



REPUBLIC OF KENYA



**In re Estate of the Late Kariu Nyange (Deceased) (Succession Cause 640 of 2004) [2023] KEHC 2606 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2606 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 640 OF 2004  
HK CHEMITEI, J  
MARCH 30, 2023  
IN THE MATTER OF THE ESTATE OF THE LATE KARIU  
NYANGE (DECEASED)**

**IN THE MATTER OF**

**NORMAN NJUGUNA NGANGA ..... 1<sup>ST</sup> PETITIONER  
JOHN WANYANGE MWANGI ..... 2<sup>ND</sup> PETITIONER  
LUCY WANGUI CHEGE ..... 3<sup>RD</sup> PETITIONER  
GRACE WANJIRU WAWERU ..... 4<sup>TH</sup> PETITIONER**

**JUDGMENT**

1. The deceased herein Kariu Nyange died intested on February 22, 2003 and he did not have a wife or a child for that matter. He died a rich man leaving several properties behind.
2. The applicants on December 1, 2016 were issued with a grant of letters of administration jointly. The 2<sup>nd</sup> administrator on January 10, 2017 applied for the said grant to be confirmed. In his supporting affidavit he indicated how the estate was to be distributed and to who in particular. The same brought out serious objections from the rest of the administrators as well as other interested parties.
3. To this end they jointly and separately filed their responses by way of affidavits and statements in objection. They also filed whatever pieces of evidence they were to rely on.
4. The substantive objection was that after the demised of the deceased, they all agreed that the beneficiaries to the estate were nieces and nephews as the deceased had no known direct children or dependants. That the total number of known beneficiaries were twenty (20) in number.
5. The 2<sup>nd</sup> administrator who for the purposes of this cause shall hereafter be referred to as the plaintiff argued among others that his late mother Ruth Nduta was married to the deceased and as such she



- rank high in terms of priority. Further and since she had passed on the mantle felt on him and in the premises he was to inherit her share as well and on top of that get his own portion.
6. After a back and forth applications by all the parties the court directed that the matter be disposed by way of *viva voce* evidence. The substantive issues being whether the late Ruth Nduta was married to the deceased and if so whether her estate had priority over the rest of the beneficiaries.
  7. The other issue was whether one Samuel Nganga Ndirangu was also a dependant of the deceased.
  8. Once the above issue was determined, the next question was to do with the distribution of the deceased estate which was expansive. The plaintiff in his application for distribution suggested in his affidavit in support how the same ought to be distributed. The rest of the administrators who for the purposes of this cause shall be deemed defendants were of the view that the estate be shared out equally noting that the deceased had no known wife and that he supported the children of his brothers and sisters without any form of favouritism.
  9. The court after full trial directed the parties to file their written submissions and all complied. The court has perused the same together with the attached authorities.
  10. The parties as stated above are in agreement that the main issue for determination is whether the late Ruth Nduta was a wife and therefore a widow to the deceased.
  11. The plaintiff called several witnesses to support his case.
  12. PW1 Mungai Mutita testified that he was a retired chief Njoro sub location and he knew the deceased family since 1986 and he knew the deceased and Nduta to be husband and wife. He said that the deceased used to visit the home of Nduta every evening and he would carry her alone in his car. Further that the Kimakia graveyard was private and reserved for the members of the said farm and their close relatives. The deceased therefore was buried there for being the husband to Nduta.
  13. On cross examination however he said that he would visit the farm as the chief but he did not live there. He would visit the farm when there was need and when on patrol.
  14. PW2 Karanja Kiberenge testified that he was a member and chairman of Kimakia farm since 1964 and that the husband to the late Ruth Nduta was one Isaack Mwangi who was the brother to the deceased and was also one of the original 39 members of the said farm. He went on to state that the deceased herein was buried at Kimakia public cemetery which had been set aside by Kimakia farm members for purposes of burying their loved ones only.
  15. He said that although the deceased was not a member of the said farm, the late Ruth Nduta whom he considered deceased wife approached him for permission and that is why he was interred there.
  16. On cross examination he said that under kikuyu customs one could marry the wife of his deceased brother which the deceased did in this case. He went on to state that the deceased paid for Ndutas dowry at Muranga but he could not recall how much he paid.
  17. As the cross examination went on he denied that the said dowry was ever paid as he was aware that dowry under kikuyu customs cannot be paid twice.
  18. PW3 James Mwangi Mugane testified that the deceased and his father Mugane Kairu were close friends and that the deceased and Nduta lived in Kimakia farm. That it was the deceased who educated Ndutas children and his father had received dowry when Ndutas girls were married off.



19. PW4 John Wanyange testified that his late father Isaac Mwangi Wanyange was married to Ruth Nduta his mother and he passed away in 1966. The deceased herein thereafter took over his parental responsibilities of providing for them.
20. That the deceased cohabited with his mother at Kimakia farm where he built a house for his mother and she in turn assisted him in his businesses. He would also assist the deceased in his farm at Mau as well as the saw mill business at Njoro. His mother, his said took care of the deceased when he was unwell.
21. He went on to state that the deceased though not a member of Kimakia farm was buried therein courtesy of his relationship with his mother. He denied that the deceased resided at Njoro House as claimed by the defendants. He supported this assertion by the production of the certificate of death as well as the minutes of the funeral arrangements.
22. PW5 Justus Mwoni testified that he was employed in the saw mill business by the deceased around 1985 and that Nduta would assist the deceased in his business. He knew her to be the wife to the deceased.
23. He went on to state that her children including pw4, Wamboi and Daniel would work at the saw mill. He said that he worked as a watchman and he was yet to be paid his dues.
24. On cross examination he said that he was only a watchman at the saw mill and not at the home. That the deceased would leave with Nduta for Kimakia farm which was three kilometres away.
25. PW6 Dalmak Naikumi testified that he knew the deceased who was a closer friend to his father Lesalol Naikumi and they lived closer to his farm at Mau where he had allowed them to graze their animals. That although the deceased did not live there he would occasionally come with Nduta whom he saw as his wife as well as PW4.
26. On cross examination he said that there was no time she slept in the main house and he did not know if he was married.
27. He said that he knew Samuel Nganga as the farm manager at Mau farm and not deceased's child.
28. The plaintiff closed his case and the defendants called their witnesses.
29. DW1 Norman Njuguna Nganga testified that he was the son of the late Nganga Wanyange who was the elder brother of the deceased herein. He said that he lived in Muranga and was one of the administrators herein. He said that he was the secretary to the funeral committee and it was agreed that the deceased be buried at Kimakia farm as those buried there were close family members.
30. He admitted in cross examination that the deceased paid fees to Ndutas children and that Samuel Nganga was a worker for the deceased who was paid his dues as per the bundles of documents produced in court.
31. DW2 Grace Wanjiru Waweru said that she was the daughter to the late Isaac Mwangi the brother to the deceased who had married Ruth Nduta and Milka Njoki. Ruth Nduta was therefore her step mother. She said that the deceased lived in Njoro house within Nakuru town and he did not live with Nduta at Kimakia as suggested by the plaintiff.
32. She went on to state that the deceased took care of the children of his late brothers without any discrimination and that they would visit Mau farm without any let or hindrance especially during Christmas. The deceased was buried at Kimakia cemetery as that was meant for any relative.



33. DW3 and 4 Catherine Wanjiku and Daniel Chege respectively who were Ruth Ndutas children beside adopting their statements on record said that they were not aware of the relationship between their mother and the deceased to be that of husband and wife. The deceased however took care of their needs.
34. DW5 Samuel Nganga Ndirangu testified that he was the son of Ndirangu Wanyange who was a step brother to the deceased and that the deceased invited him to his farm and he provided for him. He accused the 1<sup>st</sup> defendant of attempting to disinherit him. He said that he stayed with the deceased from 1980 till his demise. That he was a farm manager for the deceased at times.
35. DW6 Zipporah Mwihaki Njau testified that she had been employed by the deceased at his farm and she used to cook for him. She said that the deceased would usually come to the farm with Nduta and that the deceased told her not to refuse her food. She did not know whether the two were married.
36. She said that DW5 was the manager and PW 4 would occasionally come as well and she would cook for them.
37. As stated above the parties thereafter proceeded to file their submissions which basically hinged on three issues namely, whether Ruth Nduta was a wife to the deceased; who are to share out the estate and how should it be shared.

### **Plaintiff's Submissions**

38. The plaintiff submitted strongly that going by the evidence on board it was clear that the deceased inherited the said Nduta after the demise of her husband. That this was evidence by the deceased providing for her including building her two houses.
39. Further that all indications showed that she was involved in his businesses as well as farming activities and that they stayed together at Kimakia farm and not Njoro house as advanced by the defendants.
40. The burial of the deceased at Kimakia farm cemetery was enough testimony that the deceased though not a member of the said farm was accepted by virtue of his association with Nduta the wife to Isaac Mwangi who was Ndutas late husband and among the original 39 members of the said farm. This was buttressed by the production of the certificate of death which indicated the deceased residence to be Kimakia Njoro and not Njoro house or Mau farm.
41. In light of the above observations the plaintiff who substituted his late mother Ruth Nduta by and large and in every way submitted that there was a presumption of marriage between the two and they were therefore treated as husband and wife for all intent and purposes.
42. The plaintiff made reference to various authorities including the case of *Joseis Wanjiru v Kabui Ndegwa Kabui & Another* (2014) eKLR.
43. For these reasons the house of Nduta as of priority ought to inherit the deceased estate herein under the provisions of Section 3(2) of the *Law of Succession Act*. The plaintiff in particular submitted that he assisted the deceased to acquire much assets and it will only be equitable that he gets much of the estate.

### **Defendant's Submissions**

44. The defendants each mounted strong opposition in their submissions. Essentially, they each submitted that Ruth Nduta was never married to the deceased and their associations was purely a sister and brother in law. They admitted that the deceased was never married and did not sire any child. Though rich, he supported his relatives including Ndutas children through payment of their school fees and employing them in their businesses.



45. They submitted that the decision to inter the deceased remains at Kimakia farm was made by the funeral committee for the simple reason that the cemetery was meant for relatives of the farm owners who included the deceased. They denied that he was buried there because he was married to Nduta the wife of his late brother Isaac Mwangi who was one of the 39 original members of the said farm.
46. In terms of the distribution of the estate they proposed that the same be shared equally among the twenty identified beneficiaries as they all had a stake with the deceased and that was the original consensus by the families.
47. They were unanimous that Samuel Nganga was not a beneficiary but a farm manager of the deceased and that is why he agreed to receive his terminal dues of ksh, 26,000 given by the administrators.
48. The said Samuel Nganga however submitted that he was entitled to the estate herein because the deceased was his step father and that he worked for him from 1980 to the time of his death. He said that it was his legitimate expectation that he was entitled to the portion of the estate.
49. He further denied that the amount he was paid of kshs 26000 was sufficient compensation but he accepted the same out of desperation and the promises by the administrators that he was going to be allowed back to the farm.

#### **Analysis and determination.**

50. The first issue to determine is whether the late Ruth Nduta was the wife to the deceased. It is clearly admitted that she was the widow of the late Isaac Mwangi, the brother to the deceased herein. Her husband died in 1966 when the plaintiff was less than a year old.
51. It appears that the deceased took over the responsibilities of taking care of his brother's family. There was no objection from both sides that the deceased supported not only the children of Nduta but also the children of his other siblings. They were either working in the Mau farm, Njoro saw mill and Njoro house, a commercial property in Nakuru central business district.
52. No evidence was led to suggest that there was any formal marriage between Nduta and the deceased. The only evidence advanced was that they were generally seen together in the Mau farm and Kimakia. They would even be seen in the saw mill and that she would at times pay out employees dues.
53. Does these then qualified her to be the deceased wife? As admitted there was no customary or civil exercise undertaken to solemnise the same. All that the plaintiff advanced was for this court to find that there was a presumption of marriage.
54. This court finds it difficult to believe that there was a semblance of a marriage between the two for several reasons.
55. First of all, it is clear that the deceased took over the general support of his brother's children after his death including building two houses for Nduta. The said houses were built within Isaac Mwangi's farm. It was testified that Nduta's house was falling and that is why the deceased supported her in building the said new houses.
56. If for example the deceased had married her, there would not be any difficulty in staying with her at the Mau farm and or Njoro house within Nakuru town as they would be known as husband and wife.
57. At the same time, it is evident that the deceased supported other persons of his kindred. By virtue, therefore of his philanthropy it will be hard to believe that since he did so to Nduta and her house hold then she automatically qualified her as his wife.



58. The issue of the burial place is not in my view a ground that would let this court believe that he was married to her. The decision to inter his remains at Kimakia farm private cemetery was made by the funeral committee which involved all members of the family and not the household of the plaintiff alone. In any case there was no official document to show the position taken by the farm members. At least PW1 would have indicated so.
59. The said cemetery was therefore meant for the families of the original 39 members as well as their relatives. Evidence was led to show that other relatives had been buried in the same place.
60. The evidence of the plaintiff's siblings cannot be wished away. These were adults who were much older than the plaintiff. As indicated above the plaintiff's father passed on in 1966 when the plaintiff was 5 months old. Clearly by that time he did not know much unlike his older siblings who testified that as far as they were concerned their late mother did not marry the deceased but he supported her just like he did to the rest of the wider family members.
61. More significantly the late Ruth Nduta in her cross petition filed in this court on September 21, 2007 termed her relationship with the deceased as "a sister in law" and not a wife. She further admitted that the deceased never married in his lifetime and that he took care of her children.
62. It is therefore imperative to note that she admitted on her own and under oath that the deceased was her brother in law, never married and took care of her and her children. If that is the case who is the plaintiff to claim that her mother was married to the deceased when she failed to say so herself?
63. If the situation was as it is being advanced by the plaintiff nothing was very difficult to state so. She was old enough to consider the fact that even if she was married under any form of custom, in this case, kikuyu custom she would have said so.
64. The position taken by the plaintiff's siblings that their mother was never married to the deceased as stated earlier cannot be wished away. There was no difficulty in agreeing with the plaintiff. One then is left wondering why the plaintiff advanced this line of argument when her mother had passed on.
65. The other plaintiff's step sisters and brothers from the house of Milka Njoki denied the position taken by the plaintiff as well. They in their joint statement denied that their step mother was married by the deceased. This buttresses the argument by the plaintiffs own siblings.
66. I think the court has stated much to show that by any stretch of imagination, the late Ruth Nduta was never married to the deceased herein and the court cannot find any evidence to believe the line taken by the plaintiff of a presumption of marriage. None was proved at all and by her own admission on oath as per the pleadings on record the deceased was never married and he died a bachelor. Their association whether at Kimakia, Mau farm or Njoro saw mill was purely within the armpits of a brother in law and a sister in law.
67. In essence this court finds that whatever the deceased did to the house of Nduta including Nduta herself was purely philanthropic and in line with African socialism where one carried the responsibilities of his siblings in the event of death or such other tragedy. This was much visible as the deceased herein did not have a family of his own and more importantly he was blessed with much wealth. This wealth was extended to the other family members who admitted that the deceased employed them as well in his businesses. As a matter of fact, the plaintiff seemed to lead in benefitting from the deceased while he was alive.
68. Before looking at how the estate ought to be divided, there was the objection by Samuel Nganga Ndirangu. His objection hinges on the ground that he was a son to the deceased under kikuyu



customary law and that he lived and worked for the deceased till his death. It also emerged during the hearing that he was a step son to the deceased.

69. During the hearing however it emerged on cross examination that he was working for pay at the deceased farm. He was actually a farm manager and that eventually after the deceased death he was paid a sum of ksh 26,250 which he admitted. He however said that he accepted the same under duress and that he was in a desperate situation.
70. During cross examination he admitted that he was brought by the deceased from his home in Muranga and he was ordinarily being paid for the work done
71. Evidence was led to show that the farm (Miti Mingi) where he worked had been leased out to one Rose Brothers and it becomes difficult to believe that the said objector clearly worked for the deceased as a son and not an employee.
72. Although the deceased employed most of his relatives, there was none whose evidence of payments was advanced like the protestor herein. If indeed he was a step son, then he would not have accepted to sign off whatever amount he was paid.
73. On the same vein, there is evidence that the potential beneficiaries herein at some point advanced themselves some money from the estate. The same was done consensually. However, the name of the objector did not feature anywhere among them and neither did he raise any objection.
74. In the premises, this court comes to an irresistible conclusion that the said Samuel Nganga Ndirangu was never a beneficiary to the deceased estate herein but was an employee. If in case, he was dissatisfied with the amount advanced to him as his terminal dues then he ought to seek legal redress elsewhere but not through this cause.
75. The next issue to be determined is who are the actual beneficiaries. Having established that Ruth Nduta was not a wife and in any case if she was alive she would have just benefited as a relative of the deceased, I think it is right to conclude that the twenty (20) persons agreed by the families are the legitimate beneficiaries of the estate herein.
76. This position is well grounded under Section 39(1) of the *Succession Act*. The same states that;

“Where intestate has left no surviving spouse or children

- (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate 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; or if none
  - (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
  - SUB(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.



- (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”

(Underlining mine)

77. Being therefore the children of his two brothers and sister they are qualified legally including the plaintiff. Although the plaintiff testified that he worked much for the deceased, there was nothing to show that he deserved more than the rest. All that he did was to assist the uncle just like what the rest did elsewhere including her mother.
78. More importantly whatever the deceased did including the payments of their school fees in my view was rewarding enough and should be seen as part of his philanthropic character. In the African sense, what the plaintiff was doing was returning his favour to his uncle by serving him whether in the saw mill or the farm. I doubt whether the understanding was that he was being compensated for the work he was doing.
79. There was no evidence shown that the deceased demanded anything from them. He paid their fees etc. unconditionally. If he was interested in bequeathing any asset to the plaintiff or any other beneficiary including the plaintiff's mother, he would have done so during his lifetime. But as it is it appears that the deceased simply assisted his close relatives while he was alive and left them to sort his estate after his death.
80. Since he did not give a clear road map, then the only way is through the law which I opine that this court has acquitted itself.
81. What then is the percentage or share of each of them.? In view of the circumstances left by the deceased, the estate shall be shared equally between the 20 beneficiaries.
82. The pleadings in the court file however, are so mixed up that the court is unable to make out a comprehensive list of the twenty persons. I think it is fair to allow the administrators opportunity to clean up the list and present what the court is able to clearly decipher. In the unfortunate event that some of the twenty beneficiaries may have passed on then let their entitlement be towards their estates.
83. The court has perused the list of assets presented by the parties. Clearly their descriptions are not clear for the court to make an informed table. Some of the assets seemed not to have clear titles or descriptions.
84. This court shall grant the parties and in particular the administrators to come up with a clean table of assets and liabilities so that the court can clearly distribute.
85. Further, and because of the size of the estate, the parties are granted the liberty to agree on a mode of distribution that is equitable and fair and in the event that they are unable to settle then the court shall use its inherent powers to make a determination. This conclusion is reached without prejudice to the findings above that the deceased never bequeathed any of his assets to anyone during his lifetime and the court will not therefore entertain any further squabbles between the twenty on why and how one should get more or less.

Conclusion.

86. Taking the totality of the evidence and the submissions presented, this court makes the following orders;
- a. The late Ruth Nduta was not a wife to the late Kariu Nyange.



- b. John Wanyange the plaintiff is not the only beneficiary of the deceased estate.
- (c) Samuel Nganga Ndirangu was an employee of the deceased herein and therefore not a beneficiary to the estate.
- (d) The parties (administrators) are hereby granted 30 days to come up with a clear list of the twenty beneficiaries, deceased assets and a clear mode of distribution.
- (e) This matter be mention within 30 days from the date herein for conclusion of order (d) above.
- (f) Being a family matter each party shall meet its own costs.

**DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 30<sup>TH</sup> DAY OF MARCH 2023.**

**H. K. CHEMITEL.**

**JUDGE**

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