



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**SUCCESSION CAUSE NO.131 OF 2017**

**IN THE MATTER OF THE ESTATE OF KABUI MWANGI RUTURU (DECEASED)**

**GRACE WAIRIMU KABUI.....PETITIONER**

**- V E R S U S -**

**BETH WARUGURU.....OBJECTOR**

**JUDGMENT**

**Kabui Mwangi Ruturu** died intestate on 16/9/2006. He was a resident of Kahuru, as indicated in the death certificate dated 27/5/2008.

The deceased's widow **Grace Wairimu**, the petitioner, petitioned for letters of administration intestate in Nakuru H.C. Succession Cause 432/2008 (now Nyahururu 131/2017) on 15/8/2008. In the form P & A 5, the petitioner listed herself and her daughter Hannah Waithira Kabui as the only surviving beneficiaries. The only asset comprising the deceased's estate was indicated as Nyandarua/Kahuru/2246. The petitioner in filing the petition used an introductory letter dated 14/8/2008 from the Sub-Chief of Kabatini Sub-Location in Nakuru.

A grant of representation was issued to the petitioner on 29/10/2008 and the same was confirmed on 27/7/2009 whereby the deceased's estate devolved to the petitioner absolutely.

By a summons dated 12/2/2010, through the firm of Waichungo Advocate, Beth Waruguru, the objector/applicant, moved the court seeking the following orders:

- (1) That the letters of administration issued to Grace Wairimu Kabui on 29/10/2008 and confirmed on 27/7/2009 be revoked;*
- (2) That L.R.Nyandarua/Kahuru 2249 be included as forming part of the deceased's estate;*
- (3) Costs of the application be borne by the respondent.*

The grounds upon which the application was brought are twofold; that the grant was obtained fraudulently by making of a false statement by concealment from the court of material facts; that the grant was obtained by none disclosure of the existence of other dependants ranking equally in priority in applying for letters of administration of the estate of the deceased.

The summons was supported by the objector's affidavit dated 11/2/2010 in which she deponed that she got married to the deceased under Kikuyu Customary Law in 1945 and they established a home in Kahuru Murang'a and were blessed with one issue, Priscilla Wanjiru Nguyo (PW3). In 1958, they relocated to Ndunyu Njeru in Nyandarua where they were employed by a white settler, John Nimo as casual laborers and in 1963, they were allotted 40 acres of land – L.R.Nyahururu/Kahuru/56, where they built a home. They managed to pay the settlement Fund Trustee Fund loan from proceeds from the farm and milk; that the deceased married the petitioner in 1975 after she complained that he was selling land without her consent. By the time of his death the deceased had subdivided the land and sold some, leaving only two portions L.R.Nyandarua/Kahuru/2246 and 2249; that the petitioner failed to disclose that the objector and PW3 ranked in higher or equal priority to the petitioner in filing for letters of administration.

The petitioner opposed the said application through her replying affidavit dated 26/4/2017 in which she stated that she married the deceased in 1974 and the said marriage was solemnized on 19/11/1987; that she found the deceased living alone and told her that he had divorced his wife; that she never met the objector; that the deceased died on 16/9/2006; that by then he had subdivided his land into 4 portions, Nyandarua/Kahuru/2246, 2247, 2248 and 2249 and that he had sold three portions to different people. She was surprised that parcel 2249 was still in the deceased's name; that the deceased had even sold 4½ acres out of 2246 to different people.

On 14/6/2010, directions were taken that the objection proceedings be determined by viva voce evidence. The court started by hearing the objector's case.

**PW1 Beth Waruguru** reiterated the contents of her affidavit, that she married the deceased in Murang'a, they moved to live with John Nimo, a white settler after which they got 45 acres of land at Kahuru. The land had a loan with the Co-operative which she repaid by planting carrots and groundnuts; that they built a 5 bed roomed house and were blessed with one child, Priscillah Wanjiru who was named after the deceased's mother; that Priscillah later got married and there was nobody to look after cattle. Since her husband drunk a lot, he asked her to get him a wife and she got Grace Wairimu, a neighbour's daughter, the petitioner and she gave her two rooms; that Wairimu refused to farm; she too refused to farm and that the deceased and the petitioner ganged up and beat her, cut her after which she left for her brother's home; that the deceased went for her but her mother gave conditions which he met and promised to go and build for her another house but he never returned for her because he fell ill till he died; that she attended the funeral together with her daughter, PW3.

She produced photographs of her and the deceased P.Exh.No.2 and baptism card as proof that the daughter is the child of the deceased. She said that by the time she left, no land had been sold and that her daughter's dowry was paid to the deceased before she left. She said that the only land sold during the deceased's life time was to Mbatu but others were sold after his demise.

She said she worked very hard on the land and wants her share of 20 acres.

**PW2 David Mbugua** told the court that he had known the deceased since 1964 because he had a farm at Kahuru and PW2 was the Secretary and Manager of the Kahuru scheme; that he used to collect proceeds of sale of milk and harvest from the office; that the deceased had a wife Beth Waruguru and a daughter Priscillah Wanjiru; that Beth and deceased separated in 1976. He attended the deceased's funeral and saw Beth and the daughter at the funeral. He was aware that the deceased sold part of his land to James Matu and Daniel Muhia.

**PW3 Priscillah Wanjiru** a daughter to the objector told the court that she was born in 1953 to the objector and Kabui Ruturu. They moved from Murang'a to Nyahururu where they first lived in the farm of John Nimo a white man and in 1964, the father got a plot No.56 Kahuru Scheme measuring 40 acres; that she completed school in 1970 and got married the same year, leaving her father and mother; that her father wanted another wife and the objector got Grace Wairimu, a neighbor to marry the deceased. After a short while, the petitioner became hostile to the objector and the petitioner would team up with the deceased to beat up the objector. The objector left to live with her parents. When her father died in 2006, she attended the funeral with the objector and her son Kabui, who is named after the deceased; that after the funeral, together with the objector they called the petitioner to a meeting at the D.O's Office requesting her for a portion of the deceased's land but after several meetings, the petitioner informed them that she had obtained letters of administration and the negotiations therefore collapsed; that the petitioner had obtained a letter from the Sub Chief of Kabatini Sub-Location, Nakuru.

**Grace Wairimu Kabui, (DW1)** testified that she married the deceased in 1974 and formalized their marriage on 20/6/1987 when they had a wedding; that the deceased never told her that he had had another wife before; that when the deceased was sick, the deceased and never visited the objector never attended the funeral nor is she mentioned in the Eulogy. D.Ex.No.2(a) and (b).

DW1 also testified that the deceased had 4 pieces of land. She lives on parcel 2246 but he had sold others. She produced the sale agreements. She denied having concealed that Plot.2249 was part of the deceased's estate because it was sold to one Muhia Wanjohi and he took possession in 1983; that Plot 2246 was partially sold to Wachira Kanyi, ½ acre to Hellen Njoki and ¼ and Joseph Kuria.

In cross-examination, DW1 admitted that the deceased had told her that he had divorced his wife. She also admitted to having had a dispute with the objector and her daughter at the Chief's Office. DW1 admitted knowing PW2 but denied that he ever worked for the settlement scheme.

**DW2 Agnes Wanjiru Muhia** testified that the deceased sold to her husband David Muhia 5 acres in 1981 – 1982 and they took up possession when the deceased was still alive. DW2 produced the agreement (D.Ex.3). They had however not been issued with titles.

**DW3 Patrick Macharia Githui** told the court that he was representing the Anglican Church as a committee member; that he knew the deceased who had sold to the Church an acre from Nyandarua/Kahuru/2246 in 2003. That they have misplaced the agreement; that the deceased had called a surveyor who did survey and subdivision; that the surveyor disappeared with the original documents. That 7½ acres were left with the petitioner where she lives; that deceased died before they got titles. He further said that the petitioner has had no objection with their occupation of the land. He was not aware that the petitioner had not included them in the petition as purchasers.

**DW4 Joseph Wachira Kabugi** also said that he knew the deceased because he bought 2¾ acres from him between 1995 – 1997 and fully paid. He produced agreements dated 5/12/95, 13/3/1996 and 14/4/1997 D.Ex.No.6, 7 and 8; that the deceased died before transferring the land to him but he has settled on it. He said there are several purchasers who occupy 4½ acres and the petitioner occupies the balance of 7½ acres. He did not have any evidence to prove that he completed the payments; that the original documents had remained with the surveyor who had been given the documents for purposes of doing the survey and transfer of titles but he disappeared with them.

**DW5 Magdaline Wambui Kariuki** is the Chief of Engineer Location. She knew the deceased for long. She knows the petitioner as wife of the deceased and wrote for her an introductory letter dated 9/6/2008 which mentioned her, her children and purchasers of the land who had bought a total of 4½ acres from title 2246; that the petitioner went to her office with the purchasers when she wrote the letter D.Ex.9. She confirmed that the purchasers are in occupation of the pieces of land and that they till it. DW5 denied having known about the objector.

She admitted that the subject land was purchased from SFT and paid for through sale of proceeds from the land through Kahuru Co-Operative Society where David Mbugua (PW2) worked.

Mr. Waichungo, counsel for the objector submitted that there were only two issues for determination which are whether the grant should be revoked and whether the objector and her daughter are entitled to inherit from the deceased's estate. Counsel submitted that the petitioner

when applying for grant, used a letter issued by one John Thuo Sub-Chief Kibatini Sub-Location who was not her chief and only listed herself and her daughter as the beneficiaries of the estate; that in order to salvage the situation, she tried to sneak in a letter dated 9/6/08, from DW5, Chief of Engineer Location which included all her children as beneficiaries and the buyers; that the said letter first appeared on record with the replying affidavit dated 26/4/2010. It was counsel's observation that either the petitioner deliberately omitted to use the letter authored by DW5 dated 9/6/2008 in order to disinherit the buyers and her children or the said letter was prepared after the summons for revocation had been filed; that the petitioner also acknowledged the existence of LR Nyandarua/Kahuru/2249 which is also an act of concealment and that the grant issued to the petitioner was defective and should be revoked under Section 76(a) (b) and (c) of the Law of Succession Act.

Counsel relied on the decision of ***Re Estate of Wahome Mwenje Ngonoro Succession Cause No.96/2005 (Nyeri)*** where the court observed that a litigant has a duty to make full disclosure of all material facts which have a bearing on the issues for adjudication by the court.

As to whether the objector and her daughter (PW3) are entitled to inherit, counsel urged that the petitioner admitted that the deceased had a former wife; that the petitioner admitted to having been taken to the Chief by the objector and PW3 soon after the deceased's death; that the purchasers may not have known the objector because the dispute over sale of land was one of the reasons that the objector left; that DW5, the Chief of Engineer Location could not have known about the objector because she was a young girl when the objector left about 1974; that PW3 produced in evidence a baptism card confirming she is a daughter of the deceased and PW2 corroborated the evidence of the objector and PW3; that ***Section 3(1) of Law of Succession Act*** defines a wife to include one who is separated from her husband and the contracting of a statutory marriage does not disentitle the objector.

Counsel also urged that the fact of a prolonged cohabitation between a man and a woman gives rise to a presumption of a marriage. He relied on the holding in Court of Appeal case of ***Hortensia Wanjiku Yawe v The Public Trustee HCA.13/976***; that the objector got married in 1945 and they separated in 1974 which was a long period.

Counsel also relied on the naming of PW3 after the mother of the deceased as evidence of marriage as was held in ***Re Estate of Evanson Kungu Mureithi (Nakuru) 163/1995***.

Counsel also submitted that the deceased acquired the subject land and had fully paid for it by the time the petitioner was married and she therefore contributed towards LR.Nyandarua/Kahuru/56; that at the time of his death, parcels 2246, – which is 12. Acres and 2249 – which is 5 acres are still available for distribution and the objector should be entitled to half the said land but if the court finds otherwise, then Section 38 of the Law of Succession Act should apply.

Mr. Kanyi Nguire, counsel for the petitioner on the issue whether the objector was a wife to the deceased stated that the objector's evidence was fraught with contradictions, for example, the date of birth, and when she got married. He further submitted that it is trite that each party is bound by their pleadings and in her affidavit, the objector never indicated that she knew the petitioner only to allege in her evidence that she got her as wife for deceased; that the objector built her case as the case proceeded, raising questions as to the genuineness of her case; that the objector failed to discharge the burden placed on her to prove her allegations under Section 107 and 108 of the Evidence Act.

Counsel also submitted that the objector never led evidence on how the customary law marriage between her and deceased was conducted and whether the steps set out in the ***Book, Kenya Customary Law by Eugene Cotran*** were satisfied, that is, capacity, consent, Ngurario (slaughtering of the ram), Ruracio (dowry) and cohabitation; that even though long cohabitation is recognized as a marriage, the objector did not present any evidence to prove it e.g. interaction with the deceased's parents or siblings who acknowledged her as a wife; that the photograph produced was not proof of a relationship of marriage between the deceased and objector.

Counsel relied on the decision of ***Benjamin Kibiwot Chebulat v Mary Chelangat NKU HC.ELC 561/2013*** where the court found inconsistencies in the evidence of the witnesses on the issue of marriage and found that the most the defendant was, was a girlfriend who is not entitled to inherit from the boyfriend. He urged the court to find the same in this case.

As regards production of the baptism card by PW3, counsel submitted that it cannot prove paternity and in any event, it was after PW3 had been married; that payment of dowry of PW3 was not proved as there was no witness and in any case, PW3 never got in touch with the father for 32 years.

As to whether the grant was obtained fraudulently, counsel submitted that there is no proof that there are any facts that were ever misrepresented because even if the objector and PW3 were left out, they had no *locus standi* in the matter.

As regards parcel 2249, counsel said that an explanation was given that the petitioner was not aware whether the buyers had not been issued with a title and in any case, it was sold in 1982 and it only required rectification of grant.

In regard to the use of the letter D.Ex.4, counsel said that the petitioner said that she was misled by the Chief. Counsel urged that the court do dismiss the objection.

Having reviewed the evidence on record and the submissions by counsel, I think that the issues that emerge for determination are:

- (1) ***Whether the objector was the deceased's wife;***
- (2) ***Whether the grant was obtained fraudulently to warrant its revocation;***
- (3) ***Whether the objector and the daughter are entitled to inherit from the deceased's estate;***

(4) *Whether Nyandarua/Kahuru/2249 form part of the deceased's estate;*

(5) *How should the deceased's estate be distributed.*

***Whether the objector is the deceased's wife:***

In the affidavit in support of the summons for revocation, the objector deponed that she was born in 1945 in Murang'a and moved with the deceased to Nyandarua where they worked for a man and later were allocated with 40 acres of land Nyandarua/Kahuru/56; that they were blessed with one child, PW3.

PW3 corroborated PW1's evidence that the deceased was her father and she was born in 1953. I noted that indeed in her testimony, PW1 tended to be confused about dates and she admitted as much. All she could recall is that she got married during the war.

PW2 corroborated PW1 and 3's evidence that the objector was indeed the deceased's wife. PW2 had known them from 1964 when he worked as secretary to manager of the Kahuru Cooperative. Although the petitioner denied knowing that PW2 ever worked at the Kahuru Co-operative Society, DW5, the Chief of Engineer confirmed that indeed PW2 used to work for the Kahuru Co-operative.

PW2 and DW5 also confirmed that the farms that were allocated to the farmers in the area were paid for through sale of their produce to the Co-operative Society to the Settlement Fund Trustee. PW1 told the court that they were allocated 40 acres which they paid for by planting groundnuts and carrots. PW2 worked at the Co-operative and therefore, he must have known the deceased.

PW2 further said that he knew that the deceased had one child with the objector and that the objector left the home in 1976 after the petitioner got married to the deceased. I am satisfied that PW2 was an independent and truthful witness whose testimony was convincing.

PW1's evidence was further corroborated by PW3, her own daughter who confirmed that she was born in 1953 got married in 1970 and after she left home is when the father married the petitioner, disagreements ensued and the objector left home. Although the petitioner denied knowing the objector and PW3, it emerged from the cross-examination that she was aware of the existence of another wife before she got married to the deceased. In her testimony, the petitioner had said that she learnt of the objector in court but when pressed in cross-examination, she tried to deny her own affidavit but later conceded and even admitted that she had had cases with the objector before the chief. The Petitioner did not impress the court as a truthful person.

The petitioner's averment that she saw the petitioner in court for the first time was an outright lie. She even admitted that it is because of that dispute that the Chief refused to give the petitioner a letter. The fact that the chief refused to give the petitioner an introductory letter explains why the petitioner obtained the letter dated 14/8/2008 from the Sub-Chief of Kabatini Sub-Location – Nakuru who was not her Chief, instead of the Chief of Engineer. The petitioner must have been avoiding to use a letter from a Chief of her home area because objector would have found out that she had filed a succession cause. I am satisfied that the petitioner knew the objector as deceased's wife and went behind her back and filed this cause.

Section 3(1) of the Law of Succession Act defines who a wife is ***“wife includes a wife who is separated from her husband and the terms ‘husband’ and spouse, widow and widower, shall have corresponding meaning.”***

The objector testified that she never remarried and had never reconciled with the deceased from about 1976 to 2006 when deceased died, 30 years later; that they had lived together since 1945 to about 1975. PW2 knew the objector and the deceased in 1964 till they parted in 1976. They had cohabited for over 10 years. That is a long period. Even though the objector did not lead any evidence to prove a Kikuyu Customary Law, the long period of cohabitation leads to a presumption of a marriage. I do echo the decision in *Hortensia Wanjiku Yawe Supra* where the Court of Appeal held:

***“The fact of a prolonged cohabitation between a man and a woman can give rise to a presumption of a marriage in favour of the woman, which presumption can only be rebutted or displaced by cogent evidence to the contrary.”***

Cohabitation between the objector and deceased for about 30 years as man and wife raises a presumption of a marriage. There is no evidence that they ever divorced. A mere separation does not end the marriage.

In the Kikuyu Custom, there is order of naming of children, in a marriage. In the case of *Joseph Gitahi Githongo vs Victoria Mwhaki CA 327/2005*, the Court of Appeal observed that under *Kikuyu Customary Law*, it is common ground that children are named in a particular sequence for example, first born son is named after the man's father and the first born daughter after the man's mother. The second of either is named after the woman's parents. ***See also this court's decision in HCC 59/2017 (Nyahururu), the estate of Abraham Mwangi Mugane. See Eugene Cotran's Book, Kenya Customary Law.***

PW3 claims to have been named after the deceased's mother 'Wanjiru'. The petitioner's first child with the deceased was also named 'Wanjiru'. Though Wanjiru is indeed a common Kikuyu name which can be given to any child, I find that the naming of PW3 as Wanjiru goes to corroborate the objector's claim of a marriage to the deceased.

In *Re Evanson Kungu Muriithi Supra*, the court held ***“The birth of children who are named after the husband's parents is a factor to be taken into account.”***

The naming of PW3 as 'Wanjiru', is a factor to be taken into account whether or not the deceased and objector were married.

The petitioner and deceased contracted a statutory marriage in 1987 as evidenced by the marriage certificate D.Ex.No.1. The objector did not raise any objection to the said marriage. The question is however whether the deceased having contracted a customary marriage would contract a valid statutory marriage. In ***Machani v Vernoor 1985 eKLR***, the Court of Appeal stated as follows:

***“During the continuance of a previous marriage, the already married party would have no capacity to enter into the new marriage and the new marriage would be null until the previous marriage had been brought to an end by a final decree of divorce; such as a decree absolute.”***

The deceased and objector had never divorced. Their customary marriage was still subsisting and therefore the deceased had no capacity to contract a statutory marriage. The deceased could only contract another customary marriage. The statutory marriage had therefore no effect on the customary marriage between the deceased and objector.

Of note is the fact that the objector knew that the deceased was allotted Nyandarua/Kahuru/56 and that the petitioner had failed to disclose existence of Plot 2249. PW1 said that by the time she left the deceased's home, the land had already been fully paid for. The petitioner did admit that when she got married the land was already paid for. The objector was not a stranger in the deceased's affairs.

The production of the photographs of the funeral or the baptism card may not add any value to the objector's case. This is because the card was obtained when PW3 was already married and anybody would have posed for a photograph. However, there is ample evidence that proves that the deceased was married to the objector and they had never divorced.

In the end, I find that the objector is a wife of the deceased and PW3 is a daughter to the deceased.

***Whether the grant was obtained fraudulently:***

Section 76 of the Law of Succession Act provides for circumstances under which a grant can be revoked. The section reads as follows:

***“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion:-***

***(a) that the proceedings to obtain the grant were defective in substance;***

***(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***

***(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***

***(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-***

***(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow;***  
***or***

***(ii) to proceed diligently with the administration of the estate; or***

***(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***

***(e) that the grant has become useless and inoperative through subsequent circumstances.”***

Under the above provision, the objector has to demonstrate that the petitioner concealed some material facts, and made untrue allegations or that the grant was defective. It was admitted by the petitioner that she had a dispute with the objector and her daughter at the Chief's Office and that is why the Chief refused to give her a letter of introduction to file Succession proceedings. The petitioner used a letter dated 14/8/2008 from Sub Chief John Thuo Mwangi of Kabatini in Nakuru. It is clear from the evidence before the court that the deceased hails from Engineer Location. Although the petitioner tried to deny the said letter, she filed the letter with the petition which form part of the pleadings and she is bound by her pleadings. Instead of using a letter of introduction from the Chief of Engineer, she went all the way to Nakuru to get one.

The petitioner having said that the Chief denied her a letter because of the dispute between her and the objector, by going to get a letter from a Sub Chief of another Sub Location to file the suit was in itself fraudulent. The petitioner knew the Chief would not give her the letter alone and decided to pull a fast one on the objector, filed the petition, got the grant which was confirmed on 27/07/2009. The petitioner's actions go to corroborate the objector's evidence that while they were negotiating, the petitioner informed them that she had already obtained letters of administration. Use of the letter from Kabatini was fraudulent.

Although the petitioner produced in these proceedings another letter authored by DW5 on 9/6/2008 (D-Exhibit 9), I find that on her own admission, the letter used to commence the Succession proceedings is one filed with the petition from the Sub Chief of Kabatini. The inclusion of the letter authored by DW5 to the replying affidavit dated 26/4/2010 is a further perpetration of the fraud and deceit by the petitioner. The said letter D.Ex.9 was either procured after the application for revocation was filed or the applicant had it and did not use it.

It was later sneaked into these proceedings adding to the said fraud.

In the letter issued by Kabatini Sub Chief, it was indicated that the only two beneficiaries of the deceased's estate were the petitioner and her daughter. Even the petitioner's own 8 children were not included nor were the purchasers. The grant was confirmed citing only the petitioner as the absolute heir. The petitioner's excuse is that the chief misled her. The petitioner did not disclose which Chief misled her. At least she never alleged that DW5 did. Even so, why did the petitioner come up with another letter dated 9/6/2008 from DW5 naming other beneficiaries. I find that the petitioner failed to disclose all the material facts to the court, that there are other beneficiaries including purchasers and her own children.

It is the objector who brought to the fore the fact that the deceased also owned Nyandarua/Kahuru/2249 which was not included in the petition. The said land is still registered in the name of the deceased. Had the objector not raised it, it would not have been known. The petitioner's excuse that she did not know that it was not transferred has no basis. It was concealment of a material fact.

No consent was obtained from the objector and PW3 at the time of filing this petition. The petitioner tricked the objector by using a letter from Kabatini Sub Chief yet negotiations were ongoing before the Chief. The petition was therefore filed contrary to Rule 26 of the Probate and Administration Rules which states:

***“Letters of Administration shall not be granted to any applicant without notices to every other person entitled in the same degree as or in priority to the applicant.”***

I find that the petitioner concealed many relevant facts from the court that warrant revocation of the grant and the grant issued to the petitioner on 27/07/2009, is hereby invoked.

The petitioner said that Plot 2249 was sold to Daniel Muhia Wanjohi in 1982 and he has built on it. DW2 Agnes Wanjiru Muhia, the wife of Daniel Muhia, produced an agreement of sale of Plot 2249 to her husband on 20/12/1982. The said agreement is a copy which is illegible. The court cannot confirm whether it was for sale of Plot 2249. The court was however told that the original book in which the sale agreement had been written was produced in court but has gone missing. The agreement is more or less similar to the ones exhibited by the other purchasers. The petitioner, all the purchasers and DW7 testified that the purchasers had settled on the said land even before the deceased's demise. I recall the evidence of the objector that she left the deceased's home because they disagreed over his wanting to sell land. There was nothing to stop the deceased from selling the land after she left. Indeed there is evidence that the deceased subdivided the original Plot No. Nyandarua/Kahuru/56 into 4 portions which he sold save for 2246 where the petitioner resides. DW2, 3 and 4 testified to having bought portions of land totaling 4½ acres from Plot 2246. PW2 also told the court that he was aware that Daniel Muhia and one James Matu had bought land from the deceased. I am persuaded to believe that the said land was all sold during the deceased's life and the said purchasers must be recognized as creditors of the estate. There was no evidence that the petitioner sold the land after the deceased's demise.

#### **How should the estate be distributed;**

What remains of the deceased's estate is 7½ acres. The court takes note of the fact that the petitioner has 8 children with the deceased. I think that the proper mode of distribution should be in accordance with Section 38 of the Law of Succession Act. The Section provides as follows:

***“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”***

The deceased's family consists of 11 units, that is the objector, her daughter and the petitioner and her 8 children, and the property which comprises 7½ acres will therefore be divided into 11 equal units.

In the end, I make the following orders:

- (1) That the objector is a wife to the deceased and therefore a beneficiary of the deceased's estate with her daughter;***
- (2) The grant issued to the petitioner on 27/07/2009 be and is hereby revoked;***
- (3) A fresh grant do issue in the names of the petitioner Grace Wairimu Kabui and Beth Waruguru;***
- (4) That Nyandarua/Kahuru/2249 forms part of the deceased's estate;***
- (5) That Nyandarua/Kahuru/2249 be transferred to Daniel Muhia, a purchaser;***
- (6) That 4 ½ acres out of Nyandarua /Kahuru/2246 be transferred to the respective purchasers.***
- (7) That the deceased's estate comprising of 7 ½ acres part of Nyandarua/Kahuru/2246 be shared equally amongst the 11 beneficiaries;***
- (8) Each party to bear its own costs, this being a family matter.***

Dated, Signed and Delivered at NYAHURURU this 26<sup>th</sup> day of July 2019.

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

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