



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE 258 OF 1998**

***IN THE MATTER OF THE ESTATE OF***

**WAMAHIU WAMBUGU ..... DECEASED**

**AND**

**JAMES NJINE NDIGIRIGI )**

**DICKSON NDEGWA NDIGIRIGI )**

**MWANGI NDIGIRIGI ) ..... PETITIONERS**

**VERSUS**

**SIMON WACHIRA GACHANJA)**

**DAVID WAMAHIU WAMBUGU) ..... OBJECTOR**

**R U L I N G**

The origin of this dispute is the death of one **Wamahiu Wambugu** on the 13<sup>th</sup> May 1979. Consequent upon the said death two different parties petitioned for the grant of letters of administration intestate. The first was filed by **Christopher Gachanja Wambugu** in the Senior Resident Magistrate's court at Nyeri being succession cause number 277 of 1985. **Mr. Christopher Gachanja Wambugu** petitioned for the letters in his capacity as a nephew of the deceased. The second was filed by **James Njine Ndigirigi, Dickson Ndegwa Ndigirigi** and **Mwangi Ndigirigi**, hereinafter referred to as "*the Petitioners*" in the Senior Resident Magistrate's Court at Nyeri being succession cause number 14 of 1992. They presented the petition in their capacity as beneficiaries of the estate of the deceased. **Mr. Christopher Gachanja Wambugu** passed on but was substituted with **Simon Wachira Gachanja** and **David Wamahiu Wambugu** hereinafter referred to as "*the Protesters*". By then the two causes had been transferred to this court for hearing and final determination. It would appear that in the two succession causes aforesaid, a grant had been issued by the subordinate court to the Petitioners. Once in this court, the Protesters filed an application seeking that the said temporary grants be declared to have abated for the simple reason that the said grants had been issued for a limited period of six months which had since expired. Having carefully listened to the arguments in support and in opposition of the application, **Kasango J** on 20<sup>th</sup> April 2007 did uphold the application and proceeded to issue a fresh grant in the joint

names of the 2<sup>nd</sup> Petitioner and the 1<sup>st</sup> Protester. The judge further directed that the fresh grant issued as aforesaid be confirmed immediately.

On 24<sup>th</sup> April 2007 the Petitioners applied for the confirmation of the grant notwithstanding that six months from the date of the grant had not expired. In the supporting affidavit thereof, the Petitioners claimed that the deceased had been survived by the Petitioners as well as the Protesters as dependants. The estate of the deceased which consisted in the main of land parcel No. **Aguthi/Gatitu/ 692** measuring 10.0 acres hereinafter referred to as "*the suit premises*" was to be shared as follows:-

- a) **1<sup>st</sup> Petitioner** - **1.36 acres**
- b) **2<sup>nd</sup> Petitioner** - **1.36 acres**
- c) **3<sup>rd</sup> Petitioner** - **1.38 acres**

That application was met with an affidavit of protest by the 1<sup>st</sup> Protester on his own behalf and on behalf of the other Protester. Their protest was anchored on the fact that the Petitioners were not related to the deceased and indeed were strangers to the deceased and his estate. That the deceased who was unmarried and no issues of his own left his entire estate to his sister **Wairimu Wambugu** and her five offsprings. They proposed that each one of them gets 1.6 acres out of the suit premises. The remaining 2 acres should go to **Solomon Gichara Ng'ang'a** as a purchaser. That the proposed distribution of the estate by the Petitioners had no basis in law and did not reflect the wishes of the deceased.

The Petitioners responded to the affidavit of Protest by filing a replying affidavit in which in the main they deponed that during land consolidation and demarcation, their late father **Ndigirigi Mirera** had fragments of land measuring 4.1 acres that were consolidated together with the fragments of the late **Wambugu Mathangani** and formed land parcel number **Aguthi/Gatitu/579**. That after the said consolidation their occupation was not affected and had remained in occupation of the said portion of 4.1 acres of the suit premises from 1959. During the year 1962 however and without the knowledge of their father, the said **Wambugu Mathangani** subdivided the original **Aguthi/ Gatitu/579** and after the said subdivision that portion was taken up by the suit premises that was transferred and registered in the name of the deceased. The deceased had recognised their share of 4.1 acres in the suit premises and that is the reason why he never sought for their eviction. That after his death, they decided to file this cause so that they could get the share of their late father. In their application for confirmation of grant, they were only sharing the portion of 4.1 acres and the balance thereof would go to the Protesters. Finally they deponed that they could not be strangers on the suit premises when they have been in occupation thereof for the last 48 years.

On 18<sup>th</sup> February 2008, this court issued directions that both the affidavit of protest and application for confirmation of grant be heard simultaneously by way of viva voce evidence. On 26<sup>th</sup> January 2009, the hearing commenced before me.

First on the stand was the 1<sup>st</sup> Protester. He testified that the deceased was his maternal uncle who passed away in 1979 without having a wife or children. He owned the suit premises which he would cultivate occasionally and at times rent it out. He used to rent it out to the father of the Petitioners. Their family and that of the Petitioner was not related. Whereas they came from Aguthi, the Petitioners were from Gaki. The Petitioners belong to a different clan. Therefore the Petitioners had no right to claim the suit premises as they are strangers and indeed have their own parcel of land **Aguthi/Gaki/184** on which they stay. That the suit premises had been left to his mother. He maintained that the suit premises ought to be distributed between himself and his siblings as proposed in the affidavit of protest. When the deceased was alive the Petitioner never claimed the suit premises. He vehemently denied that the Petitioners' land had been swallowed up in the suit premises.

Cross-examined by the 1<sup>st</sup> Petitioner he responded that he had come into the case by way of substitution. That he was aware that in 1980 a caution was registered on the suit premises by one, **Ndigingi**. It was

then that Petitioners were asked to vacate the suit premises but they refused. He denied that the 1<sup>st</sup> Petitioner had a house on the suit premises.

The 2<sup>nd</sup> witness for the Protesters was **Ephraim Wambugu**. He was the step brother of the deceased. The deceased was given by his father the suit premises. The deceased died unmarried. In his lifetime he used to rent out the suit premises to some tenants one of whom was the father to the petitioners who came from a different clan as well as location about 10 kilometres away. He used the land to graze his animals. The Petitioners have never utilised the land. Rather it was their sister, **Muikamba** who used to cultivate the suit premises having rented it. The deceased left the suit premises to the five sons of her sister **Wairimu**. He maintained that the suit premises should be inherited by **Wairimu's** children and not the Petitioners.

Under cross-examination by the 1<sup>st</sup> Petitioner he maintained that the Petitioners' father never put up a house on the suit premises and that though their sister had occasionally rented the suit premises he had no documents to back up his claim.

The last witness called by the Protesters was **John Kariuki Wambugu**. He too was a stepbrother of the deceased. He merely confirmed the evidence tendered by P.W.2. Cross-examined by 1<sup>st</sup> Petitioner, he conceded that there was a small hut on the suit premises put up by one of the petitioners. However he hastened to add that he was stopped from constructing any further. With that Protesters closed their case.

For the Petitioners, the first to testify was the 1<sup>st</sup> Petitioner. He testified on his own behalf and on behalf of the other Petitioners. He testified that he came from Gaki. However the real 1<sup>st</sup> Petitioner had passed on. They did not desire to substitute him. In 1980, their father registered a caution on the suit premises claiming that the deceased had encroached on his land parcel number 692. That they were only asking for 4.1 acres that were swallowed by the suit premises. That is the reason they had petitioned for the grant of letters of administration. He conceded that they were not related to the deceased nor were they from the same clan. He also conceded that they were not dependants of the deceased nor were they from the same area. He urged the court to go by his proposed mode of distribution contained in his application for confirmation of grant.

Cross-examined by **Mr. Mugo**, learned advocate for the Protesters, he responded that he had nothing to show that the two parcels of land were merged. He suspected that it could have been done in 1964. The deceased got the suit premises from his father. Their father's land had not been merged with the deceased's father's land then. He conceded that they came from a different clan and different area. Whereas they came from Gaki, the Protesters came from Gatitu. He further conceded that their father's land is in Gaki. That their father had died but were yet to share out his estate as they were awaiting the outcome of this case. That the deceased took a portion of their father's land. Finally he conceded that they had not obtained a grant of letters of Administration in respect of their father's estate.

The 2<sup>nd</sup> and last witness called by the petitioners was **George Kingori**. His testimony was to the effect that he did not know the deceased nor the Protesters. However, he knew that the Petitioner's as they belonged to his clan. That the deceased land in Gatitu belonged to the Petitioners' father. That the said land was given to the Petitioners' father by their clan. The said land should thus be inherited by the Petitioners.

Under cross-examination by **Mr. Mugo**, the witness stated that the Petitioners' father had 2 parcels of land in Gatitu and Gaki. That he was a witness to the clan giving the Gatitu land to the Petitioners' father. That marked the close of the Petitioners' case.

Thereafter parties agreed to file written submissions which they did subsequently. I have carefully read and considered them. What then are the issues for determination in this cause? To my mind they are four.

**(a) Locus standi**

(b) Pleadings

(c) Whether the Petitioners' father's land was swallowed by the suit premises during land consolidation and demarcation and

(d) Costs

Dealing with the 1<sup>st</sup> issue framed, it is not clear from the evidence and pleadings whether the Petitioners are claiming part of the suit premises through their deceased father or by virtue of having been in occupation of the alleged portion of the suit premises in excess of 48 years. If their claim is based on the former then clearly they have no locus standi to mount these proceedings. It is common ground that the Petitioners' father is deceased. Indeed in his own testimony, the 2<sup>nd</sup> Petitioner conceded as much. He also conceded that they had yet to petition and obtain a grant of letters of administration in respect their deceased's father's estate. If that be case, on what basis then would they pursue a claim on behalf of their deceased father. I cannot think of any. It is trite law that for one to legally pursue a claim on behalf of the deceased estate one must first seek and obtain a grant of letters of Administration to the said estate whether limited or confirmed. This has not been done in the circumstances of this case. That being the case the petitioner had no locus standi to pursue these proceedings.

On the other hand if their claim is based on the alleged prolonged stay and or occupation on the suit premises then such claim ought to have been directed at **Wambugu Mathangani**, the father of the deceased and not the estate of the deceased. **Wambugu Mathangani** was the registered owner of **Aguthi/Gatitu/597**. He later subdivided the same resulting into the suit premises which he gave to the deceased. The 2<sup>nd</sup> Petitioner under cross-examination by **Mr. Mugo** did concede that: “... the deceased got the land from his father, **Wambugu Mathangani**. Our father's land had not been merged with **Wambugu Mathangani's**...” If this be the case, on what basis should the Petitioners lay a claim on the deceased's estate. No evidence was led that suggested that their alleged father's fragments of land were consolidated into the suit premises. **Wambugu Mathangani** had other sons to whom he gave land following the subdivision of the original **Aguthi/Gatitu/597**. How come the Petitioners have only seen it worth while to pursue the estate of the deceased alone and not the other sons who were also beneficiaries of the resultant subdivision of the original parcel of land and which the petitioners claim swallowed up fragments of their father's land measuring 4.1 acres? In any event if their claim is based on continuous and uninterrupted occupation of the suit premises this is not proper forum to ventilate such a claim.

A party is normally bound by his pleadings. In the application for confirmation of grant, the Petitioners claimed that they were some of the dependants of the deceased. However in their evidence, it turned out that indeed they were not dependants of the deceased at all. Earlier on in their Petition before the Senior Resident Magistrate's Court Nyeri, they had described themselves as beneficiaries of the estate of the deceased. However in the evidence before this court, they neither claimed to be dependants and or beneficiaries of the estate of the deceased. All that they said was that a portion of their father's land was swallowed up by the suit premises. All that they wanted was that portion out of the suit premises. They also claimed that they had been in continuous and uninterrupted occupation of the suit premises for a period in excess of 48 years. This is a complete departure from the initial pleadings. As already stated this claim is obviously being ventilated in the wrong forum. The suit premises were registered in the name of the deceased without any qualification. In so far as the law is concerned it wholly belongs to the estate and thus available for distribution to the beneficiaries. If the Petitioners had intended to challenge the title, then it was open for them to do so in another forum but not in these proceedings. If party is bound by his or her pleadings but completely departs from them in his evidence, is such person to be deemed to be credible? I do not think so. The Petitioners clearly lied that they were the dependants of the deceased when they knew very well that they were not. If they can lie on such simple thing, what else have they not lied about?

Assuming that indeed the Petitioners' father's frangements of land were consolidated with **Wambugu Mathangani's** parcel of land, why didn't the Petitioners' father claim his said 4.1 acres from the said **Wambugu Mathangani** during his lifetime. It is common ground that the Petitioners are not at all related to the Protesters. Indeed they do not even come from the same clan or area. It is also common

ground that whereas the Protesters are from Gatitu where the suit premises are situate, the Petitioners come from Gaki. How then was it possible for the Petitioners family to get land in an area where they had no relationship and when they did not even belong to the same clan. The Petitioners were unable to tell precisely when the merging of the parcels of land took place. They had indeed nothing to show that the frangements of land belonging to their father were in fact merged into the suit premises. In fact the only witness called by the Petitioners categorically stated the deceased land in Gatitu belongs to the Petitioners' father. That the suit premises were given to the Petitioners by his clan. This witness seems to suggest that the entire suit premises belong to the Petitioners' father contrary to the evidence of the Petitioner that only 4.1 acres of the suit premises belongs to their father. Who is lying here!

The Petitioners too testified that they have been in continuous and uninterrupted occupation of the suit premises for a period in excess of 48 years. One assumes that if a person makes such a bold statement, he must have cogent evidence to back up the statement. Unfortunately, the Petitioners have failed in this regard. The Protesters unchallenged evidence is that the Petitioners stay on their father's land at Gaki. They do not physically occupy the suit premises. An attempt to put up a hut by one of the Petitioners was thwarted by the Protesters. The only manifestation of their interest in the suit premises was to lodge a caution with the land Registry. I have looked at the caution form. In that form the Petitioners' father surprisingly claimed interest in the suit premises as a licensee and or adverse possessor. The same thing is manifest in the green card tendered in evidence as entry No. 5. Considering all the foregoing, the Petitioners' case is full of inconsistencies and contradictions as to be unbelievable. On the other hand, the Protesters evidence and that of his witnesses is consistent. Indeed the Petitioners never rebutted the said evidence. I find the Protesters' evidence credible and I believe it.

The upshot of the foregoing is that I would dismiss the Petitioners' claim to the estate of the deceased. Accordingly I confirm the grant in terms set out in paragraph 8 of the affidavit of protest. The protesters too shall have the costs of the application.

**Dated and delivered at Nyeri this 7<sup>th</sup> day of May 2009**

**M. S. A. MAKHANDIA**

**JUDGE**