

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 420 of 2004

IN THE MATTER OF THE ESTATE OF GICHOHI S/O WANGIGI (DECEASED)

BETWEEN

FRANCIS WAHOME GICHOHI.....PETITIONER

AND

IRENE NYAWIRA.....PROTESTOR

J U D G M E N T

On 20th September, 2004, Francis Wahome Gichohi hereinafter referred to as “*the petitioner*” took out a petition for letters of administration intestate in respect of the estate of the late **Gichohi S/O Wangigi**. He presented the petition in his capacity as the alleged son of the deceased. In the affidavit in support of the petition, the petitioner deponed that the deceased died sometimes in 1957. He died intestate and left the following surviving him:-

(a)	The			Petitioner
(b)	George	Ndumia	Gichohi	– son
(c)	Lucy	Nyaguthii	Ndugo	– daughter-in-law
(d)	Stephen	Ndembu	Gichohi	– son

As for the assets and liabilities of the deceased estate, the petitioner deponed that the deceased left behind land parcel **Tetu/Thatha/220** hereinafter referred to as “*the suit premises*” as the only asset. There were no liabilities. A grant of letters of administration intestate was duly issued to the petitioner on 17th December, 2004.

Subsequent thereto, the petitioner applied for the confirmation of the grant vide an application dated 15th July, 2005: In that application, the petitioner proposed that the suit premises be shared equally between the petitioner, **George Ndumia Gichohi**, **Lucy Nyaguthii Ndugo** and **Stephen Ndembu Gichohi**. It was at this juncture that **Irene Nyawira** hereinafter referred to as “*the protestor*” came into the picture. She filed an affidavit of protest against the confirmation of the grant. In the affidavit of protest, the protestor claimed that she was a dependent of the deceased being her granddaughter. That her father, also deceased settled on the suit premises and grew up there. That she had built her house on the suit premises and cultivates the same. That the petitioner was his cousin from the 1st house as his grandfather had two wives. That the proposed distribution would be grossly unfair as the offsprings of her father’s house had been totally left out. She proposed that the suit premises be shared equally between the two houses.

On 11th July, 2006, **Justice Khamoni** gave directions as to the mode of hearing of the dispute. It was to be by way of viva voce evidence. The hearing of the dispute then commenced before me on 3rd June, 2008. In her evidence, the protestor testified that she was a cousin to the petitioner. That she has lived on the suit premises since 1952. That **Gichohi**,

Njano and **Wothaya** were brothers. Her father was the son of **Wothaya** and was called **Gitahi Njano**. **Njano Wangigi** never had a wife. According to her, her share in the suit premises was to go to **Gichohi** and **Wothaya**. That she got married in 1973. She faulted the petitioner for coming to court whilst claiming that he was the son to the deceased when he knew that it was not true. She wanted the estate distributed according to her father's wishes which were that his son, **Michael Kiragu** in the event that he came back from Nairobi he should put up a house next to his in the suit premises and that he should continue cultivating the portion of land given to him. She went further and claimed that the suit premises should be divided into two equal portions and shared between her said brother **Michael Kiragu** and the petitioner. That the petitioner refused the remains of her deceased father to be buried in the suit premises and had to be buried in a public cemetery.

Under cross-examination by **Mr. Mugo**, learned counsel for the petitioner, she conceded that she was claiming a portion of the suit premises on behalf of her brother. That her said brother was involved in an accident and he is unable to speak. She admitted that she had not obtained letters of administration for her late father's estate though.

Next to testify on behalf of the protestor was **Michael Kiragu Gitahi**. He is a brother to the protestor. Though he resides on the suit premises, he has not build any house on it. Instead he stays in his late father's house. That he has been tilling the suit premises since 1962 when his father passed on and has no other land. Under cross-examination by **Mr. Mugo**, the witness stated that he had not filed affidavit of protest. That he used to stay in Nairobi until 1985 and had no letters of administration for his late father's estate.

The final witness called by the protestor was **Gladys Muthoni**. She knew both the petitioner and protestor. The suit premises belonged to **Gichohi** who was a grandfather to both the protestor and petitioner. She conceded that the protestor was married. However her home in the event that she was chased away by her husband was in the suit premises. She was an aunt to the protestor. That marked the close of the protestor's case.

On the petitioner's side, the first to testify was the petitioner. He stated that the suit premises belonged to his maternal grandfather. His mother never got married. Since 1961 when he was born he has been brought up on the suit premises. He knew the protestor. Her grandmother and his grandfather were siblings. That the protestor's father had no land. Her grandfather had land in Ithithie. The protestor had no right to inherit the petitioner's deceased grandfather's estate as she is married and ought to inherit her husband's estate. In the alternative, if she has to inherit, it must be from Kiragu's land at Ithithie. The protestor had no right to inherit the petitioner's deceased grandfather's estate as she is married and ought to inherit her husband's estate. In the alternative, if she has to inherit. It must be from Kiragu's land at Ithithie. Under cross-examination by **Mr. Nganga**, leaned counsel for the protestor, the petitioner stated that though he had described himself as a son of the deceased in the petition, that was not the correct position. He was however his grandson. That the suit premises at some point had many people who later left including Gitahi. When he died an attempt was made to bury his remains on the suit premises and members of the clan resisted as he was not a member of the clan.

Patrick Gichuki, also testified on behalf of the petitioner. He stated in his evidence that he knew both the petitioner and the protestor since childhood. That the petitioner was a grandson to the late Gichohi. The protestor was a daughter to Gitahi. However Gitahi was not related to Gichohi. He came to the area during emergency. The land had not been demarcated then. Gitahi was not given land in the area as he was a squatter in the village. Gichohi was given land by the clan. Gitahi was never given land. Indeed he was denied land. However he bought a house from another woman on the suit premises. He never put up a house of his own. That house was on Gichohi's land. Gitahi was staying therein with his wife. She died in 1964 and was not buried on the suit premises either as it did belong to them. Cross-examined by **Mr. Nganga**, the witness stated that during demarcation, people

were grouped as a clan and would agree on some contributions to purchase land. Once the land was acquired, it would be shared among the clan members who had contributed towards its purchase. The protestor and her late father had come from Ithithie.

Following the close of the petitioner's case, parties agreed to tender written submissions in support of their respective positions. I have had occasion to carefully read and consider the said written submissions.

So what are the issues in this case that calls for my determination? I think they are fourfold:-

- (i) **Whether the protestor is a dependant of the deceased.**
- (ii) **Whether the protestor's father was entitled to a portion of the suit premises.**
- (iii) **Whether the protestor has the locus standi in the proceedings.**
- (iv) **Costs.**

In her affidavit of protest, the protestor claimed that she was a dependant of the deceased being her granddaughter. However in her evidence she departed substantially from this position. She now hinged her protest on the basis of being her brother's keeper. That her father had told her that in the event that her brother (PW2) came back from Nairobi, he should put up a house next to his and continue cultivating the portion of the suit premises that he was cultivating. She further proposed that the suit premises be shared equally between the petitioner and PW2. This was a complete departure from what she had deponed to in her affidavit of protest. She no longer pursued her claim on the basis that she was a dependant. She had also claimed that she had put up her own house on the suit premises and was cultivating a portion of the suit premises. Yet the evidence tendered is contrary to what she had deponed to. She had also deponed that the proposed distribution by the petitioner was grossly unfair as the offsprings of her father's house had been left out. Yet in her evidence, she merely proposed that the suit premises be shared equally between her brother (PW2) and the petitioner. By this proposal, was she any better than the petitioner? I do not think so. She gave the following as persons who ought to benefit from the estate of the deceased; **Michael Kiraguri, Irene Nyawira, Jane wanjiku, Mercy Wangari, Jedidah wanjiru, Jane Muthoni** (deceased). However for the latter she proposed that her children **Michael Kiragu, David Maina, Susan Nyaguthii** and **kariuki** should inherit her share. It is important to note that the aforesaid people were the sisters and brothers of the deceased. From the evidence, they are all married. They have not individually staked a claim to the estate of the deceased. Even PW2, whom the protestor is fighting tooth and nail to secure his stake in the estate did not seek to protest on his own behalf. Indeed it would appear from the evidence tendered that he was actually dragged in to these proceedings by the protestor. He never testified as to the wishes of his father as elegantly put forth by the protestor.

Section 29 of the Law of Succession Act defines the meaning of a dependant. The protestor does not seem to fit in any of those definitions. Much as she may have been a grandchild of the deceased, she was not being maintained by the deceased immediately prior to his death. There is evidence that the protestor has been married for the last 30 years. She could not therefore have been a dependant of the deceased who died way back in 1957. At the time, if anything, she could only have been a dependant of her father who was still alive then.

A party is normally bound by his/her pleadings. In this case, the protestor made a complete departure from what she had deponed to in the affidavit in her oral testimony. In answer to issue one above therefore, I am of the considered view that the protestor was not a dependant of the deceased as she claimed and as envisaged by *section 29* of the Law of succession Act.

How about issue number two? The evidence on record shows that the suit premises were demarcated in the presence of the protestor's father and registered in the name of the deceased. He was an adult then but never sought to be registered as proprietor of the suit premises or a portion thereof. The protestor's father too did not throughout his stay on the

suit premises even bother to stake a claim to a portion thereof. Is it because he knew that he was not entitled to the same! It is also rather perplexing that when the protestor's parents passed on and attempts were made to bury their remains on the suit premises, those efforts were thwarted by clan members. If indeed the protestor's father was a member of the clan and a relative of the deceased, how come the family treated him so badly in death that he was laid to rest in a public cemetery. Could this not buttress the case for the petitioner and his witnesses that indeed the protestor's father was not a clan member and was a mere squatter in the village having come from Ithithie? I have no doubt at all that if indeed the protestor's father was a member of the family and clan as we have been let to believe his remains and that of his wife would not have been subjected to the indignity of being buried in a public cemetery. African communities treat death with awe. The last thing that should happen is to disrespect a person in death. The fear is that the deceased so treated is likely hunt them in life. There is therefore no way that the protestor, her brother and sisters would have allowed their parents to be buried in the public cemetery if they believed strongly that they were members of the same family and clan as the petitioner. The fact that their parents were buried in a public cemetery was not controverted and or denied by the protestor and her witnesses. Finally and it is also important to note that the protestor did not plead nor prove that the suit premises were registered in the deceased name in trust for her father and members of his family.

From all the foregoing, I am satisfied that the protestor's father was not entitled to a portion of the suit premises.

From the evidence on record, the protestor is only claiming her deceased father's entitlement in the suit premises. Actually she is doing so as her brother's keeper. She claims that her said brother was involved in an accident and cannot speak. Since nobody can speak for him, she took up the mantle. However, it is not true that her brother cannot speak as claimed. Indeed he did testify in this case as PW2. What did the protestor hope to gain by making this wild lie that PW2 could not speak for himself. Sympathy of the court perhaps! However that is hard to come by. Throughout her evidence and that of her brother, no grant of representation to her late father's estate was exhibited. That being the case and as correctly submitted by **Mr. Mugo**, neither the protestor nor her brother had locus standi to claim part of the estate through their father. Even if they were to be treated as dependants, they had not filed an appropriate application under the appropriate provisions of the Law of Succession Act for consideration along those lines.

It is worthy noting however that, the petitioner had indicated in his petition that he was a son to the deceased whereas infact and as he agreed in court, he was his maternal grandfather. On this basis, **Mr. Nganga** has urged me to treat his evidence with extreme caution. However there is no denying that the petitioner was born and bred on the suit premises. Indeed the deceased treated him as his son. That may perhaps explain why the petitioner considered himself a son of the deceased. I think the misdescription is excusable. In any even when the issue was raised with him in cross-examination he was first to correct the wrong impression created by the misdescription.

The conclusion I have come to in this mater is that the protest lacks merit and is accordingly dismissed. The grant shall be confirmed in terms proposed by the petitioner. I make no order as to costs.

Dated and delivered at Nyeri this 20th day of November, 2008.

M.S.A MAKHANDIA

JUDGE