

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1105 OF 2006

IN THE MATTER OF THE ESTATE OF GATHIONGOI MUCHUNU (DECEASED)

MONICA NJERI NDUNGU.....APPLICANT

AND

JANE WANJIKU MACHUKU.....RESPONDENT/OBJECTOR

R U L I N G

1. The application for determination is the Summons for rectification dated 25th February, 2016. It seeks the rectification of the grant confirmed on 28th September 2015, to remove one administrator, Alice Njeri Ndungu who is said to have died and to alter the mode of distribution.

2. It is brought at the instance of Monica Njeri Ndungu, one of the administrators of the estate who swore an affidavit on 25th February, 2016 in its support. She deposes that one of the administrators, Alice Waithira Gitau (hereinafter Alice) died on 8th December, 2015 after the confirmation of the grant, as evidenced by a copy of a certificate of death attached to her affidavit. Joyce Wangui Mbai swore an affidavit dated 2nd December, 2016 in support of the averments of Monica Njeri Ndungu.

3. The Applicant avers that the subdivision of the property has become impossible since some of the beneficiaries have also died. Hence the family proposes a subdivision plan in which the share of Alice Waithira Gitau shall devolve directly to the beneficiaries who are her children and which includes Dagoretti/Ruthimitu/T33 previously omitted. It is as follows:

NAME	DESCRIPTION OF PROPERTY	SHARE OF HEIRS
Teresia Njeri Ndungu Monica Njeri Ndungu Robinson Gitau Ndungu	DAGORETTI/RUTHIMITU/42	0.221 Ha.
Eric Njoroge Gitau	DAGORETTI/RUTHIMITU/42	0.221 Ha.
Teresia Njoki Parsoloi	DAGORETTI/RUTHIMITU/42	0.221 Ha.
Faith Njeri Karechu Carolyn Wanjiru Karechu	DAGORETTI/RUTHIMITU/42	0.221 Ha.
Monica Njeri Ndungu	DAGORETTI/RUTHIMITU/42	0.177 Ha.

Hannah Wanjiru Wamburi	DAGORETTI/RUTHIMITU/42	0.177 Ha.
Grace Wambui Ngugi	DAGORETTI/RUTHIMITU/42	0.177 Ha.
Simon Kariuki John Gitau	DAGORETTI/RUTHIMITU/42	0.177 Ha.
Joyce Wambui Mbai	DAGORETTI/RUTHIMITU/42	0.177 Ha.
Monica Njeri Ndungu	DAGORETTI/RUTHIMITU/T33	½ share in trust for: 1. Monica Njeri Ndungu 2. Hannah Wanjiru Wamburi 3. Grace Wambui Ngugi 4. Simon Kariuki John Gitau 5. Joyce Wambui Mbai
Teresia Njoki Parsoloi	DAGORETTI/RUTHIMITU/T33	½ share in trust for: 1. Teresia Njeri Ndungu Monicah Njeri Ndungu Robinson Gitau Ndungu 2. Eric Njoroge Gitau 3. Teresia Njoki Parsoloi 4. Faith Njeri Karechu Carolyn Wanjiru Karechu

5. The application is opposed, for there is a reply to it in the form of an affidavit sworn on 11th November, 2016 by one of the beneficiaries, Jane Wanjiku Machuku. She deposes that the Applicant's amendments did not include all the beneficiaries within the Law of Succession, herself being one and Alice Waithera, being another, in their capacities as the granddaughter and great granddaughter of the deceased respectively.

6. That Eric Njoroge, Teresia Parsoloi and Monicah Njeri Ndungu were included as dependants and beneficiaries and they are not known to her. That the Applicant herein together with another beneficiary are not entitled to a share of the deceased's estate having denounced their rights to benefit from the estate, following an arbitration before the Chief, Dagoretti.

7. The Respondent avers further that Joyce Wambui Njoroge aka Joyce Wambui Mbai is not related to the deceased in any way to get an entitlement to the estate, since she only cohabited with Charles Mbugua (deceased), the deceased's son and they had no issues of the union. That Joyce Wambui Mbai does not reside at the deceased's property with any of the beneficiaries or Dependants.

8. The Respondent also argues that Dagoretti/Ruthimitu/T.33 does not belong to the deceased, and she attached a copy of the Title Deed in support. She proposes that the deceased estate be distributed as follows:

NAME	DESCRIPTION OF PROPERTY	SHARE OF HEIRS
John Gitau Muchunu	DAGORETTI/RUTHIMITU/42	Plot 5-0.0902 HA
Simon Kariuki	DAGORETTI/RUTHIMITU/42	Plot 4-0.0902 HA
Alice Waithera	DAGORETTI/RUTHIMITU/42	Plot 1-0.0906 HA Plot 2-0.0902 HA Plot 6-0.4678 HA
Jane Wanjiku	DAGORETTI/RUTHIMITU/42	Plot 3- 0.093 HA
Erick Njoroge	DAGORETTI/RUTHIMITU/42	In trust for Erick Njoroge which is 0.08848 Ha.

9. The Applicant in reply to the replying affidavit of the Respondent, on 21st November, 2016 swore a supplementary affidavit in which she averred that the certificate of confirmation of grant devolved the two assets, Dagoretti/Ruthimitu/42 and Dagoretti/Ruthimitu/T33 of the estate of the deceased equally between the houses of Leah Wanjiku and Monica Njeri respectively. That it was not possible to proceed with the transfer of the said parcels of land since the two widows had died.

10. The Applicant averred that the grand children of the deceased were to get their deceased parents' shares. That it came as a surprise to see that on 5th December, 2013 the Land Parcel No. Dagoretti/Ruthimitu/T33 was unlawfully transferred to one Samuel Kihara Ndungu who is unknown to the family.

11. The Applicant asserts that the said land has always belonged to the deceased estate. She recalled that Alice had earlier unlawfully transferred to herself Land parcel No. Dagoretti/Ruthimitu/42 and it took the intervention of the court by an order issued on 5th July 2014 to cancel the said transfer. That it is apparent that Alice also transferred Dagoretti/Ruthimitu/T33 to a 3rd party without the knowledge of the beneficiaries.

12. The Applicant states that the other beneficiaries have no objection to the Respondent being registered jointly with her brothers Simon Kariuki and John Gitau with regard to their mother's (Alice) share of the estate. The Applicant prays that title Dagoretti/Ruthimitu/T33 transferred to Samuel Kihara Ndungu be cancelled and reverted to the name of the deceased.

13. Mr. Enonda, learned counsel for the Respondent confirmed that the Respondent is the daughter of Alice Waithera Gitau, deceased who was also one of the administrators of the deceased's estate. That the claim that the death of one of the Administrators, Alice Waithera Gitau made it impossible for the estate

to be distributed since at the time of her death, the certificate of confirmation had already been issued does not arise.

14. Counsel argued that Alice Waithera Gitau strove to preserve the estate of the deceased with no financial assistance from the beneficiaries, when called upon to contribute towards the preservation of the deceased estate and they can therefore not purport to stake any claim in the said estate. He attached copies of the discharge of charge for the Dagoretti/Ruthimitu/42 discharged by the Alice and the receipt as evidence of rates payment for the said parcel of land.

15. Counsel contended that Joyce Wambui Njoroge aka Joyce Wambui Mbai is not related to the deceased, and she and the late Charles Mungai with whom she cohabited had no issues together. That she is therefore not entitled to a share of the deceased estate. Further that she does not reside at the deceased property with any of the deceased's beneficiaries or the dependants.

16. The application dated 25th February 2016 is simple. It seeks only to rectify the confirmed grant to remove the name of Alice Njeri Ndungu who is said to have died, and to include the parcel of land known as Dagoretti/Ruthimitu/T33 that was earlier omitted. It is not disputed that Alice has died and it is a moot point that she cannot administer the estate from beyond the grave. Secondly the properties cannot be transferred into the names of the two widows if they too have died. Since they were to hold their shares in trust for their respective children the only logical thing is to let the estate devolve directly to the respective children.

17. I have considered the rival arguments herein and it is apparent that the issues raised by the Respondent were addressed in my ruling of 13th July 2015 in this cause. In that ruling the court identified and determined the issues of the rightful heirs of the estate of the deceased, the mode of distribution and the question of there being a liability attaching to the estate, which issues have been raised again by the Respondent.

18. The court did find that the deceased had two wives each of whom bore him five children. One of these children predeceased the deceased leaving behind no husband or issues and for that reason there were nine surviving children to the estate at the time of distribution. The court proceeded to distribute the known property being Dagoretti/Ruthimitu/42 in equal shares between the two houses of Leah Wanjiku and Monica Njeri. Thereafter the children in each house were to distribute the share falling to each house equally among themselves. The grandchildren whose parents had died were to receive and divide among themselves in equal share the share falling to their deceased parent.

19. The grandchildren and great grandchildren adverted to by Jane Wanjiku Machuku are therefore not beneficiaries in their own standing except the grandchildren share together with other siblings in their house the share that was due to their mother. The great grandchildren will only come into the picture if both their parent and grandparent are demised. It is noted that all beneficiaries except Alice now deceased, acknowledge that Joyce Wambui is a legitimate beneficiary of the estate. In any case by consent of the parties Joyce had been so declared by Njagi J on 20th February, 2012.

20. The question of Monica Njeri having renounced her share earlier is neither here nor there as she did not do so in any of the averments placed before the court. In any case that issue was also addressed in the earlier ruling.

21. The property known as Dagoretti/Ruthimitu/T.33 is shown by annexure "MNN2" to belong to the deceased as at 22nd August, 2003. The deceased died on 4th June 1970 and to date the Grant of Letters of Administration have not been confirmed. If indeed Alice sold it then that was an illegal transaction for which the purchaser has recourse against the estate of Alice and not the estate of Gathiongoi Muchunu for reasons that Alice had no authority to engage in an activity whose effect was to disinherit the other beneficiaries.

22. The court also notes that while on the one hand the Respondent states that Eric Njoroge, Teresia Parsoloi and Monica Njeri are not known to her, on the other hand, in her proposed distribution she has

made provision for Eric Njoroge. This question was also considered and determined in the earlier Ruling.

23. Learned Counsel Mr. Enonda cannot also revisit the issue of the efforts Alice made towards preserving the estate. If Alice did contribute towards raising money to pay off the loan for the parcel of land known as Dagoretti/Ruthimitu/42, she was only doing so as a dutiful daughter helping her parents. Such help did not entitle her to any bigger share of the estate than her siblings unless the deceased expressly said so. In this case the deceased gave no such indication. In any case the court did give her a chance to file a supplementary affidavit annexing any evidence of monies paid to preserve the estate besides the Kshs.3,400/= discernible from the discharge of charge filed in court. As at the time of her death she had not done so.

24. In sum therefore I find that the issues raised by the Respondent are an attempt to have a second bite at the cherry, which in the interests of justice cannot be allowed. For the foregoing reasons the court finds that the application dated 15th February, 2016 is merited and grants the following orders:

- i) The grant confirmed on 28th September, 2015 is hereby rectified to remove the name of Alice Njeri Ndungu.
- ii) The property that is Dagoretti/Ruthimitu/T33 is hereby included in the list of the deceased assets. Any transfer with regard to this parcel of land after the death of the deceased herein is hereby revoked and cancelled.
- iii) The two properties Dagoretti/Ruthimitu/42 and Dagoretti/Ruthimitu/T33 will devolve to the two houses in equal share and will be distributed in accordance with the proposal of Monica Njeri Ndungu.
- iv) Jane Wanjiku Machuku shall together with the other children of Alice Njeri Ndungu partake in equal share of the share due to their mother.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **26th day of April 2017.**

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L. A. ACHODE

JUDGE