



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 697 OF 2010

IN THE MATTER OF THE ESTATE OF MOCHE RURAGO alias MOCHE s/o RURAGO (DECEASED)

MUTHUKIA MOCHE.....PROTESTOR

AND

JOSPAT MAINA MOCHE.....RESPONDENT

RULING

1. The estate relates to the late Moche Rurago alias Moche s/o Rurago (deceased) who died on the 21st September, 1985 at Kiuu, Mutundu in Nyeri County. The identifiable property comprising the estate of the deceased is land parcel number Lower Muhito/Kariara/272 measuring approximately 1.74 Hectares;
2. The Deceased died intestate and left the following surviving him namely;
 - (i) Josphat Maina Moche – who is the respondent and shall be referred as ‘**Josphat**’; and is the deceased’s son;
 - (ii) Muthukia Moche – who is the protestor and shall be referred to as ‘**Muthukia**’; is also a son to the deceased;
3. Josphat had petitioned for Letters of Administration and was issued with the Grant on the 17/05/2011; on the 29/11/2011 he then filed an application to have the Grant confirmed and therein made his proposal on the mode of distribution; Muthukia filed his Affidavit of Protest on the 20/09/2012 against the Summons for Confirmation of Grant and gave his proposed mode of distribution;
4. Directions were taken on that the matter proceed for hearing and that ‘**viva voce**’ evidence be tendered;

THE PROTESTOR’S CASE

5. The Protestor stated that he was the eldest son of the deceased and that the deceased was survived with only two children; Josphat was his only other sibling;
6. He opposed the proposed mode of distribution put forward by the Respondent and proposed that the land be divided into two equal shares with each registering their portion in their respective names;
7. His claim was that he had been living on the land since 1972; that before his demise his late father had divided the subject property into two equal portions in the presence of elders; that his brother then moved onto his portion and started farming thereon;
8. Under cross-examination he stated that during the era of consolidation his father had given him parcel No.77 comprising of 8 acres; he confirmed that he knew one Samuel Kiama Kihongi and that in 1978 he had sold two acres from his land; he acknowledged that he did this intentionally and in revenge even though his father was living there; that this act annoyed his father and that he reported him to the chief; and that in 2000 he sold off another two acres which portion had the house that the Josphat had built; that he did this so that his brother would vacate the land; and indeed the person he sold this portion to demolished the house;
9. His evidence was that he was given eight (8) acres in total and that his brother had also been given four (4) and with the addition of the further gifted 4 acres his brother had a total of eight acres; he agreed that Josphat lived with and looked after their father for a total of 15 years and conceded that after having looked after him for all those years the land was given to him as a reward; but he denied knowledge of his father attending a Land Control Board meeting;
10. He prayed that his protest be allowed and that the subject property be divided into two equal portions to be shared equally by the

protestor and Josphat;

RESPONDENT'S CASE

11. The Respondent Josphat confirmed that the deceased was their father and that the deceased had only two children; that is the Protestor Muthikia and himself;

12. His evidence was that his father had three parcels of land; he had given Muthikia six (6) acres and that he was given two (2) acres and that the deceased retained four (4) acres of parcel number 272 the subject property in dispute; the division and registration happened in the year 1954 at that time Muthukia was aged 7 years and he was 5 years; and that they all lived on Muthikia's parcel of land; in 1970 he got married and continued to live on his brother parcel upon which he had built a house; his brother did not have any house and lived in a granary;

13. The parcel in dispute only had a small hut that was used as a place to rest when warding off wild animals during harvesting time;

14. In 1978 Muthikia sold off two acres of land and this action annoyed the deceased; in 2000 Muthikia sold off another 2 acres and the purchaser evicted Josphat from the land; he then went to live and build on the subject property;

15. Before his demise the deceased had initiated the process of transferring the subject property to Josphat and had attended the Land Control Board and had obtained Consent to Transfer the subject property to Josphat as a gift; that the protestor refused to attend the Land Board meeting; he tendered the application for Consent and the Consent Letter as evidence and produced the documents into court as exhibits and were marked as 'DExh.1' and 'DExh.II';

16. Unfortunately, the deceased passed on before the transfer of the subject property could be effected; he stated that he lived on the subject property and cultivated the remnant left on his brother's side;

17. Josphat called one witness Josphat Maina Kibugu Kihonge (**DW2**) to support his case; **DW2** stated that the deceased was his uncle and that he knew the Protestor and the Respondent; his evidence was that the deceased had three (3) parcels of and that he had given Muthikia six (6) acres, Josphat two (2) acres and that the deceased retained the parcel of four (4) acres; he confirmed that Muthukia sold off two (2) acres and that this act annoyed the deceased; he also confirmed that the deceased transferred the four acres to Josphat so that he would have a total of six (6) acres; that he was present when the deceased attended the Mukuruweini Land Control Board; that Muthikia and his mother knew about the meeting but never attended nor did they raise any objection; that at the time of his demise the deceased had divided everything;

18. Josphat closed his case after this witness had testified and he prayed that the subject property be distributed in accordance with his fathers wishes;

ISSUES FOR DETERMINATION

19. After hearing the evidence of both parties the only issue framed by the court for determination is on the distribution of the subject property;

(i) Distribution of the estate of the deceased.

ANALYSIS

Distribution of the estate of the deceased

20. There is no dispute as to what comprises the estate of the deceased; the dispute hinges only on distribution of the deceased's estate and the parties are not agreeable upon its mode of distribution; this court is therefore tasked with the distribution of the estate;

21. The deceased had given Muthukia six acres of land and this is not disputed; he also did not dispute the fact that he had hived off and sold a total of four acres of his land leaving a balance of two acres;

22. As for the Petitioner it was not disputed that he was given two acres of land by his father; and that the father had retained the subject property which measured four acres which is the subject property;

23. One of the guiding principles in deciding distribution of the estate is set out in Section 28 (e) of the Act and it is in regard to the conduct of the dependant in relation to the deceased; in this instance Muthikia confirmed that when he sold his portions of land this greatly incensed his father; being infuriated by Muthikia's disposal of his land the deceased opted to gift Josphat the subject property; and indeed commenced the process by attending the Land Control Board meeting and obtained Consent to Transfer; but the transaction was curtailed by the deceased's demise;

24. Muthikia also confirmed that Josphat was the one who played a greater role in looking after his father until his demise; Josphat's evidence which was uncontroverted was that he lived with his father for 15years; Muthikia acknowledged this fact may have influenced his father to gift his brother; from the evidence adduced Muthikia's conduct towards the deceased was that of hostility and full of sibling jealousy; his mistreating of both his father and brother definitely contributed to him being overlooked by the deceased;

25. The other factor to be considered was whether Josphat had a valid transaction; his father's wishes as alluded to by Josphat was that he

had wanted the brothers to have the same acreage; and the fact that the gift was donated by the deceased during his lifetime and the steps taken by the deceased to confer the gift; in noting these facts it is this court's considered view that Josphat had a valid interest recognizable in law for the purposes of distribution;

26. Taking the above into consideration the deceased's wishes of parity and in particular the acreage gifted this court finds that the applicable section of the law for the distribution of the estate is Section 42 of the Law of Succession which enshrines the principle of equity and provides as follows;

“42. Where –

(a) An intestate has, during his lifetime or by will, paid, given or settled any property to or benefit of a child, grandchild or house; or

(b)

That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house;’

27. The evidence demonstrates that Muthukia had been given six (6) acres by the deceased; whereas Josphat had been given only two (2); guided by the fact that Josphat lived the longest with the deceased and also the fact that the deceased had substantially gifted him with the subject property which comprises of four (4) acres, this court is satisfied that this was done in order to bring Josphat's acreage to be at par with that of Muthukia;

28. So as to crystalize the deceased's wishes this court is satisfied that Josphat is eligible to inherit the subject property independent of his brother;

FINDINGS AND DETERMINATION

29. The Protest is hereby dismissed.

30. The Grant is hereby confirmed on the terms as set out hereunder;

The property known as is land parcel number **Lower Muhito/Kariara/272** measuring 1.74 Acres shall be transferred and registered in the name of the Petitioner Josphat Maina Moche;

31. Each party shall bear their own costs.

It is so ordered.

Dated, Signed and Delivered at Nyeri this 7th day of February, 2019.

HON. A. MSHILA

JUDGE.