



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.32 OF 2017**

**IN THE MATTER OF THE ESTATE OF NGARI KAMANGA (DECEASED)**

**AND**

**DAVID NJERU NGARI.....1<sup>ST</sup> PETITIONER**

**EDWARD MURITHI NGARI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**JAMES KAMANGA NYAGA.....1<sup>ST</sup> PROTESTOR**

**PETER NJOROGE NYAGA.....2<sup>ND</sup> PROTESTOR**

**ROSEMARY WAKATHAIYA.....3<sup>RD</sup> PROTESTOR**

**JANE MUTHONI NGARI.....4<sup>TH</sup> PROTESTOR**

**LILIAN MUTHONI NJIRU.....5<sup>TH</sup> PROTESTOR**

**BEN KARIUKO NGARI.....6<sup>TH</sup> PROTESTOR**

**FREDRICK MURIUKI NJERU.....7<sup>TH</sup> PROTESTOR**

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

1. This matter relates to the Estate of **NGARI KAMANGA** (deceased) who died intestate on 29<sup>th</sup> March 2011. A petition for letters of administration in his estate was filed by **DAVID NJERU NGARI** and **EDWARD MURITHI NGARI**. A temporary grant of letters of administration was issued on 29<sup>th</sup> June 2016. Thereafter on 30<sup>th</sup> January 2017 the Petitioners filed a summons for confirmation of grant listing the surviving children as the beneficiaries and others as dependants. They also proposed the mode of distribution of the estate. However, an affidavit of protest was filed by Rosemary Wathaiya Gachoki, Jane Muthoni Njiru, Lilian Muthoni Njiru and Beth Kariuko Ngari. They claim that they are children of the deceased from his wife Eunice Wakaru Ngari who also had two other children namely; David Njeru Ngari- 1<sup>st</sup> Petitioner and Nancy Wawira.

The Protestors oppose the proposed mode of distribution on the grounds that it is unreasonable and unfair. They contend that they were not consulted and as daughters of the deceased they have a right to a share out of the estate of the deceased. They also claim that Nancy Wawira Ngari is mentally challenged and could therefore not sign a consent on the mode of distribution.

2. In response the Petitioners swore an affidavit in reply to the protest and aver that they had endeavoured to inform the protestors but they were adamant. That the protestors are married. They also contend that if the estate will be shared equally amongst all the children, the interest of Nancy Wawira Ngari to be registered in the name of David Njeru Ngari to hold in trust for Nancy Wawira Ngari and her son.

3. **JAMES KAMANGA NYAGA** also filed a protest claiming to be a dependant together with his brother Peter Njoroge Nyaga and his sister Mary Wangechi as they were brought up by the deceased. That the deceased had showed them a portion of about four acres where they have their homesteads and have been utilizing the land since 1986. They claim that they be given two acres out of the estate of the deceased.

4. To this protest the petitioners filed a replying affidavit and states that the protestors are sons of Nyaga Kamanga who is the brother to the deceased. The late Nyaga Kimanga had sued the deceased claiming half share out of the said parcel No. Ngariama/Ngiriambu/116. The

claim was dismissed for lack of evidence both in the lower court and in the High Court. That the protestors do not live on the land and have no developments on the land. The Petitioners contend that the protestors are strangers to the estate of the deceased and are not entitled to a share of the estate.

5. Yet a further affidavit of protest was filed by **FREDRICK MURIUKI NJERU** sworn on 22<sup>nd</sup> July 2017 claiming purchaser's interests. This protest was challenged by the Protestors Rosemary Wakathaiya and others who in their affidavit in reply state that Fredrick Muriuki Njeru is an impostor brought in by the Petitioners with whom they had colluded to distribute the land without a succession cause being filed. Fredrick Muriuki Njeru had purported to have bought land parcel No. Ngariama/Ngiriambu/3538 in 2014, long after the deceased had passed away. The title deed and others were however cancelled in **Kerugoya ELC No.27/2015** and ordered to revert to its original number in the name of the deceased. The original number is **Ngariama/Ngiriambu/116** in the name of Ngari Kamanga the deceased.

6. This matter was initially filed in this court and later transferred before the Principal Magistrate's Court at Gichugu but it was referred back to this court as the value of the estate exceeded the pecuniary jurisdiction of the Magistrate's Court. Directions had been given that the protest be disposed off by way of '**viva voce**' evidence. The parties adduced evidence and filed submissions. For the petitioners, submissions were filed by Rose Wangechi Muthike. It is submitted that from the evidence by the Petitioner, the deceased had wives namely;

- Eunice Wakaru Ngari
- Elizabeth Wambura Ngari

That Eunice had six children while Elizabeth Wambura Ngari had seven children. That the 1<sup>st</sup> and 2<sup>nd</sup> protestors were not children of the deceased. He contend that they were children of Nyaga Kamanga a brother to the deceased.

7. The Petitioners submit that the estate of the deceased comprises Land Parcel No. Ngariama/Ngiriambu/116. He proposes that the estate should be distributed to the beneficiaries of the deceased as follows:-

(i) David Njeru Ngari

Edward Muriithi Ngari

John Kamanga Ngari..... each to receive 0.80 Hectares

(ii) Nancy Wawira Ngari - 0.40 Hectares

(iii) Rosemary Wakathaiya Gachoki

Lilian Muthoni Njiru

Beth Kariuko Ngari

Jane Muthoni Ngari .....jointly 0.40 Hectares with Eunice Wakaru Ngari having life interest.

(Daughters of the first wife).

(iv) Jane Wawira Muriithi

Esther Wangerwe Ngari

Irene Njeri Mwangi

Susan Waruguru Muchiri

Margaret Mumbi Karani.....jointly 0.40 Hectares with Wambura Ngari Kamanga getting a life interest.

They submit that as per their exhibit 1 - which is a decree and proceedings in **Embu Senior Principal Magistrate Civil Case No. 57/1982** where the deceased was sued by Nyaga Kamanga and later substituted by his wife Wambui Kamanga seeking half share of the deceased's land, the case was dismissed with costs for lack of evidence.

8. That an appeal filed against the said Judgment was dismissed on 24<sup>th</sup> January 2001 in Embu HCCA No.58/2002. That the Petitioners demonstrated vide a letter exhibit 4 that the deceased father of the 1<sup>st</sup> and 2<sup>nd</sup> protestor was the owner of Nice Holding No.4088 and was succeeded by Wambui Nyaga Kamanga their mother.

9. The Petitioners submitted that the documents were not disputed nor challenged. That the protestors failed to prove that they were being maintained by the deceased immediately prior to his death. That they are not lawful beneficiaries. They relied on the persuasive decision in **Re Estate of Samuel Kamau Kimui (deceased) 2017 eKLR** where the court stated-

**“In my view merely stating that he took the sons of Marion for circumcision and that some children were named after him is not sufficient to prove that he accepted them as his own having married their mother. Based on the evidence adduced I am unable to declare that they were children of the deceased as provided under Section 3 (2) of the Law of Succession Act. There was no evidence to show that the deceased expressly recognized or accepted the four children as his own or that he assumed permanent responsibility.”**

As for the protest by 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup>, protestors, he submits that they have been adequately provided for. Although the petitioners submit that the 3, 4, 5 & 6 protestors did not file a protest, the position is that they did file a protest on 14<sup>th</sup> February 2017 sworn on 13<sup>th</sup> February 2017. Their proposed mode of distribution is that each beneficiary gets an equal share.

10. The 1<sup>st</sup> and 2<sup>nd</sup> protestors submitted that the 7<sup>th</sup> protestor cannot seek to get land from the deceased as the agreement he relied on was entered in 2004 and upto the time deceased, no transfer was signed by the deceased nor was consent of the Land Control Board obtained. That the claim by 7<sup>th</sup> protestor was not indicated in form P&A 5 by the petitioners as a liability. They submit that without the consent of the Land Control Board the 7<sup>th</sup> Protestor cannot seek to get land from the deceased's estate. They relied on Malindi High Court Succession Cause No. 160/2011 on **Re Estate of Shee Mohamed Athman (deceased) (2017) eKLR** which cited with approval several decisions of the Court of Appeal and held -

**“ There are plenty of cases relating to the issue of lack of consent from Land Control Board. In the case of SIMIYU V/S WATAMBAMALA Civil Appeal No.34 of 1984 KLR (1985) 852. I was held that due to lack of consent in a controlled transaction, the same agreement became void and buyers could only seek the recovery of the purchase price. Similarly, in the case of ONYANGO & ANOTHER v/s LUWAYI (1986) KLR 513, it was held by the Court of Appeal that owing to the failure to obtain the consent of Land Control Board within six (6) months, the sale agreement became void. In the case of KARURI v/s GITURU 1881 (KLR) 247, the Court of Appeal held that the provisions of the Land control Act are of imperative nature, there is no room for application of any Doctrine of Equity to soften it's harshness. Given the pleadings herein, I do find that if there was any sale agreement between the objector and the deceased, then such an agreement is void due to lack of consent from the Land Control Board. Although Section 8(1) of the Land Control Act empowers the court to extend the six months period, this cannot happen as the registered owner is now deceased. My finding on this issue is that the deceased did not sell the land to objector. Apart from the purported sale agreement, there is no evidence to show that there was any sale of land. No transfer was signed. The sale agreement was not witnessed by any independent party....”**

They urge the court to find that there was no sale agreement capable of being enforced legally even by way of specific performance. That the protestor did not seek refund. They submitted that the 1<sup>st</sup> and 2<sup>nd</sup> protestors were maintained by the deceased and their claim was corroborated by the testimony of the 3<sup>rd</sup> protestor. They rely on section 29 of the Law of Succession Act and urge the court to find that the deceased had taken them as his own children. He relies on **Loise Jerono Rotich -v- Kapkiyai Rotich and Another in Re- Estate of Kiprotich Komen, (deceased) (2019) eKLR**.

He submits that the claim by 1<sup>st</sup> and 2<sup>nd</sup> protestor is for dependency and is different from the cases which the petitioners relied on. They submitted that they are entitled to two acres each which they were shown by the deceased or order that the estate be distributed equally as proposed by 3<sup>rd</sup>- 6<sup>th</sup> protestors.

11. For the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> protestors it was submitted that the beneficiaries are the immediate family and those who were directly dependent on him. They submit that that the land be distributed equally amongst the petitioners and the 1<sup>st</sup> and 6<sup>th</sup> protestors. They submit that the seventh protestor has no claim over the estate of the deceased.

12. The 7<sup>th</sup> protestor submits that he had entered an agreement with the deceased which he produced in court but he died before the transaction was completed. He submits that he be considered by the court and be awarded a portion of 0.85 acres.

The parties adduced evidence in line with the averments in their affidavits.

13. The issue which arise for determination is whether the protests have merits. I will first consider the affidavits of protests by:

(i) James Kamanga Nyaga. Peter Njoroge Nyaga and Mary Wangechi sworn on 16<sup>th</sup> February 2017.

(ii) Fredrick Muriuki Njeru

14. (1) **Affidavit of Protest sworn on 16<sup>th</sup> February 2017 by James Kamanga Nyaga**

The protestor claim that they are dependants as they were brought up by the deceased. The term dependant is defined under **Section 29 of the Law of Succession Act**.

It provides:

***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.*

The Act gives the court discretion to make provision for dependant. **Section 27 of the Law of Succession Act** provides –

***“In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.”***

The question is whether the protestors are dependants of the estate of the deceased. The petitioners in the replying affidavit sworn on 20<sup>th</sup> February 2017 avers that the protestors are sons of Nyaga Kamanga who was a brother to the deceased. The said Nyaga Kamanga was given a portion by the deceased as he had not been given land during land demarcation. Later Nyaga Kamanga was given land by Mwea settlement Scheme being his Rice Holding Number 4088 Ciagini Unit 4 measuring approximately six acres and a plot at Mbiri Shopping Centre.

15. In 1982 Nyaga Kamanga sued the deceased Ngari Kamanga claiming half share out of land parcel No. Ngariama/Ngiriambu/116. The suit was dismissed for lack of evidence. His appeal to the High Court Embu was also dismissed. The petitioners contend that the protestors do not live on the deceased’s land nor have they developed it.

The petitioners avers that the fact that the deceased paid school fees for the protestors does not make them dependants. The Petitioners filed proceedings in Civil Suit No.57/1982 showing that Wambui Nyaga Kamanga had sued Ngari Kamanga claiming that she was wife of Nyaga Kamanga, a step-brother. She claimed that she was living on the suit and was claiming 3 – acres. The deceased claimed that he was the registered proprietor. He had allowed Nyaga and his family to live on the land but they had their land at Mwea which they were also utilizing. The case was dismissed. An appeal to the High Court did not see the light of day as it was dismissed by **Justice Khaminwa**. There was no appeal against the Judgment of **Lady Justice Khaminwa**. Upon entry of Judgment, a decree follows, **Section 2 of the Civil Procedure Act** defines decree as follows:

***“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—***

***(a) any adjudication from which an appeal lies as an appeal from an order; or***

***(b) any order of dismissal for default:***

The decision of the trial magistrate which was upheld by the High Court conclusively determined the rights of the deceased as against the protestor’s family. The decision by **Justice Khaminwa** was by a court with concurrent jurisdiction as this court. I cannot therefore sit on appeal against that decision.

16. The protestors admitted that their deceased was their uncle. The protestors merely denied that there was a case between the deceased and his father and mother. The petitioners proved that there was a case which was terminated in favour of the deceased land. The protestors admitted that their father owned land with N.I.B which they are suing. There is no justification for the protestors to get the land from the deceased as it would amount to them inheriting from their own father and from the deceased who is their uncle which contrary to the **Law of Succession Act**.

The deceased in the proceedings stated that he had given the protestors a place to stay. In their affidavit they did not state who their mother was. They have introduced new evidence that their mother was inherited by the deceased. She never made such claim in her lifetime. She called many witnesses in the above case and she was claiming deceased was registered in trust. Their evidence is not credible and the witness PW2 is impositor in view of the evidence which was tendered in the proceedings before the Magistrate’s Court.

17. They are not children of the deceased and they have to prove dependency. That is to say they were being maintained by the deceased. At the time of the death of deceased they were adults who were not being maintained by the deceased. They are not first line dependants who are defined as wives and children and have priority.

18. **Section 29(b)** of the **Law of Succession Act** requires that they have to prove that they were being maintained by the deceased, ***“immediately prior to his death”***.

These the protestors have not proved. Their affidavit of protest show that the deceased assisted them with school fees and had given a position to occupy. They were not destitute as they were using their land at Mwea. I find that these protestors failed to prove that they were dependants. Their claim to the deceased’s land was determined during the lifetime of the deceased. There was no appeal against the Judgment by **Justice Khaminwa**. The Judgment determined the claim by the protestors to its finality. No claim by the protestors can stand against the estate of the deceased. Their claim is not genuine as they want to get a bigger share than the children of the deceased who have priority. Their claim is not made in good faith.

19. The Petitioner has submitted that the estate of the deceased comprises in land reference number **Ngariama/Ngiriambu/116** measuring 9 Acres. The Petitioners propose the mode of distribution to the children of the deceased who are the only beneficiaries as follows:-

(i) 0.8 Hectares to be shared equally between David Njeru Ngari, Edward Murithi Ngari, John Kamanga Ngari

(ii) 0.4 Hectares - Nancy Ngari

(iii) 0.4 Hectares to be shared amongst – Rosemary Wakathaiya Gachoki, Lilian Muthoni Njiru, Beth Kariuko Ngari, Jane Muthoni Ngari (daughters of the 1<sup>st</sup> household) with Eunice Wakaru having life interest.

(iv) 0.4 Hectares to be shared amongst - Jane Wawira Murithi, Esther Wangerwe Ngari, Irene Njeri Mwangi, Susan Waruguru Muchiri, Margaret Mumbi Karani, with Wambura Ngari Kamanga holding life interest.

20. The petitioners produced a document showing that Wambui Nyaga Kamanga who is the mother of the protestors confirming that she was the beneficiary of Rice Holding No.4088. The Rice Holding belonged to the father of the 1<sup>st</sup> and 2<sup>nd</sup> Protestors. The document produced as exhibits-5 by the Petitioners shows that as at March 2017 Wambui Nyaga Kamanga wife of Nyaga Kamanga was the owner after Succession Cause No.21/86 was finalized. The protestors did not challenge these documents. The evidence was uncontroverted and is therefore evidence which the court has to treat as weighty and reliable in determining the issue in dispute. The decision of the court normally depends on whether a party who is alleging the existence (or none existence) of facts has discharged the burden of proof to imposed on him to the required standard. In view of the evidence tendered by the Petitioners, I find that the 1<sup>st</sup> and 2<sup>nd</sup> protestors have failed to prove that they are lawful beneficiaries of the deceased. As stated by in a persuasive decision in **Re Estate of Samuel Kamau Kinui (deceased) 2017 eKLR**, the 1<sup>st</sup> and 2<sup>nd</sup> protestors failed to prove with evidence that the deceased had recognized them or accepted them as his children. It was a mere allegation that the deceased had taken the mother of the protestor as wife which I find is not true. The protestors were not sired by the deceased and that is why they claimed they are dependants. From the foregoing analysis of the evidence tendered before this court, I find that the protest by the 1<sup>st</sup> and 2<sup>nd</sup> protestors is without merits.

## **(2) The Protest by Fredrick Muriuki Njeru.**

The protestor relied on a land sale agreement he purportedly entered with the deceased. This agreement was purportedly entered in the year 2004. The deceased died in 2011. It is surprising that the deceased had not transferred the land for over a period of eight years. No consent of the Land Control Board was obtained. **Section 6 of the Land Control Act (Cap 302 Laws of Kenya)** provides that transactions involving agricultural land, like sale, transfer, lease etc are void for all purposes unless the Land Control Board of the area has given its consent in respect of that transaction in accordance with the Act. The purported agreement is null and void for want of the consent of the Land Control Board. The protestor had engaged in fraudulent activities by having the land transferred to him after the deceased died and without there being succession proceeding in the estate of the deceased. The fraud was arrested by an order issued in the **Environment and Land Court in ELC Case No.27/2015** where **Justice Olao** ordered the title deeds including the one issued to the protestor to be cancelled and to revert to its original Number **Ngariama/Ngiriambu/116** in the name of Ngari Kamanga, the order was produced as exhibits. The protestor has not proved that he has a valid claim against the estate of the deceased. His remedy does not lie in this cause which is supposed to distribute the estate to the rightful beneficiaries. I find that the protestor has failed to prove that he is entitled to the estate of the deceased. I find that the protest by the 7<sup>th</sup> protestor is without merits.

21. As regards the protest by 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> protestors, there is no dispute that they are blood sisters to the petitioners. In deed in the proposed mode of distribution by the petitioners in the affidavit in support of Summons for confirmation of grant had provided for the protestors. These protestors are dependants as provided under **Section 29 of the Law of Succession Act**. The issue which the court has to determine is the mode of distribution of the estate. The Petitioners and these protestors are the beneficiaries entitled to a share of the estate. In **Re- Estate of G.K.K (deceased) (2017 eKLR)** it was stated that –

***The primary function of a probate and administration court is distribution of the estate of the dead person.”***

The Law of Succession Act which is a self-contained law with provisions and rules governing the administration of estates. In its pre-amble, it states in part that it is the ‘law relating to intestate and testamentary succession and the administration of the estate of deceased persons’.

It has provided for the mode of distribution where an intestate has died and is survived by children only. **Section 38 of the Act** provides that’

***“where an intestate has left a surviving child or children but no spouse, the net intestate estate shall subject to the provision of Sections 41 & 42 devolve upon the surviving child if there be only one, or be equally sub-divided among the surviving children.”***

**Section 40** deals with distribution of the estate where the deceased is survived by a wife and children and had married more than once under any system of law permitting polygamy. In this case the deceased is survived by one of his wives.

The wife becomes or is considered an additional unit to the number of children. **Section 40** is applicable in the distribution of the estate of the deceased. The surviving wife is entitled to an equal share of the estate.

The protestors are entitled to an equal share of the estate of the deceased. The Petitioners in the affidavit sworn by David Njeru on 6<sup>th</sup> February 2017 in reply to the protest by 3<sup>rd</sup> 6<sup>th</sup> protestor had by deponed as follows at paragraph 8. That we therefore wish to state that if the estate of the deceased person will be shared equally amongst the beneficiaries.....

- The interest of Nancy Nyawira Ngari to be registered in the name of David Njeru Ngari in trust.

- Interest of John Kamanga Ngari be registered in his name.

Equal distribution amongst the children is bounded by the law which I have cited above. The estate of the deceased should be distributed equally among all the surviving children.

For the reasons I have stated I order as follows:-

- (a) The protest by James Kamanga Nyaga and Peter Njoroge Nyaga is without merits and is dismissed with costs to the petitioner.
- (b) The protest by Fredrick Muriuki Njeru is dismissed with costs to the Petitioners.
- (c) The estate of the deceased comprised in land parcel No. Ngariama/Ngiriambu/116 be distributed among the petitioners and the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> protestors, and Jane Wawira Muriithi, Ester Wangerwe Ngari, Irene Njeri Mwangi, Susan Waruguru Muchiri, Margaret Mumbi Karani, Eunice Wakaru and Wambura Ngari Kamanga.
- (d) The share of Nancy Wawira Ngari shall be registered in the names of Rosemary Wakathaiya and Jane Muthoni Njiru.

**Dated and signed by:**

**HON. LADY JUSTICE LUCY GITARI**

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**Dated, signed and delivered at Kerugoya by Hon. Lady Justice J.N. MULWA this 12<sup>th</sup> Day of November 2020.**

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**HON. LADY JUSTICE J. N. MULWA**

**JUDGE**