



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 232 of 1997

IN THE MATTER OF THE ESTATE OF NGUHA GIITA – DECEASED

AND

FRASIAH WARUGURU NGARIURI PETITIONER

VERSUS

GIITA GATHERU MWAI OBJECTOR

RULING

The record herein shows that one, **Nguha Giita** exited from this earth on 2nd February 1997. I will henceforth refer to him as “*the deceased*”. On 19th September 1997, **Frasiah Waruguru Ngariuri** who I will henceforth refer to as “*the Petitioner*,” petitioned this court for the grant of letters of administration of the deceased’s estate. She did so in her capacity as the daughter of the deceased. In the affidavit in support of the Petition she indicated the following as having survived the deceased:-

- **Herself** – married daughter
- **Grace Wanjiru Nguuri** – married daughter
- **Flora Wambui Kinyoko** – married daughter
- **Beatrice Njoki Githinji** – married daughter
- **Jedida Wandia Mwai** – married daughter
- **Giita Gatheru** – Step son

The estate of the deceased composed of land parcel **Muhito/Mutundu/907** hereinafter referred to as “**the suit premises**.”

On being cited, **Giita Gatheru**, objected to the making of the grant to the Petitioner. I will henceforth refer to him as “**the Objector**”. This was on 15th October 1997. Contemporeously with the filing of the objection aforesaid, the objector filed a petition by way of cross-application. His grounds of objection

were that he was a grandson of the deceased and that the petitioner had not sought his consent when she commenced the succession proceedings. Secondly, the deceased though the registered proprietor of the suit premises, nonetheless held the same in trust for him. The cause thereafter went into limbo until 15th June 2007 when again the Objector filed another objection to the making of the grant and again filed another Petition by way of cross-application on 19th June 2007 on more or less similar grounds.

Both the objector and the Petitioner eventually came before me for directions on 12th November 2007 when I directed that a grant should issue in joint names of the Petitioner and Objector and that they were at liberty to jointly or singularly apply for confirmation of grant at the expiry of the statutory period.

On 13th May 2008, the Objector took out an application for confirmation of grant and suggested that he inherits absolutely the suit premises. Not to be outdone, the Petitioner also took an application for confirmation of grant dated 22nd May 2008 and filed in court on the same date. In it she proposed that the suit premises be shared between herself and the Objector as follows:-

- **Frasiah Waruguru Ngariuri – 1.0 acre**
- **Giita Gatheru – 2.0 acres**

On 8th June 2008, the Petitioner filed a protest stating that the deceased was the sole proprietor of the suit premises. That the deceased did not hold the same in trust for the Objector or anybody else. That she was a daughter of the deceased whereas the Objector was a step son.

The Objector filed a replying affidavit to the protest. In the main he deponed that he was the sole beneficiary of the suit premises. That the deceased had indicated her wish to transfer the suit premises to him and had even applied for the land control board consent to the transaction. That the Petitioner had no right whatsoever to claim the estate of the deceased. Her only sole intention was deny him his right by causing unreasonable delay to the conclusion of the cause.

On 7th December 2008, the Objector filed a supplementary affidavit in which he deponed in pertinent paragraphs that the suit premises were given to him by the deceased herein as gift on 10th February 1988. They appeared before a land control board and a consent to transfer was duly issued. During the land control board meeting aforesaid, the deceased availed all his five daughters aforesaid and transferred to each one of them the following land parcels:-

(a) Frasiah Waruguru Ngariuri – Lower Muhito/Mutundu /908 which she caused to be registered in her son's name Douglas Maina Ngariuri.

(b) Grace Wanjiru Nguri – Lower Muhito/Mutundu/911 which again she caused to be registered in her son's name Francis Wachira Nguri

(c) Flora Wambui Maina – Lower Muhito/Mutundu/910

(d) Beatrice Njoki Githinji – Lower Muhito/Mutundu/912

(e) Jedidah Wandia Mwai – Lower Muhito/Mutundu /909

(f) Objector – Lower Muhito/Mutundu/907

That all these transactions were made by the deceased the same date that is on 10th February 1988 and they were all present. Whereas the rest except the Objector and **Beatrice Njoki Githinji** presented the consent and transfer duly executed by the deceased to the lands office and obtained their title deeds the Objector and **Beatrice Njoki Githinji** did not move in that direction for want of finances as the Objector was pursuing the education of his children. That the Petitioner was well aware of all this but her intention is to grab an acre out of his entitlement which this court should not allow.

I am aware that this supplementary affidavit was filed in court without leave of court and was liable to be struck out. However having gone through the oral evidence tendered by the objector, I find that it is insync with the said supplementary affidavit. In the premises no harm or prejudice would come to the Petitioner if the same was retained in the record.

On 14th July 2008, the cause was placed before me for directions. Directions were issued in terms that the protest as well as the application for confirmation of grant be heard simultaneously by way of oral evidence. The Petitioner who had filed the protest took the stand first. Her evidence in a nutshell was that the deceased was her father and she was the first born. She objected to the scheme of distribution proposed by the Objector because she wanted one acre to remain an occupied so that in the event that she is divorced, she would come back and occupy the same. She stated that her father had given her land in his lifetime being Lower Muhito/Mutundu/908 measuring 1½ acres which she registered in her son's name. She also denied that the Objector was her relative.

Cross-examined by the Objector, she contended that on 2nd October 1986 the deceased went to the land control board and each one of them was given land. He conceded as well that the objector had never demanded land given to them by the deceased nor had she attempted to evict him from the suit premises. She contended as well that the Objector has a residence on the suit premises on which he resides alone and that she does not reside on the same.

The Petitioner then called one, **Benson Mahugu** as a witness. He testified that the deceased was a member of their clan. He knew the Petitioner as a daughter of the deceased. As for the Objector he testified that he only came from Nairobi where he used to stay to find the Objector on the suit premises. He did not know whether the Objector was a son of the deceased. He however confirmed that the Objector occupies the suit premises and has his house thereon. That marked the close of the Petitioner's case.

The Objector too testified. In essence his testimony is as per the contents of the supplementary affidavit reproduced elsewhere in this judgment. Suffice to add however that the deceased had only sired daughters. He was in need of a son. To get a son he married the Objector's mother and he was begotten. He was thus the deceased only son. He maintained that the court should confirm the grant in terms proposed by him as the deceased gave each one of them land in his lifetime and his half-sisters had conspired to disinherit him. He tendered in evidence the consent letter from Mukurweini land control board which approved the transfer of the suit premises to him by the deceased.

Cross-examined by the Petitioner, the Objector responded that if she is divorced, she should go back to the land she was given by the deceased and which she caused to be registered in her son's name. Had she not been given land by the deceased like him, he would have welcomed her to the suit premises in the event that she was divorced. That marked the close of the Objector's case.

Having carefully read the pleadings herein, the evidence tendered and considered the law, I think that there are only 2 issues for determination by this court to wit, whether the Petitioner is entitled to inherit an acre out of the suit premises and secondly, costs.

It is common ground that the deceased had six children, five daughters and one son or step son or grandson the Objector. Much as the Petitioner in her evidence attempted to deny any relationship with the Objector, it is there even in her own pleadings. In her own affidavit in support of the Petition for letters of administration intestate, she has deponed that among those who survived the deceased was the Objector whom she described as step son to the deceased. The letter of the chief dated 5th June 1997 too recognises the Objector as one of the children who survived the deceased. Finally in her own application for confirmation of grant as well as evidence, she has proposed that the Objector gets 2.0 acres out of the suit premises. What would be the basis for that distribution if at all the Objector is a stranger to the estate. In her evidence, she conceded that the Objector occupies the suit premises alone. He has put up his residence thereon. He utilises the suit premises alone. They had made no attempts to evict him. Her own witness also confirmed that the Objector solely occupies and utilises the suit premises. There is also evidence that the deceased took all the children to the Mukurweini land control board for consent to

subdivide and transfer his land to them. If indeed the Objector was a stranger to the estate as claimed by the Petitioner, I do not think that he would have been allowed to remain on and occupy the suit premises. The daughter or indeed the clan would have undertaken to evict him. I observed the Petitioner as she testified and I formed the opinion that she was not a truthful witness. She was deliberately bent on misleading this court for her own ulterior motives. She was thus not a credible witness.

One thing that has bothered me is whether the deceased was a man or a woman. The Petitioner testified as though the deceased was a man and therefore her father. The Objector on the other hand testified as though the deceased was a woman and therefore his grandmother and the Petitioner was his aunt. The death certificate on record indicates that the deceased was a man. According to the evidence of the objector however, the deceased was his grandmother. The deceased had only begotten 5 daughters. To get a son she married his mother under kikuyu custom of woman to woman marriage. From that union the Objector was born. Accordingly he considered himself her only son. This may perhaps explain the difficulty of assigning his specific relationship with the Petitioner and or her sisters as well as the deceased. For purposes of determining this dispute however it matters not whether the deceased was a woman or man.

The only reason why the Petitioner is protesting is that she fears that in the event that she is divorced, she may not have any place to go. Accordingly she would wish an acre be excised from the suit premises and be set aside for her in the event that she is divorced. It is noteworthy that she is not claiming the acre on behalf of herself and other sisters. She also wishes to have the said one acre to remain unoccupied just in case. In my view her protest is not valid as it is based on pure speculation. A decision cannot be made now based on speculation as to what might happen in future. There is no denying that in the lifetime of the deceased, all the beneficiaries benefited by being given land by way of gift *intervivos*. The deceased shared the estate to all the children. All of them were taken before the land control board and consents were given to the division and transfer. The petitioner did not at all contest this evidence. Indeed she conceded that much. As a result of the consent given, the petitioner requested that her parcel of land be transferred and registered in the name of her son, **Douglas Maina Ngariuri**. Her fear of nowhere to go in the event of a divorce can adequately be addressed by her son aforesaid. She can go and stay with him. After all the suit premises which he occupies was meant for her. By advancing the aforesaid argument knowing very well that the deceased had given each of the children their separate parcels of land, the petitioner is merely being selfish and self-centred. She wants to get more land by taking advantage of the fact that by the time the deceased passed on, the Objector had not caused the suit premises to be transferred and registered in his name as had been the intention of the deceased. The intention of the deceased with the regard to the suit premises was manifested when on 10th February 1988, when he caused the Mukurweini land control board to issue a consent letter approving the transfer of the suit premises from himself to the Objector. That consent letter was tendered in evidence and was never challenged.

All said and done, I am satisfied that the deceased in his lifetime shared out his estate to the petitioner and her sisters and to the Objector. The Petitioner has no right therefore to claim the suit premises or a portion thereof. Her entitlement is in respect of **Lower Muhito/Mutundu /908** which she caused to be transferred and registered in the name of her son, **Douglas Maina Ngariuri**. One cannot hinge a protest on fears of a future event as the Petitioner has attempted to do. That being my view of the matter, I would accordingly dismiss her protest dated 3rd June 2008 as well as her application for confirmation of grant dated 22nd May 2008. The grant shall however be confirmed in accordance with the Objector's application dated 13th May 2008.

On the issue of costs, I think that none of the parties should be burdened with costs. After all they are members of the same family. Accordingly there shall be no order as to costs.

Dated and delivered at Nyeri this 3rd day of June 2009

M. S. A. MAKHANDIA

JUDGE