



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1157 OF 1997

IN THE MATTER OF THE ESTATE OF PETER KARANJA KIONGO ALIAS WAKARUMA KIONGO (DECEASED)

1. MARY WANJIKU KARANJA

2. DANIEL KARANJA MUIGAI.....ADMINISTRATORS/APPLICANTS

VERSUS

LILIAN KABURA KIONGO.....OBJECTOR/RESPONDENT

JUDGMENT

1. Before this Court is for summons for confirmation of Grant dated 25th September 2018 in which the Applicant/Administrators MARY WANJIKU KARANJA and DANIEL KARANJA MUIGAI sought the following orders:

“1. That the Grant of Letters of Administration issued to Mary Wanjiku Karanja and Daniel Karanja Muigai in this matter on 12th July, 2017 be confirmed.

2. That the Administrators do distribute the estate as proposed in the scheduled out in paragraph 5 of the Administrator’s affidavit.

3. That the costs of this application be in the cause.”

2. The summons was premised upon **Rule 40 of the Probate & Administration Rules** and **section 71 of the Law of Succession Act, Cap 160, Laws of Kenya** and was supported by the Affidavit of even date sworn by the Applicants.

3. The Objector **LILIAN K. KIONGO** filed an Affidavit of Protest dated **17th February 2020** objecting to the confirmation of Grant and specifically to the proposed mode of distribution of the estate. The summons was canvassed by way of oral evidence.

BACKGROUND

4.This Succession Cause relates to the estate of **PETER KARANJA KIONGO ALIAS WAKARUMA KIONGO** (hereinafter the **Deceased**) who died intestate at the **Nazareth Hospital** on **25th December 1976**.

5. Following the demise of the Deceased a Petition for Grant of letters of Administration intestate was filed on **22nd December 1994**. On **16th May 2006** a confirmed Grant was issued to **Leonard Kiongo Karuma, Muigai Wakaruma, Ngotho Karuma and John Kabungu Karuma**. The estate of the Deceased was to be distributed as follows:

Leonard Kiongo Karuma	L.R.Kiambaa/Waguthu/353	Absolutely
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Muigai Wakaruma	L.R.Kiambaa/Waguthu/ 352	1.25 acres
Ngotho Karuma		1.25 acres
John Njenga		1.25 acres
Rachel Wakiiya Karanja		0.5 acres
Eunice Wakanyi		0.5 acres
		1.00 acres
Mary Wanjiku		

6. Later vide a Ruling delivered on **12th July 2017 Hon Lady Justice Ougo** revoked the Grant which in respect of the estate of the Deceased on the basis that the said Grant was defective and inoperative since all the Administrators named in the Grant had passed away. The court issued a fresh Grant to **Mary Wanjiku Karanja** and **David Karanja Mungai** the current administrators of the estate.

7. The Administrators then filed in court the summons for confirmation of Grant dated **25th September 2018** which is opposed by the Objector.

8. The Objector **Lilian Kiongo** is the wife to one **Leonard Kiongo** (now deceased) who was the 1st born son to the Deceased. The Objector avers that her late husband was one of the original administrators of the estate of the Deceased. She states that upon the death of the Deceased all his sons were registered as proprietors in equal shares of the property known as **LR No. KIAMBAA/WAGUTHU/352**.

9. The Objector is aggrieved by the proposed mode of distribution of the estate of the Deceased, which she contends omits the estate of **Leonard Kiongo**. She is of the opinion that the estate of **Leonard Kiongo** ought to be given a share of the parcel of land known as **LR No. KIAMBAA/WAGUTHU/352**.

10. The Administrators position is that Plot No. **352** originally belonged to their late father (the Deceased herein). That when their eldest brother **Leonard Kiongo** married his first wife the Deceased subdivided **LR No. Kiambaa/Waguthu/352**. Upon sub-division, **Parcel 353** (comprising of approximately **3.5 acres**) was created and was registered in the name of **Leonard Kiongo** whilst the original **Parcel No 352** (comprising of approximately **6.75 acres**) remained in the name of the Deceased.

11. The Administrator told the court in the late **1960's** the Deceased told **Leonard Kiongo** to relocate with his family to Plot **353**. However, the Objector and her co-wife adamantly refused to move to Plot **353** so that they could later claim a share of Plot **352**.

12. The Administrators position therefore is that **Leonard Kiongo** having already inherited a share of the estate of the Deceased being (**Parcel No 353**) was not entitled to receive a share of Parcel No **352**.

Analysis and Determination

13. I have considered the Protest filed by the Objector the evidence adduced in court as well as the written submissions filed by both parties. The Objector herein has filed this Protest for and on behalf of the estate of **Leonard Kiongo** a son of the Deceased. The said **Leonard Kiongo** died on **1st February 1996** (Annexed is a copy of the Death Certificate **No. 400724**). **Leonard Kiongo** had **three (3)** wives. The Objector and her co-wife **Esther Kiongo** sought and obtained letters of Administration in respect of his estate. Annexed to the Affidavit of the Objector dated **25th February 2020** is a copy of letters of Administration Intestate issued to the two widows (Annexure '**LKK 2**').

14. The Objector told the court that her co-wife is now deceased leaving her as the sole Administrator of the estate of their late husband. A copy of the Death Certificate Serial No **025602** in respect of **Esther Wahu Kiongo** is annexed as '**LKK 1**'.

15. Based on these letters of Administration I find and hold that the Objector is a legal representative of the estate of her late husband and therefore has '**locus standi**' in this matter.

16. In the Affidavit it is in support of the summons for confirmation of Grant dated **25th September 2018** it was proposed that the estate of the Deceased **Peter Karanja Kiongo** be distributed in the following manner.

Assets	Beneficiary	Share
L.R.Kiambaa/Waguthu/352	i. Daniel Karanja Muigai	1.25 acres

	ii. Estate of Ngotho Karuma (Deceased)	1.25 acres
	iii. Estate of John Njenga (Deceased)	1.25 acres
	iv. Estate Rachel Wakiya Karanja (deceased)	0.5 acres
	v. Michael Kiongo Wakanyi	0.5 acres
	vi. Mary Wanjiku	1.00 acres

17. The Objector in her evidence stated that her husband **Leonard Kiongo** being the 1st born son of the Deceased was entitled to a share of his estate. She averred that her late husband and his wives have all along resided on **Plot 352** even during the lifetime of the Deceased.

18. The Objector claims that prior to his death the Deceased had allocated to each of his beneficiaries a port of **Plot 352**. The Objector avers that following the death of the Deceased all his sons were registered as proprietors in equal shares of the property known as **L.R.Kiambaa/Waguthu/352**. Annexed to the Objectors Affidavit of Protest is a copy of an official search dated **30th August 2013** (Annexure 'LKK – 5').

19. The Objector avers that it was unjust for the Administrators to leave out the estate of **Leonard Kiongo** in the distribution of the said parcel of land. That the estate of **Leonard Kiongo** is entitled to its rightful share of **Plot No 352** just like all the other beneficiaries.

20. The Objector denied that **Plot 353** was allocated to her late husband by the Deceased. She stated that it was the clan **Mbari ya Kiongo** who gave her husband **Plot 353**. She stated that in **1957** they all lived in communal villages and that in the year **1959** the family moved to **Plot 352** but that **Plot 353** was unoccupied during that time.

21. The Objector produced a copy of the minutes of a clan meeting held on **6th March 1998** giving the history of parcel of land known as **L.R.Kiambaa/Waguthu/352** (Annexure 'LKK'6'). The Objector asserts that the Administrators have dishonourably decided to omit the estate of **Leonard Kiongo** in the distribution of **Parcel 352**. Hence her objection to the summons for confirmation of Grant.

22. The Administrator **Mary Wanjiku Karanja** relied on her statement dated **19th November 2020**. She stated that she was one of the Administrators of the estate of the Deceased. The Administrator confirmed that **Leonard Kiongo** was the eldest son of the Deceased and also confirmed that the Objector herein was a widow to the said **Leonard Kiongo**.

23. The Administrator states that initially the entire family all lived together on the parcel of land being **L.R.Kiambaa/Waguthu/352**. However, when their eldest brother married his first wife the Deceased subdivided the family land resulting into the subdivision known as **L.R.Kiambaa/Waguthu/353**. This **Plot 353** was given to **Leonard Kiongo** by the Deceased.

24. Therefore according to the Administrator **Leonard Kiongo** was already given his share of the estate by the Deceased during his lifetime. The remaining parcel No. **352** was to be divided amongst the remaining **six (6)** siblings. She therefore denies the allegation by the Objectors that the estate of **Leonard Kiongo** was not provided for.

25. The Administrator states that the 1st wife of Leonard Kiongo, **Lizzy Wambui** was buried on **Plot 353**. That all the children by **Leonard Kiongo** who have died are buried on **Plot 353** proving that the said **Plot 353** was the family land.

26. The Administrator told the court that the Objector has adamantly refused to vacate **Plot 353** and that she proceeded to construct a house on **Plot 352** contrary to the orders made by the court on **7th July 2020**. The Administrator asserts that the Objectors have received their share of the estate and urges the court to confirm the Grant as prayed.

27. At the close of oral evidence parties were invited to file their final submissions. The Administrator filed the written submissions dated **17th September 2021** whilst the Respondent did not file any submissions.

Analysis and Determination

28. I have carefully considered the material placed before the court, the evidence by the parties as well as the written submissions filed in this matter. The **Evidence Act**, places the burden of proof of any fact on the person who wishes to rely on the same. **Section 107 of the Evidence Act Cap 80, Law of Kenya provides** as follows: -

“Burden of Proof

1. **Whoever desires any court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
2. **When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

29. The issues arising for determination are:

(i) Whether the estate of **Leonard Kiongo** is entitled to share of **L.R.No Kiambaa/Waguthu/352**.

(ii) Whether the summons for confirmation of Grant dated **25th September 2018** should be allowed.

30. It is common ground that **Leonard Kiongo** was the husband **Lilian Kiongo** the Objector herein. The said **Leonard Kiongo** passed away on **1st February 1996** (Annexed copy of Death Certificate **No.400724**) and letters of Administration in respect of his estate were issued to his two surviving widows **Esther Kiongo** and **Lilian Kiongo**. **Esther Kiongo** also passed away on **30th July 2017** (see copy of Death Certificate No. **0250602**) leaving **Lilian Kiongo** as the sole administrator of the estate of **Leonard Kiongo**.

31. It is further not in dispute that the late **Leonard Kiongo** was the eldest son of **Peter Karanja Kiongo**, who is the Deceased in respect of whose estate this Succession Cause was filed.

32. The record indicates that letters of Administration in respect of the estate of the Deceased were initially issued and confirmed on **16th May 2006** in the name of **Leonard Kiongo Karuma, Muigai Wakaruma, Ngotho Karuma** and **John Kabungu Karuma** who were all sons of the Deceased vide the certificate of confirmation of Grant issued on **16th May 2006**. The estate was distributed in the following manner: -

Leonard Kiongo Karuma	L.R.Kiambaa/Waguthu/353	Absolutely
Muigai Wakaruma		1.25 acres
Ngotho Karuma		1.25 acres
John Njenga	L.R.Kiambaa/Waguthu/352	1.25 acres
Rachel Wakiiya Karanja		0.5 acres
Eunice Wakanyi		0.5 acres
Mary Wanjiku		1.00 acres

33. However, following the demise of all the above named Administrators vide a Ruling delivered by the High Court on **12th July 2017** a fresh Grant was issued to **Mary Wanjiku Karanja** and **Daniel Karanja Mungai**.

34. From the record it would also appear that the estate of the Deceased comprised of only **one (1)** asset being the parcels of land known as-

(i) **KIAMBAA/WAGUTHU/352**

35. The Objector contends that the estate of **Leonard Kiongo** who was a beneficiary of the Deceased is entitled to a share in this parcel of land known as **KIAMBAA/WAGUTHU/352**. The Objector demanded that the estate of **Leonard Kiongo** be given its rightful share of **Plot 352**.

36. The Administrators case is that **Leonard Kiongo** having been allocated Plot No **353** which was carved out of Plot **352** by the Deceased during his lifetime is **not** entitled to any share of Plot **352**.

37. The Objector claims that Plot **352** had been allocated to the sons of the Deceased. She annexed to her objection an official search dated **30th August 2013** indicating that parcel **352** was registered jointly to **Leonard Kiongo Karuma, Mungai Wakaruma** and **Ngotho Karuma**. (Annexure '**LKK5**'). The Objector cites this as proof of the fact that her late husband **Leonard Kiongo** was entitled to receive a share of Plot **352**. However, the joint registration was only done to the sons of the Deceased in their capacity as the **Administrators** of his estate and did not indicate their ownership of the said land.

38. The Objector further asserts that the said **Leonard Kiongo** resided on Plot **352** during his lifetime. She produces minutes of a clan meeting held on **6th March 1998** (Annexure '**LKK 6**') at which meeting it was resolved that **Leonard Kiongo** was a beneficiary to Plot **352**. In the same minutes, it is acknowledged that the Deceased allocated to his eldest son **Leonard Kiongo** a portion of Plot **352** on which Plot **Leonard Kiongo** built his home. This corresponds with what the Administrator has told the court.

39. From the history of the disputed parcel of land it is evident that initially the entire family occupied the parcel of land known as Plot **352**. However after demarcation the Deceased subdivided the land and allocated to **Leonard Kiongo Plot 353** which had been carved out of Plot **352**.

40. The fact that **Plot 353** was allocated to **Leonard Kiongo** by his father was disputed by the Objector. The Objector insisted that her late husband acquired plot **353** from the clan and not from his father. However, the record indicates that Plot **353** was carved out of Plot **352** which belonged to the Deceased **not** to the clan. Thus the assertion by the Objector that it was the clan who allocated Plot **353** to **Leonard Kiongo** is wrong.

41. Under cross-examination by counsel for the Administrator, the Objector admits that some of her children have built their homes on Plot **353**. The Objector goes on to admit under cross-examination that **Leonard Kiongo** and his Deceased family members were all buried on Plot **353**. The Objector stated -

“The Deceased Esther (wife of Leonard Kiongo) was buried also in Plot 353. My husband stated that he wanted to be buried in Plot 353. We did not bury Esther in Plot 352. We buried her with her husband in Plot 353.....”

42. From the above it is quite evident that **Plot 353** was considered the home and property of **Leonard Kiongo** which had been gifted to him by the Deceased during his lifetime. The said gift must be taken into account in the final distribution of the estate of the Deceased.

43. **Section 42** of the **Law of Succession Act, Cap 160, Laws of Kenya** provides as follows:-

“42 where –

(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house. (own emphasis)

44. It is manifest that **Leonard Kiongo** was given the property known as **KIAMBAA/WAGUTHU/353** by the Deceased during the lifetime of the Deceased. That gift/allocation must in terms of **section 42** be taken into account when determining the share of the net estate due to **Leonard Kiongo**. His estate cannot now claim to be entitled to the remainder of the parcel of land which was to be distributed amongst the remaining siblings. They cannot have two bites at the cherry. Accordingly I find and hold that the estate of **Leonard Kiongo** is not entitled to a share in **LR KIAMBAA/WAGUTHU/352**.

45. The Administrators herein filed a summons for confirmation of Grant dated **25/9/2018**. The same is supported by an Affidavit of even date sworn by the Administrators. All the beneficiaries of the estate (save for **Leonard Kiongo** who already received his share) have been provided for in the proposed mode of distribution. There is a consent dated **25th September 2018** duly signed by the beneficiaries. Accordingly, I allow the summons for confirmation of Grant.

46. Finally, this court makes the following orders.

(1) The Objection dated 17th February 2020 is dismissed in its entirety.

(2) The summons for confirmation of Grant dated 25th September 2018 is hereby allowed as prayed.

(3) The estate will be distributed in terms of the consent dated 25th September 2018.

(4) This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 12TH DAY OF NOVEMBER 2021

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MAUREEN A. ODERO

JUDGE