

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 383 of 2005

IN THE MATTER OF THE ESTATE OF MBAGA MUTURI DECEASED

ESTHER WANGUI MBAGA PETITIONER

versus

KIBE MBAGA 1ST PROTESTOR

VICTORIA WANGUI MUTURI2ND PROTESTOR

JUDGMENT

The deceased had two wives Wanjira Mbaga and Esther Wangui Mbaga. Esther Wangui Mbaga petitioned for Letters of Administration which was granted to her. Later she sought confirmation of the grant and sought the distribution of the only property belonging to the deceased namely MUHITO/MBIUINI /421 to be divided between her and Kibe Mbaga whereby she was to get 2.3 acres and he was to get 2 acres. Kibe Mbaga has protested against that distribution. At the beginning of the trial it was agreed that the only issue to be determined by the court was whether the suit property should be divided equally between the administrator and Kibe Mbaga or whether one of them should get a greater share. Kibe Mbaga said that in this action he was representing the first wife of the deceased who is also deceased. He said that he has only one surviving sister who is married. The administrator he said was the second wife. The deceased during his life time according to him had shown each one of them where to occupy on the suit property. He however accepted that most of their lives he and his late mother had lived in Nairobi. However it was in 1996 that the deceased showed him where he should construct his house on the suit property. There was second protestor by the name of Victoria Wangui Muturi. She was the wife of Peter Muturi Mbaga deceased. Her husband Peter Muturi was the son of the deceased in this estate. She too said that the deceased had shown her where to cultivate on the suit property. That the first protestor however, does not allow her to cultivate. She confirmed that her husband had a property known as MUHITO/MBIUINI/353. This land she said was given to him by the clan. However looking at the green card annexed to the first protestors affidavit it is clear that the first registration of that property was on 23rd October 1959. That registration was in the name of the deceased in this estate. On 14th October 1996 the property was transferred to Peter Muturi Mbaga deceased. Therefore from the record it does seem that that property was transferred by the deceased in this estate and not the clan into the second protestor's husband's name. That seems to have been a gift from the deceased in his life time. The administrator in this estate was married as second wife. She stated that during the emergency period the deceased was in detention. On being released he went to live in Nairobi. The first wife followed him there. She did not return back home and only came back when she heard that the deceased and the administrator were renewing their marriage in a church ceremony. The church marriage was in 1987. At that time the first wife returned home seeking land from the deceased. She also tried to block their renewal of their marriage. She was not successful because the marriage did proceed. The first wife returned to Nairobi on being unsuccessful in her attempts to stop the wedding and only returned on the death of the deceased. During the time of their wedding she said that the first protestor abused the deceased and as a consequence the deceased stopped him from constructing a house in the suit property. He said that during his lifetime the deceased gave her 2.3 acres and the first protestor was given two acres of that land. She reasoned that she was given the extra acres because she nursed the deceased during his illness. She ended her testimony by saying that each should get what the deceased had given them during his lifetime. The only property the subject of this Succession Cause is

Parcel No. 421. I will begin by considering the second protestor's claim over Parcel No. 421. The evidence is clear that her deceased husband Peter Muturi Mbaga obtained as a gift inter vivos Parcel No. 353. There is no evidence of any other beneficiary having obtained a gift from the deceased during his lifetime. That being the case **Section 42** of the Law of Succession Act allows the court to consider such a gift given during the life time of the deceased whilst deliberating on distribution. I find that the estate of Peter Muturi Mbaga having obtained that property is not entitled to share Parcel No. 421. By extension the second protestor is not entitled to lay claim over parcel no. 421. The administrator gave evidence of how she lived with the deceased for many years and during his last years of illness she took care of him. All this while the first wife was living in Nairobi. Taking into consideration the care that she showed to the deceased coupled with the fact that she is a wife of the deceased whilst the first protestor is a son I am inclined to agree with her proposal of distribution of the suit property. The judgment of the court therefore shall be that **Esther Wangui Mbaga** shall get **2.3 acres** of MUHITO/ MBIUINI/421 and **Kibe Mbaga** shall get **2 acres** of that property. There shall be no orders as to costs.

DATED AND DELIVERED THIS 19TH DAY OF JUNE 2008

MARY KASANGO

JUDGE