



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO. 421 OF 2014

In the Matter of the Estate Of M'nchebere M'naituri (Deceased)

JANET NJAGI M'NCHEBERE.....PETITIONER

Versus

JULIUS KIOE MWENDA.....PROTESTOR

RULING

Protest to confirmation of grant

[1] By a Summons for Confirmation of Grant filed on 2nd June 2015 the Petitioner, Janet Njagi M'Nchebere, applied for confirmation of Letters of Administration of the Estate of M' Nchebere M'Naituri issued to her on 3rd November 2014. But, before the said Grant could be confirmed the Protestor herein namely Julius Kiome Mwenda filed an Affidavit of Protest to Confirmation of Grant. The major reasons deposed to in the Affidavit of Protest were *inter alia*:-

- (1) That the Petitioner was her mother and wife to the deceased and that she has been living at Ngusishi, Timau Buuri District since 1978 together with his three other brothers namely Joseph Nkinyangi, Stanley Murangiri and Robert Kimathi Nchebere who he alleged had properties in Timau;
- (2) That his deceased father shared all his properties when he was alive including L.R NO Nyaki/Kithoka/2327 which is the only property which was given to him and his family. That the deceased was buried in this suit property and which he has extensively developed.
- (3) That the Petitioner had without his knowledge filed an application for distribution of the only parcel of land that he was given hence the protest to protect his beneficial interest.

[2] The Protestor reiterated the contents of his Affidavit of Protest in his submissions and urged the court to disallow the Application for Confirmation of Grant as it targeted L.R NO. Nyaki/Kithoka /2327 which was the only property given to him by the deceased.

The widow spoke

[3] The Petitioner who is the widow of the deceased submitted that the Protestor was a son of the deceased. She submitted that she lived in Land Parcel No Nyaki/Kithoka/2327 with her deceased husband until his death. She said that she also buried her late husband in the said land. She made further submissions, that, after the death of her husband, she continued living on the said land up to 2011 when

the Protestor demolished her house and chased her away. Subsequently, she took refuge in his son's land at Ngusishi. Therefore, according to her, it is not true that she has another land at Ngusishi as claimed by the Protester. The widow addressed other important issues; that the deceased had subdivided his land and in 1998 transferred the resultant portions to his sons including the Protestor who was given land adjacent to the suit land where he lives. Thus, it is not true that the Protester lives on the suit land. Consequently she urged the court to dismiss the Protestors protest and allow the Application for Grant since she ranked 1st in inheritance of the deceased estate.

DETERMINATION

[4] Upon careful consideration of this Application and the rival positions taken by the parties, I am of the following orientation. The Protester objected to confirmation of grant mainly on the allegation that the estate property was given to him by the deceased during his lifetime. Such claim is in the nature of a gift *inter vivos* or testamentary. Accordingly, the Protester must prove the land was given to him by the deceased during his lifetime by adducing such evidence which must bring conviction upon the court to find in his favour. I note that the Protester has not stated when he was given the land by the deceased. There is, however, information by the Petitioner to the effect that, sometime in 1998, the deceased subdivided his property and gave some of the resultant portions to his sons. According to the Petitioner, the Protester was given the land adjacent to the estate property, where he currently lives. The Protester also alluded to the fact that his late father subdivided his land and gave it to his children. I note that the Protester did not say much about the land adjacent to the suit property. In light of the foregoing facts, it becomes necessary to ask why the Protester did not give the specific details of the parcels of land which were given to the other siblings. Again, he did not explain why the deceased registered the suit property in his name and also obtained the title deed in his name on 5th June 2001- the deceased was already asserting dominion over this land. These facts militate against the claim by the Protester that the suit property is the only property that he was given by the deceased during his lifetime. There is yet another lapse; other than making general statements, the Protester did not provide any detail of the other property at Ngusishi which he alleged the Petitioner owns or was given by the deceased or was living in. Therefore, the claim that the Petitioner lives in some property at Ngusishi with his other brothers is neither here nor there and it is not proof that the Protester was given the estate property by the deceased. It bears repeating that the Protester ought to have shown the distinct share that the widow owns in the estate of the deceased instead of making a general statement that she lives with her sons in another land at Ngusishi. Accordingly, on the basis of the above facts and analysis thereto, the contentions by the Petitioner that she had been living in the suit property up to 2011 when the Protestor demolished her house and chased her away make sense and may be true; I believe her. The facts of this case impels me to state that it is about time the Law of Succession Act is reconciled with the Constitution and recognize the right of the surviving spouse on the properties of their marriage which should be quite distinct from the share of the deceased spouse; and such share is not subject to succession in a cause relating to her husband's estate. This is a painful journey courts in Kenya must begin to tread upon in order to do justice to the surviving spouse especially women. I should also state that we must also begin to recognize the right of widows in the estate property and stop those who tend to treat them as if they are squatters in the estate once the husband dies.

[5] I return to merits of the protest. Despite the common averments by the Petitioner and the Protestor that the deceased had shared all his properties when he was still alive, there is no evidence that the suit property was given to the Protester and his family. The record shows that the deceased registered the suit property in his name and obtained a title deed in his name. Again, the Protester was economical with facts as he did not provide details of all the properties of the deceased, including those which were given to the other siblings he is talking about as well as the land at Ngusishi. Mere stating that the Petitioner had another parcel of land at Ngusishi or that other properties of the deceased had been given out to his other siblings without details only shows that the Protester is guilty of material non-disclosure. I suspect that those details may reveal a totally different state of affairs and the Protester feared that any earlier settlement of property or gifts *inter vivos* or testamentary made in his favour would be taken into account in determining the share of the Protester in the net intestate estate of the deceased. In any case, and I have stated this earlier, the widow is entitled to a share in the estate of the deceased; at the minimum, life interest, although I think we should begin to recognize the constitutional rights of widows to the property

of their marriage. The attitude taken by many ostensibly drawing from the Law of Succession Act that the surviving spouse is entitled to meagre life interest in the assets she or he contributed in its acquisition, will have to pass the constitutional test; it is time the Law of Succession Act is aligned with the Constitution as provided for in section 7 of the Sixth Schedule of the Constitution. Accordingly, my overall impression of this case is this; I have considered the material and information provided by the Protester with scrupulous care; I have also looked for any evidence from any other source available within these proceedings; but I find nothing which proves that the estate property was given to the Protester by the deceased. Accordingly, I must fashion the most appropriate order in the circumstances of this case. The Petitioner is the widow of the deceased, and therefore, as the deceased left one surviving spouse and children, section 35 as read with sections 41 and 42 of the Law of Succession Act would be the best guide. First, my analysis above leads me to take one inescapable action; dismiss the protest for it is not meritorious. I accordingly, dismiss the protest. Second, as the protest has been surmounted, I confirm the grant issued to the Petitioner and order that the estate property shall be registered to her name. In addition, I order that the Petitioner shall return to and live upon the estate property. The Protester shall not prevent or interfere with her occupation of the estate property. These orders are inextricable to, explicable and necessary to meet the ends of justice in this case. The upshot is that I allow the Petitioner's Application dated 30th April 2015 for Confirmation of Grant.

Dated, signed and delivered in open court at Meru this 18th day of July 2016

F. GIKONYO

JUDGE