



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Eliud Wanjohi Wairagu (Deceased) (Succession Cause
283 of 2013) [2022] KEHC 12674 (KLR) (29 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
SUCCESSION CAUSE 283 OF 2013
K KIMONDO, J
AUGUST 29, 2022**

BETWEEN

JANE WANGARI WANJOHI 1ST PETITIONER

JAMES WAIRAGU WANJOHI 2ND PETITIONER

AND

JAMES WAITHAKA WANJOHI 1ST PROTESTOR

SAMUEL WAIRAGU WANJOHI 2ND PROTESTOR

AND

PETER MWANGI KABUI INTERESTED PARTY

JUDGMENT

1. Eliud Wanjohi Wairagu (hereafter the deceased) died intestate on December 5, 2005 at Kanyenyaini, Murang'a County.
2. He left behind over a dozen pieces of land or plots; shares in listed and unlisted companies or Saccos or investment groups; and, monies in bank accounts particularized in various affidavits by the petitioners and protestors.
3. The deceased was polygamous and was married to Grace Njeri and Gladys Gachambi. The two widows died in the course of this litigation. There are 10 children from the 1st house and 12 from the 2nd house.
4. A dispute arose over the distribution of his estate. Although a tome of materials has been placed before the court, the issues can be narrowed down to two: Firstly, as between the children of the deceased from the two houses, they have agreed to share all properties in the ratio of 10:12save for one piece of land known as Loc 9/ Kanyenyaini/2XX.



5. On that score, the petitioners claim that the land was purchased by the deceased in 1952 before the marriage to Gladys Gachambi (the 2nd wife). They thus opine that half of it should devolve in the first instance to the 1st house and the remainder be divided equally between the children from both houses. That proposal is unacceptable to the 2nd house.
6. The second issue relates to a claim by Peter Mwangi Kabui. He is not a child of the deceased. By an amended summons dated January 13, 2020, he claims that the deceased gifted him 1.24 acres out of land parcel number Loc 9/ Kiruri/7XX.
7. The petitioners and protestors are united in their opposition to that claim. In a nutshell they state that the interested party owned adjacent land whose hilly terrain was too steep to build on. He requested the deceased to give him “a place to build” on Loc9/Kiruri/7XX. The children’s case is that the portion allocated by the deceased was only 0.1 acres; and, that it could not possibly extend to the expansive area now claimed by the interested party
8. On February 3, 2020, I directed that *viva voce* evidence be taken.
9. The interested party testified as PW1 and called two other witnesses. He relied largely on his statement made on June 16, 2020 as well as two depositions sworn on January 13, 2020 and May 20, 2021.
10. In a synopsis, he said that the deceased, who was his neighbor and friend, gave him 1.24 acres out of Loc 9/Kiruri/7XX to put up a residence. That was in the year 1980. The agreement was not in writing. Like I said, the interested party owned an adjacent 4-acre piece of land whose terrain was not conducive for construction.
11. When pressed by counsel for the protestors, he said that he “assumed [the deceased] sympathized with [him]...that is why he gave me a building site”. He conceded that under ordinary circumstances, he would have required a smaller area to build. But in this case, there is a valley which explains the need for the 1.24 acres.
12. He testified that he built a permanent house, servant’s quarters and other buildings depicted in the valuation report dated January 27, 2020, fenced the area and planted tea bushes and trees. The property and developments on the portion he claims is currently valued at Kshs 26,300,000 as per the valuation report (exhibit 3) produced by PW3.
13. In cross-examination, he said that the area occupied by the houses and compound is larger than the one under tea or trees. Asked whether he would be willing to surrender the area under tea or trees, he declined positing that due to the valley below, the trees are a bulwark against soil erosion and to avoid compromising the foundation of the buildings. He was also not willing to compensate the children of the deceased with any alternative land.
14. He testified that he constructed the residence during the lifetime of the deceased and that neither he (deceased) nor his widows or children raised an objection. The interested party sought joinder in these proceedings when he learnt that the administrators had left him out in their summons for confirmation of grant. Indeed, the entire land, which measures about 12 acres had been omitted from the schedule of assets.
15. The witness conceded under cross-examination by counsel for the petitioners that the gift was not made in writing; and, that the “deceased’s intention was to give him a firm place to build”. He said further that no transfer of the portion was made but the deceased had promised to do so when distributing the land to his children. The witness found the proposal to give him 0.1 acres as unreasonable in the circumstances and having occupied the disputed portion since 1980.



16. The interested party said that none of the children of the deceased live on Loc 9/Kiruri/7XX. He denied that he was only supposed to take care of the land or that he was taking advantage of the deceased or his children. In the end, his claim is for the whole area bordered in red in the survey report dated November 5, 2019 by Real Geosurveys attached to his affidavit sworn on January 13, 2020. He said the area bordered in green is where his house, servant's quarters, other structures and parking are situated.
17. PW2 was Zachary Kanuno, a licensed surveyor. He produced the surveyors report dated May 13, 2021 (exhibit 1). It concludes that "the area comprising the homestead is enclosed by the planted boundary and hedge as shown to me is approximately 0.5018 Ha or 1.24 acres".
18. When cross-examined, he stated that he was instructed by PW1 who told him that he owned the disputed land. He did not take measurements for the area occupied by the houses but he conceded it was "larger than the one covered by the trees and tea bushes". He said the area around the houses "has its own fence" but he was not instructed to measure it.
19. PW3 was Peter Gitau Ngugi, a registered valuer trading as Upcountry Valuers. As I mentioned earlier, he produced a valuation dated January 27, 2020 (exhibit 3). In his opinion, the land claimed by PW1 measuring 1.24 acres together with the buildings and developments has an open market value of Kshs 26,300,000.
20. The petitioners' first witness was Jane Wangari Wanjohi (DW1). She made extensive reference to her statement dated May 31, 2021. She is a daughter of the deceased from the 1st house. Regarding the claim by the interested party, she stated that he at first requested the deceased for an "access" to his hilly land. The request was made by the wife of PW1. I should point out that that version of events does not appear in her earlier depositions or witness statement.
21. The deceased eventually gave PW1 a place to build. According to the witness, the portion was 0.1 acres. She was of the view that the claim for 1.24 acres is an unfair encroachment considering that PW1 is not a son; and, the deceased "has 22 children who would end up with 0.5 acres each".
22. Regarding the dispute over Loc 9/Kanyenyaini/2XX, the witness said that subsequent to the filing of the petition, they found evidence that the property was purchased in 1952 through substantial contribution by her mother, Grace Njeri, and well before the deceased married Gladys Gachambi as a 2nd wife.
23. The evidence she refers to is a handwritten note—book by the deceased, The Roxley Manuscript Book annexed as exhibit W1 in a joint affidavit sworn on October 26, 2020. There are entries at page 134 for payments or other consideration for purchase of "Gathogo's land in Kariaini" between November 29, 1952 and March 16, 1955.
24. DW1 thus opined that the 1st house should get ½ of Loc 9/Kanyenyaini/2XX while the remainder would devolve in the agreed ratio of 10:12. In short, the 1st household would get 14.5 acres while the 2nd house would inherit 5.5 acres.
25. But on cross-examination, she conceded that at page 11 of the booklet, the two widows were present at the execution another sale agreement on September 15, 1968. She also agreed that her affidavit was sworn only after the death of her stepmother; and, that the booklet did not specifically state that the 1st wife contributed to the purchase of the land.
26. The witness also said that the deceased had given land to "the two wives in their names. All the children are equal and that is how we have always utilized our land".



27. The petitioners' 2nd witness was Muchiri Gathogo (DW2). He is a brother to Mwangi Gathogo. The witness said that his brother sold Loc 9/Kanyenyaini/2XX to the deceased before he (the deceased) married his 2nd wife, Gachambi. But under cross examination, he conceded that his Identity Card shows he was born in 1948 which meant he was only 4 years at the time of the sale. But he insisted that although he never went to school, he was a big boy in 1952 and already herding goats.
28. The protestor's sole witness was John Waithaka Wanjohi (DW3). He is a son of the deceased from the 2nd house. He relied on the statement made on July 23, 2021 and a bundle of documents filed on July 28, 2022 (protestor's exhibit 1). The bundle includes some rough sketches showing the proposed location of the shares of each beneficiary or house. According to him, it ensures that heirs are not displaced or their lives disrupted.
29. I should point out however that a sketch plan relating to Loc 9/Kiruri/7XX was objected to by Mr Mwangi Chege, learned counsel for the interested party, and was only marked for identification.
30. DW3 confirmed that both houses agreed on the ratio of 10:12; and, that no child "would be uprooted from where they have developed". There was also consensus that the estate devolves to the administrators representing each house who would in turn distribute it to the children from the respective houses.
31. Regarding the claim by the interested party, he was emphatic that the deceased gave the interested party only 0.1 acres to build a house but has fenced off a larger area. In cross examination, he conceded that he knew back in 2007 of the encroachment but he never lodged a suit for eviction. He testified that there were proceedings before the chief to resolve the matter but the interested party opted to sue.
32. The witness said that failure to include the share to the interested party was not deliberate and the calculations show that the 0.1 acres was factored into. Regarding the distribution of Loc 9/Kanyenyaini/2XX, he said that the petitioners only raised the dispute after the death of his mother; and, that the 1st house is not entitled to a larger share.
33. Learned counsel for the interested party lodged submissions on May 19, 2022 and a rejoinder on July 26, 2022. The petitioners filed their joint submissions on June 7, 2022 while the protestors filed theirs on July 20, 2022.
34. On July 28, 2022, learned counsel for all the parties informed me that they were relying entirely on those submissions.
35. I take the following view of the matter. From the evidence and submissions; and, like I pointed out earlier, the following issues arise for determination-
 - i. Whether the interested party is entitled to 1.24 acres out of Loc 9/Kiruri/7XX. Paraphrased, whether the deceased gifted him 1.24 acres or a smaller area out of land parcel number Loc 9/Kiruri/7XX.
 - ii. Whether the petitioners (or children from the 1st house of deceased) are entitled to a bigger share of the land known as Loc 9/Kanyenyaini/2XX than the children from the 2nd house. Paraphrased, whether all properties should be shared in the ratio of 10:12 save for Loc 9/Kanyenyaini/2XX.
 - iii. Who should bear the costs of the cause?
36. I will commence with the first issue. It is not disputed that the interested party has been in occupation of a portion of the land parcel number Loc 9/Kiruri/7XX from 1980 or thereabouts. He has built a



permanent house, servant's quarters and other buildings depicted in the valuation report dated January 27, 2020.

37. The built up area and home compound is surrounded by a live hedge or fence. He has also fenced an adjacent area and planted tea bushes and trees. From the surveyor's report produced by PW2, the total occupied area is 1.24 acres. The property and developments is currently valued at Kshs 26,300,000 as per the valuation report (exhibit 3) produced by PW3.
38. I find from the evidence that the interested party was neither a son of the deceased nor was any consideration paid. The plain fact is that he owned, and still does, a separate or adjacent property measuring about 4 acres. But it was hilly and its topography made it either inaccessible or not conducive to put up a residence.
39. Since he and the deceased were neighbours and friends, he requested and the deceased agreed, to give him a place to build on Loc 9/ Kiruri/7XX. That phrase was used repeatedly at the trial. The interested party conceded under cross-examination by learned counsel for the petitioners that the gift was not made in writing; and, that the "deceased's intention was to give him a firm place to build".
40. Under further cross-examination by Mr Muchiri Wa Gathoni, learned counsel for the protestors, he said that he "assumed [the deceased] sympathized with [him]...that is why he gave me a building site". No transfer was made. According to the interested party, the deceased had promised to do so when distributing the land to his children.
41. The gift *inter vivos* thus remained partially complete but there was no doubt about the deceased's intentions. The decision cited by counsel for the petitioner, Mr Nzavi, *in Re Estate of Gedion Mantbi Nzioka*, High Court, Machakos, Cause 122 of 2010 [2015] eKLR can thus be distinguished.
42. That said, I entertain no doubt from the evidence that the deceased gave the interested party only a place to build; and, that the latter put up his residence there during the lifetime of the deceased. I have kept in mind that the interested party had inaccessible, hilly or steep land across the valley and only requested the deceased for a place to build on part of Loc 9/Kiruri/7XX.
43. I readily find that a place to build cannot in the circumstances or stretch of any imagination extend beyond the built up area to encompass the area where he has planted trees or tea bushes. The area gifted may not necessarily have been 1.0 acres as claimed by the petitioners and protestors, but I find that it would be unjust, selfish and inequitable to spread it to 1.24 acres as now claimed by the interested party.
44. I say so noting that the deceased has 22 children; and, who may each end up with a smaller share than an outsider that their father tried to help. Secondly, I have stated that the interested party has sizeable land across the valley. Thirdly, it is self-serving to say that he needs the additional area covered by tea bushes or trees as a bulwark against soil erosion. But even if that be the case, it was not lost on me that at the trial, the interested party expressed unwillingness to compensate the children of the deceased with alternative land.
45. From the valuation and survey reports produced by PW2 and PW3, the built up area and compound of the interested party is bordered by a well-trimmed live hedge or fence. Doing the best that I can; and, to avoid interfering with the houses put up by the interested party; and, further based on the evidence, I hold that the interested party is only entitled to the area bordered in green in the survey report dated November 5, 2019 by Real Geosurveys, Registered Surveyors and Planners. It is attached to the affidavit by the interested party sworn on January 13, 2020 as exhibit PM2. As I stated earlier, the interested party relied on that affidavit at the trial and was cross-examined on it.



46. For the avoidance of doubt, the original sketch-plan or map is attached to this judgment marked “A” and bears the signature and stamp of the surveyor. The area I have demarcated covers his main house, an adjacent farm house, gazebo, servant’s quarters, toilet block and parking. There was sufficient evidence from PW1, PW2 and PW3 that the area occupied by the houses and compound may be larger than the one under tea or trees.
47. The administrators shall have the area bordered in green in the abovementioned report resurveyed, excised from Loc 9/Kiruri/7XX and transferred to the interested party. The cost of the re-survey shall be borne equally by all the parties. The remainder of Loc 9/Kiruri/7XX shall devolve to the two houses of the deceased in the ratio of 10:12 as agreed by the petitioners and protestors.
48. I will now turn to the second issue. It is common ground that the deceased was polygamous. He died intestate. I thus find that section 40 of the [Law of Succession Act](#) is generally applicable in this case. It provides-
- 40 (1) Where an intestate has married more than once under any system of law permitting polygamy his personal and household effects and the residue of the net intestate shall in the first instance be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
- (2) the distribution of the personal and household effects and the residue of the net intestate within each house shall be in accordance with the rules set out in section 35 to 38.
49. Section 40 does not however take away the discretion of the court to distribute the estate fairly. By dint of sections 26, 27, 28, 29 and 35 of the [Act](#), as read together with Rule 73 of the [Probate and Administration Rules](#), the court has been bestowed with full discretion to provide for dependents or beneficiaries.
50. That point was well explained by Omollo J A in [Rono v Rono & another](#) [2008] 1 KLR (G&F), [2005] 1 KLR 538 at 553. See also [Re Estate of Morgan Njoroge Gakuo \(Deceased\)](#), Nairobi High Court Cause No 591 of 2007 [2016] eKLR; [Re Estate of Manasseh Mwea Kariuki \(Deceased\)](#), Murang’a High Court Cause No. 57 of 2014 [2021] eKLR.
51. Like I mentioned earlier, the two widows of the deceased died in the course of this litigation. The live issue now is how their children should share the estate. Happily, the heirs have all agreed to share all other properties in the ratio of 10:12 representing the number of children in each house.
52. However, the petitioners (or children from the 1st house of deceased) claim a bigger share of the land known as Loc9/Kanyenyaini/2XX. They contend that the land was purchased by the deceased in 1952 before the marriage to Gladys Gachambi (the 2nd wife). They thus opine that half of it should devolve in the first instance to the 1st house and the remainder be divided equally between the children from both houses.
53. That claim must fail for three main reasons. Firstly, I have examined the handwritten note—book by the deceased, The Roxley Manuscript Book, annexed as exhibit W1 in the joint affidavit sworn on October 26, 2020. The entries at page 134 reflect payments or other consideration paid by the deceased for “Gathogo’s land in Kariaini” between November 29, 1952 and March 16, 1955. I find that those entries are inconclusive and do not prove that the 1st widow, Grace Njeri, paid the consideration or a substantial part of it as claimed by the petitioners.



54. Secondly, the petitioners' witness, Gathogo (DW2) did not throw better light on the matter. Going by his Identity Card, he was only aged 4 years in 1952 and did not participate in any manner to the transaction.
55. A cardinal precept of the law of evidence is that he who alleges must prove. See sections 107 and 108 of the *Evidence Act*. In a synopsis, there is a dearth of evidence to demonstrate that the sale was concluded prior to 1956 when the 2nd wife was married; or, that the 1st wife made substantial or other payments for the land as alleged by the petitioners.
56. Thirdly, the two wives are also deceased. During the lifetime of the 1st widow, she never claimed a trust over ½ share of Loc 9/Kanyenyaini/2XX. In fact, the petitioners only raised this issue after the death of their step-mother. This case can thus be distinguished from the Court of Appeal decision in *Esther Wanjiru Gitbatu v Mary Wanjiru Gitbatu*, Court of Appeal, Eldoret, Civil Appeal 50 of 2016 [2019] eKLR cited by learned counsel for the petitioners.
57. In the High Court decision that led to the above appeal, the 1st wife had lodged in the succession cause an Originating Summons under Order XXXVI of the Civil Procedure Rules (now repealed). I held that she had proved a trust, having made substantial contribution to the acquisition of certain properties before the deceased married the 2nd wife and which entitled her to half of the assets acquired earlier. See *Esther Wanjiru Gitbatu v Mary Wanjiru Gitbatu*, Eldoret High Court P&A 244 of 2002 [2016] eKLR.
58. From the analysis of the evidence and the law, I readily find that no such trust has been proved in the instant case. It follows as a corollary that the petitioners (or children from the 1st house of deceased) are not entitled to a larger share of the land known as Loc 9/Kanyenyaini/2XX than the children from the 2nd house.
59. My final orders are thus as follows-
- i. That the interested party, Peter Mwangi Kabui, is only entitled to the portion of Loc 9/ Kiruri/7XX on which stands his permanent one-storey house, gazebo, an adjacent permanent bungalow or farmhouse, servant's quarters, toilet block and parking all encircled by a live hedge or fence.
 - ii. That the area shall not exceed the portion bordered in green in the survey report dated November 5, 2019 by Real Geosurveys, Registered Surveyors & Planners, attached to the affidavit by the interested party sworn on January 13, 2020. A copy of the sketch map is attached to this judgment marked "A".
 - iii. That for the avoidance of doubt, the interested party is not entitled to the other fenced land beyond the area in orders (i) and (ii) above and where he has planted some tea bushes and trees.
 - iv. That the administrators shall have the area in orders (i) and (ii) above surveyed and excised from Loc 9/Kiruri/7XX and transferred to the interested party. The cost of the survey shall be borne equally by all the parties.
 - v. That the remainder of Loc /Kiruri/7XX shall devolve to the children of the two houses of the deceased in the ratio of 10:12 as agreed by the petitioners and protestors.
 - vi. That the children from the 1st house of deceased are not entitled to a bigger share of the land known as Loc 9/ Kanyenyaini/2XX than the children from the 2nd house. Accordingly, that parcel shall be distributed to the children from both houses in the ratio of 10:12 as proposed by the protestors.



- vii. That all the other parcels of land and properties of the deceased shall be shared in the agreed ratio of 10:12 and as set out in paragraph 7 (b), (d) to (z) and (aa) to (gg) of the joint affidavit of Jane Wangari Wanjohi and James Wairagu Wanjohi sworn on November 4, 2019 and filed on November 11, 2019 as Reply (Answer) to Affidavit of Protest.
- viii. That the subdivisions of the various parcels of land may be guided by the sketches filed on July 28, 2022 and produced in court by the protestor (DW3) except for the properties in orders (i), (ii) and (v) above.
- ix. That taking into account the two households and the large number of 22 children, the subdivisions shall to the greatest extent possible ensure that none of the children is uprooted or relocated from the areas they have developed. However, any developments made by any heir in contravention of the status quo order issued by the court on February 3, 2020 may not necessarily be accommodated.
60. The rectified grant issued by the Court jointly to Jane Wangari Wanjohi, James Wairagu Wanjohi, Samuel Wairagu Wanjohi and John Waithaka Wanjohi shall be confirmed in terms of this judgment.
61. Costs normally follow the event and are at the discretion of the court. I have taken into account that this is a succession matter and the disputants are family members inter-se; and, also with a neighbour over a gift by the deceased. In the interests of justice, each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 29TH DAY OF AUGUST 2022.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Ms. Gachango holding brief for Mr. Muchiri for the protestors instructed by Muchiri Wa Gathoni & Company Advocates.

Mr. Njue holding brief for Mr. Mwangi for the interested party instructed by Mwangi Chege & Company Advocates.

Ms. Susan Waiganjo, Court Assistant.

The Following Is The Sketch-plan Or Map Marked "A" referred to in Paragraph 46 and Order (ii) of my judgment dated 29th August 2022 and extracted from the survey report dated 5th November 2019 signed and stamped by Real Geosurveys, Registered Surveyors and Planners attached to the affidavit by the Interested Party sworn on 13th January 2020.

KANYI KIMONDO

JUDGE

29/08/2022.

