



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**SUCCESSION CAUSE NO. 3413 OF 2003**

**TERESIAH WAGACHIRU NDITU.....1<sup>ST</sup> APPLICANT**  
**HANNAH WAIRIMU NJENGA.....2<sup>ND</sup> APPLICANT**  
**SUSAN NDURA MACHARIA.....3<sup>RD</sup> APPLICANT**  
**MONICAH WANJIRU NDUNGU.....4<sup>TH</sup> APPLICANT**  
**PETER KARANJA MWAURA.....5<sup>TH</sup> APPLICANT**

**VERSUS**

**JACOB NJOGU WAINAINA.....RESPONDENT**

**RULING**

Before me is a Summons dated 20<sup>th</sup> August 2004 filed by G.K. Gatere & Co. advocates on behalf of five applicants. The five applicants are said to be dependants of the deceased. The respondent is Jacob Njogu Wainaina, the executor of the estate.

The summons is purported to have been brought under Section 26 of the Law of Succession Act (Cap 160). It seeks for orders that, as the grant of letters of administration to the estate of Nditu Kihaguru, who died on 22<sup>nd</sup> August 2003, had not been confirmed, such reasonable provisions be now made for the applicants as dependants of the deceased and of his net estate as the court deems fit. The applicants also seek for costs of the application.

The summons is supported by an affidavit sworn by one of the applicants, Hannah Wairimu Njenga, on 20<sup>th</sup> August 2004. The summons is opposed, and an affidavit sworn by Grace Njeri Nditu on 28/4/2005 was filed, in opposition to the application. The said Grace Njeri Nditu depones in the replying affidavit, that she is the second wife of the deceased.

When the summons came up for hearing on 21/2/2006,

Mr. Gatere, counsel for the applicants, submitted that the deceased had a polygamous family. The deceased made a written will which gave only one of the two houses all the assets of the estate, leaving out the other house. Therefore, the dependants of the deceased in the other house want to be given reasonable provision from the estate. Mr. Gachoka for the respondent opposed the application, on the

ground that, each of the two houses had separate land and therefore his clients' position was that the will of the deceased be enforced.

I have considered the summons and documents filed in this cause. The petition for probate with written will was applied for by the respondent herein as executor of the will on 2/2/2003. The dependants of the deceased were listed in the petition as John Kihaguru Nditu, Isaac Mbugua Nditu, Samuel Mwaura Nditu, Monica Wanjiru Mwaura, Sarah Wambui Nditu, Alice Njanja Nditu and Grace Njeru Nditu. The grant of probate herein was issued by the court on 12<sup>th</sup> February, 2004.

The petition for grant of probate was based on the will of the deceased Nditu Kihaguru, dated 28<sup>th</sup> September 2002. I have perused the will. In the said will, the deceased bequeathed his land Githunguri/Githunguri/2065 measuring 3.0 acres to his children and wife. They are John Kihaguru Nditu, Isaac Mbugua Nditu, Samuel Mwaura Nditu, Monicah Wanjiiru Mwaura, Sarah Wambui Nditu, Alice Njanja Nditu and Grace Nditu (wife). He specifically stated in the will that if his three daughters, Monicah Wanjiru Mwaura, Sarah Wambui Nditu and Alice Njanja Nditu got married, they would not inherit from the said land. He further stated in the will, that his first wife, whose name was not specified in the will, should not inherit anything as she left him in 1957 and committed adultery and resided in Nakuru, and had her own property.

From the evidence before me, the facts are not on dispute. The deceased had two wives. The first wife was staying away from the deceased, as at the time of death. The deceased wrote a will before death, bequeathing all his land at Githunguri to this second wife and her children. The applicants now claim that their disinheritance by the deceased, through a will, is improper as they were dependants. That the deceased did not give the first wife any land or asset from this estate.

From the facts before me, I find that, though Teresiah Wangachiru Nditu and the deceased stopped staying together from 1957 or 1958, they never divorced. Therefore basically they remained husband and wife.

This application was brought under section 26 of the Laws of Succession Act. That Section provides, inter alia, that where in the opinion of the court, the disposition of the deceased by way of a will does not make a reasonable provision for a dependant, the court may order such reasonable provision as the court thinks fit for that dependant out of the deceased's net estate.

Obviously, there are two things here. Firstly whether somebody is a dependant. Secondly whether the deceased has not made reasonable provision. Dependency is defined under Section 29 of the Law of Succession Act. The relevant part of the section provides –

**“29. For the purposes of this part ‘dependant’ means –**

**(a) the wife or wives or former wife or wives, and the children of the deceased whether or not maintained by the deceased prior to his death”.**

It is clear from the above that each wife is a dependant. Each child of the deceased is also a dependant, whether or not maintained by the deceased.

The law does not state at what stage an application like the one before me should be filed.

Having considered the issues raised in this application, I am of the view that the only order I can make at this stage, is to allow the applicants to join in these proceedings, so that the case can proceed and the issue of entitlement to benefit from the estate can be determined on its merits.

In my view, making reasonable provision can only be done when all the facts are placed before the court. The facts will be before the court during confirmation of the grant, when interested parties will either agree on the assets, beneficiaries and mode of distribution, or propose their points of view, and tender evidence for the court's consideration and decision.

I therefore order that the applicants are hereby made parties in the proceedings herein, and will participate in these succession proceedings, as potential beneficiaries. The issues raised in the application for making reasonable provisions for the applicants as dependants, will be determined by the court, on evidence during the confirmation of the grant.

It is so ordered. Costs will be in the cause .

Dated and delivered at Nairobi this 7<sup>th</sup> day of March 2006.

**George Dulu**

**Ag. Judge**