous day by **Peter Maina Kanyua**, I directed that both the protest and summons for the confirmation of the grant be heard simultaneously by way of viva voce evidence.

The hearing then commenced before me on 18th February 2008. However on that day **Mr. Macharia**, learned counsel holding brief for **Mr. Kithinji**, learned counsel for the Applicant applied for adjournment ostensibly because **Mr. Kithinji** was away in the USA and would not be back until July, 2008. He therefore sought an adjournment until then. I rejected the application on the ground that the matter was extremely old and that this court does not operate at the will and or convenience of counsel. Further even the applicant was not in court meaning that both counsel and his client were taking the court for granted. On the application of both **Ms Mwai** and **Mr. Kamwenji** learned counsels for 1st, 2nd, 3rd and 4th Protestors respectively I proceed to dismiss the application for confirmation of grant filed by the applicant and thereafter proceeded to hear the protests.

Only the 2nd and 3rd Protestors testified. In a nutshell their evidence was as follows: That they were the daughters of the deceased. That **Mugo Mumenya** was their brother. Their father had land parcel numbers **Iriaini/Kiaguthu /654**, **Iriaini/Kiaguthu/221** and **Iriaini/Kiaguthu/59**. During his lifetime their deceased father had given to his sons **Mugo Mumenya** and **Mwangi Mumenya** land parcels **Iriaini/Kiaguthu/221** and **Iriaini/Kiaguthu/59** respectively as gifts intervivos . The deceased had left to her daughters land parcel number **Iriaini/Kiaguthu/654**. Accordingly they proposed that the said parcel of land should be shared equally between them i.e. **Esther Wamaitha Muthuri**, **Mary Wanjira Githinji** and **Peter Maina Kanyua**, the 4th protestor. They claimed that the their two brothers were not entitled to a share of **Iriaini/Kiaguthu/654**. They stated that though they were married, they were claiming their inheritance because their father had intended so and were in fact utilizing the land during his lifetime.

Under cross-examination by **Mr. Kamwenji** for the 4th Protestor, they all conceded that they were married and stayed with their husband. However they do work on the land. That the 4th Protestor who is a son to the 2nd Protestor had been residing on the parcel of land since childhood. That they had their parcels of land where they were married. Finally they stated that they were entitled to the estate as their brothers were given their respective parcels of land by their deceased father.

On his part the 4th Protester testified that he was the grandson of the deceased. That his mother was the 2nd Protestor. That he is the one in occupation and utilizing the suit premises. That he was utilizing the suit premises with the deceased before he passed on. That the deceased's two sons had been given their separate parcels of land. He claimed that he should solely inherit the land and that his mother and her sisters should inherit from their husbands.

Under cross-examination by **Ms Mwai**, counsel for the other protestors, the 4th Protestor conceded that

his mother and 3rd appellant do utilize a portion of the suit premises. That they had been doing so long before the death of the deceased. That the title deed to the suit premises was held by the 3rd Protestor. He was not willing to have his claim to the suit premises processed through his mother. He conceded however that his cousin called **Mwangi**, a son to one of the deceased daughter's called **Muthoni** had a portion of land excised from **Iriaini/Kiaguthu/182** and given to him directly by the deceased.

Following the close of the Protestors' case, parties agreed to put in written submission which I have carefully considered.

The issue for determination in this cause is fairly simple and straight forwarded and is whether the protestors are entitled to inherit from the estate of the deceased. The 1st, 2nd and 3rd Protestors are married daughters of the deceased. The 4th Protestor is however a grandson of the deceased sired by the 2nd Protestor. I am aware that According to Kikuyu customary law, a married woman who is not divorced as the protestors herein, are not supposed to inherit the property of their deceased father if there are surviving son(s). There is I think a proviso to this proposition. In my view it is only applicable where the deceased did in his lifetime indicate that his daughters though married should not inherit his estate. The circumstances obtaining here are rather different. There is uncontroverted evidence that the deceased wanted his daughters to inherit a portion of his estate. That is why he allowed them though married and having their own parcels of land where they were married still to farm and utilize the suit premises. There is evidence that the deceased caused his sons to vacate land parcel **Iriaini/Kiaguthu/654**. It seems to me therefore that the deceased intended them to leave the suit premises so that the same could be available to the protestors absolutely. Indeed the deceased it would appear from the evidence of the 4th Protestor that he gave the title deed in respect of the suit premises to the 3rd protestor for safe-keeping as he intended the suit premises to be inherited by the Protestors. The act of giving out the title deed meant that he had bequeathed the suit premises to his daughters.

The deceased passed on sometimes on 17th July, 1993. Accordingly the law of succession Act comes into play and is

applicable. The protestors are children of the deceased. The law allows children of a deceased person to inherit his estate without any discrimination on the basis of gender. It does not matter whether they are married or unmarried daughters. The argument of the 4th protestor that the Protestors being married daughters of the deceased should not inherit any part of the estate of their father therefore has no basis as it flies in the face of the Kenyan constitution, the law of succession Act, and international covenants and instrument that bar discrimination on account of gender that Kenya as a country is signatory to. Accordingly I reject such proposition.

The 4th protestor claims that he should solely inherit the suit premises because the deceased grandfather left him the suit premises and that he had been taken in by the deceased. That he had left his parent's home at early age.

He testified that he was brought up and maintained by the deceased on the suit premises. That by the time the deceased passed on, he was already a grown up person living and cultivating the said parcel of land. Evidence is scanty as to when the 4th protestor moved into the care and control of his grandfather. However there is common ground that the 4th Protestor had lived with the deceased for a while. However I am unable to accept that his grandfather intended that he should inherit the entire suit premises. If he had so intended nothing stopped him in his lifetime to transfer and have the 4th Protestor registered as the proprietor of the same. After all he had done so with his other grandson **Mwangi s/o Muthoni**. The 4th Protestor agreed that when **Mwangi s/o Muthoni** was given land by the deceased, he was also a grown up and was living on the deceased's land. There is no reason the 4th Protestor gave

for the failure of the deceased to give him land in his lifetime just as he had done with **Mwangi s/o Muthoni**. The only inference to be drawn is that the deceased did not intend that the 4th Protestor should

inherit the whole parcel of land. Rather he should do so through his mother. I did not hear the 4th Protestor state that once he was given the subject piece of land he would forego his inheritance where he was born. That he will not claim from his biological parents including the 2nd Protestor his inheritance from where he was born.

On the evidence on record, the 1st, 2nd and 3rd Protestors have proved their case on balance of Probabilities that they are entitled to inherit land parcel **Iriaini/ Kiaguthu/654** in equal shares. It is so ordered. The protest by the 4th protestor is accordingly dismissed as his claim to the suit premises can only be channelled through his mother, the 2nd protestor. The grant issued herein may now be confirmed on that basis. There shall be no order as to costs.

Dated and delivered at Nyeri this 7th day of April 2008

M. S. A. MAKHANDIA

JUDGE