



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CASE NO.245 OF 2009

MUCHIRI GACHARA.....DECEASED

AND

JOHN NEWTON WACHIRA.....PETITIONER

JUDGMENT

1. The Petitioner JOHN NEWTON WACHIRA applied for grant of letters of administration in the matters of the estate of NEWTON MUCHIRI GACHARA alias MUCHIRI GACHARA deceased in Karatina Succession cause No. 25 of 2005 and named the following beneficiaries
 - a. WILSON WACHIRA MUCHIRI - SON
 - b. JOHN NEWTON WACHIRA - SON
 - c. JAMES CHEGE MUCHIRI - SON
 - d. JOHN MUCHEMI MUCHIRI - SON
 - e. RICHARD NYAGA NJOROGE - NEPHEW
2. The Petitioner named the following Assets of the estate:
 - a. LR MAGUTU/GATHEHU 335
 - b. LAIKIPIA NANYUKI SOUTH TIMAU BLOCK 2(ETHI)
3. By an application dated 27th November 2006 the Petitioner made an application to substitute RICHARD NYAGA NJOROGE with NEWTON MUCHIRI GITUTO which application was allowed.
4. By an application dated 10th June 2008 DANIEL KABURU MUCHIRI filed an application under section 68(1) of Law of succession rules 49 and 73 thereof for leave to file his objection out of time on the grounds that failure to file the objection was due to the misrepresentation by the petitioner that every beneficiaries interested had been taken care of
5. By an order issued on 18th February 2009 the cause No. 25 of 2005 Karatina was transferred to this court and on 25th March 2011 direction were issued that the dispute herein be determined by way of affidavit evidence and written submissions.
6. On 19th/4/2011 the Petitioner JOHN NEWTON WACHIRA filed a further affidavit in which he deponed that one of the beneficiaries JOHN MUCHEMI MUCHIRI passed away on 19th December 2010 and that it had been agreed by the beneficiaries that the share of the late JOHN

MUCHIRI 0.06475 of LR. NO. MAGUTU/GATHEHU/356 be inherited by his widow JANE MURUGI MUCHEMI.

7. It was further deponed that the protesters herein DANIEL KABURU MUCHEMI did not contribute to the purchase of LR NO. LAIKIPIA/SOUTH TIMAU/2ETHI 233 and that he purchased N. LR NO. LAIKIPIA/SOUGHT TIMAU /2/ETHI 161 and as such was only entitled to 0.545 Ha and not 3.78 Ha of LR LAIKIPIA/SOUTH TIMAU/BLOCK 2 ETHI)233.
8. It was further deponed that the protester had mischievously introduced the name of one 'MUMBI' as a beneficiary and if she was a beneficiary she would have lodged her own protest.
9. The protestor on 11th May 2011 filed a further affidavit wherein he deponed that he purchased LAIKIPIA/SOUTH TIMAU BLOCK 2/164 9ETHI) and therefore the same does not form part of the estate.
10. That on the disputed land LAIKIPIA/SOUTH TIMAU BLOCK 2 233 he paid Ksh. 4500 being a half the amount that was required in respect of the purchase thereof and that it was done on the understanding that he would get half of the land while their father the deceased would retain a half.

SUBMISSIONS

11. On behalf of the protestor it was submitted that the same has no problem with distribution of MAGUTU/GATHEHU/365 but that he is entitled to half of LAIKIPIA/SOUTH TIMAU BLOCK 2/233(ETHI) as per the agreement between himself and the deceased.
12. It was further submitted that the protestor contributed to the purchase of the land and that he should therefore get half of the land measuring 3.78 Ha while the other half is distributed to the other beneficiaries at 0.368 Ha each.
13. On behalf of the Petitioner it was submitted that there is no dispute as regards LR MAGUTU/GATHEHU/353 which should be distributed as follows:

- | | | |
|-----------------------------|---|-------------|
| a. JANE MURUGI MUCHEMI | - | 0.6475 Acre |
| b. JAMES CHEGE MUCHIRI | - | 0.1619 Acre |
| c. CHARLES KABURU MUCHEMI | - | 0.1619 Acre |
| d. PETER WACHIRA M. GACHARA | - | 0.1619 Acre |
| e. SAMUEL KABURU WACHIRA | - | 0.6475 Acre |
| f. MARY WAKONYU MUCHIRI | - | 0.4316 Acre |
| g. DANIEL KABURU MUCHIRI | - | 0.22 Acre |
| h. JAMES GITUANJA MUCHIRI | - | 0.1619 Acre |
| i. NEWTON MUCHIRI GITUTO | - | 0.81 Acre |

14. With regard to LAIKIPIA/SOUTH TIMAU BLOCK 2 (ETHI)233 it was submitted that the land wholly belonged to the deceased and is therefore available for distribution and that there is no evidence that the protestor contributed towards the purchase thereof and that if the land was jointly owned it should have been registered in the joint names of the protestor and the deceased.
15. From the affidavit evidence and written submissions herein I have identified only one issue for determination and that is whether the protestor is entitled to half of the land.
16. This court has said before and I repeat it once more that matter of this nature are not best determined by affidavit evidence and written submission but by way of oral evidence wherein parties to the dispute are cross examined
17. It has been deponed by the protestor that he contributed Ksh. 4500 and has annexed copies of receipts in support thereof together with letter written by the deceased to the protestor in respect

thereof and the petitioner has not shown in any affidavit to contest the issue deposed therein but has attempted to answer to the same through his written submission which to my mind is not an annexure for evidence.

18. However a look at the two letters shows that the deceased was talking of the share of the protestor and the same having confirmed that he bought LAIKIPIA/SOUTH TIMAU/2(ETHI)161 one might infer that the deceased was talking about the protestors shares in the said land buying company and therefore in respect of TIMAU/2 ETHI)161 as in the translation of the letter dated 30th March 1993 the accused had this to say in paragraph two(2) thereof:-

“The land has become too expensive. Because of the amount owed to the government, we are required to pay Ksh. 400 each, the surveyour require Kshs 90 per acre. 20 acre require Ksh. 1800/= 400 to make Ksh. 2200/= if one does not pay by 14th April 1983 his share will be sold off and there will not be any questions.

Now because you have your money here Ksh. 3000/- kindly do come so that we consent so that the land become jointly owned by myself and yourself and later we share out because I will not be able to raise such kind of money.”

19. The letter dated 16th November 1983 the deceased indicated that the protestors share had been put up for sale and the total sum required was Ksh. 4000/- and in paragraph three (3) thereof the deceased refers to NGANGA in the following terms:

“Kindly inform NGANGA because he is the only one who assists me in purchasing this land (all the others have refused) to send the money that he has not paid...”

20. It is therefore clear that the deceased was assisted by NGANGA to purchase the disputed land and in the letter dated 30th March 1983 the deceased at paragraph 4 and 5 the deceased tells the protestor to tell others about the money that was being demanded from him so that he get to hear what they had to say and further are the receipts annexed to the further affidavit by the protestor are in the name of the deceased.

21. I therefore hold that the share the deceased was talking about was the protestors share in the EITHI FARMERS CO-OPERATIVE SOCIETY LTD wherein he bought LAIKIPIA/SOUTH TIMAU BLOCK 2/161 ETHI.

22. I am further persuaded by the submission by the petitioner that if the protestor had half share of the land then the same would have taken his rightful share during the lifetime of the deceased upon completion of the transaction and have his right registered on the title deed herein.

23. I therefore find no merit on the protestor herein and will dismiss the same with no order as to cost since this is a family dispute.

Dated delivered and signed this 13th day of February 2014.

J. WAKIAGA

JUDGE

Court: Judgment read in open court in the absence of the parties and the advocates.

J. WAKIAGA

JUDGE