



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
SUCCESSION CAUSE NO. 40 OF 2014

(FORMERLY NAIVASHA CM'S SUCCESSION CAUSE NO. 163 OF 2010)

IN THE MATTER OF THE ESTATE OF JOHN NJURU GAKUU.....DECEASED

GRACE WANJIRU NJURU.....PETITIONER

-VERSUS-

LOISE NJERI NJURU.....PROTESTOR

R U L I N G

1. A grant was issued in favor of **Grace Wanjiru Njuru (the Petitioner)** on 18th November 2010. The Petitioner had applied to the court in her capacity as the widow of the deceased. She named 15 persons including herself as beneficiaries and listed seven parcels of land as comprising the estate of the deceased. Through an application dated 18th May 2011, she sought to have the grant confirmed.
2. Before the grant could be confirmed, however, an Affidavit of Protest was filed by one of the daughters of the deceased namely **Loise Njeri Njuru (the Protestor)** on grounds that her late mother and widow of the deceased, **Josephine Muthoni Njuru** had been left out from the list of beneficiaries. Her assertion was that the estate of the deceased should be shared equally between the two houses of the deceased.
3. A subsequent application filed by one of the beneficiaries, **Samuel Ndungu Njuru** on behalf of himself and **Daniel Mwaura Njuru** and **Jeremiah Wanjau Njuru** sought to restrain **Loise Njeri Njuru** from wasting or farming tea bushes or collecting proceeds of tea produce in respect of the two estate properties identified as **NDARUGU/GAKOE/1619 and 1620**.
4. To this application the Protestor swore an affidavit to the effect she and other beneficiaries were rightfully utilizing the said property which her deceased mother had cultivated and that the tea bushes thereon were transferred to her family after the mother's death. Thus the tea bushes did not form part of the estate of the deceased herein.
5. Subsequent to this court's order of 20th November, 2014 a plethora of affidavits were filed by the Protestor and in support of her protest by other witnesses while the Petitioner and others supporting her petition also filed affidavits. On 21/5/2015 the parties identified the two issues for the court's determination and recorded a consent to the effect that the issues for determination were:
 - a. Scope of the estate of the deceased.
 - b. Distribution of the said estate

6. On behalf of the Petitioner, **Samuel Ndungu Njuru (PW1)**, **Grace Wanjiru Njuru (PW2)** and **Petitioner, Esther Wanjiru (PW3)**, **Josephat K. Mwaura (PW4)** and **Joseph Kinyua Mwaura (PW5)** testified.

7. The Petitioner's position is that her children and herself should be allowed to share the properties in the Rift Valley comprising the deceased's estate identified as:

1. **LONGONOT/KIJABE/BLOCK 3/824**
2. **LONGONOT/KIJABE/BLOCK 3/644**
3. **LONGONOT/KIJABE/BLOCK 3/613**
4. **KIAMBOGO/ELEMENTAITA/544**
5. **NAIVASHA/KABATI/457**

8. She also stated that the two parcels of land in Kiambu namely **Ndarugu/Gakoe/1619** be taken by the Protestor's house while the parcel **Ndarugu/Gakoe/1620** be given to her house. She has also proposed the distribution of the properties due to her house in her various affidavits on record.

9. For her part the Protestor and her nephew **Stephen Njuru** are content to take and share equally the two parcels **Ndarugu/Gakoe/1619** and **1620** but also claim the **Naivasha/Kabati/457** as due to their house. The Protestor identified other properties not listed in the affidavits of the Petitioner and which she claims were the property of the deceased. These are **Longonot/Kijabe/Block 3/1012**, **Longonot Kijabe Block 3/358**, **Longonot/Kijabe/Block 3/2144**. However, she stated that she and her mother's house are willing to let the second family have all these properties in the Rift Valley save the Kabati plot which they claim in addition to the two parcels in Kiambu.

10. Several affidavits were filed by the parties and their witnesses. However, only a fraction of deponents testified in court in compliance with the court's directions that hearing was to proceed through affidavit evidence and cross-examination of the deponents thereto. For the purposes of this ruling, only affidavits by deponents who were presented for cross-examination will be given consideration.

11. Having reviewed the evidence and submissions tendered by the rival parties, it is clear that the background to the dispute and the identities of lawful beneficiaries are not in dispute. The deceased was a polygamous man. His first wife, **Josephine Muthoni Njuru** bore him two children namely **Loise Njeri Njuru (Protestor)** and **Irene Njuru**, the latter who died in 2010 but having survived the deceased. Irene was survived by her two children namely **Stephen Njuru (PW2)** and **Martha Muthoni**. The second wife is the Petitioner herein. She had eleven children with the deceased.

12. The issues for determination were identified prior to the hearing as the scope of the estate of the deceased and the mode of distribution. On the first issue, it is evident from the Petitioner's evidence and particularly the affidavit sworn by her in support of the summons for confirmation of grant that the deceased, at the time of death owned four parcels of land in Longonot.

13. These were **identified as Longonot/Kijabe/Block 3/824, 644 and 613**. He also owned a parcel of land identified as **Kiambogo/Elementaita/No.544** and a Plot No. **Naivasha/Kabati/457**. Additionally, he was the registered owner of a Plot No. **Ndarugu/Gakoe/209** later subdivided into two parcels namely **Ndarugu/Gakoe/1619 and 1620**.

14. In the course of the evidence, it transpired that at the time of his death, the deceased was the registered owner of a parcel of land whose details are contained in the Petitioner's annexure **GW1(a)** attached to her affidavit filed on 11/5/15. The evidence adduced by Petitioner at the hearing was that the said land parcel **Longonot/Kijabe/Block 3/1012** was transferred into the name of one of the Petitioner's sons **Samuel Ndungu Njuru** after the death of his father. It is claimed that the deceased gave the parcel as a lifetime gift to Samuel. No documentation was tendered to confirm the date and circumstances of the gifting.

15. A search in respect of a parcel of land identified as **Longonot/Kijabe/Block 3/358** and which the

Protestor claimed to belong to her deceased father is also attached to the Petitioner's affidavit above as annexure "GW1b". The said search indicates that the property belongs to a third party – **Peter Maina Ruchathi**.

16. Despite making allegations that the plot **Longonot/Kijabe/Block 3/358** was the property of the deceased, the Protestor did not tender any evidence to controvert the said search. Additionally, no official searches were tendered regarding the parcel identified as **Longonot/Kijabe/Block 3/2144** by the Protestor and it is not clear whether indeed the said property exists and was the property of the deceased.

17. On the question of the properties owned by the deceased at the time of death, it is therefore my finding that the following have been proven:

1. **LONGONOT/KIJABE/BLOCK 3/824**
2. **LONGONOT/KIJABE/BLOCK 3/644**
3. **LONGONOT/KIJABE/BLOCK 3/613**
4. **LONGONOT/KIJABE/BLOCK 3/1012**
5. **KIAMBOGO/ELEMENTAITA/544**
6. **NAIVASHA KABATI/457**
7. **NDARUGU/GAKOE/1619**
8. **NDARUGU GAKOE/1620**

18. On the issue of distribution, the only point of disagreement concerns the sharing of the land at Kiambu and the Naivasha plot. The Petitioner would have plot No. Naivasha/Kabati/457 assigned to her family as well as Ndarugu/Gakoe/1620.

19. Evidence on both sides indicates that the 1st wife and her children including the Protestor exclusively lived and worked the land at Kiambu, while the Petitioner and her children lived in Longonot. The bulk of the Petitioner's evidence was that the deceased distributed his property before death and particularly that the Kiambu land was split between the two houses.

20. The deceased died intestate and secondly, the Petitioner was unable to prove by hard evidence that the 1st house had during the lifetime of the deceased, benefited from plots at Mirera, Naivasha, Hillstop, Kinungi or Longonot. Nor was there any evidence that one of the sons of the Petitioner **Samuel Ndungu Njuru** or the Petitioner's house was allocated the parcel **Ndarugu/Gakoe/1620** in the life time of the deceased. The Petitioner's evidence in this regard was riddled with inconsistencies.

21. Equally, the Protestor's assertion that the **Naivasha/Kabati** plot was also assigned to her deceased sister **Irene Wanjiru** was not confirmed through credible evidence. The Protestor's house however indicated willingness to allow the 2nd house take all the land in the Rift Valley, which is said was over 18 acres.

22. The law applicable to this case is Section 40(1) of the Law of Succession Act which states:

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

23. The house of the Petitioner has 12 beneficiaries. In her revised proposed mode of distribution set out in her submissions, the Petitioner only lists herself and two sons, possibly because **Daniel Mwaura Njuru** has already taken parcel No. **Longonot/Kijabe/Block 3/1012 measuring 2.20ha**. Two parcels of land namely **Longonot/Kijabe/Block 3/613 and 644** are identified in the submissions of the Petitioner as the share of a son **Jeremiah Wanjau Njuru**.

24. She further proposes that parcel No. **Kiambogo/Elementaita/544** should go to her son **Samuel**

Ndungu Njuru while she herself takes parcels no. **Ndarugu/Gakoe/1620, Longonot/Kijabe/Block 3/824** and the **Naivasha/Kabati/457**. She proposes that the 1st house shares parcel No. **Ndarugu/Gakoe/1619** which is said to be no more than 1 ½ acres.

25. It is true that the Gakoe parcels of land have tea bushes but the mode of distribution proposed by the Petitioner is faulty for two reasons. Firstly, she had made no provisions for the listed daughters of the deceased, also lawful beneficiaries of the estate of the deceased, whether or not they have appeared herein. Secondly, it is not equitable as the 2nd family proposes to take more than a lion's share of the estate, ignoring the fact that the 1st wife lived and worked at the Gakoe property in her lifetime. Her body is buried there.

26. Further, annexures **LNNA, B and C** to the Protestor's Replying Affidavit filed on 15th November 2011, indicates that the Protestor's mother, the Protestor and Irene's daughter **Martha Muthoni** own a good number of tea plants at the Gakoe land.

27. In my view, the proposal by the Protestor that the 1st house retains the two parcels in Gakoe, Kiambu sounds reasonable. In view of the foregoing, I will order distribution of the estate of the deceased to be as follows:

1st House

- A. **Ndarugu/Gakoe/619** – Whole share to Loise Njeri Njuru
- B. **Ndarugu/Gakoe/620** – to be shared equally between Stephen Njuru and Martha Muthoni (Children of Irene Wanjiru, the late daughter to the deceased).
- C. **Plot Naivasha/Kabati/457** to be shared equally between Loise Njeri Njuru, Stephen Njuru and Martha Muthoni.

2.

- A. **Longonot/Kijabe/Block 3/644** – to be shared equally by the following daughters of the 2nd house although they have shown no interest in this cause;-

- a. Rachel Njeri
- b. Tabitha Muthii
- c. Lilian Wangu
- d. Margaret Wanjiku
- e. Martha Ngina
- f. Serah Nungari

- B. **Longonot/Kijabe/Block 3/824** – Whole share to Grace Njeri Njuru

- C. **Longonot/Kijabe/Block 3/613** – Whole share to Jeremiah Wanjau Njuru

- D. **Longonot/Kijabe/Block 3/1012** – Whole share to remain with Daniel Mwaura Njuru

- E. **Kiambogo/Elementaita/544** – Whole share to Samuel Ndungu Njuru

28. In conformity with these findings, I direct that a confirmed grant in the name of **Grace Wanjiru Njuru** and **Loise Njeri Njuru** does issue and that the schedule thereto incorporates the mode of distribution as upheld by the court in this ruling.

29. Each party will bear own costs

Delivered and signed on this **23rd** day of **June, 2016**.

In the presence of:-

For the Petitioner : Mr. Nyakundi

For the Protestor : Mr. Ngaruiya

Court Clerk : Barasa

C. MEOLI