



REPUBLIC OF KENYA



**In re Estate of Wanjiru Nguyo (Deceased) (Succession Cause
122 of 2009) [2023] KEHC 317 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 317 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 122 OF 2009
TM MATHEKA, J
JANUARY 19, 2023**

BETWEEN

GODFREY MAINA GICHUKI PETITIONER

AND

TABITHA MUGURE NGATIA 1ST PROTESTOR

JAMES MWAI NGATIA 2ND PROTESTOR

NAFTALI MWAI NGUYO 3RD PROTESTOR

GODFREY MAINA NGATIA 4TH PROTESTOR

JUDGMENT

1. This matter relates to the estate of the late Wanjiru Nguyo who died intestate on January 10, 2004 aged 89 years old. She was unmarried and had no children.
2. The deceased had three biological siblings. Namely:
 1. Gichuki Nguyo (brother)
 2. Lucy Gathoni Nguyo(sister)
 3. Ngatia Nguyo. (brother)
3. All the above siblings are currently deceased.
4. Lucy Gathoni Nguyo was also unmarried and did not have children while both Gichuki Nguyo and Ngatia Nguyo were survived by members of their familie.
5. Gichuki Nguyo at the time of his demise was survived by the following: -
 1. Godfrey Maina Gichuki (Petitioner herein, son)



2. Esther Wanini Gichuki(daughter)
3. Lydia Wanjiru Gichuki(daughter)
4. Alice Kirigo Gichuki(daughter)
5. Gladys Mweeria Gichuki (deceased's daughter but survived by her son David Gichuki Mweria)
6. Ngatia Nguyo was survived by his three wives. Namely: -
 1. Wamaitha Ngatia
 2. Tabitha Mugure Ngatia (1st Protestor)
 3. Wanjiru Ngatia
 4. Unnamed Thirteen children
7. The deceased also had step siblings. Namely: -
 1. Nyaburi Nguyo (Step Sister)
 2. James Weru, (the 2nd protestor herein and a step brother, deceased but survived by his wife Agnes Gathoni)
 3. Naftali Mwai Nguyo. (Step Brother & the 3rd protestor herein)
8. The deceased's estate comprised of one property known as Nyeri/Waraza/203 measuring 60 acres.
9. After the demise of the deceased, her brother Ngatia Nguyo petitioned for Letters of Administration Intestate on February 6, 2019 and the same was issued on September 11, 2009 and confirmed on December 18, 2009. He however passed on before the distribution of the estate herein.
10. Subsequently, this court on May 24, 2018 and via parties' consent appointed James Mwai Ngatia, Tabitha Mugure Ngatia, Naftaly Mwai Nguyo & Godfrey Maina Gichuhi as administrators of the deceased estate in his stead.
11. On May 20, 2018, Godfrey Maina Gichuki filed Summons for Confirmation of Grant dated May 28, 2018 seeking confirmation of the Grant of Letters Administration Intestate.
12. The summons is supported by his affidavit sworn on the even date. He deponed that the deceased was his aunt by dint of being a sister to his father and that the beneficiaries of her estate are her aforementioned biological brothers and sisters namely: Gichuki Nguyo, Lucy Gathoni and Ngatia Nguyo all who are deceased.
13. According to him the deceased's estate Nyeri/Waraza/203 measuring 60 acres should be shared equally between the family of Gichuki Nguyo and Ngatia Nguyo since Lucy Gathoni died without any survivor.
14. The summons is opposed by Tabitha Mugure Ngatia and James Mwai Ngatia who swore an affidavit of protest to the summons on September 30, 2018.
15. They disagreed with the mode of distribution proposed by Godfrey Maina Gichuki on grounds that the same is not fair as it failed to take into account the wishes of the deceased and the interest of all the beneficiaries.
16. They averred that the persons entitled to share in this estate held a meeting on June 30, 2018 and agreed that Alice Kirigo Gichuki, Esther Wanini Maina, Lydiah Wanjiru Gikonyo and Lucas Wananina



Mburu should each get 1 acre parcel of land, David Gichuki Mwinyeria, Nyaburi Nguyo, Agnes Gathoni Weru, Naftali Mwai Nguyo, Lydiah Wanjiku Mureithi and Daniel Mwangi Mutero should each get 2 acres piece of Land, Wamaitha Ngatia and Godfrey Maina Ngatia should each get 5 acres piece of land while Tabitha Mugure Ngatia, Susan Gathigia Ngatia, Lydiah Njoki Ngatia, Margaret Wanini Ngatia, Jessee Weru Ngatia, Jane Wanjiru Ngatia, Lucy Wakanyi Ngatia, Joseph Wanjohi Ngatia, John Maina Ngatia, Mary Wambui Ngatia, James Mwai Ngatia, Samuel Gichuki Ngatia, Esther Wanjiru Wamuyu and Margaret Wamaitha Ngatia to share 30 acres piece of land.

17. They proposed that this court adopts the above mode of distribution.
18. It was their further deposition that the applicant is aware that the beneficiaries mentioned above have already taken their portions on the ground and sharing the land in any other way will definitely dislodge those already in occupation.
19. Naftali Mwai Nguyo swore an affidavit on April 30, 2019. He proposed that the deceased's estate should be shared equally between the family of Nyakanini Nguyo and Nyaguthii Nguyo who were the deceased's biological and step mother respectively.
20. Agnes Gathoni Weru also swore an affidavit on May 24, 2019. She deponed that there was an agreement that deceased estate would be shared equally among Tabitha Mugure Ngatia, Naftali Mwai Nguyo, Godfrey Maina Gichuki, Wamaitha Ngatia, the late Wanjiru Ngatia and herself.

Protestor's Case

21. PW1, James Mwai Ngatia adopted the averments set out in the affidavit jointly sworn with the 1st Protestor Tabitha Mugure on September 30, 2018 and his statement as his evidence in chief. He testified that the deceased was his aunt. His father Ngatia Nguyo was a brother to the deceased. It was his evidence that pursuant to the family agreement dated June 30, 2018 the land was surveyed and subdivided on November 9, 2017 and each party took possession of their share, fenced and constructed a house. He, however, did not have evidence of the same. He said that there were purchasers of the deceased's land who had also taken their share and acquired title deeds. That the deceased during her lifetime sold 4 acres to Daniel Mwangi Mutero & Lydia Murithi. He also testified that his late father Ngatia Nguyo in his capacity as an administrator sold 4 acres of estate's land to Isaack Kamau Mugo & Lucy Wanaina Mburu but he did not adduce any proof thereof.
22. He said no person was forced to sign the family agreement.
23. PW2, Agnes Gathoni testified that the deceased was a step sister to her late husband James Weru Nguo. She adopted her affidavit sworn on May 24, 2019 as her evidence in chief. She stated that the land she currently occupied was given to her late husband by the deceased. She said the deceased had also distributed her land to Tabitha Mugure Ngatia, Naftali Mwai Nguyo, Godfrey Maina Gichuki, Wamaitha Ngatia and the late Wanjiru Ngatia who is represented by Mwai Ngatia. However, she did not have any proof of the same. She proposed that 10 acres' piece of land should be given to her and each of the above named persons.
24. She confirmed she signed the consent on the mode of distribution but did not agree with it. She did so because everyone was signing. She said that there were some buyers but it was not the deceased who sold to them but the previous administrator
25. PW3, Naftali Mwai Nguyo in his testimony concurred with the mode of distribution as proposed by Agnes Gathoni.



26. It was his testimony that the estate's land was initially 65 acres but 5 acres was sold by the deceased and Nguyo Ngatia hence the remaining parcel of land for distribution is 60 acres.
27. He did not agree with the mode of distribution in the aforesaid family consent despite signing it.

Petitioner's Case

28. Godfrey Maina Gichuhi in his testimony reiterated the averments contained in his Supporting Affidavit to the summons herein. It was his further testimony that in as much as the protestors live on the deceased's land, it was never her intention that they own it. He disputed that the land was sold to third parties but confirmed that the purported purchasers namely Daniel Mwangi Mutero, Isaack Kamau Mugo, Lucy Wanaina Mburu & Lydia Murithi live on the deceased's land.
29. He said he would share his family's share of 30 acres with his sisters
30. It was his testimony that he signed the consent on the mode of distribution out of fear.

Submissions

31. Only the Protestors filed their Submissions. They filed the same on July 25, 2019.
32. They submitted that the persons listed in the Affidavit of protest are beneficiaries to the estate of the deceased by dint of section 29 of the *Law of Succession Act*.
33. They argued that in determining the rightful party to inherit, it is important to consider the degree of consanguinity and affinity. Referring to the Black's law Dictionary 8th Edition they submitted that consanguinity is the relationship between persons of same blood and origin.
34. They faulted the petitioner for failing to list all the beneficiaries of the deceased estate and for failing to obtain their consent prior to filing the summons herein.
35. They also argued that the purchasers who had bought land from the deceased and the late administrator Nguyo Ngatia ought to be considered. They relied on the case of *Titus Muraguri Warothe & 2 others v Naomi Wanjiru Wachira* Nyeri HCSC No. 122 of 2002 as quoted in the case of *In re Estate of the Late Philip Mutulili Wambua (Deceased)* [2019] eKLR where the court found that interest of the purchasers of estate's land should be legitimately taken into account in distributing the estate of the deceased.
36. They urged this court to distribute the land in accordance with the family consent dated June 30, 2018.

Analysis And Determination

37. From the parties' arguments and depositions in support of their rival positions, the issues arising for determination are;
 1. Whether the family agreement on mode of distribution dated June 30, 2018 is binding on all parties herein
 2. Whether the deceased and late Nguyo Ngatia sold estate's land during their lifetime.
 3. Who among the applicant and the protestors is the closest to the deceased and entitled to inherit from her estate.



Issue No.1

38. It is not in dispute that a meeting to discuss the mode of distribution of the deceased's estate was held on June 30, 2018. All the parties herein were in attendance and they consented to the proposed mode of distribution. PW2, PW3 and the applicant did confirm that they appended their signatures on the said consent despite not agreeing with the mode of distribution therein. PW2 and 3 testified that they did so as everyone was signing it while the Petitioner signed out of fear.
39. The agreement however has not been adopted as an order of this court. It is trite that a Consent only becomes binding on parties and attains legal character once it is adopted as an order or judgment of the court. The Supreme Court of Kenya rendered itself on this issue in the case of *Geoffrey M. Asanyo & others v The Attorney General* [2018]eKLR where their Lordships held:-
- “Adoption of a consent by a court is a process, in the course of which a court discharges the duty of evaluating the clarity of the consent placed before it by parties, and giving directions on the manner of adoption. This circumvents the risk of an unlawful Order, and validates the mode of adoption and compliance. Thus, a consent by parties becomes an Order of the court only once it has been formally adopted by the court.”
40. Clearly therefore that the aforesaid consent is not binding on the parties and this court has discretion to determine how to ultimately distribute the estate of the deceased.

Issue No.2

41. It was the protestors' case that the deceased in her life time disposed off two acres to Lydia Wanjiku and Daniel Mwangi while Nguyo Ngatia in his capacity as an administrator sold two acres of land to Issac Kamau Mugo & Lucy Wanaina and that these purchasers have already taken possession of their portions on the ground. However, they did not adduce any evidence in support thereof. In addition, those alleged purchasers have not put in affidavit evidence, any documents showing purchase such as payment receipts, bank cheques, agreements or documents acknowledging sale and purchase or ownership documents substantively linking them to the estate land. No document was exhibited with the signature of the deceased & the said administrator acknowledging such sale. Therefore, the alleged assertion of possession without concrete evidence cannot suffice as evidence of ownership. In *Johnson Muine Ngunza & another v Michael Gitau Kiarie & 2 others* [2017] eKLR stated that:
- “The *Law of Succession Act* recognises the purchaser's right and in support of these submissions the said law of Succession defines a 'Purchaser'. Purchaser according to the Act means a purchaser for money or money's worth”
42. There was nothing placed before the court to show that the alleged purchasers paid any money or made any money worth contribution to the deceased.
43. In addition the administrator was bound by section 82(b) (ii) of the *Law of Succession Act* which states that no immovable property shall be sold before confirmation of the grant; There is no evidence as to when the alleged sales were made whether before or after the grant was confirmed. In view of the above circumstances, it is my considered view that the deceased and the late Administrator Ngatia Nguyo did not sell the estate's land to the aforesaid persons.



Issue No.3

44. The deceased was not survived by spouse nor child, consequently distribution of her estate is to be governed by section 39(1) of the Act.
45. Section 39(1) (a) (b) (c) & (d) of the Act, which is relevant to these proceedings, provides as follows: -
- “39(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the estate in the following order of priority -
- a. Father, or if dead
 - b. Mother, or if dead
 - c. Brothers and sisters, and any child or children of deceased brothers and sisters in equal shares
 - d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none....”
46. The consideration of this issue is based on the degree of consanguinity and affinity. In the case of *Immaculate Wangari Munyaga v Zachary Waweru Ileri* [2016] eKLR Justice Mativo stated while dealing with a similar issue-
- “An examination of consanguinity and affinity chart below will help in determining the issue.”
47. From the above chart it is apparent that the deceased’s biological brothers and sisters and their children have closer consanguinity and affinity to the deceased compared to deceased’s step siblings.
48. In this case, it is undisputed the deceased had three biological siblings. Namely Gichuki Nguyo, Lucy Gathoni Nguyo and Ngatia Nguyo.
49. Lucy Gathoni died without any survivors. Gichuki Nguyo and Ngatia Nguyo had survivors who rank in priority compared to step siblings. Therefore, the children of the family of Gichuki Nguyo and Ngatia Nguyo in accordance with the above section are entitled to the estate equally.
50. There was no evidence to prove that the deceased had subdivided her land prior to her demise. Similarly, there was no evidence that she had distributed her land to protestors herein.
51. What orders should I issue?
52. The first thing that must be clear is that this property does not belong to any of the parties in this matter. It belongs to the deceased Wanjiru Nguyo. She could have in her life time given it to whoever she placed or even sold it. She died without doing any of that and therefore it is still her property.
53. Inheritance of the property would be by way of will if she had made one, nothing was presented to show her wishes.
54. The other mode is because of relationship with her and dependency upon her. The law sets out the degree of that relationship and who has the priority to inherit. It cannot be forced. Dependency must be proved by way of evidence.
55. From the evidence placed before me there is no merit in the protest. It is not supported by sufficient evidence to warrant deviation from what the law provides. The same is dismissed accordingly.



56. The Summons for Confirmation of Grant seeks to distribute the estate among three persons in two equal shares.
57. Obviously that would be in violation of section 39(1) (c) of the *Law of Succession Act* which provides for Brothers and sisters, and any child or children of deceased brothers and sisters in equal shares.
58. The brothers of the deceased are also deceased. Those who remain are the children of these ones. They are entitled to the estate in equal shares.
59. The applicant to provide a list of ALL the children of the two brothers of the deceased.
60. The Summons for Confirmation of Grant be and is hereby issued in the following terms:
 - a. That the estate of the deceased Nyeri/Waraza/203 is be to shared equally among the children of the two brothers of the deceased.
 - b. The Certificate of Confirmation of grant to reflect the names of ALL those children of Gichuki and Ngatia Nguyo.
61. Orders accordingly.
62. This being a family feud each party to bear their costs.

DATED AND SIGNED AT NAKURU THIS 19TH DAY OF JANUARY, 2023.

MUMBUA T MATHEKA

JUDGE

Delivered via this email this 19th January 2023.

For The Protestors

Muchiri Wa Gathoni & Company Advocates

For The Applicant

Muhoho Gichimu & Co. Advocates

