



## IN THE HIGH COURT OF KENYA AT NAIROBI

### SUCCESSION CAUSE NO. 1240 OF 1999

#### IN THE MATTER OF THE ESTATE OF SAMUEL KAMAU KIMUI (DECEASED)

#### JUDGMENT

1. The deceased Samuel Kamau Kimui died intestate on the 16<sup>th</sup> October 1987. On the 16<sup>th</sup> June 2003 a grant of letter of administration intestate was issued to Marion Njeri Kamau and Margaret Wanjiru Ogada. On the 6<sup>th</sup> October 2009 Margaret Wanjiru Ogada filed a Summons for Confirmation of the Grant. In her affidavit in support of the said summons she states that she is one of the deceased's two daughters and that the deceased was survived by the following children; Helen Wacera Mukholi, John Ndi Kimui, Edwin Kimui and Marion Njeri Kamau the widow of the deceased. She states that Dr. Violet Kimui is the mother of the deceased children. She listed the following as the deceased's assets;

**a. Location 16/Ndunyu Chege/665**

**b. Location 16/Ndunyu Chege/979**

**c. Location 1 Kiriaini/452 (subdivided into location 1 Kiriaini/814 and 815)**

**d. Githurai Kimbo 685**

**e. Githurai Kimbo 686**

**f. Thika Town Thika Scheme No. J222A**

**g. Thika Town Thika Scheme No. J2223**

**h. Motor Vehicle Registration number KQU-Datsun**

**i. Kshs. 836,000.000 held at Bank Account number 48657/1998 with National Industrial Credit Bank Limited.**

**j. Kshs. 13,230.00 held at Bank Account Number [...] with Barclays Bank, Westlands Branch.**

2. She proposed that the estate be determined as follows;

a. Location 16/Ndunyu Chege/665 – 6 acres to be shared equally between Helen Wacera Mukholi, John Ndi Kimui and Margaret Wanjiru Ogada.

b. Location 16/Ndunyu Chege/979 - 2.5 acres to John Ndi Kimui

c. Location 1 Kiriaini/815 - 6 acres to be divided between Helen Wacera Mukholi and Margaret Wanjiru Ogada.

d. Location 1 Kiriaini /815 to Marion Njeri Kamau

e. The rest of the listed assets were to go to Marion Njeri Kamau.

3. On the 18<sup>th</sup> November 2010 **Samuel Kuria Njeri** filed an Affidavit of Protest. In his affidavit he deposes that he is the deceased's son and beneficiary of the estate and has consent of his siblings Charles Muiruri Njeri, Peter Njoroge Njeri and Ann Gathoni Kamau to depone the affidavit. That after reading the summons for confirmation of grant he noted that the applicant had deliberately left out his siblings and himself on the proposed mode of the distribution of the estate. According to him the deceased was survived by the following dependents;

a. Marion Njeri Kamau

b. Samuel Kuria Njeri

c. Charles Muiruri Njeri

d. Peter Njoroge Njeri

e. Ann Gathoni Kamau

f. Margaret Wanjiru Ogada

g. Helen Wacera Mukholi

h. John Ndi Kimui

4. That Margaret, Hellen and John are his step sisters and brothers from the deceased's marriage to Violet Wangui. That though they were not the deceased's biological children the deceased took them into his family and treated them as his own children and they referred to the deceased as their father. He educated them, provided for them, brought them up and evens stood by his brothers and himself as a father during the circumcision rites as per Kikuyu customs and everyone in the community regarded him as their father. That he and his brother have sons born in the lifetime of the deceased who are named after the deceased with his blessings as per the Kikuyu customs. That the deceased estate comprised of the following assets.

a. Location 16/Ndunyu Chege/665 (6acres) subdivided into Location 16/Ndunyu Chege/1553 (4 acres), Location 16/Ndunyu Chege/1554 (2 acres)

b. Location 16/Ndunyu Chege /979 (2.5 acres)

c. Location 1 Kiriaini/452 (subdivided into Location 1 Kiriaini/814 (3 acres), Location 1 Kiriaini 891 (3.5 acres and Location 1 Kiriaini 892 (2.5 acres)

5. That the deceased was buried in Location 16/Ndunyu Chege/665. That plots at Githurai Kimbo 685 and 686 are not part of the deceased estate therefore not available for distribution but plots known as Thika Town Scheme No. 1222A and No. 12223 are non-existent and/or cannot be physically traced despite their attempts and therefore cannot form part of the estate. Motor vehicle registration number KOU 509-Datsun is a junk and has no value and cannot be distributed. That there were no cash deposits and/or funds in Bank account number 48657/1998 with National Industrial Credit Bank Limited and in Bank account number [...] with Barclays Bank, Westlands Branch both in the names of the deceased and the said accounts are non-existent and thus not available for distribution.

6. He proposes that the estate of the deceased be distributed as follows;

**a. Location 16/Ndunyu Chege/665** – 6 acres to be shared equally between Marion Njeri Kamau, Samuel Kuria Njeri, Charles Muiruri Njeri, Peter Njoroge Njeri and Ann Gathoni Kamau all from

the second household; each of the said beneficiaries sharing 1.2 acres.

**b. Location 16/Ndunyu Chege/979 - 2.5 acres** to be shared equally between Helen Wacera Mukholi, John Ndi Kimui and Margaret Wanjiru Ogada all from the 1<sup>st</sup> household; each of the said beneficiaries sharing 0.83 acres.

**c. Location 1 Kiriaini/814 and Location 1 Kiriaini/892** totaling to – 5.5 acres to be shared between Marion Njeri Kamau, Samuel Kuria Njeri, Charles Muiruri Njeri, Peter Njoroge Njeri and Ann Gathoni Kamau all from the second household; each of the said beneficiaries sharing 1.1 acres

**d. Location 1 Kiriaini/891 – 3.5 acres** to be shared equally between Helen Wacera Equally Mukholi, John Ndi Kimui and Margaret Wanjiru Ogada all from the 1<sup>st</sup> household; each of the said beneficiaries sharing 1.17 acres.

7. Justice Kimaru heard the evidence of the first 3 witnesses. The Protestor called 5 witnesses. PW1 Samuel Kuria Njeri, Pw2 Marion Njeri Kamau, Pw3 Peter Mondo Maina, Pw4 George Gakobo Kimui, Pw5 Solomon Kiuna Kiarie. After the transfer of Justice Kimaru from Family Division I took up the matter and proceeded to hear the remaining witnesses.

8. The protestor **Samuel Kuria Njeri** filed his statement in court on the 17<sup>th</sup> of January 2011; he reiterated what he deposed in his affidavit of protest which I need not repeat again. During cross-examination and re-examination he stated that after the deceased married his mother Marion he moved from Gachie to Githurai-Kimbo. The house they lived in was built by the deceased and his mother. His mother later moved out of Githurai between 2008 and 2009. Her children later left Githurai. The most educated child in their family reached class 8 they were not academically gifted and none went to secondary school. He knows that the children of Violet all went to university. That after finishing school class 8 he used to feed pigs for the deceased and he paid him for taking care of his property; he also supported him by giving him food and other needs. That they were introduced to the family of the deceased his mother, brothers and sisters. The deceased paid his dowry Kshs. 10,000/- and he named his son after the deceased. **Marion Njeri Kamau** in her witness statement filed in court on the 17<sup>th</sup> of January 2011 reiterated part of Samuel stated in his statement adding that Samuel and Charles have teenage sons named after the deceased as per Kikuyu customs in recognition of them as the deceased's grandchildren. That initially when the Petition was filed by her then counsel A.K. Malik Advocates her children were mistakenly left out as the said advocate were of the opinion that the estate would be divided equally into halves between the 2 households which as a lay person she believed then. That later the children were included on the 24<sup>th</sup> June 2002. That her counsels mistake or omission should not be visited upon her and that the exclusion of her children's names cannot on its own disentitle her children of their father's inheritance. That her children qualify to be dependents to benefit from the deceased's estate because he took care of them into his family as his step children and together with her raised them and provided for them as his children and a family until the time of his demise. Her evidence on what comprises the deceased's estate and mode of distribution was similar to that of Samuel. She stated further that after the unresolved brutal murder of her husband she singlehanded together with her children settled the hospital bills and mortuary fees and that the said liabilities should be taken into account when the estate is being distributed. During cross-examination and re-examination she stated the deceased and she built a house in Githurai and the children lived with them there. She did not have any children with the deceased. The deceased bought the Ndunyu Chege land before he met her. The deceased took her children to be circumcised. The deceased helped her children to go to school. Her children dropped school in primary. She does not know Violet though the deceased told her he was divorcing her. The deceased inherited the land in Kiriaini but she built the house in Githurai. The deceased did not buy the Ndunyu Chege land with Dr. Violet and their other properties were not jointly owned. The deceased was living in Githurai- Kimbo when he died.

9. **Peter Mondo Maina** testified that Marion was the deceased's 2<sup>nd</sup> wife and that he was living with her at the time of his death. Marion's dowry was paid in April 1985. He escorted his friend for the ceremony *Kuguraria*. *Kiande* the front leg of a goat was cut. The dowry was paid to Kuria Marion's father. Kshs.

18000/ was paid as dowry. That the father of Marion told the deceased that he will take the dowry but the deceased was to realize that she had four children. That the deceased accepted the four children when he married Marion. He knows the deceased had a first wife Violet Wangui. That Violet's children did not participate in the deceased's burial. During cross-examination and re-examination he reiterated his evidence in chief adding that the deceased was servicing a loan and therefore did not educate Marion's children and that the deceased lived in Kiambu before he moved to Githurai. **George Gakobo Kimui** testified that he is the elder brother of the deceased and that he had a close relationship with the deceased his younger brother. His affidavit filed on the 17<sup>th</sup> of January 2011 repeated what is deposed in the protestors affidavit and Marion's adding that after the deceased married Marion he adopted Marion's as his children as per Kikuyu customary law. That he witnessed the payment of dowry together with Peter Mondo. The deceased cared and provided for the said children. That as the older father he has continued to treat Marion and Violet's children as their own children. That Marion's sons named their sons after the deceased in accordance with Kikuyu customs. That he knows that before his brother died he had taken a loan facility from the bank and placed his parcel land Location 16/ Ndunyu Chege/665 as collateral security and after defaulting payment of the loan, Marion through her monetary contribution saved the property from being sold. The deceased was buried in the said land and it's of great sentimental value to Marion. During cross-examination he reiterated his evidence in chief adding that the children of Marion remained in Gachie as they were schooling there. He could not explain why Marion's children did not go to secondary school. **Solomon Kiuna Kiarie** a retired chief testified that he knew the deceased for over 20 years. The deceased lived in Githurai- Kimbo and was married to Marion and both lived as husband and wife as per the Kikuyu traditions and customs. That when the deceased married Marion he did so with the full knowledge that she had children, he voluntarily took them as his own family and brought them up until his demise. On being cross-examined he reiterated his evidence adding that though he knew the children of Marion he does not know if they went to school. He does not know the children of the first wife but the deceased took in Marion's children as his own.

10. The respondent/ administrator called the following witnesses. Dw1 Doctor Violet Wangui Kimui, Dw2 John Ndii Kinui, Dw3 Marion Gathoni Wanyoko, Dw4 Joyce Muthoni.

11. Violet Wangui Kimui adopted her affidavit filed in court on the 20/1/2012 as her evidence. Her evidence is that she married the deceased in 1959 and they divorced in 1997. They had 4 children a one died 3 are alive Hellen, John and Margaret. The deceased studied and worked in the USA between 1963 and 1973. He returned to Kenya and worked in Kenya from 1973 to 1993 until his retirement. She is teaching at Kenyatta University. That they were persons of means and during the subsistence of their marriage they acquired several properties jointly as follows;

- i. Location 16/Ndunyu Chege/665- between 1959 and 1964, this is where their family home is.
- ii. Location 16/Ndunyu Chege/979- inherited from paternal grandmother as a gift
- iii. Location 1 Kiriaini/452-9 acres between 1973 and 1975
- iv. Githurai Kimbo 685 and Githurai Kimbo 686- between 1977 and 1980
- v. Thika Town Thika Scheme No. J222A and Thika Town Thika Scheme No. J2223.

Present status of the properties are as follows;

- i. Location 1 Kiriaini/452-9 acres has been subdivided into Location 1/ Kiriani /814, 891 and 892. Plot 814 was unlawfully sold by Marion Njeri on the 23/7/2002 to one Julius Nganga Njihia and the court has since declared the sale unlawful.
- ii. The Githurai Kimbo plots exist and have a permanent house. She states they can be allocated to Marion Njeri and that their value is colossal.
- iii. The Thika plots exist are in town and are very valuable.

iv. That the rest of the assets in the affidavit of Margaret Wanjiru Ogada existed as per the date of death of the deceased. Marion can render an account of the same.

12. She avers further that she did not know of the marriage between the deceased and Marion and that she learnt of the relationship during the wedding of the daughter Helen Wacera Mukholi. That she did not know that the deceased supported the children of Marion. That she is in agreement with the mode of distribution proposed by Margaret W. Ogada. That parcel No. Location 16/ Ndunyu Chege/ 665 should go to her children because of the sentimental value the family attaches to it and it is where the deceased and their late son Edwin Kimui are buried. That given the proposal Marion is a greater beneficiary. That she is aware that Marion still draws pension from the University of Nairobi which has not been listed as part of the deceased's estate. During cross-examination she reiterated her evidence adding that; she attended the deceased's funeral. She cannot tell if Marion's children were recognized at the funeral. They were both recognized. That she had little contact with the deceased after their divorce. She denied that Marion could have rescued the land the deceased had charged for a loan he took as Marion was not working. She stated she could have rescued it. She admitted that they sold the property at Muthaiga and shared the proceeds. Dw2 John Ndii the deceased's son with Violet relied on his statement filed in court on the 4/7/2016. He deposes that he is one of the administrators having taken over from his sister Margaret Wanjiru Ogada. That he supports the proposed mode of distribution as stated in Margaret's affidavit. According to him the protestors are not beneficiaries of the deceased's estate as they were not the deceased's children. During cross-examination he stated that he knew Marion as the father's girlfriend/concubine. That he was not aware that his father's property was almost auctioned. That Marion saw something good and she wanted to benefit from it. That he met Marion's children at his father's place they used to come and go, though he would not recognize them now.

13. Dw3 Marion Gathoni Wanyoko a sister in law to the deceased. He relied on her affidavit filed in court on 20/1/2012. She narrated the names of the deceased's siblings adding that as the widow of the elder brother he knows the family very well. That George Gakobo's evidence is riddled with truths. That she is aware that after the deceased separated with Violet he did not remarry. That the deceased used to share a lot with her and disclosed to her that he had befriended Marion Njeri who had separated from her husband Kamau Kuria. She denied that the deceased had married Marion and taken her in with all her children. Adding that their families were not involved in any marriage ceremony between the two either customarily or otherwise. She deposed that there are certain ceremonies that have to be conducted under Kikuyu customary law which must involve the bride's and the groom's families. That as an elder in the Kimui family she was not involved in any dowry or marriage ceremonies between the deceased and Marion. That George Gakobo stated that he was the only one involved yet there were other family members namely the widow of the first born brother, the deceased's surviving brother Stephen Waweru Kimui and the deceased's brothers in law married to her sisters in law. That the payment of dowry in a marriage is a crucial rite in a marriage under Kikuyu customs of marriage and inheritance and that any child born by Marion outside the union with the deceased cannot and ought not to lay any claim of inheritance of the deceased's estate. During cross-examination she reiterated her evidence adding that she did not know the husband of Violet's elder daughter. She stated that she is not an enemy to George Gakobo, that she cannot say if he was lying and that they stay in the same compound. That the deceased did not tell her that he had divorced Violet. She admitted that Marion's children have continued to visit George and that recently they visited her place. Dw4 was Joyce Muthoni Thiongo her witness statement was filed on the 20/1/2012. She deposes that the deceased was her brother in law. She knew of the separation between the deceased and Violet. According to her Marion was just a lady friend of the deceased but she was not formally introduced to the family nor was there any marriage rites performed between the deceased and Marion under Kikuyu customary law as alleged by George Gakobo. That as an elder in the family she could have been involved. That her late husband died after the deceased and being family members they would have been involved. That George is not being truthful and that George cannot play the part of the father of the deceased's children as he has not been participating in family functions. That the children of Marion cannot be part of the deceased's family as no known rites were performed to adopt them into the family. During cross-examination she reiterated her evidence adding that she had a good relationship with the deceased. She admitted being taken to the lawyer by Violet to sign her statement. She does not know if her late husband took the deceased to pay dowry but she is aware that her late husband visited the deceased. She knew that her mother in law stayed with Marion. She does not

know all the six children of Marion.

14. Parties filed written submissions which I have read and considered and this is a summary of the submissions. The protestor submitted that it is not disputed that Marion is the widow of deceased and also a co-administrator and that the deceased left behind the 1<sup>st</sup> administrator whose mother he had divorced. The only issue for determination according to the protestor is whether the children of the respondent Marion born out of wedlock were the deceased children. That the law applicable is Section 3(2) of the Law of Succession Act defines the child as a child whom the deceased expressly recognized or accepted as his own or for whom he voluntarily assumed permanent responsibility. According to the protestor a child need not be a biological child for purposes of the Law of Succession Act. That during the dowry giving of the respondent parents the deceased accepted the children of Marion as his own and the deceased voluntarily assumed permanent responsibility over the children by providing for them. That he even took the sons of Marion for circumcision. That the protestor established that the deceased elder brother was present when the deceased undertook to take care of the children. The protestor urged the court to rely on the evidence of the independent witnesses who were not beneficiaries of the estate. It was further submitted that Kikuyu Customary Law was applicable in this case as far as the voluntary acceptance of male child born out of the wedlock prior to the male's Kikuyu Customary Law marriage to the mother of the said children is concerned. The protestor dismissed the applicant's witnesses as not being credible and independent. On the mode of distribution the respondent submitted that the deceased was buried in parcel no. 665 and taking away the land from her will deny her benefit of attached of the late husband than the grown up children of the deceased divorced wife. That the court should take into account that Marion rescued the said parcel of land at a time when it was being auctioned. The protestor relied on Section 93 of the Land Registration Act to safe guard the interest of Marion having contributed and saving the land. It was submitted that Marion obtained an interest in the land. It was further submitted that parcel No. 979 which is adjacent and borders with 665 shall be distributed to the children of Violet Wangui Kimui. The protestor urged the court to distribute the estate as per his proposal in his affidavit of protest.

15. The applicant submitted that it is acknowledged that the respondent is the spouse of the deceased though the marriage whether customary or otherwise is not proved. According to the applicant the dispute is whether the four dependents named by the protestor are entitled to benefit as claimed. That in doing so the court should consider whether the deceased recognized him as children and whether he provided for them. It was submitted that Marion did not disclose in the year they filed the petition the existence of the said children thought they belong to her. The protest is an afterthought and ought to be rejected. On whether the deceased took the respondent children as his own it was submitted that the children never lived with the deceased and Marion and only visited and that they were left in Gachie Village where they were staying before. That the deceased never educated them. That the evidence adduced leaves a lacuna as to whether the four children were dependents of the deceased. The applicant urged the court to adopt the mode of distribution as proposed by the applicant arguing that it is only fair and just that all the parcel of land acquired by the deceased and his former wife Dr. Violet Wangui Kimui go their children. That the respondent should get what they acquired together, all movables to go the respondent as she lived together with the deceased at the time of his death.

### **DETERMINATION**

16. I have considered the evidence, submissions and authorities cited. The only issue for determination in this matter is whether the protestor and his siblings are children of the deceased as provided under Section 3(2) of the Law of Succession Act and the mode of distribution. At the close of the hearing it was not in dispute that Marion Njeri was a wife of the deceased. The deceased therefore died leaving two houses that of Violet Wangui Kimui which is represented by the 1<sup>st</sup> administrator Margaret Wanjiru Ogada and Marion Njeri Kamau. The house of Violet has three surviving children and the house of Marion she has four children. The protestor who is Marion's son claims that the deceased adopted them as his children at the time he married their mother. That he made an undertaking at the time of paying dowry that he would care for the children. This was the evidence of the protestor's witnesses. It was upon the protestor to show that the deceased took them in cared for them and assumed their permanent responsibility. From the evidence adduced it did not come out clearly that the four children ever lived with the deceased or that he

undertook their education and care or permanent responsibility. What I gather from the evidence is that they lived in Gachie apart from the deceased and Marion and only visited the two in their home. It follows therefore that he never followed up his undertaking to adopt them as his children under the Kikuyu Customary Law for if he did he would have fully taken up their responsibility lived with them educated them and assumed his role as a father to each one of them. In my view merely stating that he took the sons of Marion for circumcision and that some children were named after him is not sufficient to prove that he accepted them as his own having married their mother. Based on the evidence adduced I am unable to declare that they were children of the deceased as provided under Section 3(2) of the Law of Succession Act. There was no evidence to show that the deceased expressly recognized or accepted the four children as his own or that he assumed permanent responsibility.

17. On the mode of distribution I have considered what has been averred and submitted by both sides. I note that Parcel no. 665 which is the largest part of the estate is of interest to both sides. It is not in dispute that the same was acquired during the marriage of deceased with Violet the mother of the 1<sup>st</sup> administrator. Marion argues that she rescued the said parcel of land and therefore she is entitled to it. That it is a place where the deceased is buried, a man she stayed with until his death. She is entitled to apportion of it therefore out of the 6 acres in parcel No. Location 16/Ndunyu Chege/665 Marion shall inherit two (2) acres. Parcel No. Location 16/Ndunyu Chege/979 shall go to John Ndii Kimui. Location 1 Kiriaini/815 the 6 acres to be divided between Helen Wacera Mukholi, Margaret Wanjiru Ogada and Marion. Marion and the protestor claim that the other portions of land in Kimbo and Thika are not available for distribution as the properties in Kimbo are not part of the deceased estate and the ones in Thika are non-existence. There was no evidence adduced by Marion to support her evidence on this. The said properties therefore shall go to Marion as proposed by her Co-administrator. He evidence that there were no cash deposits in the Banks stated was not supported by any evidence from the bank. Therefore Location 1 Kiriaini/815, Githurai Kimbo 685, Githurai Kimbo 686, Thika Town Thika Scheme No. J222A, Thika Town Thika Scheme No. J2223, Motor Vehicle Registration Number KQU- Datsun, Kshs. 836,000,000 held at Bank Account number 48657/1998 with National Industrial Credit Bank Limited and Kshs. 13,230.00 held at Bank Account number [...] with Barclays Bank, Westlands Branch shall all go to Marion Njeri Kamau. Each party to bear its own cost. It is so ordered.

Dated, signed and delivered this **21<sup>st</sup>** Day of **September 2017**

**R. E. OUGO**

**JUDGE**

In the presence of:

**Mr. Ochieng h/b for Mr. Murugara** For the Applicant

**Mr. Njiru h/b for Mr. Njagi** For the Protestor

M/s Charity Court clerk