



**Wainaina v Nganga & another (Probate & Administration Appeal  
9 of 2019) [2024] KEHC 3117 (KLR) (3 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3117 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
PROBATE & ADMINISTRATION APPEAL 9 OF 2019**

**J WAKIAGA, J**

**APRIL 3, 2024**

**BETWEEN**

**MARY WANGARI WAINAINA ..... APPELLANT**

**AND**

**WILLIAM MUGO NGANGA ..... 1<sup>ST</sup> RESPONDENT**

**PETER MWANIKI NGANGA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Martha Wanjiru Nganga on 21<sup>st</sup> June 2005 applied for grant of letters of administration in respect of the estate of Nganga Wanjau deceased in her capacity as the wife and named the following survivors: -
  - a. Martha Wanjiru Nganga .....Wife
  - b. Penninah Wangechi Gati ..... Married Daughter
  - c. James Jackson Mwangi ..... Son
  - d. Naomi Wangari Kinuthia ..... Married Daughter
  - e. Grace Waigwaini Njau ..... Daughter in law
  - f. Mary Wairimu Mwangi ..... Married daughter
  - g. Sarah Mugechi Njuguna ..... Daughter in law
  - h. Joyce Wambui Mbugua .....Married daughter
  - i. Francis Wainaina Nganga ..... Son
  - j. Esther Nyambura Nganga ..... Unmarried daughter
  - k. William Mugo Nganga .....Son



- l. Peter Mwaniki Nganga ..... Son
2. The Administrator on 4<sup>th</sup> August 2006 applied for confirmation of the grant herein an proposed the mode of distribution as follows: -
  - a. LOC 16/Ndunyu-chege /1313 already shared by the deceased.
  - b. LOC.1/Kiria-ini/153 to be shared.
    - a. Grace Waigwaini Njau.....1.4 acres
    - b. Serah Mugechi Njuguna..... 3.4 acres
    - c. Francis Wainaina ..... 1.4 acres
    - d. Esther Nyambura .....1.4 acres
    - e. William Mugo .....1.4 acres
    - f. Peter Mwaniki .....1.4 acres
3. On the 17<sup>th</sup> August 2007 Francis Wainaina Nganga Filed an affidavit of protest in opposition to the proposed mode of distribution and stated that the estate of the deceased be distributed as follows;
  - a. LOC 16/Ndunyu Chege /1313
    1. Martha Wanjiru Nganga..... 1.3 acres
    2. Francis Wainaina Nganga .....2.0 acres
  - b. LOC 1/ Kiriaini /153
    1. Serah Mugechi Njuguna ..... 3.7 acres
    2. Grace Waigwaini Njau .....1.8 acres
    3. William Mugo Nganga .....1.8 acres
    4. Peter Mwaniki Nganga .....1.8 acres
    5. Esther Nyambura Nganga .....1.4 acres
4. On the 12<sup>th</sup> September 2006 John Nganga Kinuthia filed an affidavit of protest as a grand son of the deceased being whose mother he named as Naomi Wangari Nganga on the ground that during his life time the deceased had given him 1.4 acres out of land known as LOC.1/Kiriaini/153 as a gift and took possession thereof by constructing a permanent house and developing crops therein.
5. By a Ruling thereon dated 5<sup>th</sup> June 2007 the Court found that the deceased had in his life time given out his land though without clear record and found for the Protestor and ordered that the subject property known as LOC.1 Kiriaini/153 be subdivided into four equal shares of 1.4 acres to be shared by Welton Nganga, Jamlick Nganga, William Mugo, Esther Nyambura, Peter Mwaniki and John Nganga Kinuthia while LOC.16/Ndungu Chege /1313 to be held in trust by Martha Wanjiru Nganga in her life time and to be divided equally to her children upon her demise.
6. Being dissatisfied by the said Ruling, the Appellant who was the 1<sup>st</sup> Protestor applied for review of the said Ruling by an application dated 23<sup>rd</sup> July 2007 on the grounds that: -
  - a. The Ruling was granted erroneously and in ignorance of material facts.



- b. The Ruling was unjustified.
  - c. The omission of the Protestor's name as a son of the deceased constitutes an error.
  - d. The Ruling was extremely prejudicial to the Applicant who was disinherited as a result of the error on the face of the proceedings.
7. On the 11<sup>th</sup> day of March 2008, the said application was dismissed by the Court on the ground that the Applicant had shares in LOC.16/Ndunyu Chege/1313 which he will get upon the demise of his mother and that the Applicant had a right of Appeal if he was dissatisfied with the finding of the Court.

### **Appeal**

8. The Appellant on 31<sup>st</sup> October 2018 filed an Appeal being Civil Appeal No 11 of 2011 at Nyeri out of time pursuant to an Order issued on 6<sup>th</sup> December 2011 and raised the following grounds of Appeal: -
- a. The Court erred in holding that the Appellant was not a son of the deceased.
  - b. The Court erred in holding that the deceased had sub divided his estate in 1975 and distributed the same to his children.
  - c. The Court erred in not holding that the deceased having given his children 2 acres each went ahead and allowed the Appellant to plant 1,500 tea bushes on the two acres on the disputed property and that there had been an existing dispute on the same with the Respondent.
  - d. The Court erred in law and fact by disinheriting the Appellant.
  - e. The Court erred in law and fact in distributing the estate in a most un equal manner contrary to the provision of the Succession Act.
  - f. The Court lacked pecuniary jurisdiction to hear the dispute under Section 48 of the [Law of Succession Act](#).
9. The said Appeal was transferred to this Registry for hearing and determination and directions were issued on the 17<sup>th</sup> November 2020. Directions were issued on the disposal of the Appeal herein by way of oral submission and on 29<sup>th</sup> March 2021, the Appellant sought the review of the said directions so as to file written submissions which was allowed.
10. The Appellant submitted that the deceased had distributed his land and gave each child 2 acres and that the Appellant developed 1500 tea bushes on his part of the land which the Respondent who was his mother took away from him and that the learned magistrate did not take that into account.

### **Determination**

11. From the proceedings herein, the issue for determination is whether the Appellant had a right of Appeal and if so whether the Appeal has merit.
12. The beneficiaries of the estate of the deceased are not disputed neither is the fact that the deceased had in his life time distributed his estate disputed.
13. From the record of the proceedings herein, the Appellant being dissatisfied with the determination of the trial Court exercised his right for review of the said Ruling and having so exercised that right the same lost the right to file Appeal as provided for under Section 80 of the [Civil Procedure Act](#) as read with Order 45(2) of the [Civil Procedure Rules](#) which provides that a party cannot seek review and Appeal at the same time in the following 45(2) a party who is not appealing from a decree or an Order



may apply for a review of judgement notwithstanding the pendency of Appeal by some other party except where the ground of such Appeal is common to the Applicant and the Appellant or when being Respondent, he can present to the appellate Court the case on which he applies for review.

14. It is clear that a party cannot exercise both the right of Appeal and review at the same time, the Appellant could only Appeal against the Order of the Court on the application for review and not the original decision.
- a. Being alive to the provision of Article 159 of the *Constitution*, on the merit of the Appeal herein, it is clear that what the Appellant is complaining about was not before the lower Court as the Court was not invited to place the parties on the ground and neither did the Court make an Order that the Appellant was not a son of the deceased.
  - b. I therefore find no merit on the Appeal herein, which I hereby dismiss.
  - c. This being a family dispute and whereas cost follows the event, each party shall bear their own cost.

**DATED, SIGNED AND DELIVERED AT MURANGA THIS 3<sup>RD</sup> DAY OF APRIL 2024**

**J. WAKIAGA**

**JUDGE**

In the presence of:

Muturi Njoroge for the Respondent

No appearance by the Appellant

Applicant in Court

Quinteen – Court Assistant

