



**In re Estate of Francis Waithanje Munaithaga alias Waithanje Munaithaga (Deceased)
(Succession Cause 5 of 2018) [2024] KEHC 944 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 944 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 5 OF 2018
LM NJUGUNA, J
FEBRUARY 7, 2024**

BETWEEN

NANCY MUTHONI JAMES APPLICANT

AND

JUNIUS NJUE WAITHANJE RESPONDENT

JUDGMENT

1. The applicant filed summons for confirmation of grant dated 06th August 2020, seeking orders that:
 - a. The grant of letters of administration intestate made to the applicant and the respondent on 11th July 2019 be confirmed;
 - b. The estate of the deceased be distributed according to proposal made by the applicant in the supporting affidavit to the application;
 - c. The Deputy Registrar be authorized to execute all the necessary documents to enable full administration and implementation of the grant;
 - d. The Land Registrar Embu dispense with all original title deeds in respect of the deceased's estate for purposes of implementation of the grant; and
 - e. The OCS Runyenjes police Station provides security during the sub-division of land parcel number Kyeni/Kigumo/2153.
2. The application is supported by grounds deposed in the supporting affidavit, wherein the applicant stated that even though the respondent is her co-administrator, he has been uncooperative in pursuing confirmation of the grant. That the respondent is holding the original title deeds which were nullified through an order of this court issued on 11th July 2019. That given the respondent's behavior, she is sure that once the certificate of confirmation of grant is issued, the respondent will not sign the relevant



documents to enable distribution of the estate, hence her prayers in the application herein. That the deceased was survived by 16 beneficiaries and she proposed the following mode of distribution:

- a. Kyeni/Kigumo/2144
 - i. Nancy Muthoni James- wholly
 - b. Kyeni/Kigumo/2153
 - i. Francis Njeru 0.88 Ha jointly
 - ii. Rose Rwamba Njeru
 - iii. Virginia Igandu Waithanje
 - iv. Madris Marigu Njeru 0.88 Ha jointly
 - v. Catherine Njoki Nyaga
 - vi. Alsipon Muthoni Waithanje 0.88 Ha jointly
 - vii. Anthony Muriithi Waithanje
 - viii. Nicholas Njagi Waithanje
 - ix. James Njeru Waithanje 0.88 Ha jointly
 - x. Mary Wanjagi Waithanje
 - c. Kyeni/Kigumo/2147
 - i. Stephen Nyaga Waithanje-wholly
 - d. Kyeni/Kigumo/2149
 - i. James Njeru Waithanje- wholly
 - e. Kyeni/Kinthithe/T109 &110
 - i. Mutegi Nyaga- wholly
3. In opposition to the summons for confirmation, the respondent filed an affidavit of protest dated 05th October 2022 listing 14 beneficiaries of the deceased. He deposed that some of the beneficiaries named by the applicant in the supporting affidavit are long deceased and should not be included in the distribution of the estate. That the applicant is not a member of the family of the deceased and that she is simply married to one Robert Kariuki Nguru. He proposed the following mode of distribution:
- a. Kyeni/Kigumo/2144
 - i. Johnson Njiru Munaithaga Waithanje- Wholly
 - b. Kyeni/Kigumo/6123
 - i. Nicholas Njagi Waithanje
 - ii. Mary Njagi Waithanje in equal shares
 - iii. James Njeru Waithanje
 - c. Kyeni/Kigumo/6124



- i. Aslibon Muthoni Waithanje
 - ii. Anthony Muriithi Waithanje in equal shares
 - d. Kyeni/Kigumo/6125
 - i. Virginia Igandu Waithanje
 - ii. Catherine Njoki Nyaga in equal shares
 - e. Kyeni/Kigumo/6126
 - i. Francis Njeru Kavuvu- wholly
 - f. Kyeni/Kigumo/2147
 - i. Stephen Nyaga Waithanje- wholly
 - g. Kyeni/Kigumo/2149
 - i. James Njeru Waithanje- wholly
 - h. Kyeni/Kinthithe/T109 &110
 - i. Mutegi Nyaga- wholly
4. The court took viva voce evidence in this matter. PW1 was the respondent who stated that he is a son of the deceased and co-administrator of his estate. He stated that he was issued with a grant of letters of administration on 18th September 2007 and the same was confirmed on 18th June 2009. That the said grant was revoked vide ruling dated 11th July 2019 following an application made by the applicant herein. That the applicant was not included in the succession proceedings because she was not a member of the family and that the deceased subdivided and distributed his property namely Kyeni/Kigumo/46 amongst his sons before he died.
 5. That the property namely Kyeni/Kigumo/2144 was not meant for Stanley Njeru Waithanje though he was buried on the said land. That the applicant was never recognized at the burial as the wife of his brother because she was his worker and lived with him for one year between 1999-2000. That he has allocated the said property to Johnson Njiru as the applicant is a stranger to the estate. That the applicant has 3 children but she already had 2 children before she started living with their deceased brother.
 6. PW2, Kivuti Njuguna stated that the late Stanley Njeru Waithanje was his cousin and he did not have a wife. That the appellant was not living with his deceased cousin at the time when he died but afterwards, she has continued to live on the said land. That according to him, the applicant is married to Robert Kariuki and not to the late Stanley Njeru Waithanje. That the customary rites of marriage were never fulfilled for the alleged marriage.
 7. DW1, the applicant, stated that she is the widow of Stanley Njeru Waithanje who died on 17th January 2000. That she was married to him since December 1996 and they have 3 children together, namely Jane Karimi Njeru, Kenneth Mukundi Njeru and Loise Mukami Njeru. She testified that she lived with the deceased on parcel number Kyeni/Kigumo/2144 and presently she is still living and farming on the same piece of land. That she applied for revocation of the grant, which the court allowed, since she was not considered as a beneficiary of the estate. That in her proposed mode of distribution, she excluded Evans Kamau as a beneficiary because he had already been given property by the deceased.



- That her husband did not leave behind any property when he died and that the estate belongs to her deceased father-in-law.
8. DW2, Stephen Nyaga Waithanje stated that he is a step-brother of the respondent. That himself and the late Stanley did not have titles for their properties which they were given by their deceased father. That the late Stanley was survived by the applicant and her 3 children and they reside on the piece of land given to Stanley by their father. That the applicant was married to Stanley and that he and his mother participated in the customary marriage rites.
 9. The court directed the parties to file their written submissions and both of them complied.
 10. The applicant submitted that the only issue for determination by this court is whether the applicant is the widow of Stanley Njeru Waithanje and whether her children qualify as beneficiaries of the estate. That in its ruling dated 11th July 2019, the court sought to determine if the applicant remarried after the death of Stanley Njeru in the year 2000 and whether her children were his dependants. That the court recorded similar viva voce evidence as the one adduced in the present application before revoking the grant on the basis that the respondent did not disclose that the applicant had not remarried after the death of Stanley Njeru and that her children were proved to be his dependants.
 11. That the respondent has not successfully appealed against the said ruling and the applicant was appointed as co-administrator following revocation of the earlier grant. That the property number Kyeni/Kigumo/2144 is currently registered to Johnson Njiru Munaithaga Waithanje who has no interest in participating in this suit or any other regarding the said property. That the respondent has been attempting to force the said Johnson Njiru Munaithaga Waithanje to disinherit her and her children but the said Johnson is not interested in doing so. It was her submission that she has an equal right over the estate of the deceased, in place of her late husband, as much as all the other children of the deceased. She urged the court to dismiss the protest and confirm the grant since it is stopping the other beneficiaries from enjoying their share of the estate.
 12. The protestor/respondent submitted that the property Kyeni/Kigumo/2144 is the only one in dispute and it is registered to one Johnson Njiru Munaithaga Waithanje. That the property was hived from Kyeni/Kigumo/46 which was in the name of the deceased herein and was subdivided in 1988 for purposes of distribution amongst his sons. That Stanley Njeru Waithanje was one of the sons of the deceased and the applicant was his casual labourer from the year 1999-2000 when he died. That the applicant has been married to Robert Kariuki Nguru and continues to live with him to date. He submitted that 2 of the applicant's 3 children were born long before she started living with the late Stanley and so they are not his dependants. That the applicant's alleged marriage to the late Stanley was not proved through evidence except for DW2 who was openly conflicted about the facts. He urged the court to dismiss the summons with costs.
 13. According to the case made herein above, the issues for determination are as follows:
 - a. Whether the protest raises valid issues of law; and
 - b. How the estate of the deceased is to be distributed.
 14. On the first issue for determination, I do note that the issues raised in the protest as to the legitimacy of the applicant as a wife of the deceased beneficiary, were determined by this court through its ruling dated 11th July 2019. In the said ruling, Judge F. Muchemi exhaustively dealt with the question and held that the applicant herein is a legitimate wife of the late Stanley Njeru Waithanje and her children are his dependants under section 29 of the *Law of Succession Act*. The Judge gave her reasons for the findings and proceeded to order that the grant be revoked on the basis of material non-disclosure of



the fact that there were other beneficiaries not included in the proceedings. She further ordered that all transactions arising from the revoked grant revert to the names of the deceased and the applicant was appointed as co-administrator of the estate of the accused.

15. From the said ruling, it is clear that the issue of legitimacy of the applicant as a wife of the deceased beneficiary was fully determined and I shall not delve any further in to it. This issue is therefore res judicata under section 7 of the *Civil Procedure Act* which provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

16. On the second issue for determination, having determined that the applicant is a beneficiary of the estate of the deceased, she is entitled to inherit as the widow of Stanley Njeru Waithanje (deceased) alongside all the other beneficiaries. It is the respondent’s argument that some of the beneficiaries died before the application was filed. From his list as provided in his affidavit of protest, compared with the list of beneficiaries given by the applicant, only 2 of the beneficiaries are allegedly dead. The respondent alleged this fact but did not prove the same and so this court has no way of knowing if the said allegation is true. According to the applicant, the list of beneficiaries is as listed in paragraph 2 hereinbefore while according to the respondent, the beneficiaries are as listed under paragraph 3 hereinbefore.

17. Pursuant to the ruling dated 11th July 2019, the subsequent transactions done on the estate of the deceased following revocation of the grant were to be cancelled and the property reverted to the name of the deceased. The ruling has not been appealed against and the orders remain in force, not having been reviewed or set aside. This means that the estate of the deceased comprises of the following properties:

- a. Kyeni/Kinthithe/T.109 & T.110
- b. Kyeni/Kigumo/2144
- c. Kyeni/Kigumo/2149
- d. Kyeni/Kigumo/2147
- e. Kyeni/Kigumo/2153

18. Both the applicant and the respondent concur on the distribution of properties numbers Kyeni/Kigumo/2147, Kyeni/Kigumo/2149 and Kyeni/Kinthithe/T.109 & T.110. Regarding property number Kyeni/Kigumo/2153, according to the respondent, the same does not exist but it evolved into or was subdivided into property numbers Kyeni/Kigumo/6123, Kyeni/Kigumo/6124, Kyeni/Kigumo/6125 and Kyeni/Kigumo/6126, for which he proposed distribution as stated in paragraph 3 hereinbefore. Property number Kyeni/Kigumo/2144 is the mainly contested one and the parties have divergent views. The purpose of the ruling of this court dated 11th July 2019 was partly to revert all of the deceased’s property to the name of the deceased. Therefore, property number Kyeni/Kigumo/2153 is available for distribution alongside all the other named properties of the deceased.

19. According to the evidence adduced, both parties stated that the property is in the name of Johnson Njiru Munaithaga. The applicant stated that the said Johnson Njiru Munaithaga did not participate in the cause and is not interested in doing so. This was not controverted by the respondent, neither did he call the said Johnson Njiru Munaithaga as a witness for his case. The applicant stated that she has been residing on the said land together with her children since before her husband, Stanley, died.



20. In the end, I have considered the evidence adduced, the arguments of both parties and the relevant laws, and find that the protest lacks merit. The following orders shall issue:
- a. A certificate of confirmation of grant issued on 11th July 2019, be issued indicating the mode of distribution as follows:
 1. Kyeni/Kigumo/2144
 - i. Johnson Njiru Munaithaga
 - ii. Nancy Muthoni James joint shares
 2. Kyeni/Kigumo/2153
 - i. Nicholas Njagi Waithanje
 - ii. Francis Njeru Kavuvu 0.88 Ha jointly
 - iii. Rose Rwamba Njeru
 - iv. Virginia Igandu Waithanje
 - v. Madris Marigu Njeru 0.88 Ha jointly
 - vi. Catherine Njoki Nyaga
 - vii. Alsipon Muthoni Waithanje
 - viii. Anthony Muriithi Waithanje 0.88 Ha jointly
 - ix. Nicholas Njagi Waithanje
 - x. James Njeru Waithanje 0.88 Ha jointly
 - xi. Mary Wanjagi Waithanje
 3. Kyeni/Kigumo/2147
 - i. Stephen Nyaga Waithanje-wholly
 4. Kyeni/Kigumo/2149
 - i. James Njeru Waithanje- wholly
 5. Kyeni/Kinthithe/T109 &110
 - i. Mutegi Nyaga- wholly
 - a. Following issuance of the certificate of confirmation of grant, the respondent to sign all the relevant documents enabling transfer of the estate to the beneficiaries, within 30 days thereof, failing which applicant shall present all relevant transfer documents to the Deputy Registrar within 60 days of the certificate of confirmation of grant to enable distribution of the estate accordingly; and
 - b. Each party to bear their own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 07TH DAY OF FEBRUARY, 2024.

L. NJUGUNA



JUDGE

.....for the Applicant

.....for the Respondent

