

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
SUCC. CAUSE NO.844 OF 2001

**IN THE MATTER OF THE ESTATE OF NYAGA NJONJI *alias* TERESISIO NYAGA -
DECEASED**

NYAGA GEORGEAPPLICANT

VERSUS

SAMUEL NYAGA GEORGE.....RESPONDENT

JUDGMENT

Nyaga Njonji alias Teresio Nyaga, the deceased to whose estate these proceedings relate died on 25th August 1979. On 18th April 2001, the Applicant petitioned the court to be issued with a grant of letters of administration intestate in respect of the estate of the deceased. In the petition, the Applicant described himself as the brother of the deceased. He listed the children of the deceased in the list of dependants. Interestingly, the Applicant did not seek the consent of the said children of the deceased, who obviously have priority over him when it comes to petitioning the court for a grant of letters of administration intestate. He listed one property as belonging to the estate of the deceased. The property is registered as LR. No. Gaturi/Nembure/929 (the suit property). The grant was issued to the Applicant on 14th March 2006.

On 29th November 2006, the Applicant applied to the court to have the said grant confirmed. In the affidavit in support of the application, the Applicant proposed that the suit property be distributed to three beneficiaries namely Samuel Kibuti Nyaga, who would inherit 1.11 acres, Nyaga George who would inherit 0.61 acres and Fred Muturi Paul Kathomba (a purchaser) who would inherit 0.50 acres. The application for confirmation of grant was opposed by Samuel Nyaga George. He filed an affidavit of protest. He swore the affidavit in his capacity as the son of the deceased. He stated that the Applicant had no right over the suit parcel of land. He explained that the Applicant was the deceased's step-brother. Their father (i.e. the Respondent's grandfather), George Kathande Thome was married to four (4) wives. The Applicant's mother, Marion Mutitu George who was the fourth wife, benefitted on behalf of her children (including the Applicant) when the estate of their late grandfather was distributed pursuant to **Succession Cause No.94 of 1979** at the then District Magistrate's Court Runyenjes. The Respondent annexed a copy of the proceedings to the affidavit of protest. Upon perusal of the proceedings, it was evident that the estate of the said George Kathande Thome was distributed by consent of all beneficiaries. In fact, the court adopted the consent as the judgment of the court. It is the Respondent's case that the suit parcel of land was not among the properties that belonged to his late grandfather. He explained that the suit parcel of land was independently purchased by the deceased and registered in his name in 1961. He annexed a copy of the green card which clearly showed that the deceased was the first registered owner of the suit parcel of land. The Respondent deposed that, after death of the deceased, the Applicant forcefully took possession of the suit parcel of land. He did so despite protestation by the children of the deceased. It is the Respondent's case that the Applicant is not at all entitled to the suit parcel of land as he is not a dependant of the deceased.

In response to the affidavit of protest, the Applicant swore an affidavit. He denied the assertion by the Respondent which was to the effect that he was not entitled to the suit parcel of land. He admitted the description of his relationship with the deceased but stated that the deceased and himself were sired by one Ireri Kathande who was the brother of George Kathande Thome. Although they were born of different mothers, they share the same father. He deposed that the suit parcel of land was registered in the name of the deceased during demarcation and consolidation process. The land was ancestral land. The

deceased was registered as the owner of the land to hold in trust for the deceased and himself. He stated that he had resided on the suit parcel of land from the time it was registered to date. He deposed that the land was clearly demarcated on the ground to indicate his portion and that of the deceased. He prayed that the protest be disallowed.

Directions were taken before this court where it was agreed that the issues in dispute would be disposed of by counsel of the parties making submission. Written submissions were duly filed. This court also heard oral rival submissions made by Mr. Mariara for the Respondent and by Mr. Njau for the Applicant. This court has carefully considered the said submission. It also had the opportunity to read the affidavits filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether a case was established by the Applicant that he was entitled to be considered as a beneficiary of the suit property. The deceased died in 1979 before the commencement of the **Law of Succession Act** on 1st July 1981. Under **Section 2(2)** of the **Law of Succession Act**:

“The estate of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estate shall commence or proceed so far as possible in accordance with this Act.”

The Law applicable in respect of the estate of the deceased is therefore Kiambu Customary Law. However, the parties did not make any representations in regard to Kiambu Customary Law of Succession. This court understood the Applicant's case to be that he was entitled to half of the suit parcel of land because the land previously ancestral land which had been registered in the name of the deceased during the consolidation and demarcation process just before independence. It is the Applicant's case that the deceased held title to a portion of the said parcel of land in trust for him. In support of his claim, the Applicant stated that he had resided on the suit parcel of land since the same was demarcated. In response to the Applicant's case, the Respondent stated that the suit parcel of land was not ancestral land but was rather a parcel of land that was purchased by the deceased. The Respondent stated that all the ancestral land belonging to his late grandfather (the father of the Applicant) were inherited and distributed by consent of all beneficiaries in a succession cause that was filed before the Runyenjes Subordinate Court. The Respondent stated that the Applicant forcefully took occupation of the suit parcel of land immediately after the death of the deceased. It was the Respondent's case that the Applicant had no claim whatsoever over the suit parcel of land.

Having evaluated the facts of this case, it was clear to this court that the Respondent established, to the required standard of proof on a balance of probabilities, that the suit parcel of land indeed belonged to the deceased. This court was convinced beyond a shadow of doubt that all ancestral land that belonged to the father of the Applicant (and the grandfather of the Respondent) were registered in his name during demarcation. The said parcels of land were: LR. Nos. Gaturi/Nembure/865, Gaturi/Nembure/896, Gaturi/Nembure/898, Gaturi/Nembure/936, Gaturi/Nembure/937 and Gaturi/Nembure/967. All these parcels of land were inherited by the wives and children of George Kathande Thome (deceased). The mother of the Applicant was one of the beneficiaries. So too was the mother of the deceased. The suit property was not listed as one of the properties belonging to George Kathande Thome (deceased). This court was persuaded that indeed the deceased purchased the suit property. That was the reason why the property was registered in his name. The Applicant has no right over the suit property. That was the reason why the Applicant petitioned this court without seeking the consent of the children of the deceased. That is another reason why the Applicant chose to file the present petition before this court in Nairobi instead of filing the petition in the court nearest where the land is situated.

In the premises therefore, this court holds that the Applicant is not a dependant of the deceased. He cannot therefore benefit from his estate. He is a stranger to the estate of the deceased. The grant issued to the Applicant on 14th March 2006 is therefore revoked. A new grant shall be issued to the Respondent, Samuel Nyaga George. The Respondent is at liberty to apply for confirmation of grant after securing the consent of his siblings in regard to the mode of distribution. The Applicant shall pay the costs of the suit to the Respondent. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2014.

L. KIMARU

JUDGE