



**In re Estate of the Late Danson Waweru Ngotho - Deceased) (Succession Cause 610 of 2006) [2024] KEHC 13990 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13990 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 610 OF 2006  
SM MOHOCHI, J  
NOVEMBER 8, 2024**

**IN THE MATTER OF ESTATE OF THE LATE DANSON WAWERU NGOTHO – (DECEASED)**

**BETWEEN**

**RUTH WANGUI NGOTHO ..... 1<sup>ST</sup> ADMINISTRATOR**

**DOUGLAS KAMAU ..... 2<sup>ND</sup> ADMINISTRATOR**

**AND**

**VICTOR NGOTHO WAWERU (LEGAL REPRESENTATIVES OF THE ESTATE OF STEPHEN WAWERU NGOTHO) ..... 1<sup>ST</sup> PROTESTOR**

**THOMAS NJENGA NGOTHO ..... 2<sup>ND</sup> PROTESTOR**

**RULING**

**Background**

1. The deceased a polygamous man, the late Danson Ngotho Waweru died intestate on 12<sup>th</sup> July, 2005 leaving behind two houses.
2. Ruth Wangui Ngotho, the Second Wife, petitioned for Grant of Letters of Administration in her capacity as the widow of the deceased. The Grant that was issued to her on 12<sup>th</sup> March, 2007 was by consent revoked and a fresh grant issued jointly to Ruth Wangui Ngotho and Martha Wairimu Ngotho on 1<sup>st</sup> December, 2008.
3. The Administrators filed summons for Summons for Confirmation of Grant dated 27<sup>th</sup> August 2020 with a proposed a mode of distribution and consent signed by the members of the First House. Upon the demise of Martha Wairimu Ngotho her son Douglas Kamau Ngotho substituted her as Administrator on 4<sup>th</sup> October, 2021.



4. Thomas Njenga Ngotho filed an Affidavit of Protest dated 13<sup>th</sup> May, 2021 and Victor Ngotho Waweru, also filed an Affidavit of Protest dated 29<sup>th</sup> June, 2021 both in protest against the Confirmation of Grant. The specific facts are contained in the said Affidavits of Protest.
5. The hearing proceeded viva voce with parties filing written submissions thereafter.

### **1<sup>st</sup> Protestor's Submissions**

6. It was submitted that, the 1/3 share of Loc/Rwathia/1091 and more so the 1/2 share being Loc/Rwathia/3149 and 3154 ought to form part of the estate. That the property once registered in the name of the widows ought to have formed part of the estate and what happened after the consent on 1<sup>st</sup> December, 2008 was illegal. Martha Wairimu Ngotho transferred the new parcels Loc/Rwathia/3145-3156 to Douglas Kamau Ngotho without a confirmed grant or authority.
7. That the deceased would not have written a Will dated 5<sup>th</sup> June, 1978 and distributed the property as it was not registered in his name and there was a pending Court case on it. On this argument he relied on the decision in re estate of John Githinji Ruga (Deceased) [2022] eKLR.
8. It was further submitted that, Loc/Rwathia/3145 to 3156 and Nyandarua/Olkalou/West 1509 should be distributed between the beneficiaries, as the late Martha Wairimu Ngotho never demonstrated that there were any variations between the old and new title deeds with respect to the location, general area and acreage of the land.

### **2<sup>nd</sup> Protestor's Submissions**

9. On behalf of the 2<sup>nd</sup> Protestor, counsel submitted that, it had been agreed that, all the properties of the deceased be distributed equally between the houses and that the only issue was whether the distribution done before confirmation of Grant was fair. Counsel relied on the case of Mary Rono vs Jane Rono & Another where the Court held that the Court has the discretion to ensure fair distribution of a deceased's estate judiciously on law and facts.
10. He indicated that, he was willing to give burial site from his portion and the matrimonial home was on the 1<sup>st</sup> Administrators plot Nyandarua/Olkalou/West 1504. That the 2<sup>nd</sup> Administrator had confirmed that he had a title in his mother's name Nyandarua/Olkalou/West 1509
11. It was his submission that, the burial site and the dam area was to be independent and the matrimonial home distributed amongst the two houses. It was his contention that, the distribution was done equally between the houses save for the Kenya Airways shares and that, the Protestor should hive off the spring since theirs is more.
12. He submitted that, should the Court find that, distribution was done before confirmation it was his prayer that the distribution of Nyandarua, Murang'a and Kenya Airways shares be distributed equally with the beneficiaries remaining with the respective portions they developed or buried their loved ones.
13. It was contended that, the burial site and spring area to be held in trust by the administrators and the matrimonial home can be given to the surviving widow Ruth Muthoni and the family should compensate the beneficiary who spent money on the deceased burial and

### **2<sup>nd</sup> Administrator's Submissions**

14. The 2<sup>nd</sup> Administrator submitted that, the amalgamation and subsequent subdivision of Nyandarua/Olkalou/West/1390 was fraudulently conducted and should be revoked as it was done without a



- confirmed grant and in contravention with Section 55 of the *Law of Succession Act* and reliance was placed in the case of *in re Estate of Paul M’Maria (Deceased)* [2017] eKLR.
15. It was also submitted that, the Acts of the 1<sup>st</sup> Administrator amounted to intermeddling of the estate as provided for under Section 45 of the *Law of Succession Act* and reliance was placed in the *Estate of Veronica Njoki Wakagoto (Deceased)* [2013] eKLR which addressed the seriousness of dealing with the property of a deceased person without authority.
  16. It was contended that, the titles Nyandarua/Olkalou/West/ 326-329 amalgamated to form Nyandarua/Olkalou/West/1390 were fraudulently and illegally transferred to the first wife in a record 13 days which was submitted to have been impossible. Reliance was placed in *Chemey Investment Limited v Attorney General* [2018] eKLR. The Court in this regard held that speedy registration is not a reflection of efficient delivery of service but a deliberate fast tracking of a flawed process to facilitate theft.
  17. It was submitted that, the amalgamated title was subdivided into 8 parcels 1502 to 1509 with Nyandarua 1502 to 1508 being transferred to the beneficiaries of the second wife which was the matrimonial side of the property while 1509 was transferred to the first wife Martha. That the transfer of Nyandarua 1509 was fraudulently and illegally done to the disadvantage of Martha Wairimu Ngotho as both the spring and the burial site both measuring 3.5 acres were to be curved off from 1509 to the disadvantage of the first house.
  18. It was submitted that, Nyandarua/Olkalou/West/ 326 and 327 titles are still in the custody of Douglas Kamau and therefore it is inconceivable how the amalgamation could have occurred. Reliance was placed *Sammy Magera v Kuria Kiarie & 2 Others* [2017] eKLR, to submit that it would require the surrender of all relevant titles for amalgamation.
  19. That, by the cancellation of Grant, original parcels 326, 327, 328 and 329 revert back to the deceased for re-distribution.
  20. It was further submitted that, Loc/Rwathia/3148 and 3154 do not form part of the estate of the deceased as they were transferred and legally gifted by the deceased pursuant to the Will dated 5<sup>th</sup> May, 1978.
  21. It was finally argued that, when the deceased fell ill, he was willing to provide treatment here in Kenya but Thomas Njega Ngotho without consulting the family took their father to South Africa for treatment. As such, he was not entitled to refund of the medical bill incurred. Further since there was no demand for reimbursement, it underscores the lack of consensus regarding the allocation of medical expenses

#### **Dr. David Waruiru Ngotho’s Submissions**

22. He submitted that, the 2 widows had consented to the mode of distribution and acquired title deed on behalf of their respective houses albeit the grant not being confirmed and the issue of the Second House getting a bigger share is a red-herring.
23. That the Land Control Board Consent and the transfers had been signed by the 2<sup>nd</sup> Administrator and that the allegation that his signature was forged has not been proved. He relied on the decision in *In Re Estate of David Kigumi Kimemia (Deceased)* [2021] eKLR where the Court held that the allegation of fraud has to be strictly pleaded and proven.



24. That the allegation that, LOC Rwathia 3145-3156 was bequeathed to the widows vide the Will dated 5<sup>th</sup> June, 1978 was in contravention of Section 45 of the Law of Succession Act. the Will was presented by the 2<sup>nd</sup> Administrator and that no one from the other house had heard of it
25. It was also submitted that, it was never the wish of the deceased that his family members be buried next to him only his wives. That it would be wastage to allocate 1.8 acres for a burial site as the beneficiaries will have a share of their estate and can choose where to be buried.
26. He submitted that, he was the one who constructed the matrimonial home alone with the assistance of the 2<sup>nd</sup> Objector. The 2<sup>nd</sup> Administrator has not proved that, he made any financial contributions towards the construction and in any event polygamous men lived under one roof with their wives and it was imperative that the matrimonial home ought to be occupied by the surviving spouse of the deceased until her demise.
27. That there was no evidence that the deceased was compelled by anyone to seek treatment in South Africa, there is no evidence of the 2<sup>nd</sup> Administrator was taking care of the deceased and the expenditure incurred for his treatment was also not pleaded and relied on in re Estate of SLBT (Deceased) [2021] eKLR where the Court emphasized on full disclosure of material facts. That the Court should offset his hospital bill against the half-share of the matrimonial house.

### **Analysis and Determination**

28. Having considered the Protest, the Replying Affidavits and rival written submissions, this Court is minded to refine the issues for consideration as:
  - i. Whether the amalgamation of Nyandarua/olkalou West/326,327,328,329 into Nyandarua/olkalou West/326,327,328,329/1390 and subsequent subdivision was fraudulently conducted and should be revoked?
  - ii. Whether there are free assets comprising of the estate of the deceased available for distribution?
  - iii. Whether the grant of letters of administration made on on 1<sup>st</sup> December, 2008 should be confirmed.
  - iv. What orders may the Court grant?
29. The deceased having died intestate, it therefore means that his estate and distribution thereof is subject to the rules of intestacy. Generally, the law contemplates that a person can either distribute his estate by way of a will or in absence of a will, the estate is subjected to the rules of intestacy. From the reading of Sections 35, 36, 38 and 40 of the Act, the legislature contemplated the rules to apply where the deceased has passed on and left behind survivors.
30. Section 35 of the Law of Succession provides that; -
  - Where intestate has left one surviving spouse and child or children;
    1. Subject to the provisions of Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—
      - a. The personal and household effects of the deceased absolutely;  
and



- b. a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

2. A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.
3. Where any child considers that the power of appointment under sub-section (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the Court for the appointment of his share, with or without variation of any appointment already made.
4. Where an application is made under subsection (3), the Court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—
  - a. the nature and amount of the deceased's property;
  - b. any past, present or future capital or income from any source of the applicant and of the surviving spouse;
  - c. the existing and future means and needs of the applicant and the surviving spouse;
  - d. whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
  - e. the conduct of the applicant in relation to the deceased and to the surviving spouse;
  - f. the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
  - g. the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.
5. Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

31. Under Section 45, authority to handle the assets of a dead person emanates from grants of representation to the estate of such dead person. Under Section 79 such property only vests in the



person who holds the grant of representation, meaning that the person who hold legal title for the property of the dead, and, therefore, the only person who can enter into binding transactions with third parties.

32. In this instance, the 1<sup>st</sup> Administrator was with the color of law when she undertook the Amalgamation and subsequent subdivision. The Revocation of the Grant by the Court upon consent was whilst the Court was without notice of the subdivision and amalgamation. It was at this juncture that the late Martha Ngotho or the 2<sup>nd</sup> Administrator ought to have brought the fact to the attention of the Court.
33. In *Re Estate of Moses Wachira Kimotho (Deceased) Succession Cause 122 of 2002 [2009] eKLR*, the Court made pronouncements on the importance of disclosing all material facts before a Court of law while seeking letters of administration and confirmation thereof. It observed;

“I am certain that had the Applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the Respondent been forthright and candid and included the Applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the Court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from Court of something material to the cause. The Respondent knew of the Applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant.

34. To this Court the action by the 1<sup>st</sup> Administrator was not fraudulent and the fact that the 2<sup>nd</sup> Administrator is holding the said titles and that his deceased mother did actually physically move to the ½ share bequeathed is indicative of the acceptance of the same.
35. This Court notes, that the aforesaid subdivision was undertaken equally at 19 acres to each house and that the share to the 1<sup>st</sup> house is registered in the name of their deceased mother. It is noteworthy that the survivors of Martha Ngotho shall have to undertake a separate succession to receive their respective shares therefrom.
36. I further note that the survivors of Martha Ngotho, Dr. Douglas Kamau Ngotho, Stephen Waweru Ngotho (Deceased) survived by a) Victor Ngotho Waweru b) Frankwel Wambugu Waweru c) Sammy Douglas Kamau Waweru, Veronica Wanjiru Ngotho Kariuki, Francis Waruiru Ngotho and Pauline Muthoni Ngotho Maina (Deceased) survived by a) Danson Ngotho Maina, b) Grace Wanjiku Muthoni, c) Joseph Muthoni, d) Douglas Kamau Maina and e) Catherine Mugure Maina are all entitled to a share from Nyandarua/Olkalou/West 1509.
37. By the time of filing the summons for confirmation of grant it was clear and apparent to the 2<sup>nd</sup> Administrator, that the estate of the deceased had significantly been distributed, the Affidavit of Thomas Njenga Ngotho dated 12<sup>th</sup> August 2008 is indicative of the settled position which indicates that the 2<sup>nd</sup> Administrator not only participated in the clan meeting but had this information which is deliberately withheld when preparing the summons for confirmation.
38. It is further noted that, the entire clan of “Acefra Ambari Ya Kihungu” from the deceased Danson Ngotho Waweru converged a meeting at the deceased's land “Matuura” in Olkalou on 23<sup>rd</sup> October 2005 and that, it was unanimously agreed by all those present including the objector that all those parcels of land known as Nyandarua Ol Kalou West/326, 327,328 and 329 should be consolidated



into one block then to be simultaneously sub-divided into two equal portions of 19 acres each so that each of the two houses would get its own separate title in the names of deceased's wives Ruth Wangui Ngotho and Martha Wairimu Ngotho.

39. That, the entire clan (Muhiriga) stayed for three days to ensure that the foregoing exercise was fully and peacefully done and within the three days after the meeting of 23<sup>rd</sup> October 2005 the consolidation and sub-division was done and all the family members including the objector expressed full satisfaction.
40. The events of the 23<sup>rd</sup> – 27<sup>th</sup> October 2005 cannot be termed as fraudulent as the same was done openly with not only involvement of the entire family of the deceased but including the entire clan of “Acefra Ambari ya Kihungu”.
41. The Amalgamation and resultant submission resulted in the two houses each receiving 19 acres which is each house getting 50%, I do not see such a subdivision to be unfair in any respect.
42. Under Section 71 of the Act, Administrators are enjoined to apply for confirmation of his grant after expiration of six months from the date the grant was made to him. The provision is in mandatory terms. According to Kamau J in *In the Matter of the Estate of Gachunga Gachamba (deceased) Nairobi HCSC No. 642 of 2000* the application for confirmation of a grant is a mandatory requirement of law and without it any confirmed grant would be void to the extent of the confirmation.
43. The Court upon the application for confirmation being made may confirm the grant or, if not satisfied that the applicant will properly administer the estate issue a confirmed grant to another person or persons or order the postponement of the confirmation. Section 71(2)(a) of the Act and the proviso to subsection (2) state as follows: -
  - “(2) The Court to which application is made, or to which any dispute in respect thereof is referred, may –
    - (a) If it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or...

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the Court is satisfied as to the respective identities of the all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”
44. This Court is persuaded by Dr. David Waruiru Ngotho’s assertion that, the 2<sup>nd</sup> Administrator has not proven that his signature was forged. Which standard of proof was established in *Re Estate of David Kigumi Kimemia (Deceased) [2021] eKLR* where the Court held that the allegation of fraud has to be strictly pleaded and proven.
45. This Court finds that, the Properties known as LOC Rwathia 3145-3156 did not form part of the estate of the deceased having been gifted to the wives of the deceased during his lifetime and registered as such and accordingly gifted to the 2<sup>nd</sup> Administrator by the Late Martha Wairimu Ngotho.
46. This Court is of the view that Loc 19/Rwathia3148 and 3154 ordinarily ought to devolve to all the children of the Late Martha Wairimu and that the dispossession or validity of the titles being in the name of the 2<sup>nd</sup> Administrator shall be ventilated thereon.



47. The 2<sup>nd</sup> Administrator sought the inclusion of Plot No 14067 “Ha kahii” as forming part of the estate of the deceased by providing a photocopied handwritten note listing plots and names of purported owners. He also provided a draft mutation pointing out the same. Unfortunately, the Court is not persuaded of this evidence and unless concrete evidence is thus presented then the same shall not be available for distribution.
48. The other siblings to Douglas Kamau Ngotho, from the 1<sup>st</sup> house appear aggrieved of this transfer but can ventilate the same away from the instant succession cause in a succession cause of the late Martha Wairimu Ngotho.
49. This Court is afraid that, the summons for confirmation of grant as filed does not seek to bring the matter to a rest, but rather seeks to re-open and protract matters arrived by consent with their full knowledge, I am unsatisfied as to the bonafides by the 2<sup>nd</sup> Administrator of the Summons for confirmation of grant dated 27<sup>th</sup> August 2020 or that the applicant will properly administer the estate after such confirmation.
50. This Court promotes and encourages the resolution of disputes by parties using all available alternative means including convening of clan meetings to assist in resolution of the dispute(s).
51. The fact that distribution of the main asset was undertaken before a grant was issued, would be irregular and illegal warranting revocation but not in a mechanical manner as this Court has a duty to appreciate that which was irregular, to determine the purpose, import and outcome and where the Court does not find any malafide or ill intent by the parties then this Court has a duty in rendering substantive justice to aid the parties in regularizing such an action.
52. There has been arguments emanating from the 1<sup>st</sup> house that the matrimonial house should be valued and 50% of value be compensated to the 1<sup>st</sup> house. I have considered response by Thomas Ngotho the 2<sup>nd</sup> Protestor who asserted that the said home was constructed by the 2<sup>nd</sup> house making monetary contribution of kshs 1,200,000/- between 1993 and 1994 and that the 1<sup>st</sup> house and the 2<sup>nd</sup> Administrator declined to contribute indicating other personal financial commitments.
53. It was the evidence by the 2<sup>nd</sup> Administrator that he did contribute some unspecified sum which he alleged to have given the deceased. To this Court this evidence was unpersuasive and as such this Court finds that the matrimonial home currently situate on parcel Nyandarua/Olkalau/1504 shall remain.
54. With regard to the allocation of, or want of, allocation for the family burial spot, it has been argued that the two members of the 1<sup>st</sup> house are already buried on Nyandarua/Olkalau/1509 on sections assigned to respective families and that the Late Martha Wairimu Ngotho was buried on Nyandarua/Olkalau/1503 currently in the name of the 2<sup>nd</sup> Protestor where the deceased is also buried. This Court finds that the deceased could express his desire to be buried next to his wives but cannot in death dictate where all his children and offspring would be buried. If the two houses were united it would set aside an area for burial. The Court further notes lack of clarity as to what size of land would constitute a burial spot.
55. Finally, the issue of the deceased medical bills incurred in South Africa before the demise of the deceased, and whether such bills should form part of the liability to the estate. Whenever children support their parents in treatment, the same cannot be regarded as a liability to the estate unless there was express agreement between the deceased and such a child to the deceased expending his/her resources on the understanding that he shall recover the same from the estate. Or alternatively where it is shown that such expense was incurred to be recovered from the estate of the deceased by consent of all family members.



56. In this regard the claim by Dr. David Ngotho for the kshs 1,300,000/- treatment expense cannot be sustained as a liability to the estate and that he cannot now claim that the expense should be shared between the two houses.
57. The only assets available for distribution are the shares of 1000 Kenya Airways Limited.
58. On the converse the Affidavits of protests by Thomas Njenga Ngotho dated 13<sup>th</sup> May, 2021 and Victor Ngotho Waweru, dated 29<sup>th</sup> June, 2021 are upheld to the extent that they confirm the estate is significantly distributed, the two houses and the offspring thereon are already settled.

### **Final Disposition**

59. Consequently, the impugned Summons for Confirmation of Grant dated 27<sup>th</sup> August 2020 must and is hereby disallowed. This in effect means that both protests to confirmation of grant and distribution of the estate are merited
60. This Court hereby confirms the Grant made on the 1<sup>st</sup> December 2008 on the following terms: The 1000 Kenya Airways limited in the name of the deceased shall be sold and the proceeds therefrom shall be shared between the two houses of the deceased at 50% to each house.
61. This Court shall not award any costs as the parties herein are from the same family and that condemning any part to adverse cost orders shall not be in furtherance of substantive justice.

It is so ordered.

**JUDGMENT SIGNED, DATED AND DELIVERED AT NAKURU ON THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2024.**

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**Mohochi S.M**

**JUDGE**

