



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 104 OF 2014

IN THE MATTER OF THE ESTATE OF VIRGINIA WANJIKU GITHUKA (DECEASED)

PETER KIRAGU

LYDIA MWIHAKI

RODA WAMBUI

SUSAN WARUGURU.....PROTESTERS

VERSUS

CATHERINE WANGUI KIMANI.....PETITIONER

J U D G M E N T

1. Virginia Wanjiku Githuka died on 27th May 2021. She had one son. Peter Githuku Ndung'u who was married to Catherine Wangui Kimani.

2. Upon her death her son applied for Grant of Letters of Administration on 1st February 2014. The letter from the Chief Rurii Location dated 28th January 2014 addressed to the Deputy Registrar indicated that, she was the registered proprietor of;

1) Bahati/Kabatini Block 1/3098 0.65 Ha at Mchanganyiko Village.

2) Safaricom shares – 500

3) Kengen shares – 12

4) Equity Bank A/c 000xxxxxxxxxxx

3. On 21st October 2014 Peter Kiragu, Lydia Mwaniki, Roda Wambui and Susan Waruguru filed Summons for Revocation and Annulment of Grant under Section 76 of the Law of Succession and Rule 44 of the P & A Rules, on the grounds that, it had been obtained by fraud and non-disclosure of material facts, by means of untrue allegations, and rendered useless as the petitioner had passed on in May 2014.

4. The application was supported by the affidavit of Peter Kiragu the 1st applicant sworn on 22nd October 2014.

5. His position was that the deceased was a sister to his maternal grandmother.

6. That when his mother died in 1989, he and his siblings were sent away from his father's home on the day his mother was buried.

7. That immediately thereafter the deceased took him, and his sister Lydia Mwhaki to her home at Bahati/Kabatini Block 1/3098 and enrolled him at Kagoto Nursery and Primary School, later at Crater Primary School at Upper Hill Secondary School where she paid expenses. That at the same time Lydia was sent to KITI to study computer at her expense. Later on his other siblings Roda and Susan joined them at the deceased's residence where they continued with schooling.

8. That even his circumcision ceremony was at the deceased's cost, and that she constructed a permanent house for him in her homestead. That even the wedding, dowry negotiations for his sister Roda were conducted at the home of the deceased. That he knew no other home.
9. He deponed further that in 2010 he was arrested and remained in prison till 2013 September when he was released he came home to find that deceased had died, and the petitioner denied him access to the home. That the petitioner had failed to disclose to court that the deceased had other dependants, as the deceased had treated him and his siblings as her children, that the petitioner was renting out his house without his consent, that all his personal effects he had left in that house were missing. He produced a bunch of photographs featuring him and his siblings and the deceased among other relatives at her home and other places.
10. On 8th May 2014, Peter Githuka Ndung'u the petitioner died and his wife Catherine Wangui Kimani obtained Limited Grant of Letters of Administration for purposes of concluding Succession Cause 104 of 2014. This was issued on 27th July 2014.
11. She filed an application for substitution dated 16th January 2015. This was allowed by consent on 22nd June 2016. This effectively settled the Summons for Revocation of Grant.
12. Thereafter she filed Summons for Confirmation of Grant dated 29th July 2016 on 28th July 2016. In that application she proposed to inherit the whole of the mother in law's estate by herself.
13. That Summons provoked the protest by Peter Kiragu filed on 13th September 2016 supported by the witness statements of John Waithaka Wangai, Josephat Kimiri Mwathi, his aunt Rachel Wangui Ihahi and himself all dated 13th September 2016. In the affidavit of protest he reiterated the facts in the affidavit in support of his Summons for Revocation of Grant, save that he added his proposal for the distribution of the estate, that his siblings and the said Catherine Wangui Kimani to share the estate of the deceased equally.
14. The petitioner filed a Replying Affidavit sworn on 14th February 2017 she deponed that she and the deceased's son got married in 1989. That by then her mother in law was living in a semi permanent house on the land she had been allocated by Ndeffo Farmers Company Limited. That it was her husband who put semi-permanent houses for rental for her mother in law between 1984 – 1985, after which she began a grocery business. Thereafter, they built their house and built a permanent house for her with three stores outside. That her deceased husband was a camera man in the office of the Vice President where he earned huge allowances which they used to accept their mother in laws property while she worked at High Ridge Teachers.
15. That the protestor was a child of her husband's cousin who died, and their father requested to be assisted to bring them up. That the four were distributed among relatives who assisted in their upbringing through monthly contributions.
16. That the protestor dropped out of school in 2002 at form 2 and left. It was agreed that he be taken back to his father, and he never returned to the deceased's house.
17. That the deceased never adopted the protestor and his siblings and at the time of her death, the protestor was not her dependant. Her affidavit was accompanied by the witness statements of Peter Githuka dated 29th November, 2016 Daniel Maina Kiringo dated 24th November 2016.
18. It is in this back drop that the Summons for Confirmation of Grant and the Protest were heard by way of *viva voce* evidence. The matter was part heard before *A. K. Ndung'u J* when I took over on 14th October 2019.
19. In his testimony the protestor reiterated the contents of his affidavits and witness statements. He added that he did not know his father and only found himself in the home of the deceased he and his sister Lydia. He testified that in 2002 he left school due to peer pressure. He testified that he had a stone house built for him by deceased where he lived till 2010 when he was charged with Robbery with Violence and remanded in custody till 2014 when he came back to find deceased had died. He said that the petitioner's husband was like his brother, that he depended entirely on the deceased. That his sisters were now all married. He took the court through the photographs. His concern was that in the Summons for Confirmation of grant the Petitioner had not annexed his consent to the mode of distribution. It was his position that he knew no other home other than the deceased's.
20. On cross examination he confirmed that he left prison in 2014 and not 2013 as deponed. That at the time of the hearing he was living in Narok. He told the court that he was arrested twice, in 2003 for Murder and released in 2004, began a Kinyozi business, then hawking, then "mjengo", then he was arrested for Robbery with Violence.
21. Referred to the names in his identity card, he confirmed that he obtained his identity card in 2005, that he did not know who the name Gitau in the identity card referred to, that it was the deceased who sent him to get the identity card, that she gave him her documents to do so, but he could not recall what documents those were. He said he did not know Rurii Sub Location and that his identity card indicated he was from Kiamaina Sub Location. That since he left remand in 2014 he had not lived in the deceased's home. That he assisted to construct the deceased's house and that the house he claimed to be his was constructed by the deceased for him.
22. On re-examination he told the court that the deceased gave him the start up capital to start his various businesses. That when he was arrested in 2010 she paid a lawyer for him though he had no evidence to support the same.
23. His witness, Josephat Kimiri Mwathi's testimony was that he knew the protestor and the deceased in 1992, because he used to see him coming from school, and also because he used to visit the deceased's home to collect sacks. He testified that when the protestor was arrested the deceased "stood for him" but he was taken to jail. He had no idea that the protestor had been arrested twice. He did not know when the deceased died. His home was 1½ - 2 km from the home of the deceased. He said he knew deceased's son. He claimed that the deceased's

son found when houses in the home of deceased already constructed.

24. His other witness, Rachel Wangui Ihahi was daughter to the sister of the deceased and a sister to the mother of the protestor and his siblings. She testified that the father of the protestor and his siblings was unknown and that upon her death, the deceased took them in as hers. She claimed that deceased built a house for the protestor, that no one else assisted the protestor to maintain the children. She also testified that when deceased died she never attended her burial because she herself was unwell. She confirmed that the protestor was in remand and never attended the burial.

25. On cross examination she said her mother was a step sister of the deceased and therefore deceased was a step grandmother of the protestor. She conceded that she and the mother of the protestor had lost in a land dispute between them and the deceased. On cross examination she said that the protestor was not a party to the land dispute. On 20th February 2020 the protestor closed his case.

26. The petitioner in her testimony reiterated the contents of her affidavits. She confirmed that her husband was the only child of the deceased, and that he died before the cause was finalised. That the grandmother of the protestor and his siblings was one Rodah Wambui, a step sister of the deceased Virginia. That when their mother died, their father one Benson Gitau requested for assistance to raise them, that their grandmother Rodah took them with her and later on Virginia took the protestor Peter's sister Lydia. When the protestor became impossible his grandmother brought him to Virginia. Their sister also named Rodah Wambui was taken by their grandfather one Mukunga to Timboroa while Rodah their grandmother remained with the youngest one Ruguru.

27. When their grandmother died, Ruguru was brought to Virginia's home. By the time of Virginia's death, none of the girls was at home and they had all been married. That the protestor left Virginia's home in 2002 when he refused to continue with school. That Virginia called his uncles and told the boy to go back to his father, and since 2002 he never lived in Virginia's home. That their father one Benson Gitau who lived in Subukia – Kirengero.

28. She testified that had her husband lived the grant would have been confirmed the way it was. That the protestor only came home after the death of this uncle but never attended the burial. She said the deceased got sick in 2009, and they had to sell two (2) plots out of the property to meet her medical costs. That had she any intentions of giving the protestor she would have done so during that subdivision

29. On cross examination she confirmed that the deceased assisted the protestor and his siblings just like she did with all the other nephews and nieces who benefited from her generosity. She testified that their father made contributions to their schooling and even came when the protestor was circumcised. She said that after that he was sleeping in one of the stones and it was not true that Virginia had built him a house. She testified that when the protestor was arrested neither she nor her mother in law came to court.

30. That the protestor was chased away from the home by the deceased in 2002, and he took away all personal effects and went to his father's home. She testified further that Rodah's marriage ceremonies were done at Virginia's for convenient that when Virginia got sick and subdivided her shamba to sell some plots she said the remainder was for her son. Had she intended to give the protestor anything she would have done it then.

31. With regard to the photos, she testified that Virginias was very close to all her niece and nephews. She denied threatening the sisters to the protestor and asked the protestor to call them as his witnesses.

32. Her witnesses Susan Wanjiku Kamau testified that the deceased was her aunt, sister her own mother. That the protestor was a son of her sister. That their father was one Gitau. That by the time their mother died she had left Gitau and was married in Ngachura to one Ndung'u. She confirmed that upon her death the children were shared among maternal relatives. That at form 2 the protestor ran away from school and went to look for his father. She testified that she too was a beneficiary of Virginia's generosity as she educated her through Secondary School. She said that her cousins, the sisters to the protestor were not asking for anything as they were not asking for anything as they were satisfied with what their grandmother had done for them.

33. On cross examination she said she was living on a piece of land belonging to Virginia but it had not been given to her, that she began to live there after the death of Virginia because Virginia had said so before she died.

34. She confirmed that when the protestor was arrested members of the family including the deceased came to court when he was brought to court.

35. She confirmed that the mother to protestor was not buried at Gitau's because she had already left him.

36. The petitioner closed her case.

37. Parties through their counsel Mr. Waiganjo for the protestor and Mr. Gakinya for the Petitioner filed written submissions.

Protestor's submissions

38. It was submitted that the protestor is a dependent of the deceased together with his siblings. The court was urged to be guided by **Section 27 of the law of Succession Act** which 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 lump sum and to impose such conditions as it thinks fit”

39. It was further submitted that the guidelines on making provisions for dependants are outlined in **section 28**. The protestor is considered as a dependant as per **Section 29 of the Law of Succession Act**. Counsel submitted that the protestor has proved dependency from the deceased as he depended on the deceased since he was young and relied on the case of *In the matter of the estate of S.M. N (deceased) Machakos H.C. Succession 1 of 2017*. Where the court observed that;

“...proof of dependency is thus a condition precedent to the exercise of the discretion in Section 29(b) ... in addition while considering the meaning of dependant under section 2 of the act,”

The court made reference to **Beatrice Ciamutua Rugamba vs Fredrick Mutegei and others, Chuka Succession Cause No. 12 of 2016** it was stated that;

“From the foregoing, a dependant under section 29(b) and (c) must prove that he/she must prove that he /she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but the proof of dependency.”

40. It was further submitted that the protestor had legitimate expectations that the deceased would provide him with a home or at least give a share of the assets. As the case *in Re Estate of Albert Musyoka Mueti (deceased) 2020 eKLR* where the judge observed

“I also note that PW2 expressed legitimate expectations to benefit from the estate of the deceased having schooled him. In this regard, I, therefore, find that the respondents were dependants of the deceased.”

41. The court was urged to find the protestor as a dependant and make a provision for the protestor from the estate of the deceased.

Petitioner’s submissions

42. The Petitioner through her counsel submitted that the deceased had an only son Peter Githuku (deceased) and being a generous woman took in the protestor and his siblings and catered for their needs. Counsel also submitted the protestor did not fall as a dependant of the deceased as per **Section 29 of the Law of Succession Act**. It was argued that **section 29** does not provide for the grandchildren of a step-sister. Further, that the protestor was not maintained by the deceased immediately prior to her demise as the protestor and his siblings had become of age and left the homestead of the deceased.

43. Counsel for the petitioner urged the court to find that the protestor had failed to prove dependency as per **Section 29** and dismiss the application.

Analysis and determination

44. Having considered the evidence, and the rival submissions the following are the issues for determinations:

- a. Is the Protester and his siblings dependants of the deceased?
- b. Is the Petitioner entitled to the entire state of the deceased?
- c. What orders ought to issue?

45. On the first issue it is not in dispute the deceased had one child Peter Githuku Ndung’u who survived her but died before this cause was finalized. He was survived by his wife and four children. Hence without the protest he would have been the sole beneficiary of his mother’s estate.

46. The protest turned out to be the protest of the 1st protestor as his sisters did not participate. They did not file any affidavits in support of the objection he filed first, neither did they file any affidavits or witness statements in support of the protest. Hence at the outset it is evident that out of the four children of the late Margaret Muthoni, a step niece of the deceased herein only one is pursuing a share of her estate as dependant.

47. I have set out the evidence upon which the protestor claims dependency. The **Law of Succession Section 29** describes dependants to mean;

For the purpose 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

48. It is evident that the protestor was a child whom the deceased took into her care. There is no doubt about that. She did that for him, for his sisters and for other nephews and nieces. The section however qualifies who becomes a dependant for purposes of inheritance: one who was

being **maintained by the deceased immediately prior to his death.**

49. What would this mean? Plainly in my view it means that as at the time of the demise of the deceased the applicant was being maintained by the deceased.

50. According to the Protester he and his siblings were sent away from their father's home when their mother died. That is what he deponed in one of the affidavits. Hence it cannot be true that his father is unknown.

51. The evidence before me is that the deceased and her other relatives shared out the children of the protester's mother after her death so as to provide for them. It is also evident that the protester's mother was married but left her husband the father of the protester and went to get married elsewhere. Despite the fact that his father never paid dowry there is evidence that he was known to the family including his own home.

52. Raising of children by relatives when their parents pass away or are unable to parent is a very normal phenomenon in many Kenyan communities. We are mostly patriarchal. So that even where the child, especially the male child, is raised by the maternal relatives his roots with his father are never uprooted. There is that unspoken belief that it is difficult for a step mother to take good care of another woman's children. This is reproduced in all the horrid tales that exist about cruel step mothers. While it is not always the case and while the narrative may be changing, the raising up of the children by maternal relatives did not automatically make them heirs. In some communities, where it was felt that the nephew needed to be settled it would be land outside the ancestral land of his maternal relatives.

53. Be that as it may not all the raising of such children gives them rights to inherit from the deceased relative unless as provided by the law they can demonstrate dependence. It is not tenable that by merely fostering a child the child acquires rights to inherit. This would create problems and create a challenge for people who just want to assist children in need. In the protester's case he was first taken in by his grandmother, Rodah, the mother to his own mother. Thereafter, he was sent to the deceased's where she took care of his every need together with his two sisters. However he dropped out of school in 2002. From that time he seems to have been on his own. He was arrested for Murder in 2003. He took on other jobs, kinyozi, hawking and mjengo, and earned his own money before he was again arrested for robbery with violence in 2010. There is nothing from him to show that from the time he left in 2002 he was ever maintained by the deceased. There is no evidence that he was even living in that home. Taking into consideration the number of cousins he had, including his own sisters, it would have been the easiest thing to establish. That all this time he was living at the deceased's home before his arrest in 2010. However he could not summon even one of them to testify in his favour. The only person who could testify was a person who did not live in that home and who knew nothing about the goings on in deceased's home and family. He only used to see him coming from school.

54. His circumcision at the deceased's home was inevitable whether or not his father attended or was interested. The deceased was responsible for him and surely she could not have abdicated this duty. Even when his sister was getting married, if she chose her step grandmother as the person who could hold her hand at that time, nothing wrong with that. But that *per se* would not turn him or her into an heir.

55. What emerges from all this is that the protester cannot say that he was being maintained by the deceased immediately prior to her demise. This position was held in the case of **Beatrice Ciamutua Rugamba vs Fredrick Nkari Mutegi & 5 others [2016] eKLR**, where the court stated that;

“From the foregoing, a dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.”

56. The protester has been able to establish relationship but has failed to establish dependency.

57. The Petitioner is a daughter-in-law of the deceased. She is the wife of the deceased's only son. In **Nahashon Karungu Macharia vs Rosemary Kahura Njoroge (2016) eKLR** it was held that a daughter-in-law of a predeceased son is a beneficiary of the estate of the latter deceased parent-in-law thus: -

“The Deceased was survived by the said Administrator and another son, Patrick Muthemba Macharia. He was also survived by a daughter-in-law called Rosemary Kahura Njoroge (a widow of another son, now deceased, James Njoroge). There had been yet another son, John Kimani, who died after the Deceased. It is common ground that he died without wife or issue. So, in effect, there are only three beneficiaries to the estate of the Deceased – his two surviving sons and the widow of another son, since deceased.”

58. The Petitioner's husband did not pre-decease his mother. He died after her and she took over as the Petitioner seeing that he was an only child. However, by the fact that she is a widow of the deceased son of the deceased, she is a beneficiary entitled to a share estate of her mother in law.

59. Coming to the Summons for Confirmation of Grant, this is a case where the intestate died and was survived by her only son. The applicable law is **Section 38 of the Law of Succession Act** which states;

“38. Where intestate has left a surviving child or children but no spouse

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.”

60. According to the law the entire Estate would devolve upon the son. The son died before the estate was distributed. Now we have two estates, that of a son and his mother, and a widow and a daughter in law. Does the entire estate of the mother devolve to the estate of the deceased son? Does his widow, the petitioner become the sole beneficiary of the deceased's estate?

61. While daughters in law can inherit their mothers in law it is my considered view that the daughter in law does not step into the absolute shoes of her husband with respect to her mother in law's estate. This is because the moment the son died the estate became subject of its own administration and in the absence of the son could there be other beneficiaries on a similar footing with the daughter in law? For instance would the grand children of the deceased be *mstari was mbele* as compared to the Petitioner?

62. There are now two estates. The estate of the husband of the Petitioner to which **Section 35 of the Law of Succession Act** would apply. Then there is the estate of the mother in law where **Section 38 of the Law of Succession Act** would have applied save for the death of the child. The child is survived by his wife and children. Hence the Petitioner herein is just one of the beneficiaries. These now become the beneficiaries of his mother's estate. Had he inherited it, it would have been his absolutely. It is my view that his death left the available to the inheritance by his widow and his children.

63. The petitioner, has not disclosed the number and ages of the children she had with her deceased husband. This she must do, together with their certificates of birth and a supporting letter from the chief, together with her own proposal on how this could be done. This is to satisfy the requirements of **Section 71 of the Law of Succession Act** which states:

“(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

...Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.”

64. Final orders:

- i. The Protester is not beneficially entitled to a share of the Estate of the deceased as he has not established dependency.**
- ii. The protest is accordingly dismissed without any orders as to costs.**
- iii. The Petitioner and her children with the deceased are beneficially entitled to the estate of the deceased.**
- iv. So as to comply with Section 71 of the Law of Succession Act the Petitioner to, within 30 days hereof, to provide information on the number, ages of the children together with certificates of birth, and the requisite letter from the chief. In default the grant issued to her will stand revoked.**
- v. Orders accordingly.**

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 18TH DAY OF OCTOBER, 2021

MUMBUA T. MATHEKA,

JUDGE.

In the presence of:

Edna Court Assistant

Protester

Petitioner

Waiganjo for Protester

Gakinya for the Petitioner

Jhgakinya.advocates@yahoo.com