



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NO.39 OF 2009**

**IN THE MATTER OF THE ESTATE OF EVAN GITHINJI KAMWARO (DECEASED)**

**CATHERINE WAIThERA GITHINJI.....PETITIONER/APPLICANT**

**-VERSUS-**

**LYDIA NJOKI MACHARIA**

**MARGARET WANJIKU GITHINJI..... RESPONDENTS**

**JUDGMENT**

This judgment is written from the proceedings taken the Hon Mativo J. when I took over the matter it was pending written submissions.

From the record, Evan Githinji Kamwaro died on 31<sup>st</sup> May 2007. He was survived by three wives Lydia Njoki Macharia, Margaret Wanjiku Githinji and Esther Mbooni Githinji, and their children and his sister Esther Wangu Kamwaro. He was the registered proprietor of IRIAINI/GATUNDU/582.

Lydia na Margaret filed for grant of letters of administration intestate and on 17<sup>th</sup> June 2009 were issued with the same.

On the 21<sup>st</sup> June 2011 they filed Summons for confirmation of the grant seeking to distribute the estate among themselves each at 0.75 acres, Esther Kamwaro at 1.5acres and Charles Njogu Mwaniki at 0.5 cares and Samuel Mugo Munene at 0.25 acres. The whole house of Esther Mbooni was excluded.

A certificate confirming the grant in the terms above was issued on 20<sup>th</sup> April 2012. It provoked Summons for Revocation of the grant dated 14<sup>th</sup> August 2012 by Catherine Waithera Githinji claiming her right as an unmarried daughter of the deceased, seeking that the estate be distributed in accordance with s. 35 of the law of Succession Act.

On 15<sup>th</sup> October 2015, the grant to Lydia and Margaret was revoked by consent and a fresh one issued to Catherine Waithera Githinji, Lydia Njoki Macharia and Margaret Wanjiku Githinji. Catherine filed Summons for confirmation of grant distributing the estate to Esther Kamwaro 1.5 acres, and the remainder equally among the three houses of the three wives of the deceased at 0.566 of an acre with her holding her mother's share in trust for herself and her siblings.

Lydia and Margaret filed an affidavit of protest on 3<sup>rd</sup> February 2015 setting out each house members of each house. They proposed that their sister in law Esther to get 0.4 acres according to her brother's wishes, they alleged that Esther Mboone their co wife had sold 0.75 acres of land to two purchasers who should get their share leaving her house with only 0.14 Ha to go to Catherine on humanitarian grounds, 0.23 acres to each of them and the alleged purchasers to each get 0.2 Ha and 0.1 ha respectively.

To support their claim they attached two sale agreements one dated 21<sup>st</sup> October 2010 between Peter Kamwaro Githinji and Samuel Mugo Munene. This agreement clary states that Peter is selling ¼ acre out of the parcel of land IRIAINI/GATUNDU/582 registered in the name of EVANS GITHINJI KAMWARO at the sum of Ksh.155,000/=. Ksh.100,000/= is acknowledged as received, and Ksh 55,000 to be paid upon transfer of the land. The agreement is signed by the buyer and seller and two witnesses.

Interestingly, another agreement is attached as having been drawn on either 29<sup>th</sup> September 2010 or 26<sup>th</sup> April 2011 whereby Peter acknowledges receipt of the balance of Ksh 55,000.

Another sale agreement is between Peters kamwaro Githinji and Charles Njogu Mwaniki for ½ an acre to be excised from IRIAINI/GATUNDU/582 at Ksh.400,000/=. Ksh.121,000/= is acknowledged as received and the balance of Ksh.279,000/= to be paid only at upon transfer of the land. Again, another document is attached dated 29<sup>th</sup> September 2010, an acknowledgement for the receipt of

Ksh.279,000/=.

I noted that the witnesses to all these transactions were the same Leah Muoja and Miano Murimi and the agreements were drawn by Maina Karingithi and Co. Advocates.

The SCG and the Protest were heard together.

The protesters merely reiterated the contents of their affidavit of protest. They claimed that their co wife had sold her portion of the land and left. That the purchasers are the ones who brought to them the sale agreements. However they were not present when the alleged sales were made. Their co wife never told them she had sold the land. They confirmed that their husband never sold any land before he died.

They confirmed that at the time of the death of the deceased, he was living with his 3<sup>rd</sup> wife Esther Mboone, her children and his sister. Each of them was living elsewhere. They also confirmed that Charles Mwaniki and Samuel Munene were strangers to the estate. Lydia said Esther should get only one acre. Margaret said that the land be divided into 4 equal portions.

On her part Catherine testified that she and her mother were chased away from the land by two people who claimed to have bought it from her brother. They made a report to the police at Karatina but no action was ever taken. Her mother disappeared since then and her whereabouts were unknown to her. The protesters were not on the land at that time as they only came after the deceased had died. She had no problem with her aunt maintaining the portion she occupied and the rest sharing the remainder equally.

Esther Kamwaro also testified how she lived on the land with her brother Catherine, her mother and brother. That the protesters only came back after the death of her brother although Lydia Njoki had not returned to the land. She had no knowledge of the alleged sale and was opposed to the inclusion of strangers in her brother's estate. She supported the petitioner's proposal. She stated that the alleged purchasers used police to harass Mboone.

Parties filed submissions through their respective counsel. The only issues are those set out in the proviso to s. 71 of the Law of Succession Act:

*Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed **until the court is satisfied as to the respective identities and shares of all persons beneficially entitled**; and when confirmed such grant shall specify all such persons and their respective shares.*

Who is beneficially entitled to the estate of the deceased? What are their shares? Are the two strangers protected by s. 93 of the Law of Succession Act which states:

**93. Validity of transfer not affected by revocation of representation**

*(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by **a person to whom representation has been granted shall be valid**, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.*

*(2) A transfer of immovable property **by a personal representative to a purchaser shall not be invalidated** by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.*

Starting with the alleged purchasers, the evidence of the sale agreements is itself doubtful. It bears the impressions of falsehood. They were not innocent buyers for value. See, the buyers knew the land DID NOT BELONG to the purported seller. It is there in black and white in the title deed which bears the name of the person who is not the SELLER. Esther Mboone is neither a party nor a witness to the said sales. Neither is Catherine Githinji. The agreements as drawn state as much. They also state that balance of purchase price to be paid upon transfer of the sold land only for them to purport to pay the all the balances before that event.

The law prohibits the dealing with the property of a deceased person outside its ambit. In my view these were intermeddlers who should face the pain of criminal charges under section 45 of the Law of Succession Act which states clearly:

**45. No intermeddling with property of deceased person**

*(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, **no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.***

*(2) Any person who contravenes the provisions of this section shall—*

*(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*

*(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.*

These persons are said to have taken possession of the deceased's property and used extra judicial powers to throw out his widow and her children. They did not have the guts to present their own case but chose to hide behind the skirts of the two other widows (the protesters )of the deceased to push their interests, because, I suspect '*wenyewe wanajishuku*' (loosely translated '*they suspect themselves*).

This is fortified by the proviso to section 82 (b) at (ii) states in mandatory terms that **no immovable property shall be sold before confirmation of the grant**; That is why it is doubtful that any lawyer would draw such a sale agreement knowing that the owner was deceased, or without questioning why another person and not the registered owner was actually selling land. In my view it would amount to abetting a fraudulent activity and abetting the commission of a crime.

If they 'bought' any land it was from a person who had nothing to sell. They bought nothing and have no business being on that parcel of land. If indeed they paid any money to the so called Peters Kamwaro Githinji let them pursue him for their money. The estate of Evans Githinji Kamwaro owes them nothing.

It is unfortunate that the protesters chose to support a cause they knew nothing about. It appears to me they would not have wanted their co wife who lived with their husband till he died, while they were away out there, and who left only after his death, which is when they came back, to inherit anything from his estate. Their alleged sympathy for their step daughter is hypocritical, as if anything they are the ones who ought to get the least share seeing that they are willing to give away their husband's estate to strangers instead of the legal beneficiaries.

These strangers are not beneficially entitled to the deceased's estate under any color of right. They should actually stop utilising the said property and pursue the purported seller with whom they bear equal blame for intermeddling with the deceased's estate. Actions such as theirs must not be condoned.

Hence the only beneficiaries to the deceased's estate are his three widows and his sister.

What are their shares?

The land measures approximately 1.30 Ha. That is around 3.2 acres. All the parties are not in agreement that Esther Kamwaro should inherit ½ of her brother's estate. She can have 1.2 acres leaving 2 acres to be shared among the three. The protesters were willing to give away their inheritance. The petitioner to have 1 acre to hold in trust for herself and her mother's house, and the two protesters to share the other 1 acre equally.

I think that is as fair as it goes in the circumstances of this case.

A certificate of confirmation to issue accordingly. No orders as to costs.

**Dated, delivered and signed at Nyeri this 18<sup>th</sup> day of January 2019.**

**Mumbua T Matheka**

**Judge**

In the presence of:

Court Assistant-Emmanuel

No Appearance for parties

Judgment delivered.

**Mumbua T Matheka**

**Judge**

18/1/19