



**In re Estate of Elizabeth Wairimu Ngotho alias Elizabeth Wairimu Kabiru (Deceased)
(Succession Appeal E001 of 2022) [2024] KEHC 16095 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION APPEAL E001 OF 2022
CM KARIUKI, J
DECEMBER 19, 2024
IN THE MATTER OF THE ESTATE OF ELIZABETH WAIRIMU NGOTHO ALIAS
ELIZABETH WAIRIMU KABIRU (DECEASED)**

BETWEEN

JOEL GAKUNYI NJUGUNA APPELLANT

AND

REGINA MUTHONI NGUNJIRI 1ST RESPONDENT

VERONICAH WANGUI KEERU 2ND RESPONDENT

PAULINE WANJIRU KARANJA 3RD RESPONDENT

RULING

1. The Appeal herein emanates from the ruling delivered on the 10/3/2022 by Hon. C Obulutsa in Nyahururu CMC Succ Cause No. 96 of 2018.
2. The ruling was pursuant to an application dated 14/7/2021 challenging the Certificate of Confirmation of Grant issued on the 27/5/2021, where all the six (6) surviving beneficiaries of the estate of Elizabeth Wairimu Ngotho namely Godfrey Njuguna Kabiru (Deceased) represented by the Appellant, Veronichah Wangui Keeru, Reginah Muthoni Ngunjiri, Pauline Wanjiru Karanja, Peter Kambo Kabiru and Wilson Mwangi Kahiga were to inherit L.R No. Nyandarua/Lesirko/928 and 929 in equal shares.
3. The basis of the application was that the deceased had during her lifetime bequeathed L.R No. Nyandarua/Lesirko/928 to her son Godfrey Njuguna Kabiru and a copy of the Land Control Board's Consent for transfer dated 20/8/1991 was issued to that effect. The consent, an agreement by the deceased and her sons Godfrey Njuguna Kabiru aka Godfry Mburu Kabiru and Peter Kabiru dated 26/12/1987 and a certificate of translation confirmed that the deceased had during her lifetime



- subdivided her LR No: Nyandarua/ Lesirko/36 of 19 acres into 4 portions. Her sons Godfrey and Peter were to each get a portion of 5 acres, the deceased was to retain one portion of 5 acres in her name and sell the remaining portion of 4 acres.
4. Peter Kambo Kabiru opted to buy the 4 acres from the deceased bringing his entitlement to 9 acres and a title deed for the 9 acres was issued to him during the deceased lifetime. This is L.R No. Nyandarua/ Lesirko/930.
 5. Godfrey Njuguna Kabiru on the other hand was poor and sickly and thus unable to raise transfer money and the deceased died before she could transfer the Land to him. This is L.R No. Nyandarua/ Lesirko/928.
 6. The deceased's entitlement of 5 acres was left intact under L.R No. Nyandarua/ Lesirko/929.
 7. The Court after considering the application agreed with the Appellant that his father Godfrey Njuguna Kabiru was indeed bequeathed L.R No. Nyandarua/ Lesirko/938 by his deceased mother Elizabeth Wairimu Ngotho and it proceeded to rectify the Certificate of Confirmation of grant and it directed that the aforesaid parcel of land be inherited by Joel Gakunyi Njuguna to hold as administrator of the estate of Godfrey Njuguna Kabiru.
 8. As for L.R No: Nyandarua/Lesirko/929, which the deceased Elizabeth had retained for herself, the Court distributed it among the surviving children omitting Godfrey Njuguna Kabiru thus the present appeal.
 9. The Appellant listed 2 grounds in the Memorandum of Appeal dated 28/3/2022 as follows:-
 - I. That the Learned Trial Magistrate erred in Law and in fact in failing to distribute L.R No. Nyandarua/Lesirko/929 as provided for under Section 38 of the [Law of Succession Act](#).
 - II. That the Learned Trial Magistrate erred in Law and in fact in omitting the estate of Godfrey Njuguna Kabiru as heirs of L.R No: Nyandarua/Lesirko/929.

Appellant's Written Submissions

10. It was stated that it is not in dispute that Godfrey Njuguna was the deceased's son and that that his brother Peter Kambo Kabiru was gifted 5 acres of land *inter vivos* but he was given a share of L.R No: Nyandarua/Lesirko/929 by the Court as contained in the Certificate of Confirmation of Grant dated 10/3/2022. The question that begs then is why was Godfrey discriminated? Reliance was placed on Article 27 of the [Constitution](#) of Kenya 2010 which provides for equality and freedom from discrimination.
11. It was argued that the Learned Trial Magistrate in his Ruling dated 10/3/2022 did not give reasons why Godfrey was omitted from distribution of Parcel No: 929 whereas his brother Peter was included. That the ruling was unconstitutional to that extent and it contravened Article 27 of the [Constitution](#).
12. Further, it was contended that Section 38 of the [Law of Succession Act](#) on the other hand enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender. It was stated that the deceased voluntarily gave her 2 sons 5 acres during her lifetime and he knew very well that she had daughters but she did not transfer the portion of 5 acres to the daughters. It therefore follows that the 5 acres ought to have been inherited by all her 6 children including Godfrey.
13. The Appellant argued that in the agreement dated 26/12/1987, the deceased was categorical that the portion of 5 acres being L.R No. Nyandarua/Lesirko/929 was hers. That if the intention was to hold



the portion for her daughters, nothing would have been easier but for her to state so in the agreement. Reliance was placed on *Eliseus Mburu M. vs. Harriet Chambaka & Anor* [2012] eKLR

14. In conclusion, the Appellant prayed for the appeal to be allowed and for a fresh Certificate of Confirmation of grant to issue sharing LR No: Nyandarua/Lesirko/929 equally among Joel Gakunyi Njuquna to hold as administrator of the estate of Godfrey Njuguna Kabiru, Peter Kambo Kabiru, Veronich Wangui Keeru, Pauline Wanjiru Karanja, Reginah Muthoni Ngunjiri and Wilson Mwangi Kahiga to hold as administrator of the estate of Josephine Wambui.

Respondents' Written Submissions

15. The Respondents submitted that a historical background of the deceased's wishes during her lifetime would come in handy in order to appreciate the Respondents' case. The deceased was at one time the owner of L.R Nyandarua/ Lersiko/36 measuring 7.7 hectares. It is evident from the mutation form for L.R Nyandarua/ Lersiko/ 36 that the deceased sub divided it into three portions, that is, 2.02 hectares, 2.02 hectares and 3.66 hectares respectively. The deceased had expressed her intention of gifting his two sons, (that is, Godfrey Njuguna and Peter Kambo), each with a portion of 5 acres (2.02 hectares).
16. The deceased sold a portion of about 4 acres to Peter Kambo, and this made his portion to measure 3.66 hectares. The deceased perfected her gift over L.R Nyandarua/ Lesirko/930 measuring 3.66 hectares by obtaining the Land Control Board consent for transfer by way of gift. The deceased went further and transferred it L.R Nyandarua/ Lesirko/930 to Peter Kambo.
17. The deceased initiated the process of perfecting her gift of 5 acres to Godfrey Njuguna Kabiru. The deceased obtained and Control Board consent for transfer of L.R Nyandarua/ Lesirko/929 to Godfrey Njuguna Kabiru. The deceased died before the transfer to Godfrey Njuguna Kabiru was registered. The said transfer notwithstanding, the Respondents have all along recognized the deceased's intention to gift Godfrey Njuguna with L.R Nyandarua/ Lesirko/929. The Respondents' submission before the trial court was that the estate of Godfrey Njuguna should get L.R Nyandarua/ Lesirko/929.
18. The estate was thus left with L.R Nyandarua/ Lesirko/928 measuring 2.02 hectares (5 acres). This is the parcel of land that the Appellant has faulted the trial court for giving it to Peter Kambo Kabiru, Veronich Wangui, Pauline Wanjiru, estate of Josephine Wambui and Regina Muthoni Ngunjiri.
19. It was stated that the deceased died intestate, and at the time of her death she had gifted her two sons with 5 acres each. The 5 acres gift meant for Peter Kambo Kabiru was fully perfected during the lifetime of the deceased, and title documents were issued in terms. The deceased had intended to gift L.R Nyandarua/ Lesirko/929, and she had obtained land control board consent. The Respondents conceded to the fact that they do not have any objection for the estate of Godfrey Njuguna Kabiru being given L.R Nyandarua/ Lesirko/929.
20. It is thus not in dispute that the Peter Kambo Kabiru and the estate of Godfrey Njuguna Kabiru are beneficiaries of gifts from the deceased. It is also not in dispute that Veronich Wangui, Pauline Wanjiru, estate of Josephine Wambui and Regina Muthoni Ngunjiri did not benefit from any gift from the deceased. It is also not in dispute that at the time of her death, the deceased had L.R Nyandarua/ Lesirko/928 as the only property that was not gifted to anyone.
21. The Respondents asserted that in view of the circumstances of this case, in considering the mode of distribution of L.R Nyandarua/ Lesirko/928, the court will ordinarily be guided by the provisions of Section 42 of the *Law of Succession Act*. Further, it was pleaded that it is not in dispute that the deceased had gifted her two sons, that is, Godfrey Njuguna Kabiru and Peter Kambo Kabiru with portions of lands each measuring 5 acres. The deceased did not gift her 4 daughters with any portion of land.



22. It was pleaded that taking into account the aforesaid two gifts to the two sons, the net estate is L.R Nyandarua/ Lesirko/928 measuring 2.02 hectares (5 acres). This is the portion that is the subject of distribution. The said portion of 5 acres if distributed to the 4 daughters each will get a portion of 1.25 acres. Compared to the sons who have 5 acres each, the daughters will take less acreage. Thus, they submitted that Godfrey Njuguna Kabiru and Peter Kambo Kabiru should be given their respective gifts of 5 acres each and the 4 daughters should equally share the L.R Nyandarua/ Lesirko/928. Reliance was placed on *In the Estate of Waweru Mwaniki Gatuha (Deceased)* [2020] eKLR,
23. It was contended that the Appellant contends that the trial court was not guided by Section 38 of the *Law of Succession Act*. The wording of the provisions of Section 38 of the Act makes it subject to the provisions of Section 42 of the Act. In the circumstances, it was their submission that the trial court did not err when it did not give the estate of Godfrey Njuguna Kabiru a share in L.R Nyandarua/ Lesirko/928.
24. It was stated that the court was guided by the principle of equality, and at the same time, it took due regard to the wishes of the deceased. The wishes of the deceased entailed the sons getting 5 acres each, whereas the remaining portion of 5 acres was left presumably for the daughters. That the deceased did not specifically bequeath the daughters any portion of land and as such the intestate proceedings with regard to L.R Nyandarua/ Lesirko/928 falls squarely under the provisions of Section 42 of the Law of the Succession Act.
25. They further stated that the trial court erred when it gave Peter Kambo Kabiru a share in L.R Nyandarua/ Lesirko/928. To that extent, they urged the court to remove Peter Kambo Kabiru from getting any share in L.R Nyandarua/ Lesirko/ 928.
26. It was averred that there is no equality in this mode of distribution, but the Respondents have maintained that they are contended with getting 1.25 acres each. In the circumstances, they urged the court to dismiss the appeal, and in addition, remove the name of Peter Kambo Kabiru from sharing L.R Nyandarua/ Lesirko/ 928.
27. Lastly, the Respondents asserted that they have demonstrated that the appeal lacks merits, as the Appellant is advancing a cause of inequality in the distribution of the deceased's assets and thus they urged the court to dismiss the appeal with costs to the Respondent.

Analysis and Determination

28. I have carefully perused through the memorandum of appeal and the submissions filed by the respective parties. From the foregoing, the issues for determination are as follows:-
 - I. Whether the Learned Trial Magistrate erred in Law and in fact in failing to distribute L.R No. Nyandarua/Lesirko/929 as provided for under Section 38 of the *Law of Succession Act*/
 - II. Whether the Learned Trial Magistrate erred in Law and in fact in omitting the estate of Godfrey Njuguna Kabiru as heirs of L.R No: Nyandarua/Lesirko/929?
29. It is not in dispute that the deceased had during her lifetime gifted her sons Godfrey Njuguna Kabiru and Peter Kabiru 5 acres each from LR No: Nyandarua/ Lesirko/36. The deceased subdivided her plot of 19 acres into 4 portions each, her sons got a portion of 5 acres each, the deceased retained 5 acres and eventually sold the remaining 4 acres to her son Peter Kabiru.
30. The basis of the application was that the deceased had during her lifetime bequeathed L.R No. Nyandarua/Lesirko/928 to her son Godfrey Njuguna Kabiru and a copy of the Land Control Board's Consent for transfer dated 20/8/1991 was issued to that effect. The consent , an agreement by



the deceased and her sons Godfrey Njuguna Kabiru aka Godfry Mburu Kabiru and Peter Kabiru dated 26/12/1987 and a certificate of translation confirmed that the deceased had during her lifetime subdivided her LR No: Nyandarua/ Lesirko/36 of 19 acres into 4 portions. Her sons Godfrey and Peter were to each get a portion of 5 acres, the deceased was to retain one portion of 5 acres in her name and sell the remaining portion of 4 acres.

31. Peter Kabiru got L.R No. Nyandarua/Lesirko/930 which is 9 acres including his gift and the land that was sold to him by the deceased. Godfrey got L.R No. Nyandarua/Lesirko/928 and the deceased retained L.R No. Nyandarua/ Lesirko/929, the impugned parcel hereinafter. Apart from her two sons the deceased also had 4 daughters namely Veronicah Wangui, Pauline Wanjiru, Josephine Wambui (deceased) and Regina Muthoni Ngunjiri who did not get any gifts from the deceased during her lifetime.
32. It goes without saying that the deceased was free to deal with her property however she wished during her lifetime. However, after her death the actions which she took must be considered in total when considering distribution of her estate and must be subjected to the *Law of Succession Act* whether she died intestate or otherwise. The court has the discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.
33. Section 42 of the *Law of Succession Act* provides that:
34. Where-

an intestate has, during his lifetime or by will paid, given or settled any property for or the benefit of a child, grandchild or house; or taken had he not predeceased the intestate. That property shall be taken into account in determining the share of the set intestate estate finally, accruing to the child grandchild or house.
35. Accordingly, Section 42 is clear that whatever any beneficiary gets during the deceased's lifetime must be considered as the already been excised from the estate. In my considered opinion, all the deceased's property property, will be accounted for under the Act for a determination on whether the properties remain as part of the intestate estate or were passed on to other parties before death of the deceased. If Godfrey's and Peter's interests were to be considered afresh as if they had not received any gift from the deceased, it would be unfair and discriminatory because it would mean that they would get shares that are over and above other beneficiaries. This court is tasked with maintaining equity in sharing out the deceased's estate so that fairness is achieved. The Act never intended that equal distribution means that each beneficiary gets an equal share but that the distribution should be equitable considering the circumstances of each case.
36. At this point it is important to make it clear that the rights of sons and daughters in the estate of the deceased are recognized in equal measure under the *Constitution*. The court In re Estate of Waweru Mwaniki Gatuha (Deceased) [2020] KEHC 2620 (KLR) held that:-

Section 42 is clear that whatever Charles Mwaniki Waweru had received during the deceased's lifetime must be considered as the same had already been excised from the estate. If Charles Mwaniki were to be considered afresh, that is to get an equal share with other beneficiaries, it would be unfair and discriminatory because it would mean that Charles Mwaniki would get over 10 acres while others get only 5 acres. I agree with the submission that Section 42 of the Act is meant to protect the wishes of the deceased by ensuring that what the deceased wished to bequeath to Charles Mwaniki during his life was done. But this



section also serves to enable the court maintain equity in sharing out the deceased's estate so that fairness is achieved.

37. It is my considered opinion that Godfrey and Peter having already benefitted from the estate by the gifts given to them by the deceased during her lifetime, the remaining 5 acres should be distributed among the sisters taking into consideration, the principles of natural justice, equity and good conscience.

38. The court In re Estate of Godana Songoro Guyo (Deceased)[2020] eKLR stated as follows:-

In this matter, the arguments made by the Learned Counsel for the applicant is that the approach which had been alleged to have been adopted by the deceased was a practical and equitable one aiming at giving the sons an advantage of enabling the sons to retain the land where they have been living on and developed overtime. This view is apparently, untenable in law having in mind that the applicant's failed to prove that such an approach was ever vended by the deceased. I should make it clear in this Judgment that no child comes to the distribution table of the estate intestate with superior rights. Therefore, a situation whereby a male heir will be preferred to inherit more shares to a female heir of the same estate for purposes of inheritance can no longer withstand constitutional scrutiny. In the letter and spirit of the Constitution dependants daughters under Section 29 of the Law of Succession irrespective of age, or social status are entitled to inherit from their parents intestate equally like their brothers. The measure of differentiation on distribution that may occur should not be prejudicial or unjust along gender lines which Article 27 (4) of the Constitution specifically disallows.

39. Consequently, and in exercising the court's discretion and the foregoing analysis, I find that the trial magistrate erred in including Peter Kambo in the as part of the beneficiaries who should benefit from LR. Nyandarua/Lesirko/929.

40. In the result the following orders do issue:

- i. The appeal herein lacks merit and therefore fails.
- ii. LR/Nyandarua/Lesirko/929 shall be distributed and shared equally among Veronicah Wangui, Pauline Wanjiru, the estate of the late Josephine Wambui and Regina Muthoni Ngunjiri.
- iii. Each party shall bear their own costs.

DATED AND DELIVERED AT NYANDARUA THIS 19th DAY OF DECEMBER 2024.

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CHARLES KARIUKI

JUDGE

