



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CIVIL APPEAL 40 OF 2013**

**(PRINCIPAL MAGISTRATE COURT- LIMURU SUCCESSION CAUSE 121 OF 2011)**

**IN THE MATTER OF THE ESTATE OF NGUGI MBIYU ALIAS NGUGI MBIU (DECEASED)**

**JUDGMENT**

**(Appeal from Hon. Acting P.M. Ms. A. R. Ireri on judgment delivered on 15<sup>th</sup> February 2013)**

**CELINAH WACEKE NGUGI .....  
APPELLANT**

**VERSUS**

**TERESIA MUKAMI THAIRU.....1<sup>ST</sup>  
RESPONDENT**

**ESTHER WANJIKU KARANJA.....2<sup>ND</sup>  
RESPONDENT**

**SOPHIA WAMBUI.....3<sup>RD</sup>  
RESPONDENT**

**ELIZABETH NYAMBURA KANJA.....4<sup>TH</sup>  
RESPONDENT**

**PLEADING**

The deceased died on 3<sup>rd</sup> December 2002.

The Appellant filed memorandum of appeal on 12<sup>th</sup> June 2013 on the following grounds;

1. The Trial court erred in law and fact by revoking grant and issuing a new grant yet the court had no jurisdiction to revoke the grant.
2. The Trial court ignored the court order of 10<sup>th</sup> May 2012, that Elizabeth Njeri and Elizabeth Nyambura to adduce evidence and establish their respective marital relationships with Ngugi Mbiyu (deceased) and Alexander Kamau (deceased)

3. The Trial Court erred in allowing the appellant to be cross-examined, against objections by the advocate for the Appellant on alleged marriage of Eliza Njeri when in fact no admissible evidence had been tendered in court in that regard by the Objectors or the Appellant.
4. The Trial Court erred in disqualifying the Appellant from being administrator and was alleged to have come to court with unclean hands and instead appointed Nephath Mbiyu, son to the Appellant and Esther Wanjiru daughter of Elizabeth.
5. The Trial Court erred in law and fact by concluding without any evidence that the share of Kamau Mbiyu be considered in favour of Elizabeth Nyambura who is not administrator of the deceased's estate.
6. The Trial court ignored completely written submissions filed and misconstrued and misapplied the law especially the **Law of Succession Act Cap 160**.

## **BACKGROUND**

According to the Court record and appeal record;

The deceased died on 3<sup>rd</sup> December 2002, he was survived by the widow Celina Waceke Ngugi, 4 sons, 2 daughters and daughter in law and 2 grandchildren.

On 23<sup>rd</sup> August 2011, the widow filed petition for grant of letters of administration in Limuru Court and annexed the Chief's letter of 22<sup>nd</sup> August 2011 listing beneficiaries of the deceased's estate. The grant was issued on 4<sup>th</sup> October 2011 and was confirmed on 17<sup>th</sup> October 2011.

Elizabeth Nyambura, widow to the Deceased's son Alex Kamau Ngugi (deceased) filed an affidavit of protest on 20<sup>th</sup> December 2011. Although, she was included in the list of beneficiaries and she gave written consent to the confirmed grant, she took issue with being excluded in the distribution of land parcel **Limuru/Ngecha/739** and instead she was allotted as sole proprietor 3 shares of **Njokerio Farmers Ltd**. She deposed that she had been allocated her late husband's portion in **Limuru/Ngecha/739** under the original subdivision. She proposed alternative mode of distribution as each of the deceased's sons acquires 0.75 acres and the widow retains 2 acres in her name.

Teresiah M. Thairu, Esther W. Karanja and Sophia W. Kiarie filed affidavit of protest on 5<sup>th</sup> January 2012 and deposed they are daughters of Eliza Njeri Johana co-wife to Celina Waceke Ngugi. They stated that Eliza Njeri Johana is incapacitated and incapable of participating in the proceedings. The administrator filed petition for grant of letters of administration and left out the co-wife and her children. They proposed the suit property Limuru /Ngecha/ 739 should be divided equally between the 2 houses. The Protestors summoned the administrator's family to the Chief Rironi location and they refused as instructed by their advocate vide letter dated 17<sup>th</sup> January 2012.

The Respondent filed a Replying Affidavit and deposed that the protest filed was filed wrongly and incompetent.

The protestors filed Chamber Summons on 14<sup>th</sup> February 2012 to have the Court issue an injunction to stop the administrator intermeddling with the estate which orders were issued on 22<sup>nd</sup> February 2012.

The summons for confirmation of grant and the 2 protests were subjected to a full hearing and Respective Counsel filed submissions. The Trial Court delivered Ruling on 15<sup>th</sup> February 2013 and revoked the grant and reissued it to Nephath Mbiu Ngugi and Esther Wanjiru.

The Trial Court conducted hearing and in its' ruling disqualified Celinah Waceke as she came to Court with unclean hands. The grant was revoked and a new grant issued to Nephath Mbiyu and Esther Wanjiru.

The parties were to agree on distribution by the 2 wives and their children and the share for Kamau Mbiu shall be in favour of Elizabeth Nyambura.

## **ISSUES**

The grounds of appeal are summarized in answering the following questions;

1. Did the Trial Court have jurisdiction to revoke the grant and issue a new grant?
2. Is Elizabeth Nyambura Kanja (4<sup>th</sup> Respondent) a beneficiary to the deceased's estate and if so what is she entitled to?
3. Is Eliza Njeri Johana wife to the deceased and did she and the deceased have the 3 children; 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents?
4. Are Teresia Mukami, Esther Wanjiku, Sophia Wambui beneficiaries of the deceased's estate?
5. If so what is their share of the estate?

## **TRIAL COURT EVIDENCE**

PW1 Assistant Chief, Rironi stated that he was approached by the Appellant and her children and he issued them with a letter to confirm them as family of the deceased. This was after 4 months as they resolved the inclusion of her late son's widow Elizabeth Nyambura Kanja. Finally they agreed and included her as beneficiary to the deceased's estate and she lives on the suit property Limuru/Ngecha/739.

The 1st - 3rd Respondents who claimed to be children of the deceased approached the Assistant Chief. He did not know them. He called elders and summoned the Protestors and Appellants to resolve the dispute. The Appellants' family at first declined, they came later and the Appellant confirmed she knew the Respondents' mother, they lived together from 1940s until 1953 when she left the home. Her son Nephath Mbiyu seemed to recall his step -sisters.

PW2 John Mwaura Chief from Gatimu village stated he issued the Appellants' with a letter to bring to Court. Later the Assistant Chief (PW1) informed him that Respondents claimed to be children of the deceased and their mother wife to the deceased. He summoned parties to his office, one of the Appellants brought him a letter from their advocate that he was not to interfere in the matter as it was in Court. He knew the deceased and the Appellants family but not the protestors.

PW3 Patrick Mbiyu, the Deceased's nephew, stated he was Chief in the area from 1984 -2000. He was born on 1943 and later changed to 1947 and knew the deceased as his maternal Uncle older brother to his mother. He knew the Appellants' family and confirmed the Respondents were children of the deceased by his wife Elizabeth who lived with her husband the deceased from 1947 and left in 1953 and went back to her home with the children.

He claimed that the deceased talked of his other children to him. He knew 2 of the children were twins and 2 children were deceased and they were named after the family members. The witness went and identified the Respondents at the Chief's office. In cross -examination he admitted that the Respondents did not attend the deceased's funeral.

PW4 Peter Mbiyu Githuka a nephew of the deceased stated he was born in 1944 and he found the deceased with 2 wives the Appellant and the Respondents' mother. Eliza Njeri Johana had 5 children 2 boys Mbiyu and Karanja who are deceased and buried in his land, the living children are the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents whom he identified in Court. He said though they left with their mother, in 1957 the children were brought to live with their grandmother for a short time.

PW5 Muniu Kinyanjui lived near his friend Mbiyu Ngugi, the deceased. He married Celinah and then he would visit both wives. Later Eliza left and went to live on her sister's land. The deceased visited her there on his way to and from the firewood and charcoal business that he carried out with his lorry. He could not confirm the protestors' mother's marriage because during 'emergency' formal weddings were

not conducted but elders facilitated dowry negotiations. He accompanied the deceased to visit Eliza at her home. Eliza was his schoolmate. He Left Gatimu and moved to Escarpment in 1962.

PW6 Mary Wanjiku Kinyanjui, daughter to the deceased and her mother is Eliza Njer Johana. She produced birth certificate issued to her in 1994 which was for other purposes. She claimed she met the deceased in Kiambu severally but did not go to his home. The deceased was her father.

PW7 Elizabeth Nyambura Kinyanjui widow to deceased's son Alex Kamau Ngugi (deceased) said she lived with the deceased from 2000 until 2004 when he died. On the same day 20<sup>th</sup> September 2004 she lost their child and he died. She lived on his father's land. She lives with 2 stepchildren. She had been excluded from Succession Cause until she went to the Chief, She protested against the distribution of the estate, she is to move to land parcel 'Njokerio' which she does not know of and it would mean she is removed from her present home.

PW8 Teresia Mukami Thairu was born 1949 ahead of her were Mbiyu, Wanjeri and Karanja (all deceased) there were twins Wambui and Wanjiru born in 1952 and then Wanjiku born in 1960. They left home in 1953 and went with their mother. They came back briefly in 1957 and lived with their grandmother and later went with their mother. Their father (the deceased) visited their home up to 1985. She did not know of his death until in 2011.

PW9 Esther Wanjiru stated that the deceased was her father and they lived in Gatimu and left with her mother in 1953. They met with her step -brother Nephath and she helped settle his wife while she worked in Kisumu. Later she met her father in Westlands and he told her that his wives did not treat him as a husband and cook for him, so they would not inherit his property. She would be administrator for her mother's children.

PW10 Celinah Waceke testified she was married to the deceased in 1939 and they had 5 boys Nephath Mbiyu, James Wanjai, Philips Allen Kangethe, Willaim Gitau, Alex Kamau and (deceased) and 2 girls, Serah Njambi, Hellen Wanjiru. The deceased left instructions on how to dispose of his land and she complied. The 5<sup>th</sup> Respondent was not married to her late son Alex Kamau, she lived with him on the land for a year. The Appellant does not get along with her she insults her. She believes she poisoned her son.

With regard to Eliza Njeri Johana, she was married in 1943 and they lived together with the deceased. She had children but she could not recall them as they left the homestead along time ago.

## **DETERMINATION**

This Court cannot interfere with the demeanor of witnesses and credibility of their evidence on appeal as this court did not see or hear from the witnesses directly. This Court can only evaluate the evidence on record and arrive at its own conclusion.

The Trial Court revoked the grant issued 4<sup>th</sup> October 2011 and confirmed on 17<sup>th</sup> October 2011. The Appellant deposed that there was no application for revocation before the Court, the protests were about distribution of the estate only. Under **Section 48 of Law of Succession Act Cap 160**, the application for revocation of grant would be brought under **Section 76 of Law of Succession Act Cap 160** whose sole jurisdiction lies in the High Court. The Court exceeded its jurisdiction under the prevailing law at the time.

Secondly, the process of obtaining the grant and awaiting 6 months before confirmation of grant as prescribed in **Section 71 of the Law of Succession Act cap 160** was not complied with. In the absence of reasonable circumstances to warrant the Court to grant confirmation of the grant within 2 weeks, it was irregular, illegal and invalid to issue the grant on 4<sup>th</sup> October 2011 and confirm it on 17<sup>th</sup> October 2011 without set out facts on the urgency to confirm the grant before 6 months.

Thirdly, the grant was revoked and a new grant was issued to the Appellant's son and Daughter in law's step-daughter. The Appellant was left out as she was alleged to have come to Court with unclean hands. She failed to disclose to the Court the existence of her co- wife Eliza Njeri Johana and her children 1<sup>st</sup> 2<sup>nd</sup> & 3<sup>rd</sup> Respondents. From the evidence above it is not disputed that the Appellant was married in 1939, her co-wife was married in 1943 and they left in 1953. She did not know their whereabouts, she had no contact with the family, they did not attend her late husband's funeral, by their own admission, they knew of his death, 9 years later; in 2011 when the 3<sup>rd</sup> Respondent saw the notice in Kenya Gazette. Surely, how was the Appellant to disclose the other family when they were not in contact and she did not know where they were? In my opinion the Appellant disclosed to the best of her ability what she knew at the time. She was candid that during her testimony she disclosed the truth; she knew her co –wife that Counsel had to interject to stop her adducing evidence for the benefit of the Protestors. From the above facts, the Appellant did not come to Court with unclean hands.

With regard to the issue whether Elizabeth Nyambura Kanja, 5<sup>th</sup> Respondent is a beneficiary of the deceased, the uncontroverted evidence on record is that she met Alex Kamau Ngugi, son to the Appellant (deceased) and lived with him from 2000 -2004. On 20<sup>th</sup> September 2004 she gave birth to their baby girl who died on the same day Alex Kamau Ngugi died. She said she lived on the property since then. She was involved in his funeral and the Eulogy produced as exhibit she was his wife. The Appellant contends that the 5<sup>th</sup> Respondent was not married she has no children with her deceased son.

The 5<sup>th</sup> Respondent did not establish any form of marriage; customary or statutory marriage with the deceased. They did not contract a Kikuyu customary marriage as envisaged by **Eugene Cotran in "The Restatement of African Law"** which outlines the essentials of a valid marriage under Kikuyu customary Law are; namely, capacity to marry, consents of the parties, 'ngurario' ceremony, 'ruracio' and commencement of cohabitation. The 5<sup>th</sup> Respondent description from the Eulogy reads as follows;

***"He got married to Ngonyo Mutangiri and they wereblessed with 2 children D N and S W. They later separated and afterwards he got another lady Elizabeth Waceke whom he lived with and they were blessed with a daughter who was born at the same day he died 20<sup>th</sup> September 2004. Her name is S W."***

This is not evidence of marriage by 5<sup>th</sup> Respondent to the deceased's son. A presumption of marriage cannot be inferred as it is on the basis of long cohabitation and reputation. They lived together for only 4 years. In the absence of any evidence of some form of marriage to the Deceased's son Alex Kamau, her claim as beneficiary to the deceased's estate shall fail. Alex Kamau Ngugi's share of the estate shall be bequeathed to his children D N and S W.

With regard to Eliza Njeri Johana, it is on record that she was wife to the deceased, the Appellant stated that she knew her and they lived together with her late husband from 1947. She left the homestead with her children in 1953. The Appellant stated she was married in 1939 and her co-wife in 1943. There were no formal ceremonies during that period of emergency except payment of dowry. Therefore the issue of a Kikuyu customary law may not arise due to admission by the Appellant as to Eliza Njeri Johana's claim through her children 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents.

The Court noted with concern that the Trial Court's proceedings disclosed as follows;

***"Further evidence ought to be adduced by Elizabeth Njeri to establish whether she and her children are valid parties to this suit simply stating so is not sufficient. The same should apply to Ms Elizabeth Nyambura in that her relationship with the deceased's son in this family one Alexander Ngugi"***

Thereafter Elizabeth Njeri alias Eliza Njeri did not attend Court, she did not testify and although it was stated in evidence she suffered a stroke and she resides in Lari, the facts of her identity as wife to the deceased was not established by Identity card and/or photographs, her medical status was not confirmed by official documents e.g. medical report. Therefore, she did not tender evidence to establish if she and

her children were valid parties to this Case.

The evidence by PW1 and PW2 local administrators did not know of these parties until they visited their offices and laid claim to the deceased's estate in 2011. PW3 and PW4 nephews to the deceased stated they knew the Respondents, the Court questions their credibility, they were young when the deceased had both families, yet in their testimony they admit the Respondents and their mother left in 1953, clearly they lost touch since then and over the years. How could they identify them in 2011 at the Chief's office?

Assuming, the 1<sup>st</sup> 2<sup>nd</sup> & 3<sup>rd</sup> Respondents children of Eliza Njeri Johana are valid parties to the suit and beneficiaries of the deceased's estate; if they lived with the deceased from 1947-1953 what proof is there to confirm they are biological children of the deceased? Mary Wanjiku annexed a birth certificate issued in 1994 with name of deceased as father and name of Eliza Njeri as mother, yet 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents moved out in 1953 and admitted they lost touch with their father either 1971 or 1985 how then was the birth certificate lawfully obtained without the father's knowledge and or consent?

The evidence on record confirms the Respondents left deceased's home in 1953, it is not clear that the deceased contacted them or if so he did so continuously as they did not know of his death in 2002. They did not attend his funeral and did not realize they are beneficiaries of his estate until 9 years later in 2011.

Why would the Respondents pursue beneficial interest from the deceased's estate when they made no effort to contact and remain in touch with their father, the deceased? How come they did not know of his death and attend his funeral if they are his biological children? How come they learnt of his death 9 years later if they were in touch? Could this be a case of claiming beneficial interest in the deceased's estate by the advent of Constitution 2010 that allows equal benefit and protection of the law and non discrimination to all persons as opposed to Kikuyu Customary law where daughters who were married did not inherit property from the father as they would be catered for in the husband's family?

Suffice is to state that every civil case shall be proved on a balance of probability. **Section 107 of the Evidence Act cap 80** prescribes;

*“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist.”*

Eliza Njeri Johana did not prove she is the one married to the deceased and that she is alive but sick and the Respondents are children from the deceased. The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents have to prove they are all biological children of Eliza Njeri and Ngugi Mbiyu (deceased) and therefore are dependents under **Section 29 of Law of Succession Act Cap 160**.

**Section 28 of Law of Succession Act provides;**

*“In considering whether any order should be made under this part, and if so what order, the Court shall have regard to;*

*...the conduct of the dependant in relation to the Deceased.....”*

The Respondents may have been neglected when young and left with their mother, they became adults, there is no cogent evidence they remained touch and contact with the deceased. If they did, they would have known when he died in 2002, they would have attended his funeral which they did not and laid claim to his estate immediately and not 9 years later after they saw the notice in Kenya Gazette. This conduct of the dependents in relation to the deceased is not deserving of reasonable provision from his estate. The Court is not sure from evidence they are dependents as the deceased's paternity was not proved.

## **COURT ORDERS**

- 1. In the absence of sufficient evidence to establish the Respondents' claim as valid parties to**

deceased's estate this Court upholds the appeal sets aside the orders of the Trial Court of 15<sup>th</sup> February 2013.

2. A new grant to issue to the Appellant Celinah Waceke Ngugi and her son Nephath Mbiyu
3. The Trial Court exceeded its jurisdiction under the prevailing law at the time Sections 48 & 49 of Law of Succession Act cap 160
4. Elizabeth Nyambura Kanja did not prove her marriage to the Deceased's son Alexander Kamau Ngugi and she is not a beneficiary of his estate. The deceased sons' s share of his estate should be held by his children D N and S W
5. Eliza Njeri Johana did not provide evidence of identity and marriage to the deceased and her claim to the estate of the deceased is not established
6. Teresiah Mukami Thairu, Esther Wanjiku Karanja and Sophia Wambui did not prove to be valid parties to this suit; biological children of the deceased.
7. The administrators to exercise statutory duties under Section 83 of Law of Succession Act and file summons for confirmation of grant in 90 days.
8. Any aggrieved party may file protest
9. Each party to bear its own costs.

DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 20<sup>TH</sup> DAY OF JUNE, 2016

**M.W. MUIGAI**

**JUDGE**

*In the presence of*

Mr. Githuka for the Applicant

Mr. Mugo for the Respondent: I am applying for stay of execution of 45 days to appeal to Court of Appeal.

**COURT:** The application for stay of execution is denied.

**M.W. MUIGAI**

**JUDGE**