



**In re Estate of the Francis Githii Ng'ang'a (Deceased) (Succession Cause
39 of 2016) [2024] KEHC 5574 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5574 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
SUCCESSION CAUSE 39 OF 2016
GL NZIOKA, J
MAY 9, 2024**

IN THE MATTER OF THE ESTATE OF THE FRANCIS GITHII NG'ANG'A (DECEASED)

BETWEEN

JOHN NG'ANG'A GITHII PETITIONER

AND

PERIS NJOKI GITII PETITIONER

JUDGMENT

1. The deceased herein, Francis Githii Nganga died on 9th July 2015. Subsequently the 1st petitioner, John Nganga Githii, filed a petition for grant of Letter of Administration dated 11th May 2016. He described himself as the son of the deceased's second wife, one Saweria. Alongside the petition he filed summons under sections 45, 47 and 76 of the Law of Succession Act, and Rule 44 and 73 of Probate and Administration Rules.
2. The applicant was seeking for the following prayers: -
 - a. That all future rents collected from LR No. 1144/540 (Grant IR No 33667 Naivasha CBD 1144/861(Grant No. IR 37549) Industrial Area, LR No. 1144/918 (Grant No. IR 43791) Lake View Estate, Plot No. 323, Naivasha Town Block 1/40 Kihoto Estate, Naivasha Block 1/3 Kihoto Estate, Naivasha/Municipality Block 7/430 Kabati Estate and Loc 16/Ndakaini/413 in Ndakaini, be collected by an independent estate agent and be deposited in an Estate Account to be operated under the supervision of this honourable court.
 - b. That the respondents be ordered to immediately give a detailed statement of account in respect of all the rents, and/or other financial income collected, generated and/or gained from the properties forming part of the estate of the deceased herein from the date of the demise of the deceased herein.



- c. That this honourable court be pleased to order PERIS NJOKI GITHII to surrender to and furnish this honourable court with all the Title documents, for parcels of land and log books of all the vehicles registered in the name of the deceased herein for safe custody pending the final hearing and determination of the petition herein.
 - d. That Bank accounts in the name of the deceased name at A/C 0200xxxxxx863 Equity Bank Limited, Naivasha Branch, Barclays Bank (K) Limited A/C 02xxxxxx32 at Naivasha Branch in the name of Franco Philly Co. Limited, be frozen until the final hearing and determination of the petition herein or until further orders of this court.
3. In response, the 2nd petitioner filed an objection dated 24th November 2016, and a cross-petition on 1st December 2016. The matter was heard and the court allowed prayers (3) allowing each part to provide at least two names of their preferred Estate agent with their respective profiles. As regard prayer (4) and (5) the court directed the co-petitioner to file within 30 days, a full schedule of the Estate titled documents and log books in her possession, and render professional account in respect of all rents and profits received by her and/or the Franco-Philly Company Limited since 9th July 2015 in relation to the Estate.
 4. The prayer (6) was granted freezing the bank account No. 020xxxxxx2863 held by the deceased at Equity Bank Naivasha Branch and account No. 02xxxxxx32 held at Barclays Bank at Naivasha Branch in the name of the afore said company. The court further ordered for gazettment of the two petitioners.
 5. However, by a consent order recorded in court on 21st February 2018, the parties agreed the 2nd petitioner files a summons for confirmation and the 1st petitioner to file an affidavit of protest. The summons for confirmation dated 26th June 2018 was then filed by the 2nd petitioner and on 19th September 2018, the 1st petitioner filed an affidavit of protest and on 7th November 2018, an affidavit on the preferred mode of distribution of the Estate.
 6. The matter proceeded to full hearing. The 1st petitioner's case was supported by the evidence of three witnesses. PW1- Samuel Mugo Nganga, the deceased brother whose evidence was that, the deceased had two wives Peris Njoki Githii, being the 1st wife and Mama Jane, the 2nd wife. That he was involved in the dowry negotiations of the two wives, and that both wives were involved in the burial arrangements. In cross-examination he denied the suggestion that, he had bad blood with the deceased before his demise. In re-examination he stated that when the 2nd wife was married she had a child called Jane but whom the deceased took in and was maintaining his own child.
 7. The 2nd witness was one Saweria Waruguru Githii who testified that she was the deceased's wife. That, they got married in 1972 when she had one child who was 1½ years old called Jane. That she was taken to Kihoto and later taken to Githiuro where the deceased built her a house in the year 1974, where she lived from 1974 to 1994 for twenty (20) years. However, in the year 1994 the deceased relocated her back to Naivasha as Njabini was too cold and built for her a house in Kihoto where his first wife, the 2nd petitioner, was residing.
 8. That, the deceased paid dowry to her brother of Kshs. 6,000 in 1972, and in 1982, there was a ceremony at her brother's home, when the deceased and other 'wazees' took three (3) sheep and a he-goat taken earlier plus Kshs. 25,000 honey a large coat blanket, sufuria and two sheets as dowry. That in 1995, her daughter Jane was married and dowry paid to the deceased. However, a disagreement arose between her and the deceased. That she reported to the deceased's brothers in Muranga but efforts to reconcile them did not bear fruits and she had to leave, after her daughter built for her a house at Kabati. That when the deceased passed on she was involved in the funeral arrangements as a wife.



9. She produced a letter written by the Assistant Chief in which she is recognized as deceased's wife. She testified that, she would like to have a share in the land her husband built for her in Kinangop and the money held in the bank account.
10. The 3rd witness who testified for the 1st petitioner was himself to the effect that, he is the 2nd born of Saweria Waruguru Githii and the deceased. That his mother was deceased second wife. That he swore an affidavit on the mode of distribution of the assets of the Estate of the deceased and would like the same adopted. That the same affidavit identifies the beneficiaries. That the shamba at South Kinangop be shared equally among the 1st and 2nd house. He refuted the proposal by the 2nd petitioner that part of the Estate be given to Franco Philly company Limited as desired by the deceased, and argued that, that issue has already been dealt with vide a ruling delivered by this court. That as the deceased died intestate. The estate be distributed as per the law of succession
11. However, the 2nd petitioner supported her petition through evidence of three (3) witnesses. The 1st witness Mokua Njoroge testified that, he knew the deceased well and even attended his funeral service. That, he knew the deceased had only one (1) wife, the 2nd petitioner. However, he was aware of his child called Ng'ang'a, the 1st petitioner herein who belonged to the lady at Kihoto.
12. The 2nd witness was the 2nd petitioner. She testified that, the deceased was her husband, although she could not recall when they got married. That they had eight (8) children. She denied that, Saweria was her co-wife or deceased's wife but acknowledged knowledge of her son, the 1st petitioner as one of the deceased's children. She told the court that, Saweria was her husband's employee having been employed as a househelp and staying at Kinangop.
13. That, the deceased was sick for a long time suffering from cancer but Saweria and her daughter Jane did not visit him; and neither were they involved in the medical bills. That Saweria could not be deceased's wife as no dowry was paid for her. That, the deceased gave each of his five (5) children ten (10) acres of land, and they were contended. That the remaining property should be divided among her and her daughters. That, the property be registered in the name of the company referred herein. However, if the court does not agree, it be distributed among the legal beneficiaries. She objected to any property being given to Saweria and her daughter.
14. The last witness was one John Ndungu Githii, the 2nd petitioner's son, who testified, he was not aware of Saweria as the deceased's wife or the muddy house at Githioro. He supported the summons for confirmation of grant as proposed by his mother, the 2nd petitioner.
15. The parties filed their respective submissions at the close of the hearing of the case. The same were highlighted thereafter and are considered herein. From the submissions of the respective parties two issues have arisen for determination namely: -
 - a. Who the dependants of the deceased are
 - b. The mode of distribution of the deceased's property
16. As regards that 1st issue I find that, the dispute revolves around two people, Saweria and Jane. The law of succession under section 29 of the Act provides for dependants of a deceased person. It provides for a wife or former wife, all children who were being maintained by the deceased as dependents. The question is: Was Saweria a spouse. Was Jane a dependant.
17. In considering the evidence adduced by both petitioners in that regard, the 1st petitioner adduced the evidence of Saweria to the effect that she was the deceased's wife and married under Kikuyu customary law. Her evidence was supported by the deceased's brother PW1, Samuel Mugai, and a letter from the



- Assistant Chief and National ID Card. On the other party the 2nd petitioner's evidence that she was the only wife of the deceased was supported by the evidence of Mukuu Njoroge.
18. It is therefore clear that, there is no evidence that disqualifies expressly either of the two claimants from being the deceased's wives. Further still, none of them has supported by evidence how their marriage was solemnized. Whereas the 2nd petitioner argues that no dowry was paid for Saweria to be recognized as the deceased's wife under the Kikuyu customary marriage, in the same vein, there is no evidence that, any dowry or traditional cultural rites or "Ngunario" rites were carried out in relation to her marriage to the deceased.
 19. Further evidence reveals that, the deceased was at one given time staying with Saweria, whether as a house help as alleged by the 2nd petitioner, or as a wife as alleged by Saweria. It is evident that, the two stayed together for long which relationship gave rise to the 1st petitioner who the deceased accepted and recognized as his own blood son. This evidence tend to tilt in favour of the evidence of Saweria that, she was not just a house help. There is also evidence that, the deceased built for Saweria a house. The 2nd petitioner in her statement said that "she knew at some time Saweria lived with the deceased in a rental house constructed with mud". Thus, the 2nd petitioner evidence supports the fact that, the deceased and Saweria had an intimate relationship beyond employer and employee.
 20. Furthermore the 2nd petitioner states in her submissions that, the evidence adduced by the 1st petitioner "points to a relationship between the deceased and Saweria, the mother of the 1st petitioner, which turned sour over twenty (20) years prior to the deceased's death". With due respect, why would a relationship between employer/employee turn sour after 20 years? Pursuant to the aforesaid, I hold that both Saweria and 2nd petitioner were wives of the deceased, although at the time he died, Saweria had left her home after the deceased sent her away.
 21. The next issue relates to Jane. It is not in dispute that, Saweria got married when she had Jane at age 1½ years. The 1st petitioner's case is that Jane was being maintained by the deceased. He has deposed to the same and so has the mother, Saweria. The question is where is Jane? Wasn't she the appropriate person to advance her own cause of action. She is said to be married therefore she is not a minor. No one would have testified in support of where she went to school, whom she stayed with, whom she recognized as her own father, who paid her school fees, where she stayed, and so on. The 1st petitioner is younger than her. It is not even clear the age difference between them. Therefore he may not support the answers to all the afore question.
 22. The evidence of Saweria to all the afore issues can only have been corroborated by Jane herself. It is not good enough for the 1st petitioner to come and submit without supportive evidence that, Samuel Mugo "confirmed that, the deceased recognized Jane Muthoni as his child" and that, the 2nd petitioner confirmed she was with her daughter Lydia Wambui at Muranga. Where is Jane to attest to that? The appearance of her photograph in the deceased's to burial programme does not support her maintenance by the deceased. In fact, it is not quite clear at what stage she left the deceased's home if she was there in the first place. In that regard I am unable to find and hold that, Jane was being maintained by the deceased at the time of his death and therefore qualifies as a dependant under section 29 of the [Law of Succession Act](#).
 23. The last issue canvassed is the mode of distribution of the assets of the Estate of the deceased. Having found that, the deceased had two wives, and died intestate, then the rules of intestacy will apply in the distribution of the afore assets. Both parties have filed proposed modes of distribution. However, what is not clear is the assets of the Estate. The distribution can only be done once the parties agree on the assets to be distributed. Thus whereas the 2nd petitioner name's twelve (12) real properties, three (3)



vehicles and a tractor, the 1st petitioner refers to thirteen (13) real properties, three (3) vehicles and a tractors, rental income and livestock.

24. The 2nd petitioner argues that the rental income was excluded from the assets by the ruling of Honourable Lady Justice Meoli. Therefore the mode of distribution cannot be dealt with finality unless and until the assets under the Estate are agreed on.

25. It is so ordered

DATED, DELIVERED AND SIGNED THIS 9TH DAY OF MAY, 2024.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Ndubi for the 1st petitioner

Mr. Nganga H/B for Ms. Ngugi for the 2nd petitioner

Ms. Ogutu: Court Assistant

