



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**In re Estate of John Ngige Karungu (Deceased) (Succession Cause  
2621 of 2013) [2022] KEHC 9987 (KLR) (Family) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 9987 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**SUCCESSION CAUSE 2621 OF 2013**

**AO MUCHELULE, J**

**JUNE 29, 2022**

**IN THE MATTER OF THE ESTATE OF JOHN NGIGE KARUNGU (DECEASED)**

**BETWEEN**

**MARY WANJIRU KINYANJUI (ADMINISTRATRIX OF THE ESTATE OF TOM  
KAMAU KARUNGU) ..... APPLICANT**

**AND**

**PENINAH INYANJE KARUNGU ..... RESPONDENT**

**RULING**

1. The applicant Mary Wanjiru Kinyanjui (the administratrix of the estate of Tom Kamau Karungu) filed this application dated 20<sup>th</sup> November 2021 against the respondent Peninah Inyanje Karungu seeking the following orders:-
  - “(a) That this matter be certified urgent and be heard and ex-parte within the first instance;
  - b. That pending the hearing and determination of the application this Honourable Court be pleased to place an inhibition on the following parcels of land and any subdivision emanating thereof:-
    - i. Shawa/Gicheha/Kangakinga/Block 4/206;
    - ii. Shawa/Gicheha/Kangakinga/Block 4/205;
    - iii. Shawa/Gicheha/Kangakinga/Block 4/163;
    - iv. Shawa/Gicheha/Kangakinga/Block 4/201;



- v. Shawa/Gicheha/Kangakinga/Block 4/172;
  - vi. Shawa/Gicheha/Kangakinga/Block 4/213;
  - vii. Shawa/Gicheha/Kangakinga/Block 4/202;
  - viii. Shawa/Gicheha/Kangakinga/Block 4/164;
  - ix. Shawa/Gicheha/Kangakinga/Block 4/199;
  - x. Shawa/Gicheha/Kangakinga/Block 4/9;
  - xi. Shawa/Gicheha/Kangakinga/Block 4/178;
  - xii. Shawa/Gicheha/Kangakinga/Block 4/179;
  - xiii. Shawa/Gicheha/Kangakinga/Block 4/184;
  - xiv. Shawa/Gicheha/Kangakinga/Block 4/185;
  - xv. Shawa/Gicheha/Kangakinga/Block 4/186;
  - xvi. Shawa/Gicheha/Kangakinga/Block 4/226;
  - xvii. Shawa/Gicheha/Kangakinga/Block 4/208;
  - xviii. Shawa/Gicheha/Kangakinga/Block 4/207;
  - xix. Shawa/Gicheha/Kangakinga/Block 4/165;
  - xx. Shawa/Gicheha/Kangakinga/Block 4/171;
  - xxi. Shawa/Gicheha/Kangakinga/Block 4/218;
  - xxii. Shawa/Gicheha/Kangakinga/Block 4/214;
  - xxiii. Shawa/Gicheha/Kangakinga/Block 4/177;
  - xxiv. Shawa/Gicheha/Kangakinga/Block 4/166;
  - xxv. Shawa/Gicheha/Kangakinga/Block 4/200; and
  - xxvi. Shawa/Gicheha/Kangakinga/Block 4/221.
- b. That the Administratrix/Executrix be compelled by an order of this court to transmit to the Applicant herein being the administrator of the estate of the late Tom Kamau Karungu their share of the estate as per the certificate of confirmation of grant dated 17<sup>th</sup> February 2015 within 30 days;
  - c. That the orders issued by this Honourable Court rectifying the certificate of grant on 10<sup>th</sup> November 2020 be reviewed and/or set aside and the intestate assets discovered after the confirmation of certificate of grant be equally distributed afresh among the beneficiaries;
  - d. That upon the grant of prayer (d) above, this Honourable Court be pleased to issue an order directing the Lang Registrar to rectify the register by cancelling any registration and/or dealing on the named parcels of land after the death of the deceased and the titles revert to the deceased for purposes of distribution;



- e. That this Honourable Court be pleased to compel the Administratrix/Executrix to render to the court a true and just account of the status of distribution of the Estate as per the certificate of confirmation of grant issued on 17<sup>th</sup> February 2015 within 30 days;
  - f. That in default of the forgoing, the Administratrix/Executrix be removed as an administrator and accounts for all the assets of the estate and make good losses and the court appoints new administrators to complete the administration of the estate; and
  - g. That the Administratrix/Respondent be held personally liable for the cost of this application.”
2. To be able to appreciate what the application seeks, it is important to give the history of this cause. The deceased John Ngige Karungu died testate on 18<sup>th</sup> March 2013. He was survived by his wife (the respondent), a son Tom Kamau Karungu and a daughter Lilian Wambui Karungu. The respondent and her son Tom Kamau Karungu were the executors of his Will which was made on 11<sup>th</sup> August 2009. The respondent and her son petitioned this court for the grant of probate of written Will. The grant was issued to them on 26<sup>th</sup> March 2014. Prior to the confirmation of the grant, Tom Kamau Karungu died on 3<sup>rd</sup> August 2014. He left a widow (the applicant) who petitioned and was appointed the administratrix of his estate. The respondent applied for the confirmation of the grant of probate in respect of this estate. The grant was confirmed in accordance with the Will.
3. In an application dated 17<sup>th</sup> October 2020, the respondent applied to rectify the certificate of confirmation, stating that in his written Will the deceased had not included the following properties a fact she had discovered subsequently:-
- a. Shawa/Gicheha/Kangakinga/Block 4/206;
  - b. Shawa/Gicheha/Kangakinga/Block 4/208;
  - c. Shawa/Gicheha/Kangakinga/Block 4/205;
  - d. Shawa/Gicheha/Kangakinga/Block 4/207;
  - e. Shawa/Gicheha/Kangakinga/Block 4/163;
  - f. Shawa/Gicheha/Kangakinga/Block 4/165;
  - g. Shawa/Gicheha/Kangakinga/Block 4/201;
  - h. Shawa/Gicheha/Kangakinga/Block 4/171;
  - i. Shawa/Gicheha/Kangakinga/Block 4/172;
  - j. Shawa/Gicheha/Kangakinga/Block 4/218;
  - k. Shawa/Gicheha/Kangakinga/Block 4/213;
  - l. Shawa/Gicheha/Kangakinga/Block 4/214;
  - m. Shawa/Gicheha/Kangakinga/Block 4/202;
  - n. Shawa/Gicheha/Kangakinga/Block 4/177;
  - o. Shawa/Gicheha/Kangakinga/Block 4/164;



- p. Shawa/Gicheha/Kangakinga/Block 4/166;
  - q. Shawa/Gicheha/Kangakinga/Block 4/199;
  - r. Shawa/Gicheha/Kangakinga/Block 4/200;
  - s. Shawa/Gicheha/Kangakinga/Block 4/9;
  - t. Shawa/Gicheha/Kangakinga/Block 4/221;
  - u. Shawa/Gicheha/Kangakinga/Block 4/178;
  - v. Shawa/Gicheha/Kangakinga/Block 4/179;
  - w. Shawa/Gicheha/Kangakinga/Block 4/183;
  - x. Shawa/Gicheha/Kangakinga/Block 4/184;
  - y. Shawa/Gicheha/Kangakinga/Block 4/185;
  - z. Shawa/Gicheha/Kangakinga/Block 4/186;
  - aa. Shawa/Gicheha/Kangakinga/Block 4/226;
4. The application was allowed and the certificate rectified to include the properties which went to the respondent.
  5. In the written Will of the deceased, he had in paragraph 3(b) stated as follows:-

“To my wife Mrs. Peninah Inyanje Karungu and my son Mr. Tom Kamau Karungu, I bequeath full ownership of Plot No. L.R. No. Shawa/Gicheha/Kangakinga/Block 4/229 situated in Nakuru District.”

The certificate of confirmation had indicated that the beneficiaries would share in accordance with the Will. The application for rectification received the support of Lilian Wambui Karungu, but the applicant was not consulted or served. It is not in dispute that the deceased had prior to his death subdivided LR No. Shawa/Gicheha/ Kangakinga/Block 4/229 into two portions:- LR No. Shawa/Gicheha/Kangakinga/Block 4/292 and 293. The deceased had entered into an agreement with Perazim Agencies Ltd to sell to them LR No. Shawa/Gicheha/ Kangakinga/Block 4/293 measuring 10 acres for Kshs.13,500,000/=. He obtained a letter of consent dated 1<sup>st</sup> November 2012 from the Land Control Board to transfer the parcel to the buyer. He died before the transfer had been effected.

6. It is apparent that the deceased had a parcel of land LR No. Shawa/Gicheha/ Kangakinga/Block 4/92 which he did not include in the Will. It is evident from the evidence and documents exhibited by the respondent that the deceased had before his death subdivided the parcel into plots which included parcels 206, 208, 205, 207, 163, 165, 201, 171, 172, 218, 213, 214, 202, 177, 164, 166, 199, 200, 9, 221, 178, 179, 183, 185, 186 and 226. In the application for rectification, she stated that the deceased had not included the parcels in the Will, a fact that she had discovered subsequently. She deponed that her then advocate advised that, since the parcels were not subject of the Will and yet they belonged to the deceased, they would be the subject of intestate succession. She, however, was advised by the registry that she would come by rectification to get the property given to her in an amended certificate of confirmation. Of course the registry had no business advising her and, in any case, the advice was an illegal one. The Will did not make reference to LR No. Shawa/Gicheha/Kangakinga/Block 4/92, or its subdivisions, and did indicate that any other property that belonged to the deceased and had not been mentioned in the Will be shared in accordance with the Will. The disclosure by the respondent in her



affidavits in the instant application in regard to these properties was not availed to the court at the time of the rectification of the certificate of confirmation. In any case, it is trite that rectification relates to the correction of an error in the names of persons or places, or the description of persons, things or places, correction of errors regarding the time and place of death and, in case of a limited grant, the purpose for which the grant was made (*In Re Estate of Dishon Ondiek Mayabi (Deceased)* [2020]eKLR).

7. Secondly, the properties in the application for rectification were not the subject by the deceased's Will, and they could therefore not be introduced by the mere rectification of the certificate of confirmation (*In Re Estate of Charles Kibe Karanja (Deceased)* [2015]eKLR). It was fraudulent on the part of the respondent to seek to introduce these properties by rectification into a testate succession. Parcel LR No. Shawa/Gicheha/Kangakinga/Block 4/92 and the subdivisions, including those were the subject of the application for rectification, belonged to intestate succession, and not in this testate succession.
8. The applicant was represented by Mr Mwangi and the respondent by Mr. Gabriel Mwangi. They filed written submissions, and one of the issues for determination was the effect of Clause 3(b) of the Will given the fact that the deceased had before death subdivided LR No. Shawa/Gicheha/Kangakinga/Block 4/229 into LR No. Shawa/Gicheha/Kangakinga/Block 4/292 and 293, and sold 293 to Perazim Agencies Ltd. That had left 292 which measures about 163 acres that the respondent has since registered in her name. According to the applicant, the 163 acres that comprise parcel 292 belonged to the deceased and should be available for equal distribution between her and the respondent, in accordance with Clause 3(b). Making reference to the decision in *In The Matter of the Estate of Salome Mukami Kariuki (Deceased)* [2013]eKLR, it was the submission of counsel for the applicant that where the deceased died testate, it is important to respect his Will and how he intended to have his assets distributed after his demise. In such circumstances, the court has to try as much as possible to construe the intentions of the testator so long as it can be construed without any ambiguity or absurdity. In this case, he submitted, the intention of the testator can clearly be construed that he intended that the entire of LR No. Shawa/Gicheha/ Kangakinga/Block 4/229 be distributed to the respondent and the late husband of the applicant. Now that he sold part of it, the applicant asked that the balance (that is LR No. Shawa/Gicheha/ Kangakinga/Block 4/292) be shared equally between the applicant's late husband and the respondent.
9. According to the respondent's counsel, the only bequest to the applicant's late husband was contained in Clause 3(b) of the Will. It was a joint bequest to him and to the respondent, and therefore his entitlement was half of the parcel. It is common ground that LR No. Shawa/Gicheha/Kangakinga/Block 4/229 was subdivided into 292 and 293, and on 27<sup>th</sup> August 2012 the old title was closed and new titles issued. This was done by the deceased before his death. He died on 18<sup>th</sup> March 2013. Counsel raised the question: what happens when a property is bequeathed in a Will and, before the testator's death, he subdivides, the title is closed, and he sells part of the subdivision? Counsel submitted that the case did not call for the interpretation of the Will, but it was about what legal effect to give to the facts. According to him, the principle of ademption set it. Counsel referred to section 23 of the *Law of Succession Act* (Cap. 160) that provides that –

“Testamentary gifts and dispositions shall fail by way of lapse or ademption in the circumstances and manner and to the extent provided by the Second Schedule.”

Paragraph 8(1) and (2) of the Second Schedule provides as follows:-

- “(1) If property which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the gift cannot take effect by reason of the subject thereof having



been withdrawn from the operation of the will; and where a gift fails on this account it is said to be “adeemed”.

- (2) There must be a substantial change in the subject of a specific legacy to cause ademption and a merely nominal change shall not have that effect.”

Counsel cited the decision in *Eunice Mumbi –v- John Kamande Kimani & Another* [2012]eKLR in which Justice Lenaola (as he then was) held that where property bequeathed in a Will was subsequently subdivided by the testator and new registers and titles issued after the closure of the old register, the old register (title) ceases to exist, and the subdivisions are deemed to have attracted the doctrine of ademption, and so the Will became invalidated and the bequest could not be sustained.

10. I have anxiously considered the facts of this cause, and the oral submissions by counsel. The deceased’s Will was executed on 11<sup>th</sup> August 2009. He bequeathed LR No. Shawa/Gicheha/Kangakinga/ Block 4/229 to the respondent and the applicant’s late husband. On 28<sup>th</sup> June 2011 the deceased sold about 10 acres of the parcel to Perazim Agencies Ltd for Kshs.13,500,000/=. The applicant’s husband was involved in the transaction and a substantial part of the purchase price was paid to the applicant’s late husband. The parcel (229) was subdivided into 292 and 293. 293 was the one being sold. On 1<sup>st</sup> November 2012 Land Control Board consent to transfer 293 to Perazim Agencies Ltd was obtained. It meant that, following the sale of a portion of 229 and the subsequent sub-division of the parcel to allow for the transfer, the parcel in Clause 3(b) of the Will no longer existed. What existed was a portion of it, that is 292. Although the deceased in the Will bequeathed 229 to the respondent and the applicant’s late husband, he subsequently sold a portion of it, leaving the substantial part of it which comprised 292. Parcel 292 was left in his name. There was no evidence led to show that, despite the sale, he changed his mind about bequeathing the balance (292) to the two. I agree with the applicant’s counsel’s submission that the deceased’s intention was to have the remaining 163 acres comprised in 292 go to the respondent and the applicant’s late husband. In reaching this decision, I have considered that there was no substantial change to the intention of the deceased, and that the specific legacy was left substantially in place and is therefore capable of being sustained. I do not find that the bequest failed by way of lapse or ademption. It follows that, in accordance with Clause No. 3(b) of the Will, the 163 acres comprised in parcel LR No. Shawa/Gicheha/Kangakinga/Block 4/292 shall be shared equally between the respondent and the estate of the applicant’s late husband Tom Kamau Karungu. I direct that the certificate of confirmation that was rectified to the respondent on 17<sup>th</sup> February 2015 shall be amended to reflect this position. The Land Registrar is directed to cause the respondent and the estate of the late Tom Kamau Karungu to equally share LR No. Shawa/Gicheha/Kangakinga/Block 4/292.
11. In view of what I indicated in paragraphs 6 and 7 of this ruling, the rectification of the certificate of confirmation and the resultant certificate that was issued are hereby reviewed and set aside. Any titles that followed the rectification are nullified and cancelled. I reiterate that LR No. Shawa/Gicheha/Kangakinga/Block 4/92, the subdivisions 206, 208, 205, 207, 163, 165, 201, 171, 172, 218, 213, 214, 202, 177, 164, 166, 199, 200, 9, 221, 178, 179, 183, 185, 186 and 226, and any other subdivisions from the main title (92), shall not form part of this testate succession. It will be in the intestate succession that the respondent shall account to the applicant in relation to this parcel and its subdivisions.
12. In those terms, the applicant’s application dated 20<sup>th</sup> November 2021 is allowed. Costs shall be paid by the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JUNE 2022.**

**A.O. MUCHELULE**

**JUDGE**

