



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2543 OF 2004

IN THE MATTER OF THE ESTATE OF JOSPHAT KING'ORI NJOGE (DECEASED)

JOHN MWANGI KING'ORI.....1ST PETITIONER

DANIEL MACHARIA KING'ORI.....2ND PETITIONER

PETER MACHARIA KING'ORI.....3RD PETITIONER

VERSUS

ANTONY WAMBUGU.....PROTESTOR

JUDGMENT

1. The deceased Josphat Kingori Njoroge died intestate on 23rd March, 1999. He was survived by six children. The grant of letters of administration with regard to the deceased's estate was issued to Daniel Gicheru King'ori, John Mwangi King'ori and Peter Macharia King'ori on 25th October, 2004. The only property listed as forming part of his estate is land parcels No. L.R No. **Laikipia/Marmanet/328** measuring 13.6 hectares. The ownership of the parcel thereof is contested because it is alleged that Esther Wambugu (now deceased), sister to the deceased herein is claiming beneficial interest over half of the portion. The grant is pending confirmation.

2. The petitioners filed summons for confirmation of grant dated 22nd August, 2016. It was their prayer to have the estate of the deceased distributed as provided for in the schedule to the mode of distribution attached. From the proposal, the estate was to be distributed as follows:

- a. Naomi Wangeci King'ori (daughter) – 1.5 acres
- b. John Mwangi King'ori (son) – 6.0 acres
- c. Ruth Wanjiru King'ori (daughter) – 1.5 acres
- d. Daniel Gicheru King'ori (son) – 1.5 acres
- e. Peter Macharia King'ori (son) – 6.0 acres
- f. Joseph Kiragu King'ori (son) – 6.0 acres
- g. Mary Wanjiru Kimani (daughter) – 1.5 acres
- h. Estate of Esther Wanjiru(Deceased) – 5.0 acres

3. From the schedule the estate was distributed to all the deceased's children and the estate of Esther Wanjiru which was granted 5 Acres. An affidavit of consent was attached indicating that all the children of the deceased had given their consent to the distribution of the estate as proposed by the petitioners bar the estate of Esther Wanjiru whose consent was not acquired and is protesting the mode of distribution proposed.

4. Antony Wambugu, the protestor herein swore an affidavit of protest dated 29th September, 2016 against the confirmation of grant. He stated that he was the grandson and holder of letters of administration ad litem to the estate of Esther Wanjiru Wambugu, a sister to the deceased. It was his allegation that the estate of Esther Wanjiru Wambugu was entitled to half (1/2) share of property known as Laikipia/Marmanet/328. That, this was a result of an arbitration in a dispute before elders. It was a decision of the elders to grant her (1/2)

share of the property on 18th March, 1983.

5. Further, that the deceased herein applied to have the award set aside before Nyahururu Resident Magistrate in Land Case No. 4 of 1983 but the application was dismissed and judgment entered in terms of the award. Subsequently, the deceased herein appealed against the dismissal vide Nakuru High Court Civil Appeal No. 9 of 1983 but his appeal was also dismissed.

6. That on 25th October, 1988 the Laikipia Land Control Board gave its consent for sub division and transfer of the said land parcel to Esther Wanjiru, by then deceased but this stalled because the land was still in the name of the Settlement Scheme Trustees. It was his position that the estate of Esther Wanjiru Wambugu was entitled to ½ share of the parcel being 6.8 hectares and not 5 acres as proposed by the petitioners.

7. In response to the protest, the 3rd petitioner filed a further affidavit dated 4th April, 2017 on behalf of the other petitioners. He refuted the allegations made by the protestor that the estate of Esther Wanjiru Wambugu is entitled to half (1/2) share of Laikipia/Marmanet/328. He stated that the RMCC Land Case No. 4 of 1983 did not confer any beneficial interest to Esther Wanjiru Wambugu.

8. He also challenged the jurisdiction of the council of elders who made the determination as to the beneficial interest. He added that if there was an award, or order on the subject matter, it had already been extinct by effluxion of time. That, the file before Nakuru High Court being alluded to by the protestor was lost and had never been reconstructed. It was his position that no suit had ever been conclusively decided in favour of the late Esther Wanjiru Wambugu.

9. On sub division of the property, he asserted that this was never done and that the property is registered in the name of the deceased and not the Settlement Fund Trustees as alleged by the protestor. Further, he stated that the property was only allotted to the deceased's herein and not jointly with his sister the late Esther Wanjiru Wambugu. He also indicated that the estate of Esther Wanjiru Wambugu was in occupation of only 5 acres of the parcel of land in accordance with the decision of a panel of elders dated 8th November, 1988 and is on that basis that the petitioners have proposed that her estate should receive 5 acres.

10. On 12th November, 2018 when the matter came to court, Learned Counsel for the Petitioners Mr. Mwangi holding brief for Mr. Kimandu sought leave of the Court to file a further affidavit on the grounds that they had received new information from the Office of the Director of Adjudication and Settlement. There was no objection from the protestor's advocate. Leave was subsequently granted and both parties filed their respective affidavits.

11. The 3rd petitioner swore a second supplementary affidavit, dated 13th November, 2018. He stated that the property in issue was allocated to the deceased on 24th July, 1968. That, after paying the requisite fee and fulfilling the terms of allotment, he was awarded the certificate of outright purchase dated 27th May, 1985. It was his averment that, the property could not have been transferred to the late Esther Wanjiru Wambugu as one of the conditions necessary was to obtain consent from the Settlement Fund Trustee which was never granted. He asserted that the property was solely owned by the deceased.

12. In his response, the Protestor through a supplementary affidavit dated 28th November, 2018 reiterated the contents of his affidavit of protest. He asserted that the petitioners were avoiding the main issue which was that judgment had been entered in favour of his grandmother in Nyahururu R.M.C.C No. 4 of 1983 and Nakuru High Court Civil Appeal No. 9 of 1987. That there was no indication that these decisions were set aside or appealed against. He accused the petitioners of only attaching parts of the pleadings and the proceedings before Nakuru H.C.C. No. 124 of 1987 in an effort to mislead the court that there were two parallel awards over the subject matter. He insisted that the dispute was not on who acquired the property but what was the beneficial interest that had accrued to the estate of Esther Wanjiru.

13. Parties filed written submissions in support of their cases. In the Petitioners' submissions they reiterated the contents of their affidavits filed in support of their claim. It was submitted that the alleged orders and judgements they were seeking to rely on were allegedly issued in 1983 and 1987 respectively. That since then they had never been enforced. Section 4(4) The Limitation of Actions Act provided that judgment or an order of the Court cannot be enforced after the end 12 years and thus the claim for half portion had no legal standing.

14. The petitioners also submitted that the panel of elders had jurisdiction on land disputes as envisaged by Section 3, 4, 5 and 6 of the Lands Disputes Tribunal Act, Section 3(2) of the Judicature Act, Articles 67(2) (f) and 159 of the Constitution of Kenya. That, the panel's decision was to give Esther Wanjiru Wambugu 5 acres.

15. In his submissions, the protestor reiterated the contents of his affidavits in protest to confirmation of grant. He also submitted that in previous proceedings between the deceased and the late Esther Wanjiru Wambugu, the beneficial interest of the parties thereto was determined conclusively and the attempts by the petitioners to litigate the matter afresh was res judicata. He relied on the case of Nguruman Limited vs Jan Bonde & Another[2017] eKLR.

16. He further submitted that the Consent Order to transfer the land issued by the Laikipia Land Control Board has not been appealed against and was final and can therefore not be questioned by the court. He added that the Petitioners had acknowledged that the Late Esther Wanjiru Wambugu is entitled to a portion out of the deceased's estate by granting her a share of 5 acres out of the parcel of land. The only dispute is on acreage. This he said was not an attempt to enforce the Courts's Judgment in Nyahururu R.M.C Land Case No. 4 of 1983.

17. After a careful consideration of the affidavits on record and the submissions of the learned counsels, the issue that arises for determination is:

- i. Whether the protestor is entitled to half share of the deceased's estate on the grounds provided in the protest.

18. I have considered the proceedings before me and what is striking is that neither parties were able to bring to court the complete proceedings in relation to Nyahururu Resident Magistrate Land Case No. 4 of 1983 and Nakuru High Court Civil Appeal No. 9 of 1987 which have been extensively mentioned in these proceedings. Only bits of the proceedings and affidavits were provided. The Court in reaching a determination will rely on the evidence presented.

19. The protest to be determined is challenging the proposed mode of distribution advanced by the Petitioners who have proposed that the estate of Esther Wanjiru receives 5 acres from the estate of the deceased. It is their protest that the Estate of Esther Wanjiru Wambugu is entitled to a half (1/2) portion of the total estate of the deceased herein being property known as L.R. No. Laikipia/Marmanet 328 measuring 6.8 Hectares. It was the protestors claim that the late Esther Wanjiru Wambugu was the beneficial owner of the ½ portion of the parcel of land. He attached an award from a panel of elders and an order from the Senior Resident Magistrate Nyahururu directing the Executive Officer to execute all the necessary documents to effect the sub division on Plot No. 328. He asserted that the deceased herein had filed an application before the Magistrates Court in Nyahururu to set aside the award but his application was dismissed. On appeal before the High Court at Nakuru, the appeal was also dismissed for lacking in merit.

20. The protestor attached a Judgment of the Court from Nakuru Civil Appeal No. 9 of 1987 where the appeal was dismissed as proof of his claim. This was not challenged by the petitioner. They instead insisted that the file was lost and the case had not been concluded.

21. On examining the Judgment of the Court, it is my considered opinion that after the appeal was dismissed, the panel of elders did not have jurisdiction to reabitate the matter. The matter had already been heard and determined by the panel of elders who gave an award. The Resident Magistrate in Nyahururu adopted the decision and an appeal against this decision before the High Court in Nakuru was dismissed. Therefore, any attempts to reopen the case was res judicata.

22. Further that, the order of court that the protestor was trying to execute, had already been extinct by effluxion of time. It was the petitioners' claim that there was a second award issued. In my view, it is too late in the day for the Petitioners to disown the protestor who is claiming interest on behalf of the estate of Esther Wanjiru Wambugu as the Petitioners already included her Estate in the list of beneficiaries to receive a share of the estate. It is also too late in the day for the Petitioners to allege that the claim by the protestor has become extinct by lapse of time while they have all along treated the estate of Esther Wanjiru Wambugu as beneficiaries to the estate of the deceased.

23. By their conduct, and through the Petition the Petitioners have conceded the full rights of the estate of Esther Wanjiru as a beneficiary of the estate of the deceased herein to inherit a portion of the property registered in the name of the deceased. This is a clear manifestation of their recognition of the existence of some form of beneficial interest accrued by with which the beneficiaries' of the deceased's estate were also in the same standing as the estate of Esther Wanjiru.

24. Another issue raised by the Peititoners was that the order that the protestor was seeking to rely on were allegedly issued in 1983 and 1987 respectively. This they claimed had become extinct by the lapse of time as provided for under the Limitations of Actions Act. On his part the protestor stated that he was not trying to execute the order but was merely using it as an indication that the matter on the acreage to be distributed to the estate of Esther Wambui Wambugu had already been heard and determined to its conclusion.

25. On the question as to whether the rights of Esther Wanjiru Wambugu are extinct by effluxion of time, I had recourse to the case of **Re Estate of Josephine Magdalena Motion (Deceased) [2016] eKLR**, in which Justice W. Musyoka stated,

“The Limitation of Actions Act prescribes periods for limitations of actions and arbitrations. My reading of the actions to which that statute applies is that it does not include succession causes, or, at any rate, causes or actions governed by the Law of Succession Act. It covers such matters as actions founded on contracts and torts, actions to recover land and rent, actions to recover money, actions in respect of trust property or movable property of a deceased person, and related causes. In short, it envisages ordinary civil suits brought within the framework of the Civil Procedure Act and Rules. It does not envisage the special proceedings governed by such statutes as the Law of Succession Act.....”

He continued by adding that:

“I am conscious that the Limitation of Actions Act does in some provisions provide for actions in respect of property of a deceased person. However, what these provisions envisage are ordinary suits, often referred to as administration suits, filed by administrators or beneficiaries in respect of estate property seeking a variety of reliefs. The Act sets time limitations for the bringing of such administration suits. Those provisions have nothing to do with reliefs that are created by the Law of Succession Act, and that are brought within the framework of the Law of Succession Act.....”

26. I agree with the decision of Hon Justice W. Musyoka in the cited case.

27. In view of the foregoing, I find that the protestor has established a case for the distribution of ½ portion of the deceased's estate to the estate of Esther Wanjiru Wambugu. The protest dated 29th September 2016 is hereby allowed. Each party to bear their own costs.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 9TH DAY OF APRIL 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Petitioners

In the presence ofAdvocate for the Protestor