



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 525 OF 2011**

**IN THE MATTER OF THE ESTATE OF GEORGE WAIYAKI WAMBAA – (DECEASED)**

**DAMARIS WANJIRU KINYANJUL.....ADMINISTRATOR/APPLICANT**

**VERSUS**

**LAWRENCE HINGA WAIYAKI.....ADMINISTRATOR/RESPONDENT**

**GLADWELL WANGARI THUKU.....OBJECTOR**

**JUDGMENT**

1. The deceased George Waiyaki Wambaa died intestate on 19<sup>th</sup> August 2003. He left the following assets:-

- (a) Dagoretti/Kinoo/2099 measuring 0.47 Ha;
- (b) Dagoretti/Kinoo/2095 measuring 0.73 Ha;
- (c) Dagoretti/Kinoo/490/6 measuring 0.0297 Ha; and
- (d) Kiambu/Limuru/5873/3,6 and 7 that measures 28.617 Ha (70.7125 acres).

2. The deceased's wife Gladys Wambaa Waiyaki died. The children were as follows:-

- a) Frank Wambaa Waiyaki who died and left a widow Mary Wanjuhi Wambaa and children;
- b) Fredrick Njenga Waiyaki who died along with his wife but they left children;
- c) Catherine Nyangui Waweru;
- d) Daniel Mbugua Waiyaki who died and left a widow Salome Wangui Wamagata and children;
- e) George Ngethe Waiyaki;
- f) Damaris Wanjiru Kinyanjui;
- g) Lawrence Hinga Waiyaki; and
- h) Eric Githinji Waiyaki who died and left a widow Gladwell Wangari Thuku and children.

3. On 23<sup>rd</sup> April 2012 Lawrence Hinga Waiyaki, Eric Githinji Waiyaki and Damaris Wanjiru Kinyanjui were appointed joint administrators of the estate of the deceased. When Eric Githinji Waiyaki died, Lawrence Hinga Waiyaki and Damaris Wanjiru Kinyanjui were left as the co-administrators.

4. The dispute regards the sharing of the estate to these identified beneficiaries.

5. On 22<sup>nd</sup> August 2016 the administrators Lawrence Hinga Waiyaki and Damaris Wanjiru Kinyanjui applied for the confirmation of the grant. In the application, it was proposed that all the beneficiaries equally share Dagoretti/Kinoo/2095; the family of the late Eric Githinji Waiyaki as represented by his widow Gladwell Wangari Thuku (the objector) gets 0.346 Ha of Dagoretti/Kinoo/2099; 0.01 Ha of Dagoretti/Kinoo/2099 be preserved for access road; and the balance of 0.01 Ha of Dagoretti/Kinoo/2099 be registered in the name of a company to be formed by all the beneficiaries. Regarding Kiambu/Limuru/5873/3, 6 and 7, the distribution be as follows:-

- (a) Mary Wanjuhi Wambaa – 9 acres;
- (b) Salome Wangui Wamagata – 9 acres;
- (c) Fredrick Njenga Waiyaki – 9 acres
- (d) George Ng’ethe Waiyaki – 9 acres
- (e) Lawrence Hinga Waiyaki - 11 acres
- (f) Eric Githinji Waiyaki – 7.3 acres;
- (g) Kathleen Nyangui Waweru – 8 acres;
- (h) Damaris Wanjiru Kinyanjui – 8 acres; and
- (i) P.C.E.A Church – 1 acre.

Plot No. 490/6 at Muthiga Market (Dagoretti/Kinoo/490/6) was to be shared equally by Salome Wangui Wamagata and George Ng’ethe Waiyaki.

6. This sharing followed several family meetings. It was consented to by all the beneficiaries, except the objector. The objector (the widow of Eric Githinji Waiyaki) felt that she was getting less than the rest, her home and borehole (which was her source of income) were being excised and taken away and that her access to her home was being interfered with.

7. Eric Githinji Waiyaki and his family were staying on the deceased’s land in Limuru. The deceased and his wife were living on Dagoretti/Kinoo/2099. This is where they were eventually buried. The deceased had sunk a water borehole here that the entire family and neighbours were using. When the deceased died in 2003, Eric Githinji Waiyaki brought this family here. He took over the deceased’s home. He and his wife (the objector) wanted to have exclusive ownership and use of this parcel of land, and the borehole. The rest of the beneficiaries would like their parents’ graveyard and the borehole to be excised and become common facilities to be accessed by all beneficiaries, including the objector. It should be registered in the name of the company in which all beneficiaries are shareholders.

8. On 14<sup>th</sup> March 2017 the court ordered the estate to be valued and a report to be filed. Green Gain Consultants Ltd valued the properties in the estate and filed their report. The values were as follows:-

- (a) Dagoretti/Kinoo/2099 – Kshs.56,000,000/=;
- (b) Dagoretti/Kinoo/2095 Kshs.95,000,000/=;
- (c) Dagoretti/Kinoo/490/6 – Kshs.16,000,000/=; and
- (d) Kiambu/Limuru/5873/3, 6 and 7 Kshs.700,000,000/=.

9. When Damaris Wanjiru Kinyanjui saw the valuation report, she changed her mind. She filed an amended application for confirmation dated 23<sup>rd</sup> October 2018 in which she stated that –

**“.....the valuation report has demonstrated that the first schedule was indeed unfair and it was favouring the objector for no apparent reason.”**

She got Mary Wanjuhi Wambaa Waiyaki, Fredrick Njenga Waiyaki, Salome Wangui Wamagata and Kathleen Nyangui Waweru to agree with her in her new proposal which was as follows:-

- a) Dagoretti/Kinoo/490/6 was to be shared equally between Salome Wangui Wamagata and George Ng’ethe Waiyaki;
- b) Dagoretti/Kinoo/2095 to be shared equally among Mary Wanjuhi Wambaa, Fredrick Njenga Waiyaki, Salome Wangui Wamagata, George Ngethe Waiyaki, Lawrence Hinga Waiyaki, Eric Githinji Waiyaki, Kathleen Wangui Waweru and Damaris Wanjiru Kinyanjui;

c) Kiambu/Limuru/5873/3,6 and 7 to be shared so that Mary Wanjuhi Wambaa gets 9 acres; Fredrick Njenga Waiyaki 9 acres; Salome Wangui Wamagata 9 acres; George Ngethe Waiyaki 9 acres; Lawrence Hinga Waiyaki 11 acres; Erick Githinji Waiyaki 6 acres; Damaris Wanjiru Kinyanjui 8 acres; Kathleen Nyangui Waweru 8 acres; and PCEA Church 1 acre; and

d) Dagoretti/Kinoo/2099 be shared so that Eric Githinji Waiyaki gets 0.89 acres; and the portion with the graveyard and water borehole measuring 0.27 acres to be the common area for all the beneficiaries.

This sharing was opposed by Lawrence Hinga Waiyaki and the objector. Damaris Wanjiru Kinyanjui, Lawrence Hinga Waiyaki and the objector testified.

10. Under **sections 35(5) and 38 of the Law of Succession Act (Cap. 160)**, the eight beneficiaries left by the deceased are each entitled to equal share in his estate. **(In the estate Grace Wachuka –v- Jackson Njuguna Gathungu and Another [2014] eKLR).**

11. The court shall bear in mind that each of the four properties has a different value, and is in different state of development. The court will endeavour to be equal, fair and equitable to the parties.

12. The proposal that was made by Lawrence Hinga Waiyaki and Damaris Wanjiru Kinyanjui in the application for confirmation filed on 22<sup>nd</sup> August 2016 and the proposal of the latter in her amended application for confirmation filed on 23<sup>rd</sup> October 2018 are, to a large extent, similar. In each case, Dagoretti/Kinoo/2095 is to be shared equally among all the eight beneficiaries and Dagoretti/Kinoo 490/6 is to be shared equally between Salome Wangui Wamagata and George Ng'ethe Waiyaki. In either proposal, it is indicated that each beneficiary should benefit from Kiambu/Limuru/5873/3, 6 and 7. The shares of all the beneficiaries, except Erick Githinji Waiyaki, do not change. It does appear not disputed that Dagoretti/Kinoo/2099 has substantial value, and it is peculiar because it has the graveyard and the borehole. The rest of the beneficiaries would like access to these two sites. Presently, the objector has made it difficult for the sites to be accessed. When the objector was cross-examined she conceded that the rest of the beneficiaries should have access to the graveyard and the water borehole. She was, however, worried that access to the sites may interfere with the rest of the parcel which she asked for in the distribution. I note that the objector's family has lived here since 2003. It should not be disturbed, the same way Lawrence Hinga Waiyaki cannot be asked to leave Kiambu/Limuru/5873/3, 6 and 7 where he has always lived.

13. I consider that the valuation helped put values to each property. However, it did not substantially affect what both Lawrence Hinga Waiyaki and Damaris Wanjiru Kinyanjui had earlier proposed.

14. Bearing in mind all the above, I order that the joint grant that was issued to Lawrence Hinga Waiyaki and Damaris Wanjiru Kinyanjui on 23<sup>rd</sup> April 2012 shall be confirmed in the following terms:-

a) Kiambu/Limuru/5873/3,6 and 7 shall be shared so that Mary Wanjuhi Wambaa gets 9 acres; Fredrick Njenga Waiyaki 9 acres; Salome Wangui Wamagata 9 acres; George Ngethe Waiyaki 9 acres; Lawrence Hinga Waiyaki 11 acres; Gladwell Wangari Thuku 6 acres; Kathleen Nyangui Waweru 8 acres; Damaris Wanjiru Kinyanjui 8 acres; and PCEA Church 1 acre;

b) all these beneficiaries shall equally share Dagoretti/Kinoo/2095;

c) Salome Wangui Wamagata and George Ngethe Waiyaki shall equally share Dagoretti/Kinoo/490/6; and

d) Dagoretti/Kinoo/2099 shall be shared so that Gladwell Wangari Thuku gets 0.89 acres that has her residential home and rental houses, and all the beneficiaries (including her) shall be registered in respect of 0.27 acres that has the graveyard and the water borehole, and that registration may be through a company that they may form.

15. This being a family dispute, I ask that each side pays own costs.

**DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 30<sup>TH</sup> day of APRIL 2020**

**A.O. MUCHELULE**

**JUDGE**