

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO.13 OF 2017

IN THE MATTER OF THE ESTATE OF SAMSON NJUGUNA TORO (DECEASED)

A N D –

NORMAN GACHOGU NJUGUNA.....APPLICANT

- V E R S U S -

JAMES KEFFA NG'ANG'A.....PROTESTOR

JUDGMENT

This matter relates to the estate of Samson Njuguna Toro(the deceased) who died on 7/2/1996. He was survived by his wife Miriam Wanjiku Njuguna who later died on 13/6/1999. They were blessed with 13 children namely:

1. *Tabitha Nyambura*
2. *Hellen Wangu (deceased)*
3. *Harriet Njeri*
4. *James Kefa Wagara (deceased)*
5. *Naftali Thairu (deceased)*
6. *Roxanah Wairimu (deceased)*
7. *Norman Gachogu (deceased)*
8. *Helina Waitherero*
9. *Leah Wacuka*
10. *Samuel Mburu (deceased)*
11. *Grace Mukami*
12. *Abigaël Nyokabi*
13. *Jeremiah Macharia (deceased)*

Norman Gachogu Njuguna filed this petition for grant of letters of administration intestate on 6/4/2009 in **P.M.'s Court Naivasha being Succession Cause No.54/2009**. Grant of letters of administration were issued to Norman Gachogu Njuguna on 1/9/2009.

On 14/4/2005, in **Naivasha SPM Succession Cause No.37/2005**, James Keffa Ng'ang'a(the protestor) son of Hellen Wangu, obtained grant of representation in Hellen Wangu's estate for purposes of pursuing a Succession Suit in respect of the Hellen Wangu's estate. The protestor then filed a summons for revocation of grant issued to Norman Gachogu on 1/9/2009, in **Nakuru HCC.Misc.Succ Cause No.7/2009**. The court revoked the grant on 6/11/2009.

A fresh grant was issued to Norman Gachogu Njuguna. He filed a summons for confirmation of grant on 17/1/2012 which was accompanied by a list of the deceased's properties, the heirs and a schedule on how the properties were to be distributed.

The protestor, **James Kefa Ng'ang'a (PW1)** filed an affidavit of protest against confirmation dated 17/2/2012 contending that the deceased's property, Murang'a Location 59/Kanyenyaini Karuri/228 (8.1 acres) was not included in the properties deceased prefer distribution and asked to withdraw the proposal that plot No.1144/102, Sokoni Naivasha be allocated to him. He proposed that the deceased's estate be shared equally amongst all the deceased's children whether dead or alive or be sold and proceeds be shared equally.

On 24/5/2012, directions were taken that the protest do proceed by way of viva voce evidence. The protestor testified first that the deceased

was his grandfather, a father to his mother, Hellen Wangu Ng'ang'a who died on 18/9/1994 and the protestor was appointed as a representative of her estate in Naivasha SPM 37/2005 vide a limited grant dated 14/4/2005. He identified all the properties named in the list of properties in the application for confirmation of grant in the deceased's estate, dated 17/1/2012 and opposed the proposed mode of distribution. He suggested that all the twelve properties be sold and the proceeds be shared equally between the 13 children of the deceased. He also stated that the two of the deceased's properties were omitted from the list which are plot 59 Kanyenyaini Murang'a, and Murang'a Location 9/Karuri/228, measuring 8.1 acres; that confirmation was done in respect of Loc 9/Karuri in Murang'a Succession Cause No.194/2001; that the land was transferred to strangers, that is, David Wahome Mwangi - 4.1 acres, Francis Gathui Mwangi – 2.5 acres, Alison Njoroge – 2.1 acres who are not members of the deceased's family. He produced in evidence, proceedings in Murang'a Succession Cause 194/2001 and contends that the distribution done in that case was illegal. He also mentioned another property being in Kanyenyaini which should be sold and proceeds shared equally between the beneficiaries.

The protestor told the court that his mother lived with her boyfriend Ng'ang'a till 1986 when she returned to her father's home; that she died and was buried at Kijabe Cemetery. He complains that it is only his mother who was not provided for yet some of the deceased's children inherited part of the deceased's estate.

PW2 Daniel Mbatia Macharia who supports the protest testified that he is a son to Jeremiah Macharia Njuguna and grandson to the deceased; that Jeremiah too died in 2004 leaving behind PW2 and his brother Robert Njuguna Macharia and their mother. He is opposed to the proposed mode of distribution by the petitioner because his mother and aunt Hellen Wangu were excluded from the distribution although he and his brother were included in the distribution and were given plot No.1144/105 Sokoni Naivasha Town to be shared between him, his brother and aunt Tabitha.

PW2 further objected to the distribution proposed by the petitioner because he was not consulted before the proposed subdivision. He told the court that he wants the whole of that property on behalf of the family of Jeremiah Macharia. He also opposed distribution of Naivasha Mwinjuri Block 4/5287 Murera because it belonged to his grandmother Miriam Wanjiku; that he did a search and found it to have been divided and some land was sold and some transferred to his uncle. He also complained that plot No.70 Kabati is a residential plot and rent has been collected but his family has not benefited from it and he wants the rent shared equally between all the family members; that he wants a disclosure on plot No.3493 Utheri Wa Lari; for the Nyandarua property, he wants equal distribution which should include the children of Hellen Wangu, Naftali Theuri; that dealing with the deceased's bank account be stopped; that his mother had been living on the Murang'a plot but upon searching found it had been subdivided into 10 plots with titles, some in the grandmother's name, his uncle Mburu and his cousin James Kefa Ng'ang'a (Protestor).

He would like the Naivasha land shared equally amongst his cousins; that plot 103 Naivasha Sokoni be given to the family of Hellen Wangu and KQ, NBK, KCB, KFA value should be disclosed and the acreage of land in Nyandarua be disclosed.

Norman Gachogu Njuguna (DW1) the first petitioner in this matter partially testified but was stood down before he completed his testimony. The matter was adjourned but he died before he could be recalled to conclude his testimonies. DW1 was not subjected to cross examine **Grace Muthoni Njuguna (DW2)** a daughter of the deceased, took over as the administrator of the deceased's estate. DW2 testified that although only 7 beneficiaries were named in the affidavit dated 17/1/2013 in support of the confirmation of grant, all the children of their deceased siblings were catered for in the distribution. DW2 set out how each of the deceased's 13 children has received from the deceased's estate and that includes the two protestors James Kefa Ng'ang'a and David Mbatia. She added that there are 74 nieces and nephews but only these two have challenged the distribution.

DW2 identified the 1st protestor, James Keffa Ng'ang'a as a son to her sister, Hellen Wangu Ng'ang'a who died in 1994 when her parents were still alive and left when all her children were adults and none was dependant on the deceased. On the other hand, the 2nd protestor David Mbatia is the son of Jeremiah Macharia (deceased), a son of the deceased.

In reply to the allegation that some property was not listed in the schedule for distribution, DW2 stated that the Murang'a land Location 9 was sold by the eldest brother after he secretly obtained letters of administration in Murang'a Succession 194/2001 (P.Ex.2) without the knowledge of the other heirs and that he sold the land to three people and they were not able to reclaim it.

As respects Plots 59 in Kanyenyaini Murang'a DW2 said that the same was sold by her mother following the wishes of the deceased; that Githunguri Kiambaa Plot 265 belonged to her sister Harriet Njeri Samson even before her parents died. PW2 further stated that they held a family meeting on how the properties were to be distributed and all were in agreement. DW2 further stated that it is her mother Miriam and her elder brother Norman, who wrote the mode of distribution that was adopted by the rest of the family. She denied that any property was left out of the schedule.

Although the protestor seemed to suggest that the deceased, Samson Toro left a Will, there is no evidence to that effect. The protestor had earlier prosecuted an application for revocation of the grant that had been issued to Norman Gachogu whereby a ruling was rendered by Ouko (J) on 1/9/2009. PW1 never alluded to there having been a Will left by the deceased. I find that the deceased died intestate. DW2 said that it is the deceased's wife, her mother, together with her eldest brother Norman who stepped into the shoes of her father and came up with the schedule for distribution.

PW2 explained, why, in the application for confirmation they had only listed 7 of the deceased's children, the reason being that the 6, who were already deceased were not included and that included PW1's mother, Hellen Wangu. DW2 agreed that in total, the deceased had 13 children:

There is no doubt that PW1 is the son of Hellen Wangu, a daughter of the deceased. The protestor is not the child of the deceased as provided under Section 3(2) of the Law of Succession Act. Being a grandchild, the court will have to consider whether he is entitled to inherit from the deceased.

The deceased died on 7/2/1996 and the applicable law is therefore the Law of Succession Act 1981. As noted earlier, the deceased died

intestate and the estate will be distributed in accordance with Part V of the Laws of Succession Act. Section 32 of the Act exempts certain kinds of property from Part VI but that which is not exempt will be distributed in accordance with Section 33 of the Act. In this case, the deceased left behind a wife and children and hence the provisions that are applicable are Sections 35, 38 and 40 of the Laws of Succession Act which provides that the spouse of the deceased shall be entitled to household effects of the deceased absolutely; a life interest in the whole residue of the net intestate and if it is a widow, the interest shall determine upon remarriage and the spouse shall have a power of appointment of all or pay part of the capital of the net intestate by way of gift, the net intestate is then distributed to the children and widow as units. The protestors not being children of the deceased cannot inherit as a child of the deceased. In his affidavit of protest, PW1 included himself as a son of the deceased which is not the correct position.

Although the deceased was survived by the wife, she later died and in that case, Section 38 of the Laws of Succession Act applies. It provides as follows:

“Where an intestate has left a surviving child or children but no spouses, the next intestate shall subject to the provisions of Section 41 and 42, devolve upon the surviving child if there is only one or be equally divided among the surviving children.”

Whether the protestors were dependants of the deceased; the protestors have not claimed to be dependants. Section 29 of the Act defines who a dependant is. The Section reads as follows:

“Section 29

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.

By the time the deceased died, PW1 said he was an adult and he never alleged that he was a dependant of the deceased before his death. PW2, too did not claim any dependency.

So, can the protestor inherit from the deceased being a grandchild?

As properly held by J. Musyoka in Nairobi, ***In the matter of the estate of Veronica Njoki Wakago, Succession cause No.1974/2008*** grandchildren can inherit from their grandparents, indirectly through their own parents. The protestors would not have inherited from their grandfather if the mother and father were alive. The judge stated as follows:

“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July, 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents. In this case, the applicant’s mother survived the deceased. She is the one entitled under Part V to inherit her mother, the applicant’s deceased grandmother. The applicant clearly has no claim under Part V so long as his mother survived the deceased.”

In this case, both James Keffa Ng’ang’a and David Macharia can inherit directly from the deceased’s estate because their parents are deceased.

The next question then is what comprised the deceased’s estate?

In the affidavit in support of the petition for letters of administration dated 3/4/2009, the following properties were listed as forming the deceased’s estate:

- 1. Plot No.70 Kabati Location Naivasha;***
- 2. Plot No.1144/102 Sokoni Naivasha;***
- 3. Njoya Farmers Co. Ltd Shares (Plot);***
- 4. Plot No.1144/105 Sokoni Naivasha;***
- 5. Plot No.59 Kinyenya-in Murang’a;***

6. Loc.9/Kiruri/228 (8.1acres);

7. Nyandarua S/K/1416 Bamboo Scheme

Others which are included in the protestor's submissions are:

8. Utheri Wa Lari 3493;

9. Shares at Kenya Airways and National Bank.

PW1's view is that all these properties should be sold and the beneficiaries should share the proceeds equally.

PW1's proposal is untenable because, Plot No.59 Kinyenyaini, Murang'a was sold by Miriam Wanjiku, the deceased's widow. DW2 said that she did so under the instructions by the deceased. It is not even known when the sale took place. PW1 and 2 did not follow up to establish how it was done. On the other hand, Loc 9/Kiruri/228 was sold by James Keffa Wagara after he secretly obtained letters of administration in Murang'a Succession Cause No.194/2001 P.Exh.No.3. That fact is not disputed. The confirmation was issued on 11/12/2000 and the property was subdivided into three and it devolved to three purchasers, namely: David Wahome Mwangi, Francis Githi Mwangi and Esborn Nyaga Mwangi who are not family members. The transfer of the land to those purchasers was done in 2000, over 18 years ago. DW2 told the court that in the proposed schedule for distribution, they took into account the fact that the said Keffa Wagara had benefited from the said piece of land and it was considered to be part of his entitlement.

Further to the above, DW2 testified that her brother Naftali was given 3 acres which was excised from Nyandarua South Kinangop/1416 which he used to pay off a loan which he had obtained in respect of the Kiambu land and that was included as part of his inheritance. DW2 said that the said land was given when the deceased was still alive. Because of the passage of time, and the fact that some of the property was given in the deceased's lifetime, it is impossible to put all the assets together for sale and redistribution.

It is trite law that he who alleges must prove. It was the protestor's contention that all the deceased's properties were not included in the proposed schedule for distribution. It was upon the protestors to point out which property was not included in the schedule. DW2 was adamant that all the properties forming the deceased's estate are included and distribution is as per her schedule that was exhibited. DW2 satisfactorily explained how survived for about 4 years and the Loc.9/Kiruri/228 and plot 59 Kinyenyaini were dealt with. As regards the complaint by PW2 that there was money in the bank, it should be remembered that the deceased left behind a wife who needed upkeep. PW2 should have shown that the money is still available for distribution which he did not.

PW2 Daniel Mbatia complained that land parcel Naivasha Mwichunjiri Block 4/5287 Mirera was not in the deceased's name but the grandmother's. As correctly pointed out, the instant matter does not relate to Miriam Wanjiku's estate but the estate of Samson Njuguna Toro.

PW2 also opposed the distribution of Nyandarua South Kinangop/1416 because some people and specifically, Hellen Wangu Njuguna, Naftali Theuri Njuguna had been left out. I have looked at the proposed schedule of distribution set out by the petitioner (DW2) and I do note that just like all the other beneficiaries, both Hellen and Naftali's families have been provided for in plot Nyandarua South Kinangop/1416.

I think at this stage, it is necessary to set out the schedule of distribution by the petitioner. PW2 admitted that he is aware that distribution cannot be exactly equal but must be equitable. DW2 told the court that in the family, they have about 74 nieces and nephews but it is only these two who have complained about distribution.

Having considered the evidence of DW2 and the proposed schedule of distribution, I have no doubt that all the 13 children of the deceased have been provided for. Most of the deceased's children are deceased and it is clear from the schedule that the grandchildren PW1 and 2 have been appointed to hold the shares due to their parents on behalf of their respective families. I have noted that the petitioner did not give the acreages of the pieces of land and the protestors never attempted to avail them by doing a search or carry out a valuation to demonstrate that some of the heirs were being given less than others. The court will presume the proposal to be fair.

In this case, Hellen Wangu, the mother to James Keffa Ng'ang'a (PW1) got a share of Plot 1416. DW2 also told the court that PW1 also got a part of Naivasha/Mwichungiriri Block 4/5287 Mirera, which is now Plot 1144/102 Sokoni Naivasha which had been transferred to Miriam Wanjiku, the deceased's wife, who then distributed it; PW1 got Plot 1144/102 Sokoni to hold on behalf of his siblings. DW2 explained that it is Miriam and her elder brother who came up with the schedule of distribution and therefore it did not matter whether the plot that was allocated to PW1 was from the deceased directly or the wife. Both were taken into account.

Similarly, I have seen that the house of Jeremiah Macharia (deceased) was duly provided for in the distribution under Plot 1144/105 Sokoni Naivasha ½ share and one share of Nyandarua South Kinangop/1416. In fact, DW2 observed that David Mbatia being the only surviving son of Jeremiah, stands to benefit the most. Harriet Njeri had during the life of the deceased, given Plot 265 Kiamba.

The distribution of some of these properties was done during the life of the deceased and the wife Miriam. Section 42 Laws of Succession Act provides that such a gift *inter vivos* will be taken into account during distribution.

Section 42 reads:

“Where-

(a) An intestate has, during his lifetime or by will, paid given or settled any property to or for the benefit of a child, grandchild or house; or

(b) Property has been appointed or awarded to any child or grandchild under the provisions of Section 26 or section 35,

that property shall be taken into account in determining the share of the, net intestate estate finally accruing to the child, grandchild or house.”

The deceased's children who had earlier benefited from gifts from him have been taken into account.

The deceased died on 7/2/1996 about 23 years ago. Some of the properties may have been developed by those who have been in use while some may have changed hands. Therefore, the orders sought by the protestors cannot be availed to them. It would be unfair to awake a statement that has existed for 23 years and move people from the properties with a view to selling so that the proceeds can be shared as suggested by the protestor.

For all the above stated reasons, I find that the mode of distribution proposed by the petitioner is fair enough and should be adopted. I find no merit in the protests.

Distribution will be as follows:

	NAME OF BENEFICIARY	PROPERTY
1.	TABITHA NYAMBURA	-PLOT NO.1144/105 SOKONI NAIVASHA TOWN (<i>Half a Share</i>) -NYANDARUA/SOUTH KINANGOP/1416 (<i>One Share</i>)
2.	HELLEN WANGU (DECEASED)	-NYANDARUA/SOUTH KINANGOP/1416 (<i>One Share</i>) <i>James Keffa Ng'ang'a has already benefited from Plot 1144/102 Sokoni from Miriam Wanjiku.</i>
3.	HARRIET NJERI	-NYANDARUA/1416 (<i>One Share</i>) -GITHUNGURI KIAMBA PLOT NO.265 (<i>whole share</i>)
4.	JAMES KEFFA WAGARA (deceased)	-NJOYA FARMERS CO.LTD SHARES (<i>to go to his daughters Jennifer Wanjiku, Becky Wangeci and Zipporah Muthoni.</i>) <i>-family benefited from the sale of the 8 acre piece of land in <u>Murang'a Location 9/Karuri/228</u></i>
5.	NAFTALI THAIRU (deceased)	-NYANDARUA/SOUTH KINANGOP/1416(<i>One Share</i>) <i>-3 acres was earlier used to pay for loan of Kiambu land.</i>
6.	ROXANAH WAIRIMU (deceased)	-PLOT NO.3493 UTHERI WA LARI (<i>1/3 Portion to go to the son Robert Gikwa</i>) -NYANDARUA/SOUTH KINANGOP/1416 (<i>One Share, to go to the son Robert Gikwa</i>)
7.	NORMAN GACHOGU (deceased)	-NYANDARUA/SOUTH KINANGOP/1416(<i>One Share</i>) <i>-Had benefited from a Gift from deceased.</i>
8.	HELINA WAITHERERO	-NYANDARUA/SOUTH KINANGOP/1416(<i>One Share</i>)

		- PLOT NO.3493 UTHERI WA LARI (1/3 Portion) -KENYA COMMERCIAL BANK SHARES
9.	ALICE WACUKA	- PLOT NO.3493 UTHERI WA LARI (<i>1/3 Portion</i>) -NYANDARUA/SOUTH KINANGOP/1416(<i>One Share</i>)
10.	SAMUEL MBURU NJUGUNA (deceased)	-PLOT NO.1144/102 SOKONI NAIVASHA TOWN (<i>whole share</i>) -NYANDARUA/SOUTH KINANGOP/1416 (<i>One Share</i>)
11.	GRACE NJUGUNA MUKAMI	-KENYA AIRWAYS SHARES -NATIONAL BANK SHARES -NYANDARUA/KINANGOP/1416(<i>One Share</i>)
12.	ABIGAIL (deceased) NYOKABI	-PLOT NO.70 KABATI (<i>To be held by her son James Wagara</i>) -NYANDARUA/SOUTH KINANGOP/1416(<i>One Share</i>)
13.	JEREMIAH MACHARIA	-PLOT NO.1144/105 SOKONI NAIVASHA TOWN (<i>Half a Share</i>) -NYANDARUA/SOUTH KINANGOP/1416 (<i>One Share</i>) <i>To David Mbatia</i>

A certificate of confirmation of grant do issue forthwith in the names of Grace Mukami Njuguna , the petitioner

This being a family matter, each party do bear its own costs of the protest as well as costs of the distribution.

Dated, Signed and Delivered at NYAHURURU this 28th day of June, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Wanjiku Muriithi holding brief for Mr. Waichungo for the protestor

Soi – Court Assistant

Petitioner - absent