



**In re Estate of Phylis Wasuna Kamau, also known as Philis Wasuna (Deceased)  
(Succession Cause 25 of 2019) [2023] KEHC 19838 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19838 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
SUCCESSION CAUSE 25 OF 2019  
CM KARIUKI, J  
JULY 6, 2023**

**BETWEEN**

**ZIPPORAH NYAMBURA NJUGUNA ..... APPLICANT**

**AND**

**MICHAEL NDUNGU NJUGUNA ..... RESPONDENT**

**JUDGMENT**

- 1 The issue before the court is on the distribution mode for the Deceased estate. This followed the filing of the affidavit of the proposed mode of distribution dated August 4, 2022 deponed by the Applicant. The Applicant averred that:
- I. Her late mother had four children who are the rightful heirs to her estate as follows:-
    - i. Zipporah Nyambura Njuguna
    - ii. Michael Ndungu Njuguna
    - iii. Susan Ruguru Njuguna
    - iv. Mary Wanjiru Mburu (Deceased)
  - II. At the time of the Deceased's death, she left behind L R Nyandarua/ South Kinangop/ 575, the suit land hereinafter, which measured approximately 3.3 hectares.
  - III. That, however, the Respondent herein, after he obtained the grant of letters of administration in secrecy and the same was confirmed, and the property bequeathed to him caused the subdivision of the suit land into many resultant titles. He sold some of it, measuring approximately 1.012 hectares.
  - IV. That at the moment, the only property remaining is L R Nyandarua/South Kinangop/ 12301, which measures approximately two decimal two eight eight hectares (2.288 ha)



- V. Since the Respondent had already disposed of his beneficial interest, she proposed that the remaining property of the estate goes to the benefit of the remaining beneficiaries.
  - VI. Further, since Mary Wanjiru is Deceased, she proposed that her beneficial share of the estate goes to her daughter, Phylis Wangui Mburu, to hold in trust for herself and on behalf of the other children.
  - VII. However, it was always her mother's wish that the suit land remains intact without any subdivisions in order to avoid the sale of the same to strangers as she believed in the family remaining together, and she felt the land was a factor that would always bring them together.
  - VIII. To that extent, she would propose that the distribution of L.R. No. Nyandarua/ South Kinangop/12301 be as follows:-
    - i. List of properties:
    - ii. Nyandarua/ South Kinangop/12301
    - iii. Whom to inherit:
    - iv. One (1) acre:
    - v. Zipporah Nyambura Njuguna- to be sold to cater for legal fees and administrative costs.
    - vi. The remaining portion of approximately 4.6 acres:
    - vii. Zipporah Nyambura Njuguna- whole share (to hold in trust for herself, Susan Ruguru Njuguna, and Phyllis Wangui Mburu)
2. However, in the event that the court is not inclined to adopt the mode of distribution proposed above, she proposes that the following be adopted in the alternative:-
    - i. List of properties:
    - ii. Nyandarua/ South Kinangop/12301
    - iii. Whom to inherit:
    - iv. One (1) acre:
    - v. Zipporah Nyambura Njuguna- to be sold to cater for legal fees and administrative costs.
    - vi. The remaining portion of approximately 4.6 acres (to share equally):
    - vii. Zipporah Nyambura Njuguna
    - viii. Susan Ruguru Njuguna
    - ix. Phyllis Wangui Mburu
  3. That if the mode of distribution as proposed under paragraph 10 is adopted, she further proposed that the burial place where the graves are situated be part of her share which means that upon sub-division as proposed, she be allocated the area where the graves are located.
  4. They all agree with the rest of the beneficiaries except for the Respondent, who has never been agreeable to anything the rest of the family proposes.



5. In response, the Respondent filed his affidavit in protest of the proposed mode of distribution dated February 15, 2020. Andrew Gitau Ndungu deponed the same, and he averred that:-
6. That the late Phyllis Wasuna Kamau had six children, namely: - Michael Ndungu Njuguna (Deceased), Solomon Kamau Njuguna (Deceased), Zipporah Nyambura Njuguna, Margaret Wambui (Deceased), Mary Wanjiru Mburu (Deceased) and Susan Ruguru Njuguna.
7. The Deceased had two properties: L R No Nyandarua/South Kinangop/ 12301 (6 acres) and Plot No. 39 in Mugumu Township. Whereas L R. No Nyandarua/South Kinangop/ 12301 was a free property and was willed, plot no. The Applicant surreptitiously disposed of 39 in Mugumu Township.
8. That contrary to the allegations leveled by the Applicant under para 4 of her affidavit, the late Michael Ndung'u Njuguna, after obtaining a grant of probate, administered the estate as per the Deceased's will without deviation.
9. That the suit land devolved to the late Michael Ndung'u Njuguna as per the will, and he was therefore entitled to dispose of any portion of the said property without reference to anybody.
10. Despite having authority under the law to dispose of any portion of the property, the late Michael Ndung'u Njuguna only sold a portion to raise fees for filing the grant of probate.
11. That it is true, as deposed by the Applicant, what remains is 5.6 acres which the Respondent occupies, 0.4 acres having been sold to obtain a grant of probate.
12. The estate of the late Michael Ndungu Njuguna is entitled to the entire 5.6 acres of the property, and any distribution of the same is contrary to the Deceased's wishes as expressed in her will.
13. The Deceased's Will, having been adjudged valid, cannot be amended and varied through an order of distribution by the honorable court as the same will be contrary to the *Law of Succession Act*.
14. That without prejudice to the deponents above, should the court be minded to distribute the property as follows:-
  - i. Susan Ruguru Njuguna – 2.5 acres
  - ii. Michael Ndungu Njuguna – 2.5 acres
  - iii. Zipporah Nyambura Njuguna – 0.4 acres (having sold plot no. 39 in Magumu Township)
  - iv. Graveyard – 0.2 acres
15. The honorable court ordered each party bear costs, and no portion should be sold to cater to any party's legal fees.

#### **16. Applicant's Submissions**

17. The Applicant presented two alternative proposals. The first one is that one acre be sold to cater for her incurred legal fees, while the remaining 4.6 acres should be registered in her name or her benefit and in trust for Susan Ruguru Njuguna and Phyllis Wangui Mburu.
18. In the alternative, the Applicant proposed that one acre of land be sold to cater for legal fees she incurred and other administrative costs like a subdivision of land and processing of titles. In contrast, about 4.6 acres should be shared equally among her, Susan Ruguru Njuguna, and Phyllis Wangui Mburu. She further proposed that the family graveyard will be within her portion if the above distribution mode is adopted.



19. The Applicant asserted that the justification for the above distribution mode is that the Respondent had already sold and benefitted from 1.012 hectares of the subject land, which he admitted during the hearing. It was stated that the Respondent would still have received the largest portion of land since he also benefited from a portion measuring 1.012 hectares, translating to more than 2 acres. In contrast, the remaining beneficiaries will receive a parcel of land slightly bigger than 1 acre.

## 20. Respondent's Submissions

21. The Respondent submitted that the Applicant, through her submissions, had brought up a new matter that was never adjudicated upon and/or was never brought up during the trial. To wit, the Applicant is now raising new allegations that the Respondent (now Deceased) had sold a house that was located in South C, Nairobi, that had been left to the Deceased by one of her Deceased children, and as such, he should not benefit from the estate. It was reiterated that in the Applicant's affidavit on the mode of distribution, the same was not raised as an issue. Further, in the ruling dated July 7, 2022, the property to be distributed is Nyandarua/ South Kinangop/12301.
22. In addition, it was averred that the issue of Plot No 39 in Magumu Township was brought up during trial wherein the Applicant did accept and/or acknowledge that she sold the plot for kshs 500,000/-.
23. The Respondent stated that despite the deposition before the court that the court should endorse the mode of distribution, the court has no such powers, more so where the court has established that there is a valid will. The only power the court is clothed with is provided under Sections 26, 27, and 28 of the *Law of Succession Act*. Reliance was also placed on *In re Estate of Nditu Kiharagu (Deceased)* [2022] eKLR.
24. It was reiterated that based on the size of the Deceased property, the Applicant is not entitled to any portion of having disposed of Plot No 39 in Magumu Township, a fact she concealed when making her application until he was called out during the hearing, the Applicant admitted to having sold the said portion together with her husband for kshs 500,000/-.
25. It was submitted that justice, in this case, is that adequate provision be made for Susan Ruguru Njuguna, who has not benefitted from any of the Deceased properties, provision for a graveyard be made, and Michael Ndung'u Njuguna be allowed to utilize the remaining portion of the property.

## 26. Analysis and Determination

27. I have carefully considered the affidavits filed, the evidence adduced by both parties, and the submissions made by their counsels and the law and authorities cited, and the main issue that arises for determination is the mode of distribution to be adopted for distributing the Deceased's estate.
28. In the instant case, in its judgment dated July 7, 2022, this court declined to revoke the grant of probate issued to the Respondent (now Deceased). However, the court declared the Respondent a trustee regarding L R No Nyandarua/South Kinangop/12301 for the provisions of the graveyard, and the beneficiaries, including the Applicant, were left out without any inheritance.
29. As regards the impeachment of the Deceased's Will, the court held that the Applicant had failed to discharge the burden of proof of her case against the Respondent in terms of Section



76 of the *Law of Succession Act*. The court found no merit in the summons for revocation of the grant to the extent that it challenged the validity of the Deceased's Will but succeeded to the extent that the suit land will be awarded to the Applicant, other omitted beneficiaries, and the graveyard.

30. Accordingly, in line with the judgment of this court dated July 7, 2022, I find that the Deceased's property subject to distribution herein is L R No Nyandarua/South Kinangop/12301, measuring approximately 5.6 acres. Both parties have made several allegations alluding to Plot No. 39 Magumu Township, which I find is not the subject matter in the instant case, and in any case, the same, if disputed, can be addressed in the proper forum as this court cannot make any conclusive findings as to the parties' allegations on the same.
31. Additionally, I find that the rightful beneficiaries of the estate are:-
  - i. Zipporah Nyambura Njuguna
  - ii. Michael Ndungu Njuguna
  - iii. Susan Ruguru Njuguna
32. I have thoroughly considered both parties' proposed modes of distribution. In the Applicant's proposed distribution mode, she asserted that the remaining portion of the suit land is distributed amongst her, Susan Ruguru, and Phylis Mburu and that the family graveyard be situated within her portion. However, I reject that proposal. The family graveyard cannot be distributed to include anyone's inheritance. The Respondent asserted that the family graveyard measures 0.2 acres. I find that the Respondent shall continue to trust the portion that covers the family graveyard for his and the other beneficiaries' benefit.
33. That being the case, I find that in the interest of justice and to ensure fair and equitable distribution to all beneficiaries and that no beneficiary is denied their entitlement from the estate;
  - i. The remaining 5.4 acres shall be distributed equally among all the three beneficiaries of the Deceased's estate, that is, 1.8 acres each.
  - ii. Further, the beneficiaries shall conduct a secret ballot to determine which portion of L R No Nyandarua/South Kinangop/12301 each shall occupy after subdivision.
  - iii. Each beneficiary shall pay equal fees for the surveyor appointed to demarcate the land in accordance with the orders above and any other attendant fees necessary for the survey, subdivision, and issuance of new titles in their respective names.
  - iv. I also find that each party shall bear its costs,

**DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 6TH DAY OF JULY 2023.**

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**CHARLES KARIUKI**

**JUDGE**

