



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**SUCCESSION CAUSE NO. 943 OF 2013**

**[FORMERLY NAIROBI P&A CAUSE 2928 OF 2008]**

**RE ESTATE OF JACKSON KIMANI KARINGA (DECEASED)**

**HENRY NGIGI JACKSON KIMANI.....PETITIONER**

**VERSUS**

**ANTONY KIMANI WAMBUI .....PROTESTOR**

**JUDGMENT**

1. Jackson Kimani Karinga (hereafter *the deceased*) died intestate on 5<sup>th</sup> September 1997. He was 94 years.
2. His net intestate estate comprises three parcels of land known as Loc. 6/Gikarangu/1552; Loc. 6/Gikarangu/1857; and, Loc. 6/Gikarangu/360.
3. The petitioner's view is that he should retain the first two properties while the protestor should only inherit Loc. 6/Gikarangu/360 measuring 1 acre. The protestor on the other hand proposes that all the three properties be shared equally between the petitioner and protestor.
4. The petition for letters of administration was lodged by Henry Ngigi (hereafter *the petitioner*) at the central registry at Nairobi on 17<sup>th</sup> December 2008. He pleaded that the deceased was survived by only two dependents: Him and Ruth Wambui Kimani, now also deceased and the mother of the protestor.
5. A grant was issued to the petitioner on 15<sup>th</sup> May 2009. He thereafter applied for confirmation of the grant on 12<sup>th</sup> July 2010.
6. However, an affidavit of protest was lodged by Ruth Wambui on 14<sup>th</sup> September 2010. She died on 24<sup>th</sup> January 2011 and was substituted by her son, Anthony Kimani Wambui (hereafter *the protestor*) pursuant to a limited grant issued by the High Court at Nyeri on 17<sup>th</sup> June 2011. The new protestor filed a fresh affidavit of protest on 12<sup>th</sup> March 2013.
7. On 30<sup>th</sup> July 2013, the cause was transferred to Murang'a High Court.
8. The core of the protest by Ruth Wambui was that the deceased had two wives: Florence Muthoni, who was the petitioner's mother; and, Joyce Wanjiku (the protestor's mother). She claimed that the three parcels of land total to 16.5 acres. Her case was that the petitioner sought to eject her from the portion she was cultivating on Loc. 6/Gikarangu/1552 and to relocate her to Loc. 6/Gikarangu/360.
9. She argued that the net effect would be to allocate her a measly 1 acre and leave the petitioner with the lion's share of 15.5 acres. She also averred that the Maragua Lands Disputes Tribunal ordered her to be reinstated to a portion of Loc. 6/Gikarangu/1552.
10. The fresh affidavit of protest sworn on 11<sup>th</sup> March 2013 by the substituted protestor regurgitates the same arguments.
11. The retort by the petitioner is on a three-strand: Firstly, that the deceased had executed transfer forms for all the three parcels save that the registration was not completed; secondly, that the protestor was not a daughter of the deceased; and, thirdly, that the Maragua Land Disputes Tribunal lacked jurisdiction to issue her with the orders for adverse possession.

12. On 20<sup>th</sup> July 2020, I directed that the protested summons be determined by *viva voce* evidence.
13. Despite being served, the protestor did not attend the hearing scheduled for 5<sup>th</sup> October 2020. I must however observe that there is a signed witness statement on record by the protestor dated 18<sup>th</sup> January 2018 and filed on even date. And there are also the two affidavits of protest. I will revisit the matter shortly.
14. The petitioner (PW1) relied largely on his witness statement dated 21<sup>st</sup> January 2020. Its thrust is that the original protestor, Ruth Wambui, was not his step sister but a daughter to one Maingi Waweru, a destitute age mate of the deceased; and, to whom the latter took pity upon and allocated him and his wife Joyce Wanjiku an acre of land on Loc. 6/Gikarangu/1552. The deceased also constructed a hut for them on the land. The petitioner was categorical that Joyce Wanjiku (the mother of Ruth Wambui and grandmother to the current protestor) was not a wife of the deceased.
15. That part of evidence was re-affirmed by his two witnesses, Mburu Ngware (PW2) and Mary Wanjiru (PW3). Those witnesses also relied largely on their witness statements dated 21<sup>st</sup> January 2020.
16. The petitioner added that before the demise of the deceased, he had executed transfer forms to the three parcels of land in favour of the petitioner as shown in exhibits 1. However, no registration was effected. The original titles as well as the relevant searches were produced (exhibits 1 & 2).
17. As the protestor did not appear at the trial, the evidence by the petitioner and his two witnesses was not tested on cross examination. But for reasons that I will give shortly, I found elements of it to be self-serving.
18. The petitioner filed submissions with a list of authorities on 19<sup>th</sup> October 2020. The protestor neither testified nor filed submissions.
19. I have taken the following view of the matter. The proposal by the petitioner would relocate the protestor and his brother, Henry Ngigi Wambui, to one acre on Loc. 6/Gikarangu/360. That would mean that the petitioner retains the other two properties.
20. The original protestor and the substituted protestor claim to be daughter and grandson respectively of the deceased – a fact contested by the petitioner. The protestors had proposed that all the properties be divided in half between the two houses of the deceased.
21. In order to succeed, the protestor bore the evidential burden to prove that his grandmother was a wife of the deceased. He who alleges must prove. See section 107 of the **Evidence Act**. See also *Esther Wanjiru Kiarie v Mary Wanjiru Githaka*, High Court, Eldoret, P&A Cause 244 of 2002 [2016] eKLR.
22. I find that the claims by the protestor are on an evidential and legal quicksand: The protestor did *not* attend the hearing. His witness statement and the earlier one by his late mother remained unadorned and of little probative value. However, I cannot disregard the two affidavits of protest on record by the protestor and his late mother. But those contested depositions on their own do not prove *some* core elements of the protest.
23. However, there are express *admissions* by the petitioner and his two witnesses that Maingi Waweru (the husband to Joyce Wanjiku) was given about an acre of land on Loc. 6/Gikarangu/1552 by the deceased. Rahab Wambui (the daughter of Joyce Wanjiku) and the protestor deposed that they have always resided and farmed on half of the land. The petitioner concedes that Maingi moved into the land way back in 1961. He admits that the deceased “*extended a helping hand to Joyce Wanjiku Maingi by building for her a hut on Loc. 6/Gikarangu/1552*”.
24. This succession cause is not and cannot possibly be an appeal on the findings of the *Maragua Lands Dispute Tribunal Case No. 80 of 2006*. But it seems obvious to me that the family of Maingi had entered the land with the licence of the deceased, a fact conceded by the petitioner. In any case, the Tribunal had merely ordered that Joyce Wanjiku continue to stay on the land pending these succession proceedings.
25. I am also well guided by Article 159 of the **Constitution** which exhorts the court to do substantive justice to all the parties. Section 27 of the **Law of Succession Act** as read with Rule 73 of the **Probate and Administration Rules** imbue the court with *complete discretion* and power to ensure that the ends of justice are not defeated.
26. I found it telling that in both the Muthithi Chief’s letter dated 19<sup>th</sup> January 2007; and, the petition for letters of administration taken out by the petitioner, they name Ruth Wambui Kimani as the only other dependent. I have deliberately underlined the name *Kimani*.
27. I thus find that it would be ludicrous and highly unjust to relocate her children (the protestor and his brother Henry Maingi Wambui) from Loc. 6/Gikarangu/1552 to one acre of bare earth on Loc. 6/Gikarangu/360. I find the proposal selfish and not backed by plausible wishes of the deceased.
28. The more just course to take, and I so find, is that the protestor and his brother Henry Ngigi Wambui shall be allocated 2 acres out of Loc. 6/Gikarangu/1552. Those 2 acres shall be demarcated as far as is practicable to ensure that they fall on the area they now occupy and to cause no serious disruption. The petitioner cannot be heard to complain because he will still be left with over 14 acres of land.
29. From the evidence, the deceased had executed transfer forms for the three properties in favour of the petitioner. While it may be true that the necessary consents of the Land Control Board were sought, the transfers were never registered. Doubt is completely removed by the original titles and searches produced in court (exhibits 1 & 2) which are still in the name of the deceased. What that means is that the estate of the deceased remained intact.

30. But in view of the petitioner's testimony, and having found some evidential lacuna in the protestor's case, I find that the petitioner is entitled to the whole share of Loc. 6/Gikarangu/1857 and Loc. 6/Gikarangu/360. As I have stated, Loc. 6/Gikarangu/1552 shall partially devolve to the petitioner *less* 2 acres that shall go to the protestor and his brother. This is the justice of the case noting that the petitioner will still end up with the lion's share of the land.

31. My final orders are as follows-

a. That the protest *partially* succeeds to the extent that the protestor Anthony Kimani Wambui and his brother Henry Ngigi Wambui shall be allocated 2 acres out of Loc. 6/Gikarangu/1552. The 2 acres shall be carved out as far as practicable to ensure that they fall in the area they currently reside on and to cause minimum disruption.

b. That Loc. 6/Gikarangu/1552 shall *partly* devolve to the petitioner Henry Ngigi Jackson Kimani *less* 2 acres that shall go to the protestor and his brother as more particularly set out in order (a) above.

c. That the petitioner Henry Ngigi Jackson Kimani is entitled to the whole share of Loc. 6/Gikarangu/1857 and Loc. 6/Gikarangu/360.

32. The grant shall be confirmed in terms of this judgment.

33. Costs follow the event and are at the discretion of the court. In the interests of justice, each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED** at MURANG'A this 2<sup>nd</sup> day of February 2021.

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of:**

No appearance by counsel for the petitioner.

Petitioner (present)

Protestor (absent)

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.