



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.142 OF 2017**

**IN THE MATTER OF THE ESTATE OF CHARLES KIHIA WACHIURI (DECEASED)**

**WILLIES WACHIURI KIHIA.....APPLICANT/RESPONDENT**

**VERSUS**

**ANTHONY GIKARIA KIHIANYU.....PROTESTOR**

**A N D**

**BENARD WACHIRA WACHIURI.....CAVEATOR/APPLICANT**

**RULING**

This matter relates to the Estate of Charles Kihia Wachiuri who died intestate on 24/1/2017 at Shamanei. He was survived by his two sons Willies Wachiuri Kihia and Martin Muniyiri Kihia.

A grant of letters of administration intestate was issued to the petitioner Willies Wachiuri Kihia on 11/10/2017.

On 28/12/2017, an Interested party by name of Antony Gikaria Kihianyu instructed the firm of Waruhiu K'Owade and Ng'ang'a to enter appearance for him. The said Interested Party filed an affidavit of protest to the confirmation of grant dated 30/1/2018 claiming a beneficial interest in the deceased's estate.

On 19/4/2018, Benard Wachira Wachiuri through the firm of Kinyua Njogu & Co. filed a summons by a dependant under **Section 26 of the Law of Succession Act**. The applicant sought the following orders:

**1. Spent;**

**2. That pending the hearing and determination of this application inter-parties, the petitioner/ respondent be compelled to return the deceased's five (5) dairy cows of Friesian Breed and the deceased's motor vehicle Reg. No. KAP 160Y Nissan 200 Pick-Up to the deceased's Land Parcel No. Laikipia/Nyahururu/522;**

**3. That pending the hearing and determination of this application inter-parties, a preservative order be made restraining the petitioner/respondent by himself, his proxies, employees, servants or agents from alienating and or wasting the deceased's estate, evicting the applicant from the deceased' properties or in any other manner interfering with the applicant's peaceful occupation and enjoyment of the deceased's Land Parcel Nos. Laikipia/Nyahururu/522 and Laikipia/Nyahururu/ 336.**

**4. That pending the hearing and determination of this application inter-parties, Equity Bank (Kenya) Ltd be ordered to provide and file in court the current bank statement and or the current bank account balance in respect of the deceased's Equity Bank Account No.xxxx.**

**5. That no grant of representation of the estate of the above named Charles Kihia Wachiuri who died on 24th January, 2017 having been confirmed, such reasonable provision be now made for the applicant as a dependant of the deceased out of his net estate as the court thinks fit.**

The application was supported by the applicant's affidavit dated 19/4/2018 and a further affidavit dated 30/5/2018.

The grounds upon which the application was brought are that the applicant was the deceased's brother and he had lived and taken care of the deceased's properties for over 30 years from about 1984 till he died; that the applicant used to cultivate the deceased's land and that he was wholly dependent on the deceased during the deceased's lifetime and that he is the one who took care of the deceased in the last three years of his life as he ailed; that he used to reside on Land Parcels No.Laikipia/Nyahururu/522 and used to cultivate LR. Laikipia/Nyahururu/336; that he is a dependant of the deceased under Section 29 of the Law of Succession Act and entitled to inherit from the deceased's estate yet the petitioner has left him out from the list of beneficiaries and the mode of distribution filed in court. That is what has provoked this application.

The petitioner Willies filed a replying affidavit dated 25/5/2019 and a supplementary affidavit dated 27/04/2017 opposing the said application on grounds that the applicant is a brother to the deceased is a beneficiary in Succession Cause No.33/2016 and that the applicant is trying to acquire the deceased's estate illegally and has been intermeddling with the deceased's estate. The petitioner is represented by Muchiri Advocate.

Directions were taken that this matter be determined by way of viva voce evidence with the applicant being first to call his witnesses who included the applicant, PW1, Florence Muthoni Ndung'u (PW2), Purity Nduta Ndoria (PW3) and Kanyangi Mwai (PW4).

**Benard Wachira (PW1)** testified that he used to live on the deceased brother's land at Igwamiti Plots 336 and 522 (Laikipia) where he has lived since 1984 when the deceased bought Plot 336; that the deceased asked him to go and live there and he did; that the deceased bought plot 522 in 1985 where he built and he went to live there; that they farmed and kept cattle; that it is PW1 who did all the farm work and he had been given a place to till, that is, plot 336, and he still tills it to date and plants maize.

He listed other properties that the deceased had, vehicle, lorry, farm equipment of which he listed and attached photographs – P.Ex.1(a) & (b). He said that the deceased divorced with his wife in 1988 and she went to America. He also had two sons, the petitioner and Martin who did not live on the said land. He said that he lived alone on the land till 2015, when the deceased left Nanyuki to come and live at Igwamiti.

The applicant said that after the deceased's death, the family sat and decided that since he used to live with the deceased, he should be given some of his property; that in the meeting, the petitioner, his brothers and sisters Wilfred Ndoria, Florence, Margaret Njoki and Mary Nyatoro and Peter Kamunya his brother in law, Steven Ndung'u and sister in law purity Ndoria, were all present; that the minutes of the meeting were recorded by Purity Ndoria P.Ex.No.2; that the Assistant Chief knew that he lived there and wrote the letter dated 21/3/2017 to that effect (P.Ex.3). He said that the deceased's lorry has been removed from the land to Nanyuki, the Friesian cows have been removed and kept elsewhere while the pick-up is said to have been sold. He said that he depended on the deceased and requests to be given 10 acres out of the 56, a tractor, 2 cows and money from the deceased's account to help him raise his grandchildren as the money was proceeds from sale of maize, hay and wheat.

He admitted that his father's estate which comprises several properties has not yet been distributed but it does not belong to him alone and is still pending in court as the deceased was the administrator; that he lives on 7 acres of Plot 205 permanently with his wife and children and it still belongs to his father's estate.

**Florence Muthoni Mwangi (PW2)** is a sister of the deceased and the applicant. She told the court that the applicant lived with the deceased for about 30 years at Igwamiti; that the deceased had separated with the wife about 1988 who left for USA; that the deceased remained in Nanyuki while the applicant took care of the farm, ploughing using a tractor, growing grass e.t.c; that the deceased's 2 sons were cared for by her sister but later followed their mother to the USA and that the eldest son Willies (DW3) returned to Kenya and lives in Nairobi while the other was left in USA; that the two children have never lived in Igwamiti; that he used to talk to the deceased who told him that since he had been abandoned by the family, he would give the applicant 10 acres to assist him; that after the deceased's burial, Willies asked the applicant why he was living there and that is when the family decided to have a meeting. The minutes were recorded by Purity Nduta Ndoria PW3; that they agreed that the applicant should remain in the home, show the deceased's children what he used to do till the family met again and if he had to leave, he would have to be given something. Later, they learned that the deceased's son had gone with police and tried to chase the applicant; that in the meeting they agreed that the applicant tills the land till the family would have another meeting.

**PW3 Purity Nduta Ndoria**, a wife to the deceased's brother is the one who recorded the minutes of the meeting held on 4/3/2017 after the deceased's burial (P.Ex.2). PW3 said that at 2nd paragraph of the minutes, they agreed that the person who had been caring for the deceased, that is, the applicant Bernard, should inherit property from the deceased. Although they did not name the person, they knew it was referring to the applicant who had been living with the deceased at Igwamiti. They did not however state how much the applicant would get; that it was also agreed that the applicant should continue to cultivate 10 acres; that it was also agreed that the applicant would continue managing the land.

**PW4 Kanyangi Mwai**, a Senior Assistant Chief of Shamenei said that he knew the deceased, Charles Kihia and also the applicant Wachira. He thought that the land in issue was the applicant's only to learn that it belonged to the deceased. He knew that the applicant used to till the land, planting maize, barley and would plough for people for money; that from 1986, PW4 used to see the applicant cultivate the land. He identified the letter (P.Ex.No.3) dated 21/3/2017 that bears his name and signature authored by him in which he recommended that the applicant is entitled to be treated as a beneficiary of the deceased's estate; that the letter was supposed to help him get the deceased's death certificate. PW4 said that by then, he was acting as the Chief of Shamenei since the chief had retired.

#### ***The Petitioner's Case;***

**Grace Nyaguthie Munyiri**, a former wife to the deceased (DW1) testified that she got married to the deceased in 1980, bought 3 ½ acres of land plot 2787/431 in 1982 and built their house where they lived till they separated. They were blessed with two sons Willies Wachiuri Kihia (DW3) and Martin Munyiri Kihia; that the applicant Bernard Wachira also known as 'Muhuthu' is the deceased's brother and used to work for the deceased as a tractor driver and that he lived in his home in Marmamet with his family; that though the deceased lived in Nanyuki, the deceased used to visit his land in Igwamiti on weekends; that plots 336, 538, 609, 522 were all bought during the subsistence of their marriage; that only plot 2814 was purchased after the divorce; that divorce was filed in 1991 and decree nisi was issued in 1993. DW1

said that she worked as a Headmistress of Inoro Secondary School and contributed to the purchase of the lands through Mwalimu Co-operative Loans but upon divorce, she did not claim any property because it would pass to their sons. She denied that the applicant ever lived at Igwamiti for 30 years as alleged. That the applicant used to earn a salary though the deceased was very generous with his family; DW1 said that plot 336 measures 15 acres while 522 measures 10.3 acres and total acreage 25.03 acres.

DW1 was aware that deceased sold 1 ½ acres of Nanyuki land and had been paid just before his demise. According to DW1, the applicant should not benefit from the brother's estate because he will benefit from his own father's estate which is still pending determination in court. Though she has a right to inherit from the deceased's estate being a former wife, she said she had left the property for the sons to inherit. According to DW1 she was always aware of what went on with the deceased as she kept in touch with the deceased especially when the children were small; that the deceased visited the children in USA and she later learnt of the goings on from the sons.

**James Rukwaru Wang'ombe (DW2)** who knew the deceased in 1983 testified that he knew that the deceased bought pieces of land in Igwamiti in 1983, 1984, 1985 and 1987; that he used to meet with the deceased almost every weekend when he came to home to Igwamiti. DW2 knew the applicant as deceased's brother and that he lived at Marmanet but used to do the ploughing and harvesting for the deceased; that the applicant also assisted as a driver and he viewed the applicant as a worker. He said that the deceased's sister called to inform him that his friend (deceased) had died and that the deceased had informed him the previous day that he would be shelling maize the next day.

DW2 also stated that the applicant would stay at Igwamiti when activities like ploughing, planting and harvesting were going on. DW2 also knew that apart from the applicant who was a driver, there were other workers including the one who looked after cattle and did the milking. DW2 admitted that on 30/03/2018 Willies (DW3) informed him that he suspected that the deceased's estate was not safe and he went with him to the deceased's home together with police to collect cattle which the applicant pointed out to them as deceased's while he claimed some to be his.

**Willies Wachiuri Kihia**, the petitioner, testified as DW3. He is the son of the deceased and has a brother, Martin Munyiri who lives in USA. He told the court that after retiring from formal employment, his father carried out farming activities on parcels No. Laikipia/Nyahururu/336, 522, 538, 609, 2814 which were consolidated and registered in the deceased's name. DW3 admitted that the applicant is his uncle who lives in Marmanet and a beneficiary of his own father's estate in Succession Cause 33/2016 Re-Estate of Wachiuri Wanjohi, together with his siblings including the deceased. He denied that the applicant's family has ever resided in Igwamiti; that he lived in Nanyuki, went for further studies to USA in 1999 and returned to Kenya in 2012; that he was always in touch with his father when in USA and in Kenya; that the deceased collapsed in his house on 24/01/2017 and died while alone; that the deceased had harvested maize which he intended to sell and needed help and so invited the applicant to come and assist; that the deceased was buried in plot 522 which the applicant now claims. He was aware that the deceased sold part of the Nanyuki land to one Antony; that the matter was the subject of HCC 251/2015 where Antony Gikaria (DW5) sued the deceased but they recorded a consent on 09/01/2017. He denied knowing of any gift that the father gave to anybody during his life time.

DW3, was at the meeting of 04/03/2017. He denied that the meeting ever agreed on matters of inheritance but the agreement was that the applicant would continue managing the deceased's farm for one year till DW3 and his brother decided what to do; that after that, when he tried to procure the death certificate, he found that the applicant had already been issued with one. DW3 denied that the applicant used to take care of the deceased, because the deceased moved to Igwamiti in 2015 when the applicant had left. He also stated that the applicant used to be hired seasonally depending on the work and never lived at the deceased's home permanently and was never a dependant of the deceased. Contrary to the allegation that he has intermeddled with the estate, DW3 said that the applicant moved into the estate after the deceased's death and has refused to move out and is the intermeddler.

He denied that the proceeds for sale of the harvest of maize were ever deposited in the Equity Bank Account; that he only sold the Pick-up with his brother's consent. DW3 also said that residential houses are only on plot 522 which the applicant now claims; that the meeting never talked of the applicant's residential status yet he still resides on the deceased estate to date.

**DW4 Christopher Njogu Maranga** knew the deceased in 1970 when they worked together in Nakuru. DW4 also knew the applicant as he used to assist with operation of the deceased's agricultural machinery; that the applicant would stay at the deceased's home when there was work otherwise he would be at his home at Marmanet. DW4 had even visited the applicant's home in Marmanet. DW4 said that he was a close acquaintance to the deceased and even knew when he acquired the Igwamiti land and that he never talked of distributing his estate. According to DW4, the deceased had employed the applicant together with other workers. He also stated that he visited deceased's home in Igwamiti and if there was no work, the applicant would not be engaged.

**DW5 Anothony Gikaria Kihiani**, an advocate of the High Court, practicing in Nanyuki and Nairobi recalled that on 01/08/2011 he entered into a sale agreement with the deceased for 1.5 acres to be hived off LR.2787/432 to be amalgamated with another land to form Nanyuki Municipality Block 12/154; that the amalgamation took too long. He intervened and speeded up the process and after completion, the deceased felt the cost of the land in 2011 had been overtaken by time and needed to be reviewed but DW5 felt he did his part and he filed a suit **Nyeri ELC 251/2015 Anthony Gikaria vs Charles Wachiuri**. They however entered into negotiations and it was agreed that DW4 pay an extra 2 million on exgratia basis which he did and the suit was compromised on 09/01/2017 when a consent was recorded; that they had engaged a surveyor but the deceased died on 24/01/2017 before survey was done. He produced documents in support of his claim for a beneficial interest in the deceased's estate.

Mr. Njogu, Counsel for the applicant filed his submissions on 13/02/2020. He urged that the application is brought under **Section 26 of the Law of Succession Act** that a dependant who has not been provided for may move the court to make reasonable provision for him; that **Section 29 of Law of Succession Act** defines who a dependant is and that the applicant has demonstrated that he is a dependant and the court should therefore exercise its discretion under **Section 29 (b) Law of Succession Act** in his favour. It was also submitted that the applicant had stayed with the deceased for over 30 years farming and keeping cattle on the deceased's farm; that he had been given a place to farm i.e. 15 acres on plot 336 that all his economic activities were based on the deceased's land and he wholly depended on the deceased for his livelihood, that his siblings and PW4 did confirm that he had been on the land all those years; that the petitioner never produced any document to show that he used to receive a salary; that his father's estate has not yet been distributed and is still the subject in CMC 33/2016 and that can only be taken into account after the case is determined; that the deceased's estate is vast, consisting 56 acres i.e.

Laikipia/Nyahururu/336, 322, 333, 609 and 2814 and that is why he asks for a reasonable provision from plot 336 which he has been cultivating, a tractor, 2 dairy cows and part of the cash in the bank account.

Mr. Muchiri, Counsel for the Petitioner filed his submissions on 18/02/2020. He submitted that the issues for consideration are whether the applicant is a dependant, and whether the applicant has proved that he was maintained by the deceased in terms of **Section 29 (b) of the Law of Succession Act**. Counsel submitted that it has been proved that the deceased purchased plots 336, then 522, 538, 609, during the subsistence of his marriage to DW1; that the evidence by the respondent is that the applicant carried out economic activities on behalf of the deceased; that the applicant has land in Marmanet where he carries out his economic activities where his family lives, which family he never called as witnesses; that the deceased's siblings were not candid in alleging that the applicant took care of the deceased; that PW4 denied the petitioner a letter of introduction and instead gave it to the applicant till the Chief intervened. It is the petitioner's submission that the applicant was an employee of the deceased which was confirmed through testimonies of DW2, 3 and 4.

Counsel relied on **Section 66 of the Law of Succession Act** which gives preference to the persons who can administer a deceased person's estate and that the applicant wants to unjustly enrich himself from the deceased's estate. Counsel urged that the applicant is an adult with a family and property and can not be the deceased's dependant.

I have duly considered the affidavits filed by both parties; evidence of all the witnesses who testified and the submissions by Counsel. When considering all the above, the issues that this court will have to ultimately determine is whether the applicant is a dependant of the deceased's estate and if so, what is he entitled to?

The applicant moved the court under **Section 26 of the Law of Succession**. It provides as follows;

***“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”***

**Section 29 of the Law of Succession Act** defines who a dependant is. It provides as follows;

***“For the purposes of this Part, "dependant" means;***

- a) 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;***
- b) Such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and***
- c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”***

In terms of Section 29 and Section 66 of the Law of Succession Act, the deceased's dependants are his former wife (DW1) and his two sons, William Wachiuri (DW3) and Martin Munyiri. Under Section 66 of the Law of Succession Act, they are the persons with priority to take out letters of administration. DW1 told the court that they were divorced in 1991 and although the properties forming part of the estate except one Plot No. 2814, were bought during the subsistence of the marriage and hence deemed to be matrimonial property, she did not want to lay any claim on any of them as their sons would inherit them. Since the applicant does not fall in the above category, the onus rests on him to prove to this court on a balance of probabilities that he was a dependant of the deceased under Section 29 (b).

From a reading of **Section 29 (b) of the Law of Succession Act**, a dependant is a person who was maintained by the deceased immediately before the deceased's demise.

The deceased died intestate. He left behind the following properties as listed in the applicant's affidavit at paragraph 10 which are as follows;

- 1. Laikipia/Nyahururu/336**
- 2. Laikipia/Nyahururu/522**
- 3. Laikipia/Nyahururu/538**
- 4. Laikipia/Nyahururu/609**
- 5. Laikipia/Nyahururu/2814**
- 6. Sipili/Donyoloip/Block 1/3591 (Laikipia)**

7. *Nyahururu/Municipality Block II/42*
8. *Nanyuki/Municipality Block 12/154*
9. *Motor vehicle registration number KAC 155S Mercedes Benz Lorry*
10. *Motor vehicle Reg. No. KAP 160Y Nissan 200 Pick Up*
11. *Tractor Reg. No. KUK 851 Lamborgini*
12. *Trailer Reg. No. ZA 9398*
13. *Harrow – Nardi model*
14. *Planter – super seeder model/type*
15. *Baler – Mersy Ferguson*
16. *Sprayer – Hardi model*
17. *Maize Sheller*
18. *Posho Mill*
19. *Gang Mower*
20. *Ranger – Fordson Major model*
21. *5 dairy cows (Friesian breed)*
22. *Proceeds in Bank Account No. 0207290542289, Equity Bank (Kenya) Limited.*

It is also not in dispute that the deceased had sold 1 ½ acres of Nanyuki Municipality Block 12/154 to DW5, Anthony Gikaria who had fully paid for it and it was only awaiting transfer to him. He is therefore a creditor to the estate of the deceased. That claim is not disputed by the petitioner.

No doubt the applicant is a brother to the deceased. All the witnesses who testified alluded to the fact that the applicant used to drive the deceased's tractor and managed the other farm machinery that the deceased owned. The question is whether he was an employee or he just worked for the brother without pay and merely depended on the deceased.

The applicant is an adult man with a home, 7 acres which is part of plot 205 Marmanet. That is where his wife and children live. It was admitted that the applicant's wife and children have never lived in Igwamiti but reside on their land at Marmanet. The applicant did admit that fact. If the applicant's family has never lived in Igwamiti, then the question is then whether the applicant then how he lived in Igwamiti for all the 30 years his family?

The applicant told the court that he needs property in order to bring up his grandchildren. He also told the court that the deceased helped pay fees for his children. No evidence to that effect was availed. If the applicant's children are now grown up the deceased was longer paying fees. In any event, the applicant's grandchildren are the responsibilities of their parents and the applicant can not front them as the reason to be considered for dependency.

Anyway, even if the deceased paid school fees for the applicant's children, how much fees did he pay, which school, for how long? In any event, since the children are grown up, it means that the deceased was no longer paying the school fees. The fact that a person has paid some fees for somebody's children is not evidence of dependency. It should have been demonstrated how much the deceased paid, for how long, for who and where and I believe there must be some form of continuity till the deceased's demise. That was not done.

In support of his claim that the applicant totally depended on the deceased economically, the applicant said that the deceased had allowed him to till 5 acres out of plot 336. What the applicant did not tell the court is whether the deceased provided all the seedlings, the fertilizers that he planted on the said land so that he only harvested the end product; The applicant was not explicit as to what the deceased did for him.

**Section 107 of the Evidence Act** places a duty on the applicant to prove his allegations. It was not enough for him to just claim that he was maintained by the deceased without evidence of the said maintenance. If he was given money as an allowance for his upkeep and general use, he should have demonstrated that fact, which he has not done.

The applicant and his witnesses all claim that the applicant lived with the deceased for about 30 years. Even if that were true, though disputed, these witnesses have no idea on what terms the applicant and deceased related. It is the applicant who claims that he was never paid a salary but not even PW2, 3 or 4 could tell whether or not he was paid a salary. There is evidence that there were other workers. Infact

DW3 annexed to his supplementary affidavit a document dated 27/04/2007 which he indicated that the applicant was paid salary.

The applicant further relied on minutes of a meeting involving his siblings and the Petitioner, dated 04/03/2017. At the meeting it was agreed that the person who had been serving the deceased inherit property from the deceased. At clause 3, it was further provided that the applicant would cultivate 10 acres of land; that the applicant would continue to look after the welfare of the cattle while one Maina Ndung'u planted trees on one acre; At paragraph 5, the applicant would ensure that the Igwamiti properties were intact and that he would manage the estate for the whole of 2017 and thereafter the petitioner and his brother Martin Munyiri would decide whether he would continue or not.

The petitioner denied knowing to who exactly the committee referred to as having taken care of the deceased and was entitled to inherit. The applicant claimed that he took care of the deceased from 2015 when he moved from Nanyuki to Igwamiti. He did not disclose at all how he 'took care' of the deceased. The court was not told whether the deceased was sick that he needed somebody to care for him. It is only in the minutes of 04/03/2017 that it is mentioned that he had been sick. There is no evidence that the deceased needed to be looked after. The deceased lived alone in his house while the applicant stayed in the servant's quarters. Infact when he met his death, the deceased was alone in the house. According to the petitioner (DW3) they had to break the doors of the deceased's house and thereafter informed the petitioner and others concerned. The question is how was the applicant taking care of the deceased. Was he cooking for him, washing his clothes or what type of care? The applicant did not disclose the kind of care that he accorded the deceased. It is not enough for the applicant to merely allege and leave it to the court to presume or imagine.

In addition, the applicant's witnesses did not tell the court the kind of care the applicant accorded the deceased for them to come to the conclusion that he should inherit from the deceased. I must point out at the state that the estate belonged to the deceased. It had not been inherited by him from his parents but he purchased it. In my view the deceased's siblings had no role in deciding for the heirs who was to inherit.

Though the applicant contends that he has lived with the deceased for 30 years as supported by his witnesses PW2, 3 & 4, yet, the petitioner's position is to the contrary, that the applicant only came to work during harvesting or ploughing seasons or when required but that he lived in his home in Marmanet, DW2 and 4 acres also stated the same. Indeed, the applicant confirmed that his wife and children have always lived at Marmanet. As noted earlier, the deceased is now dead and can not wake up to tell the court how he had engaged the applicant. The dead do not tell tales. If indeed the deceased had intended that the applicant inherit from him, what would have been easier than gifting him with the land he tilled or any other property during his lifetime.

Further to that, the deceased never mentioned to his siblings PW2 and 4, that he intended to give the applicant some of his land or other property. DW2, and 4 were also people known to the deceased. Infact DW2 and 4 were his friends, who from their testimonies, were close acquaintances but the deceased did not tell any of them of his intention to give some of his property to the applicant. Instead DW2 and 4 knew the applicant as an employee.

At the family meeting of 04/03/2017, the applicant had been told to look after the deceased's property for a year. Instead, he went to the Assistant Chief, PW2, who wrote a letter and introduced the applicant as a brother to the deceased who had stayed in the deceased's farm for over 30 years and deserved to be amongst the beneficiaries of the deceased. It is not for an Assistant Chief to determine who one's beneficiaries are. Armed with that letter, the applicant went and obtained the deceased's death certificate dated 20/03/2017. The applicant did so without the petitioner's knowledge. The applicants conduct of going behind the committee and the deceased's children to obtain the Chief's letter and birth certificate smacks of bad faith. The committee had told the applicant that the deceased's children would decide what to do after the end of 2017, but he did not wait. Did the applicant intend to steal a match from the deceased's children?

Further to the above, though the committee agreed that the applicant would remain in charge of the deceased's farm till end of 2017, the petitioner said that by the time he testified in 2020, the applicant has refused to leave the deceased's land and was still on the land – three years later. The applicants presence on the said property is in my view intermeddling which has serious consequences including penal consequences. The applicant's conduct raises questions as to whether he had plans for his brother's property even before the petitioner filed this cause.

The applicant admitted that he lives on a 7 acres portion of Marmanet Plot No. 205 whose total acreage is 35 acres which is part of his later father's estate (Wachiuri Wanjohi). He admitted that the father's estate is yet to be distributed but Plot 205 has been shared amongst the three brothers with each getting 7 acres which he occupies and uses. The father's estate comprises other properties of Gilgil/Karunga B13/124, Shoka 2.246 hectares and Gilgil/Karunga B/3/124 1.72 hectares; Bahatini/Block 1/697 (0.65 hectares); Gilgil Karunga 13/03/128 (Shoka) 3.2 hectares. The administrator of that estate was the deceased. The applicant is a beneficiary of that estate and even with the death of the deceased, instead of prosecuting the father's estate, he is instead keen on prosecuting the deceased brother's estate. Even if the applicants father's estate has not been distributed, it is evident that the applicant is not a man of straw to claim to be a total dependant of the deceased. Curiously the applicant never told the court what he does with the 7 acres out of plot 205 Marmanet where the wife and children live. Seven acres of land is big land by any standards in Kenyan today. Besides, as noted earlier the applicant will be entitled to more property from his father's estate.

The applicant has gone ahead and determined what he should be given out of the deceased's estate, i.e. 10 acres of land out of parcel Laikipia/Nyahururu/336; the tractor and farm machineries, two dairy cows and part of the cash in the bank. The applicant claims the said land because that is where he used to cultivate 5 acres. If the applicant used to till 5 acres, the court wonders why he now claims 10 acres. The petitioner deponed that the father bought the land in 1983 and obtained a loan to develop it. In my view, so far, the applicant has not laid a basis for claiming the said property. Even if the deceased had a vast estate of 56 acres, vehicles and machinery, what was left was for his dependants. I find the conduct of the applicant to be one of a person who wants to use force to get property from the deceased's estate whatever it takes. In my view the applicant has not come to court with clean hands.

He who alleges must prove. I find that the applicant has not proved on a balance of probabilities that he is a dependant to the deceased's estate, who was maintained by the deceased just before his demise. If the applicant had acted with humility maybe the deceased's children, who are his nephews, may have given him a token of appreciation that he worked for the father for so long. However, that cannot be forced. I find no merit in the application. The application is hereby dismissed with costs to the petitioner.

As regards the application by Antony Gikaria (DW5), his claim is not disputed and distribution will be done at confirmation. The petitioner be at liberty to move the court for confirmation of grant.

**Dated, Signed and Delivered at NYAHURURU this 25th day of June, 2020.**

.....

**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Mr. Njogu for the Petitioner (virtual)

Eric – Court Assistant