

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 257 of 1999

MACHARIA S/O KARUNDO ALIAS MACHARIA KARUNDO..... DCD

AND

JOHN MWANGI MACHARIA PETITIONER

VERSUS

1. PETERSON NGINGA MACHARIA

2. ALEX GITHINJI MACHARIA..... PROTESTORS

JUDGEMENT

The deceased in this cause died in 1966. One of his then surviving wives namely Maria Wanjiku petitioned at the lower court for letters of administration. On her demise her son John Mwangi Macharia was substituted as the petitioner. When the Petitioner applied for confirmation of grant, objections were raised to that confirmation. The objection was heard by way of viva voce evidence. What came out from the evidence adduced before court was that the deceased had three wives. Those wives were Mary Wanjiku, deceased, Ruth Othaya Muthoni, deceased and Esther Wairimu. The deceased had the following children John Mwangi Macharia, Peterson Nginga, Philip Nginga, Mary Wanjiku, Alex Githinji, Francis Kiragu deceased and Elizabeth Wanjiku. The estate property is parcel number Othaya/Ihuririo/232. The court found the evidence of the deceased step-brother namely Francis Kioi to be most reliable. He stated that their father had two wives. He divided his property amongst the two wives whereby he was registered as an owner of his mother's portion and the deceased was registered for the other portion which he held in trust for himself and his brother Nginga Kirundo. Nginga Kirundo was involved in the Mau Mau fighting and died in the forest in 1953. After the emergency period the deceased with his family and the wife of Nginga Kirundo moved from the village to the estate land. The wife of Nginga Kirundo was called Ruth Muthoni. On going to the estate property the deceased told Ruth Muthoni to build on one side of that property. Ruth Muthoni had 4 daughters with Nginga Kirundo. Ruth Muthoni later had another child after the death of Nginga Kirundo who was called Nyambura. Nyambura in turn had children namely; Peter Nginga Nyambura, Shadrack Mwangi Nyambura, Judy Muthoni Nyambura and Patrick Kariuki Nyambura. In his evidence Francis Kioi stated that the property should be divided amongst the children with the oldest child the petitioner getting a large portion of 2 acres and the only surviving wife of the deceased Esther Wairimu getting ½ an acre. In contrast to that evidence was the evidence of the Petitioner. The court found his evidence to be unreliable, contradictory and self-serving. In his evidence he stated that his father did inform him about his impending death. That his father gave information of how he was to be buried. Further that his father stated that the property was to be distributed amongst his wives. What is interesting about that evidence is that the petitioner did not raise that issue of the oral will during the cross examination of the previous witnesses. Also in his application for confirmation of grant dated 11th April 2002, he did not seek the distribution in accordance with the stated oral will. The petitioner was emphatic that the grand children of Ruth Muthoni were not resident on the estate property. This was during his evidence in chief. On being cross examined on that issue although he tried to evade the question he did eventually accept that Ruth Muthoni was on the land at the time when the deceased died. Many times on being cross examined the Petitioner was reluctant to answer the questions.

I have considered the evidence tendered by the beneficiaries in this matter. On one hand some of the beneficiaries requested that the petitioner be given 2 acres and all the other children of the deceased be given one acre whilst the grand children of Ruth Muthoni be given 4 ½ acres. The other beneficiaries were of the view that distribution should be according to the wives of the deceased excluding the grand children. Having accepted the evidence of Francis Kioi as being the most reliable I do find that the deceased held estate property on his own behalf and in trust for his deceased brother namely Nginga Kirundo. I am therefore of the view that the grand children of Nginga Kirundo are entitled to obtain land on the estate property. Therefore in my judgement i do grant the following orders;-

- 1. That Peter Nginga Nyambura, Shadrack Mwangi Nyambura, Judy Muthoni Nyambura and Patrick Kariuki Nyambura do get one acre each of the property Othaya/Ihuririo/232.**
- 2. Esther Wairimu wife of the deceased do get half an acre of the property Othaya/Ihuririo/232.**
- 3. The balance of the property to be given equally to the following; - John Mwangi Macharia, Peterson Nginga Macharia, Philip Nginga Macharia, Alex Githinji and Elizabeth Wanjiku.**
- 4. There shall be no orders as to costs.**

Dated and delivered at Nyeri on 11th December 2007.

MARY KASANGO

JUDGE