



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 199 OF 2006**

**MARTHA GATHONI NDUNGU.....PETITIONER/APPLICANT**

**VERSUS**

**ANNE NDUTA NGUGI A.KA. HANNAH NDUTA.....1<sup>ST</sup> RESPONDENT**

**JAMES NDUNGU.....2<sup>ND</sup> RESPONDENT**

**HELLEN WANGUI NDUNGU.....3<sup>RD</sup> RESPONDENT**

**J U D G M E N T**

1. The deceased Hannah Nduta Ndung'u, died intestate on 9<sup>th</sup> March, 1997.
2. The deceased was married to James Ndungu who is also deceased and together they were blessed with four children. Namely;
  - i. John Muchiri Ndung'u,
  - ii. Hellen Wangui Ndung'u,
  - iii. Martha Gathoni Ndung'u
  - iv. Phylis Muthoni Ndung'u.
3. The deceased upon her demise left the following properties;
  - a. Dundori/Muguathi Block 1/694
  - b. Utheri Wa Lari-Shares-Plot Longonot/Kijabe Block 2/6686.
4. On 20<sup>th</sup> April, 2006, the above beneficiaries petitioned this court for Letters of Administration Intestate which was granted on 21<sup>st</sup> February 2007.
5. John Muchiri Ndungu and Phylis Muthoni Ndungu who were among the administrators of the deceased's estate died on 11<sup>th</sup> July, 2007 and 7<sup>th</sup> December, 2015 respectively before the Confirmation of the Grant.
6. Martha Gathoni Ndungu who is the petitioner herein vide an application dated 30<sup>th</sup> of March 2016 brought under **section 71(1) and Rule 40(1)** of the **Probate and administration Rules** seeks for orders that :-
  - a. **The grant of letters of Administration intestate granted to John Muchiri Ndung'u (Deceased), Martha Gathoni Ndung'u, Hellen Wangui Ndung'u & Phylis Muthoni Ndung'u (Deceased) on 21<sup>st</sup> of February 2007 be confirmed and the confirmed grant be issued to herself. The costs be in the cause.**
7. The Application is supported by her sworn on 30<sup>th</sup> March, 2016. She deposed that the estate of the deceased herein was to be distributed among the daughters and their brother John Muchiri Ndung'u (deceased). That John Muchiri Ndung'u (deceased) inherited their father's

estate which is comprised of Land and Hellen Wangui Ndung'u was given land in Lari Constituency by their mother which land she has since disposed of.

8. She averred that no provision for the dependants is pending, no formal objection of grant has been made to date and that no duty is payable in respect of the deceased. She stated that it had been agreed among all beneficiaries that the properties Dundori /Muguathi Block 1/694 and Utheri Wa Lari Shares Longonot/Kijabe Block 2/6686 be given to her and to Phylis Muthoni Ndungu(Deceased) respectively.

9. That her sister Hellen Wangui Ndungu and the beneficiaries of John Muchiri Ndungu (deceased) and Phylis Muthoni Ndungu (deceased) had declined to sign the consent despite numerous requests to do so.

10. On 14<sup>th</sup> of November, 2019, the 1<sup>st</sup> respondent, Anne Nduta Ngugi swore an affidavit on her behalf and on behalf of her siblings in opposition to the petitioner's application.

11. She deposed that she was the daughter to Abraham Muchiri and Teresiah Muthoni who are deceased. That her father Abraham Muchiri (deceased) was a beneficiary herein and as per the agreement dated 5<sup>th</sup> April, 1997 he was given land parcels numbers **Dundori/Muguathi Block 1/694 & 709**.

12. She stated that they lived with their parents on the said parcel number 709 and cultivated on plot number 694 and when her parents died they were buried on parcel number 709. She continued living on Land parcel number 709 and farming on parcel number 694 even after the demise of her parents.

13. That there were rental houses and the main house on parcel number 709. Sometimes in the year 2016 the petitioner herein and 3<sup>rd</sup> respondent who are her aunties threatened to evict her from the parcels in questions and to make good their threat their house was burnt at night.

14. She further deposed that in the year 2017 her said aunties ordered her to vacate the house and at night the house was burnt again.

15. She reported the matter to the area chief and in the year 2019, the petitioner and the 3<sup>rd</sup> respondent physically evicted her from the aforementioned parcels of land and hired people to demolish the remaining homestead and advertised the property for sale.

16. She averred that the petitioner and the 3<sup>rd</sup> respondent never raised any issue with regard to the properties in question during the lifetime of her parents and prayed that this court restrains any interested party from interfering with their quiet possession.

17. James Ndung'u Macharia, the 2<sup>nd</sup> respondent is the only child and beneficiary of the estate of Phylis Muthoni Ndung'u (deceased). Phylis Muthoni Ndung'u was one of the beneficiaries of the estate of the deceased herein. He inherited land parcel number Longonot/Kijabe Block 2/6686 from his mother and he has no claim over the deceased's estate save that he also swore an affidavit in support of the 1<sup>st</sup> respondent's case. He reiterated and or corroborated the averments contained in her affidavit.

18. The 3<sup>rd</sup> respondent never participated in these proceedings despite being duly served.

19. On 3<sup>rd</sup> of June 2019, this court ordered that this application be disposed of by way of *viva voce* evidence.

#### **EVIDENCE OF THE PARTIES**

20. In her testimony the petitioner in her testimony reiterated the averments contained in both her Supporting Affidavit sworn on 30<sup>th</sup> March, 2016 and her witness statement filed in court on 2<sup>nd</sup> July, 2019.

21. She denied that she chased the 1<sup>st</sup> respondent from her father's land and admitted that the house at their home was burnt, but that she had nothing to do with the arson. She also disputed that plots numbers 709 and 694 were left to the 1<sup>st</sup> respondent by her parents.

22. It was her testimony that she only has an interest in plot number 694 which she had bought.

23. On cross examination she said that John Muchiri (deceased) was the administrator of her father's estate in **Succession Cause Number 222 of 2015**. She testified that there were allegations that her father had a land in Kitale but went there and they found no land as it was said that their father had not fully paid for his share. She admitted that the houses on plot number 709 were burnt. That there was no constructions on plot number 694; that plot number 709 and 694 are about 100 meters separate. She did not have any documents to prove that she was the owner of plot number 694.

24. The 1<sup>st</sup> protestor, James Ndungu Macharia testified that his deceased mother Phylis Muthoni who was one of the beneficiaries to the estate herein was given land parcel number Longonot/Kijabe Block 2/6686.

25. He confirmed this land now belonged to him and he was content. He testified in support of the 1<sup>st</sup> respondent's case herein. He said John Muchiri the deceased father to the 1<sup>st</sup> respondent by virtue of being a beneficiary to the estate and as per the agreement dated 5<sup>th</sup> April 1997, was given land parcels number Dundori/Muguathi Block 1/694 & 709 and the petitioner herein was given land at Kitale.

26. He confirmed that on plot number 709 there are rental houses and the main house and that is where his grandparents were buried; that land parcels 694 and 709 were separate and each was about 0.9 acres. That these parcels of land rightly belonged to the 1<sup>st</sup> respondent Anne Nduta. It was his testimony too that the properties in questions were jointly owned by his deceased grandparents.

27. The 2<sup>nd</sup> protestor Ann Nduta reiterated the averments contained in her Supporting Affidavit. In addition, she stated that houses on parcel number 709 were burnt down and there is only one remaining. That the plot number 694 is where she was cultivating. She said she had never gone to Kitale to verify whether the land that was allegedly given to the petitioner existed.

28. PW3, Mary Muthoni Mutuku, the chief Githioro Location in Nakuru County testified that in 2017 she registered a caution against the parcels Dundori/Muguathi Block 1/694 & 709 for the reasons that 1<sup>st</sup> respondent aunts wanted to dispose of the said land.

## **SUBMISSIONS**

### **PETITIONER/APPLICANT'S SUBMISSIONS**

29. The petitioner filed her Submissions dated 9<sup>th</sup> August, 2021 on 11<sup>th</sup> August 2021.

30. The petitioner framed the following issues for determination;

- i. Whether the deceased distributed her land Parcel DUNDORI/MUGWATHI BLOCK 1/694 and LONGONOT/KIJABE BLOCK 2/6686 prior to her death.
- ii. Whether the estates of Hannah Nduta Ndung'u (deceased) and John Ndung'u Mahia (deceased) should be treated as one estate.
- iii. Whether the distribution of the estate of the deceased parents by the relatives in the meeting of 5<sup>th</sup> April, 1997 is binding.
- iv. Whether the petitioner's proposal on distribution is the best and fairest and equitable of all and in line with the wishes of the deceased.
- v. Whether the protestors have locus standi to participate in the proceedings in the present case.

31. On the first issue, the petitioner submitted that the deceased bequeathed the two parcels of land to herself and to Phylis Muthoni Ndung'u (deceased) by way of gift *inter vivos* or *causa mortis*. That this court vide section 42 of the Law of Succession Act is compelled to honour the wishes of the deceased. She stated that it is undisputed that **Parcel No. Dundori/Mugwathi Block 1/694 and Longonot/Kijabe Block 2/6686** exist and belong to the deceased's estate, and that the 1<sup>st</sup> protestor and the petitioner are in possession and use of Parcel No. Longonot/Kijabe Block 2/6686 and Dundori/Muguathi Block 1/694 respectively. The petitioner urged this court to be guided by the case of **Re Estate Of Late Gideon Manthi Nzioka (Deceased) (2015) eKLR** in which the court relied on the entire provisions of section 31 of the Law Of Succession Act in distinguishing between a valid gift *inter vivos* and gifts *mortis causa*.

32. The Petitioner argued that in construing whether the deceased dealt with the property as a gift *inter vivos* or gift *causa mortis*, the evidence to establish such gifts must be clear and convincing. That in her testimony she stated that her parents called all beneficiaries and gave each one of them his or her property, said meeting was held days before the death of the parents, that the circumstances of their parent's death immediately after the meeting show the deceased parents contemplated death when they distributed assets and granted possession of the requisite parcels of land to each beneficiary.

33. The petitioner stated that her evidence is probable as it's not hearsay like that of the protestors who were young at the time of her parents' death.

34. In order to prove that the land in questions were bequeathed to her and her late sister Phylis Muthoni as gift *causa mortis* the petitioner relied on the case of **Cain vs Moon (1896)2 RB 253** which the court explained the requirements for gift *causa mortis*.

35. The petitioner submitted that from her evidence it was clear that the deceased intended to make the gift in her favour as she relinquished dominion over title to the land parcel no. Dundori/Mugwathi Block 1/694 and intended to perfect the title to her exclusion.

36. On the second issue, the petitioner submitted that the properties herein were not jointly owned by her deceased parents.

37. On the third issue, the petitioner relied on two cases of **Re Estate of Elizabeth Wanjiru Waweru (Deceased) (2017) eKLR & Re Estate Of Penina Teriki Chepkurgat (Deceased) [2020]eKLR** in which the court in both cases stated that the law does not allow any person to distribute assets of a deceased other than through the succession process. That any distribution of the estate through a meeting of either clan members or beneficiaries have no legal force and it is not binding.

38. The petitioner submitted that the alleged family agreement the protestor sought to rely on was not binding as it amounted to intermeddling of the estate by the strangers.

39. The petitioner contended that it is noteworthy that the said meeting whose minutes were relied on by the protestors made reference to the estate of James Ndung'u Mahia (Deceased) whereas the estate in dispute relates to Hannah Nduta Ndung'u.

40. On the fourth issue, the petitioner submitted that if the protestors' claim on distribution was upheld it would offend Article 27 of the Kenyan constitution. That distribution should be equal and in tandem with the said Article 27. She submitted that there was no evidence on record that the land in Kitale that was purportedly given to her existed.

41. She urged the court to take into account the issues of fairness and equity and to consider that land parcel no. Dundori/Lanet Block 1/709 was bequeathed to John Muchiri (deceased) by their father and allow her to get land parcel numbers Dundori/Lanet Block 1/694. That the two parcels of land were of equal size but land parcel number 709 was developed.

42. On the last issue, the petitioner argued that the protestors had no *locus standi* in these proceedings as they are grandchildren and not allowed to inherit from their grandparents. That the 2<sup>nd</sup> protestor admitted to have other siblings but failed to join them in this proceedings and that the protestors to date had not obtained letters of administrations in respect of the estates of their respective parents and therefore had no proof that they were their personal representatives.

43. The Petitioner urged the court to dismiss the protestor's claim.

#### PROTESTOR'S SUBMISSIONS

44. The protestors filed their submissions dated 16<sup>th</sup> September, 2021 on 6<sup>th</sup> October 2021. They reiterated the averments contained in their pleadings and their evidence before this court.

45. They relied on the case of ***In re Estate of Olare Tana (Deceased) [2019] eKLR*** in which the court overruled the objections by the interested parties who had participated in the process of appointing elders and identifying beneficiaries yet they challenged the distribution of the estate land. The court opined that their objection was an afterthought and an attempt at scuttling the distribution process.

46. The protestors urged this court to exercise its discretion in favour of the 1<sup>st</sup> respondent by declaring that land parcels numbers Ndundori/Mugwathi 694 & 709 belong to her and her siblings.

#### ISSUES FOR DETERMINATION

47. Having considered the application, the affidavits both in support of and in opposition to the application and the submissions filed. I am of the considered view that the following issues stand out for determination;

**i. Whether the agreement dated 5<sup>th</sup> April, 1997 on the mode of distribution of the deceased's estate is binding and at the same time whether the Estate of Hannah Ndung'u is the same as that of her deceased husband James Ndung'u (Deceased)**

**ii. Whether the petitioner's Proposed mode of distribution of the Estate is fair and whether it should be adopted. How should the estate of HANNAH NDUTA NDUNGU be distributed?**

#### ANALYSIS & DETERMINATION

**i. Whether the agreement dated 5<sup>th</sup> April 1997 on the mode of distribution of the deceased's estate is binding and whether the estates of the deceased's spouses can be treated as one..**

48. From the evidence on record the deceased herein was killed by her husband who also took his life. Soon thereafter the larger family met to deal with the estates of the deceased. It is evident that from the record that each of the spouses had their own property.

49. It is on record that the deceased's father distributed his property before he died.

50. The estate of his wife Hannah Nduta Ndung'u comprised two parcels of land Dundori/Muguathi Block 1/694 and Longonot/Kijabe Block 2/6686 both registered in the name of Hannah Nduta Ndung'u.

51. It is not in dispute that Longonot /Kijabe block 2/6686 was given by the deceased to her daughter Phyllis Gathoni in her lifetime and it is now registered in the name of the son of Phyllis Gathoni

52. It is the protestors' position that the deceased estate was distributed to the beneficiaries vide an agreement dated 5<sup>th</sup> April, 1997. They argued that as per the said agreement, the petitioner herein was given land in Kitale while the 1<sup>st</sup> respondent's father John Muchiri was given land parcels number Ndundori/Muguathi Block 1/694 & 709. It is however noteworthy that the property 709 was not registered in the name of the deceased but that of her husband.

53. The protestors urged this court to adopt the said agreement on the mode of distribution.

54. It is important to note that the said agreement relates to the estate of James Ndung'u (deceased) while the estate herein belongs to Hannah Nduta Ndung'u.

55. The deceased in this matter died on 9<sup>th</sup> March 1997. The meeting by the clan members and the beneficiaries which resulted in the aforementioned agreement was held after the demise of the deceased and before obtaining of the letters of administration intestate.

56. It is imperative to note that the primary mandate of the probate court is to distribute the estate of a deceased person to the rightful beneficiaries. Distribution is, therefore, at the core of probate and succession proceedings.

57. The **Law of Succession Act** was operationalized on 1<sup>st</sup> July 1981. **Section 2 (1) of the Act** provides that: -

**“S. (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”**

58. The deceased in this matter died post the commencement of the **Law of Succession Act (Cap 160 Laws of Kenya)**. The deceased’s estate therefore should be distributed in accordance to the provisions of the **Law of Succession Act**.

**59. In re Estate of Elizabeth Wanjiru Waweru - Deceased [2017] eKLR** the court observed as follows;

**“The Law does not allow any person to distribute asset of a deceased person other than through the process of succession. The deceased in this matter died post the commencement of the Law of Succession Act (Cap 160 Laws of Kenya). That is the applicable Law in the distribution herein.**

**Beneficiaries can and do often agree on the mode of distribution of a deceased's estate. Where, however, there is disagreement on the mode of distribution, the court must step in and invoke the law.”**

60. In **Eunice Wairimu Rukwaro & Another vs Dorcas Wangui Rukwaro and Others [2005] eKLR**, the deceased's clan elders met after his death and distributed his property without undergoing the process of succession. During the hearing, the petitioners argued that the property should be distributed the way the clan elders had done. In dismissing that argument, the court found out that the so called clan elders had intermeddled with the deceased's estate contrary to **Section 45(1) of the Law of Succession Act**. The court stated:

**“The clan elders had no authority to distribute the properties of the deceased under any written law, nor did they have any grant of representation. Their purported distribution of the estate was of no legal effect.”**

61. In the same vein, in our instant case the persons who purported to distribute the estate herein in a meeting had no authority so to do under any written law, nor did they have a grant of representation. The best that meeting could have achieved would have been to strike an agreement on distribution which would if all parties consented, be adopted by the court in the confirmation stage. There was no such consent. In any event there was a clear mix up of the two estates.

**62. In re Estate of Nzioka Muathi (Deceased) [2021] eKLR** the court stated;

**“.... While I have no problem with clan elders mediating between the warring parties, to adopt the decision of the clan elders line, hook and sinker, would amount to this Court abdicating its judicial mandate and that the Court cannot do. In this case, the disputed clan meeting had no binding force of law since the clan had no power to distribute the deceased's property. In any case, since the third respondent gave her sworn testimony that she was not aware of or attended that said meeting, any resolution therefrom cannot form a basis for her to be estopped”**

63. Clearly the agreement dated 5<sup>th</sup> April, 1997 relied on by the protestors is not binding and or has no legal effect. It mixed up the two estates. It purported to distribute property whose particulars were even unknown and it is evident it was not fair to some of the beneficiaries. For instance, there is no explanation why the protester's father would get a parcel of land from both parents on top of other assets, while leaving some with nothing or no known inheritance.

**(ii) Whether the petitioner's proposed mode of distribution is fair and whether it should be adopted by this court.**

64. The petitioner averred that she bought this parcel of land through her mother name. She said the deceased herein passed on before transferring the said property to her.

65. The protestors disputed this position.

66. It is trite law that he who alleges must prove. **Section 107 of the Evidence Act** provides that for the: **Burden of proof**

**“Section 107: (1) Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

**Section 108: Incidence of burden**

**The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

**Section 109: Proof of particular fact**

**The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.”**

67. The petitioner simply stated that she bought the land. However, she did not place any evidence before court to demonstrate the purchase. The petitioner testified that her parents called all beneficiaries and gave each one of them his or her property, said meeting was held days before the death of the parents and that the circumstances of their parents’ death immediately after the meeting show the deceased parents contemplated death when they distributed assets and granted possession of the requisite parcels of land to each beneficiary.

68. The petitioner did not adduce any evidence to prove that such meetings took place. She ought to have attached the minutes of the alleged meeting as evidence in this case.

69. Ideally we ought to apply, on this estate **Section 38 of the Law of Succession Act** Provides: -

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

70. However, the deceased dealt with one of her properties before she died. This the court must consider this fact. The court cannot also shut its eye to the fact that the four children of the two deceased parents ought to have shared their parent’s properties equally. Since some of them were given the share that was their father’s estate, it would be unfair for them to hog their mother’s estate as well. Distribution of the deceased’s estate therefore must be fair, equitable and just and each beneficiary should have a fair inheritance from their deceased’s parent.

71. It is not in dispute that parcel no Dundori/Muguathi Block 1/694 exists and that it is the estate’s property. The 3<sup>rd</sup> respondent herein did not participate in this proceedings despite service. The safe presumption to make therefore is that she has no claim over the deceased’s estate.

72. The 2<sup>nd</sup> respondent herein confirmed to court that by virtue of being a grandson and the only beneficiary to the estate of the late Phylis Muthoni Ndung’u he inherited the property Longonot/Kijabe Block 2/6686. He is content with it.

73. John Muchiri who was the father to the 1<sup>st</sup> respondent herein was given plot no Dundori/Muguathi Block 1/709. His daughter who is the 1<sup>st</sup> respondent herein inherited this land. The petitioner has no claim whatsoever over this parcel of land.

74. It is on record that no one knows where the land alleged to be in Kitale is or what its particulars are, yet the protestors are insistent that the Petitioner was given land in Kitale. The protestors were duty bound in accordance to **Section 107 of the Evidence Act** to prove on a balance of probability that the land did exist and that the petitioner was given the said land. In any event there is no dispute that they have one parcel of land from the estate and they would not be disinherited.

75. As things stand it is only the Petitioner who has not inherited anything from her parents’ estate. I do not think it would be necessary to undo what has been distributed and occupied while there is one property that could simply be left to the petitioner.

76. It is my view that the protest is misguided. It is dismissed.

77. Consequently, the Summons for confirmation of grant dated 30<sup>th</sup> March 2016 is allowed in terms of paragraph 10 of the Supporting Affidavit. That means that the Petitioner will inherit land parcel no. Dundori/Muguathi Block 1/694.

78. A Certificate of Confirmation of Grant to issue accordingly.

79. This being a family matter each party will bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DECEMBER, 2021**

**MUMBUA T. MATHEKA**

**JUDGE**

In the presence of:

CA Lepikas

For Petitioner: Mr. Mbuthia

For Respondents: Mr. Geke for 2<sup>nd</sup> respondent N/A

1<sup>st</sup> and 3<sup>rd</sup> respondents in Person N/A