



REPUBLIC OF KENYA



**Mwangi v Wanyoike & another (Succession Cause 20 of 2018)
[2024] KEHC 166 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 20 OF 2018
CM KARIUKI, J
JANUARY 18, 2024**

BETWEEN

SAMUEL NJOROGE MWANGI PETITIONER

AND

MARY WANGARI WANYOIKE 1ST PROTESTOR

JOHN KIMEMIA MWANGI 2ND PROTESTOR

JUDGMENT

1. The deceased herein Mwangi Kiongo Gakunyi died intestate on 12/12/1986. He was survived by Samuel Njoroge Mwangi, Mary Wangari Wanyoike and John Kimemia Mwangi. The deceased left behind one asset being LR No. Nyandarua/Karati/67 measuring approximately 47 acres. On 26/3/2014, the court issued a grant of letters of administration intestate in respect to the deceased estate to Samuel Njoroge Mwangi and Mary Wangari Wanyoike.
2. The Petitioner then filed a summons for confirmation of grant dated 20/11/2017- where he sought for the grant to be confirmed and for the estate to be distributed as follows: -Samuel Njoroge Mwangi – 17 acres Mary Wangari Wanyoike – 15 acres John Kimemia Mwangi – 15 acres
3. The 1st and 2nd Protestors herein filed an affidavit of protest dated 8/2/2019 where they sought for the estate to be distributed equally as follows: -Samuel Njoroge Mwangi – 15.6 acres Mary Wangari Wanyoike – 15.6 acres John Kimemia Mwangi – 15.6 acres
4. The protest was heard by way of *viva voce* evidence.

Petitioner's Submissions

5. The Petitioner contends that he should get a bigger share by 2 acres as he paid off a loan that was due to the Agricultural Finance Corporation, AFC in respect to the estate property in 1990. It was his



- contention that he redeemed the property after it had been pledged as security by the deceased for a loan he secured from AFC. He therefore secured the only asset of the estate available for distribution with his own finances and in the circumstances, he sought to be compensated with an additional 2 acres.
6. It was asserted that to prove his claim, the Petitioner produced a letter dated 21st July 1989 addressed to his elder brother Peter Wanyoike Mwangi and copied to the rest of the siblings inviting them to AFC offices for a discussion on their father's loan. He also produced a receipt dated 22nd October 1990 showing that he is the one who cleared the loan. That from the two documents it is not in doubt that the deceased had obtained a loan from AFC and had not repaid it by the time of his demise.
 7. Reliance was placed on Section 107 & 108 of the *Evidence Act*.
 8. The Petitioner argued that the Protestors denied that the deceased had a loan but did not produce any evidence that there was no loan and that the land was free of an encumbrance. That his evidence on the loan was uncontroverted.
 9. Further reliance was placed on Section 38 of the *Law of Succession Act*, Succession Cause No. 250 of 2009- *In the Matter of the Estate of Washington Mugo Kigo* and *In the Matter of the Estate of the Late George Cheriro Chepkosiom* Succession Cause No. 16 of 2010 in stating that the court is not bound by the principles of distribution under Section 38 and that the said section is only a starting point. The court reserves the discretion to distributed the estate of the deceased person in a manner that would be fair.
 10. In conclusion, the Petitioner submitted that in the circumstances to achieve fairness the mode of distribution as proposed in the summons for confirmation of grant- should be adopted by the court.

Protestors' Submissions

11. The Protestors submitted that the applicant's argument that he should get a bigger share by 2 acres as he paid a sum of Kshs. 10,000/- on 22/01/1990 to AFC to offset a loan is untenable. That the receipt produced as an exhibit does not bear a parcel number to confirm payment was in respect of a loan charged against the suit property. The applicant did not produce a formal charge and/or a discharge of charge to prove that indeed there was a loan taken against the title for the suit property noting that the existence of such a loan was denied by the Petitioner.
12. Moreover, it was argued that how the amount of Kshs. 10,000/- was translated to 2 acres of land remains a mystery as 2 acres of land within Nyandarua cannot be valued at Kshs. 10,000/-
13. It was asserted that the applicant confirmed that the occupation on the ground by the three beneficiaries is in equal shares and he doesn't occupy the excess of the 2 acres he sought to be awarded in the summons for confirmation of grant. That there was no evidence that the beneficiaries had agreed that he pays Kshs. 10,000 for him to get an extra 2 acres.
14. Lastly the Protestors stated that there were no grounds advanced as to why the court should depart from the mode of distribution provided for under Section 38 of the *Law of Succession Act* and therefore they prayed for the protest to be allowed and for the estate to be distributed equally amongst the 3 surviving beneficiaries. They also prayed for costs.

Analysis and Determination

15. I have considered summons for confirmation of grant, the protest, evidence adduced and submissions filed by parties herein and the main issue that arises for determination centres around the mode of distribution to be adopted for LR No. Nyandarua/Karati/67, the suit land herein.



16. The Petitioner contended that he should get an additional 2 acres over the other beneficiaries making a total of 17 acres because he had repaid a loan that was taken by the deceased in which the suit land was offered as security. On the other hand, the Protestors who are the remaining beneficiaries asserted that the land should be distributed equally i.e. 15.6 acres each and denied any knowledge of the existence of the loan.
17. In oral submissions, PW1 Mary Wangare Wanyoike denied knowing any of any loan paid by the Petitioner for the land. He stated that he had no informed them and that he should not get the 2 acres he sought. In cross examination, she stated that her husband died in 1995 so at the time of the payment of the said loan he was alive but her father in law, the deceased herein was dead.
18. On the other hand, the Petitioner testified that he paid a loan of Kshs. 10,000 for the suit land herein. That the others refused to pay as shown by the letter dated 21/7/1989 addressed to Peter Wanyoike. He stated that the deceased had said that whoever had paid the loan would get an extra 2 acres. During cross examination, he asserted that in 1986, the deceased borrowed Kshs. 100,000. That he paid it in bits amounting to about Kshs 400,000 including interest. That he did not have the receipts but his brothers did not anything.
19. Further, he stated that he paid for all the loan and got the title. That the title was security for the loan. He stated that he had receipts for Kshs. 10,000 dated 22/10/90.
20. Consequently, the Petitioner having alleged that the deceased had taken a loan which he paid in order for the title to be released was sought to prove the allegations by producing two documents that is a receipt dated 22nd October 1990 and a letter from AFC to Peter Wanyoike Mwangi dated 21st July 1989. The receipt indicated that it was from AFC for Kshs. 10,000/- was received from Samuel Njoroge Mwangi A/C Mwangi Kiongo Gakunyi as instalment/interest payment.
21. Further, the letter referenced as no. AFC/23.3/210592/11-02-17 was addressed to Peter Wanyoike from the Branch Manager- AFC Naivasha asking him to call into the branch office on 25th July 1990 in connection with their late father's loan account with them. The letter was also copied to Wanjiru Mwangi and Njoroge Mwangi.
22. Accordingly, it is my considered view that from the evidence produced before court, it appears that the deceased indeed took a loan from AFC. However, what this evidence does not prove is whether the suit land was in any way attached to this loan. It also appears from the Kshs. 10,000 paid by the Petitioner that he had indeed paid Kshs. 10,000 in respect to the loan.
23. However, I find that this single receipt does not prove that the Petitioner paid an amount of Kshs. 400,000 including interest for the loan taken by the deceased. I also find that there is no evidence to prove that the deceased had indicated that whoever pays for the loan should get 2 acres. Unfortunately, Peter Wanyoike and Wanjiru Mwangi, the Petitioner's brother and mother respectively are now deceased who would have also shed more light on the loan was now deceased and representatives from AFC also did not testify to in support of the Petitioner's case. Accordingly, I find that the Petitioner has not produced satisfactory and credible evidence to establish that the deceased's loan was charged against the suit land and that he is thus entitled to the 2 acres he sought.



24. In the end, it is my considered view that the suit land should be distributed as per Section 38 of the *Law of Succession Act* which provides as follows: -

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children”.

25. The provisions of the aforementioned section clearly state that the net intestate estate shall be divided equally among the surviving children. In view of the same, I find that the mode of distribution in the summons for confirmation of grant by the Petitioner should be set aside and that the suit land measuring 47 acres should be distributed equally among the 3 beneficiaries that is:-

- a. Distribution;
 - i. Samuel Njoroge Mwangi – 15.6 acres
 - ii. Mary Wangari Wanyoike – 15.6 acres
 - iii. John Kimemia Mwangi – 15.6 acres
- b. Let each party bear own costs.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 18TH JANUARY 2024

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C KARIUKI

JUDGE

