



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 211 OF 2009**

***In the matter of the Estate of KAMAU GIKURI (Deceased)***

**ABIJAH WANJUE MBOGO.....APPLICANT**

**V E R S U S**

**NJERU NYAGA.....PETITIONER/RESPONDENT**

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

1. The deceased in this cause died intestate on 29/04/1998. The petitioner/respondent Njeru Nyaga applied for letters of administration intestate on 8/04/2009. This cause was gazetted on 22/08/2014 and the letters of administration intestate issued to the respondent on 6/10/2014.
2. The respondent applied for confirmation of grant and proposed that the deceased's only asset Ngandori/ Kiriari/211 be shared equally between himself and the applicant herein Abijah Wanjue Mbogo.
3. A protest against confirmation was filed by Rosemary Wambogo a daughter of the deceased on 22/06/2015 claiming a share for herself and her sister Jane Wambeti. The Surviving widow of deceased Vides Wandugu Kamau filed an affidavit of protest arguing that being the surviving widow, she was better placed to be issued with the letters of administration intestate. However, she did not apply for revocation of the grant and neither did she claim any share in the estate. Her claim in totality was never pursued for hearing. The widow was to appear during the hearing as a witness of the protester Rosemary Wambogo.
4. As for Abijah Wanjue, her claim was that L.R. Ngandori/ Kiriari/1263 is registered in the name of the deceased while L.R. Ngandori/Kiriari/211 which had been presented by the respondent for distribution was registered in the name of one Mugo M'Thara and called for this succession cause to be closed or dismissed. This application/ objection was never prosecuted by Abijah.
5. This case was partly-heard by Bwonwonga J. before he proceeded on transfer to another station. I took it over and heard the remaining witnesses. Directions were taken by Bwonwonga J. before the hearing commenced that the cause be disposed of by way of *viva voce* evidence.
6. The protester Rosemary Wambogo testified that she and one Jane Wambeti are daughters of the deceased and were left out of this cause by the respondent who even denied them any shares in the estate. She claimed two half - acre portions one for herself and the other for her sister. She called two witnesses being her sister Jane and her aged mother Vides Wandugu Kamau.
7. The two witnesses supported the evidence of the protester that the deceased had two wives namely:-
  - (a) Teresia Rwamba - 1<sup>st</sup> wife
  - (b) Vides Wandugu - 2<sup>nd</sup> wife
8. It was stated that the first wife had two sons namely Mbogo Kamau the husband of Abija Wanjue and the respondent Njeru Nyaga.
9. The second wife had two daughters and one son. The daughters are the protester Rosemary and her sister Jane Wambeti. The name or status of the son were not given. It was not indicated whether he is still living or whether he had a family.
10. The respondent supported the claim of the protester in his testimony and proposed the distribution to take the following form in respect of Ngandori/Kiriari/1263:-

- (a) Njeru Nyaga -1 acre
- (b) Rosemary Wambogo - ½ acre
- (c) Jane Wambeti - ½ acre

11. In her testimony Abija disagreed with the protester and the respondent that Rosemary and Jane should get shares out of Ngandori/Kiriari/1263. She said that the deceased gave the 2<sup>nd</sup> wife her land which measures four acres. This is the land that the protester and her sister ought to share. The land of the deceased Ngandori/Kiriari/1263 measures three acres and ought to be shared as follows:-

- (a) Abijah Wanjue – Two (2) acres
- (b) Njeru Nyaga – One (1) acre

12. Abijah explained that it was the wish of the deceased to give the respondent one acre because he did not look after his father in his old age. She went on to say that she was a caregiver of the deceased and before he died, he said she should inherit two acres. Her husband Mbogo Kamau who is the respondent's brother passed on several years ago.

13. The issues for determination are as follows:-

- Whether the protestor and her sibling are entitled to shares.
- The shares of each of the beneficiary as identified by the court.

14. The evidence of the protestor, the respondent, Abijah Wanjue and their witnesses left several issues clear. Firstly, that the deceased was survived by one widow Vides Wandugu Kamau. She testified in court that she was 97 years old and confirmed that the deceased gave her land where she resides. She did not claim any share from the deceased's estate.

15. Secondly, it was agreed by the parties that the deceased is survived by the following children:-

- (a) Njeru Nyaga – respondent/petitioner
- (b) Abijah Wanjue (wife of deceased's son Mbogo)
- (c) Rosemary Wambogo
- (d) Jane Wambeti

16. It is not in dispute that the deceased died intestate leaving one surviving widow and four children. It is noted that the respondent did not include the protestor and her sister as beneficiaries of the deceased in filing this cause. However, he later changed his mind and now fully supports the protestor's claim.

17. The evidence of Abijah was that she was a caregiver of the deceased and is therefore entitled to a bigger share in the estate. The law treats all the children of the deceased equally irrespective of whether or not any of them provided moral or financial support to the deceased during his lifetime. I therefore find no basis in Abijah's claim of two acres out of the only asset of the deceased. As the respondent filed this cause, he filed a copy of official search for LR No.Ngandori/Kiriari/211 registered in the name of one Mugo M'thara. This issue was raised by Abijah Wanjue and the correct official search was then filed. It is duly noted that the reference number of the deceased is L.R. Ngandori/Kiriari/1263.

18. The surviving widow lays no claim in this succession cause for she owns her own land. A copy of official search dated 2/12/2015 shows that Wandugu Kamau DW3 is the registered proprietor of L.R. No. Ngandori/Kiriari/960 measuring 4.34 acres. There was no evidence that the deceased gave this land to his 2<sup>nd</sup> widow to share with her two daughters. The widow is still alive and is the proprietor for all intents and purposes.

19. The deceased's land Ngandori/Kiriari/1263 is the only asset that this court will deal with in this cause. This has been identified as the only asset available for distribution from the certificate of official search. The children of the 2<sup>nd</sup> widow must be considered alongside those of the deceased widow as beneficiaries.

20. The law applicable in this case is Section 40 of the Law of Succession Act which provides:-

Section 40 (1)

*Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.*

21. It was held in the case of the **SAWERIA WAMURUONA MUCHANJI VERSUS JINANO NGARI [2008] eKLR** that: -

*This is plain unequivocal language means that the estate shall be sub-divided equally amongst the surviving children of the deceased adding the widow as a unit.*

22. It is important to note the protester and her sister though entitled to equal shares in the estate only claims half an acre for each one of them. This court will honour their claim of lesser shares for it must have been based on some considerations. Their claim was well supported fully by the respondent.

23. It is my finding that the protest is merited and it is hereby allowed.

24. The grant is hereby confirmed as follows:-

L.R. Ngandori/Kiriari/1263

(a) Njeru Nyaga – 1 acre

(b) Abija Wanjue – 1 acre

(c) Rosemary Wambogo – ½ acre

(d) Jane Wambeti – ½ acre

25. I hereby order that the certificate of confirmation do issue in the foregoing terms.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF MARCH, 2018.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Petitioner/respondent**

**Applicant**

**Protestor**