

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1993 OF 2008

IN THE MATTER OF THE ESTATE OF JAMES KAGWIMA GATHU – (DECEASED)

SUSAN WANJIRU GATHU.....ADMINISTRATRIX/APPLICANT

VERSUS

LUCY WAMBUI KAGWIMA.....ADMINISTRATRIX

AND

MARY WAHU GATHU.....PROTESTER

JUDGMENT

1. The deceased James Kagwima Gathu died intestate on 8th October 2005. He was survived by his widow Elizabeth Mugure Kagwima. He had the following children:-

- (a) Patrick Handi Kagwima;
- (b) Robert Gichungu Kagwima;
- (c) Lucy Wambui Kagwima;
- (d) Scholastica Waithira Kagwima
- (e) Assumpta Mukuhi Njenga;
- (f) George Gathu Kagwima;
- (g) Beatrice Mukami Kagwima; and
- (h) Mary Nagi Kagwima.

George Gathu Kagwima died on 3rd January 1993. He left a family which included a widow Susan Wanjiru Gathu (Administratrix/ applicant) and her four children. There are other claimants to his estate. Patrick Handi Nagi died in 2012 and left his widow Esther Wanjiru Muhura. Scholastica Waithira Kagwima died and did not leave a family. Mary Nagi Kagwima died in 1990 and left a son Patrick Handi Nagi.

2. On 20th April 2006 the deceased's widow Elizabeth Mugure Kagwima petitioned the Senior Resident Magistrate's Court at Limuru in **Succession Cause No. 27 of 2006** for the grant of letters of administration intestate. The grant was issued on 21st September 2006. She filed an application for the confirmation of the grant. Her proposed mode of distribution was opposed by Susan Wanjiru Gathu. Susan Wanjiru Gathu followed this with an application to revoke the grant. Before it was heard, Elizabeth Mugure Kagwima died on 7th June 2015.

3. Following application by Susan Wanjiru Gathu, on 7th December 2016 the court appointed Lucy Wambui Kagwima, Robert Gachungu Kagwima and Susan Wanjiru Gathu as the co-administrators of the estate of the deceased. They were asked to apply for the confirmation of the grant.

4. On 15th December 2016 Susan Wanjiru Gathu filed an application for the confirmation of the grant, and proposed how the estate of the deceased should be shared. On 12th January 2017 Lucy Wambui Kagwima filed a counter proposal on distribution. Mary Wahu Gathu filed an affidavit of protest to the application as filed by Susan Wanjiru Gathu. Her case was that she was a wife to the late George Gathu Kagwima, having got married to him in 1977 and having got 3 children with him. She stated that she married him when she had a child whom he adopted as their 4th child. She stated that George Gathu Kagwima had yet another wife with children; that Susan Wanjiru Gathu was not the only widow left by him. She contested the mode of distribution in the application for confirmation in so far as it stated that

George Gathu Kagwima had only one family. I will return to this issue later in this judgment.

5. The deceased's estate comprised the following assets.

- (a) Limuru/Bibirioni/Block 1/26 which had been subdivided into 10 portions, that is Limuru/Bibirioni/3200 to Limuru/Bibirioni/3209;
- (b) Naivasha/Mwichiringiri Block 4/3299 – 1.236 Ha;
- (c) Naivasha/Mwichiringiri Block 1/1495 – 1.103 Ha;
- (d) Naivasha/Mwichiringiri Block 1/1335 – 1.800 Ha;
- (e) Naivasha/Mwichiringiri Block 1/225 (Ihindu);
- (f) Longonot/Kijabe Block 3/1608 – 0.38 Ha;
- (g) Tigoni/Mabrouke Block 1/530 – 0.0450 Ha;
- (h) Kieseges/Nyamamithi/ Block 4/1212 (Subukia – 2.448 Ha;
- (i) Limuru/Bibirioni/T.11;
- (j) Naivasha/Maraigushu Block 9/4 – 3.12Ha;
- (k) Shares in National Bank of Kenya Ltd; and
- (l) Shares in Barclays Bank of Kenya.

6. It does not appear disputed that Susan Wanjiru Gathu's late husband (George Gathu Kagwima) left another wife Mary Wanjiku Gathu. Mary Wahu Gathu claims to be the third wife of the deceased. Susan Wanjiru Gathu disputes that Mary Wahu Gathu was wife to the deceased, but Lucy Wambui Kagwima (a co-administrator and George Gathu Kagwima's sister) acknowledged her (Mary Wahu Gathu) as a wife to the brother. It is notable that this cause is in relation to the estate of the deceased, and not the estate of his son George Gathu Kagwima. Since George Gathu Kagwima died no petition for grant has been filed. There is no grant issued. It is during the petition in respect of his estate that his beneficiaries will be identified. The court will determine how many widows he left, and how many children he left. It is during that cause that the status of Mary Wahu Gathu will be determined. M/s Muhuhu for Susan Wanjiru Gathu invited this court to determine the status of Mary Wahu Gathu, and to find that she was not married to the late George Gathu Kagwima. With profound respect, this court is not determining the beneficiaries and/or dependants of George Gathu Kagwima. It is determining the beneficiaries of the deceased herein. These beneficiaries, I determine, include George Gathu Kagwima. He died and therefore his estate shall benefit.

7. The deceased did not leave a Will, written or oral. But it does appear that he had settled some of the family members. To the extent that the settlement is ascertainable, the wishes of the deceased will be respected. Secondly, the court will, to a large extent, consider where the respective beneficiaries are presently living, so that there is minimum disruption. Lastly, where the parties are agreed on the respective shares, this will, as much as possible, be respected.

8. The deceased left a widow and 8 children. The widow died. One of the children (Scholastica Waithira Kagwima) died and left no family. George Gathu Kagwima, Patrick Handi Kagwima and Mary Nagi Kagwima each died and left a family. I determine that the deceased left seven beneficiaries. Under **section 35(5) of the Law of Succession Act (Cap. 160)** the estate shall, subject to what I have said in the foregoing, be divided equally among the seven beneficiaries. However it will be borne in mind that the estate was not valued. The values of the respective parcels are not known. Achieving equality is therefore not easy. The court will endeavour to be as fair and equitable as possible.

9. The proposal of the 1st administratrix and 2nd administratrix are as follows:-

Assets	Proposal by Susan Wanjiru Gathu	Proposal by Lucy Wambui Kagwima
Limuru/Bibirioni Block 1/26	Beatrice Mukami Kagwima	Beatrice Mukami Kagwima
Limuru/Bibirioni/3200	(whole)	(whole)
Limuru/Bibirioni/3201	Lucy Wambui Kagwima (whole)	Lucy Wambui Kagwima (whole)
Limuru/Bibirioni/3202	Susan Wanjiru Gathu (1 acre absolutely)	Elizabeth Mugure Kagwima (deceased) to be shared equally between the 7 beneficiaries

Limuru/Bibirioni/3203	Esther Wanjiru Mwaura (to hold in trust for her children)	Estate of Patrick Handi Kagwima (whole)
Limuru/Bibirioni/3204	Robert Gichungu Kagwima (2 acres absolutely)	Robert Gichungu Kagwima (whole)
Limuru/Bibirioni/3205	Robert Gichungu Kagwima (0.25 acres)	Robert Gichungu Kagwima (whole)
Limuru/Bibirioni/3206	(Gravesite) Robert Gichungu Kagwima and Susan Wanjiru Gathu	Lucy Wambui Kagwima and Robert Gichungu Kagwima on behalf and in trust of 6 beneficiaries expect the estate of George
Limuru/Bibirioni/3207		
Limuru/Bibirioni/3208	To be shared equally among the 7 beneficiaries	To be shared equally among the 7 beneficiaries
Limuru/Bibirioni/3209		
Naivasha/Mwichiringiri Block 1/225	Yusuf Kamau Waigi/Wanjiru Ndungu (1 acre) and balance to go to estate of Mary Nagi Kagwima	Yusuf Kamau Waigi/Wanjiru Ndungu (1 acre) and Estate of Mary Nagi Kagwima (remaining portion)

Assets	Proposal by Susan Wanjiru Gathu	Proposal by Lucy Wambui Kagwima
Naivasha/Mwichiringiri Block 1/1495	2 acres to be jointly shared between Wilson Kagwima, George Gathu Nagi & Patrick Handi Nagi (2 acres to be registered jointly) Yusuf Kamau Waigi/Wanjiru Ndungu (1 acre)	Yusuf Kamau Waigi/ Wanjiru Ndungu (1 acre) Estate of Mary Nagi Kagwima(remaining portion)
Naivasha/Maraigushu Block 9/4	Asumpta Mukuhi Njenga (1 acre) Lucy Wambui Kagwima (1 acre) Esther Wanjiru Mwaura (1 acre) Robert Gichungu Kagwima (1 acre) Susan Wanjiru Kagwima (1 acre) Beatrice Mukami Kagwima (1 acre) 1 acre to be share jointly between; Lydia Wangari Nagi, Lucy Mukami Nagi & Alice Wanjiru Nagi	Asumpta Mukuhi Njenga (1 acre) Ketraco (2.01 acres) All 7 beneficiaries(equal shares)
Kieseges/Nyamamithi/Block 4/1212 (Subukia)	2 acres to be shared jointly ; Wilson Kagwima Nagi, George Gathu Nagi & Patrick Handi Nagi Esther Wanjiru Mwaura(1 acre) to hold in trust for her children Lucy Wambui Kagwima (1 acre) Asumpta Mukuhi Njenga (1 acre) Robert Gichungu Kagwima (1 acre)	All 7 beneficiaries in equal shares
Longonot /Kijabe Block 3/1608	Lucy Wambui Kagwima (1 acre)	All 7 beneficiaries in equal

		shares
Plot No. 11 Bibirioni	Asumpta Mukuhi Njenga	All 7 beneficiaries in equal shares
Shares at Barclays and National Bank of Kenya	Registered jointly to be held in trust for beneficiaries	All 7 beneficiaries in equal shares

10. It should be noted that the proposal by Lucy Wambui Kagwima had the support of Robert Gichungu Kagwima, Beatrice Mukami Kagwima, Assumpta Mukuhi Njeri, the estate of Mary Nagi Kagwima and the estate of Patrick Handi Kagwima. This means that, of the seven beneficiaries only one beneficiary (the estate of George Gathu Kagwima as represented by Susan Wanjiru Gathu) held a different view on distribution. The case of Lucy Wambui Kagwima, and those who support her, was that the deceased had to a large extent indicated how his estate should devolve, and this is what is contained in the proposal. According to Susan Wanjiru Gathu the deceased died intestate, without expressing his wishes in any way. However, when she was cross-examined, she stated as follows: -

“.....no one has asked me to vacate the 4 acres. It is deceased who gave me this portion. He also gave me land in Limuru. He told me he would give me land in Limuru. I do not know if the parcels in Limuru have beacons. I visit the parcels. I know the portions have boundaries. This is because each party cultivates separate area. Some portions were given to individuals and others were not given. Those given portions were Robert Gichumu and Patrick Handi.....Robert Gichumu was given 2 acres. Patrick Handi was given 2 acres. Beatrice Mukami was given 1 acre.....”

It is clear from the above evidence that the deceased had given some portions of land to certain members of his family, and therefore the proposal by Lucy Wambui Kagwima (as supported by the rest of the family except Susan Wanjiru Gathu) represented the ascertained wishes of the deceased.

11. Nonetheless, the proposals had areas of agreement. For instance the shares in National Bank of Kenya and Barclays Bank of Kenya were proposed by either side to benefit all the 7 beneficiaries equally.

12. Both sides agreed that Limuru/Bibirioni/3200 should go to Beatrice Mukami Kagwima absolutely, Limuru/Bibirioni/3204 should go to Robert Gichungu Kagwima and Limuru/Bibirioni/3205 should go to Robert Gichungu Kagwima.

13. In respect of Naivasha/Maraigushu Block 9/4, for instance, it was common ground that 2.01 acres of it was compulsorily acquired by Ketraco and the proceeds are awaiting this distribution to be shared. Both sides essentially agree that each beneficiary should share in the balance of the land.

14. The other example is Kieseges/Nyamamithi Block 4/1212 (Subukia). Susan Wanjiru Gathu proposed that all the seven beneficiaries should benefit equally. Lucy Wambui Kagwima has made a proposal that is near all the parties benefitting.

15. Lucy Wambui Kagwima has honoured the 4 acres that the deceased gave to the late George Gathu Kagwima in Naivasha/Mwachiringiri Block 1/255. The parties agreed that estate of James Kangethe gets 2 acres and estate of Eunice Nagi Kimani gets 1 acre from the parcel. There was also agreement on the sharing of Naivasha/Mwachiringiri Block 1/1495.

16. Lucy Wambui Kagwima stated that the deceased had not shared Limuru/Bibirioni/3207, Limuru/Bibirioni/3208 and Limuru/Bibirioni/3209. She asked that each be shared equally among the seven beneficiaries. This was the same proposal made by Susan Wanjiru Gathu.

17. Considering all the above, I determine that the estate of the deceased be shared as follows:-

(a) the shares in National Bank of Kenya and Barclays Bank of Kenya shall be sold and shared among the estate of the George Gathu Kagwima, the estate of Patrick Handi Kagwima, the estate of Mary Nagi Kagwima, Beatrice Mukami Kagwima, Robert Gichungu Kagwima, Lucy Wambui Kagwima and Assumpta Waithira Kagwima;

(b) Limuru/Bibirioni/3207, 3208 and 3209 shall equally be shared among the beneficiaries as shown in (a);

(c) Limuru/Bibirioni/3200 shall go absolutely to Beatrice Mukami Kagwima;

(d) Limuru/Bibirioni/3205 shall absolutely go to Lucy Wambui Kagwima;

(e) Limuru/Bibirioni/3202 shall be shared equally among the seven beneficiaries as shown in (a);

(f) Limuru/Bibirioni/3204 and 3205 shall each absolutely go to Robert Gichungu Kagwima;

(g) Plot No. 11 Bibirioni (Limuru/Bibirioni/T.11) shall absolutely go to Assumpta Mukuhi Njenga;

(h) the estate of George Gathu Kagwima shall get 4 acres in Naivasha/Mwachiringiri Block 1/225. 2 acres of the parcel shall go to the estate of James Kangethe and 1 acre shall go to the estate of Eunice Nagi Kimani;

(i) the proceeds of 2.01 acres of Naivasha/Maraigushu Block 9/4 that went to Ketraco shall be equally shared among the seven beneficiaries, and the balance shall be shared equally among the seven beneficiaries indicated in (a) above;

(j) Kieseges/Nyamamithi Block 4/1212 (Subukia) shall be equally shared among the seven beneficiaries as shown in (a) above;

(k) Longonot/Kijabe Block 3/1608 shall go to Lucy Wambui Kagwima absolutely; and

(l) Yusuf Kamau Waigi/Wanjiru Ndungu shall get 1 acre in Naivasha/Muichiringiri Block 1/1495 and the balance to go to the estate of Mary Nagi Kagwima absolutely.

18. In these terms the joint grant that was issued to Susan Wanjiru Gathu, Robert Gichungu Kagwima and Lucy Wambui Kagwima on 7th December 2016 is confirmed.

19. This was a family dispute. Each side shall bear own costs.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 30TH day of APRIL 2020.

A.O. MUCHELULE

JUDGE