



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
HIGH COURT SUCCESSION CAUSE NO. 100 OF 1991
IN THE MATTER OF THE ESTATE OF ANDREW
MWAI WAHOME (DECEASED)
AGNES WANJUGU NDUNYU.....APPLICANT
TERESA WAMUYU KARABA.....INTERESTED PARTY
V E R S U S
GODFREY NGUYO MWAI & 2 OTHERS.....RESPONDENTS
J U D G M E N T

On the 14th April 1983, Andrew Mwai Wahome died.

On 15th November 1991 the Public Trustee filed this petition under section 6(2)(a) of the Public Trustee Act Cap 168 Laws of Kenya for Letters of Administration intestate to the Estate of Andrew Mwai Wahome.

It is important to point out at the earliest that in the application the petitioner stated that

1. "The deceased died intestate domiciled in the Republic of Kenya"
2. That every person having an equal right proven right to a grant of representation had consented to the petition/renounced the right

In support of the petition the Public swore an affidavit on 15/8/1991 where at paragraph 5 he deposed that the **deceased died intestate** and left the following persons surviving him.

- | | | | |
|----------------------|---|-------|------------|
| 1. Milka Wangui | – | Widow | – 70 years |
| 2. Bethwel Munyiri | - | Son | - 37 " |
| 3. Elizabeth Wanjiru | - | Widow | - 55 " |
| 4. Timothy Kagotho | - | Son | - 33" |

- | | | | |
|--------------------|---|----------|--------|
| 5. Joyce Mumbi | - | Daughter | - 27 “ |
| 6. Johny Kairo | - | Son | - 25 “ |
| 7. Geoffrey Ngunyu | - | Son | - 23 “ |
| 8. Samuel Ndungu | - | Son | - 18 |

At paragraph 6 of the affidavit he gave a full inventory of the assets and liabilities of the deceased at his death.

Assets

- a. ½ plot No. 70 Nanyuki]
- b. Plot No.2/Gichira Nyeri] 120,000/=
- c. Aguthi/Mungaria/293]
- d. Barclays Bank – Balance in A/C Ksh. 20,590/80

Personal effects: Ksh.500

Liabilities: ½ shares joint a/c 13757/90.

On 17th February 1992 grant of letters of administration intestate were issued to the Public Trustee.

On 20th July 1992 the certificate of confirmation of grant to original grant was issued to the petitioner pursuant to the provisions of s.71 of the Law of Succession.

In the schedule it was stated: -

“The identification and shares of all persons beneficially entitled to inherit the estate of the deceased have been ascertained and determined as follows: -

Milka Nyaguthi Mwai and Elizabeth Wanjiru Mwai as tenant for his life and thereafter to the following absolutely in equal shares;

Bethwel Wanyiri Mwai	Son	-	37
Timothy Kagotho Mwai	Son	-	33
Joyce Mumbi Mwai	Daughter	-	27
Johny Kairu Mwai	Son	-	25
Godfrey Nguyo Mwai	Son	-	23
Samuel Ndungu Mwai	Son	-	18

On 21st January 2004 another application for confirmation of the grant dated 30th June 2003 was filed by the Public Trustee. The Public Trustee made reference to a court order granted on 7th May 2001 which identified the shares of all persons beneficiary entitled to inherit and the court confirmed the grant identifying the specific shares for each beneficiary; -

- 1) L.R. Aguthi/Gaki/590 to be transferred to Milka Nyaguthii Mwai as a life tenant and thereafter to Joseph Wanyiri Mwai Absolutely.
- 2) L.R. Aguthi/Mungaria/293 to be subdivided and distributed hereunder
 - (a) Godfrey Nguyo - 3 ½ acres
 - (b) Samuel Ndungu - 3 ½ acres
 - (c) Joyce Mumbi - 3 ½ acres
- 3) LR. Aguthi/Mungaria/467 to be transferred to John Kairu absolutely
- 4) Plot No. 650 Ngobit to be subdivided and distributed as hereunder;
 - (a) John Kairu Mwai - 16 acres
 - (b) Godfrey Nguyo Mwai - 8 acres
 - (c) Samuel Ndungu Mwai - 8 acres
 - (d) Joyce Mumbi Mwai - 8 acres
- 5) Plot NO. 70 Nanyuki Municipality to be transferred to Elizabeth Wanjiru Mwai as life tenant and thereafter to Johny Kairo, Godfrey Nguyo, Samuel Ndungu and Joyce Mumbi absolutely in equal undivided shares.
- 6) Plot No. 11 Kingongo 5511 to be transferred to Johnny Kairo and Joyce Mumbi as tenants in common in equal undivided shares.
- 7) Money with Public Trustee to be transferred to Milka Wanjiru and Elizabeth Wanjiru widows, in equal shares

On 17th November 2011, Agnes Wanjugu Ndung'u filed summons for revocation of grant and named Johny Kairu, Godfrey Nguyo, Samuel Ndungu, Joyce Mumbi and the Public Trustee as respondents.

In the summons and the affidavit in support sworn on 15th November 2011, she contended that the grant issued to the petitioner on 17th February 92 and confirmed on 21st January 2004 be annulled and be revoked on the ground that the proceedings to obtain the same were defective in substance and had been obtained fraudulently by making false statement and concealment from the court of things material to the case.

She deponed that she was the 1st born daughter of Andrew Mwai Wahome and Elizabeth Wanjiru Mwai – and her brothers and sisters were Johny Kairu, Godfrey Nguyo, Samuel Ndungu and Joyce Mumbi. That Milka Nyaguthii was her stepmother and Joseph Wanyiri her step brother. That she only learnt of this succession cause and the distribution of the father's estate after the death of her mother in 2011 when she saw surveyors on the family lands. That she had taken care of her mother during her illness, paying her bills and that her mother had told her that the property in Nanyuki, plot No. 70/section 12 Nanyuki, Municipality would pass on to her.

When the Summons for Revocation of grant was served, the record shows that except for Godfrey Nguyo, the other respondents each e filed an affidavit conceding that the protestor was indeed their sister and that she had been left out of the succession cause. Each of them deponed that the plot No.70/section 12 Municipality was left to her as her inheritance and none of them was laying any claim to the plot.

A consent was filed on 19th January 2012 signed by the three of them to the effect that the protestor could have the said plot.

The Public Trustee also filed an affidavit in response to the summons for revocation of grant on 7th February 2012 the Public Trustee deponed that the office relied on a family agreement and instructions by the family and the two widows of the deceased and that the Public Trustee learnt about the applicant when she lodged her complaint in 2011. The Public Trustee deponed further that most of the properties had been transferred to the other beneficiaries and the only remaining one was plot No. 70 Nanyuki. As the administrator the Public Trustee, had no objection to the applicant inheriting it.

Unfortunately, that did not bring the matter to an end as on 20th April 2012, Teresa Wamuyu Karaba and Mary Consolata Wangui Gikonyo filed a Summons General under rules 49, 59(1) and 73 of the Probate and Administration rules seeking to be joined in the succession cause that they were both daughters of the deceased and

“we also have an interest in the estate of the deceased and it would only be fair and just if the interest of the 5th respondent (the applicant) is determined together with our interest in the estate of the deceased”

In his response filed on 15th May 2012, Joseph Munyiri Mwai contended that what was now happening was a dispute among the children of his stepmother Elizabeth Wanjiru Mwai, and their share of their house's inheritance. He contended that his mother's house, Milka Nyaguthii was content with its share of the estate being Aguthi/Gaki/390 and was not interested in anything else despite the fact that the two new applicants were his married sisters. He wondered why they wanted to be joined in the fray yet what was at stake was property that had been shared to his step mother's house. He deponed he was aware that his step mother Elizabeth had said severally that plot no 70 Nanyuki was to go to the protestor.

The applicant was of similar view in her affidavit filed on the same date that the two new applicants were her step sisters and their mother's house was sufficiently taken care of. That the issue of plot No. 70 was about issues in the family of Elizabeth and their mother's share was not affected at all.

Their application to be joined was allowed. They filed a supplementary affidavit on 5th July 2012 in which they specified that their interest was not only in plot No. 70 Nanyuki, but also plots No. 11 King'ong'o estate and No. 2 Gichiche Market Nyeri.

They sought to have the applicant herein account for the proceeds from that plot 70 Nanyuki since March, 2009, and that for the plots no. 11, and no. 2 Nyeri, they were only interested in own specific their shares.

The applicant responded vide an affidavit filed on 24th July 2012 where she contended it was unfair for her step sisters to seek accountability from her only yet every sibling was utilizing their share of the estate and they had not asked the others to account. That the two plots were generating income that the two parcels of land 590 and 293 were being utilized by the others to their benefit and this was the more reason why the grant should be revoked and the estate shared equally.

In light of the foregoing, on 27th July 2012 Hon. Justice Wakiaga gave the parties an opportunity to have a family meeting and discuss the Nanyuki plot. Joseph Wanyiri and Joyce Mumbi were to chair the meeting and Agnes Wanjugu, the secretary.

The record shows that a meeting was held on 10th August 2012 but was marred by disagreements and no consensus was reached forcing the protestor to file another affidavit on 15th August 2012 in which she described the events of 10th August 2012 and why she deserved to inherit the property plot No. 70 Nanyuki.

On 26th October 2012 after the receiving the report that there had been no consensus, the court decided

that the matter to proceed by way of oral evidence.

On 16th December 2016 when the matter came before Mativo J, Mr. Kamweru observed that perhaps it would not be proper to revoke the whole grant because the family had proceeded by way of consensus. He submitted that it appeared that the only property in dispute was No. 70. Ms. Thungu confirmed that parties were unable to agree. That her client would be satisfied with the plot 70 but the rest of the family was in disagreement.

The judge directed that all parties be served and matter be fixed for hearing on 24th May 2016. On that day Mr. Kamweru sought to withdraw from the proceedings because he had advised his client Mr. Godfrey Mwai on the law but he did not accept the legal advice. His client did not object.

The matter proceeded for hearing on 20th September 2016.

In her testimony of the applicant Agnes Wanjugu Ndung'u told the court that her father had three wives; Milka Nyaguthii Mwai, Elizabeth Wanjiku Mwai, Nyagaki Mwai; all of whom were now deceased.

That in her mother's house they were seven; Timothy Kagotho, Agnes Wanjugu, Joyce Mumbi, Godfrey Nguyo, Samuel Ndung'u, Johny Kairo, Peter Wahome. The last two were also deceased.

In Milka's house they were three – Joseph Wanyiri, Teresa Wamuyu and Mary Consolata Wangui.

That the third wife never had children. She said her father owned ½ share of plot 70 Nanyuki which he had left to his wife Elizabeth. That she had occupied the plot since 1988 and had paid rent to her mother's account. She said if she inherited the plot she would be satisfied, otherwise the only other alternative was for the whole grant to be revoked and the estate to be re-distributed fairly.

On cross examination she said Kagotho was given his land by her father while he (the father) was alive. She said she would not share the plot with the step sisters because this plot had been given to her mother, and her mother had said it would be hers.

The respondents testified through Godfrey Nguyo, Samuel Ndungu and Mary Consolata Wangui. The respondents objected to the applicant getting the plot for two reasons; that their father left an oral will, a cassette where he said that no married daughter should inherit his property and where he also distributed his property, and that she had her own properties. Godfrey Nguyo produced the English documentary transcript of the contents of the cassette.

He alluded to the meeting of 10th August 2012 and testified that they listened to the cassette that the three married sisters were not mentioned in the cassette that each of the married sisters was blessed with property and hence the children of Elizabeth would be co-owners of plot No.70 Nanyuki. He said they all signed the agreement agreeing that they would maintain their father's mode of distribution.

On cross examination he conceded that the cause was not commenced with a letter from the chief, that no family agreement was signed for the petitioner, but a list of names was supplied. That the protestor was not involved in the distribution of the estate but that she was aware of the case and the Public Trustee. He did not agree with the Public Trustee's position on the applicant's inheritance he conceded that his father never said anything about married daughters in the cassette. Quoting from the extract the said he said when his father said;

“any of my daughters who may not have anywhere to go may be given something...”

His father was referring to marriage.

Shown his affidavit of 1st November 2016 he conceded that the family had indeed altered his father's wishes to share the plot No.70 among seven persons instead of the four he alleged his father had

appointed to share the same. That the reason for the change was because the sisters demanded a share of the estate.

He was adamant that if the grant was revoked the rest of the family would not be involved. That he personally would not participate in the proceedings and that the applicant could as well take all the properties. That the applicant being a married daughter and having her own property could not inherit their father's property. That she would only inherit if she was unmarried.

In his testimony, Samuel Ndungu Mwai, objected to the applicant's claim because their father had said that any daughter who was married should not inherit his property.

In cross examination he said the estate of his father was distributed by the Public Trustee in court and that grant could not be revoked. He conceded that they never disclosed the existence of Agnes to the Public Trustee because she was married. He said he had no interest in the Nanyuki plot. That the protestor was rich, that she had her shambas and plots in Nanyuki and did not deserve to inherit anything from her father. He could not point out in the transcript anywhere their father had said that married daughters should not inherit.

D.W.3 Mary Consolata Wangui Gikonyo testified that their father distributed his properties except the Nanyuki plot. That he never gave the married daughters anything. She said if the grant was revoked there would be violence and disruption in the family. She said her interest in the plot No. 70 was because it had not been distributed by her father and that the three married sisters should have a share. When she was told that D.W.1 had proposed that the Nanyuki property to be shared equally by all the children of Mwai, she was in disagreement stating that those who got something should leave what was remaining to those who never got anything.

Shown the certified grant she said the same should not be revoked. She said she was no longer interested in the family all owning the Nanyuki plot, now she wanted her share. She said that being a child of Mwai, she could choose what property she wanted to inherit and that property was the Nanyuki plot.

Teresa Wamuyu chose not to testify saying that she relied on what her brothers and sister had said in court.

Parties had agreed to file written submissions. The applicant filed but the respondents chose to rely on their record, and everything they had placed before the court.

The only issue for determination is whether the grant made to the Public Trustee on 17th February 1992 and confirmed on 22nd January 2004 should be revoked.

Lingering in the background of this cause is whether the deceased died testate/intestate.

The cause as filed by the Public Trustee was that of an intestate. It is very clear that the cassette produced by D.W.1 was never presented to the Public Trustee because he does not mention it anywhere.

The question is, can the evidence of that cassette be considered to be an oral will as put forward by the D.W. 1 and the other respondents?

Section. 9 of the Law of Succession Act provides that;

- 1) No oral will shall be valid unless
 - (a) it is made before two or more competent witnesses; and
 - (b) the testator dies within a period of three months from the date of making the will.

The deceased died on 14th April 1983. The cassette was made on 13th July 1982. Death was nine months later. There is nothing from the transcript to indicate that what the deceased said was witnessed by anyone. Hence what the respondents are referring to as a will comes out as an expression of the deceased's wishes in as far as the Law of Successions Act is concerned.

Secondly section 10 of the Act provides the proof of an oral will –

“If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.”

The transcript also says that it is sourced “from the sound alleged to be that of Andrew Mwai Wahome”. The parties in court have not disputed the sound to be that of their father, the issue is the interpretation of what he said.

From the evidence before me every person relying on the alleged will is an interested party, and is relying on it to support their side of the case and not necessarily to show what exactly the deceased meant. Hence there is no independent evidence to support the interpretation given to the words of the deceased by the respondents. And hence, in as much as the contents of the cassette and the transcript of what the deceased said are part of the evidence, as far as the Law of Succession Act is concerned, they do not amount to a will, oral or otherwise.

S.76 of the Law of Succession provides for the circumstances under which a grant may be revoked;

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.

In this case it is admitted by the respondents and the Public Trustee that the neither applicant's name nor her existence as a sister included in the list of beneficiaries. It was also falsely alleged that she had been consulted and her consent obtained, and in the alternative that she had waived her right. Truth is, the respondents by not giving the Public Trustee the complete list of the members of the family amounted to concealment of material facts from the court of the material fact of the existence of the married sisters. The Public Trustee, having been misled in the said manner, ended up making the untrue allegations that all the beneficiaries were consulted to the making of the grant and consented to the mode of distribution

of the estate.

This explains why the Public Trustee did not take any position on the issue, leaving it to the court to do what would be fair and just in the circumstances, as it clearly emerged that when the petition was filed not all those who were beneficially entitled were included in the list to the Public trustee.

Except for Geoffrey Nguyo and Samuel Ndung'u, the married sisters in this family of Miilka Nyaguthii Mwai are not in agreement on the issue of the distribution of their father's estate, as their brother Joseph Muniyiri would want the court to believe. It is clear that even the other two sisters Teresa and Mary Consolata felt they were denied and that is why they followed in the footsteps of the applicant though timidly. In fact, Teresa found it difficult to testify, and Mary Consolata was blowing both hot and cold as to what exactly it is she wants from her father's estate.

It did not escape this court's attention that DW1 could not fathom the grant being revoked and his sister's getting anything from his father's estate riding on what he termed to be his father's bitterness when he made that cassette. This appears to have intimidated the sisters with fear of violence. He even threatened to abandon everything he had inherited from his father if the grant was revoked, yet he had readily altered some of the said wishes. Apparently it did not matter for as long as it suited him.

I have said it elsewhere; marriage does not change the DNA of a woman. She still remains her parents' child and it should never be allowed to be a reason for discrimination. The negative influence of patriarchy in the discrimination of women in inheriting their parents' property ought not be given any room to breathe. Surely it cannot be said that the mother did not contribute anything to the property that ends up at the distribution table of the father. Somewhere in there is the unseen and unacknowledged contribution of the mother.

The other obvious fact is that the property under distribution does not belong to any of the children but to the deceased, and if he did not give it out, while he was alive, it becomes free for distribution.

This clearly brings to place the proviso to section .71 of the Law of Succession Act that provides in no uncertain terms; -

“provided that, in cases of intestacy the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled and when confirmed such grant shall specify all such persons and their respective shares”

The court in confirming the grant on 22nd January 2004, three persons beneficially entitled were not included because their names were omitted from the list of beneficiaries. The applicant was seeking only one property, No. 70 Nanyuki. The step sisters came in pursuant of plots no.11 Kiganjo, Kingogo and no. 2 Gichira in Nyeri. That speaks to the fact that the court was misled in arriving at the confirmation as it did. The reasons for denying the applicant and her sisters a share of their father's estate is based on what D.W.1 and DW2 say are the wishes of their father, that only the unmarried daughters were to inherit.

These wishes do not appear that specific. He has mentioned certain parcels of land without specifics. In fact, from the transcript his greatest concern was to separate his wife Milka Nyaguthii from the rest of the family because according to him she practiced witchcraft and this had brought great suffering to the rest of her family. He says,

“On 15th December 1963, I bought land for her in Mirichu. After struggling with her a lot I saw it better for her to stay by herself... the land had 200 coffee trees, ... I took her to the shamba and bought her three cows and the land was registered in my name and the coffee in her name... the land is mine.... this is the lady who destroyed family... due to her goings on Swahili traditions.”

That effort to destroy the witchcraft paraphernalia did not succeed and her son Wanyiri appeared to be in it together with his mother. Somewhere in the transcript he also says, *“I have talked these things because of the situation as it is”*. He gives the impression that was addressing a problem. Nowhere in the

transcript does he make any specific exclusion of his married daughters. In any event if there had been a will the petition would have been different.

The D.W. 1 has stated categorically that if the grant is revoked he would not participate in any proceedings. The law will not allow an injustice simply because a party is intimidating the others. If he was so upright in the first place he would have mentioned everyone, given the Public Trustee the cassette to determine what should or should not be. In any event should that happen the law will take its course.

The D.W. 2 says the applicant is a rich woman and should not inherit her father's estate. Joseph Wanyiri's position is that he has no objection to the applicant's request for as long as it does not affect his mother's house's share. What all these parties are forgetting .is that nothing in this estate belonged to any of them. Everything belonged to the deceased and none of them can lay a better claim to the property from the other unless s/he was given the property by the deceased in his life time.

Section.34 provides the meaning of intestate –

A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.

The deceased's property was deemed to be free that is why the cause was 'intestate'

The Law of Succession Act does not differentiate children as male, female, married or unmarried. All children of a deceased person are treated equally by the law. There are a host of authorities on this issue. Justice Gikonyo in **the Matter of the Estate of M'ngarithi M'miriti alias Paul M'ngarithi M'miriti (Deceased) [2017] KLR**, regarding the **discrimination of daughters in inheritance**; put it in a way that rings so true I need only echo his words here;

From the arguments coming through, it is clear issues to do with discrimination based on gender and sex have emerged. There were bad times in the heavily patriarchal African society; that being born as daughter disinherited you. And so, even the judicial journey to liberate daughters from being so down-trodden by the patriarchal society in Kenya on matters of inheritance has been long and painful. As a matter of fact, due to the constitutional architecture of our nation at the time, before 2010, we only saw pin-prick thrusts and rapier-like strokes by courts on these persistent patriarchal biases. But, things changed when RONO vs. RONO [2008] 1 KLR 803 delivered the downright bludgeon-blow on these discriminatory practices against women in inheritance; it splendidly paid deference to the international instruments against all forms of discrimination against women especially the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). And, I am happy to say that from thence, there are many cases- and the number is rising by the day as courts implement the Constitution- which states categorically that discrimination in inheritance on the basis of gender or sex or status is prohibited discrimination in law and the Constitution. More specifically I am content to cite the proclamation by the Court of Appeal in the case of Stephen Gitonga M'murithi vs. Faith Ngiramurithi [2015] eKLR that: -

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”

Therefore, a son will not have priority over a daughter of the deceased simply because he is male; all- male and female siblings- are equal before the law and are entitled to equal protection of the law. See article 27 of the Constitution. Accordingly, the 3rd Administrator and her children who are claiming the inheritance of late Festus K. M'Ngaruthi, the son of the deceased are only entitled to the share of their late father. They are not, in the circumstances of this case entitled to more share than the distinct share of each of the two daughters of the deceased simply because the late Festus M'Ngaruthi was the son. The three children of the deceased are entitled to share the net intestate estate of the deceased equally.

This respondent herein have been adamant even to deny the applicant the little that she would have been satisfied with. In the process the step sisters also realised that they have also been discriminated against. The distribution of the estate does not have to be hostile if members of this family sit round the table entitlement to more attitude outside the discussion. One cannot be denied their inheritance because of what they have. What they have is theirs.

It is inevitable that the grant of letters intestate confirmed on the 22nd January 2004 was obtained in violation of the Law of Succession Act, as clearly set out under s. 76, in violation the rights of the applicant, and those of her other two married sisters.

The same is, and is hereby revoked.

A fresh grant is issued to the Public Trustee.

The Public Trustee to apply for confirmation of the grant within 30 days hereof and to include all those who are beneficially entitled, and specifically the applicant and the two step sisters.

Any beneficiary not interested in the estate is at liberty to waive their rights according to provisions the Law of Succession Act.

It is so ordered.

Right of Appeal 30 days

Dated, delivered and signed at Nyeri this 29th November 2017.

Teresia Matheka

Judge

In the presence of:

Court Assistant Harriet.

Ms. Thungu for the applicant,

N/A for the other applicants

Godfrey Nguyo respondent present in person.