



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.39 OF 2019**

**IN THE MATTER OF ESTATE OF DANSON MUGUI NJOROGE alis**  
**DANSON MIGWI NJORORE alias DANSON MUGWI NJOROGE alias**  
**DANSON MIGWE NJOROGE – DECEASED**

**LUCY NJERI NJOROGE.....APPLICANT**

**-VERSUS-**

**JANE NYAMBURA.....1<sup>ST</sup> RESPONDENT**

**JAMES ALLAN KAMAU DANSON.....2<sup>ND</sup> RESPONDENT**

**EUNICE NJERI KONTULANTI.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. This is a Protest by **Lucy Njeri** a daughter-in-law of the deceased and wife of **Geoffrey Njoroge** (pre-deceased) son of the deceased bringing her action on her own behalf and on behalf of her children. The motion is being considered concurrently with the confirmation of the grant of probate of a written will.
2. The main substratum of the protest is that, the Applicant and her children were left out of the will and not adequately provided for and thus pray the Court to remedy the same.

3. The deceased died living a valid will, wherein he explicitly gave reason why he never assigned any share to the family of **Geoffrey Njoroge** his eldest son that predeceased him. The deceased was of the view that he had adequately provided for him his bequeath **Plot No. 112 Lenginet Settlement Scheme Nakuru** during his lifetime.
4. This protest proceeded by way of viva voce evidence and filed written submissions.

### **Applicants Case**

5. It is the Applicant's case in Submission that, she and her children qualify recognition as dependants under **Section 29** of the **Law of Succession Act**.
6. The Applicant testified that no provision was made for her children by the deceased, despite the Will's assertion of prior provision.
7. That the Application is brought by the Applicant on behalf of the estate of **Geoffrey Dickson Njoroge** and the children of **Mr. Njoroge**. The Applicant is the Administratrix of Mr. Njoroge's estate having been issued with a Grant in **Chuka Succession Cause No. 173 of 2008**. The said Grant is annexed to the Applicant's Further Affidavit deposed to by the Applicant on 16<sup>th</sup> June, 2023.
8. That the deceased will never made any provision for her and her children and that **Section 26** of the **Law of Succession Act** provides that if the Court is of the opinion that the disposition of a deceased's estate as provided by his Will is not such as to make reasonable

provision for the maintenance of a dependant of the deceased, the Court may order that such reasonable provision be made out of the deceased's net estate for the maintenance of that dependant as the Court thinks fit.

9. The Applicant places reliance on the case of **Erastus Maina Gikunu & Another vs Godfrey Gichuhi Gikunu & Another [2016] eKLR**, where the Court observed as follows:

***“...it is important to say here that, although there is this freedom, Section 26 of the Act enjoins the testator to make reasonable provision for his dependants. The Court is permitted, on application and where it is satisfied that the testator has not done so to intervene by making what it deems reasonable provision. The desire of society to protect the family of a testator is the main reason for, not only allowing testamentary freedom, but also imposing certain limitations and protection against disinheritance.”***

10. Further reference is made to the case of **Rono v Rono & Another [2005] eKLR**, the Court of Appeal affirmed the Court's role in rectifying inequities in a Will, emphasizing that dependants are entitled to fair provision.

***“...That would clearly work an injustice particularly in 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 the Act does not provide for that kind of equality.”***

11. That, the deceased's Will lacks specificity. The Will does not set out, in clear detail, the deceased's net assets and liabilities. Further, the Will does not outline how the deceased's properties are to be distributed among his dependants.
12. That the Will fails to identify specific assets or clearly allocate provisions to the children of Dr. Njoroge. This lack of clarity casts doubts on the deceased's intentions and demonstrates insufficient provision for the applicant's family. Courts have routinely held that vague dispositions may result in unfair exclusions, warranting judicial intervention.
13. That, the Lenginet property was acquired by the Applicant's late husband and registered in his name. Further, the Applicant testified that the property alleged to be bequeathed to her children was not in the deceased's ownership.
14. That, the Applicant maintained and discharged the property following the demise of her husband. Letter of Allotment for Plot No. 112 Lenginet Settlement Scheme Nakuru, she evidenced a Charge for the Plot No. 112 Lenginet Settlement Scheme Nakuru, Discharge for the for Plot No. 112 Lenginet Settlement Scheme Nakuru, Loan Payment Receipts for Plot No. 112 Lenginet Settlement Scheme Nakuru, Letter to the Directorate of Adjudication and Letter of Allotment of the Unsurveyed Plot No. 7 on her List of Documents.
15. That, no evidence supports the respondents' assertions that the property belonged to the deceased, nor did they initiate any action to revoke its title. Indeed, the 1<sup>st</sup> Respondent, **Jane Nyambura**, testified

before this Honorable Court that their late father could not bequeath this property since it did not belong to him.

16. That furthermore, the Applicant testified in Court that no provision was made to her children by her late husband's deceased father as alleged in the will, and the property alluded to in the will was registered in her late husband's name and was not owned by the deceased. The Respondents did not provide any evidence to support their assertion that the deceased had adequately provided for the Applicant's children during his lifetime.

17. That, based on the above, it is clear that the disposition of the deceased's estate under his last will and testament did not make reasonable provision for the Applicant and her children as dependants of the deceased, contrary to the provisions of **Section 26** of the Act.

18. That, **Section 26** of the Law of Succession Act allows the Court to make an order for reasonable provision if a dependant is left out or inadequately provided for in the Will. Relevant considerations include the deceased's obligations, the needs and circumstances of the dependant, and any prior support provided. With re **Estate of Phylis Wasuna Kamau (Deceased) (Succession Cause 25 of 2019) [2022] KEHC 3286 (KLR)**, cited to fortify the argument.

19. That, the Applicant has shown she and her children did not receive prior provision from the deceased. Her prior inclusion in her mother-in-law's estate establishes her entitlement in this case, as her husband's share should rightfully pass to her and their children.

20. That, the Respondents have argued against the Applicant's entitlement, asserting ownership over the Lenginet property. However, all ownership records were in **Dr. Njoroge's** name, and no trust arrangement was documented.
21. That the Applicant contends that the Respondent's attempts to claim Dr. Njoroge's property are without merit, noting their refusal to legally challenge the Applicant's title to the property.
22. That this Honourable Court should find that she and her children are entitled to a reasonable share from the estate, as the current will fails to provide for their needs.
23. The Applicant beseech this Honorable Court to find that, the Applicant and her children qualify as dependants under **Section 26** of the Law of Succession Act, And that the deceased's Will inadequately provide for the Applicant and her children as dependants, rendering judicial intervention necessary and that, the Applicant and her children are entitled to reasonable provision from the estate.
24. She therefore prays that the Application dated 3<sup>rd</sup> June, 2024 be allowed as prayed and that this Honorable Court:
- a) *Orders reasonable provision from the estate of **Danson Mugui Njoroge** for the estate of **Geoffrey Dickson Njoroge**, the applicant and her children.*

*b) Directs the respondents to include the applicant and her children as beneficiaries in the confirmation of the grant.*

*c) Awards costs of this application to the applicant.*

### **Respondents Case**

25. The Respondents submit that according to the evidence presented, the late **Danson Mugwi Njoroge** together with his wife had the habit of acquiring land as a couple and thereafter registering the same in the names of their sons. The sons whose names were used in registering ownership of the property would hold the respective property in trust for the other siblings as directed by the parents. In other scenarios, the parents ie the **late Danson Mugwi Njoroge** and his late wife **Rhoda Njoki** would dispose of the said property and utilize the proceeds therein an example being the farm at Sondu Scheme.

26. That, it is notable that the deceased and his late wife used to purchase the said property and register in the name of their children during the period when the said sons were still schooling and without any income and therefore the said sons could not allege that they had purchased the respective assets. Whenever the deceased herein paid for the land rates, the payment receipts would be in the name of the son whose name had been used to register the parcel of land. This however did not mean that the said son was responsible for purchasing the land or paying the land rates. An example was given in respect of a parcel of land that had been acquired being Sondu Roger Farm and which had been registered in the name of one of the deceased's sons but which was being used by the deceased (Danson Mugwi Njoroge) and his late wife (Rhoda Njoki). The said parcel of land was later sold by the late

Danson Mugwi Njoroge and his late wife (Rhoda Njoki) and they utilized the proceeds. Document No. 7, 8 and 9 of the respondents supplementary list of documents depicts the same.

27. That, the deceased and his late wife also purchased the land being Lengenet Settlement Scheme and the same was registered in the name of the Applicant's late husband. It is notable as per Document No. 1, 2, 3 and 4 of the supplementary list of documents that by the time the said parcel was being obtained and registered in the name of the late **Geoffrey Njoroge**, the late Geoffrey Njoroge was still schooling and with no income but fully depended on his parents and therefore he could not have had any money to purchase such a property. It goes without saying therefore that the payment receipts could only bare the name of Geoffrey Njoroge even though his parents were the ones who used to pay for the land rates because the land was registered in his name.

28. That, during the meeting that was held on 10<sup>th</sup> December, 2005 as per document No. 14 in the supplementary list of documents, the late **Rhoda Njoki** was categorical that the Lengenet Farm had been obtained and registered in the name of the late **Geoffrey Njoroge** who was holding it in trust for the other two sons. She stated that if the same was to be sold, then the proceeds of the sale were to be distributed equally among the three (3) sons, i.e Geoffrey Njoroge and his two (2) brothers.

29. That it is notable that the Applicant confirms this to be the position and even admits that she was present during the said meeting. According to

the minutes, the Applicant appreciated the generosity of her parents-in-law and further proposed to pay rent in the South C house as opposed to relocating to her lawful home/house. The Applicant only paid rent when the late Rhoda Njoki was alive but stopped immediately she passed and it took the intervention of the Court for her to vacate the South C house.

30. That when the late **Rhoda Njoki** was alive, the late **Danson Mugwi Njoroge** always utilized the Lengenet Farm in peace. Document No. 25 in the supplementary list of documents is a lease agreement between the late **Danson Mugwi Njoroge** and a tenant by the name **Barton Laraabi** in respect of the Lengenet Farm. However, after the demise of the late Rhoda Njoki, all hell broke loose when the Applicant started frustrating the helpless Danson Mugwi Njoroge. It is notable that the Applicant proceeded to evict the deceased's tenant who had leased the Lengenet Farm and the same is depicted in the letter attached as document 26 in the supplementary list of documents. She later entered into an agreement with the same **Barton Laraabi** and even proceeded to sell the Lengenet farm to him while the deceased was alive. The sale agreement is document 27 of the supplementary list of documents and this was done notwithstanding the wishes by the late Rhoda Njoki as captured in the minutes for 10th December, 2005 and in particular paragraph 3 of the said minutes.

31. That, the Applicant never consulted the two (2) other brothers of her late husband on whether they consented to her selling the Lengenet Farm despite the fact that they were each entitled to 1/3 of the proceeds from the Lengenet farm. She also never shared the proceeds from the farm

with the said brothers-in-law. To date she has never been willing to share the proceeds of the Lengenet farm with the two (2) brothers-in-law despite knowledge of her late mother-in-law's wishes. It is for the said reason that the late Danson Mugwi Njoroge indicated in his will dated 30<sup>th</sup> May, 2016 that the Applicant and her children had been well provided for in his lifetime.

32. That, the Applicant has moved this Court while raising contradicting issues regarding the Lengenet Farm while demanding an inheritance from the deceased's estate.

33. That, the Applicant's late husband was 21 years old and was a student at the University of Nairobi and he fully depended on the parents for an upkeep since he was not employed. The "boom" that the university students used to get from the government was also not sufficient for upkeep and therefore it could not have been used to purchase land as alleged by the Applicant.

34. The Applicant has brought out the issue of the estate of the late **Rhoda Njoki** which has not been distributed among any of the deceased's biological children but which the Applicant wanted to be given when the late Danson Mugwi Njoroge had applied for letters of administration.

35. The Respondent contends that the Applicant was a daughter-in-law to the late Danson Mugwi Njoroge and therefore she is not a dependant by virtue of **Section 29** of the Law of Succession Act.

36. Reliance is placed upon on the case of **In re Estate of Francis Andachila Luta (Deceased) (Succession Cause 875 of 2012) [2022]**

**KEHC 16900 (KLR) (23 December 2022) (Judgment)** which confirms that a daughter-in-law is not a dependant. The Court stated as follows while dismissing protestor's application: -

***"So, what is the situation here? The protestor is not a child of the deceased. She is, therefore, not entitled to anything out of the estate of the deceased herein. She is a daughter-in-law of the deceased, as she was married to his late son" (Emphasis Ours).***

37. The Court went further to state as follows:

***"The protestor is not a child of the deceased. She is a daughter-in-law. In terms of rights or entitlement to a share in the estate, she had none at all. She is not in the same league with the applicant nor the son, Andrew Muchenditsi. Nor any of the other daughters of the deceased. She has zero right or entitlement. It is her children, with her late husband, who have right or entitlement to a share of the estate, by dint of section 41, by way of stepping into the shares of their late father. The protestor can only agitate a claim on behalf of her late husband, and she can only agitate the same upon obtaining a grant of representation to his estate, for it only that grant that would clothe her with authority to speak on behalf of her husband, speaking for her husband without obtaining a grant to his estate amounts to intermeddling into his estate, which is a criminal offence under section 45(2) of the Law of Succession Act. The mere fact that she is his surviving spouse clothes her with no-authority whatsoever to claim that which accrues to her late husband. The protestor has not provided any proof that she holds such a grant with respect to the estate of her husband." (Emphasis ours).***

38. Similarly, the Applicant is a daughter-in-law who has adult children who would have sued on behalf of her late husband. She therefore does not have locus to bring this application.

39. That, it is notable that at paragraph 16 of the Affidavit dated 17<sup>th</sup> November, 2022, the Applicant alleged that the **late Rhoda Njoki** had given her late husband (the **late Geoffrey Njoroge**) the Lengenet Farm. The Applicant proceeded to contradict herself through the supplementary affidavit dated 2<sup>nd</sup> May, 2023 by alleging at paragraphs 7, 8, 9 and 10 that her late husband had purchased the Lengenet Farm. She further states at paragraph 6(e) of her witness statement dated 16<sup>th</sup> June, 2023 that her late husband purchased the Lengenet Farm and another piece of land.

40. The Respondent contends that the Applicant's conduct towards the deceased requires scrutiny with respect to **Section 28 (e)** of the Law of Succession Act.

41. That, from the brief facts of the case, it is clear that the applicant frustrated the late Danson Magwi Njoroge ever since the late Rhoda Njoki's demise.

42. That, this is evidenced by the Applicant's conduct of declining to pay the house rent immediately Danson Magwi Njoroge's wife (Rhoda Njoki) passed on. As if that was not enough, the applicant herein proceeded to evict the late Danson Mugwi Njoroge's tenant from the 30 Acres parcel of land at Lengenet farm and proceeded to sell it to a third party without consulting the late Danson Mugwi Njoroge or the other two sons and

further without caring how her actions would negatively affect the late **Danson Mugwi Njoroge**.

43. That, the Applicant has gone as far as alleging that the deceased hated his biological son (Geoffrey Njoroge) whom he dutifully cared for and even ensured he schooled to university, according to her, whatever the deceased herein did for his late son (Geoffrey Njoroge) did not matter. Indeed the late Danson Mugwi Njoroge hated the late Geoffrey Njoroge as the Applicant would wish the Court to Imagine, then he would never have educated him or even gifted him the plot in Nyeri among other responsibilities which he did towards his late son.

44. That, it is apparent that the Applicant no longer cared about her mother-in-law's wishes regarding the Lengenet Farm and even the issue of the same being held in trust. She never cared whether her actions towards the late Danson Mugwi Njoroge caused him pain and her actions can only be equated to those of a person of hatred towards the deceased,

45. It is the Respondent's submission that the deceased was right not to provide for the Applicant and her children in his Will in the circumstances.

46. That, the Applicant does not have a firm stand on how the late Geoffrey Njoroge purportedly acquired the Lengenet farm. It is notable from the brief facts and the evidence on record that at one point she alleges that her late husband was given the said land as a gift and at another point she alleges that he purchased and was allocated the same and even paid for it. It is imperative to note though that during cross examination,

the witness confirmed that indeed during the meeting which was held on 10<sup>th</sup> December, 2005, her mother-in-law stated that the Lengenet Farm had been obtained by the parents and that the same had been registered in the name of **Geoffrey Njoroge** who was holding In trust for his other two (2) brothers. Interestingly, the Applicant herein really appreciated the action by her parents-in-law in respect of the property that had been bought and which was to pass to the deceased's children. At no point during the meeting did the Applicant herein complain or allege that the Lengenet Farm had been purchased by her late husband or that it belonged to her late husband. The allegation that the late Geoffrey Njoroge had purchased the Lengenet Farm is therefore misconceived and an afterthought whose aim is to hoodwink the Court into giving her double inheritance to the detriment of the deceased's biological children.

47. The Respondents on the other hand maintain that their deceased parents used to purchase property then register in the name of their sons to be held in trust for other children. From the minutes for 10<sup>th</sup> December, 2005, it is evident that the Applicant's mother-in-law whom the Applicant alleges gifted her late husband the 30 Acre Lengenet farm categorically stated that Geoffrey Njoroge was in fact holding the property in trust for the other two sons. The Applicant is seen thanking the late Rhoda Njoki for their action as opposed to objecting to the same.

48. In fact, by the time the deceased herein and his late wife were purchasing the Lengenet Farm and registering it in the name of the late

Geoffrey Njoroge, Geoffrey was a 21-year-old student who depended on his parents entirely and he had no income and so he wouldn't have possibly been in a position to purchase land. The late Darison Mugwi Njoroge utilized the Lengenet Farm until the time the Applicant herein forcefully took it from him and later sold it to Barton Laraabi.

49. The fact that the land rate receipts were always written in the name of the late Geoffrey Njoroge should not be a reason to allege that the late Geoffrey Njoroge had purchased the Lengenet Farm. That, Courts of law have repeatedly held that payment of rates is not conclusive proof of ownership of land. This position was held in **Republic v County Government of Narok & another Ochweri (Exparte Applicant) (Environment and Land Judicial Review Case E002 of 2023) (2023) KEELC 20336 (KLR) (4 October 2023) (Judgment)** where the Court asserted that in order to prove ownership of suit property, parties are required to provide certificate of titles with respect to their particular claims. The Court asserted that the mere fact that a party paid land rates or rent as the case may be does not suffice as proof of ownership of the subject land.

50. That, the Lengenet Farm was purchased by the late Danson Mugwi Njoroge and his late wife the late Rhoda Njoki and the same was registered in the name of the late Geoffrey Njoroge. It is notable that Geoffrey Njoroge was fully depending on his late parents by the time the parcel of land was being bought. The late Danson Mugwi Njoroge kept utilizing the farm when the late Geoffrey Njoroge was alive and even after the demise of Geoffrey Njoroge. According to the law,

payments receipts for land rates can only be issued in the name of the person whose name has been registered of the land documents. This is the sole reason as to why the receipts for payment of the land rates were in the name of the late Geoffrey Njoroge.

51. That this Court should not be misguided into finding that the 30 Acre Lengenet Farm was purchased and owned by the late Geoffrey Njoroge just because his name was used by his parents while securing the land.

52. It's the Respondent's submission that the Applicant is hoodwinking this Court into allowing her application by giving misleading information and that is why she even contradicts her evidence therefore seek that the application dated 17<sup>th</sup> November, 2022 be dismissed with costs to the Respondent.

53. That, **Section 42** of the Law of Succession Act allows parties to consider the previous benefits while dealing with the property of a deceased person and distribution of assets.

54. The Applicant sold a 30 Acre parcel of land which was to be shared equally among 3 sons of one family and kept all the proceeds. It is undisputed that the Applicant forcefully took the land from the deceased who was utilizing it thereby frustrating the late Danson Mugwi Njoroge without any mercy towards him. It should be noted that the late Danson Mugwi Njoroge was utilizing the Lengenet Farm even when Geoffrey Njoroge was alive as per the evidence by the respondents.

55. That the late Rhoda Njoki was clear during the meeting that was held on 10<sup>th</sup> December, 2005 that the Lengenet Farm was to be distributed equally among her three (3) sons even though they had registered it in the name of the late Geoffrey Njoroge who was holding in trust for the other two (2) sons. During the meeting for 10<sup>th</sup> December, 2005, the Applicant was grateful to her parents-in-law for the Lengenet Farm which was to be distributed between her family and the two (2) other sons. It is interesting that she later alleges that the Lengenet Farm solely belonged to the late Geoffrey Njoroge

56. That, the Applicant has solely benefited through her actions in respect of the said Lengenet farm to the detriment of the deceased's other children and it is for the said reason that the deceased stated that she and her children had been provided for thereby stating that his remaining assets would be distributed among his remaining children. The Applicant cannot allege to have been left out when in fact she obtained the biggest share whose value she has declined to disclose to date.

57. The Applicant is the only person who has benefitted from the estate of the deceased amongst all the children of the deceased by virtue of being a wife to the deceased's son. She declined to share the proceeds of the 30 Acre parcel of land at Lengenet despite the wishes of Rhoda Njoki. She even declined to have the current value of the said 30 Acre parcel of land taken and as such she can only be equated to a greedy and selfish person who is out to use any means possible to frustrate everyone to her advantage.

58. As to whether the children of the late Geoffrey Njoroge had been adequately provided for by the late Danson Mugwi Njoroge the Respondents contend that it is evident that the late Danson Mugwi Njoroge and the late Rhoda Njoki who were the parents to the late Geoffrey Njoroge and the respondents herein purchased the 30 Acre Lingenet farm. The said farm was to be divided into three (3) portions and distributed among the applicant's husband and two (2) other sons of the late Danson Mugwi Njoroge
59. That the Applicant proceeded to sell the Lengenet Farm without consent of the other two (2) sons hence going against the wishes of the late Geoffrey Njoroge's mother. She also did not distribute/share the proceeds for the sale of the 30 Acre Lengenet Farm to the other two (2) sons as previously directed by the late Geoffrey Njoroge's mother (the late Rhoda Njoki) as per the meeting for 10<sup>th</sup> December, 2005
60. It is notable that the Applicant declined to divide the proceeds for the Lengenet Farm among the two (2) brothers of the late Geoffrey Njoroge and as such the family of the late Geoffrey Njoroge is the only one which already benefited from the property of the late Danson Mugwi Njoroge and the late Rhoda Njoki.
61. It is for the above reason that the late Danson Mugwi Njoroge stated in his will that the family of the late Geoffrey Njoroge had been provided for during his lifetime.

62. The Respondent submits that validity of the deceased written will is not in contest and thus pray the Application to be dismissed with costs.

### **Analysis and Determination**

63. The question that begs is, whether under the circumstances the Court can interfere with the last testament of the deceased to make reasonable provision for her and her children?

64. This was largely a motion for Reasonable provision and not a contestation of the will, **Section 26** of the Act provides:

***“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the Court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the Court thinks fit shall be made for that dependant out of the deceased’s net estate”.***

65. The Protestors are the daughter in law and grandchildren of the deceased. Such are competent to apply in Court for reasonable provision out of the estate of the deceased. However, of specific and greater value is that whether the application will succeed is a different thing altogether. The Court will therefore determine whether a case for reasonable provision for the protestors has been made.

66. The Applicant, **Lucy Njeri Njoroge**, widow of the late **Geoffrey Dickson Njoroge** (son of the deceased) filed Summons for reasonable

provision dated 17<sup>th</sup> November, 2022. The Applicant has brought this application under **Section 26** of the Law of Succession Act, seeking reasonable provision from the estate of the deceased, **Danson Mugui Njoroge**.

67. The deceased's Will, dated 30<sup>th</sup> May 2016, failed to provide for the Applicant and her children. They are therefore seeking a Court Order for adequate provision as lawful dependants under the Law of Succession Act.

68. According to **Section 27** of the Act provides:

*In making provision for a dependant the Court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.*

69. The discretion of the Court to order for reasonable provision is unfettered, but must be exercised judicially; on consideration of the facts of the case and defined factors and principles of law. The factors to be considered by the Court in the exercise of its discretion are stipulated in **Section 28** of the Act, which provides:

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

- a. the nature and amount of the deceased's property;*
- b. any past, present or future capital or income from any source of the dependant;*
- c. the existing and future means and needs of the dependant;*
- d. whether the deceased had made any advancement or other gift to the dependant during his lifetime;*

- e. the conduct of the dependant in relation to the deceased;***
- f. the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;***
- g. the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant***
- h. The nature and amount of the deceased's property***

70. This is yet another case where the concept of disentitlement arises and the conduct of the dependant asserting entitlement, in relation to the deceased, the general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant comes into focus by the Court.

71. The principle underlying this was stated in the persuasive precedent in **Hughes v National Trustees Executors & Agency Co. Australasia Ltd {1979} 143 (CLR 134)** Gibbs J remarked:

***“The question whether conduct is sufficient to disentitle an applicant to relief must depend not only on the nature of the conduct itself, but also to some extent, on the strength of his or her need or claim to the provision from the Estate of the deceased. The stronger the applicant's case, for relief, the more reprehensible must have been his conduct to disentitle him to the benefit of any provision.”***

72. Furthermore, **In Re K {1921} St R. QD 177 Re Osbourne {1928} St RQD 129** at 131:

***“The onus of proof of disentitling conduct lies on those who resist the application by alleging disentitling conduct, where an allegation of disentitling conduct is made, the Court considers whether, on the balance of probabilities, it***

***has been proven.” What should a Court make of a Testator’s decision in the Will disentitles? Some of his or her direct bloodline dependents? The deliberate choice of the wording Testamentary Freedom in the making of Wills is a concept tied with certain rights in relation to property.***

73. It is important to reiterate testamentary freedom is safeguarded by law and exceptional circumstances would justify blatant disentanglement as occurred in this case. The deceased was explicit that he had provided for his now deceased son. It is undisputed.
74. The deceased left his Will dated 30<sup>th</sup> May, 2016 that did not provide for the Applicant and her children.
75. This was not a contestation of ownership of **Plot No. 112 Lenginet Settlement Scheme Nakuru** but rather that it was acquired by the deceased and registered in his first born son’s name at a time when the said son was a teenager who had no means to acquire the same.
76. The Applicant has not evidenced proof that her deceased husband acquired **Plot No. 112 Lenginet Settlement Scheme Nakuru** without any assistance whatsoever by the deceased.
77. I am equally disturbed that the deceased utilized the Lenginet property until the Applicant evicted the deceased’s tenant and sold the same. The Applicant appropriated all the proceeds of the sale to herself. All this occurred during the deceased lifetime and this being a daughter-in-law and father-in-law relationship would depict lack of respect, arrogance and spite by the Applicant to the deceased.

78. I am persuaded that this is a case where **Section 28 (e) of the Law of Succession Act** applies.
79. I am persuaded of the evidence presented that the Applicants' deceased husband was registered as owner of Lenginet property (Plot No.112) in trust for his other siblings, that upon his demise the Applicant reneged on the trust and sold the entire parcel.
80. The Applicant's conduct towards the deceased and the evidence of bad blood between the Applicants the deceased parents in law gave rise to the provision in the Will indicating the previous bequeath.
81. The deceased was explicit that he left out the Applicant and her children as he had provided for the children of his late son during his lifetime.
82. This Court hereby finds the deceased will dated 30<sup>th</sup> May, 2016 to be valid for execution.
83. The grant of probate of written will dated 8<sup>th</sup> November, 2019 is hereby confirmed. The application dated 17<sup>th</sup> November, 2023 is dismissed with costs.
84. The executor (s) shall forthwith distribute the estate of the deceased strictly as per the written Will within 6 months.
85. Any aggrieved party has leave to appeal within 30 days. The period of leave shall serve as stay against execution of judgment.

It is so ordered.

**Judgment Dated, Signed and Delivered at Nakuru  
On this 19<sup>th</sup> Day of June, 2025.**

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**S. Mohochi  
JUDGE**

**In the presence of:**

Court Assistant – Schola

Murithi holding brief for Kisila for Respondent

M/s Kinyua for Applicant