



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 85 OF 2005**

**IN THE MATTER OF THE ESTATE OF JOSEPH GICHANGI WANGONDU (DECEASED)**

**ESTER NYANJAU GITONGA**

**WAIGWA MAINGI**

**JOHN NDUHIU.....PROTESTORS**

**VS**

**STEPHEN GITONGA GICHANGI.....RESPONDENT**

**RULING**

1. The estate relates to the late **STEPHEN GITONGA GICHANGI (DECEASED)** who died on the 20<sup>th</sup> July, 1998; he died intestate and his estate is comprised of one property known as Land Parcel No. Tetu/Ichagachiru/303;
2. As set out in the Chiefs letter dated the 7/12/2004 the deceased was survived by the following children;
  - i. Stephen Gitonga Gichangi - son
  - ii. Charles Ndungu Gichangi – son
  - iii. Mary Wanjiru Mwangi – daughter
  - iv. Beatrice Wambui Wambugu – daughter
3. The aforesaid letter includes the names of the 1<sup>st</sup> protestor Esther Nyanjui Gitonga (**Ester**) and the other protestors as Interested Parties; the 1<sup>st</sup> protestor commenced the instant cause by citing the respondent herein; Stephen the respondent as the son of the deceased entered appearance to the Citation and thereafter cross-petitioned for the Letters of Administration and a Grant was issued in his favour on the 29<sup>th</sup> March, 2006;
4. By an application dated 12/09/2007 the 1<sup>st</sup> protestor applied for the Revocation of the Grant under Rule 44 of the Probate and Administration Rules on the grounds that the respondent had refused and or neglected to apply for the Confirmation of the Grant within the time of six (6) months as stipulated in law; she prayed that a fresh Grant be issued to herself to enable her to proceed to apply for its confirmation;
5. One year later on the 27/08/2008 the respondent proceeded to file the application for the Confirmation of the Grant and therein proposed his mode of distribution; this generated several Affidavits of Protest which were filed by Ester and her co-protestors namely Waigwa Maingi and John Nduhui Maingi in opposition to the petitioner's proposed mode of distribution;
6. Ester describes herself as a niece to the deceased and the other protestors describe themselves as the sons to the brother of the deceased which makes the deceased an uncle to all the protestors whereas the respondent is their cousin; they all gave their reasons for protesting and included their proposed modes of distribution of the deceased's estate.
7. Directions were taken that the matter proceed for hearing by way of oral evidence being adduced; the protestor (**Ester**) was represented by

learned Counsel Mr. Kiminda whereas the other two protestors and the respondent were all acting in person; all the parties testified and called witnesses and after the full hearing the parties were directed to file and exchange written submissions; hereunder is a summary of the evidence and submissions of the respective parties;

### **THE PROTESTORS' CASE**

8. Ester's (**PW1**) evidence was that the deceased was a brother to her late mother; that the deceased had two (2) siblings, namely;

i. Beatrice Wambui Wangonde- deceased

ii. Maingi Wangonde – deceased;

9. Her contention was that the suit property was family land and was registered in the name of the deceased to hold in trust for his late brother and his sisters; her late mother (**Beatrice**) now deceased was not married and that Ester was only claiming her mother's 1/3 share which was her mother's entitlement; upon her mother's demise Ester stated that she opted to inter her mother's remains on her (**Ester's**) own shamba situate in Kinangop/Nyandarua as there was nowhere else to bury her; as for the deceased and his late brother both were buried on the suit property and on their respective portions;

10. That it was apparent from the proposed mode of distribution that the respondent had only taken care of himself and his sibling brother; Ester stated the land belonged to her grandfather and that the respondent held it in trust for himself, his late brother as well as his late sister; that her preferred mode of distribution was that the suit property be sub-divided into three (1/3) portions as set out hereunder;

i. Ester Nyanjau Gitonga – 1.46 acres

ii. Stephen Gitonga Gichangi

Charles Waigwa Maingi – 1.46 acres- jointly

iii. Waigwa Maingi – 1.46 acres

11. To support her case the 1<sup>st</sup> protestor called Zachariah Maingi Gitonga (**PW2**); he stated that the 1<sup>st</sup> protestor was his mother and that the respondent was his uncle and that the deceased was his grandfather; he corroborated the evidence of the 1<sup>st</sup> protestors in that the subject property was family land and that it was registered in the name of the respondent because he lived on the land; that he knew the deceased's brother named Maingi Wangonde whom he also described as his grandfather; that upon his demise he was interred on the subject property; his grandmother was not interred on the land due to the fact that his mother had financial constraints;

12. He supported the 1<sup>st</sup> protestor's proposed mode of distribution; that the subject property be distributed between the respondent and Maingi's family and Beatrice's family; under cross-examination he concurred that as a grandchild he had no claim to the estate;

13. The 1<sup>st</sup> protestor closed her case after this witness testified.

### **2<sup>ND</sup> PROTESTORS CASE**

14. The evidence of Waigwa Maingi (**PW3**) was that the deceased was his uncle who was a brother to his late father Maingi Wangonde; that both brothers were now deceased; the respondent was a son to the deceased; he confirmed that his deceased uncle had two (2) siblings and named them as follows;

i. Beatrice Wambui Wangonde- deceased

ii. Maingi Wangonde – deceased;

15. The estate comprised of only one property Tetu/Ichagachiru/303 which he claimed was family land as it belonged to their late grandfather; which had been registered in the deceased's name for him to hold in trust for himself and for the other family members; upon his father's demise his remains were interred on the subject property as had been instructed by him;

16. He had filed a Protest together with his brother and his proposed mode of sharing was that the subject property be divided into three (3) equal shares so as to ensure that the interest of all parties entitled is taken care of; and had proposed that the subject property be divided as follows;

i. Ester Nyanjau Gitonga – 1.46 acres

ii. Stephen Gitonga Gichangi

Charles Waigwa Maingi – 1.46 acres- jointly

iii. Waigwa Maingi – 1.46 acres

## **RESPONDENTS CASE**

17. In response the respondent confirmed that he was the administrator of the estate; and that there was only one property that comprised the estate of the deceased and that it belonged to his late father; that he had filed a Summons General on the 27/08/2008 seeking to confirm the Grant and that the application had been met with stiff opposition from the protestors;

18. He confirmed that the 1<sup>st</sup> protestor (**Ester**) was a daughter to Beatrice Wambui (deceased) who was a sister to his deceased father making the 1<sup>st</sup> protestor a niece to the deceased and a cousin to himself; that the 1<sup>st</sup> protestor was married to one Wachira Gikonyo and her late mother had also been married to a Gitonga Mugenyu; that due to their marital status Ester's mother ought to have inherited the property left behind by her late husband; and that Ester was also not eligible to benefit from the deceased's estate and ought to inherit the property left by her husband;

19. He denied that the suit property was family land and that his grandfather never lived on the subject property; but acknowledged that the three siblings lived on the land before consolidation; his contention was that his deceased father was a younger son and under Kikuyu customary law it was not possible for him to have held the property in trust for his older siblings in particular the elder brother Maingi Wangonde; that the protestors Waigwa and John who are also his cousins were both adults during land consolidation; and that both brothers were well aware that their father had sold off his portion of land and that was the reason for moving to Kieni; that his father had only buried his late brother on the subject to honour his wishes; but no other family member had been buried there;

20. His contention was that these protestors were not entitled to any share in the deceased's estate as the elders had divided the land and that the 2<sup>nd</sup> protestors late father had sold off his portion; that the remaining subdivision belonged to his father;

21. As for his two sibling sisters namely Beatrice Wambui and Mary Wanjiru Mwangi his claim was that they had both renounced their interest in their deceased's father's property; and therefore his proposed mode of distribution was as between himself and his sibling brother and was as follows;

- i. Stephen Gitonga Gichangi – 2.4 acres
- ii. Charles Ndungu Gichangi – 2.0 acres

22. He urged the court to rely on the Green Card; and that the land belonged to his father and it was not available for distribution to the three protestors.

## **ISSUES FOR DETERMINATION**

23. After hearing the presentations of the respective parties and upon reading the rival written submissions this court has framed the following issues;

- i. Whether all the Protestors are entitled to benefit from the deceased's estate;
- ii. Distribution of the estate;

## **ANALYSIS**

### **Whether all the Protestors are entitled to benefit from the deceased's estate:**

24. The evidence of the protestors was that the suit property was family land and that the petitioner held it in trust for his late brother Maingi and his late sister Beatrice; and being children of the deceased's siblings they were entitled to their parents share in the estate of their grandfather; the respondent countered this by denying that the suit property was family land and went on to berate the 1<sup>st</sup> protestor and her late mother as being married women and therefore not entitled to benefit and ought to benefit by inheriting their respective husband's properties; as for the other protestors his contention was that their father had sold off his portion of the land given to him by the village elders;

25. This court had occasion to peruse the court record particularly the petitioner's affidavit in support of the petition for Letters of Administration dated 17/09/2005 and filed in court on the 7/02/2005 therein he depones and lists the subject property in the inventory of the assets as having belonged to the deceased;

26. It is a well established rule of evidence that whoever asserts a fact is obligated to prove it in order to succeed; in this case the respondent has deponed at paragraph 4 of the Supporting Affidavit as follows;

**“4. That the deceased died intestate and left the following surviving him;**

- a. Stephen Gitonga Gichangi - son - Adult**
- b. Charles Ndungu Gichangi - son – Adult**
- c. Mary Wanjiru Mwangi - daughter - Adult**

**d. Joseph Waigwa Maingi - nephew – Adult**

**e. John Nduhiu Maingi – nephew – Adult**

**f. Esther Nyanjau Gitonga - niece Adult”**

27. From the above averments it is clear and evident that the respondent has included the three protestors as survivors to his father’s estate; such an action can only be considered as an acknowledgement of the interest the protestors have in his father’s estate; yet it is noted that all the respondent’s evidence is centered on defeating the protestors’ rights to any shares they may have in the subject land;

28. Again this court reiterates that the person who states a fact has the onus of proving it; the respondent has named and described the 2<sup>nd</sup> protestor and his brother as nephews in the Petition for Letters of Administration; in evidence he made reference to the sub-division of their grand-father’s land by elders; and that his father and brother were both given their respective shares; and that the older brother sold his share; it is worth noting that the respondent called no elders or witnesses to support and or prove this contention on land distribution and or on the sale of the late Maingi’s portion; no documentary evidence was produced in support; this evidence can only then be described at best as hearsay and falls short of the required standard of on a balance of probabilities;

29. The respondent acknowledged the fact that the deceased allowed the 2<sup>nd</sup> protestor’s father to be buried on the parcel he deems to be his father’s land; he stated in his evidence that his father was buried at one end of the subject property and the brother at the other end; this action of interment on separate sides of the land can only be deemed as having been done in anticipation of inheritance; and this court is satisfied that the interment of Maingi on the land confers rights to the 2<sup>nd</sup> protestors over the land;

30. The respondent in his Petition also named and described the 1<sup>st</sup> protestor therein as a niece and survivor to his fathers estate; and acknowledged that this very Esther was the daughter of Beatrice; his evidence was that the 1<sup>st</sup> protestor’s mother Beatrice was a married woman and therefore was not entitled to benefit from the deceased’s estate; and that any distribution to either Beatrice and or Esther would be in violation of customary law;

31. The general pattern of inheritance under Kikuyu Customary law which is patrilineal is that married women are not entitled to inherit their fathers’ property and instead ought to inherit their husbands’ property; by making reference to the marital status and rights of Beatrice it is this court’s considered view that the respondent acknowledges the fact that the land belonged to his grandfather who was Beatrice’s father; which therefore means that the subject land was family land and did not belong solely to his father;

32. The Respondent filed the Succession Cause under Law of Succession Act; this Act read together with The Constitution 2010 has eliminated gender discrimination in matters related to succession; and both ensure that men and women have equal rights to inheritance regardless and irrespective of gender and or marital status;

33. From the evidence adduced this court is satisfied that the subject property belonged to the family and was left in the able hands of the late father of the Respondent ; this court finds that all the Protestors are entitled to benefit from the deceased’s estate;

**Distribution of the estate:**

34. As the parties are not in agreement as to the manner the estate is to be distributed this court is therefore tasked with the distribution of the deceased’s estate;

35. This court has made a finding that the subject property was family land and has also found that the present owner is not entitled to the subject property on his own account;

36. The 1<sup>st</sup> protestor and the 2<sup>nd</sup> protestor have proposed in their mode of distribution that the property be divided into three equal shares; with the deceased’s share going to the respondent and the other two shares going to the respective families of the deceased’s siblings; whereas the respondent had proposed that it be distributed to himself and his sibling brother as set out in the application for Confirmation of the Grant; It is noted that the Respondent did not include his sibling sisters but the explanation for their exclusion is well documented and is due to the sisters having duly filed Notices of Renunciation of interest in the estate of their deceased father;

37. In this instance it is not in dispute that all the parties are grandchildren of the original owner; and it is not in dispute that there were three siblings namely Joseph, Maingi and Beatrice and that the three are all deceased; that Joseph was the father of the respondent and his brother; that Maingi was the father of the 2<sup>nd</sup> Protestor and his brother; and lastly Beatrice was the mother of the 1<sup>st</sup> protestor; there is no surviving spouse and all the aunts and uncles are all deceased;

38. The applicable law is found at Section 41 of the Law of Succession Act; therefore the grandchildren will step into their respective parents’ shoes and will take the share which their parents would have been entitled to in their deceased’s father’s estate;

39. The estate shall be distributed and divided into three equal shares and a share awarded to each of the three families as follows;

i. Ester Nyanjau Gitonga – 1.46 acres

ii. Stephen Gitonga Gichangi

Charles Waigwa Maingi -1.46 acres- jointly

iii. Waigwa Maingi -1.46 acres

**FINDINGS AND DETERMINATION**

40. The protests are all found to be meritorious and are hereby allowed; the protestors are all found to be entitled to a share in the estate of the deceased;

41. The petitioner's mode of distribution is found to be unfair and discriminatory whereas the 1<sup>st</sup> protesters and 2<sup>nd</sup> Protestors mode of distribution is found to be fair;

42. The Grant is hereby confirmed on the terms as set out in paragraph 39(i) (ii) and (iii) hereinabove;

43. This being a family matter each party shall bear their own costs.

It is so ordered.

**Dated, Signed and Delivered at Nyeri this 7<sup>th</sup> day of November, 2019.**

**HON. A. MSHILA**

**JUDGE.**