



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Succession Cause 865 of 2004

**IN THE MATTER OF THE ESTATE OF SAMUEL NJENGA
GATHUNGA (DECEASED)**

RULING

The Administrator/Respondent Mary Wanjiku Kanyoni received certificate of confirmation in the estate of the deceased on 26th March, 2004 in Succession Cause No.3 of 2003 before Senior Resident Magistrate's Court at Limuru.

The Objectors Grace Wangari Thugu and Esther Gathoni Karanja, (who is now deceased) the sisters to the Administrator/Respondent filed the summons to revoke or annul the said confirmation of grant on 29th March, 2004, Summons was provided under Section 76 of the Law of Succession Act (Cap.160 Laws of Kenya).

After directions by the court that the Objector proceedings be heard by oral evidence, both parties adduced evidence.

Before I elaborate on the evidence adduced, I may point out the undisputed facts:

1. The deceased was paternal uncle to the parties.
2. The Administratrix lived near the deceased and the two Objectors' matrimonial places are at a distance to the deceased's home.
3. The three sisters filed a land dispute against the deceased in respect of their mother's land wherein the deceased lost.
4. The deceased before his death called Esther a co-objector to bring a goat to appease their differences which was brought and the goat was slaughtered and eaten.
5. During the night of that ceremony the meat of the slaughtered goat was stolen and the deceased handed over the title deed of his land and Shs.800 to the Administratrix.
6. **The deceased died soon after the event.**
7. **After the funeral the three sisters shared the debt of the deceased in the sum of Shs.900/-.**
8. **The Administratrix went ahead and obtained grant and the Objectors are thus before the court claiming that they also are the beneficiaries.**

9. The Administratrix claims that the deceased gave her to keep the title in the event of his death and thus she relies on an oral will.

In the background of these facts, the Objectors opened their case. One of the Objectors Grace Wangui gave evidence and two witnesses were called to support their claim. Grace PW.1 testified that on 6th June 1994 the deceased called all the three sisters before his death. Esther was requested to bring the goat. At 12.00 p.m. they all were called by the deceased and he told them that they all were his children and they all took a piece of meat and ate it. He blessed them thereafter and told them that his property was theirs and theirs were his. He died on 19th June, 1994. The Administratrix bought his coffin using Shs.800 and she further told them that the following day of the meeting the deceased gave her the title deed and money for safekeeping as he suspected that left-over meat was stolen.

After the burial, meeting was held and they all paid Shs.300 each to pay for debt of KShs.900/- left by the deceased. They shared the other things lying in his house.

According to her the two sisters (Objectors) permitted the Administratrix to lease the land so that she could be assisted with school fees for her two children. When they asked her later to return the land the problem issued. The chief also, when they were waiting for his letter, issued the same to the administratrix and she went ahead behind their backs to obtain the grant of representation. She denied that the Administratrix was given the land by the deceased excluding them in presence of two witnesses.

This fact may be relevant and I shall deal with the same later in this ruling.

In cross-examination she denied that the deceased was sick for one and half years. According to her he was sick for about four months before his death. She stressed that there was a tap of water nearby and nobody needed to fetch water for him. Herself and co-Objectors used to visit him as they used to cultivate their mother's land (the bone of dispute between the deceased and the sisters) and that they used to bring firewood for him.

When asked about the meat eating ceremony, she stressed that the deceased called all the three in his house and blessed them all. They agreed that one Njuguna Mugure (DW.3) was a neighbour to the deceased but on the day of the ceremony he came late.

She reiterated that after the funeral, as the funeral committee was being dissolved, they contributed equally to pay his debt of Shs.900/- and that was the last meeting they had in respect of the deceased. She also reiterated that the administratrix herself told them the next day that she was given the title and Shs.800/- to keep by the deceased as the meat was stolen.

Her next witness was Peter Karanja (PW.2) and is a brother-in-law to the administratrix, the husband of the original co-administratrix.

According to him the deceased called him through one Muhiya and asked him to bring a goat so that they all could eat the same together with the three sisters. The ceremony is called '**Kuruta Kiharo**' meaning to remove the case from the homestead. He took the goat with Muhiya and one Gachangwe who is now deceased. When the meat was sent to the deceased through one Samuel he indicated that he wanted to see his three children. After two weeks of the said ceremony the deceased died.

Then he talked about committee meeting after the funeral and the three sisters contributed equally to pay department of Shs.900/- left by the deceased.

In cross-examination, he confirmed that the deceased was really sick for about two weeks before his death and before that he used to cook and take care of himself and his wife and Objector Grace used to visit him daily during those two weeks. He agreed that before that the three sisters were not in good terms with the deceased but denied that the administratrix was in good terms with him. He stated that Muhiya and Njoroge were church leaders and went to see the deceased, in that capacity, adding that Njoroge was also deceased's neighbour. He was not aware of the deceased's meeting with Njoroge and Njuguna Mugare

prior to his death. He also confirmed that he was present when the household goods were shared amongst three sisters after the funeral.

He said that the decision of the chief was not agreeable to them.

PW.3 was Tabitha Gathoni who is a niece to one Samuel Njenga (her paternal uncle). He knew the three sisters.

Her home at Fadhi was at a distance of 20 minute's walk to that of the deceased. She said she sells fruits at market and on her way to and from market she would visit him. At around 4.00 p.m., she would leave fruits at his home to be picked up when she would go back to the market.

In her cross-examination, however, she stated that for two weeks when the deceased was sick she could not say who looked after the deceased as she had not visited him during that period. But she agreed that during that time Njuguna who was his neighbour and also Mary could have visited as they stayed very near to the deceased.

She also talked about the ceremony of goat slaughtering and stated that after the said ceremony the deceased's relation with the three sisters improved. She also stated that before the death, the deceased had leased his land and after that the Administratrix was leasing the same. She added however that during funeral there was no discussion as regards the division of his property and that she received ***Ngoima*** and ***Ruracio*** from the three sisters on behalf of the deceased. She reiterated what is stated by others that the deceased used to cook himself.

This was the evidence from the Objectors.

The Administratrix similarly gave evidence and called two witnesses.

In the beginning of her evidence, she testified that she was living with the deceased as he had no wife. That other two sisters (Objectors) were married and live far from the deceased. But thereafter she stated that she was also married and stayed near the deceased's house. She said that the deceased's limbs were getting swollen and that towards the end, he was unable to do anything and she helped him to do everything. However, I do note that she has not told what was the duration of the beginning, middle and end of his ailment.

Similarly, immediately after stating that there was a land dispute between "**all of them and they were not in talking terms**" she stated the case was between "**three of us and the deceased**".

According to her three days after the finalization of the case, the deceased went to her home and asked her to assist him by fetching water, cooking and washing him. Thus the enmity between him and herself cleared but remained between him and the Objectors. Once again she did not say when the case was finalized.

She also agreed that her sister Esther was asked to get a goat to be slaughtered so that the past can be forgotten.

Once again, immediately after stating that two Objectors were with the deceased inside his house after the goat was slaughtered, she testified: "**Now I say three of us were called by the deceased**". Then the deceased told them that he had accepted the goat and have forgiven "**Them**" (emphasis mine) and have opened the gate for receiving the dowry from "**Our**" husbands starting from the eldest.

As per her evidence, after the meat was stolen, the deceased called her and told her to remove a bag containing his documents and gave her Shs.800/-, title deed and some letters. As regards the land in dispute, after she testified as regards the use of land, she was asked to repeat her evidence. It was necessary as some issues were raised as regards the interpretation of her evidence by the interpreter.

She said that the deceased told her that he had given her the land and that she should not give the land to anyone except to him, if he lived. He also directed not to evict the lessees of his land if they intend to live on. She told her sisters what transpired and kept the documents and money. In a meeting after the funeral the issue of property was raised and Peter Mahiyu and Njuguna Mugare indicated that they knew that the land was hers. No one including the Objectors and their husbands did raise any Objection.

She also stated that as the Objectors did not want any household goods, she took them to her home.

According to her, her sisters started raising issues after eight years. She refused to give them the title. The elders and Chief also decided that the land was hers.

Thereafter she filed the petition.

In cross-examination she was asked questions on the proceedings before the elder wherein she had stated that first she did not respond to the request of the deceased to assist him but when Gichoya Mukwero was sent, she agreed. I also would like to quote a passage from her statement on page 3, of the chief's record of proceedings.

“That theft made him to send some to me. When I came he told me to look into a sack and a bucket. In it there was coin money totaling KShs.800/- and a land title deed. He told me to take it and never give it to anyone except him on demand”.

She denied that the Objectors and their husbands helped to repair the deceased's house. She denied before me that Esther bought medicines for the deceased but when confronted with her statement before the chief she agreed that Esther's husband bought medicines for the deceased. She denied that the said Karanja (Esther's husband) washed the deceased. She also agreed that Esther was asked to buy the goat on behalf of all the sisters and that they were forgiven thereafter. She also stated that the deceased gave her the title deed as he was afraid that someone would steal it, after the meat was stolen.

Even though she did not say any person being present with her when the deceased gave her the title deed, she stated that one Margaret Wangui was present.

She also agreed that all the three sisters had shared the debt of Shs.900/-. She denied that her sisters (Objectors) allowed her to lease the land to pay for her children's school fees. She also denied that they approached her to commence the succession proceedings, and she told them that the land was hers. Then she stated that she did not know what she told them. She denied she wanted to sell the land to Njuguna Magare and said that he told the family after the funeral that he had not bought the land from the deceased as suspected.

She was asked several questions on the record of the proceedings before the Chief which were not as per her evidence before the court.

Even in re-exam she gave confused answers as to who was sent and when by the deceased to ask her to assist him.

Second witness was Muhiya Njoroge who knew the deceased since they were young and his house is near to that of the deceased. He was in charge of welfare of this church and thus he visited the deceased on 20th October, 1993. He found him alone, but the deceased told him that one Wanjiku assisted him by washing him and providing him with firewood. Then he advised the deceased to forgive the two sisters and Esther's husband Karanja. The deceased told him that unless something is done his curse on them for taking him to court would remain. Then he asked Karanja to produce a ram and Karanja did what he told him to do. He talked about the slaughtering ceremony and the deceased blessing all. He also confirmed the evidence from the Objector that after the death, dowry of one ram was paid from all the three sisters.

Unlike all other witnesses, he stated that the deceased died after six months from the meat ceremony.

He talked about the next day of the ceremony of meat eating. According to him when he was coming back home from work he met one Njuguna and was told that the deceased had requested to see him. They both went to the deceased house and the deceased told them that because of the theft of meat he has given money and title deed to the Respondent/Administratrix and that in case of his death, they should tell the family that the land belonged to the Administratrix. He added that after the death of the deceased, while he was at the Administratrix place, he told this incident in presence of the Objectors. They did not raise any question, which they did after eight years had lapsed. Then he said that before the death the relation between the deceased and the Administratrix was good but that between the Objectors and him was not good as he was bitter as regards the case.

I may pause here to note that it is his evidence that the deceased blessed all the three at goat slaughtering ceremony and also asked for dowry which was paid and that according to him the deceased died after six months.

In cross-examination, he stated that only the Objectors were blessed by the deceased after the ceremony and asked for dowry from the husband of all the three sisters. In cross-examination, he also now contradicted himself by saying that on 4th day of the ceremony all the husbands brought the dowry as they were told by the deceased. Then he said that the dowry was paid to the mother-in-law of PW.3 Tabitha Gathoni.

He also stated that although he has testified that the Administratrix used to wash the deceased, he had never seen her washing him, and that he used to visit him alternately. He also stated that he was not present when the deceased gave Administratrix the title deed. He also confirmed that in his statement before the chief he had stated that stealing of meat prompted the deceased to give the title deed to the Administratrix. After admitting that he was the spokesman at the meeting after the funeral he did not recall how the deceased's debt of Shs.900 was paid by saying he left before sharing was done. He also agreed that he did not mention the name of Njuguna who as per his evidence was with him when he was told by the deceased about the title deed been given to the Administratrix.

He told the court, after stating that only the Administratrix helped the deceased, that the two Objectors did not help the deceased even for a day.

The third witness is Njuguna Magare. He talked about goat slaughtering ceremony and its purpose and said that the deceased later on asked for another goat but did not specify its purpose.

The next day the deceased asked him to call Muhiya. He did so and then the deceased asked him to call the Administratrix. When she came the title deed and money was given to her so that they could not be stolen and the deceased was also sick. The deceased also told them that in case he did not survive the Administratrix was to take care of the title deed and that she was to stay on the land as if it was hers.

In cross-examination he stated that if the Administratrix testified that only his wife was present when the Title Deed was given to her, it could be true and then stated that himself and Muhiya were told by the deceased that the title deed was given to the Administratrix. He also agreed that before the Chief he stated that he was present when the title deed was handed over to the Administratrix.

In cross-examination he then stated that while he was going home the deceased told him that he had given the title deed and money to the Administratrix.

This explanation raises two issues viz (1) The deceased was not bed-ridden and (2) this witness was not with DW.2 Muhiya Njoroge when the deceased told him, about the Title deed.

The last witness is Peter Gichuhi Mwaniki. He is a paternal grandson to the deceased. However, I do note that the deceased was not married and it is not before the court whether the deceased had any brothers, as apparently the only heirs to the deceased were parties before me. According to his evidence, it was only the Administratrix who looked after the deceased as she was staying near him and that the Objectors did not have good relation with the deceased as Gathoni took the deceased to the D.O.

He testified about the funeral and meeting thereafter when Muhiya Njoroge told all present how the deceased had told him that he had given his land to the Administratrix as he had assisted him in all respect.

Thereafter after five to six years he heard that there was a case before the Chief and family members presented a letter to the chief. This letter was not presented before the court. In the letter it was written how the land was given to the Administratrix by the deceased.

In cross-examination he agreed that he received Shs.300/- from each sister to pay the debt of the deceased as he was the Secretary of the funeral committee. He also said that there was no much discussion on the land in the meeting and that minutes of the meeting were not recorded.

He also agreed that the letter to the chief referred to by him was not written when the three sisters were present.

This is the evidence before me.

I do note that the deceased blessed all the three after the slaughtering ceremony was performed. As a matter of fact he called all the three sisters alone to bless them. There is evidence on record that he also asked for dowry after he blessed them and the same was paid by all the husbands. It does not really matter whether it was paid immediately after four days as per evidence of DW.2 or before the burial.

It is also indisputable that the money and title deed were given to the Administratrix by the deceased after the theft of the meat and he was afraid that they could also be stolen.

It is the case of the Administrator that the deceased had given her the title deed to keep with directions not to give to any one except him on demand. This evidence has to be considered in view of the circumstances under which the title deed was handed over to the Administratrix.

It is agreed by all concerned that the Administratrix was living near the deceased and she was the most convenient person to be handed over the things of the deceased for safe keeping.

The claim of the Administratrix that none of the objectors and their husbands assisted the deceased in any respect has been contravened by the evidence in cross-examination of Administratrix's and her witnesses.

On the other hand, it was the case of the Administratrix that the deceased made an oral will in the presence of two competent witnesses. These averments were made in paragraph 16 of her replying affidavit sworn on 10th June, 2004 but have not been proved.

The evidence of the Administratrix DW2 and DW3 vary in all relevant aspects as regards the deceased making an oral will and handing over the money and title deed to her. I do not need to reiterate the contradictions as I have detailed the respective testimonies.

I thus reject that the deceased made an oral will as contended by the Administratrix. In the premises, I do find that the estate is an intestate one with all the three sisters (one deceased by now) as beneficiaries.

Accordingly, I revoke the grant of letters of Administration issued to Mary Wanjiku Kanyoni made in Succession Cause No.3 of 2003 before S.R.M.'s Court Limuru.

I direct that the fresh grant be issued to Mary Wanjiku Kanyoni and Grace Wangari Thungu.

Thereafter both the Administratrix or either of them shall file the summons for certificate of confirmation of grant within 14 days from the date of issuance of the grant. The other Administratrix shall file her proposal of distribution amongst the three beneficiaries (The heirs of Esther Gathoni Karanja who is now deceased) I do not make any order on costs.

Dated and signed at Nairobi this 8th day of March, 2007.

K.H. RAWAL

JUDGE

8.3.07