



REPUBLIC OF KENYA



**In re Estate of Joseph Kimani (Deceased) (Succession Cause
29 of 2017) [2022] KEHC 11652 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11652 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 29 OF 2017
CM KARIUKI, J
MAY 26, 2022**

BETWEEN

KARANJA KIMANI APPLICANT

AND

JACINTA WANGARI GATITU 1ST PETITIONER

ANN WAITHIRA GATITU 2ND PETITIONER

RULING

1. The Petitioners Jacinta Wangari Gatitu (widow) and her sister Ann Waithira Gatitutu lodged petition intestate on 31st May, 2013 over the estate of Joseph Kimani Karanja.
2. They listed the survivors as;
 - i. Jacinta Wangari Gatitu – Wife
 - ii. Karen Wanjiru Kimani – Daughter 15 years
 - iii. Emmah Wanjiru Kimani – Daughter 7 years
 - iv. Caleb Gatitu Kimani – Son 4 years
3. And also assets as follows:
 - i. Laikipia/Nyahururu/7099
 - ii. Nairobi/Block 82/3536
 - iii. Nyahururu/Municipality Block 6/219
 - iv. Kabazi/Munanda Block 2/266 Munanda



4. Subsequently, the matter was gazette and grants issued intestate. This attracted an application by Karanja Kimani father of deceased. Application for revocation of grant. The same was heard and determined by Wendoh J. on 29th March, 2019. She made finding in part:

“In fact, by a letter dated 20th January, 2021, DW1 had agreed to transfer the Plot. 7099 to the objector.

In my considered view, the deceased bought and settled his parents on the said land Plot 7099 and there is no scintilla of evidence that the intended to remove them from the said land. The deceased allowed PW1 to bury his children in the land. I doubt that the deceased intended to repossess the land.

It is not in dispute that the deceased had settled his sister Mary Muthoni, who is disabled and Susan Wangari (PW2) told the court that the deceased settled them on the land before he married DW1.

DW1 admitted that the deceased used to assist his sister and he educated some of their siblings. DW1 also admitted that Mary Muthoni is physically challenged. Having been on the said land for so long and though Susan is a tailor, they are people of low means. They live there with their children. There is no doubt in my mind that the deceased intended to settle his sisters on the said land and never intended to get it back.

In regard to the deceased’s parents and the two sisters, the deceased maintained and provided for them in terms of the land they are settled on.

In the end, I find that DW1 should have disclosed to the court that the deceased had dependents on plot Laikipia/Nyahururu/7099 and Kabazi/Munda Block 2/266.

It is also apparent from the evidence that DW1 did not make a full disclosure of what comprised the deceased’s estate. The deceased was buried on Laikipia/Nyahururu/1706.”

5. She thus revoked the grant but retained 1st Petitioner as Administrator of estate being widow of deceased.
6. Upon filing of application to confirm grants on 3rd July, 2019 Karanja Kimani lodged protest on 28th November, 2019.
7. Same was canvassed before me via submissions after adopting evidence taken by Wendoh J. was agreed.

Protestors’ Submissions:

8. The Protester herein PW1 went ahead and protested the Petitioner’s mode of distribution of the deceased’s estate vide an affidavit of protest dated 27th November, 2019 as required by law.
9. The parties herein went ahead and indicated to court that they wished to rely on the evidence taken by Justice Wenoh in the proceedings seeking annulment and or revocation of grant dated 9th December 2014.
10. Evidence was led by the Protestor PW1 that the deceased was his eldest son. It was his evidence that he was buried in his farm at Igwamiti. He testified that he had other children but pointed out that Joseph Kimani and one Wambui had since passed on. The Protestor testified that the Petitioner or DW1 for that matter it was his testimony that DW1 was the wife of the deceased. It was his evidence that DW1 did not involve him and his family in the filing of a succession cause which position led to revocation of a grant issued to DW1 vide judgment of the court dated 29th March 2019.



11. Evidence was led by the Protestor that he was settled on parcel Laikipia/Nyahururu/7099 by his deceased son over 20 years now. It was his evidence that he was settled therein by his deceased son on his own volition and free will. It was his evidence that he buried his daughter Miriam Wairimu and daughter in law Margaret Wangari on the said land, a fact which is not in dispute or denied by the Petitioners. It was his evidence that he had extensively developed parcel Laikipia/Nyahururu/7099 and even annexed photographs as ‘KK I’ in his sworn affidavit.
12. Evidence was led by the Protestor that he did bury his daughter Miriam Wairimu and grant daughter on parcel Laikipia/Nyahururu/7099 and went ahead to annex photographs of their graves as ‘KK III’. It was his evidence that he has always enjoyed quiet and peaceful occupation of parcel Laikipia/Nyahururu/7099 where he lives with his family to date. Evidence was led by the Protestor to the effect that he went to the chief’s office, Nyahururu Location on 20th November, 2012 with the Petitioner or DW1 where both parties agreed that parcel Laikipia/Nyahururu/7099 would lawfully revert to the Protestor. The agreement between the Protestor and DW4 was annexed as ‘KK II’.
13. Both parties entered into the said agreement voluntarily and without any coercion whatsoever. Evidence was led by the Protestor that he was settled on parcel Laikipia/Nyahururu/7099 by the deceased from Gatongu over 20 years ago. It was his evidence that the deceased never told him to leave the aforesaid land during his lifetime.
14. It was Protestor’s evidence that the deceased had settled his 2 disabled sisters. Mary Muthoni and Susan Wangari on parcel Kabazi/Munanda Block 2/266 (Maombi) during his lifetime. It was his evidence that his 2 disabled daughters have lived in the aforesaid land for over 20 years now. It was his evidence vide his affidavit of protest that the deceased catered for the medical needs of his 2 disabled sisters as can be seen from copies of medical receipts annexed as ‘KK V’. DW1 in her testimony before court confirmed that the deceased indeed catered for the basic needs of his 2 disabled sisters during his lifetime.
15. Evidence was also led by the Protestor that the deceased has settled his son Njoroge on plot No. 126 SSSII where there are 5 rental units. It was his evidence that the deceased had not evicted the brother Njoroge from the said rental units ever or at all particulars whereof are well within the Petitioner’s knowledge.
16. It is clear that the deceased desired that the Protestor takes possession of parcel Laikipia/Nyahururu/7099 and his 2 disabled sisters do take possession of Kabazi/Munanda Block 2/266 (Maombi).
17. The Protestors claim to have been dependents of the deceased hence could only be provided as dependents with Section 26 of *Law of Succession Act* which provides:

“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a Dependent, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependent, order that such reasonable provision as the court thinks fit shall be made for that dependent out of the deceased’s net estate.”
18. As rightfully and correctly observed by Lady Justice Wendoh in her judgment dated 29th March, 2019, page 11 of 2017, it was proved by the Protestors on a balance of probabilities that the deceased had bought and settled his parents on Laikipia/Nyahururu/7099 and his 2 disabled sisters Mary Muthoni



and Susan Wangari on Kabazi/Munanda Block 2/266 (Maombi) during his lifetime and there was no scintilla of evidence that the deceased intended to remove them from the said land.

19. The deceased even went ahead and allowed the Protestor to bury his daughter Margaret Wairimu and sister in law on the said land, a clear demonstration that he never wished or intended to repossess the said land. The deceased also allowed his 2 disabled sisters to take occupation of the Kabazi/Munanda Block 2/266 and have been occupants therein for over 18 years now.
20. It is submitted that the matter herein is a perfect candidate for the court to invoke Section 26 of the *Law of Succession Act* in favour of the Protestors herein going by the evidence adduced by the parties herein in the wider interests of justice.
21. It is now not in dispute that the protestors herein qualify to be classified as dependents of the deceased under Section 29(b) of the Act going by the evidence adduced by parties at the trial of suit in support of our proposition is the case of *Re Estate of Albert Musyoka Mueti (deceased)* [2021] eKLR.

Petitioners' Submissions:

22. The Petitioners have vide a summons for confirmation of grant dated 13th November, 2019 sought for the grant issued to them on the 29th March, 2019 to be confirmed in terms of paragraphs 2 and 3 of the supporting affidavit sworn on the 13th November, 2019 where the entire estate is to be registered to the deceased wife Jacinta Wangari Gatitu to hold in trust of herself and her children Karen Wanjiku Kimani, Emmah Wairimu Kimani and Caleb Gatitu Kimani.
23. Karanja Kimani father of the deceased filed an affidavit of Protestor dated 27th November, 2019, from his protest, the Protestor appears to be proposing for the following properties to be registered to himself, his daughters and son:
 - i. L.R. No. Laikipia/Nyahururu/7099 – to the Protestor Karanja Kimani
 - ii. L.R. No. Kabazi/Munanda Block 2/266 (Maombi) – Mary Muthoni and Susan Wangari (sisters of deceased)
 - iii. Paul Njoroge – one rental house on a plot in Nyahururu plot No. 126.
24. The three aforesaid persons claim to have been put in possession of the respective properties they claim by the deceased prior to his demise. In the judgment delivered on the 29th March, 2019 by Justice Wendoh, the court held as follows:

“ Paul Njoroge, a brother to the deceased is said to be a Kenya Defence Forces Officer and had been allowed to reside in one of the house on plot No. 126 Nyahururu whereas other houses were rented out. It was admitted that it is the deceased who educated the said Paul Njoroge. Njoroge is employed and able to cater for himself. In my considered view, he cannot be deemed to be a dependent of the deceased.”
25. The court went further to find as follows in respect of the said Paul Njoroge:

“ The first responsibility of a married man is his wife and children and others are secondary. That is why the parents, brothers and sisters or any other persons have to prove dependency Paul Njoroge was educated by the deceased and is standing on his own and is not entitled to share in deceased's estate.”



26. No appeal was preferred against the said judgment and that settles the claim lodged by Paul Njoroge on a rental unit on Plot No. 126 Nyahururu Municipality.
27. As for the Protestor and his two daughters who are claiming land in Kabazi, the court had this to say:
- “In regard to the deceased parents and the two sisters, the deceased maintained and provided for them in terms of land they are settled on. Now that the deceased is gone, they cannot expect to continue being dependent on DW1, who has 3 young children to look after and bring up as well as both parents would have. The deceased parents and sisters can now look up to the other three sons who are able to support.”
28. It was alleged by the Protestor that the deceased intended of him and his 2 daughters to inherit the properties they are claiming, the deceased had not transferred the parcels of land to them during his lifetime.
29. The Protestor claims to have settled on L.R. No. Laikipia/Nyahururu/7099 in the year 2002. The deceased died on the 1st November, 2012. Why did the deceased not transfer the land to him for the 10 years he was alive if at all he intended to bequeath the land to the Protestor absolutely?
30. Mary Muthoni and Susan Wangari are said to have occupied L.R. Kabazi/Munanda Block 2/266 about 16 years ago. Why was the land not transferred to them by the deceased during his lifetime?
31. Both parcels of land are registered to the deceased and they form part of his estate which should be distributed as per the law. Section 35 of the *Law of Succession Act* is the applicable law.
32. The law provides that where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to:
- (a) The personal and household effects of the deceased absolutely; and
 - (b) A life interest on the whole residue of the net intestate estate.
33. The Protestor and his daughters are not provided for under Section 35 of the *Law of Succession Act* and the license that they had been given by the deceased to occupy the two parcels of land terminated upon his demise.
34. The 2 parcels of land should be transferred to the deceased’s wife to hold in trust of herself and her children as proposed in the summons for confirmation of grant. The Protestor and his two daughters are capable of fending for themselves as they have been doing for the 10 years that the deceased has been dead.
35. The Petitioner on the other hand has young children to take care of whose future remains unknown and speculative and it would be unfair to allocate a chunk of their father’s estate to the grandfather and aunties which properties stand to be inherited by others after their demise.
36. The deceased had no intentions of permanently transferring the two parcels of land to the Protestor and his daughters. The Petitioner had no powers to enter into an agreement on distribution of parcel No. Laikipia/Nyahururu/7099 before the Area Chief before filing a Succession Cause and any such agreement is null and void and amounts to intermeddling with the estate of a deceased person. Most in laws are fond of coercing widows who are still mourning their beloved husbands to execute agreements on distribution of the estate and this should be abhorred.



37. The Petitioner shall decide on whether she shall extend the same generosity that her deceased husband had extended to the three after the grant has been confirmed and a license should not be declared in their favour in the present succession cause.
38. The court should direct Paul Njoroge to vacate from Plot No. 126 as he continues to occupy the plot even after the court declared that he is not a dependent and he cannot inherit on the 29th March, 2019.
39. The Protestor still owns L.R. No. Kabazi/ Kabazi Block 1/132 (Gatongu) as confirmed through the green card filed in court on the 15th February, 2022 and he thus does not stand to be rendered destitute as claimed.
40. Reliance is made on the *Re Estate of Joshua Orwa Ojodebb (deceased)* [2014] eKLR and *John Gatbee Gitbae v Rose Wanjiru Muturi* [2016] eKLR in support of the submissions.

41. **Issues and determination**

42. The court after going through the record I find the issues are whether the protestor and his two daughters named were dependents of deceased and if so whether they are entitled to part of deceased person estate?
43. The starting point is the Judgement of Wendo J of 29/3/2019 which in part held;

“In regard to the deceased’s parents and the two sisters, the deceased maintained and provided for them in terms of the land they are settled on. In the end, I find that DW1 should have disclosed to the court that the deceased had dependents on plot Laikipia/Nyahururu/7099 and Kabazi/Munda Block 2/266. It is also apparent from the evidence that DW1 did not make a full disclosure of what comprised the deceased’s estate. The deceased was buried on Laikipia/Nyahururu/1706.”

44. The court clearly declared the parents and two sisters “dependents on plot Laikipia/Nyahururu/7099 and Kabazi/Munda Block 2/266”
45. The said declaration which resulted in revocation of grants stands un-impugned in an appeal or review thus has consequences. Thus, the matter has to go for distribution as ruled by Wendo J.

Distribution of the Estate:

46. The deceased died intestate was survived by his wife and children. The Act gives the court discretion to make provision for the dependents. Section 27 *Law of Succession Act* provides:

“In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.”

For the purpose of identification of the dependants, the Act proceeds to define the dependants as follows:

Section 29 of the *Law of Succession Act* provides that;

“For the purposes of this Part, “dependant” means-

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;



- (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

47. The court in exercising discretion to make provision for dependents must do so judicially. This calls for the fair and equitable distribution of the estate. Wendo J specifically pointed out in respect of which properties the protestor and his 2 daughters were dependants. Thus court makes the orders as to the distribution of estate as afore stated namely;

- I. Thus, the protestor and his 2 daughters will get the properties they occupy” namely; plot Laikipia/Nyahururu/7099 and Kabazi/Munda Block 2/266” as ruled by Wendo J.
- II No orders as to costs.

DATED AND SIGNED NYAHURURU THIS 26TH DAY OF MAY, 2022.

.....
CHARLES KARIUKI
JUDGE

