



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 18 OF 2018**

**IN THE MATTER OF THE ESTATE OF KAMAU NDIRANGU (DECEASED)**

STEPHEN NJIHIA KAMAU.....1<sup>ST</sup> PETITIONER

LUCY WANJIRU WANJAMA.....2<sup>ND</sup> PETITIONER

VERSUS

JOHN NDIRANGU KAMAU.....PROTESTOR

**JUDGMENT**

1. The Petitioners herein filed for summons of confirmation of grant dated 21<sup>st</sup> October 2020 seeking to have the grant of letters of administration made on 6<sup>th</sup> June 2013 be confirmed as per the proposed amended mode of distribution.
2. By an affidavit of protest sworn on 18<sup>th</sup> January 2021 by John Ndirangu Kamau, the Protestor herein responded by protesting against the mode of distribution. The Petitioners responded to the same vide the supplementary affidavit dated 29<sup>th</sup> April 2021 sworn by Stephen Njihia Kamau.

**PETITIONERS' SUBMISSIONS**

3. The Petitioners submitted that during the hearing the protestor admitted that he was agreeable to the mode of distribution in relation to the following:-

- i. Title no. Nyandarua/Muruaki/3432 measuring 1/8 acres – John Ndirangu Kamau*
- ii. Title no. Nyandarua/Muruaki/1713 measuring 12 acres – John Ndirangu Kamau*
- iii. Title no. Nyandarua/Tulaga/66 (Gathaara) measuring 1/8 acres – Wilson Ndirangu Kamau*
- iv. Title no. Nyandarua/Muruaki/3434 measuring 1/8 acres – James Wangige Kamau*
- v. Title no. Nyandarua/Muruaki/3435 measuring 1/8 acres – Stephen Njihia Kamau*

4. In relation to the various properties that the Protestor alleged had been transferred prior to the deceased's death via a fraudulent power of attorney, the petitioner asserted that it is not enough to allege fraud and not provide any evidence to that effect and therefore the Protestor's allegations remain just as such. The Petitioners indicated that they had responded to these allegations vide the supplementary affidavit sworn on 29<sup>th</sup> April 2021 with supporting annexures of current searches and certified copies of the green cards. Reliance was placed on ***Ratila Gordhanbhai Patel vs Lalji Makanji [1957] 1 EA 314 (CAD)***. The Petitioners urged the court to find that the Protestor had failed to discharge his burden under ***Section 107 of the Evidence Act***.

5. The Petitioners averred that the Protestor was challenged to provide particulars of the alleged bank accounts of the deceased but he failed and therefore those allegations fail the test under ***Section 107 of the Evidence Act***.

6. In relation to Kambi Farm, the Petitioners emphasized that the same is registered to Wilson Ndirangu Kamau pursuant to a title issued on 2<sup>nd</sup> October 1975 and it was bought by him as evidenced by a sale agreement dated 1973 while he had attained the age of majority. In any case, they averred that the Protestor is free to challenge its acquisition at the Environment and Land Court.

7. The Petitioners contended that the contentious issues in the estate relate to:

- *Whether the Protestor as the 1<sup>st</sup> born of the 2<sup>nd</sup> family ranks in priority over the 2<sup>nd</sup> petitioner and is entitled to a larger share of the estate.*
- *The effect of the Protestor in not contesting to the mode of distribution*
- *Distribution of Title Number: Nyandarua/Muruaki 4621 and Title Number: Nyandarua/ Muruaki/4623*

8. On issue no. i) the petitioner submitted that all beneficiaries of the estate should be treated equally and are entitled to protection guaranteed under *Article 27 and 60 (f) of the Constitution of Kenya*. Further reliance was placed on *Estate of Stephen Kurgat Kimwei (Deceased)* and *Section 35, 38 And 40 of the Law of Succession Act*.

9. On issue no. ii) the Petitioners asserted that the Protestor did not execute the consent to the mode of distribution despite him being present in the meeting where the same was discussed and minuted thus he was keen on frustrating and derailing these proceedings. Reliance was placed on *Section 71 (3) (a) and 82 (d) of the Law of the Succession Act* and *Re Estate of Reynolds Mwangi Kinyanjui (Deceased) [2021] eKLR*.

10. The Petitioners averred that 9 out of the 11 beneficiaries including the Protestor's biological siblings gave their consent which goes a long way into affirming that the Protestor's protest lacks merit and further that his reasons to not give consent have no legal underpinning but are based on personal prejudices which include that he is opposed to his sister being an administrator and he had been sued by the Petitioners for intermeddling with the deceased's estate.

11. It was the Petitioners' submission that Title Number: Nyandarua/Muruaki 4621 which is 12 acres should be distributed equally among all the deceased's daughters and Nyandarua/Muruaki 4623 measuring 0.75 acres should be granted to Anne Njeri. It was their prayer that the grant be confirmed as per the amended mode of distribution appearing on Page No. 50 of the supplementary affidavit marked 'SNK-4' save for Nyandarua/Muruaki/1713 which is *lis pendens* at the Environment and Land Court in Nyahururu.

**On Protestor's Submissions, same was not filed by the time of drafting this judgement.**

12. The Protestor through the affidavit of protest against confirmation of grant dated 18<sup>th</sup> January 2021 sworn by himself deposed that the deceased left behind the following properties:-

- i. Nyandarua/Muruaki/1713*
- ii. Nyandarua/Muruaki/3431*
- iii. Nyandarua/Muruaki/3432*
- iv. Nyandarua/Muruaki/3434*
- v. Nyandarua/Muruaki/3435*
- vi. Nyandarua/Muruaki/3437*
- vii. Nyandarua/Muruaki/1710*
- viii. Nyandarua/Muruaki/1711*
- ix. Nyandarua/Muruaki/1712*
- x. Nyandarua/Tulaga/2259*
- xi. Kambi Farm (Developed Plot) No. 8489*
- xii. Nyandarua/Tulaga/66 (Gathara)*
- xiii. Money Banked at KCB, BBK And Aberdare Sacco*
- xiv. Rental Income*

13. That the deceased had expressed his wish and desires that the following properties be distributed as follows:

- *Wilson Ndirangu Kamau*

o *Kambi Farm Plot No. 8489*

o *Nyandarua/Muruaki/1710*

o *Nyandarua/Tulaga/66*

· *James Wangige Kamau*

o *Nyandarua/Muruaki/1711*

o *Nyandarua/Muruaki/3434*

· *Stephen Kamau Njihia*

o *Nyandarua/Muruaki/1712*

o *Nyandarua/Muruaki/3435*

· *John Ndirangu Kamau*

o *Nyandarua/Muruaki/1713*

o *Nyandarua/Muruaki/3437*

o *Nyandarua/Muruaki/3432*

o *Nyandarua/Tulaga/2259*

· *That Joyce Waithera and Rakeli Waithera should share Nyandarua/Muruaki/3431 equally.*

· *That Lydia Wambui Kamau, Beth Muthoni Thamaini, Lucy Wanjiru Wanjama, Florence Nyambura Kamau, Ann Njeri Kamau should each get two acres from Nyandarua/Muruaki/3437.*

14. That the remaining 4 acres from Nyandarua/Muruaki/3437 should be shared equally between Joyce Waithera and Rakeli Waithera should share Nyandarua/Muruaki/3431 equally.

15. That the money in the deceased's bank accounts should be shared equally among all the beneficiaries including the rental income from January 2005 to date, Kshs.3 million proceeds from the sale of trees.

16. Further, the Protestor deponed that the consent on the mode of distribution to property had left out most of the properties comprised in the deceased's estate for the reason that the Petitioners had illegally and unlawfully transferred the same.

17. It was the Protestor's averment that he was not present in the alleged family meeting held on 19/9/2020 were the mode of distribution was discussed and that the Petitioners have been alienating him from any family discussions in a concerted effort to hide their unlawful dealings, transfers and intermeddling with the estate. He reiterated that the deceased's estate should be distributed as per the aforementioned proposal.

#### **ANALYSIS AND DETERMINATION**

18. In the premise, the issues for determination herein are:

a) *Whether all the properties listed by the Protestor are subject to distribution?*

b) *What is the proper approach towards determining the mode of distribution?*

19. There is no dispute as to who the beneficiaries of the deceased's estate are i.e.

1) *Joyce Waithera*

2) *Rakeli Waithera*

3) *James Wangige Kamau*

4) *Anne Njeri Kamau*

- 5) *Wilson Ndirangu Kamau*
- 6) *Florence Nyambura Kamau*
- 7) *Lucy Wanjiru Wanjama*
- 8) *John Ndirangu Kamau*
- 9) *Lydia Wambui Kamau*
- 10) *Beth Muthoni Thamaini*
- 11) *Stephen Kamau Njihia*

**a) Whether all the properties listed by the Protestor are subject to distribution?**

20. The Petitioners submitted that during the hearing the protester admitted that he was agreeable to the mode of distribution in relation to the following:-

- *Title no. Nyandarua/Muruaki/3432 measuring 1/8 acres*
- *Title no. Nyandarua/Muruaki/1713 measuring 12 acres*
- *Title no. Nyandarua/Tulaga/66 (Gathaara) measuring 1/8 acres*
- *Title no. Nyandarua/Muruaki/3434 measuring 1/8 acres*
- *Title no. Nyandarua/Muruaki/3435 measuring 1/8 acres*
- *The Protestor through the affidavit of protest against confirmation of grant dated 18<sup>th</sup> January 2021 sworn by himself deposed that the deceased left the following properties:-*
- *Nyandarua/Muruaki/1713*
- *Nyandarua/Muruaki/3431*
- *Nyandarua/Muruaki/3432*
- *Nyandarua/Muruaki/3434*
- *Nyandarua/Muruaki/3435*
- *Nyandarua/Muruaki/3437*
- *Nyandarua/Muruaki/1710*
- *Nyandarua/Muruaki/1711*
- *Nyandarua/Muruaki/1712*
- *Nyandarua/Tulaga/2259*
- *Kambi Farm (Developed Plot) No. 8489*
- *Nyandarua/Tulaga/66 (Gathara)*
- *Money Banked at KCB, BBK And Aberdare Sacco*
- *Rental Income*

21. On the other hand, the Petitioners ascertained that the only properties available for distribution were:-

- *Title Nyandarua/ Muruaki 4621*

- *Title No. Nyandarua/Muruaki/4623*
- *Title No. Nyandarua/Muruaki/3432*
- *Nyandarua/Muruaki/1713*
- *Title No. Nyandarua/Tul 66 (Gathaara)*
- *Title No. Nyandarua/Muruaki/3434*
- *Title No. Nyandarua/Muruaki/3435*

22. The properties that the Protestor alleges were not included in the scheduler of assets include:

- *Money Banked At KCB, BBK And Aberdare Sacco*
- *Rental Income*
- *Nyandarua/Muruaki/3437*
- *Nyandarua/Muruaki/1710*
- *Nyandarua/Muruaki/1711*
- *Nyandarua/Muruaki/1712*
- *Nyandarua/Tulaga/2259*
- *Kambi Farm (Developed Plot) No. 8489*
- *Nyandarua/Muruaki/3431*

23. In response to the aforementioned allegations by the Protestor, the petitioners through the supplementary affidavit dated 29<sup>th</sup> April 2021 deponed as follows:-

24. That Nyandarua/Muruaki/3431 does not form part of the estate as the same was transferred to Stephen Njihia Kamau on 16<sup>th</sup> December 2004 prior to the deceased's death then the same was sold to Benson Kuria Kairu, its current proprietor. **(annexed SNK 3(a)- certified copy of the green card and SNK 3(b) copy of current search certificate over the said parcel)**

25. Nyandarua/Muruaki/3437 was subdivided by the deceased and the said parcel mutated to Nyandarua/Muruaki/ 4621, 4622, 4623, 4624, 4625, 4626 and 4627. Subsequently, the deceased sold Nyandarua/Muruaki/ 4622, 4624, 4625, 4626 and 4627. **(annexed SNK 4 (a) – copy of the closed green card for Nyandarua/Muruaki/3437, SNK 4 (b) mutation thereof, SNK 5(i) –SNK 5 (iv) copies of green cards and searches over the said parcels)**

26. Nyandarua Muruaki 1710 does not form part of the estate as the same was transferred to Wilson Ndirangu Kamau prior to the deceased death. **(annexed SNK 8 copy of title deed)**

27. Nyandarua/ Muruaki /1711 was transferred to James Wangige on 16<sup>th</sup> December 2004 prior to the deceased's death. **(annexed SNK 9 - copy of the green card)**

28. Nyandarua/Tulaga/2259 was transferred to James Kamau on 24<sup>th</sup> December 2004 prior to the deceased's death. **(annexed SNK 11 (a) and SNK 11(b)- copies of the green card and search over the property)**

29. The deceased never owned Kambi Farm as Wilson Ndirangu Kamau is the registered owner of LR 84995/5 bought from Kambi Farmers' Co-operative Society in 1973 and subsequently registered in his name. **(annexed SNK 12 (a) and SNK 12 (b) copies of the certificate of title and sale agreement respectively)**

30. On the issue of rental income the only developed property is Nyandarua/Muruaki/3431 does not form part of the deceased's estate.

31. That Nyandarua /Muruaki/3432, 3434 and 3435 are bare developments and no rent is collected from them

32. That they are not aware of any bank accounts in KCB, BBK and Aberdare Sacco

33. For the right formula on distribution to be followed by the administrators or administrator, all the property available for distribution must be specified and proved to be such. Any property which is not available for distribution may not and cannot be available for distribution in

an application for confirmation of grant.

34. I have thoroughly considered the Protestor's protest and evidence thereof presented before the court as to the properties not included in the schedule for distribution and I find that there is no evidence to support his claims that the properties left out are available for distribution as part of the deceased's estate and that they were illegally transferred by the Petitioners. The protester has not proven his case.

35. The Protestor alleged fraud in the manner in which some of the properties were transferred to some of the beneficiaries. Fraud is a criminal offence. The Protestor ought to have reported the alleged fraud to the police for investigations to be conducted on the same. I am unable to determine that the properties were indeed transferred fraudulently due to lack of evidence supporting the same. In any case, the Protestor can contest the ownership of the disputed parcels within the proper forum.

36. That being the case, it is my considered finding that the properties available for distribution as part of the deceased estate are:

- *Title Nyandarua/ Muruaki 4621*
- *Title No. Nyandarua/Muruaki/4623*
- *Title No. Nyandarua/Muruaki/3432*
- *Nyandarua/Muruaki/1713*
- *Title No. Nyandarua/Tul 66 (Gathaara)*
- *Title No. Nyandarua/Muruaki/3434*
- *Title No. Nyandarua/Muruaki/3435*
- *The Protestor averred that his proposed mode of distribution as according to the deceased's wishes was:-*
- *Wilson Ndirangu Kamau*
  - o *Kambi Farm Plot No. 8489*
  - o *Nyandarua/Muruaki/1710*
  - o *Nyandarua/Tulaga/66*
- *James Wangige Kamau*
  - o *Nyandarua/Muruaki/1711*
  - o *Nyandarua/Muruaki/3434*
- *Stephen Kamau Njihia*
  - o *Nyandarua/Muruaki/1712*
  - o *Nyandarua/Muruaki/3435*
- *John Ndirangu Kamau*
  - o *Nyandarua/Muruaki/1713*
  - o *Nyandarua/Muruaki/3437*
  - o *Nyandarua/Muruaki/3432*
  - o *Nyandarua/Tulaga/2259*

37. That Joyce Waithera and Rakeli Waithera should share Nyandarua/Muruaki/3431 equally.

38. That Lydia Wambui Kamau, Beth Muthoni Thaini, Lucy Wanjiru Wanjama, Florence Nyambura Kamau, Ann Njeri Kamau should each get two acres from Nyandarua/Muruaki/3437.

39. That the remaining 4 acres from Nyandarua/Muruaki/3437 should be shared equally between Joyce Waithera and Rakeli Waithera should

share Nyandarua/Muruaki/3431 equally.

40. That the money in the deceased's bank accounts should be shared equally among all the beneficiaries including the rental income from January 2005 to date, Kshs.3 million proceeds from the sale of trees.

41. On the other hand, the Petitioners' submitted their proposed mode of distribution as:-

- *Title Nyandarua/ Muruaki 4621 (in equal shares) - Anne Njeri Kamau ID No xxxxx*
  - o *Florence Nyambura Kamau*
  - o *Lucy Wanjiru Wanjama*
  - o *Anne Njeri Kamau ID No xxxxx*
  - o *Beth Muthoni Thamani*
  - o *Lydia Wambui*
- *Title No. Nyandarua/Muruaki/4623 - Anne Njeri Kamau ID No xxxxx*
- *Title No. Nyandarua/Muruaki/3432 - John Ndirangu Kamau*
- *Nyandarua/Muruaki/1713 - John Ndirangu Kamau*
- *Title No. Nyandarua/Tul 66 (Gathaara)- Wilson Ndirangu Kamau*
- *Title No. Nyandarua/Muruaki/3434 - James Wangige Kamau*
- *Title No. Nyandarua/Muruaki/3435 - Stephen Njihia Kamau*

42. From the foregoing and leaving out the disputed properties of which I have already made my finding on the same above, both parties agree that the following properties should be distributed as follows:-

- *Title No. Nyandarua/Muruaki/3434 - James Wangige Kamau*
- *Title No. Nyandarua/Muruaki/3432 - John Ndirangu Kamau*
- *Nyandarua/Muruaki/1713 - John Ndirangu Kamau*
- *Title No. Nyandarua/Muruaki/3435 - Stephen Njihia Kamau*
- *Title No. Nyandarua/Tul 66 (Gathaara)- Wilson Ndirangu Kamau*

43. That leaves Title Nyandarua/ Muruaki 4621 (in equal shares) and Title No. Nyandarua/Muruaki/4623.

44. However, the record shows that Nyandarua/Muruaki/1713 which is lis pendens before Environment and Land Court in Nyahururu. **Rule 41(3) and 42 (2) of the Probate and Administration Rules**, empowers the Court before confirmation of a grant to remove property which is in contest from the schedule of assets and have the same determined separately. If the contested property is found to be part of the Estate of the Deceased, the same is restored back to the schedule of assets of the deceased's estate available for distribution. This position was supported by the case of ***In Re Estate of Francis Peter Njuguna [2016] eKLR***.

45. According to **Section 29 of the Law of Succession Act** "dependant" means

***"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."***

46. This section does not discriminate between children of the deceased on sex or marital status. ***In re Estate of Solomon Ngatia Kariuki – Deceased [2008] eKLR, Makhandia J.*** (as he then was) stated:

***"The law of Succession Act does not discriminate between the female and male children married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate."***

47. (See also ***Mary Wangari Kihika v John Gichuhi Kinuthia & 2 others [2015] eKLR***)

48. Accordingly, daughters are entitled to inherit whether unmarried or married.

49. The Petitioners proposed that the remaining parcels be distributed as follows:

· ***Title Nyandarua/ Muruaki 4621 (in equal shares) - Anne Njeri Kamau ID No xxxxx***

o ***Florence Nyambura Kamau***

o ***Lucy Wanjiru Wanjama***

o ***Anne Njeri Kamau ID No xxxxx***

o ***Beth Muthoni Thamani***

o ***Lydia Wambui***

· ***Title No. Nyandarua/Muruaki/4623 - Anne Njeri Kamau ID No xxxxx***

50. In my view the mode of distribution proposed by the Petitioners appears quite fair. I find that the protest is unfounded. The same is dismissed.

51. In the premises, I am of the view that the summons of confirmation of grant dated 21<sup>st</sup> October 2020 should be granted as per the petitioners' mode of distribution marked "SN4" save for Nyandarua/Muruaki/1713.

52. Thus the court makes the orders that;

***(i) The protest is dismissed.***

***(ii) The grants are confirmed and the proposed distribution approved save for Nyandarua/Muruaki/1713 which will have to await ELC verdict.***

***(iii) Parties bear their own costs.***

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 16TH DAY OF DECEMBER, 2021.**

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**CHARLES KARIUKI**

**JUDGE**