



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 1036 OF 2010**

**(IN THE MATTER OF THE ESTATE OF THE LATE KARIUKI MACHARIA)**

**ESTHER MUMBI KARIUKI.....APPLICANT**

**-VERSUS-**

**FREDRICK NJARAMBA.....PROTESTOR**

**JUDGMENT**

The applicant petitioned for and was granted letters of administration intestate of the estate of her late husband Kariuki Macharia who died on 29 October 2007; the deceased was then domiciled in the Republic of Kenya and residing at Gakii sub-location. The grant was made on 28 March 2011.

By a summons dated 17 December 2012 the applicant sought to confirm the grant and distribute the deceased's estate which comprised a parcel of land known as Title No. Aguthi/Gakii/1381. She proposed to have the entire estate devolve upon herself despite the fact that the deceased was survived by seven children; they did not, however, seem to have any issue with the scheme proposed by their mother for devolution of their father's estate since they signed a consent (no doubt under rule 40(8) of the Probate and Administration Rules) endorsing the scheme; it was filed in court on 27 of December 2012.

In the absence of any protestor by the deceased's children everything ought to have gone according to script; however, this was not to be because on 11 June 2013 the protestor filed an affidavit protesting against the distribution of the estate of the deceased on the ground that he had been left out in the distribution yet he was the son of the deceased.

In his affidavit of protest, he alleged that the deceased was married to his mother, Lucy Wanjiku in the 1960s but that they separated in the early 1970s. He deposed further that after the separation, he initially lived with his father before one Titus Ndunge Mute took him in and brought him up. He acknowledged, however, that the applicant was also the deceased's wife and that they had seven children.

After the deceased died the protestor approached the deceased's clan on the question of distribution of his estate. The clan referred him to the assistant chief of the area from where the deceased hailed; the assistant chief advised him that he had a genuine claim on the estate and that she would schedule a meeting in her office between the petitioner, the protestor and the clan elders to settle this issue. The meeting was subsequently held but, apparently, the applicant refused to acknowledge the protestor and include him in her summons as one of the beneficiaries of the deceased estate, hence the protest.

When the matter came up for hearing, the protestor adopted the evidence in his affidavit of protest on which he was eventually cross-examined. In answer to questions put to him during cross-examination, the protestor testified that he was born in 1965 and that though he does not bear any of the names of the deceased he was still his son. According to him, his surname, Njaramba, was the deceased's father or his grandfather; in other words, he was named after the latter. Even then, it was his evidence that the father to the deceased was called Macharia Kimara; he was also aware that he had several wives one of whom was called Njeri Kimara who was the mother to the deceased. He was, however, not so certain that the deceased's other wife was called Ann Mumbi.

He also testified that his mother was Lucy Wanjiku and that she died in 2005. She lived at Aguthi at her parent's place where she was also buried upon her death. According to him, she separated with the deceased in 1975 by which time the applicant had not been married to the deceased. However, he testified further that he was not aware whether the applicant was married to the deceased in 1973.

It was also his testimony that he lived with a relative from his mother's side called Titus Mute who took him in in 1975; this relative died in 1995. Before then he lived on the deceased's estate. He did not know Paul Gichuru and was also not aware whether he was a cousin to his father.

He also did not know Wangare Kibui. But he knew Teresa Wanjiku only identified as being related to his paternal grandmother and who also lived on the deceased's estate.

He further testified that since his mother left in 1975, he never went back to the deceased. The last time he met his father was in April 2007; at that time, he met him together with members of his clan and one Mathenge Kariti whom he described as his uncle. The applicant, according to him, was not at home. However, when his father died, he did not attend his funeral because he was not informed of his death and, in any event, he was away in Uganda. He was, however, aware that he was admitted in hospital between 2003 and 2007 though he never paid any of his hospital bills. He confirmed that he was not mentioned anywhere in the deceased's eulogy as being related to the deceased in any way. He denied that his mother was married to Ann Mumbi.

Geoffrey Waweru Njane, one of the protestor's witnesses, testified that he knew the protestor as the son of the deceased whom he identified as Kariuki Wa Macharia. According to him, the deceased was married to three wives; the first wife was called Gachiku; the second one was Njoki Kariuki while the third one was Esther Mumbi Kariuki. It was his evidence that the second and the third spouses are the only surviving wives of the deceased. Of these wives, Njoki had no child; the first wife had a child called Fredrick Macharia Kariuki but she went back to her parents in 1970. The third wife has several children.

The father of Kariuki Macharia, according to him, was Macharia Kimara who had two wives; Wacera, the elder wife and the mother of Kariuki (the deceased), and Ann Mumbi Macharia. Mumbi did not have children and therefore she married a wife called Esther Wanjiru Njuki who is still alive today. It was his evidence that she is the mother of the protestor and that she went back to her parents because she disagreed with her 'husband' Mumbi. As to whether any dowry was paid when Mumbi married her, he testified that he was not aware. But he was aware that after Esther Wanjiku left, she married another wife called Teresa Wanjiku who again is still alive today. Ann Mumbi died.

The father of the deceased had subdivided his land into three portions and distributed it amongst his two wives, Wacera Kimara, Ann Mumbi Kimara and Paul Gichuru who was a nephew to Macharia Kimara. He was the son of Macharia Kimara's brother.

Wacera had one son who is the deceased in this cause; the land given to her was naturally inherited by the deceased and it is the portion of land that the applicant occupies.

The protestor, according to this witness, is entitled to a portion of land given to Ann Mumbi for the simple reason that she was the 'husband' to his mother.

During his cross-examination the witness testified that he knew the protestor as Fredrick Njaramba Kariuki and he was not aware that the name in his identification card reads Fredrick Njaramba Titus. When he was referred to his statement, he admitted that he had indicated in the statement that the deceased had two wives while in his evidence in court he had stated that the deceased had three wives. He also stated that the protestor's mother was called Gichuku Kariuki though in his statement he had referred to her to as Esther Wanjiku. According to him, Esther Wanjiku had died and had been buried at her father's place.

Geoffrey Mathenge Karibe, another of the protestor's witnesses testified that he was the protestor's uncle in the sense that he was a brother to his father. He knew the protestor as the son of the deceased. In cross-examination he testified that he was born on 28 December 1943. He could not tell when the deceased was born but he knew his father to be Kariuki Macharia also known as Macharia Kimara. The latter, according to him had two wives, Wamaitha Wacera who was the deceased's mother and Wanjiku Kibura or Wanjiku Macharia. Ann Mumbi was the wife of Macharia Kimara. It was his evidence that Wanjiku Kibura, Wanjiku Macharia and Ann Mumbi referred to one and the same person. Ann Mumbi did not have children but he denied that she married Esther Wanjiku. He could not tell her first name. He admitted that the mother of the protestor was Wanjiku.

He further testified that Kariuki Macharia had three wives one of whom was Wanjiku Kariuki the mother of the protestor. The second was Njoki Kariuki while the third was Esther Mumbi.

He was aware that the protestor did not give any money for treatment of his father and that though he met him several times he never met him at the deceased's home at any time.

The third witness for the protestor was one George Githiari Kiboi. His evidence was that Kariuki Macharia's father and his grandfather were brothers. The protestor's mother, according to him, was the deceased's first wife. The second wife was called Njoki and the third wife was called Esther Mumbi. The deceased disagreed with his first wife and therefore she went back to her parents together with the protestor. He was to be brought up by a certain sub-chief. He came back home later when he was an adult and the deceased accepted him as his first-born child but that the third wife was not so welcoming. The second wife had no children and that she had also left and gone back to her parents. Esther Mumbi was currently living in the deceased's home.

During cross-examination he testified that the deceased's father had two wives; the second wife was Hannah Mumbi. He could not tell the name of the first wife but he knew that she was the mother of Kariuki Macharia, the deceased. Hannah Mumbi did not have children but her deceased husband gave her half of his land. He was aware that Paul Gichuru was a son to Macharia. In other words, he was a nephew to the deceased. He was also given an acre of land by Macharia before he died.

Hannah Mumbi married Teresa Wanjiku Njuki who, according to him, should have been her son's wife. She had one son and therefore Wanjiku should have been her daughter-in-law. According to the Kikuyu customs she was married to Hannah Mumbi. Hannah Mumbi had earlier married Wangare Kibii but they separated and dowry was returned. He admitted that Mumbi had earlier married Lucy Wanjiku.

As far as the protestor is concerned, he was aware that his mother was the wife of Kariuki and she was called Wanjiku. He was aware that she went back to her parents but could not tell where the protestor went. He was, however, aware that he was brought up by a sub-chief called Titus Ndirangu. He admitted that during the burial of the deceased the protestor's name was not mentioned as one of his children. As

to when the protestor came back home, he did not know and denied having participated in the ceremony to welcome him back home.

Also testifying in support of the protest was Michael Kameru Muricho whose brief testimony was that at one time, the deceased asked him to call the protestor so that he could take him to hospital. According to him, the deceased was the protestor's father.

The final witness for the protestor was Amos Muthui who testified that he was the protestor's cousin and that they were brought up together at the deceased's home. The protestor, however, left and went to work elsewhere and that he used to come and visit his deceased father. His father and the protestor's grandfather were brothers. The protestor's father according to him was called Gitonga Kimara also known as Kariuki.

On her part, the applicant testified that she was married to the deceased in 1973 and that the two of them were blessed with seven children. The deceased was the son of Macharia Njuki who was also called Kimara. He had two wives whom she named as Wamaitha also known as Wacera and Ann Mumbi.

The first wife was the mother of her husband but Ann Mumbi did not have any children though she married her own wives. One of these wives was Teresia Wanjiku who is still alive and has six children.

Macharia Njuki had a parcel of land being Title No. Aguthi/Gaki/608. It was her evidence that this parcel of land was divided into three portions and that the first portion was given to her late husband Kariuki Macharia; the second portion was given to Paul Gichuru because his father and the father to Macharia Njuki were uncles. He, however, sold his share to one George Ndirangu Kiberenge. The third portion was given to Ann Mumbi. The new registration numbers of these parcels were respectively, Aguthi/Gaki/974 given to Kariuki Macharia; Aguthi/Gaki/975 given to Paul Gichuru and, Aguthi/Gaki/976 given to Ann Mumbi. It is on this latter parcel that Teresa Wanjiku lives.

Wamaitha also known as Wacera had two children; the deceased who was also her husband and another child who died, apparently in his infancy years. The land belonging to Wacera was given to the deceased. The deceased, however, subdivided it and sold part of it to George Ndirangu Kiberenge. What remained was Title No. Aguthi/Gaki/1381 which is the estate that comprises the deceased's estate.

She denied that the protestor was ever at the deceased home when she was married in 1973; as a matter of fact, she denied that her husband ever had any other wife. The protestor never visited the deceased at any time and more particularly, he never visited him even when he was ill from 2004 until 2007 when he died. Neither did he attend his burial. According to the applicant, the first time she heard of the protestor was on 18 March 2013 when she was summoned by the assistant chief to her office and asked her to consider the protestor as her son.

She testified further that none of the witnesses who had testified on behalf of the protestor were engaged in the burial arrangements of the deceased and none of them ever introduced the protestor to her as the deceased's son.

A neighbour to the applicant, Timothy Maina Gicheru, testified that he knew Macharia Njuki had two wives, Wamaitha Wacera and Ann Mumbi and that Wacera had a son called Kariuki Macharia but that Mumbi did not have any children. She married one Lucy Wanjiku who had two children; Maina and the protestor. Wanjiku was sent away back to her parents in 1970. Ann Mumbi married another wife called Wangari Kibii. She too was sent away. Mumbi married the third wife called Wangui. She was also sent back to her parents. In 1978 she married Teresa Wanjiku who survived her and still lives in her land to date. Ann Mumbi herself died in 2002. Macharia Njuki divided his land into three parcels. The first portion was given to Wacera the second portion was given to Paul Gicheru while the third portion was given to Ann Mumbi. The protestor left with this mother in 1970 and never came back.

Thus far went the evidence of the contestants.

To say that the evidence of the of relationship between the deceased, Kariuki Macharia, his father Macharia Kimara, their wives, children and the positioning of the protestor in this web is nothing less than a jigsaw puzzle would be an understatement; nonetheless, this honourable court has the onerous task of putting the pieces together in order to find the true picture; this can only be done after a careful analysis of the evidence.

There appears to be a common ground that the protestor may have been related to the deceased in some way; the only point of contention is the nature of the relationship; while the protestor's position is that the relationship was as close as that of father and son, the applicant, on the other hand, says that the protestor and the deceased were remotely related, if there was any relationship at all. It is not surprising that the nature of the relationship between the deceased and the protestor should be the central point of contention because the devolution of the deceased's estate to the potential beneficiaries is invariably tied to how close they were to him. This explains why the only basis upon which the protestor has pitched his claim on the estate is that he was a direct offspring of the deceased.

The burden was always on the protestor to prove his case; however, his testimony together with that of his witnesses was, at best, convoluted. Their testimony was characterised by contradictions; they were either contradicting themselves or were contradicting each other. For instance, though the protestor alleged that he was named after his grandfather, he admitted that his surname 'Njaramba' was not his grandfather's name. he denied that his grandfather had a wife called Mumbi and was not familiar with his nephew Paul Gichuru. His own witness, Geoffrey Waweru Njane, on the other hand, knew Mumbi as Kimara's wife and Paul Gichuru as his nephew.

Again, though Amos Muthui testified that he grew up together with the protestor at the deceased's home, the protestor himself testified that he left that home while he was still young and that he was brought up by someone else

Njane's testimony, though contradictory in certain respects, shed some light on what may have been the protestor's proper lineage. According to his testimony, Kariuki Macharia whose estate is the subject of this cause, was the son of Macharia Kimara. Macharia Kimara had two wives; the first wife was called Wacera while the second wife was called Ann Mumbi.

Wacera was the mother of Kariuki Macharia. Ann Mumbi was barren and so according to Kikuyu customs which sanctioned woman to woman marriage she was entitled to 'marry' her own wife so that she could get a child or children of her own. Thus, she married not just one but three different wives; these were Esther Wanjiku Njuki, Wanjiru wa Kibii and Teresa Wanjiku. According to the evidence available, it was not her intention to have as many 'wives' but that she disagreed with each of them and sent them back to their parents every time she married them; she finally settled on Teresa Wanjiku, whom both the applicant and the protestor agree is still alive and settled on that parcel of land which Ann Mumbi inherited from her husband, Macharia Kimara.

In his evidence in chief, Njane testified that Kariuki Macharia had three wives; these were Gachiku, Njoki Kariuki and Esther Mumbi Kariuki, the applicant in this cause. Apart from the applicant, Njoki Kariuki is still alive. Gachiku is deceased and in this part of his evidence, he described her as the mother of the protestor.

During his cross-examination, however, he was categorical that, in fact, Esther Wanjiku Njuki, the first wife of Ann Mumbi was the mother of the protestor and as if to clear the air where the protestor's claim rightly lies, he stated as follows:

**Fredrick Njaramba (the protestor) should get the portion of land given to Ann Mumbi because she had married his mother.**

This piece of evidence was against the background of his testimony on how Macharia Kimara had shared out his land prior to his death. It was his evidence that Kimara had divided his land into three equal portions two of which he gave to his two wives, Wacera and Mumbi while the third portion he had given to his nephew, Paul Gichuru. It follows that the protestors share, if any, should come from Mumbi's estate for the simple reason that Mumbi was the 'husband' to his mother.

This evidence by the protestor's own witness effectively shut out the protestor's purported claim on the deceased's estate. It was, to a large degree, also consistent with the applicant's evidence. Just like the protestor's witness, it was her evidence that indeed her husband was the son of Macharia Njuki who was also called Macharia Kimara and that he had two wives namely, Wacera and Mumbi. She added that Wacera had two children one of whom was her husband while the other one died. Mumbi, on the other hand had no children and she married several wives; the last of these wives was Teresa Wanjiku whom she married when the applicant was already married to Kariuki Macharia.

She provided more particulars on Macharia Kimara's distribution of his land into three different parcels. The original parcel according to her evidence was Title No. Aguthi/Gaki/608. The three parcels that were excised from the parcel were Title Nos. Aguthi/Gaki/974 which was given to her late husband Kariuki Macharia, 975 which was given to Paul Gichuru and 976 whose beneficiary was Ann Mumbi. Her husband sold part of his share of the land as a result of which the remaining portion was registered as Title No. Aguthi/Gaki/1381, which from the certificate of official search filed alongside the petition measures approximately 6.637 hectares.

Based on the protestor's own witnesses' testimony, I am inclined to conclude that there is no merit in the protestor's protest. The protestor appeals to me to be a person who is not quite certain of his lineage or bloodline and his protest is more or less of a gamble; his bet in this protest is on the deceased but as it has turned out, particularly from the testimony of his own witnesses' testimony, he floundered. If he had the information which Njane gave to court, one wonders why he would want to lay any claim on the deceased's estate.

In a nutshell, his claim, if any, may lie elsewhere; as far as his protest is concerned, there is no proof whatsoever that he has a valid claim on the deceased's estate. Accordingly, I have no alternative but to dismiss the protest; it is hereby dismissed with costs to the applicant. In the same breath, I allow the summons for confirmation of grant dated 17 December 2012 and hereby do confirm the grant made to the applicant on 28 March 2011 in terms proposed in paragraph 2 of the affidavit sworn by the applicant in support of the summons. It is so ordered.

**Dated, signed and delivered in open court this 12<sup>th</sup> day of July, 2019**

**Ngaah Jairus**

**JUDGE**