



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO 15 OF 2013

IN THE MATTER OF THE ESTATE OF KINYUNGU NJOROGE, DECEASED

NAHASHON KARUNGU MACHARIA.....ADMINISTRATOR

VERSUS

ROSEMARY KAHURA NJOROGE.....PROTESTOR

J U D G M E N T

1. The Deceased herein, ***Kinyungu Njoroge*** died intestate on 27/07/1988. On 5th March 2014 a grant of letters of administration intestate was issued to one of his sons surviving him, ***Nashon Karungu Macharia***.

2. The Deceased was survived by the said Administrator and another son, ***Patrick Muthemba Macharia***. He was also survived by a daughter-in-law called ***Rosemary Kahura Njoroge*** (a widow of another son, now deceased, ***James Njoroge***). There had been yet another son, ***John Kimani***, who died after the Deceased. It is common ground that he died without wife or issue. So, in effect there are only three beneficiaries to the estate of the Deceased – his two surviving sons and the widow of another son, since deceased.

3. The Administrator applied by summons dated 10/09/2014 for confirmation of the grant. The estate of the Deceased comprises two properties –

(i) Land parcel LOC 8/GAKUYA/362 measuring only 0.7 acres.

(ii) Plot LOC 8/KIANJOGU/T.67

The Administrator proposed at paragraph 5 of his supporting affidavit that he and his brother Patrick each get 0.28 acres in parcel 362 while their sister-in-law Rosemary gets 0.14 acres therein. He also proposed that the village plot, T.67 be registered in the name of Rosemary as sole proprietor thereof.

4. Rosemary (hereinafter called the Protestor) has opposed that distribution as proposed by the Administrator. This is by her affidavit of protest filed on 22/12/2014. She counter-proposes that the entire estate be shared equally between the three beneficiaries. In other words, that the three should share equally parcel No 362 and Plot T.67.

5. The protested summons was canvassed by way of oral evidence. The Administrator testified and called his brother Patrick who stated that his testimony was like that of the Administrator. On her part the Protestor also testified and called one witness, John Kamau Kamure, a cousin of the Administrator and his brother.

6. I have considered the testimonies of the witnesses. It is not in dispute that all three beneficiaries live on and cultivate parcel No 362. What is in dispute is whether the Protestor occupies and uses a portion equal to those of the other two (as she claimed) or smaller (as claimed by the Administrator and Patrick).

7. It is also not in dispute that the Protestor's late husband is not buried in parcel No 362 but in plot T.67; that the Protestor is the only one who cultivates that plot; and that her son has built his house in that plot. It appears not in dispute that the Administrator and Patrick do not use, and have never used, any part of the plot.

8. The Administrator and Patrick said that their brother (Protestor's husband) was buried by the clan in the village plot and not in parcel 362 because it was the Deceased's wish that the plot should comprise his inheritance, though the Deceased later said that he could also have the portion in parcel 362 that had his (deceased's son's) coffee. That is the portion the Administrator and Patrick say measures 0.14 acres.

9. On her part the Protestor says that her husband was buried in the plot because the Administrator would not allow him to be buried in plot No 363; and further that the Deceased never said that the village plot should go to her husband. But I note that her own witness stated that he (and other clan members) accepted that the Deceased had said that the Protestor's husband should be buried in the plot and not in parcel No 362, and that that was why they buried him there.

10. The preponderance of the evidence before the court is that the Deceased gave to the Protestor's husband the village plot as a gift *inter vivos*. She alone cultivates the plot and that is where her husband is buried. Her son has built on that plot. The other two beneficiaries (the Administrator and Patrick) do not use the plot and have no claim in it. This gift *inter vivos* by the Deceased to the Protestor's husband must be taken into account in the interests of justice.

11. I also accept the Administrator's testimony that it was also the Deceased's wish that the Protestor's husband also get the portion in parcel No 362 occupied by his coffee.

12. It is to be noted that parcel No 362 is a very small parcel of land measuring only 0.7 acres in which already stand three homes and coffee. The three beneficiaries also appear to cultivate the land for their and their families' sustenance. The Administrator's proposals that he and Patrick each get 0.28 acres in the parcel while the Protestor gets 0.14 acres appears to me to be eminently fair and just. In addition, of course, the Protestor will also get the village plot absolutely.

13. I will in the circumstances allow the summons for confirmation of grant. Distribution shall be as proposed at paragraph 5 of the supporting affidavit. It is so ordered. Parties shall bear their own costs of the proceedings.

DATED AND SIGNED AT MURANG'A THIS 10TH DAY OF MARCH, 2016

H.P.G.WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 11TH DAY OF MARCH 2016