



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 301 OF 2015

IN THE MATTER OF THE ESTATE OF SAMUEL MAINA

MBORA alias SAMUEL MBORA (DECEASED)

AND

PUBLIC TRUSTEE.....PETITIONER

VERSUS

GRACE WANJIRU NDIRITU.....PROTESTER

R U L I N G

This matter was originally here as Nyeri Succession cause No.301 of 2015. It was transferred to Othaya SRM's Court where it became cause No.16 of 2018.

On 5th July 2018 the learned Magistrate Hon. B. M. Ekhubi SRM determined that the deceased was last domiciled in Kiriogo in Ndaragwa an area not within the jurisdiction of the Othaya Magistrate's Court. On the strength of the case **RE Estate of Muriungi Nderitu (2015) eKLR** he determined he had no jurisdiction and returned the matter to us for determination.

This cause began in the office of the Public Trustee Nyeri who filed this cause.

Samuel Maina Mbora alias Samuel Mbora died on 14th January 2003. He was an employee of the Ministry of Livestock Development. He was pre-deceased by his wife. According to the letter from the District Commissioner Nyeri dated 10th May 2004 to the Public Trustee the deceased was survived by his mother Grace Wanjiru Ndiritu as he and his wife had died without leaving any issues. The Public Trustee subsequently filed this cause, with her consent and listed the deceased's mother as the sole survivor and his estate as;

- i) Laikipia/Ngobit Supuko Block 2/304 Wiyumiririe.
- ii) Proceeds from Harambee House Cooperative
- iii) A/c Balance KCB Nyahururu
- iv) Personal effects

On 3rd December 2008 another letter issued from the District Commissioner Nyandarua to Public Trustee saying that the deceased was survived by 2 sons John Nderitu Maina deceased, and Paul Wachira Maina. The District Commissioner proposed that Paul Wachira Maina be the sole beneficiary of the deceased's estate.

On 18th October 2010 the Public Trustee filed summons for confirmation of grant dated 15th October 2010 where the two – the mother to the deceased and Paul Wachira Maina were listed as survivors but the Public Trustee now proposed Paul Wachira Maina as the sole beneficiary of the entire estate.

The deceased's mother filed an affidavit of protest on 10th November 2010 sworn on the same date. In it she deponed that she was indeed the mother to the deceased. She contended that Paul Wachira Maina was not a son of her late son and therefore was not entitled to inherit

any property from his estate, that the land Laikipia/Ngobit Supuko Block 2/304 Wiyumiririe was family land only registered in deceased's name to hold for the family.

She listed his other beneficiaries as his brothers and sisters her children;

- i) HANNAH WAMBUI NDIRITU
- ii) MOSES KING'ORI NDIRITU
- iii) LYDIAH WARUGURU NDIRITU
- iv) BETH WATURI NDIRITU
- v) MARY WANGARI NDIRITU

and that her son had named her as his next of kin in all his employment records hence she was the only heir to his property.

In response Paul Wachira Maina swore an affidavit in support of the Public Trustee's Summons for confirmation of grant sworn on 17th February 2011. His position was that when the deceased married his mother Christine Muthoni Maina, he was already born but the deceased took him in as his child. They had lived on the land in Wiyumiririe where both his father and mother were buried. That he attended the neighbouring [Particulars Withheld] Primary school and even the area assistant chief recognized him as son of the deceased. He annexed his leaving certificate and letter from the area assistant chief. Further that when the deceased's gratuity was forwarded to Public Trustee vide a letter dated 28th August 2008 he was recognized as next of kin and that the deceased had nominated his mother Christina Muthoni Maina whom he described as wife as his next of kin in the Harambee Sacco.

In a rejoinder, Grace Wanjiru Ndiritu through affidavit sworn on 30th June 2011 deponed that the said Paul Wachira was never accepted as her son's son because he was not circumcised at her son's home but at his maternal uncle's home. That the fact of his mother being nominated as the next of kin did not mean that he was recognized as a son and that the document dated 28th August 2008 may have been obtained through fraud.

Parties through their respective counsel Ms. Lucy Mwai for Paul Wachira Maina and Mr. Muchiri wa Gathoni for Grace Wanjiru Ndiritu agreed that the only issue for determination was whether Paul Wachira Maina was a son of the deceased. They agreed to address the issue by way of written submissions.

I have considered the submissions.

For Paul it was submitted that the Law of Succession Act recognized him as a child by dint of definition of child by Section 2 of the Laws of Succession Act which states ' *References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.* (emphasis mine); and by which of the facts that;

- 1) Deceased married his mother
- 2) He accepted him as his son
- 3) He lived with both on the suit land
- 4) He was entitled to inherit his father's property as his father's child.

Secondly, that under Kikuyu customary law – the marriage of Paul's mother to the deceased made the deceased the legal father of Paul. N this he relied on *Allot N. Allot Restatement of African Law: 2 The law of Succession* with reference to " **Illegitimate children**" where the author states '

A mother is one of the guardians of her illegitimate children. The male co guardian being her own father (or in his absence, her eldest brother). Note the natural father of the child has to pay the pregnancy compensation. If the mother should subsequently marry, her husband becomes the co guardian who, who is regarded as the children's father for all purposes, including the inheriting of his property'.

Customary law is living law. It has changed with time and part of it has been rendered null by dint of written law. There is no illegitimate child in the current constitutions dispensation. The biological parents of a child whether married or not have the equal responsibility to raise that child and provide for that child. The notion of illegitimacy in my view was based on the twin discriminatory patriarchal notion that a woman who got a child out of wedlock was solely responsible for the pregnancy and the child. That child was considered 'illegal'. That the male responsible could only be responsible if he willingly accepted responsibility, and paid compensation for the pregnancy to her father another male. This notion has no place in the current Constitutional human rights framework. Outside the legal exceptions, Children are the responsibility of their parents. That is the force of Article 53 of the Constitution. Of course the law of succession recognises that a man could take in a child who was not his biological issue and accept him or her as his own child. That however would not turn that child into a son or

daughter but into a beneficiary to the estate, unless there is an adoption order. Where that status is contested like in this case, it is upon Paul, the one asserting the same to prove that the deceased indeed took him in as his own child.

On her part, for Grace it was argued that Paul only obtained the status of a son through the letter from the chief. That the said Paul had admitted he was not the biological child of the deceased. That the only relationship that existed between Paul Wachira Maina and the deceased is that his mother was married to the deceased. That alone did not confer to him the status of a son. That he did not fall anywhere near the degree of consanguinity as recognized by the Law of Succession Act Rule 7(1) (e (iii) of P&A Rules.

It is common ground that Christine Muthoni Maina Paul's mother was married to the deceased. That at the time of marriage Paul was already born. It is not clear when this marriage took place but it is in a document dated 3rd February 2004 that Paul indicates that his mother was appointed next of kin by the deceased. However by the date of that document both Paul's mother and the deceased were both dead – and Paul did not attach the nomination card to show when this nomination took place.

The school leaving certificate shows he attended [Particulars Withheld] Primary School from class 3 to class 8. However it does not lay any connection with the deceased. The document saying he was recognized as a beneficiary is dated 2008 yet the earliest document from the District Commissioner dated 10th May 2004 shows that the deceased was survived by his mother only. There was no mention of Paul Wachira, and even the application by the Public Trustee dated 10th March 2005 only mentioned one survivor the deceased's mother. It is only in 2008 that letters began to appear showing that Paul Wachira Maina is the son of the deceased and the sole beneficiary of his estate. This is the letter from the District Commissioner's office Nyandarua dated 3rd December 2008, the print out from the Ministry dated 28th August 2008, all of which seem to inform the Public Trustee's summons for confirmation of grant dated 15th October 2010, and finally the chief's letter dated 30th November 2010 saying that Paul was chased away from the shamba by Grace Nderitu and her sons Moses King'ori when the deceased herein passed away in 2003.

The big question is: What evidence is there that the deceased had voluntarily assumed the permanent responsibility for Paul Wachira Maina?

The deceased's mother has challenged all the evidence brought by Paul and the challenge is serious. And it is clear that it was upon Paul to avail the requisite evidence that apart from simply being his mother's husband, the deceased was his stepfather. Perhaps his maternal relatives would have supported his claim, or neighbours on the land where the deceased and Paul's mother are buried. Clearly no such evidence has been placed before me.

The three documents he has alleged cannot confirm son hood to Paul Wachira Macharia. Hence I must find and hold that the said Paul is not a son to the deceased.

Can Paul be determined to have been a dependant? Section 29 of the Laws of Succession Act provides for dependants who are defined at section 29 (b) to include "*step children, children whom the deceased had taken into his family as his own*"

Even under this law, Paul Wachira would have and establish his dependency under Section 26 if at all. Otherwise the material before me does not support Paul's assertion that he had acquired the status of a son.

Where does that leave him? The fact that his mother is buried on that land would mean that he has some sentimental ties to that land that cannot be wished away. Surely it would only be fair that he has access to the portion of the land where his mother is buried. That is all that this court can grant in the circumstances. The protester, could, in respect for her son, allow Paul that access. Otherwise nothing stops Paul from pursuing his mother's estate.

The Protest is allowed with no orders as to costs

The grant be confirmed in terms of the protest

Dated, delivered and signed this 1st March 2019 at Nyeri.

Mumbua T Matheka

Judge

In the presence of:

Court Assistant: Juliet

Ms. Macharia for Ms. Lucy Mwai for applicant

Ms. Wambui Mwai for Mr. Muchiri wa Gathoni for protester

Mumbua T Matheka

Judge

1/3/19