

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Succession Cause 357 of 2004

IN THE MATTER OF THE ESTATE OF NJERU MATHENGE-----DECEASED

AND

CHRISTOPHER WANJOHI RITHO – PETITIONER/APPLICANT

VERSUS

MACHARIA NJERU OBJECTOR/RESPONDENT

RULING

According to **Macharia Njeru**, hereinafter referred to as “*the Protester*”, his father the late **Njeru Mathenge** who expired on 16th September 1994 hereinafter referred to as “*the deceased*” was a generous and religious person. He voluntarily and willingly surrendered and or donated to PCEA Kihate Church 0.2 acres out of his land parcel **Muhito/Thiha/306** hereinafter referred to as “*the suit premises*”. However he passed on before he could transfer to the said Church the portion aforesaid of the suit premises.

On 3rd August 2004, **Christopher Wanjohi Ritho** the Registrar, PCEA Kihate Church on behalf of the Church hereinafter referred to as “*the Petitioner*”, petitioned this court for the grant of letters of administration in his capacity as an interested party. According to him the deceased passed on intestate and left the Protester, **Bancy Wathiha Mbatia** and **Jane Wangui Njeru** surviving him. On 17th March 2005 the Petitioner was granted letters of administration intestate. On 19th September 2005, he applied for the confirmation of the grant. He proposed that 1.0 acres out of the suit premises be transferred to PCEA Kihate Church. He made no provision for the children of the deceased, the Protester included. Small wonder then that when the Protester got wind of he application and its contents he immediately filed an affidavit of Protest against confirmation of grant. In the Protest, the protester deponed that the Petitioner was not a son, relative or dependant of the deceased and was therefore not a beneficiary entitled to inherit the estate of the deceased on his behalf or on behalf of anybody else as claimed in the summons for confirmation of grant. That the Petitioner was an impostor and a stranger to the estate of the deceased and had no legal capacity and or any locus standi to bring these proceedings either by himself or on behalf of PCEA Kihate Church, as he is not a registered trustee of the interested beneficiary PCEA Kihate Church. That even the said church was a mere congregation with no legal capacity to sue or be sued nor can it hold property in its name. That the deceased left several other assets which had not been included in the proceedings.

On 25th June 2007 the cause came before me and I issued directions that both the protest and summons for confirmation of grant be heard simultaneously by way of oral evidence. The hearing subsequently commenced before me on 12th March, 2009. The protest testified as follows; that the deceased was his father. He was survived by the protestor and his two daughters who were all married. That the Petitioner was a neighbour but were not related. He did not come from his clan. He did not accept the mode of distribution proposed by the petitioner. The suit premises belonged to the deceased and should be inherited by the Protestor alone.

Cross-examined by **Mr. Mugo**, learned Advocate for the Petitioner, he conceded that he belonged to PCEA Kihate church that was constructed on the suit premises. He further conceded that the deceased had only surrendered to the said church, 0.2 acres of the suit premises. That is where the church had been put up. However the church had since taken up more space in the suit premises. He had no objection to

the church retaining 0.2 acres of the suit premises. He denied that the deceased ever sold the suit premises to the church. The deceased had protested the church's encroachment on his portion of the suit premises to no avail. He maintained that the whole suit premises should not go the church but only 0.2 acres. That marked the close of the Protester's case.

When it came to the Petitioner to present his case, he was nowhere to be seen in court. **Mr. Mugo** made a valiant attempt to adjourn the matter to no avail. I refused the application for adjournment on the basis that before I confirmed this cause for hearing at the expense of others, **Mr. Mugo** had assured me that he was ready for the hearing with all his witnesses. There being no explanation for the sudden absence of the Petitioner and or his witnesses, I declined to grant **Mr. Mugo**, the adjournment sought. Faced with this daunting task, **Mr. Mugo** could only do what any reasonable advocate would do in the circumstances. He stated that he had no evidence to offer in support of the application. That being the case, the petitioner's case was deemed as closed without any evidence being offered.

Nonetheless, **Mr. Mugo** asked that he be allowed to tender written submissions in support of the Petitioner's case. The Protester too asked for the same favour. Their wishes were granted. Subsequently **Mr. Mugo** filed his written submissions which I have carefully read and considered. The Protester did not file his written submissions though. Instead he merely re-filed the previous affidavit of protest against confirmation of grant.

The Petitioner did not attend court and no evidence was therefore tendered in support of his application. On the other hand, the Protester tendered evidence in support of his protest. His evidence was uncontroverted and challenged. The Petitioner being neither a child or dependant of he deceased has no other basis to claim the suit premises other than the basis stated by the Protester in his evidence. The Petitioner's claim was for an acre out of the suit premises. No basis was laid by the Petitioner for such entitlement. Yet in his evidence, the Protester admitted that the deceased had during his lifetime given a portion of the suit premises to the church measuring 0.2 acres. He went on to state that the church has since taken up more of the suit premises than was initially surrendered to it by the deceased. Indeed it had taken up $\frac{3}{4}$ of the suit premises. The Protester further testified that the deceased was against the church's encroachment aforesaid. He further testified that he had no objection to the church occupying the 0.2 acres of the suit premises.

The Petitioner having led no evidence in support of his claim as against the protester who did so, I am inclined to believe and act on the unchallenged evidence of the Protester. Accordingly the grant is confirmed on the basis of the protest and that the PCEA Kihate Church shall get 0.2 acres out of the suit premises. The remaining shall go to the Protester. There shall be no order as to costs.

Dated and delivered at Nyeri this 7th day of May 2009

M. S. A. MAKHANDIA

JUDGE