



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

(FAMILY DIVISION)

SUCCESSION CAUSE NO 805 OF 1994

IN THE MATTER OF THE ESTATE OF MONICA WAMAITHA KIHARA (DECEASED)

IRENE WAMBUI KIMANI1ST APPLICANT

CAROLINE WAMBUI KIHARA2ND APPLICANT

MARGARET WANJA THIONG'O3RD APPLICANT

ALICE WANJIKU MUNYUI4TH APPLICANT

VERSUS

DORCAS WAIRIMU KAMAU.....1ST RESPONDENT

TERESIA WANJIKU KIHARA.....2ND RESPONDENT

MONICA WAMAITHA NJOROGE.....3RD RESPONDENT

MARGARET WANJA NJOROGE.....4TH RESPONDENT

VERONICA WANGARI NJOROGE.....5TH RESPONDENT

JAMES KIHARA NJOROGE.....6TH RESPONDENT

RULING

1. The application subject of this ruling is dated and filed on 11th September 2015. It was filed by **Irene Wambui Kimani, Caroline Wambui Kihara, Margaret Wanja Thiong'o and Alice Wanjiku Munyui** daughters of the deceased.

2. The deceased also had two sons **John Njoroge Kihara** and **Ngugi Kihara** both of whom are now deceased. The 1st Respondent **Dorcias Wairimu Kamau** is the mother in law of **Ngugi Kihara** (deceased son), the 2nd respondent, **Teresia Njoroge** is the widow of **John Njoroge** (deceased son), **Monica Wamaitha Njoroge, Margaret Wanja Njoroge, Veronica Wangari Njoroge and James Kihara Njoroge** are children of **Teresia Njoroge**.

3. The sons of the deceased herein that is **John Njoroge Kihara** and **Ngugi Kihara** applied for grant of letters of administration which were issued on the 1st of August, 1994. **Ngugi Kihara** died first and his widow **Rachael Kihara** replaced him as an administrator. When **John Njoroge** died he was replaced by his widow **Teresia Njoroge**.

4. At confirmation of the grant herein all the properties which formed part of the deceased estate and which are said to have revolved to her from the estate of her late husband were distributed to **John Njoroge Kihara** and the estate of **Ngugi Kihara** in equal shares. The properties as listed on the confirmed grant were as follows:

i. Kabete/Kibichuku/301

ii. Kabete/Kibichuku/277

- iii. **Muguga/Kanyariri/451**
- iv. **Kabete/Muthumu/T.27**
- v. **MN/Block 1/37**
- vi. **½ share plot No. 29 Wangige market**
- vii. **½ share Mombasa XIX/131**
- viii. **L.R. Mombasa/Block XXII/118**
- ix. **Mombasa/C.R 27302**

5. The applicants contend that though they agreed as a family to have their two deceased brothers be the administrators of their mother's estate, they were never consulted when the application for confirmation was filed nor their consents sought on the mode of distribution.

6. In support of the assertion above, on record are various applications and affidavits by Irene the 1st Applicant in an attempt to pursue her mother's estate. Notable are:

- An affidavit dated 2nd February 2009
- An application seeking for revocation of grant dated 29th May 2009
- An application for revocation of grant dated 10th March 2009.
- An application dated 29th 2010 where Irene sought to restrain wastage of one of the properties namely MIS/Block 1/37.

7. The results of Irene's efforts was an order by **Rawal J** (as she then was) dated 23rd June 2009 appointing Irene Wambui Kimani alongside Teresia Wanjiku Njoroge as administrators herein.

8. In an affidavit dated 20th July, 2018 Irene listed the following assets as belonging to the estate:

- a) **Land Parcel No. XXII/118 in Mombasa**
- b) **Kabete/Kibichiku/301**
- c) **Muguga/Kanyariri 451**
- d) **Kabete/Kibichiku/277**
- e) **L.R. No. 10090/22**
- f) **Kabete/Kibichiku/2361**
- g) **Kabete/Muthumu T.27**
- h) **XIX/131**
- i) **IMS/37 Mombasa**
- j) **Plot No. 29 Wangige**
- k) **Shares in Shirikisho Bar**
- l) **XIX/158 (Maswa) Mombasa ½ share**
- m) **Plot Chagamwe in Mombasa 3793**

9. In responding to the application before court the 1st Respondent informed the court that she is the executrix of Rachael's estate (Rachael is a sister-in-law to the applicants). She further informed the court that Rachael and Ngugi Kihara have two children namely Monicah Wamaitha Ngugi and Kelvin Kihara Ngugi who were 6 and 7 respectively when their mother died and she has since taken care of them.

10. Further she informed the court that in **Case No. 32 of 2003; In the matter of the Estate of Rachael Wanjiru Ngugi**, Ngugi Kihara's brother John Njoroge Kihara (since deceased) and thereafter his widow Teresia Wanjiku filed objection proceedings stalling the process.

11. She further contended that she is not in control of any assets of this estate herein save for L.R. No. Mombasa/Block XXII/118 which she states was left behind by her daughter and should not be made subject of this case. In support of her contention she exhibited an agreement between Rachael Wanjiru Ngugi and John Njoroge Kihara wherein the two agreed to distribute the Estate deceased herein so that;

- **L.R. No. Mombasa/Block XXII/118 and**
- **an undeveloped plot in Changamwe CCR 27308 went to Rachael Wanjiru**
- **L.R. No. Mombasa/Block XIX/131**
- **L.R. No. 100090/22 a farm in Juja went to John njoroge**

The rest of the properties as listed below were to be shared equally amongst the two:

- **MN/Block 1/37**
- **Plot No. 29 Wangige market**
- **Kabete/Muthumu T.27**
- **Kabete /Kibichuu/277 ¼ acre as common burial ground and the rest shared equally.**
- **Kabete/Kibichiku/301**

12. In the mix of things and after the death of John Njoroge, it appears that the 1st and 2nd Respondents have had issues as the 2nd Respondent is said to have gone against the agreement above mentioned and has had several properties registered in her name and that of her children pursuant to another succession cause being **Cause No. 357 of 2009 in the Estate of John Njoroge Kihara**.

13. The 2nd Respondent, Teresia Wanjiru Njoroge's response to this application is to the effect that the Applicants were aware of the grant that was issued to their late brothers, yet none of them complained, or demanded proceeds of the estate over the years, further that the Applicants ought to challenge the will of their father; **in Succession Case No. 40 of 1983** as their father had left his estate to be held by the deceased herein in trust for their two sons.

14. I have considered the application, the responses, annexures therein and submissions by counsel and in my considered opinion the issues for determination are:

- i. Who ought to be the beneficiaries of the estate of the deceased herein; Monica Wamaitha Kihara.**
- ii. Should the applicants have been considered in the distribution of their mother's estate.**
- iii. Should the confirmed grant dated 7th June 2001 be annulled and/or revoked.**
- iv. If iii above is in the affirmative what would be the outcome of the transfers already effected.**
- v. Whether accounts ought to be rendered.**

15. Who ought to be the beneficiaries of the estate of Monica Wamaitha Kihara? & should the daughters be included in the distribution?

In order to answer this issue, it is crucial to consider how Monica acquired the properties subject herein. The replying affidavit of the 2nd Respondent lays bare the history dating back to when the deceased husband died. The husband of Monica Wamaitha Kihara, **James Kihara Njoroge** is said to have left a will however the will was not annexed in these proceedings. An affidavit of an executor of the said Will, one **Mugo Njoroge** in an affidavit named Monica's sons as survivors of James Kihara Njoroge alongside 3 sons from his first wife. However, the said affidavit in paragraph 6 thereof stated;

“6 The estate of the deceased is to be shared equally between the deceased two wives; namely Cecilia Wangari Kihara and Monica Wamaitha Kihara who shall thereafter and on their own discretion distribute the same amongst their children.”

16. In my view the mere fact that the executor Mugo Njoroge gave names of survivors of James Kihara Njoroge as those of his sons without listing names of his daughters as his survivor's daughters out does not in itself mean that his daughters were not entitled to share in his property. "Children" under the law refers to both daughters and sons. The courts in applying the Law of Succession Act (The Act) prior to the current Constitution and under the current Constitution have not discriminated on female children of deceased persons.

See **Rono vs Rono Court of Appeal Case No. 66 of 2002.**

Secondly, even if one was to go by the alleged Will, the widows were mandated to distribute the estate to their children at their discretion. Monica Wamaitha Kihara did not leave a will meaning she did not distribute her estate and therefore Section 38 of the Act comes into play.

Section 38 provides:

“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 be equally divided among the surviving children.”

17. Following the above facts and provision of the Law, clearly the applicant and all her sisters alongside their two deceased brothers should have been considered in the distribution of the estate of the deceased herein.

18. **Further Section 76 of the Act** provides that any interested party may Apply to court any time whether a grant of representation has been confirmed or not for reasons stated therein, including where the proceedings were defective in substance, where the grant was obtained fraudulently by making of a false statement or by concealment from court of material facts.

19. **Should the grant be annulled and/or revoked?**

The daughters of the deceased were entirely excluded from the distribution of their mother’s estate and their consent not obtained at the point of confirmation of the grant. This therefore means that the provisions of Section 76 of the Act come into play and therefore the grant herein ought not to be sustained, it ought to be annulled and revoked, which I hereby do.

20. **Should the accounts be rendered?**

There have been various administrators at different times, and to ask that the 2nd Respondent to render accounts may not necessarily be possible or fair and for now I decline to order her to provide accounts.

21. **Should titles be cancelled following the transfers?**

Since the grant dated 7th June 2001 has been annulled, I direct and order that the Land Registrars in respective registries where the below mentioned properties are situate do cancel the existing titles and revert the titles to the name of Monica Wamaitha, the said properties are:

- i) **Kabete/Kibichiku/301**
- ii) **Kabete/Kibichiku/277**
- iii) **Muguga/Kanyariri/451**
- iv) **Kabete/Muthumu/T.27**
- v) **MN/Block 1/37**
- vi) **½ share Plot No. 29 Wangige market**
- vii) **L.R. No. Mombasa/Block XXII/118**
- viii) **Mombasa/CR 27302**

22. Further, having annulled and revoked the grant, I am of the opinion that from the conduct of the 2nd Respondent she is not fit to administer the estate. I also find the 2nd Respondent does not rank priority to the Applicants and I decline to appoint her as an administrator. Her interest should be in the distribution of the Estate on behalf of her daughters’ children.

23. As such, I appoint **Caroline Wambui Kihara** to administer the estate alongside **Irene Wambui Kimani**.

24. I also direct the administrators as appointed to forthwith open a joint account where all income due to the estate from properties as herein listed will be deposited pending further orders.

25. The administrators shall proceed to file an application for confirmation of the grant of the estate within the next 90 days. Any party aggrieved may file a protest.

26. This being a family matter each party to meet their own costs.

Dated and Delivered in Nairobi on this 24th day of OCTOBER, 2019.

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ALI-ARONI

JUDGE