



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**SUCCESSION CAUSE NO.327 OF 2012**

**IN THE MATTER OF ESTATE OF THE LOICE WANGARI KAMAU (DECEASED)**

**MARY WANJIKU MWANGI.....PROTESTOR/APPLICANT**

**VERSUS**

**NYAMBURA WANGAI WANJOHI.....RESPONDENT**

**JUDGEMENT**

**BRIEF BACKGROUND**

1. The deceased **Loice Wangari Kamau** died on 31<sup>st</sup> January 1994, letters of administration intestate were filed by **Nyambura Wangai** on 13<sup>th</sup> November 2015. She was granted letters of administration intestate on 15<sup>th</sup> February 2016. The protestor **Mary Wanjiku** sought revocation of the grant through summons dated 30<sup>th</sup> May 2016.
2. On 28<sup>th</sup> September 2016, by consent of the parties, the grant issued on 15<sup>th</sup> December, 2016 was revoked and a fresh grant was issued jointly to **Mary Wanjiku Mwangi** and **Nyambura Wangai Wanjohi**.
3. Parties agreed to take out summon for confirmation of the grant.
4. In application confirmation of grant filed by **Nyambura Wangai** on 7<sup>th</sup> November 2016, she proposed an equal distribution of the estate of the deceased (Bahati/ Kabatini Block1/358).
5. In response, **Mary Wanjiku Mwangi** opposed the mode of distribution proposed by the applicant by filing a replying affidavit on 16<sup>th</sup> February 2017. She averred that the requisite 6 months period had not lapsed to warrant the filing of the application for confirmation of the grant.
6. The objector further averred that the property Bahati/Kabatini Block 1/358 was solely bought by her husband and together they built a matrimonial home in the year 1978 and embarked on farming and utilization of the property to the exclusion of **Nyambura Wangai**.
7. Parties adduced *viva voce* evidence.

**PROTESTOR'S CASE.**

8. PW1 **Mary Wanjiku Mwangi** testified that the deceased **Loice Wangari Kamau** was her mother-in-law and respondent **Nyambura Wangai Wanjohi** her sister-in-law. She testified that her husband **Mwangi Kamau** died in 1978 before the deceased herein Loice Wangari Kamau. She said the deceased had 2 sons and Nyambura Wangai Wanjohi but her surviving child is Nyambura.
9. She stated she cannot share the property with Nyambura as she is married and staying in her matrimonial home and she should not get a share of my husband's share. She stated that from the chief's letters, the owner of the land LR Bahati/Kabatini Block 1/1358 is Mwangi Kamau her husband.
10. She testified that she was not present when title deeds were released. Mwangi was removed and Loise Wangari (deceased) name was inserted. She said she lives in the land with her children and both the deceased and Nyambura have not lived in the land. She has documents for the purchase of land and the title is with Nyambura. She showed this court a record to show that her husband's name Mwangi was canceled and **Loice Wangare** written marked as PMFI2.
11. The protestor testified that the deceased Loise was living in Pangani Nakuru and after the death of her husband the land had not been

subdivided. She said her husband was buried in a cemetery while Loise was buried in the suit property.

12. On cross-examination by counsel for Nyambura, the objector stated that she was married in 1970 and she had one child when she got married who was 3 years old. She said she now has 5 children namely: **Milkah Wangari, John Kamau Mwangi, Moses Moshono Mwangi, Stanley Kuria, and Sammy Gathege.**

13. She said she only sired one child with the deceased and further stated that when she got married her husband had already acquired the property and the house was built in 1970 by her husband. She said the deceased Loice lived in Pangani though she previously lived in Crater before moving to Pangani. She said the Pangani plot was allocated to the deceased Loice by the municipal council.

14. She testified that the deceased Loice took possession of the suit property in 1993 and that she died in 1994 and was buried in the suit property and her brother-in-law who died in 2004 was also buried in the land. She said she did not know why the cancellation in the land register was done. She said the copy of the title show it was released on 18<sup>th</sup> October 1984 when she lived in Kaptembwa Nakuru West. She confirmed that she went back to the suit land in the year 2002 and from 1998 she did not live in the land and during that time Nyambura utilized the land by farming. She said she is opposed to Nyambura being given ½ share of land.

15. PW2 **Washington Wangombe** testified that he knew the deceased **Loice Wangare Kamau** and confirmed that **John Mwangi Kamau** was her son. He testified that he purchased land with John Mwangi Kamau that his parcel is No.358 while that of Kamau is 358. He said the land was changed to the late Loice's name because Mwangi's wife was not around. He stated that the land belongs to John Mwangi Kamau.

16. On cross-examination by Mr. Chege, he said he did not know when the land was subdivided and he could not tell for how long the protestor was away from her matrimonial home. He said the chief had determined that the property be given to the protestor.

17. He stated that at Ndevo Company people were given land and a small plot to build and the deceased Loice built a house in the 1970s and that is where PW1 lives now.

18. PW3 **John Kiraho Wariti** who is the acting chief of Kiamaina Location was summoned to produce Ndevo farm register in court as the custodian of the register testified that he found the register in the office at the time he was employed. He testified it shows the owner of parcel No. 358 has 2 names Mwangi Kamau which is canceled and indicated deceased and the second is Loise Wangari Kamau. He said the land is in Kiamaina Location is Bahati/Kabatini Block 1/358 and he did not know why the name Mwangi was canceled in the file. He confirmed that parties did not sign and there is also no date showing when the cancelation took place. He said the register has a stamp and no seal as the chief has no seal.

#### **PETITIONER'S CASE**

19. DW1 **Nyambura Wangai Wanjohi** testified that the deceased Loice Wangari was her mother and that she had 4 children of whom 3 have died and she is the only one surviving. She confirmed Mary Wanjiku the protestor is her elder brother's wife but no dowry was paid to her parents.

20. She testified that the deceased gave the late Mwangi money to purchase the property but instead of writing the name of their mother Loice, he wrote his name and when their mother learnt about it, they went to Ndevo Ltd and had Mwangi's name canceled. She said her mother lived alone in Bahati/Kabatini Block 1/358 and when she fell sick, she took her to where she is married but when she died, she was buried in her land.

21. She testified that the plot in Pangani was sold by her mother the late Loice when she was alive and money was used for treatment; that the title deed of land No.358 is in the name of Loise Wangari. She said the deceased wrote a will bequeathing her the property and she was to give a share to Mwangi's son Kamau(protestor's son) if he ever returned.

22. On cross-examination by **Ms. Kinuthia** for the protestor, she stated that the protestor is currently utilizing the suit land and she has no document to show who bought the plot. She said she build the house for the deceased and the deceased died in her home and she was buried in land No. 358.

#### **PROTESTOR'S SUBMISSION**

23. The protestor submitted that the deceased Loice was placed to inherit the property of her son John Mwangi after his demise as the protestor was away. She submitted that the evidence was corroborated by PW2, and thus the protestor and her children are entitled to inherit the property of her husband. She cited the case of **re estate of Julius Ndubi Javan (deceased)(2018) eKLR where the court held**

**“the primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that it is very reason why rule 41(30) the probate and administration rules was enacted so that claims which are prima facie valid should be determined before confirmation.”**

24. The protestor submitted that the changes were done after the demise of John Mwangi who was the proprietor of the property in question and Nyambura Wangai failed to prove how the property was acquired by the deceased; that all she had was a copy of the title in the deceased name. she urged this court to dismiss the evidence of the petitioner where she stated that the deceased Loice and John Mwangi went to Ndeffo company to change the title as the same is inadmissible as she was not present and it is tantamount to hearsay.

25. She further submitted that the petitioner is entitled to the Pangani plot which was sold by the deceased before her demise but is not entitled to the Bahati /Kabatini block 1/358 plot.

26. She submitted that the evidence of the Chief who is the custodian of the register is sufficient evidence to show that the register was interfered with after the demise of John Mwangi. she urged this court to allow the copy of the register as sufficient proof as per **section 80(1) of the evidence act.**

27. The court was urged to find that the protestor has proved her case to the required standard and find that the property belongs to John Mwangi and should be inherited by the protestor and her children.

### **PETITIONER'S SUBMISSION**

28. The petitioner submitted that the protestor failed to raise her claim on ownership of the property before the demise of the deceased. She submitted that the petitioner single-handedly took care of the deceased without the assistance of the protestor and it is only prudent the petitioner inherits the property. Further that the protestor failed to inform the court of the steps taken in rectifying the anomaly of the register by suing the relevant persons and the deceased. she Cited **Section 24(a) of the Land Registration Act**

**“subject to this act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”**

29. The petitioner submitted that **Section 25 and 26** vests absolute and indefeasible title to the owner of the property; that Section 26 protects the interests of the registered owner who has an indefeasible title and submitted that the protestor is required to prove the following:-

I. That title to Bahati/Kabatini Block 1/358 was obtained, procured, and /or transferred to the deceased by fraud

II. That the deceased was part of the fraud

30. In support of the above, the petitioner cited the case of **Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others (2015) eKLR** where the court held as follows:-

**“ it will be seen from the above that the title is protected, but the protection is removed and the title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party, or where it is procured through illegality, un-procedurally, or through a corrupt scheme”**

31. The petitioner submitted that the protestor has failed to adduce evidence that will best facilitate the proof of the litigated factual issue of proving fraud as per **Sections 107 and 109 of the Evidence Act**; that she has failed to meet the threshold of proving fraud and the person who did the cancellation was not called to adduce evidence as to why the cancellation was done. She urged this court was urged not to substitute the deceased with the John Mwangi as no sufficient proof was adduced.

32. On the issue of inheritance, the petitioner submitted that since the property in question belongs to the deceased and not John Mwangi, the protestor is not a beneficiary as per section 29 of the Succession; that the protestor is only entitled to hold the property in trust of John Mwangi's son Kamau but since the son is an adult, he should be entitled to his share and the petitioner, on the other hand, is entitled to a share by virtue of being a daughter to the deceased.

33. The petitioner submitted that the estate should be distributed equally among the children of the deceased and cited the case of the **Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR** where the court stated as follows:-

**“... grandchildren can only inherit their grandparents indirectly through their parents, the children inherit first and thereafter the grandchildren inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren's parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents”**

34. The petitioner urged this court to be guided by **section 66 (b) of the succession Act** in an intestate succession as it gives priority to the spouse and surviving children. cited the case of **Re Estate of John Musambayi Katumanga (deceased) (2014) eKLR court held the estate should be shared equally among all the children as provided for in section 35 and 38 of the Law of Succession Act.**

35. The property should devolve between the petitioner and his late brother (John Mwangi) who is survived by his son Kamau; that the protestor is not entitled to a share and is being greedy by wanting to inherit the entire property. She submitted that the petitioner's right to petition for a grant was anchored under **Section 26 of the Law of Succession** and urged this court to find that the property belongs to the deceased and allow the petitioner to inherit a portion of the estate taking into account she assisted the deceased before her demise.

### **ANALYSIS AND DETERMINATION**

36. I have considered the evidence adduced and submissions herein. I determine the issues for determination are:

a. Whether the property herein was owned by the deceased and is available For distribution

b. How the property should be distributed if available for distribution

**(i) Whether the property herein was owned by the deceased estate and is available For distribution**

37. It's the protestor's case that the property herein belongs to her late husband Jone Mwangi. She urged this court to allow her and her children to inherit the property in exclusion of the petitioner. The petitioner on the other hand wants the estate to be shared equally between herself and the protestor's son.

38. Looking at the register adduced by the chief the same has a cancelation and name Loice written in place of Mwangi; however, the register does not tell when it was done. It is the evidence of PW1, PW2, and PW3 that the same was done after the demise of John Mwangi. The evidence adduced is that the change was done before the said John Mwangi died and that is at the time the late Loice realized the person in the land register was her son and not her. No clear evidence was adduced to explain the change of name and when it was done.

39. It is however not dispute that the deceased Loice lived in the land and she was buried there. There is no explanation as to where the protestor was at the time the late Loice lived in the land and at the time she was buried there. She also never adduced evidence to confirm that her late husband purchased the land and it solely belonged to him and his family.

40. At the time of the late Loice's death, the land was registered in the name of the deceased. **Section 24(a) of the Land Registration Act**

**“subject to this act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”**

41. The protestor failed to adduce evidence to prove that the property was fraudulently registered in the late Loice's name. I, therefore, find that acquired an indefeasible title to the property and it falls within the estate of the deceased.

**(ii)How the property should be distributed if available for distribution?**

42. **Section 29 of the Law of Succession Act**, describes dependants to mean

**For 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, grandparents, 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.**

43. The protestor is a wife to the son of the deceased while the petitioner is a daughter to the deceased. Both are entitled to a share of the estate of the deceased. It would be fair and just for the property to be shared equally between the protestor and the petitioner.

**44. FINAL ORDERS**

**1) The Letters of confirmation of grant application dated 7<sup>th</sup> November 2016 is hereby confirmed.**

**2) The deceased's property land LR Bahati/Kabatini Block 1/1358 to be shared equally between the petitioner and the late John Mwangi's family.**

**3) Each party to bear own costs.**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU**

**THIS 28TH DAY OF OCTOBER, 2021**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:**

**JENIFER - COURT ASSISTANT**

**MR. MURITHI COUNSEL FOR PROTESTOR**

**MS. DAYE HOLDING BRIEF FR MR. CHEGE COUNSEL FOR RESPONDENT**