



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
SUCCESSION CAUSE NO. 36 OF 2014
FORMERLY NAKURU SUCCESSION CAUSE 436 OF 2010
(Formerly Naivasha CM's Succession cause No. 76 of 2005)

In the matter of the estate of Maiko Githinji Gateri.....DECEASED
JACKSON THANGWA GITHINJI.....PETITIONER
-VERSUS-
LUCY WAMBUI GITHINJI.....OBJECTOR

R U L I N G

1. This is an old Succession Cause, was filed in the Senior Principal Magistrate's Court Naivasha (as it then was) in 2005. It was filed by **Jackson Thangwa Githinji** the sole surviving son of the deceased **Maiko Githinji Gateri**, by his deceased first wife **Jane Wambui Githinji** who predeceased him. The deceased herein died in September 1999.
2. A grant issued to the Petitioner was not confirmed as he prayed in 2006 due to a protest filed by the 2nd wife of the deceased **Lucy Wambui Githinji**. Instead in its ruling on the objection, delivered on 4/5/2006, the court allowed the application (filed on 16/10/2005) and issued a grant in the joint names of and the Petitioner and the second wife of the deceased (hereinafter 1st and 2nd Petitioner).
3. Subsequently, there was a hiatus and the said grant could not be confirmed as prayed (application filed on 6/11/2006) as the 2nd Petitioner filed a second protest on 16th November 2006. Thereafter, the parties requested the court to transfer the cause to the High Court in Nakuru, citing lack of pecuniary jurisdiction by the lower court. Nothing much appears to have happened before the High Court in Nakuru. When this court was established at Naivasha in 2014, the suit was transferred here.
4. Following family consultations pursuant to the court's directions on 18/12/2014, parties reported that the list of beneficiaries was agreed as follows:-

1. Children of the 1st house of Jane Wambui Githinji

- a) Jackson Thangwa Githinji (1st Petitioner).

- b) Lucia Wambui Gateri (1st Widow of the deceased son of the first wife)
- c) Mary Wanja Gateri (Second widow of the deceased son of the first wife)

2. Second House of Lucia Wambui Githinji 2nd Petitioner – widow

- a) Teresia Nyambura Githinji
- b) Samuel Gateri Githinji
- c) Peter Wanyeki Githinji
- d) Susan Wairimu Githinji
- d) John Gituro Githinji
- f) Jane Wangui Githinji
- g) Dorcas Nyamweya Githinji
- h) Mary Wanjiku Githinji
- i) Sabina Itheri Githinji

The ACK St. Michael Thithino was said to be a Purchaser/beneficiary.

5. This put paid some of the earlier affidavits filed by parties contesting the identity of the bona fide beneficiaries of the estate of the deceased. Also agreed upon were the properties constituting the estate of the deceased. Two parcels of land at South Lake Naivasha, and in Njabini respectively had been agreed upon.

6. An additional parcel in Gatamaiyu was confirmed in the affidavit filed in support of the fresh Summons for confirmation of grant filed on 14/10/2015 by second Petitioner. She initially had offered to confirm the existence of the Gatamaiyu property. Two subsequent affidavits were filed by the 1st Petitioner and entitled as affidavits of protest, pursuant to the court's direction on 16/2/2015 that the parties should file affidavits to resolve issue of distribution

7. In addition to the 3 agreed land parcels, the 1st Petitioner's affidavits refer to other moveable and immovable properties which he states were part of the estate of the deceased. The latter include land parcels, motor vehicles, and cash in bank, the existence and particulars of which no tangible proof was proffered. The agreed properties are therefore:

1. L.R. NAIVASHA SOUTH LAKE/396
2. L.R. NO. NYANDARUA/NJABINI/844 (KIANDEGE)
3. PLOT NO. 1897 GATAMAIYU DEVELOPMENT CO. LIMITED

8. It is true as the 1st Petitioner has asserted in his affidavits that his Summons for confirmation of grant filed in November, 2006 was still pending when the 2nd Petitioner filed for confirmation on 14/10/2015. This duplication possibly arises from the concerted quest by either Petitioner to have an upper hand in the question of confirmation and distribution of the estate. Seemingly they could not move the court jointly.

9. Be that as it may, both Petitioners desire the confirmation of the grant issued to them jointly in 2006. I will consider all material contained in affidavits filed since November 2006 regarding the question of

distribution; whether filed in support of summons for confirmation of grant or in “protest.”

10. The position taken by the 1st Petitioner is that the deceased had settled the respective families on two different portions of land: the 1st family on Naivasha South Lake and the 2nd at Njabini, respectively. That the 1st wife had participated actively in the acquisition of the Naivasha land before the 2nd Petitioner married the deceased. That it was the express desire of the deceased that each family inherits the land parcels on which he had settled them during his life time.

11. The 1st Petitioner further depones that his mother’s remains are buried at the Naivasha land while the deceased’s remains were interred at Njabini. He offers that in addition to the land at Njabini, the 2nd Petitioner can have the Gatamaiyu Plot. He also asserts that the 2nd Petitioner in the cause of her cohabitation with the deceased in his sunset years, was a beneficiary of many gifts in the form of movable and immovable properties. That subsequent to his demise, she inherited several movables including motor vehicles. That most of her children are independent and do not reside at Njabini, where the 2nd Petitioner lives. Finally he contends that a portion of the Naivasha land parcel measuring 0.5 acres had been “apportioned” by the deceased to **ACK St. Michael Thithino**.

12. The 2nd Petitioner disputes the latter claim, and contends that, if any such transaction was entered into, it was done by the 1st Petitioner without consulting her and her children. She too claims that a widow of one deceased’s son, **Mary Wanja Gateri** received a gift of 12 acres of land at Karati from the deceased. Further, that the 1st Petitioner was also a beneficiary of immovable property in Nakuru, courtesy of the deceased.

13. Her position, to which all her children consent is that the three land parcels in Naivasha, Njabini and Gatamaiyu all be shared equally between the two houses. The reason given for this is that, the land in Naivasha is larger at 9.81 acres, as compared to the Njabini land at 1.3 hectares, and further that the value of the former stands at about Shs. 190 million.

14. The 1st Petitioner’s submissions reiterate the said Petitioners affidavits and urge the court to distribute the assets of the estate in accordance with the wishes of the deceased. And that, under Section 40 of the Law of Succession Act, each house should be considered as a unit to forestall conflict between them. For the most part, the 2nd Petitioner’s submissions repeat depositions contained in the said Petitioners affidavit. On the law the court was urged to be guided by Section 40 of the Law of Succession Act. Citing the case of **Re Estate of John Musambayi Katumanga (Deceased) [2014] eKLR** and **Virginia Wanjiku Kinuthia –Versus Muthoni Kinuthia [2014] eKLR** on the principle of equal distribution, the 2nd Petitioner proposed an equitable distribution.

15. I have considered the affidavits filed as well as the submissions. The deceased herein died intestate. He was polygamous in the true sense of the word, and seemingly considered himself as such. Although he admittedly settled his two families in Njabini and Naivasha respectively, it is difficult from the rival depositions of the parties to discern what his true wishes were regarding the inheritance of his net estate.

16. There is no doubt that the law applicable in this case is Section 40 of the Law of Succession Act, which states:-

“1) 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.

2) The distribution of the personal and household effect and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Sections 35 to 38.”

17. I have reviewed the two decisions cited by Mr. Njuguna for the 2nd Petitioner, which both made reference to the famous case of **Rono Versus Rono [2005] eKLR**. Although the two learned judges of the High Court in the authorities cited by the 2nd Petitioner gave consideration to the principle of equality as encapsulated in Section 40 of the Law of Succession Act, it seems that there were shades of differences concerning the primacy of the principle of equality in the distribution of the estate of deceased person.

18. For my part, I am more inclined to agree with **Ngaah J** when he states in the **Kinuthia Case** in reference to **Rono –Versus- Rono [2005] eKLR**. that:

“It is clear from this (Rono) that equality as a decisive factor in the distribution of a net estate is ruled out; it is equally clear that in this exercise of distribution of an estate, the court has discretion to consider such other factors as may be necessary for instance the number of children in each house and their station in life.”

19. This means that Section 40 of the Law of Succession Act leans more towards equity than an equality of surgical precision, which can result in distortions in distribution, and hence injustice. This in my humble view is what **Omollo J** was advocating in **Rono and Rono [2005] eKLR**. And it is imperative to quote his words fully:-

“I had the advantage of reading in draft form the judgment prepared by Waki, J.A., and while I broadly agree with that judgment, I nevertheless wish to point out that I do not understand the learned Judge to be laying down any principle of law that the Law of Succession Act, Cap 160 of the Laws of Kenya, lays down as a requirement that heirs of a deceased person must inherit equal portions of the estate where such deceased dies intestate and that a judge has no discretion but to apply the principle of equality as was submitted before us by Mr. Gicheru. I can find no such provision in the Act.

My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has discretion to take into account the number of children in each house. If Parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each hose be taken into account.

Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in a case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.”

20. In the present case the 2nd Petitioner has expressed willingness to share equally with the 1st house all the agreed assets of the estate of the deceased. She had more children (10), compared to the 3 surviving children in the family of the 1st house. Secondly, the land in Njabini has a lower acreage than the Naivasha South Lake property (3 odd acres against 9 odd acres, respectively). The acreage of the Gatamaiyu plot is unknown but it is unlikely that a plot would measure upwards of an acre. There can be no argument that land in Naivasha South Lake has rapidly appreciated in value in comparison to land in Njabini or the plot at Gatamaiyu.

21. Hence to my mind, leaving the 2nd Petitioner with these two latter properties only would be a travesty of justice. Moreso because there was no evidence tendered to prove that the first house, or the 1st wife of the deceased acquired the Naivasha property as alleged by the 1st Petitioner.

22. It may well be that either side of the family received gifts *intervivos* from the deceased. But there being no firm proof beyond mere assertions, the court cannot take such alleged gifts into account. This also applies to the alleged sums of money belonging to the first wife which were supposedly “inherited”

by the deceased in an undisclosed succession cause, and which monies the 1st Petitioner now claims.

23. No proof of the existence of the said monies was placed before the court. Nor the confirmed grant in the alleged succession cause in respect of the first wife. Besides, if the deceased received such alleged sums in respect of a different succession cause, this cause is hardly the forum to turn back the clock.

24. The deceased son of the first wife was known as **Zacharia Gateri Githinji**. His two widows **Mary Wanja** and **Wambui Gateri** have been accommodated in the deposition of the two parties differently. While the 1st Petitioner in his 2006 Summons to confirm the grant did not make provision for them, in subsequent affidavits he proposes that they only share only with him the alleged sum of Shs. 232,539.30 said to have come from the estate of the first wife. He proposes to take for himself the entire land parcel at Naivasha. Such a proposal is clearly not equitable.

25. For her part, the 2nd Petitioner proposes that the said widows share equally within the first house, half of the estate of the deceased going to that house. As stated earlier, the alleged monies from the 1st wife's account or estate have not been established. Secondly, even though under Section 40 each polygamous house shares equally of the estate, there must be equity too within the houses. That is the import of the provisions of Section 35 of the Law of Succession Act.

26. Thus, reviewing all the available material, I will distribute the estate of the deceased in the following manner:-

1ST HOUSE

NAIVASHA SOUTH LAKE 396/3

Share

- | | | |
|-----------------------------|---|------------|
| a) Jackson Thangwa Githinji | - | 1.55 acres |
| b) Mary Wanja Gateri | - | 1.55 acres |
| c) Wambui Gateri | - | 1.55 acres |

NYANDARUA/NJABINI/844

Share

- | | | |
|-----------------------------|---|---------|
| a. Jackson Thangwa Githinji | - | 0.21 Ha |
| b. Mary Wanja Gateri | - | 0.21 Ha |
| c. Wambui Gateri | - | 0.21 Ha |

GATAMAIYU PLOT NO. 1897

Wholeshare

- | | |
|-----------------------------|------------------|
| a) Jackson Thangwa Githinji | |
| b) Mary Wanja Gateri | To share equally |
| c) Wambui Gateri | |

2ND HOUSE

NAIVASHA SOUTH LAKE 396/3

Share

a) Lucy Wambui Githinji	-	0.423 acres
b) Teresia Nyambura Githinji	-	0.423 acres
c) Sabina Itheri Githinji	-	0.423 acres
d) Mary Wanjiku Githinji	-	0.423 acres
e) Samuel Gateri Githinji	-	0.423 acres
f) Peter Wanyeki Githinji	-	0.423 acres
g) Mary Nyakayu Githinji	-	0.423 acres
h) Susan Wairimu Githinji	-	0.423 acres
i) John Gituro Githinji	-	0.423 acres
j) Dorcas Nyamweya Githinji	-	0.423 acres
k) Jane Wangui Githinji	-	0.423 acres

NYANDARUA/NJABINI/844/KIANDEGE

Share

a) Lucy Wambui Githinji	-	0.059 Ha
b) Teresia Nyambura Githinji	-	0.059 Ha
c) Sabina Itheri Githinji	-	0.059 Ha
d) Mary Wanjiku Githinji	-	0.059 Ha
e) Samuel Gateri Githinji	-	0.059 Ha
f) Peter Wanyeki Githinji	-	0.059 Ha
g) Mary Nyakayu Githinji	-	0.059 Ha
h) Susan Wairimu Githinji	-	0.059 Ha
i) John Gituro Githinji	-	0.059 Ha
j) Dorcas Nyamweya Githinji	-	0.059 Ha

27. The above distribution has considered that, on the face of it, the deceased was a fairly prosperous person. As the last widow residing with the deceased at the time of his death with her children, the 2nd Petitioner must have benefitted from other outgoings and profits of the estate. Her children said to be minors in 2006 are now adults. And furthermore, she was entitled under the law to keep for herself all the chattels of the deceased in the matrimonial home, including the dwelling house, and possibly farming machinery.

28. Regarding the 1st Petitioner's assertions that a parcel equal to 0.5 acres at Naivasha was bequeathed to **ACK Thithino Church**, these were not firmed up through evidence. It is not clear how the said church came to be listed among beneficiaries of the deceased. And needless to say, any transactions purporting to pass title in the property which is part of the estate of a deceased person before the grant is confirmed is a nullity. That position requires no legal authority. As such, this court did not and cannot make any provision for a beneficiary that is evidently a stranger to the estate of the deceased.

29. The grant will be confirmed in accordance with the distribution ordered. I direct, in the interest of justice, that a copy of the confirmed grant be served upon the two widows of the **Zacharia Gateri Githinji**, (namely **Mary Wanja Gateri** and **Wambui Gateri**) by the 2nd Petitioner and a return of service be filed in this court within 21 days of today's date, to confirm compliance, and brought to the attention of the Deputy Registrar. Parties will bear own costs.

Delivered and signed on this **22nd** day of **July**, 2016.

In the presence of:-

For the Petitioner : Mr. Otieno holding brief for Mr. Muyala for the 1st Petitioner

Miss Kithinji holding brief for Mr. Njuguna for 2nd Petitioner

Court Clerk : Lilian

C. MEOLI

JUDGE