



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Succession Cause 134 of 1998**

**IN THE MATTER OF THE ESTATE OF MOFFAT GITHUKU WARURI..... DCD**

**AND**

**PAUL MAINA GITHUKU.....PETITIONER**

**VERSUS**

**1. JOSEPH WARURI GITHUKU )..... 1<sup>ST</sup> PROTESTOR**

**2. PETER GACHARA KINYUA )..... 2<sup>ND</sup> PROTESTOR**

**JUDGMENT**

This judgment relates to objection to making grant filed by Joseph Waruri Githuku (who I shall hereinafter refer to as Joseph). Paul Maina Githuku (who I shall hereinafter refer to as Paul) and Margaret Muthoni Githuku (who I shall hereinafter refer to as Margaret) petitioned for grant of letters of administration intestate in respect of this estate on 20<sup>th</sup> September 1996. Joseph objected to that petition on the basis that he had not being included in the list of those who were left surviving the deceased. The court by directions given on 15<sup>th</sup> July 2003 ordered that the objection be heard and the following issues be determined:-

1. The persons to be appointed as administrators of this estate.
2. The assets of this estate.
3. The beneficiaries of this estate.
4. distribution

The objector Joseph in evidence in chief stated that the deceased was his father. He had three wives. His mother who is now deceased was called Wakarithi. She had five children who are as follows:-

1. Joseph Waruri Githuku
2. Paul Maina
3. Theresa Gathigia (deceased)

4. Ann Wangithi Wairagu
5. Susan Terry Angwenyi

The other wife is called Margaret Muthoni. She has the following children:-

1. John Warui
2. Jenniffer Wanjiru
3. Monica Wambui
4. Anne Njoki
5. Winfred Wanjiku
6. Anthony Kariuki
7. Wangui Githuku
8. Wangechi Githuku

The first wife was separated from the deceased and she had no children. Joseph said that he had stayed with the deceased after the death of this mother. That Paul had retained title documents belonging to the deceased during his life time. That although the deceased requested for them, Paul declined to return them. He stated that the properties of the deceased were as follows:-

1. MUTIRA/KIRIMUNGE/522
2. MUTIRA/KIRIMUNGE/52
3. MWERUA/BARICHO/313
4. MUTIRA/KANYEI/59

At one time Paul irregularly transferred the deceased's coffee account but it was later reversed. In respect of parcel No. 59 the same was subdivided into two parcels at the end of 1993. The new numbers of those parcels were;- Mutira/Kanyei/940 and 941. In early 1995 the deceased transferred property 941 to him. Before then the caution that had been on parcel No. 59 was removed through a court order. He exhibited the Green Card of parcel No. 941 which indicated that it was transferred in his name on 13<sup>th</sup> February 1996. He further stated that the deceased had donated to him a power of attorney which was registered. On being cross examined he confirmed that the deceased died on 27<sup>th</sup> October 1995. He also confirmed that when the caution was removed on parcel No. 59 the deceased was not alive. He confirmed that the caution was removed on 13<sup>th</sup> February 1996. He also confirmed that as at that time there was no administrator appointed in respect of this estate. He said that the order to remove the caution was from a case filed in Embu Case No. 914 of 1993. That it was the deceased who took the court order to the land Registrar in August 1995 before his death. He also further confirmed that he had obtained a special power of attorney from the deceased by April 1994. The general power of attorney was given to him in July 1994. He stated that the deceased was suffering from Diabetes and was blind but was literate. He became completely blind in 1993. Joseph stated that it was the deceased who went to the land office for the sub division of parcel No. 59 but that it was he; Joseph who signed the mutation forms on 20<sup>th</sup> August 1994. That the deceased gave him parcel No. 941 as a gift during his life time but that the registration of the sub division was delayed due to the caution that had been registered against the title of parcel No. 59. He confirmed that he later sold parcel NO. 941 to Stanley Kinyua Gachara for Kshs.500,000/-. He had to date received half the purchase price. In respect of property Mutira/Kinyei/49 he said that that was given

to him by Akiuri Clan which was his mother's clan. His deceased father's clan was Agathigia Clan. Property parcel No. 59 now subdivided into parcel No. 940 and 941 is occupied by Paul. Parcel No. 52 is occupied by his step mother Margaret. That parcels numbers 522 and 313 are not occupied by anybody but that they are utilized by both Paul and Margaret. He confirmed that the land control board had given consent to the transfer of parcel No. 941 into his name. He sold it to Stanley Kinyua who had land next to parcel No. 941. He confirmed that Stanley Kinyua was aware of the acrimony between him and Paul. He denied that he had been served with court papers where family members had sought an order for him to give access to the deceased. He confirmed that he stayed with the deceased for three years before his death. That although the deceased was sick his memory was good. He was referred to a case filed against the deceased seeking maintenance for his children and this witness stated that that case was filed under the instigation of Paul. He prayed that the court will divide the whole estate equally among the beneficiaries. The next witness was Lucy Muthoni an interested party who was substituted for Stanley Kinyua Gachara, deceased. In chief she denied that her late husband Stanley Kinyua knew about the dispute between Joseph and Paul. She prayed that the court would allow her to use parcel No. 941 which she had been prevented by Paul. The first witness to give evidence in support of the petitioner's case was Paul. He said that he petitioned for the grant of letters of administration together with Margaret. He confirmed that his mother had two sons that is, Joseph and himself. He also confirmed that there are two sisters who are married. Margaret Muthoni he said resides at parcel No. 52 which is 2.38 hectares. She also cultivates parcel No. 313 which is 6 acres. He Paul resides at parcel No. 59 which is 7.4 acres. He later clarified that he only occupies the sub division of that property that is parcel No. 940. Parcel No. 941 he said is unoccupied and is bushy. He utilizes parcel No. 522. In reference to the mutation forms relating to the sub division of parcel No. 59 he said that there were signed in October 1994 and the signature thereon belonged to Joseph. That the deceased in August 1994 was terribly sick, was blind and had lapse of memory. That from the death of their mother in 1988 the health of the deceased deteriorated. That after the death of their mother Joseph restricted the deceased from seeing other family members. That there was another property namely Mutira/Kinyei/49 which had been purchased by their deceased father but registered in the name of Joseph. He denied that Joseph got this property as a gift from Akiuri clan. That their deceased father was Agathigia clan who did not see eye to eye with the Akiuru clan. That clan land could only be given to a member of the same clan. That the dispute between him and Joseph began when their mother passed away. Their mother during her life time was doing everything for their family. When she died Joseph began to encroach on the deceased properties that he even attempted to evict Margaret their step mother. That he got the deceased to thumb print some documents on the pretext that it was Paul who intended to sell the deceased's properties. Because of the power of attorney Joseph got from the deceased he decided to put caution against the deceased's properties. That the transaction between Joseph and Stanley Kinyua was not done in open. He said that Stanley Kinyua was not an innocent purchaser without notice. Although earlier in his evidence he had stated that parcel no. 941 was bushy and unoccupied he later stated that there were coffee bushes stretching from parcel No. 940 and 941. He proposed that since Joseph had gotten parcel No. 49 during the life time of the deceased that Margaret should therefore get Parcel No. 52 and parcel no. 313. That he Paul should get parcel No. 59 absolutely. That parcel No. 522 which is 2 ½ acres be divided equally between himself, Joseph and Margaret. This witness produced a letter written by Executive Officer of Embu Court with a view to showing that the case quoted in the green card of parcel No. 59 i.e. No. 941 of 1993 did not exist in Embu court. It is however noteworthy that the Executive Officer in the letter made reference to the case Number 914 of 1994. The second witness in support of the petitioner's case was Margaret Muthoni. She stated that she was a wife to the deceased. The deceased had two wives. The first being Beatrice Wakarithi and the second being herself. The first house had two sons and two married daughters. In her house she had two sons and six daughters. Two of her daughters are married and four are not. That she still resides on the land where the deceased left her that is parcel No. 313. She said that the deceased for several years suffered with high blood pressure and sugar diabetes. That as his sickness progressed he became forgetful although there were times he could communicate well and other times he could not. The deceased's first wife resided on parcel No. 522. She denied the knowledge of power of attorney given to Joseph. She was aware of the disputes between Joseph and Paul which arose over inheritance and after the death of their mother. As a result there had not been an agreement on which property each party should get. She proposed that she be given parcels No. 313 and No. 52. She further proposed that Paul be given parcel No. 59 which is 7 ½ acres. That the court do take into account the property given to Joseph namely parcel No. 49 which 6 ½ acres. In respect of parcel No. 522 she

requested that it be divided equally between the two houses. She said that she does not expect to share with anyone the parcel of land where she resides and she does not expect to share the parcel of land where the first wife was residing. She confirmed that parcel No. 941 is fenced and that no one lives there. On being cross examined she said that parcel No. 49 was purchased before demarcation by the deceased. She however had no proof of that purchase. In respect of parcel No. 941 she requested that it be retained in the name of Stanley Kinyua. PW 3 had worked for the deceased for 23 years. She knew the deceased's family from 1968. She said that parcel No. 49 was bought by the deceased and given to Joseph when he got married.

That was the evidence presented before court. It is clear that the deceased at the time of his death was sickly and blind. Whether or not he was suffering from memory loss I find that there was no proof before court. The petitioner ought to have adduced medical evidence to prove the state of the deceased's mind. That as it may be I find that Joseph obtained the transfer of parcel No. 941 into his name after the death of the deceased. This is clear from the details of the green card that the registration into his name of that land was after the death of the deceased and before the grant of letters of administration. From the evidence adduced before court I find that the subsequent transfer of that property to Stanley Kinyua was without notice. He was in my view an innocent purchaser. There was no contrary evidence produced before court. The fact that he was a neighbour of the deceased is not sufficient evidence of notice. Further section 2 of the Law of Succession Act defines Estate as, "*Means the free property of the deceased person.*" Although parcel No. 59 was free at the time of the deceased's death due to the subsequent transfer by Joseph of parcel No. 941 into his name that property did not fall for consideration in this matter. Further I find that there was no sufficient proof before court that the case which removed the caution of parcel No. 59 did not exist. At the beginning of this judgment I outlined the issues for consideration in this judgment. On the first issue as to who should be appointed administrator of this estate I have considered the evidence before me and the submissions filed. I find that both Paul and Joseph mistrust each other. To take care of that mistrust I think it is right to appoint both of them as administrators. In addition the second house needs to be represented in the administration. I therefore appoint Margaret Muthoni to be a co-administrator with the two. The court therefore shall appoint Paul Maina Githuku, Joseph Waruri Githuku and Margaret Muthoni. On the second issue I find that the assets of the estate do not include parcel No. Mutira/Kanyei/49. The objector Joseph said that he was given this property by his mother's clan before demarcation. The petitioners and their witness were not able in my view to disprove this. Joseph stated that at the time he was given that land he was 17 years old. Paul, Margaret and PW 3 said that that property was bought by the deceased and given to Joseph during the life time of the deceased. In my view they failed to prove that the property at any time was purchased or belonged to the deceased. In answer to the second issue I find that the assets of the estate are

1. MUTIRA/KIRIMUNGE/522
2. MUTIRA/KIRIMUNGE/52
3. MWERUA/BARICHO/313
4. MUTIRA/KANYEI/940

In respect of the third issue on who are the beneficiaries of the estate I find in evidence that Margaret stated she had two sons who from the list she gave would seem to be John Waruri and Anthony Kariuki. She had four unmarried daughters but she failed to name them for the purpose of identifying the beneficiaries. In response to this issue doing the best that I can from the evidence before me I find that Margaret Muthoni, John Waruri, Anthony Kariuki, John Maina Githuku, Joseph Waruri Githuku and unnamed four unmarried daughters are the beneficiaries. The fourth issue was how the deceased estate should be distributed. Evidence came out clearly that the deceased at the time of his death left two houses residing on distinct pieces of land. Margaret was left occupying parcel No. 313 and cultivating parcel No. 52. The first house was left occupying parcel No. 59 (now subdivided). Paul stated that he presently cultivates parcel No. 522. This was not contradicted by any party. Bearing in mind the manner of occupation and use of the land I will recognize that Joseph benefited from parcel No. 941. Paul therefore will be given parcel No. 940 absolutely. Parcel No. 522 being cultivated by Paul shall be divided equally

between Paul and Joseph. The judgment of this court is as follows:-

1. *That a grant of letters of administration do issue in the following names: \_*

· *Joseph Waruri Githuku, Paul Maina Githuku and Margaret Muthoni jointly.*

2. *Distribution of the deceased's estate shall be as follows:-*

· *Paul Maina Githuku parcel No. Mutira/Kanyei/940 absolutely.*

· *Paul Maina Githuku and Joseph Waruri Githuku to share equally parcel No. Mutira/Kirimunge/522.*

· *Margaret Muthoni to get a life interest in parcel No. Mutira/Kirimunge/52 and Mwerua/Baricho/313 and thereafter to her surviving children.*

3. *Property parcel No. Mutira/Kanyei/941 to remain in the name of Stanley Kinyua Gachara.*

4. *There shall be no orders as to costs.*

*Dated and delivered at Nyeri this 8<sup>th</sup> October 2008.*

**MARY KASANGO**

**JUDGE**