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| Case Number: | Probate & Administration 1 of 2006 |
| Date Delivered: | 18 Dec 2008 |
| Case Class: | Civil |
| Court: | High Court at Nyeri |
| Case Action: | Judgment |
| Judge: | Mary Muhanji Kasango |
| Citation: | IN Re THE ESTATE OF MWANGI KIRIIRI (Deceased) [2008] eKLR |
| Advocates: | - |
| Case Summary: | . |
| Court Division: | Family |
| History Magistrates: | - |
| County: | Nyeri |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Application allowed |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Probate & Administration 1 of 2006

[IN THE MATTER OF THE ESTATE OF MWANGI KIRIIRI (DCD)]

ZACHARIA KAMAU MWANGI APPELLANT

VERSUS

1. HANNAH NJERI MWANGI..... 1ST RESPONDENT

2. VIRGINIA WANGUI MWANGI..... 2ND RESPONDENT

3. MIRIAM NJOKI MWANGI 3RD RESPONDENT

JUDGMENT

The estate the subject of this appeal relates to Mwangi Kiriiri deceased. Succession of that estate was filed at SRM's Kigumo Succession Cause No. 59 of 2003. The deceased left the following surviving him.

1. Martha Waitherero – Wife
2. Zacharia Kamau Mwangi
3. John Muturi Mwangi
4. Miriam Njoki Mwangi
5. Virginia Wangui Mwangi
6. Hannah Njeri Mwangi
7. Joyce Wanjiku Mwangi

The grant was issued jointly to Zacharia and Hannah. Hannah sought confirmation of that grant to the effect that property Loc 2/Kangari/259 be distributed equally between Martha Waitherero, Zacharia, Miriam, Virginia, Hannah and Joyce Wanjiku. Zacharia protested to that mode of distribution. In his affidavit of protest he proposed that the property be distributed as follows:-

1. Martha Waitherero 5 acres
2. Zacharia Kamau 3 acres
3. Agnes Njeri 0.1 acres

He based his suggested mode of distribution on the ground that all his sisters except Miriam Njoki were married. He stated that his brother John Muturi was deceased and at the time of his death he had been separated from a lady he was cohabiting with. The lower court ordered the protest to be heard by way of viva voce evidence. The evidence tendered in the lower court on behalf of the petitioner was to the effect that the deceased left seven people surviving him. Two of his sons John Muturi and Joseph Nduti Mwangi were deceased. Both were not married. The petitioner said that the deceased had left one property being Loc 2 Kangari/259. That property was 8.1 acres. The petitioner said that she and her sister were not married. She therefore prayed that the property be divided equally amongst the surviving children of the deceased. She denied that Milka Muthoni was married to her deceased brother and termed her as a stranger. She stated that Milka does not reside on the property. On being cross examined the petitioner Hannah said that she had four children. She was staying with three of them and one of the daughters was living with another man. The lower court noted that as she responded to those questions her demeanour changed. On being referred to the Eulogy of her late brother John Muturi Mwangi which referred to Milka Muthoni as his wife and which also said that she had two children the petitioner persisted in her statement that she had never seen Milka. The petitioner also stated that she cultivates the suit property and has a cow and sheep which were taken care of by her mother. She confirmed that her mother had been sick since the year 2005. Photographs were shown to her taken during the burial of her deceased father and she denied that the persons with in the photograph were her husband and her mother in law. The protestor Zacharia in evidence started by saying that his mother was sickly and that she was suffering from depression. She said that Miriam Njoki his sister was unmarried. Virginia Wangui got married in 1994 before the death of their father. Joyce Wanjiku was also married but her husband died. Hannah Njeri got married in 1995. He said that she had lied about the photographs and that in the photograph was her husband and her mother in law. None of the married sisters according to him resided on the suit property. His deceased brother John Muturi had a wife and two children. His children had been named in accordance with the Kikuyu custom. That in his life time his deceased father distributed the suit property whereby he gave his sons two acres each. The balance of the property 4.1 acres he gave to his mother. His mother was to hold the 4.1 acres in trust for unmarried daughters. At the time of giving evidence he said that there was only one unmarried sister namely Miriam Njoki. On the suit property he said he had built a house and had planted tea bushes. His deceased brother Muturi had also planted tea bushes. He had intended to build a house but passed away before then. He denied that any his sisters utilize the suit property. That none of those sisters reside on that land property. He also stated that Agnes Njeri Kamau who was a sister to the deceased had been allocated by the deceased 0.1 acres. That his deceased father had carried out the distribution of this land in the presence of elders. His witness Samuel Kiarie Mwangi said that he was very close to the deceased in his life time and that they were related. He confirmed that he was aware of the happenings in the deceased's home. That the deceased gave to his wife 4 acres of land which she was to hold in trust for the deceased's children. He also gave Agnes Njeri 0.1 acres. Zacharia was given 2 acres and Muturi also 2 acres. Muturi was married to Milka Muthoni. That Zacharia was utilizing 2 acres of that land. He said that Virginia, Joyce and Hannah were married. Miriam was unmarried. On cross examination he said that Hannah was married under Kikuyu customary law although no dowry was paid. He confirmed under cross examination that the deceased's wife Waitherero was sick and that she suffered from depression and unsound mind. The next witness was Mwangi Nganga who also confirmed that he was close to the deceased. That the deceased distributed 2 acres each to Zacharia and Muturi. The balance of the land 4.1 acres was given to the deceased's wife. Milka Muthoni gave evidence and stated that the deceased was her father in law. She got married to John Muturi in 1996. He died in the year 2004. They had two children. In Muturi's life time they were utilizing 2 acres. They had planted tea bushes. They leased the two acres and she produced an agreement to that effect. She prayed that the court will give her the two acres. Virginia Wangui gave evidence and said that they were seven in the family. She too confirmed that their mother was sickly. She denied that she was married and stated that she wanted to inherit her father's property since he had not left any will. That her deceased father had

always said that his property would be divided amongst his beneficiaries by the court. She did not want her mother to hold any land in trust for her. Miriam Njoki said that she was unmarried and on being asked about her other sisters she said that she did not know if they were married. She confirmed their mother is sickly and that their deceased father had not distributed his land. She too did not want their mother to hold land for her. The lower court on hearing that evidence confirmed the grant as follows:-

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|----|------------------------|---------------------|--|
| 1. | AGNES NJERI KAMAU | LOC. 2/KANGARI/259 | 0.1 ACRES |
| 2. | MARTHA WAITHERERO | LOC. 2/ KANGARI/259 | 1.33 ACRES (Life interest only) |
| 3. | HANNAH NJERI MWANGI | LOC. 2/ KANGARI/259 | 1.33 ACRES |
| 4. | ZAKARIA KAMAU MWANGI | LOC. 2/ KANGARI/259 | 1.33 ACRES |
| 5. | MILKAH MUTHONI MUTURI | LOC. 2/ KANGARI/259 | 1.33 ACRES |
| 6. | VIRGINIA WANGUI MWANGI | LOC. 2/ KANGARI/259 | 1.33 ACRES |
| 7. | MIRIAM NJOKI MWANGI | LOC. 2/ KANGARI/259 | 1.33 ACRES |

Zacharia was not satisfied with the distribution made by the lower court. He therefore filed the present appeal with the following grounds:-

1. *THAT the learned magistrate erred in law and fact when she failed to give any portion of land to MARTHA WAITHERERO as the widow to the deceased whereas she stood first in the order of priority.*
2. *THAT the learned magistrate erred in law and fact in failing to appreciate that the estate of the deceased was governed by the Kikuyu Customary Law*
3. *THAT the learned magistrate erred in law and fact when she gave the appellant equal share with the respondents whereas some of the respondents were married daughters who have an opportunity of inheriting elsewhere.*

I have considered the evidence submitted in the lower court and I have also considered submissions made by the parties. It is clear that there was intention by the deceased to give his sister Agnes Njeri 0.1 acres. The court will uphold that distribution. From the evidence of the parties it is clear that the wife of the deceased is sickly. In submissions before court Zacharia said that his mother needed medication and that he used the proceeds of the tea bushes to purchase that medicine. That evidence was not contradicted. The elders who gave evidence in the lower court stated that the deceased had indicated in his life time that his sons should get 2 acres of land. That evidence was not discredited. Having considered the evidence the appeal will succeed to the following effect in respect of Loc. 2/Kangari/259:-

1. ***That Zacharia Kamau Mwangi shall get two acres absolutely.***
2. ***Milka Muthoni Muturi shall 2 acres absolutely.***
3. ***Agnes Njeri Kamau shall get 0.1 acres absolutely.***
4. ***Martha Waitherero shall get the remainder of the land for her life time and thereafter to Hannah***

Njeri Mwangi, Virginia Wangui Mwangi and Miriam Njoki Mwangi.

5. Each party shall bear their own costs in this appeal.

Dated and delivered at Nyeri this 18th day of December 2008.

MARY KASANGO

JUDGE



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