



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2667 OF 2015**

**IN THE MATTER OF THE ESTATE OF CHOGI NGETHE (DECEASED)**

**DAVID KAMOSE NJUGUNA.....APPLICANT**

**VERSUS**

**PETER KARANJA NGETHE.....RESPONDENT**

**RULING**

1. The deceased Chogi Ngethe died on 23<sup>rd</sup> March 2015 at Kanunga in Kiambu. It does not appear to be in dispute that he left two houses. The children of the first house (house of Priscillah Wairimu Ngethe) are:-

- (a) Chogi Ngethe;
- (b) Wanjiru Ngethe;
- (c) Wanjiku Ngethe; and
- (d) Nguru Ngethe.

The members of the second house are:-

- a) Annah Waithira Ngethe (widow) and children:
- b) Peter Karanja Ngethe;
- c) David Mwangi Ngethe;
- d) Joseph Muigai Ngethe;
- e) Lucy Nduta Ngethe;
- f) Jenifer Wanjiru Ngethe; and
- g) Esther Wanjiru Ngethe.

2. On the basis that the deceased left a written Will dated 29<sup>th</sup> November 2010, the named executor Christopher Njuguna Mungai on 29<sup>th</sup> October 2015 petitioned this court for the grant of probate of written Will. Only the children of the first house supported the petition. A grant was issued on 25<sup>th</sup> May 2016. It is, however, unfortunate that the court issued grant of letters of administration intestate instead of grant of probate with a written Will. This must have been a genuine mistake on the part of the court. I will proceed on the basis that the correct grant (grant of probate with written Will) was the one issued.

3. In the Will, the deceased directed that his named property should not be transferred to anybody for a period of 25 years after his death;

that the property would during the period remain in his name for the benefit of his children and their children. The properties were –

- a) Tinganga/Cianda/Block 1/578;
- b) Kiambaa/Kanunga/T.103;
- c) Kiambaa/Kanunga/T.394;
- d) Tinanga/Cianda/Block 1/1617;
- e) Tinanga/Cianda/Block 1/1615;
- f) Tigoni 1/Tigoni/Block 1/2344; and
- g) Kiambaa/Kanunga/70.

4. On 13<sup>th</sup> April 2017 Christopher Nguguna Mungai filed an application to have the grant of probate confirmed. Only the members of the first house consented to it. Summons were issued to the members of the second house.

5. Before the application was heard, Christopher Njuguna Mungai died on 1<sup>st</sup> April 2020. The members of the first house consented to David Kamose Njuguna to step in the shoes as the executor. Hence the application dated 8<sup>th</sup> February 2021 to have the grant revoked for being inoperative.

6. Peter Karanja Ngethe (of the second house) swore a replying affidavit on his behalf and on behalf of the members of his house. First, he complained that they were not consulted for the petition for grant, but had received summons on the application for confirmation and on the application to substitute the executor. He introduced a Will dated 5<sup>th</sup> January 2011 which said the deceased left. According to the Will which he annexed, the deceased had bequeathed his properties to the widow Annah Waithira Ngethe, her children and grandchildren. Further, Peter Karanja Ngethe complained that at the time of filing the petition the executor had omitted to file searches of the deceased's parcels of land. According to him, this omission was deliberate. This is because, by the time the deceased died, he had transferred his property as follows:-

- a) Tinganga/Cianda Block 1/578 sold to David Ndungu Njogu and title issued on 24<sup>th</sup> April, 2013;
- b) Kiambaa/Kanunga/T103; Kiambaa/Kanunga/T394;

Tinganga/Cianda Block 1/1617; Tinganga/Cianda Block 1/1615 Tigoni/Tigoni Block 1/2344 and Kiambaa/Kanunga/70 had all been transferred to his widow Annah Waithira Ngethe on 3<sup>rd</sup> April, 2013;

Consequently, Peter Karanja Ngethe said, the deceased left no estate that can be distributed. He had bequeathed his entire estate by the time he died. Peter Karanja Ngethe annexed copies of searches of the parcel as evidence of the transfers.

7. David Kamose Njuguna swore a further affidavit saying that the members of the second family of the deceased had declined to consent to the petition and had become violent. It was only when summoned by the court over the application for confirmation that they introduced the issue of the second Will. He stated that he was surprised that the second Will mentioned only the second family. Secondly, that the executor of the Will was Lucy Nduta Ngethe who was then a minor. Thirdly, the Will disinherited the first family and was therefore not valid. Regarding the transfers of the parcels of land, he stated that they were, like the second Will, irregular, fraudulent and a corrupt scheme sought to disinherit the children of the first house.

8. Mr. Ochieng represented David Kamose Njuguna and the first house whereas M/s Ngethe represented the second house. They agreed that the dispute be determined on the basis of the affidavits filed and written submissions. They filed written submissions. There was no opportunity afforded for the cross-examination of the averments and depositions of the parties. It would therefore mean that the evidence of either side will be accepted as such.

9. What this means is that the deceased left a written Will dated 29<sup>th</sup> November 2010, did another Will on 8<sup>th</sup> January 2011 and before he died, he on 3<sup>rd</sup> April 2013 transferred his property to his second widow. In the first Will he indicated that his property be left to his name to benefit his children and his grandchildren for 25 years. In the second Will he bequeathed his property to the second house. Then he transferred the property to his second widow.

10. There is no application to invalidate either Will on any ground. There was no application to find that the deceased could not have used the second Will to disinherit his first house. There was no application for the court to determine that the deceased could legitimately give his entire estate to his second widow and thereby disinherit the rest of the family. Now that the deceased, while alive, gave all his property to his second widow, was she given absolute or was she to hold in trust for those who legitimately expected to inherit him? Is the dispute for a Succession Court or for the Environment and Land Court?

11. Back to the application for revocation by David Kamose Njuguna. Even if it were to be allowed, the estate has no property that can be the subject for execution. The only value would be that he can sue or be sued on behalf of the estate. On that basis, I allow the application and revoke the grant of probate with written Will that had been issued to Christopher Njuguna Mungai. In his place David Kamose Njuguna shall be the executor.

12. I have noted the concerns by the second house. But they have their own Will with own executor, and did not cross-petition for a grant. They did not ask that there be a joint grant to David Kamose Njuguna and Lucy Nduta Ngethe.

13. In conclusion, I allow the application dated 8<sup>th</sup> February 2021. I make no order as costs.

**DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2021.**

**A.O. MUCHELULE**

**JUDGE**