

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 134 OF 1986
(IN THE ESTATE OF WAITHUKI WANJOHI ALIAS MATHEW WAITHUKU – DECEASED)
AND
GERALD GACHIHI)

ALICE MUTHONI) PETITIONERS

VERSUS

SAMUEL GICHUKI WAITHUKI OBJECTOR

JUDGMENT

The first petitioner is the grandson of WAITHUKI WAIGANJO (deceased) to whose estate these proceedings relate. The second petitioner is the wife of the deceased. The objector is the son of both the deceased and the second petitioner. The deceased had 2 parcels of land viz:-

OTHAYA/IHURIRIO/276 and OTHAYA/IHURIRIO/452. I will hereinafter refer to the latter parcel as the suit property. The deceased had 2 wives – the paternal grandmother of the first petitioner and the second petitioner. The father of the first petitioner was the only son in the house and the objector too is the only son in the other house.

The deceased transferred parcel No. OTHAYA/IHURIRIO/276 to the first petitioner and on 13/11/81 the first petitioner became the registered proprietor thereof. The deceased passed away on 27th July 1984. Parcel No. 276 measures about 5.1 acres while the suit property measures about 15 acres. The first petitioner testified that he is claiming 5/35 acres out of the suit property so that the 2 houses of the deceased can have equal shares of the estate of the deceased. The first petitioner has planted tea on the suit property and he contends that he did this without any objection from either the second petitioner or the Objector. He denied that there was an agreement made between him and the objector that he picks the tea for only 10 years and vacate that portion of the suitland.

In her evidence the second petitioner stated that the deceased gave her the suit property and that the first petitioner moved to parcel No. 276 when the deceased was alive. She denied filing a final petition with the first petitioner. Her children include the objector as the only son and daughters. She has 3 unmarried daughters who live with her on the suit property. The objector testified that she was not notified when the first petitioner filed the cause. He is not named as one of the beneficiaries of the estate of the deceased. He added that the first petitioner's mother is alive and living on parcel No. 276. She has not staked any claim to the suit property.

The objector produced as DEX 2 the agreement dated 14/2/88 between him and the first objector in which it was agreed that the first petitioner tends the 3500 tea plants on the suit property from April 1988 to April 1998. The objector is named in the agreement as the owner of the suit property.

I have considered the case for the restrictive parties. It is apparent that the deceased had made provision for each of his two houses before his demise. The first petitioner testified by being awarded parcel No. 276 *intervivos*. His father is the only son in their house. He had no unmarried sisters. On the other hand the house of the second petitioner consists of the objector and 3 unmarried sisters who also have a right to the estate. It would be inequitable for the house of the first petitioner's father to get about 10 acres while the objector remains with only 5 acres to be shared out with his 3 unmarried sisters. It is also noteworthy that the first petitioner's mother did not show any interest in the distribution of the estate.

I am convinced that the first petitioner has been less than candid in this matter. He proposed to file the succession cause with the second petitioner. What appears from the court file are 2 causes in one file. I

find that this was a devious way by the first petitioner to achieve his goal. This is confirmed by his exclusion of the objector as one of the beneficiaries to the estate.

I will dismiss the first petitioner's petition and uphold the objector's case. The suit property will vest in the objector and his unmarried sisters. The second petitioner will have a life interest thereon.

I make no order as to costs.

Dated this 22nd day of November, 2002.

J.K. MITEY

JUDGE