



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 2942 OF 2008**

**IN THE MATTER OF THE ESTATE OF ZIPPORAH WANJIRA MACHARIA (DECEASED)**

**JOHNSON KAHIGA MACHARIA.....APPLICANT**

**-VERSUS-**

**SIPHAN ANTON NGINGI.....1<sup>ST</sup> RESPONDENT**

**LUCY NDUTA MACHARIA.....2<sup>ND</sup> RESPONDENT**

**SAMUEL KIMEMIA MACHARIA.....3<sup>RD</sup> RESPONDENT**

**ANTONY KARUOYA MACHARIA.....4<sup>TH</sup> RESPONDENT**

**WILSON MWANGI.....5<sup>TH</sup> RESPONDENT**

**AMOS NGURE WANJIRA.....6<sup>TH</sup> RESPONDENT**

**CHARLES CHEGE MACHARIA.....7<sup>TH</sup> RESPONDENT**

**ZIPPORAH WANJIRA WANJIKU.....8<sup>TH</sup> RESPONDENT**

**ZIPPORAH WANJIRU HEIZAL.....9<sup>TH</sup> RESPONDENT**

**RULING**

1. The deceased to whose Estate these proceedings relate is Zipporah Wanjira Macharia, who died intestate on 1<sup>st</sup> May 2001 while domiciled in Kenya. Letters of administration intestate of all her estate were issued to her son, Amos Ngure on 14<sup>th</sup> May 2009 and confirmed vide certificate of confirmation of grant dated 19<sup>th</sup> July, 2010. The said certificate was rectified on 6<sup>th</sup> April, 2011.

2. The deceased is said to have been survived by the following beneficiaries:

- (a) Siphon Anton Ngigi - son
- (b) Amos Ngure Wanjira - son
- (c) Charles Chege Macharia - son
- (d) Samuel Kimemia Macharia - son
- (e) Antony Karuoya Macharia - son
- (f) Wilson Mwangi - son
- (g) Zipporah Wanjiru Heizal - granddaughter

- (h) Lucy Nduta Macharia - daughter
- (i) Johnson Kahiga Macharia - son
- (j) Zipporah Wanjira Wanjiku - granddaughter

3. On 18<sup>th</sup> February 2016, Musyoka J revoked the said Letters of Administration and the confirmed grant, and ordered that Amos Ngure Wanjira, Charles Chege Macharia, Samuel Kimemia Macharia and Johnson Kahiga Macharia be appointed as the Administrators of the estate. The judge also ordered that the title deeds namely:

- (a) Makuyu/Kimorori/Block/I/792
- (b) Ruiru/Kiu Block 13/557
- (c) Ruiru/Kiu Block 13/558
- (d) Loc 14/Kairo/1784
- (e) Loc 14/Kairo/ T.149

issued to Amos Ngure Wanjira be revoked and do revert back to the deceased estate.

4. On 11<sup>th</sup> January 2017, Amos Ngure Wanjira, Charles Chege Macharia, Samuel Kimemia Macharia and Johnson Kahiga Macharia, the administrators herein, filed an application for confirmation of grant via summons dated 16<sup>th</sup> December, 2016. On 8<sup>th</sup> February 2017, Samuel Kimemia Macharia filed an affidavit of protest against the confirmation of the said grant.

5. Kimemia deposed that he was in agreement with the content of the summons for confirmation but differed with the supporting affidavit of Johnson Kahiga Macharia and in particular the mode of distribution, where the parcel of land Ruiru/Kiu Block 13/557 was allocated to Amos Ngure Wanjira. Kimemia further averred that according to the family meeting between the beneficiaries of the estate, held on 11<sup>th</sup> October, 2016, there was no agreement on who would inherit Ruiru/Kiu Block 13/557.

6. Hearing concerning this parcel of land commenced on 26<sup>th</sup> April 2017. PW1 Agnes Mwangi testified for the Petitioners/Administrators that she and Zipporah Wanjira had been friends from 1962 and she knew the deceased's children.

7. PW1 told the court that the deceased called her one day and told her that she was ailing and should she die, the land in Muranga's Kairo area should be inherited by her sons to divide among themselves, while she had left the land at Kenol to the daughters. That the two plots in Githurai and Eastleigh should not be distributed. The proceeds of rent collected therefrom were to go into a bank account and be distributed among her children.

8. The deceased also told PW1 that a second plot in Githurai would go to Amos, because she had educated all the other children all the way to form four, but Amos had not benefitted by way of education from her since he was in jail. The deceased told PW1 that she had some land in Mombasa and any member of the family could move there and occupy it.

9. PW1 testified that the deceased had also installed her children in houses in Kariokor before she died. During the deceased's funeral, PW1 told Chege and Ngige what the deceased had told her. She expected that the two would tell the rest of the siblings what she told them because they were all in good terms at the time.

10. PW2, Amos Ngure Wanjira, stated that indeed he had served a 30 year jail term and upon his release from prison in 1998, he went to Eastleigh section 3 where his mother lived. His mother took him to Githurai and showed him two parcels of land. One was known as Ruiru/Kiu Block 13/558, and was developed. It had on it a block of flats which was four stories high up to the 3<sup>rd</sup> floor. The second was Ruiru/Kiu Block 13/557 which was an undeveloped plot.

11. His mother took him to the ground floor of Ruiru/Kiu Block 13/558 and showed him a three bedroom flat to be his dwelling. All the other flats had door numbers but the one PW2 occupied had no door number on it. PW2 was given the responsibility of collecting rent from the tenants in that flat in place of his brother Anthony Karuoya. He was to use the money from the rent as he deemed fit and remit the rest to the mother.

12. PW2 stated that his mother did this because he had not benefitted from the good things of life that she had offered his siblings. He lived in that plot for three years before he was arrested again and subsequently sentenced to seven (7) years imprisonment in 2001 on charges of robbery. He was released on appeal in October, 2002 and returned to find his siblings Ngige, Chege, Kahiga and Nduta had taken over the house and allocated it to their sister, Nduta. They had also broken into the house and distributed his household effects among themselves. He could therefore not return to the house upon his release.

13. PW2 stated that currently Ngige and Nduta collect rent on one floor each of Ruiru/Kiu Block 13/558 while Kahiga takes the rent on two floors. He contended that Kahiga's claim that the deceased did not distribute any property is false and that Kahiga has many properties. In the year 2015, Kahiga began constructing structures on and tilling Plot No. Ruiru/Kiu Block 13/557, when all the siblings know that the plot belongs to Amos. Nduta, Kahiga and Mwangi have refused to attend the family meetings.

14. PW2 admitted to taking out a grant of letters of administration through a succession cause filed in the year 2008 in which he listed himself as the only child of the deceased. He stated that he did this only because his siblings refused to agree on filing a succession cause, but he intended that once they came to court, everyone's name would be included in the distribution. The other siblings were however opposed to the filing for succession and wanted the property to remain in the name of their deceased mother.
15. At one time the family got court orders to exhume their mother's body for DNA extraction, but this was not done upon recording a consent that they were all children of the deceased. He stated that Chege and Ngige informed him that Agnes Njeri, their mother's best friend, told them that their mother left plot no. Ruiru/Kiu Block 13/557 to him.
16. PW2 stated that he had located Agnes Njeri six days before they came to court, after having last seen her in 1999 and 2000 when he was with his mother. He urged that she had never visited him in Eastleigh and he did not know her physically. At Kiambio, where he was directed to look for her, he met five different people known as Njeri before he found the one who was his mother's friend.
17. PW2 maintained that their mother distributed the parcels known as Loc 14/Kairo/1784 to 1797 in their rural home in 1993 while he was in jail and he does not therefore know whether she called a meeting at home when she distributed the land. He further stated that the family house was given to Samuel Kahiga as the deceased's last son. That his mother also gave Kahiga a plot in the town centre and built rental units on it from which Kahiga collects rent. He expressed his wish to have the rent collected from all the properties in Githurai and Eastleigh go to one account held by the administrators for distribution to his siblings.
18. PW3, Charles Chege Macharia, one of the administrators of the estate of the deceased confirmed that PW1, Agnes Njeri Mwangi, was indeed his late mother's friend. That the two were in business together trading in cereals and Agnes attended his mother's funeral in Kairo Muranga in May 2001. She slept in Ngige's house after the burial. The next day, Agnes told him of his mother's wish to leave Plot no. Ruiru/Kiu Block 13/557 to Amos who had spent all his life in jail.
19. PW3 asserted that he and his mother were close and it was he who used to read letters for her. That she educated all her children to their capacities save for Ngure who spent many years in jail. In the year 1996, his mother had also intimated to him that she would leave the plot no. Ruiru/Kiu Block 13/557 to Ngure since he had not benefitted much from her. He further asserted that their mother distributed her property in Muranga in the presence of the chief and a surveyor and directed that the rest of her property should not be sold. The rent collected therefrom should instead be used to educate her grandchildren. All the children were present when the mother distributed the land, and minutes were recorded by Ngige.
20. PW3 was categorical in his objection to the property being distributed to Amos together with Nduta and Kahiga, stating that this would be denying Amos what is rightfully his. He would only agree to such distribution if Amos Ngure consented that it should be distributed in such manner.
21. On 4<sup>th</sup> October 2017, the matter proceeded for the hearing of the Objector's case. DW1, Lucy Nduta Macharia, filed a witness statement on 16<sup>th</sup> May 2017 in which she objected to the property known as Ruiru/Kiu Block 13/557 going to Amos Ngure Wanjira alone stating that it is family property. She asserted that what their mother gave them individually is known to each one of them and that their mother said that the property should belong to all her children.
22. DW1 averred that she does not know Agnes Njeri Mwangi who testified as PW1 and she could not tell whether she attended her mother's funeral since there were many people. She stated that it was not true that her mother gave the subject property to Amos because he had been in jail and had not benefitted by way of education. She stated that whenever her mother wanted to do such distribution, she would have all her children present and one of her sons Siphon would take minutes.
23. DW1 stated that after 1993, her mother did not call any other meeting to distribute her property. She disputed PW1's testimony that her mother distributed her property again in later years. She asserted that her mother could not have done so having already distributed her property. She opined that Amos' suffering in jail was his choice and that they too suffered with their mother to acquire the property. That she and her mother spent nights at Pangani Police Station over the property.
24. It was DW1's view that the property should be distributed equally without selfishness and if her brothers do not want a share in the property that is up to them. She added that she had built a small food kiosk on the land more than ten (10) years ago and that she now lives in a rental house in Githurai having moved from Ruiru/Kiu/Block 13/558 last year.
25. DW1 opposed the suggestion to have rent from the properties taken collectively and distributed equally stating that the family members do not agree amongst themselves and it would be difficult to actualize the suggestion. The current situation is that the family members who agree collect rent together in Githurai while five others who agree collect rent together in Eastleigh. She also pointed out that the land in Kahuro Muranga has tea bushes on it and each brother collects tea from their portion.
26. She urged the court to distribute the parcels of land in Eastleigh, Mombasa and Githurai equally. That the properties in Githurai, Eastleigh and at the Coast be sold and the proceeds distributed equally among the deceased's children. She stated that she had previously agreed to the mode of distribution out of fear, and that her mother never bought a plot or transferred any of her properties to her.
27. The testimony of DW2, Johnson Kahiga Macharia, who lives in Githurai in his deceased mother's property, was in agreement with that of DW1. He filed a statement objecting to the plot being given to Amos Wanjira alone. He asserted that he does not know Agnes Njeri Mwangi who testified as PW1 and that whenever his mother wanted to distribute her property, she would call all her children, state her intentions, and minutes would be taken which they would all sign.
28. He stated that on 20<sup>th</sup> May 1993, their mother called them and distributed her land to all her seven (7) sons and two (2) daughters. That only Amos was absent since he was in jail, but he was included in the distribution. She gave land and a plot to each son while their sister

Hazel Njeri was given property in Dandora and Kitengela and not in Muranga and Kenol.

29. DW2 contended that their mother could not have distributed her land to them and then years later told another person to distribute her property differently. He stated that Amos went to jail because of his own deeds and their mother could not have given him property because of regrets that she did not educate him. That the property his mother gave to Samuel Kimemia and Amos Ngure was in Githurai and she had shown him the certificate. He further stated that Charles Chege, Ziphani Ngige and Lucy Nduta told him that plot no. Ruiru/Kiu Block 13/557 in Githurai was his and allowed him to put up rental rooms. Nduta also built a food kiosk thereon.

30. DW2 urged the court to distribute Plot no. Ruiru/Kiu Block 13/557 between Amos, Lucy and himself since the other brothers are not interested in it. He however expressed his wish to be given the plot solely arguing that he did not inherit any land from his mother. He stated that during distribution, their mother left out the Githurai and Eastleigh plots because they were business plots and the rent from Plot no. Ruiru/Kiu Block 13/558 is collected by Lucy, Chege, Kimemia and himself.

31. DW2 stated that he came to Nairobi in 2001 and lived at Eastleigh section 3 with his mother. It was his testimony that his mother left him their home in Kahero as a reward for agreeing to live back home. He also stated that their mother gave him Plot no. Ruiru/Kiu Block 13/557 in Githurai although she did not write this down. That the land his mother gave to Samuel Kimemia and Amos Ngure was in Ngara Mwishokanesie.

32. DW2 asserted that when Amos obtained the grant of letters of administration, he never tried to evict him. He urged the court to distribute Plot no. Ruiru/Kiu Block 13/558 to all of the deceased's children and grant Plot no. Ruiru/Kiu Block 13/557 to him since he is the one who built a home on it ten years ago and is the last born of the family. He contended that he never heard his late mother state that Plot no. 557 should go to Amos Ngure and that granting the plot to Amos would be to his detriment and would oppress him.

33. The court directed the parties to file and exchange brief submissions limited to Plot no. Ruiru/Kiu Block 13/557 because distribution on all other properties was agreed. A. W. Kinuthia learned counsel for the Applicant filed submissions dated 22<sup>nd</sup> November 2017 in which they urged that the Applicant and Lucy Nduta have occupied Plot no. Ruiru/Kiu Block 13/557 for a period of ten (10) years with the knowledge of the other beneficiaries who had given their consent. Counsel submitted that the evidence of PW1, Agnes Njeri Mwangi, was deceitful and misleading since the deceased had already distributed her property on 20<sup>th</sup> August 1993, while the evidence of PW3, Charles Chege, was also misleading for being skewed towards that of PW1.

34. Mr. Kinuthia submitted that the gift *inter vivos* was overtaken by events since the property was not transferred to Amos Ngure during their mother's lifetime as she had done for several of her children. That upon her demise therefore, the property reverted back to the estate and ought to be divided among her beneficiaries in accordance with **section 38** of the **Law of Succession Act**. He urged the court to divide the property among Johnson Kahiga Macharia, Lucy Nduta Macharia and Amos Ngure Wanjira who had shown interest in it.

35. M/s Onesmus Githingi the Advocate for the 1<sup>st</sup> Administrator, Amos Ngure, filed written submissions dated 7<sup>th</sup> February, 2018. He urged that prior to her death, the deceased granted Amos Ngure authority to collect all rental proceeds from Plot no. Ruiru/Kiu Block 13/558 which borders Ruiru/Kiu Block 13/557 in a bid to aid Amos in settling down having spent 28 years in prison. The deceased also handed over title documents of Ruiru/Kiu Block 13/557 to Amos Ngure.

36. Counsel contended that PW1, a close friend and confidante of the deceased also testified that the deceased intended to bequeath the property Ruiru/Kiu Block 13/557 to Amos. That the Applicant and Lucy Nduta only fault PW1's testimony with regard to the distribution of property Ruiru/Kiu Block 13/557. He relied on the cases of **Naomi Wangechi Munene & Another vs Dorcas Wanjiru Gitonga [2016] eKLR** and the case of **Paul Kiruhi Nyingi & Another vs Francis Wanjohi Nyingi [2009] eKLR** to buttress his argument that the wishes of the deceased ought to be taken into consideration by the court in determining this matter.

37. Upon considering the pleadings and the rival arguments herein, the issue that emerges for determination is whether Plot no. Ruiru/Kiu Block 13/557 was gifted *inter vivos* and should devolve solely to Amos Ngure or whether it should be shared equally between the beneficiaries.

38. The parties have raised various arguments with the Applicant stating that the gift *inter vivos* was overtaken by events while the Respondents state that the wishes of the deceased to give the property to Amos should be respected. According to **Section 38** of the **Law of Succession Act** the estate of a deceased should be shared equally among the deceased's children. The section provides thus:

**“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.”**

39. The deceased herein is not stated to have been survived by a spouse. Therefore, by virtue of section 38, the deceased's property ought to devolve to her children in equal shares. When determining what share ought to devolve to a particular beneficiary, the court must consider previous benefits received by each of the beneficiaries as provided under **section 42** of the **Law of Succession Act**, which states thus:

**“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 spouse; or**

**(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child,**

**grandchild, or house.”**

40. The evidence presented before this court shows that the deceased distributed her property among her children during her lifetime. This has not been denied by any of the parties herein. The deceased having died intestate, it is the duty of this court to examine the previous benefits received by each of the beneficiaries to determine the proper mode of distribution of the remaining estate.

41. The Applicant in his testimony states that he ought to inherit Plot no. Ruiru/Kiu Block 13/557 because the deceased did not give him any share of her property. This is in conflict with his own testimony that the deceased distributed land to all her children on 20<sup>th</sup> May 1993 and also left him her matrimonial home in Kahuro. Of importance is that at the time of the distribution, Amos Ngure was incarcerated.

42. The question for determination is whether the Plot whose distribution is contested qualifies as a gift *inter vivos* and does not therefore, form part of the estate of the deceased. In **Reginah Nyambura Waitathu vs Tarcisio Kagunda Waithatu & 3 Others, succession cause 475 of 2013**, Mativo J observed thus:

**“If indeed the deceased had already given the other beneficiaries their share, then that would be taken into account at the time of distribution. But it must be proved beyond doubt that indeed the deceased gave out the property or gift during his/her lifetime. Guidance can be obtained from the following passage from Halsbury laws of England dealing with incomplete gifts, where it is stated as follows:-**

***“...if a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which was in his power to do.”***

43. In these circumstances, the deceased is said to have distributed property amongst her children and there were minutes which were recorded and signed by all of the children. The deceased is said to have distributed her property to each of her children and allowed each one of them to occupy their portions. While not all the portions were transferred into the names of the respective children, evidence presented before this court shows that the portions were such that each of the children who were present received an equal share, and took possession of their shares.

44. The parties accepted their shares as stated and began to pick tea from each of their portions that were under tea bushes. Although Amos Ngure was in jail at the time, it is evident that the deceased intended to gift all her children voluntarily and satisfied the requirements of gifts *inter vivos*.

45. From the evidence, the deceased did distribute her property and the beneficiaries have abided by her wishes in the utilization of the portions distributed to each of them, save for the parcel of land known as Ruiru/ Kiu Block 13/557. Besides the properties distributed to each of the beneficiaries solely, there are other properties which they enjoy in common in groups.

46. The plots enjoyed in common in groups are such as plot no. 940 at Eastleigh section 3 which has five units. His mother owned only one unit out of the five and it comprised of two rooms and a kitchen. From this unit, a caretaker collects a monthly rent of Kshs. 20,000/-and pays it into an account in the names of Anthony Karuoya and Amos Ngure.

47. The second Plot is no. 36/945/111 which has 42 little rooms, five of which are made of stone. A caretaker collects rent of Kshs. 80,000/-per month on behalf of Amos, Kimemia, Karuoya and Virginia and deposits the money in an account held by the four. The rest of their family collects rent from the Githurai property.

48. I note that eight (8) beneficiaries are in agreement with the confirmation of grant and the mode of distribution as set out therein but are opposed to the manner of distribution of the parcel of land known as Ruiru/Kiu Block 13/557. They contend that the parcel should devolve to Amos Ngure. Two beneficiaries being Lucy Nduta and Johnson Kahiga are opposed to this and want the property to remain in their mother's name. They are also the only ones who want a share in the parcel of land that is Ruiru/Kiu Block 13/557.

49. PW3 averred that their mother distributed her property in 1993 and was very precise on everyone's share. Each child got about one and a half acre of land, including Amos Ngure who got one and a half acre of land under tea bushes. I note that in the year 2014, Kahiga erected some units on Plot no. Ruiru/Kiu Block 13/557 without a confirmed grant. He observed that Kahiga is not a good person.

50. I observed from the evidence of DW1 that the deceased did call a meeting in Kairo on 20<sup>th</sup> August 1993 at which she divided the land in Kairo into seven (7) portions which she distributed among her seven (7) sons. She gave her two daughters a plot each in Muranga. Another plot in Kenol was given to DW1 and her sister jointly. While none of them has built on the pieces of land given to them, the portion of each child is identified. In addition, one daughter, Hazel Njeri, was given a plot in Kitengela which was registered in her name and therefore does not form part of the deceased's estate.

51. The evidence of the parties in this matter portrays the deceased as a very industrious mother, who supported her children and wanted the best for each and every one of them. She educated them and set them up in life. Although the Applicant and Lucy Nduta have no sympathy for Amos, from the evidence, the mother never gave up on him while he was incarcerated for about 28 years. She appears to have been saddened by his missing out on life.

52. The beneficiaries of the estate herein received most of their shares in the estate from the deceased *inter vivos*. Although the deceased did not process the actual transfers of those properties into the names of the different beneficiaries, they all took possession of their respective shares and have abided by her distribution. I see no reason why Amos Ngure who was absent most of the time serving a prison sentence should be treated differently, even if as argued, his sojourn in prison was of his own making.

53. This is a court of justice and whilst the Law of Succession Act promotes equality, it can only be achieved through equity. There were ten children, two of whom, Hazel Njeri and Virginia Wanjiku, have since died and are represented by their children. I note that besides Nduta and Kahiga, no other beneficiaries are opposed to the distribution of the said plot to Amos Ngure. They hold that this is according to their mother's wishes.

In the end the court finds that the protest filed on 8<sup>th</sup> February, 2017 has merit and is accordingly allowed with the following orders:

(i) That the grant of letters of administration made to Amos Ngure Wanjira, Charles Chege Macharia, Samuel Kimemia Macharia and Johnson Kahiga Macharia be and is hereby confirmed.

(ii) Plot No. Ruiru/Kiu Block 13/557 is hereby devolved to Amos Ngure;

(iii) All the other properties be distributed in terms of paragraph 8 of the affidavit sworn by Samuel Kimemia Macharia on 7<sup>th</sup> February, 2017 from property no. 2 to property no. 27.

It is so ordered.

**SIGNED DATED and DELIVERED in open court this 18<sup>th</sup> day of June 2018.**

.....

**L. A. ACHODE**

**JUDGE**

**In the presence of.....Advocate for the 4<sup>th</sup> Administrator**

**In the presence of.....Advocate for the 2<sup>nd</sup> and 3<sup>rd</sup> Administrators**

**In the presence of .....Advocate for the 1<sup>st</sup> Administrator**