



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Succession Cause 489 of 2006

IN THE MATTER OF MATHANGANI BAI..... DECEASED

ROSE WANJIKU MBAI PETITIONER

Versus

CYRUS MURIUKI MATHANGANI PROTEST

JUDGMENT

Letters of Administration intestate in this estate were petitioned by Rose Wanjiku Mbai the daughter in law of the deceased. She was married to Justus Mbai son of the deceased. She listed those who survived the deceased as:-

1. Jean Wangui Kinyua
2. Rose Wanjiku Mbai
3. Ernest Mwangi Mathangani
4. Cyrus Muriuki Mathangani

Jean and Ernest renounced their claim over this estate by an affidavit sworn on 2nd June 2004. The grant in this matter was issued jointly to Rose and Cyrus. Rose filed a summons for confirmation of grant and sought that the property KIRIMUKUYU/KIRIA/363 be divided between herself representing the estate of her late husband, Ernest and Cyrus. That application received the protest of Cyrus. In his protest Cyrus confirmed that the number of people listed as surviving the deceased were correct. He also confirmed that the deceased estate had only the property KIRIMUKUYU/KIRIA/363. He proposed in his affidavit sworn on 1st November 2005 that the property be given to him solely. In suggesting that mode of distribution he did not assign a reason why Rose was being disinherited. It was in the affidavit filed later and sworn on 13th October 2008 that Cyrus stated he had purchased KIRIMUKUYU/KIRIA/136 in 1975. He annexed a sale agreement showing that he was the buyer on that date. He then deponed as follows:-

5. That in 1978 and 1979, we discussed with my late brother Justus Bai Mathangani and we agreed that I would give him LR NO. Iriaini/Kairia/136 in exchange with his share of legacy in our fathers LR NO.

Kirimukuyu/363.

6. *That on 5.6.1979 land parcel No. Iriaini/Kairia/ 136 was transferred to my said brother Justus Bai Mathangani and consideration indicated as a gift (annexed is a copy of the extract of title marked CMM 2)*

7. *That on 11.9.1996 the said land was transferred to Rose Wanjiku Mbai the petitioner herein as the personal representative of the late Justus Bai Mathangani.*

8. *That I made similar arrangements with my other brother Ernest Mwangi Mathangani who in his affidavit of renunciation sworn on 2.6.04 and filed on 2.6.2004 jointly with my sister Jean Wangui Mathangani has disclaimed any interest in the estate comprised in L.R. NO. Kirimukuyu/ Kiria/363.*

9. *That I have been in exclusive possession and occupation of LR NO. Kirimukuyu/Kiria/363.*

Rose responded to that affidavit by stating that parcel no. 136 was not part of the deceased estate. She further stated:-

4. (i) *That the parcel known as LR. Iria-ini/Kairia/136 was bought by my late husband but was registered in the protestor's name at the time in trust of my late husband.*

(ii) *That the true position is that at the time of the purchase of L.R. Iria-Kairia/136 my husband who was a Police Officer was based in Eldoret at the time and I at the time was nursing a small baby, this therefore meant that neither I nor my husband could be available to attend the Land Control Board hence the agreement at the time of purchase was done in the protestor's name so that he could attend the Land Board.*

(iii) *That I know as a fact that my husband sent the money to the petitioner who together with my sisters in law Jean Wangui and the Late Esther Kirigo paid the then owner one Muraguri Maingi.*

(iv) *That I and my husband discovered that the petitioner had after putting the parcel into his name proceeded to charge it with KCB without our authority. We had to pay a sum of kshs.7,000 to get it discharged upon which it was immediately transferred to my late husband on 5.6.79. I thereafter had it transferred to myself.*

(v) *That I reiterate that I continued to use my marked designated portion within Kirimukuyu/Kiria/363 long after the transfer of LR Iriaini/Kairia/136, and there was no way the protestor would have allowed that if I had no interest in the Kirimukuyu land.*

She reiterated that she is in occupation of Parcel No. 363 and has continued to be there even after Cyrus transferred Parcel No. 136 to her late husband. On that Parcel No. 636 she had planted coffee and has built a permanent home.

Deceased died in 1966. The Law of Succession Act does not apply to this estate. It is the written law and the custom of the deceased that will assist this court in determining the matter. Relying on the case of EDITH WAGITHI CHIIRA vs REBECCA WANGUI GICHUHI Civil Appeal No. 30 of 1998, it is clear that a wife under Kikuyu custom was entitled to inherit her husband's property. In that case of Chiira the High Court found that there was a valid Kikuyu marriage and stated:-

"Charles was collecting rent for seven rooms in Blue Eating House as his share of his father's estate. The respondent (his wife) is entitled to that income."

The court of appeal upheld that finding. On my part I find that Rose is entitled to inherit her late husband's share of the deceased property. Parcel no. 136 as correctly stated by rose is not part of this estate. The judgment of this court is that KIRIMUKUY/KIRIA/363 be divided with ROSE WANJIKU MBAI getting one third of it and CYRUS MURIUKI MATHANGANI getting two thirds of it. There shall be no orders as to costs.

Dated and delivered this 18th day of December 2008.

MARY KASANGO

JUDGE



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