



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

**Succession Cause 570 of 2001**

***IN THE MATTER OF THE ESTATE OF WAMUNGA MWONJORIA ..... DECEASED***

**AND**

**MUTHONI KAMUNGA ..... 1<sup>ST</sup> PETITIONER**

**ERASTUS WACHIRA KAMUNGA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NGII NGURE KAMUNGA ..... 1<sup>ST</sup> PROTESTOR**

**JOSEPH ALBAT NGURE KAMUNGA ..... 2<sup>ND</sup> PROTESTOR**

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

Following the death of Kamunga Mwonjoria on 26<sup>th</sup> April 1995, Muthoni Kamunga and Erastus Wacira Kamunga, wife and son respectively of the deceased on 11<sup>th</sup> October 2001 jointly petitioned this court for grant of letters of Administration intestate. In the petition, the petitioners indicated that the deceased died intestate and left behind the petitioners together with Evelyn Wairimu Kamunga and Margaret Wahito Kagiri surviving him. The assets of the deceased consisted of only land parcel number [PARTICULARS WITHHELD] hereinafter referred to as “*the suit premises*”. On 10<sup>th</sup> January 2002, the grant was duly issued to the petitioner by justice Juma (*as he then was*).

On 4<sup>th</sup> June 2002, the petitioners filed an application for confirmation of grant. In the said application the petitioners proposed that the suit premises be transferred and registered in their names absolutely. However on 15<sup>th</sup> July 2002 one Ngii Ngure Kamunga and her son, Joseph Albert Ngure Kamunga hereinafter referred to as “*the protestors*” filed an Affidavit of Protest against the confirmation of grant. In their protest, the protestors through the 1<sup>st</sup> Protestor claimed that the deceased was her brother. That the petitioners had petitioned for the grant without informing them and requiring their consent nor serving them with citation to renounce their right to petition for the same though they knew that they were close relatives of the deceased. That the petitioners had given false information that they were the sole beneficiaries of the estate of the deceased. That if the grant is confirmed to the petitioners, the protestors as lawful beneficiaries will be left out. That the deceased had indicated to the protestors that they were beneficiaries of his estate. It was for that reason that they had lodged the protest.

In response to the protest, the 2<sup>nd</sup> Petitioner, Erastus Wachira Kamungi swore a replying affidavit on his

own behalf and on behalf of the co-petitioner, Muthoni Kamunga. In pertinent paragraphs he deponed that the protestor was his paternal aunt, an elderly lady married to one Kangi – deceased and resides in her farm at Gikondi. That the petitioners had no legal obligation towards the protestors to inform them or seek their consent or otherwise to facilitate the grant of representation of the deceased's estate. That by virtue of the petitioners being a wife and son respectively of the deceased, they ranked higher in priority for grant of letters of Administration of the estate of the deceased than the protestors who are a sister and nephew respectively to the deceased. That the protestors were not close nor did they support either spiritually or materially the maintenance nor looked after the well being of the deceased whilst alive. In fact they did not even attend the deceased burial. Finally he deponed that the protestors have no beneficial interest or any known claim to a share of the deceased's estate.

On 3<sup>rd</sup> May 2004 the case was placed before justice Okwengu for directions. Directions were given in terms that the petition and protest be heard by way of viva voce Evidence and parties be at liberty to call witnesses. The hearing then commenced before me on 16<sup>th</sup> October 2008.

On behalf the protestor, her son Joseph Albert Ngure Kamunga testified and called one witness. His testimony was as follows albeit in summary. That he was the son of Ngii Kamunga the first protestor who had since passed on. That her mother had been married but was later divorced in 1944. She then came back and resided with her brother, Kamunga Mwonjoria, deceased. By the time she came back as aforesaid her father had passed on. She never went back to her former husband Kangi Kaburu nor re-married until she passed on. All along she was leaving with her deceased brother. However in 1958 she left her brother's residence and was employed in Thika until 1<sup>st</sup> June 2004 when she passed on. It was his wish therefore to inherit a portion of the deceased estate as he had been brought up by the deceased. He proposed that the suit premises being ancestral land should be divided into three equal portions so that he gets one portion that ideally should have gone to his deceased mother and the other two portions may be shared between the petitioners. That earlier on when he approached the 1<sup>st</sup> petitioner regarding the suit premises with his brother she vehemently told them to go back to their father and claim their inheritance.

Cross-examined by Ms Mwangi, learned counsel for the petitioners, the witness stated that he stayed with his mother at the deceased residence from 1944 to 1958. That the deceased had no brothers. That the suit premises were ancestral land as the deceased had inherited the same from his grandmother. That before his mother died she was still staying in Thika. He conceded that his deceased mother did not attend the deceased burial. He also conceded that he had his own parcel of land measuring one acre in which he buried his mother when she passed on as aforesaid. He also conceded that neither himself nor his deceased mother had ever put up any structures on the suit premises. Finally he stated that he was claiming a portion of the estate in his own right as he was brought up by the deceased.

Kihia Mwonjoria, was the witness called by the protestor. He testified that he was a step brother to the deceased. That the protestor's mother was a sister to the deceased. That though the protestor's mother had once been married to Mr. Kangi, they had separated in 1944 and she came back in the company of the protestor and stayed with her brother, the deceased. That bride price had been paid. That the protestor's mother had two children with Mr. Kangi. Whereas one child remained with Mr. Kangi, the protestor moved back with his mother. That part of the bride price was however refunded. That the protestor and his mother resided with the deceased upto 1958 when she left to take up a job at Thika to educate her children. According to him, the protestor was entitled to inherit a portion of the estate of the deceased as he had no inheritance at Mr. Kangi's.

Under cross-examination, he conceded that the protestor's mother did not attend the deceased's burial as she was at her place of work. That a portion of dowry paid by Mr. Kangi for the Protestor's mother was refunded. That the protestor's mother was buried on the protestor's land. With that the protestor's case came to a close.

For the petitioners, the 1<sup>st</sup> Petitioner testified and called one witness as well. She testified thus; that the deceased was her husband. The deceased had been previously married to one, Wangui, the mother of the 2<sup>nd</sup> petitioner. She knew the protestors. The 1<sup>st</sup> protestor was a sister to her deceased husband and the

2<sup>nd</sup> protestor his nephew. She maintained that the suit premises belonged to the deceased and can only be inherited by her house and that of Wangui. The protestors had never stayed on the suit premises. The protestors never claimed the suit premises or a portion thereof during the lifetime of the deceased. When the first protestor passed on she was buried where she was married. The relationship between the deceased and protestors was casual. Indeed when he passed on the protestor never attended his burial. That the protestor had in fact already inherited from his father's estate.

Under cross-examination by Mr. Macharia, learned counsel for the protestor, the witness maintained that the 1<sup>st</sup> protestor was buried where she was married. That Mr. Kangi had since died. She too did not attend the 1<sup>st</sup> protestor's and her husband's funeral as they were not friends with the 1<sup>st</sup> protestor. She was not also told by her husband to attend Mr. Kangi's burial. That the 1<sup>st</sup> protestor was buried on the 2<sup>nd</sup> protestor's land. However she was buried by her son the 2<sup>nd</sup> protestor and that is why she had stated in her evidence that she was buried where she was married.

Josephat Gatungi Wanyinge testified as follows on behalf of the petitioners. He was a cousin to the deceased. That the suit premises have all along been occupied by the petitioners. That though the 1<sup>st</sup> protestor was a sister to the deceased she was married and was still married at the time she passed on. That the 2<sup>nd</sup> protestor could not inherit a portion of the deceased estate because his mother was married and that is where his inheritance lies. According to him the suit premises should be inherited by the houses of the 1<sup>st</sup> Petitioner and her former co-wife, Wangui. That during the lifetime of the deceased, the protestors never claimed the suit premises. Finally he testified that the 1<sup>st</sup> protestor and the deceased were never on good terms. Under cross-examination, he maintained that the 1<sup>st</sup> protestor had been married and when she died she was buried on the 2<sup>nd</sup> protestor's land. That according to kikuyu custom, when a daughter is divorced, she cannot inherit her father's estate or a portion thereof. He was not however sure that the 1<sup>st</sup> protestor had been divorced as no dowry was refunded. As far as he was concerned she was never divorced. That the 1<sup>st</sup> protestor never put up a house on the suit premises. However he knew that when the deceased fell out with the 1<sup>st</sup> Protestor, the 2<sup>nd</sup> protestor who had been residing with the deceased was chased away. With this evidence, the petitioners' case came to a close.

Thereafter respective parties agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered the said written submissions. To my mind the issues for determination are threefold.

- (i) Whether the 1<sup>st</sup> protestor is entitled to inherit a portion of the deceased's estate
- (ii) Distribution of the deceased estate
- (iii) Costs

On the first issue, it is difficult to discern the basis of the 2<sup>nd</sup> protestor's claim to a portion of the deceased estate. From the evidence on record it would appear that he anchored his claim to the estate on the basis that he was brought up on the suit premises by the deceased. In a way he was saying perhaps that he was a dependant of the deceased. He also claimed that the suit premises was ancestral land and as a member of the deceased family he was entitled to inherit a portion thereof just like the petitioner.

In his evidence the protestor claimed that he was brought up by the deceased after his mother, the initial 1<sup>st</sup> protestor was divorced by his father. He went on to claim that the deceased educated him. Thereafter he got a job as a civil servant, left the deceased's homestead and has never been back since. It is important to note that this protestor has since bought this very piece of land whereat he has settled. Indeed when the 1<sup>st</sup> protestor passed on he buried her on this very piece of land aforesaid and not the suit premises the subject of these proceedings. This being the scenario, can the surviving protestor really claim to have been a dependant of the deceased? I do not think so. Section 29 of the law of succession Act defines who dependants are. They are wife or wives or former wife or wives, and the children of the

deceased whether or not maintained by the deceased immediately prior to his death; such of the deceased's parents, step parents, grand parents, grandchildren, stepchildren, children whom the deceased had taken into his family as his own, brothers and sisters, and half brothers and half sisters, as were being maintained by the deceased immediately prior to his death, and where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of death. From the foregoing, it is quite clear that the 2<sup>nd</sup> protestor who is a nephew of the deceased does not fit in any of the above categories of dependants. There is no evidence that the deceased had taken the protestor into his family as his own. The protestor claimed that the deceased educated him. However other than this bare allegation by the protestor there was no other evidence to back up the claim. Further, the mere fact that a person undertakes one's education does not necessarily mean that he had taken in such person as a member of his family. It is also interesting to note that a person whom the protestor considered his father would die and he fails to attend his burial. Indeed even his own mother failed to attend her own deceased's brother's burial. The protestor did not explain the circumstances that led to him and his mother to give a wide berth the burial of the deceased. Perhaps the reason is as proffered by the petitioner and her witness, that the deceased and protestors were not on good terms. In the absence of any evidence to the contrary I will take the foregoing as the reason behind their failure to attend the deceased's burial. If that be the case, can it really be claimed that the protestors were dependants of the deceased and or deemed themselves to be members of the deceased family? It is on record that the 1<sup>st</sup> protestor left the deceased's homestead in 1958 when she was employed in Thika where she remained until she passed on sometimes on 2<sup>nd</sup> June, 2004. The 2<sup>nd</sup> protestor too left the homestead once he got a job as a civil servant. From the evidence on record the last time the protestor was on the suit premises was in 1986. Since then and using the proceeds of his salary, he bought his own separate parcel of land where he has settled. There is no evidence that the protestor's father Mr. Kangi has ever disowned him. Accordingly and as testified to by the petitioner and her witness the protestor's inheritance if any lies in the estate of his deceased father, Mr. Kangi and not the instant estate. Attempts were made by the Protestor's only witness to show that the dowry paid for the protestor's mother was returned following the dissolution of the marriage. However his testimony was not convincing at all and I choose not to believe it. And even if it was true that the dowry or a portion thereof was returned, does that act alone mean that the protestor ceases to be a son of Mr. Kangi and therefore not entitled to inherit a portion of his father's estate? I do not think so. Mr. Kangi's estate in my view is still available for distribution among his children, the protestor being one of them.

Section 28 of the law of succession Act provides the guidelines the court ought to consider when making orders regarding provisions for dependants. These are:

- (a) The nature and amount of the deceased estate,
- (b) Any past, present or future capital or income from any source of the dependant.
- (c) Existing and future means and needs of the dependant
- (d) Whether the deceased had made any advancement or other gift to the dependant during his lifetime.
- (e) The conduct of the dependant in relation to the deceased.
- (f) The situation and circumstances of the deceased's other dependant's and beneficiaries.
- (g) The situation and circumstances of the case, including so far as can be ascertained the testator's reason for not making provision for the dependant.

The protestor was in employment by the time the deceased passed on. He was thus not dependant of the deceased for his daily upkeep and sustenance in the strict sense of the word. He had his own income until his early retirement. For the 1<sup>st</sup> protestor, now deceased, she left the deceased's homestead in 1958, when she took up a job in Thika, where she remained until she passed on as well. When the deceased passed on she was least bothered. She could thus not claim to be a dependant in those circumstances.

She was leaving on her own salary in Thika. The 2<sup>nd</sup> protestor also testified that he bought his own parcel of land where he has settled and that is where he buried his mother. This clearly demonstrates that the protestors were not in anyway reliant upon the deceased prior to his death. Much as they wanted this court to believe that they were dependants of the deceased, they have failed to bring themselves within any of the above circumstances that the court takes into account in making the order for provision for dependants. In any event, I do not think that the protestors were really convinced that they were dependants of the deceased when they filed the protest. I think that they were merely testing waters. In my view, the protestors if they were serious in their endeavour ought to have made an application under section 26 of the law of succession Act for an order for provision for dependants not adequately provided for on intestacy.

The petitioners have demonstrated that they have all along lived and earned their upkeep from the suit premises. They have their residences on the suit premises. None of the protestors have ever put up any structures on the suit premises to manifest their entitlement to the same.

Is the suit premises ancestral land? I have looked at a copy of the green card in respect of the suit premises tendered in evidence. It is indeed very clear that the suit premises are registered in the names of the deceased, Kamunga Mwonjoria. No other evidence was adduced to show anything to the contrary. Nor was any evidence tendered to show that the deceased was so registered as the proprietor of the ancestral land trust of any other person. In any event, the surviving protestor is not a member of the deceased's family. So that even if the suit premises were ancestral land, the surviving protestor would not be entitled to the same as he belongs to his father's family and not the deceased. Further there is no prove that the suit premises were ancestral land.

So how should the estate of the deceased be distributed. In my view, the protestors have not demonstrated to my satisfaction that they are entitled to any share in the estate of the deceased. Their protest ought therefore to be and is hereby dismissed. The grant should be confirmed in terms proposed by the petitioners in their application for confirmation of grant dated 4<sup>th</sup> June 2002.

Considering all the circumstances of this case, I do not think that it will serve the cause of justice if I was to order that costs be borne by any of the parties herein. The order on costs that best commends to me is that each party should bear his/their own costs.

*Dated and delivered at Nyeri this 28<sup>th</sup> day of November 2008*

**M. S. A. MAKHANDIA**

**JUDGE**