



**REPUBLIC OF KENYA**

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

**P & A CAUSE NO. 6 OF 2019**

**(FORMERLY NAKURU MISC SUCCESSION CAUSE NO. 20 OF 2013)**

**IN THE MATTER OF THE ESTATE OF PELICE WANGARI CHURU (DECEASED)**

**JUDGEMENT**

1. This matter relates to the estate of Pelice Wangari Churu (the deceased herein) and in particular the mode of distribution of the aforesaid estate. On 6<sup>th</sup> June 2016, the court issued an order for the revocation of grant confirmed on 7<sup>th</sup> March 2021 in *Naivasha Succession Cause No. 24 of 2010*.

2. It was ordered that a fresh grant do issue in the joint names of David Murira the 1<sup>st</sup> administrator/ Applicant herein and Julius Kuria Kanyi Chiuru, the 2<sup>nd</sup> administrator/ Respondent herein. The honorable court further ordered that an application for confirmation of grant be lodged jointly and in the absence of agreement on how the property should be distributed, the aggrieved party be a Protestor to the distribution.

3. Arising from the aforesaid orders, the 1<sup>st</sup> administrator filed summons for confirmation of grant dated 20th November 2018 supported by a supporting affidavit of even date. The Respondent filed an affidavit of protest against the confirmation of grant dated 5<sup>th</sup> December 2018 protesting the mode of distribution of the deceased's estate. Subsequently, after directions were taken both the Applicant and the Respondent gave oral evidence in court.

4. Summarily, **PW1, David Murira**, the deceased' son testified that the before the deceased died, she owned land that she had not yet distributed i.e. Nyandarua/Karati/3837 where he lives which is 3 acres which had been excised from Nyandarua/Karati/194 that was 9 acres. He narrated that the deceased had distributed plot 194 to her 3 children, the beneficiaries herein namely Julius Kuria, his elder brother, Esther Nyawira, his sister and himself. That he was given 2 acres which became Nyandarua/ Karati/ 3034 where he lives. Esther Nyawira got Nyandarua/Karati/3033- 2 acres where she lives and his brother got Nyandarua/Karati/3035- 2 acres where he lives.

5. It was his testimony that the deceased declared that the 3 acres i.e. plot 3837 which was under her name would be distributed amongst her children with each getting 3 acres and that she told his Uncle John Mwangi Murira, Aunt Tabitha Gacembi Waweru and John Mwangi. That the children were present when the deceased said how land should be shared. He produced the title for plot 3837- copy exhibit 1.

6. The Applicant narrated that the deceased also left parcel Nyandarua/Karati/1352 – 2 acres. That she had distributed into 2 –i.e. Nyandarua/Karati/3994 and Nyandarua/Karati/3995 each consisting of one acre and both titles were in names of the deceased before she died. He produced copies of the titles marked as P-Exhibit 2 and P-Exhibit 3 respectively. That the deceased divided each acre between him and his brother, the Respondent before them and other witnesses; plot 3995 going to him and plot 3994 to the Respondent.

7. Moreover, the Applicant requested the court to distribute the estate as the deceased did namely:-

***a) Nyandarua/ Karati/ 3837- each of the 3 children get one acre- according to the deceased's wishes***

***b) Nyandarua/Karati/3995 to go to David Murira as per deceased's wishes***

***c) Nyandarua/Karati/3994- to go to Julius Kuria***

***d) Shares-Mukomboki- to go to Esther Nyambura***

***e) Gome holding to be shares equally***

***f) KCB shares- to Julius Kuria alone.***

8. He stated that the Respondent wanted both Nyandarua/Karati/3994 and 3995 yet when their mother was alive he never claimed the land. Further, the Respondent wanted 2 acres from plot 3837 claiming that he is the eldest and that he had contributed to the purchase of that land yet he had never made such claims when the deceased was alive. Upon cross examination, he asserted that Nyandarua/ Karati/1352 was bought in 1990 from Elijah Kairu Kamau by the deceased.
9. When the Applicant was recalled, he testified that the land sale agreement presented before court in evidence by the Respondent was undated and it was between Elijah Kairu Kamau and the deceased. That the properties in dispute is Nyandarua/Karati/1352. That there were other witnesses and that he was named as the 6<sup>th</sup> witness yet he was not present when the agreement was made and did not sign. Additionally, he stated that the seller was selling trees to his mother and not Julius.
10. He testified that as per green card dated 17/10/1990, the land was in the name of Elijah Kairu. That it was transferred to the deceased on 12/03/1991 and that on 02/11/2006, the land was subdivided into 2 i.e. one acre each 3994 and 3995.
11. It was his testimony that that the agreement dated 17/12/1990 referred to sale of trees. That the Respondent was paying Elijah for trees on plot Nyandarua/Karati/1352. That it was signed by Julius and Elijah. That he was not involved in the sale and although the deceased's name appears she did not know how to sign and didn't sign the same. It was his assertion that the agreement does not tally with the agreement for sale of land as in plot 240 agreement, the deceased bought land and trees.
12. Further, the Applicant reiterated that the Respondent did not buy the land and that he did not know why he was withdrawing the sum of Kshs.95, 000/- in March 1989 as per the KCB – Bank withdrawal slip bearing the Respondent's name showing he withdrew.
13. In cross examination, the Applicant asserted that Plot 2597 belonged to the deceased. That the search shows that in 1992, it belonged to Respondent but the deceased gave him a part of it. That It was subdivided to create Nyandarua/Karati/3036 and 3037. And he got plot 3036 which he sold. That he was issued with a grant in Naivasha on 07/03/2012 together with his sister which was later revoked but by that time had already sold plot 3995.
14. In conclusion, he stated that Nyandarua/Karati/1352 was purchased by the deceased for Kshs.78, 000/- and that there was an agreement of sale. That the deceased paid the first instalment of Kshs.40, 000/- and later a balance of Kshs.38, 000. That the deceased subdivided the land while she was alive. He asserted that the Respondent should have asked the deceased while she was alive and that he had no land to give him.
15. **PW2 John Mwangi Murira**, the deceased's brother, **PW3 Tabitha Gachambi Waweru**, the deceased's sister, **PW4 James Kimani Ndonge**, the deceased's nephew and **PW5 Esther Nyawira Churu**, the deceased's daughter also testified each relying on their witness statements dated 11/09/2019.
16. On the other hand, **DW1 Julius Kuria Churu**, the deceased's son testified that he was opposed to the proposed mode of subdivision of the deceased's property. He presented a list of documents dated 26/06/2019 and 10/07/2019 as evidence. He stated that there are two pieces of land i.e. Nyandarua/Karati/3837 and 1352. That plot 1352 had already been distributed and subdivided into 3994 and 3995 but he would like to get a bigger share.
17. It was his testimony that the deceased bought Nyandarua/Karati/194 which gave rise to plot 3837 from the Settlement Fund Trustee in December 1963 and that he assisted her to get it. That together with the deceased they decided that each person should get their share. That the deceased called for a get together with his siblings in 2003 to tell them what they had agreed. That those who were present were Uncle John Mwangi Murira, Aunt Gachembi and the children of Peris. That the deceased said that each person should get 2 acres and 4 acres were left. That later she gave one acre to Wangari Sharon, a grandchild and 3 acres were left i.e. 3837. That she did not say anything about how the same would be shared.
18. The Respondent stated that the witnesses' statements were not true and that he should get more land because of how he had worked for the family and that he had helped pay for the loan. That he gave land to the Applicant and he sold it. That he gave him 3036 which was a division of Nyandarua/Karati/2557. That the land was his and not the deceased's. That he bought plot 3994/3995 in 1989.
19. He asserted that originally plot 1352 which is captured as plot 240 Karati had trees. That he had bought it for Kshs.78, 000/- in 1989 and had a bank slip from KCB showing he withdrew Kshs.45, 000/- on 15/03/1989. That the balance was paid in September 1989. That in the agreement the trees were his and they were paid for besides the Kshs.78, 000.
20. In conclusion he testified that the alleged meeting that was held to subdivide plot 3837 was a meeting to disperse the funeral committee and the only thing that was distributed was the deceased's personal effects and not land.
21. Upon cross examination, the Respondent asserted that he agrees with the Applicant's proposal save on the two pieces of land.

### **1<sup>ST</sup> ADMINISTRATOR/ APPLICANT'S SUBMISSIONS**

22. It was the Applicant's case that the deceased had clearly stated and said how her estate would be divided among the beneficiaries. That the deceased called her brother and other family members and in the presence of the beneficiaries she had stated how her estate would be shared out.
23. That after her death, her brother John Mwangi Murira who testified in court as a witness corroborated the evidence of the Applicant and added that he subdivided the estate of the deceased as per her wish immediately after she was buried. His evidence was supported by the evidence of Tabitha Gachambi Waweru, Joseph Kimani Ndome and Esther Nyawira Churu who all gave evidence as witnesses to support the

Applicant's case.

24. In a nutshell, the Applicant's case is that the estate of the deceased should be subdivided as follows:-

- a) *Nyandarua/Karati/3995 measuring 1 acre was to be given to the Applicant.*
- b) *Nyandarua/Karati/3994 measuring 1 acre was to be given to the Respondent.*
- c) *Nyandarua/Karati/3837 measuring 3 acres was to be shared equally among the beneficiaries where each would get 1 acre.*
- d) *Share Certificate Makomboki Self Help Group- the whole share was to be taken by Esther Nyawira Curu.*
- e) *Gema Holding Investments Co. Ltd- the shares were to be divided between the 3 beneficiaries.*
- f) *Shares Kenya Commercial Bank Ltd- the whole share was to be taken by the Respondent.*

25. The Applicant submitted that the Respondent differed with part of this proposal and in turn proposed that he should get the two shares comprising of Nyandarua/Karati/3994 and 3995. That from Nyandarua/Karati/3837 measuring 3 acres he should get 2 acres while the Applicant and Esther Nyawira should each get  $\frac{1}{2}$  an acre. That the Respondent's case of his proposed distribution is that he assisted the deceased to purchase lands forming part of the estate.

26. In conclusion, the Applicant asserted that his proposed mode of distribution was fair and is supported by firm and consistent evidence which is well corroborated. That the Respondent's alleged contribution in the purchase of the lands that form part of the estate does not exist and therefore he urged this court to uphold his proposed mode of distribution.

#### **2<sup>ND</sup> ADMINISTRATOR'S /PROTESTOR'S SUBMISSIONS:**

27. The 2<sup>nd</sup> administrator in his evidence stated that he assisted his mother when purchasing the properties and in particular parcels number Nyandarua/Karati/3994 and 3995. He produced documents in support of his claims to have assisted her deceased mother in repayment of the loan to the settlement fund trustees.

28. The 2<sup>nd</sup> administrator further stated that in particular reference to parcel of land Nyandarua/Karati/3995 he had developed the same extensively by planting trees thereon yet the 1<sup>st</sup> administrator had despite the grant issued to him having been cancelled proceeded to dispose off the same and transfer it to a third party. He submitted that the proposal on distribution by the 1<sup>st</sup> administrator should not be followed strictly considering that the 2<sup>nd</sup> administrator did contribute in repayment of the loan and is thus entitled to a bigger share of the estate. It was his prayer that his proposal be followed and costs be in the cause.

#### **ANALYSIS AND DETERMINATION:**

29. I have observed that both parties are unanimous in their affidavits in that all the listed issues are beneficiaries of the deceased namely Julius Kuria Kanyi Chiuru, David Murira and Esther Nyawira and on the properties listed as belonging to the estate of the deceased. The bone of contention in the proposed modes of distribution center around the distribution of Nyandarua/Karati/ 3837 and Nyandarua/Karati/3994 and 3995.

30. In the instant case, the Applicant proposes that Nyandarua/Karati/3837 should be distributed among the 3 children equally; each getting one share and Nyandarua/Karati/3994 should go to the Respondent and Nyandarua/Karati/3994 should go to him. Conversely, the Respondent proposed that he should get 2 acres from Nyandarua/Karati/3837 and that the Applicant and their sister should share the remaining 1 acre with each getting  $\frac{1}{2}$  and acre each and that he should also get both Nyandarua/Karati/3994 and 3995.

31. The Applicant underpinned his proposal on the fact that it is based upon the deceased's wishes; claims that were corroborated by his sister and 3 other witnesses i.e. PW2, PW3 and PW4 vide their witness statements. He contended that he had distributed the deceased's property as per wishes which she has declared while alive before his siblings and 3 other family members.

32. The Respondent submitted that his proposal was based on the fact that that he had helped pay for the loans towards the purchase of the land and reiterated that his claim is because he purchased the land and developments. He went on to produce before court a list of documents in support of his claim. He maintained that indeed the deceased had distributed all other properties belonging to the estate before her death save for plot no 3837 which she left undistributed. He insisted that because he contributed in repayment of the loan and is thus entitled to a bigger share of the estate including plot no 3994 and 3995.

33. **38 of the Law of Succession Act** provides for the distribution of estates in circumstances where the intestate had has left a surviving child or children but no spouse. It states that:-

***“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”***

34. Consequently, following the failure of the parties to come up with a mutually acceptable mode of distribution **Section 38 of the Act** applies. I am of the opinion that the application of **Section 38** will result in equal distribution of the estate among the children of the

deceased. Further, this court shall take into account **Section 42 of the Act** given that both parties agree that the deceased had distributed the estate amongst them save for the contentious parcels of land. **Section 42 of the Act** states that:-

**“Where —**

**an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or**

**Property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act,**

**That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”**

35. It is important that this court interrogates the Respondent’s claim that the land in question belongs to him or rather that he helped the deceased purchase them all while having in mind that the Applicant strongly denies these claims maintaining that the deceased was the sole owner of the properties and that she had distributed them before her demise in determining the mode of distribution.

36. Looking at the evidence presented this court is dealing with at least two contentious parcels of land i.e. Nyandarua/Karati/3837 which initially was part of Nyandarua/Karati/194 and Nyandarua/Karati/3994 and 3995 both emanating from Nyandarua/Karati/1352.

37. The Respondent claimed that he should get a larger share of plot 3837 as he had assisted the deceased to purchase plot 194 by way of paying for the loans. However, it is clear from the evidence that the title deed for Nyandarua/Karati/3837 is under the deceased’s name only and does not bear the Respondent’s name as part owner. The certificate of official search dated 15<sup>th</sup> September 2014 also confirms the same.

38. The Applicant alleged that plot 3837 had already been distributed by the deceased, claims that were affirmed by 4 other witnesses. It is my opinion that even if the same was not to be taken into account the property still qualifies for distribution under **Section 38 of the Law of the Succession Act**. I find that there is nothing in evidence indicating that the Respondent bought plot 194 together with the deceased save for his claims that he had worked hard for the family which unfortunately does not amount to ownership of the said piece of land.

39. I also find that the Applicant’s claim that the deceased had already declared her wishes as to the distribution of the aforesaid parcel to be true and verifiable given the consistent statements by the witnesses. The Applicant has proven on a balance of probabilities that the deceased had indeed declared her wishes that each child should get one acre each of plot 3837.

40. Secondly, the Respondent also claimed to be part owner of Nyandarua/Karati/1352 which gave rise to Nyandarua/Karati/3994 and Nyandarua/Karati/3995. He asserted that he had bought the land together with the deceased. Contrarily the agreement for sale that he produced before court does not support his claim. The agreement though mostly illegible clearly indicated that the sale was between the deceased as the purchaser and the seller, Elijah Kairu Kamau.

41. The Respondent only appeared as a witness to the document. Moreover, the other pieces of documents produced by the Respondent only go to show that he bought trees from plot 1352 from the seller and does not in any way suggest or prove that he was part-purchaser of the piece of land. There was no sufficient reason that was advanced to explain why Respondent was not included in the sale agreement or even title documents.

42. The bank slip produced before court by the Respondent also does not serve as proof that he had helped the deceased purchase the land as the funds referred to therein may have been used for anything. The Respondent did not demonstrate any nexus between those funds and the purchase of plot 1352.

43. Similarly, I find that the Applicant has proven on a balance of probabilities that the deceased had indeed declared her wishes concerning plot 1352 that give rise to plot 3994 and 3995 to the extent that the latter should go to the Applicant and the former to the Respondent.

44. The upshot is that the determination of the manner in which this property will be distributed shall follow the guidelines provided for in **Section 38 as read together with Section 42 of the Law of Succession Act**. Therefore, the mode of distribution shall be as follows:-

**i. Share Certificate Mukomboki Self Help Group –whole share shall go to Esther Nyawira.**

**ii. Gome Holding Investments Co. Ltd - shares shall be distributed equally between the 3 beneficiaries i.e. Julius Kuria, David Murira and Esther Nyawira.**

**iii. Kenya Commercial Bank Ltd- whole share shall go to Julius Kuria.**

**iv. Nyandarua/ Karati/ 3837 measuring 3 acres shall be distributed equally between each of the 3 beneficiaries each getting one acre.**

**v. Nyandarua/Karati/3995 measuring 1 acre shall go to David Murira.**

**vi. Nyandarua/Karati/3994 measuring 1 acre shall go to Julius Kuria.**

*Additionally, each party shall bear its own costs.*

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 21ST DAY OF OCTOBER, 2021.**

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**CHARLES KARIUKI**

**JUDGE**