



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**SUCCESSION CAUSE NO. 130 OF 2014**

**In the matter of the Estate of *PETER NJERU NTHIGA (Deceased)***

**NTHIGA CIGANA.....PETITIONER**

***V E R S U S***

**MURIITHI PETER NJERU.....PROTESTER**

**R U L I N G**

1. The parties in this case filed the cause in their capacities as father and son of the deceased Peter Njeru Nthiga as shown by the record. The cause was gazetted on 11/4/2014 with the names of the two petitioners as having filed the cause jointly.
2. However, the letters of administration intestate were issued to the first petitioner Nthiga Cigana on 12/06/2006. It is not known how the 2<sup>nd</sup> petitioner was left out in the issue of the letters of administration having been co-petitioner. The administrator filed a summons for confirmation of grant which was opposed by the 2<sup>nd</sup> petitioner in open court and later by filing an affidavit of protest. He will be referred to herein as the protester.
3. The administrator/1st petitioner filed a reply to the protest. Directions were later given to the effect that the protest be heard by way of *viva voce* evidence. None of the parties called any witness and both parties testified solo in support of their respective cases.
4. The administrator in his affidavit in support of confirmation of grant named only himself as the survivor of the deceased. In the distribution of property he proposed that he inherits L.R. No. Nthawa Siakago/118 while the protester was to be given L.R. No. Nthawa/Siakago/1261.
5. In his testimony, the administrator told the court that the protester should not inherit any share in the deceased's estate for he was not sure whether he (protester) was fathered by the deceased. He further stated that his son the deceased was not married and had no children and that he was a thief who was killed by a mob.
6. It was further stated that the two properties forming the assets in the estate initially belonged to the administrator and had transferred them to the deceased for this reason. The administrator argued that the properties should revert back to him.
7. He further testified that he had met the protester in the company of the deceased and was introduced to him by the deceased as his son. According to the administrator, the deceased lived alone and not with the protester or with any other person.
8. The protester in his affidavit of protest stated that he was the only surviving son of the deceased and was entitled to the estate of the deceased solely and opposed the mode of distribution by the petitioner who was the father of the deceased. He said his mother one Catherine Wangari left him and his two siblings as young children. The other two passed on in 1992 and in 1994 respectively.
9. The protester said he was taken into the home of his grandmother, who was the wife of the administrator and with whom they had separated. The deceased took care of him as he stayed with his grandmother. He used to cultivate deceased's land L.R. No. Nthawa/Siakago/1261 measuring 0.5 acres after the death of his father but the administrator evicted him from the land. He now resides at Siakago town where he does boda boda (motor bike) business and he is married with three children.
10. He testified that the other parcel of land L.R. Nthawa/ Siakago/118 measuring three (3) acres is currently used by the administrator for cultivation of crops. The administrator has his own home and owns several parcels of land. He accused the administrator of colluding with the area chief to deny him his right of registration as a Kenyan citizen. He is aged 32 years and was only issued with an identity card early this year. The protester further said that the administrator obtained the grant in his name through fraud and concealment of the fact that the protester was a child of the deceased.

11. The issue for determination in this case is whether the protestor is a child of the deceased and entitled to inherit as established by law. Secondly whether the administrator as the father of the deceased is a heir to the estate of his late son.

12. The evidence of the protestor which was not disputed is that he was not aware that the petitioner had filed this succession cause although he was named as the 2<sup>nd</sup> petitioner. There is a possibility that he was given the court papers to sign without knowing what the administrator was up to. Alternatively, it is possible that the administrator signed the papers himself on his own behalf and that of the protestor and presented them to court.

13. Whatever the case may be, none of the parties complained of forgery to the relevant authorities. The court will therefore take the papers as they are that the cause was filed jointly by the parties. The protestor has not applied for revocation of the grant and has only protested against the confirmation of grant.

14. There is an irregularity or mistake by the court registry which issued the grant in the name of one petitioner while the record clearly showed there were two names. It is the function of the court to issue letters of administration automatically 30 days following gazette of the cause where there is no objection. This error by the court ought to be corrected in the interests of Justice and for this reason, the protestor is hereby joined as a co-administrator in this cause.

15. The administrator said the protestor was not a son of the deceased as the deceased was not married. He then proceeded to state that it is the deceased who introduced the protestor to him as his son. He said he took the protestor's mobile phone number and even called him later informing him of the death of the deceased. The administrator did not deny that the protestor was brought up by his own wife whom he had separated and who was the grandmother of the protestor.

16. The letter of the area chief dated 20/3/2014 named the administrator and the protestor as the known survivors of the deceased in their capacity as father and son respectively. Consequently, the administrator named the protestor as a child of the deceased in the papers he filed in court making him a co-petitioner in this cause. It is during confirmation of grant that the parties differed on the mode of distribution.

17. With the oral admission in the administrator's testimony made on oath coupled with documentary evidence signed by him and the letter of the area chief, the law of estoppel must be invoked against the administrator. He cannot deny that the protestor is the son of the deceased. He admitted calling the protestor to inform him of the death of the deceased. This should not have happened if the protestor was a stranger.

18. The fact that the area chief knew the protestor as the son of the deceased and the administrator as his grandfather raises doubts as to the credibility of the administrator. This evidence leads me to the conclusion that the protestor was known as the son of the deceased during the lifetime of his father. The protestor is therefore a son and heir to the deceased's estate.

19. It matters not whether the protestor attended the burial of the deceased for this is not a legal requirement in inheritance. The protestor explained himself that the burial of the deceased was brought forward with two days by the administrator and he came to learn later that the deceased had already been buried.

20. The administrator also accused the protestor of not contributing funds in filing this cause. Financial contribution or other kind of active participation in the cause does not affect a beneficiary right of inheritance.

21. I am guided by the case of **CHRISTINE WANGARI GACHUGI VS ELIZABETH WANJIRA EVANS & 11 OTHER [2004] eKLR** where the Court of Appeal held:-

*Under section 38 of the Act; all that one needed to establish in this cause was to show that they were either children or grandchildren of the deceased. Matters of failure to participate actively in the litigation proceedings should not have been a disentitling consideration in respect of the 2nd, 3rd and 4th cross appellants, in the absence of their renunciation of respective claims to the estate.'*

22. The law of inheritance does not call for a party to play any part of the proceedings but to prove that he or she is a heir to the estate by virtue of his relation to the deceased as set out in Section 38 of the Act. The protestor has established that he is a heir to the estate of the deceased and needs not do any more.

23. The administrator is a parent to the deceased in this cause. Section 38 provides that *where there is a surviving spouse, child or children*, a parent will not be considered for inheritance. Section 39(1)(a) is not applicable in this case. The administrator is therefore not a heir to the estate given the circumstances of this case.

24. It was the administrator's case that the two properties of the deceased originated from him. He gave them to the deceased during his lifetime. The legal position is that once the property changes hands, the new owner acquired absolute rights of ownership and can deal with it in the manner he desires including passing it to another person with or without consideration.

25. The former owner loses all the rights on transfer of the property. The law of succession does not concern itself with how the property was acquired. The administrator's argument has no basis in law and is accordingly disregarded.

26. It is not in dispute that the deceased had no spouse at the time of his death and was survived by only one child the protestor. The law applicable is Section 38 of the Act which provides:-

*Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.*

27. I therefore enter judgment in favour of the protestor as the sole heir of the estate. The grant is therefore confirmed in the terms set out in the affidavit of protest.

28. Certificate of confirmation to issue.

29. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF NOVEMBER, 2016.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Both parties present**