



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO.655 OF 2012

IN THE MATTER OF THE ESTATE OF IBRAHIM GAKUO GACHAGA (DECEASED)

JANE NDUTA NJOROGE.....PETITIONER

VERSUS

SIMON MWATHI WATHARI.....1ST OBJECTOR

DAVID WATHARI NJOROGE.....2ND OBJECTOR

JUDGMENT

1. The petitioner herein filed this petition in her capacity as the daughter of the deceased **Ibrahim Gakuo Gachaga**. Two members of her family filed objection. 1st objector being the son of petitioner's brother and the 2nd objector is petitioner's brother.
2. Ground of objection are the grant of letter of administration were full of lies and falsehood; that the grant was fraudulently issued. The objectors sought to have the Grant issued to both the petitioner and the objectors.
3. The 1st objector filed affidavit in support of protest filed on 5th July, 2017.
4. He averred that he never signed affidavit of consent making grant of administration intestate dated 4th September 2012 and confirmation of grant application dated 13th January 2014. He averred that it is a forgery.
5. He further averred that the petitioner was given 3 acres in Nyandarua and told to settle there and never to claim any share from the estate of the deceased, which now belong to the other beneficiaries.
6. That the deceased divided his land between his two wives giving each house 4 acres; that the deceased remained with 2 acres which assisted when he was alive; land parcel 1360. That when he fell sick, he sold one acre to **Mary Gathua** on 28th July 1989 and remained with one acre parcel No.1421.
7. He averred that the petition was filed without their knowledge and the chief's letter issued without their knowledge; further that temporary grant, confirmation and rectification of grant was done without their knowledge.
8. He averred that the petitioner used the grant to register the land as a trust on 24th March 2014 for their benefit as shown by search dated 16th October 2014.
9. He averred that all the petitioner did was a forgery, as they had not appointed her as their trustee.
10. He averred that before the deceased died he gave the title to his wife **Teresia Wambua Wathari** and before she died she gave the title to **Simon Mwathi Wathari** one of the beneficiaries herein; that **Simon** gave to his aunt the petitioner herein to keep it until the family meet to decide on succession.
11. He averred that in March 2014 he was surprised to learn that the land was about to be sold by the petitioner; he added that they had not allowed her to hold the land in trust for them and that they never signed consent to certificate of confirmation; he said that he learnt of this succession cause when he was served with summons to attend for application for rectification on 31st August 2016. He prayed that the trust created be dissolved and the estate be distributed equally

PROTESTOR'S EVIDENCE

12. This matter proceeded by way of *viva voce* evidence. **Simon Mwathi Wathari** who is the 1st protestor testified that the deceased herein is his paternal grandfather. He testified that his grandfather had two wives and that he is from the first wife **Mary Gathoni Njoroge** who had 2 sons and 3 daughters. He said the second wife had 4 sons. He said the petitioner **Jane Nduta** is from the 1st wife and that she is a sister to his father **William Wathari Njoroge**.

13. He further stated that before his grandfather died, he divided his land to his two wives 4 acres for each wife and remained with 2 acres for his food and wives. He said by the time his grandfather died, he had sold one of the 2 acres. He said the title of the remaining one acre was left with his father which he gave to the petitioner awaiting distribution.

14. He said he later learnt that the acre was being sold and he came to court to stop the sale. He said they had not known that the petitioner had come to court until when she attempted to sell the one acre. He denied signing any consent before succession being filed.

15. He said that he wants the property of his late grandfather to be divided equally between his two wives as he had divided equally the other portion before he died. He denied that the deceased gave the one acre to the petitioner before he died.

16. In cross examination 1st protestor said the one acre is in the name of the petitioner. He said the 1st wife divided her 4 acres among her two sons one being his father and the 2nd Stanley who sold his portion and purchased land elsewhere. He said that the 1st wife's 3 daughters who include the petitioner were married.

17. The 2nd protestor **David William Njoroge** testified that the deceased was his father and confirmed that he had 2 wives and that he is the son of the 2nd wife who had 4 sons including him. He confirmed that before his father died he had given each wife 4 acres to divide between their children and remained with 2 acres for himself.

18. He said that his father sold one of the 2 acres and wanted what remained to be divided equally between the two homes but instead the petitioner filed succession and registered the one acre in her name. He said they want the one acre to be divided equally between the two homes the way his father had divided the other portion.

19. He denied that they authorized petitioner to file succession and hold the one acre in trust for them. He confirmed that the first wife divided her 4 acres between her 2 sons and the second wife between her 4 sons. That the second wife further divided one acre that was for her mentally handicap son between her other 3 sons who include 2nd protestor.

PETITIONER'S EVIDENCE

20. In response, the petitioner denied that she did not involve the protestors in succession. She said she even attended court with the 2nd protestor. She confirmed that her father distributed property as stated by 1st and 2nd protestor.

21. In cross-examination, she said that the family agreed that the one acre go to her. She however admitted that they never agreed that the one acre be registered in her name. She said it was a mistake.

22. She denied having given instruction that the one acre be registered in her name; she also denied saying that the other beneficiaries live in their own. She said it is her Advocates who filed the documents and she stated that her father had given her one acre before he died. She said that she separated with her husband in 1970 and since then, she has always lived with her parents and has always come to court with 2nd protestor.

23. She admitted that it was erroneous on land registry to register the one acre in trust. In cross-examination by court, the petitioner said she was given title of the one acre on 24th March 2014 and that she knew she was holding it in trust for others. She said she learnt about it 2 months after taking the title. She denied having tried to sell the land nor having intending to sell.

24. Petitioner availed one witness **Wangu Njoroge**. She said she is the daughter of **Joseph Njoroge Wathari** the deceased and is a sister to petitioner both from the 1st house. She said she is married and is not interested in her father's land. She said her father shared his land equally between his two wives and gave petitioner one acre. She said the petitioner took care of the deceased when he was sick. She said her and her other sister are married but the petitioner is not married. She said her father called her and told her one acre belong to the petitioner.

25. **Hannah Waithera Kibe** testified that she is the daughter of **Margaret Wambua Gitau** who is a sister of petitioner from the 1st house. She said that her and her siblings agreed to support the petitioner. She said her grandfather had given her one acre. She said her and her siblings are not interested in share of her grandfather's land.

26. **Joseph Njoroge** testified that the deceased was his grandfather; that he is the son of **Stanley Njoroge** from the first wife. He confirmed that his father and his uncle **William** were given 2 acres each, he said their share from the one acre be given to the petitioner. She said they have decided to give her because she was not married.

27. **Eliza Kio Githaka** said that he sold 3 acres of land to the petitioner in **Murungaru Kinangop** in 1H8. He said he does not know the deceased herein. In cross-examination, he said the petitioner sold the land and purchased another land elsewhere. He however said he does not know which year she sold and where she purchased the other land.

ANALYSIS AND DETERMINATION

28. It is not disputed that the deceased had 10 acres of land and from the 10 acres he gave each of his two wives 4 acres each and remained with 2 acres at the time he died he had disposed of one of the 2 acres.

29. The dispute herein is one acre, which the deceased had not alienated at the time he died. According to objectors, it should be divided between the two wives and the deceased had done with the other portion. It's noteworthy that from the 1st wife it is only the 1st objector who is opposed to the one acre being given to the petitioner. Their representatives; her sister has indicated she be given the one acre as her father had told her so, the other beneficiaries have indicated that are not interested in the deceased unalienated land and that their share go to the petitioner.

30. On the other hand, 2nd objector from the second house has said that the one acre should be shared equally between the two wives.

31. There is no will to the effect that the deceased intended to give the petitioner the one acre. He also distributed his land while he was alive and if he wanted to give petitioner one acre nothing would have stopped him from doing so. Evidence indicate that he left the 2 acres for his use together with his wives and by the time he died, he had sold one acre for medication.

32. From the foregoing, I find that the remaining one acre was not intended for the petitioner and the same should be divided equally between the two houses. Each to get half acre. The petitioner being from the first house. I direct that the half for 1st wives children be divided into 5 portions. The petitioners' siblings have indicated their desire to surrender their portion to the petitioner. The 1st protestor to therefore get one fifth of the half-acre and the other portion to go the petitioner.

33. FINAL ORDERS

1. LR No 1421 be divided into 2 equal halves. One half to be shared equally between children of the two houses.
2. The first house half acre to be subdivided into 5 equal portions. One portion to go to the 1st protestor and the remaining 4 portions to the petitioner.
3. The other half acre being part of LR.No.1421 to be shared equally between the 4 sons of the second house.
4. Each party to bear own costs

Judgment dated, signed and delivered at Nakuru this 6th day of February, 2020.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

Jeniffer – Court Assistant

Jane Nduta Njoroge Petitioner

No appearance for 1st Objector

No appearance for 2nd Objector