



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**(FAMILY DIVISION)**

**SUCCESSION CAUSE NO 94 OF 2017**

**IN THE MATTER OF THE ESTATE ELIZABETH WAIRIMU WAIYAKI (DECEASED)**

LEWIS WILKINSON KIMANI WAIYAKI.....1<sup>ST</sup> PETITIONER

PETER GICHUHI WAIYAKI.....2<sup>ND</sup> PETITIONER

TIRAS BARAE WAIYAKI.....3<sup>RD</sup> PETITIONER

VERSUS

EUNICE WAMAITHA.....1<sup>ST</sup> OBJECTOR

JOHN NJENGA MANG'ARA.....2<sup>ND</sup> OBJECTOR

**JUDGMENT**

1. The deceased herein **Elizabeth Wairimu Waiyaki** {Elizabeth} and her husband **Tiras Waiyaki Munyua** {Mzee Tiras Waiyaki} who pre-deceased her had 16 children namely; -

- a. **Dr. Munyua Waiyaki {deceased}**
- b. **Lewis Kimani Waiyaki**
- c. **Gladwell Muthoni Buliro**
- d. **Jane Nunga Newbold**
- e. **Roxana Wanjiru Thuku**
- f. **Peter Gichuhi Waiyaki**
- g. **David Wanyoike Waiyaki {deceased}**
- h. **Charles Thuo Waiyaki**
- i. **Lilian Njeri Waiyaki**
- j. **Dr. Benjamin Githieya Waiyaki (deceased)**
- k. **Kenneth Mang'ara Waiyaki {deceased}**
- l. **James Mugo Waiyaki {deceased}**
- m. **Mwathi Waiyaki {deceased}**

**n. Eliud Thini Waiyaki {deceased}**

**o. Edwin Muiru Waiyaki {deceased}**

**p. Virginia Wambui Otieno {deceased}**

2. **Dr. Benjamin Githieya Waiyaki** was the husband to the 1<sup>st</sup> objector **Eunice Wamaitha {Eunice}**. The two sired three issues namely; -

**a. Elizabeth Wairimu**

**b. Rosalyne Wanjiku**

**c. Brian Tiras Waiyaki.**

3. The 2<sup>nd</sup> Objector **John Njenga Mang'ara {John}** is a son of **KMW**.

4. Mzee Tiras Waiyaki died in 1988. He left a Will wherein he bequeathed all his properties to his wife Elizabeth the deceased in this matter, including properties claimed to have been gifted *inter vivos* by him to his sons.

5. Elizabeth is said to have sub divided the family land Dagoretti/Kinoo/3575, transferred to all her sons the portions Mzee Tiras Waiyaki had gifted them, as if to complete the wish of her late husband save for the Estate of Dr. Benjamin Githieya, other than the area where Eunice and her late husband had put up their matrimonial home; Dagoretti/Kinoo/ 2483 which she quietly gifted to Eunice's son who was only 3 years old at the time. Eunice's husband died a year before the transfers were effected.

6. At the time KM was alive but it appears as though he did not get the entire property as gifted to him by his late father.

7. Elizabeth died on 5<sup>th</sup> April, 2014. She equally left behind a Will wherein she distributing her estate to only some of her heirs and part of it to the Executors/ Trustees of her Will to manage and deal with.

8. The matter before court is between the two objectors on one hand and the Trustees of Elizabeth's will.

9. Eunice lays claim on;

**Dagorretti/Kinoo/2482**

**Dagoretti/Kinoo/2484**

**A portion of Dagorretti/Kinoo/2503**

She asserts that the said properties alongside Dagoretti/Kinoo 2483 had been gifted *inter vivos* to her late husband by Mzee Tirus Waiyaki and Elizabeth ought to have gifted the same to his estate.

10. Similarly, the 2<sup>nd</sup> objector, John lays claim on

**Dagoretti/Kinoo/2492,**

**Dagoretti/Kinoo/2493 &**

**Dagoretti/Kinoo 2498**

on his own behalf and that of his siblings. It is his case that his father's estate was not given their complete share of inheritance as had been gifted to their father by Mzee Tiras Waiyaki stating that Dagoretti/Kinoo/2493 & 2498 were not transferred to their father. John's father, KMW died on the 15<sup>th</sup> of October 2011. John's evidence further is that Dagoretti/Kinoo/2492 was gifted to their late father by Elizabeth during her life time though she retained the title due to their father's alcoholism at the time and which property they were in possession of until the demise of their father.

11. The Trustees vehemently oppose the objections. It is their case that Eunice's claim is *res judicata* as the same was determined in Civil Case No. 122 of 2000. Further, they deny the allegation that the late Mzee Tiras Waiyaki had gifted properties as alleged by the objectors as Mzee Tira Waiyaki left a Will wherein his entire Estate was bequeathed to his wife Elizabeth. As for possession it is their case that Eunice took possession of the three properties she claims save for the one where her matrimonial home stands after the demise of Elizabeth.

12. Further, the Trustees assert that Eunice, as a daughter in law and her children alongside John and his siblings as grandchildren of the deceased are not dependants within the meaning of Section 29 of the Law of Succession Act ("The Act"); further neither Eunice nor KM challenged the Will of Mzee Tiras Waiyaki's; they further claim that Eunice's occupation of the named properties amount to intermeddling with the properties of the estate.

13. As for John they urge that he has no *locus standi* as he is not a legal representation of his father's estate; further no evidence was placed before court to prove that John's father was entitled to L. R. NO. Dagoretti/Kinoo/2492; John was less than candid with the court; and further that KM had expressed his wish not to inherit his parents.

14. Having considered the pleadings, evidence and submissions I am of the considered view that the issues for determination are as follows.

**a. Whether Eunice's claim is res judicata?**

**b. Whether Eunice and John and her/his family are dependants of the deceased?**

**c. Whether or not to interfere with the deceased Will**

**d. Who meets the costs of the suit?**

Issues a. b. c. & d. apply to Eunice's case whereas b & c apply to John's case. In the judgement I will consider the claims jointly and where necessary separately.

15. **Is Eunice's claim res judicata?** Eunice and Elizabeth were involved in **Civil Suit No 122 of 2000**, wherein Eunice had claimed for adverse possession of the properties she claims from the Estate of Elizabeth, alleging that her family had been in possession of the same long before her husband died as the said properties had been gifted to her late husband by her late father in law Mzee Tiras Waiyaki *inter vivos*. Eunice lost the case for adverse possession. In his Judgement Anganyaya J as he then was granted vacant possession of the said properties save for L.R. NO. Dagoretti/Kinoo 2483 to Elizabeth.

16. In relying on the principle of *res judicata* the court ought to consider several factors; the identity of the subject, cause of action; parties to the suit, and whether judgement was final.

Section 7 of the Civil Procedure Act provides;

**"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such a court."**

17. Further in the case of **Uhuru Highway Development Limited Versus Central Bank of Kenya & 2 Others (1996) eKLR** the Court of Appeal had this to say on the subject;

"In order to rely on the doctrine of *Res judicata* there must be;

- i) A previous suit where the matter was in issue.**
- ii) The parties were the same or litigating under the same title.**
- iii) A competent court heard the matter.**
- iv) The issue has been raised again."**

18. The parties to this suit and the previous one are certainly dissimilar, the cause of action is similarly different. In **Civil Suit 122 of 2000** Eunice had brought a claim based on the doctrine of adverse possession. This suit is brought under the law of Succession Act where the Trustees of the Will of Elizabeth are sued ostensibly because the deceased failed to provide for the Objectors in her Will. Even though some of the properties are similar, in my view the claim herein does not squarely fit within the tenets of the principle of *res judicata*.

**19. Are the objectors' dependants of the deceased within the meaning of Section 29 of the law of Succession Act?**

According to Eunice by the time the deceased wrote her will, on the 5<sup>th</sup> of November 1998 all her 16 children were alive save for Edwin Muniyua Waiyaki who died living no survivors and Eunice's late husband; Dr. Benjamin Githieya Waiyaki who left behind 4 survivors. Further she asserts that Elizabeth in line with her late husband's earlier decision of gifting their sons, completed the exercise by sub dividing the main family asset and transferring to her sons their gifts *inter vivos* just a year after Eunice's husband died in 1998 and as Mzee Tiras Waiyaki had gifted them. This piece of evidence is supported by the 2<sup>nd</sup> objector, Richard Kamau Mugo, a cousin of Tiras Waiyaki, Lawrence Waiyaki Wambaa also a cousin to Tiras Waiyaki & Ephraim Thibu.

20. Eunice further claims that although Elizabeth transferred to each son

their portion she did not transfer any land to the Estate of her late son Dr. Benjamin Githieya Waiyaki save the portion where her matrimonial house stands as stated herein..

21. Eunice further urges that in her last Will Elizabeth failed to provide for

the Estate of her late husband though she ought to have done so, he being one of her sons as she gifted her other children. Eunice's case before court is a claim for and on behalf of the heirs of Dr. Benjamin Githieya Waiyaki; share of inheritance that would otherwise have been passed to him had he been alive.

22. In her claim Eunice appears to say that the estate of her late husband was failed in its expectation as survivors of one of Elizabeth's sons as they have not benefitted in equal measure with the other children of the deceased both during the deceased life time and in death. In her evidence Eunice stated that her mother in law discriminated upon her as a young widow while she was alive and which discrimination continued even upon her death.

23. On his part the court understands John to say that Elizabeth gifted his father *inter vivos* property L.R. NO. Dagoretti/Kinoo 2482 but withheld the title to the same due to his father's alcoholism at the time though she allowed the family put into use the said property and therefore the children of his father ought to get the said property. Further he claims that some of the properties gifted to his father by Mzee Tiras Waiyaki were not transmitted to him by Elizabeth whilst she was alive nor in her Will yet all other sons of Elizabeth got the portions as gifted to them by Mzee Tiras Waiyaki transferred to them.

24. **Section 29** of the Act defines a dependant as follows: -

*“For the purpose of this part, ‘dependant’ means: -*

*(a) The wife or wives, or former wife or wives and the children of the deceased, whether or not maintained by the deceased immediately prior to his death;*

*(b) Such of the deceased's parents, step-parents, grand-parents, grand-children step- children whom the deceased had taken into his family as his own, brother and sisters, and half-brothers and half- sisters, as were being maintained by the deceased immediately prior to his death; and*

*(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”*

25. In **Re Estate of Wahome Njoki Wakagoto (2013) eKLR** it was held: -

*“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1<sup>st</sup> July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”*

**Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR** it was stated:

*“..... grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grandchildren inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”*

26. The trustees are right in their argument but only to the extent that children & the spouse of their departed siblings cannot lay claim as dependants of their late mother directly. However, this argument can only succeed if the objectors were claiming directly as heirs of the deceased which is not the case here. The objectors are indirectly laying claim in that they seek for what ought to have gone to their respective parents and/or husband had they been alive. One's inheritance does not cease upon death. Estates of deceased persons are entitled to benefit what would otherwise have gone to the deceased heir. It is not in dispute either that the objectors are not questioning the validity of Elizabeth's Will.

27. Case law cited above state that as long as grandchildren claim what ought to have gone to their parents they are regarded as dependants within the meaning of Section 29 (a) of the Act.

28. **Section 5** of Act gives power to a testator to will his/her property as he/she so wishes. This freedom though is not absolute, it is curtailed where the court forms the opinion that dependants of the deceased were not reasonably provided for. In arriving at such an opinion, the court has to read the said section together with **Sections 26 & 27** of the Act which provide as follows:

**Section 26** provides;

*“Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for the dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”*

Section 27 of the Act goes further to empower the court to remedy grievances brought to it in the following terms; -

**“In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.”**

29. In propagating the provisions of Section 5 as read with 26 & 27 courts have stated as follows:

**Ndolo v Ndolo Case No. 128 of 1995** the Court of Appeal stated as follows:

**“This court must, however recognise and accept the position that under the provisions of Section 5 of the Act, every adult Kenyan has an unfettered testamentary freedom to dispose of his or her property by will in any manner he or she sees fit. But like all freedoms to which all of us are entitled the freedom to dispose of property given by Section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in the enjoyment of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her life time.”**

In **John Kinuthia Githinji vs Githua Kiarie & Others Court of Appeal Case No. 79 of 1998** referred to in the **Estate of James Ngugi Mungai** Succession Case No. 523 of 1995 Gicheru JA as he then was quoted C J in **Banks vs Good Fellow 1870 L.R.** as follows:

**“The law of civilized people concedes to the owner of property the right of determination by the last will, either in whole or part to whom the effects which he leaves behind him will pass...**

**A moral responsibility of no ordinary importance attaches to the exercise of the right given. The instincts and affections of mankind, in the past majority of instances, will lead men to make provisions for those who are nearest to them in kindred and who, in life have been the object of that affection....**

**The same motive will influence him in the exercise of the right to disposal when secured to him by law. Hence arises a reasonable and well warranted expectation on the part of a man’s kindred surviving him, that on his death effect shall become theirs instead of mere strangers. To mock the common sentiments of mankind and violate what all man..... deeming an obligation is moral law.**

30. In her Evidence Eunice gave details of how Elizabeth disposed of her estate while alive and in the Will as follows; -

Main family asset which was initially, **Dagoretti/Kinoo/375** subdivided and distributed by Elizabeth in her life time to her children as follows;

<b>PORTIONS</b>	<b>ACREAGE</b>	<b>NAMES</b>
i. A & X	1.7	Elizabeth Wairimu Waiyaki (though A in occupation by Eunice)
ii. B	0.68	Tiras Waiyaki (Comprises Eunice’s Matrimonial Home)
iii. C	0.242	Cemetery
iv. D & A1	1.171	Charles Thuo Waiyaki
v. E	018	Water tank
vi. F & Z	1.887	Lilian Njeri Waiyaki
vii. G & U	2.58	Eliud Thini Waiyaki
viii. H & T	2.65	Dr. Peter Gichuhi Waiyaki
ix. J & Y	2.644	Reginald Mwathi Waiyaki
x. K & V	2.207	Nyoike Waiyaki
xi. L	0.45	Elizabeth Waiyaki
xii. M & S	1.171	KM

xiii. N & R	4.776	Dr. Munyua Waiyaki T/A Global Institute
xiv. P & W	2.59	Lewis Kimani Waiyaki
xv. Q & B1	3.407	James Mugo Waiyaki

As distributed in the Will; -

**PROPERTIES**

**BENEFICIARIES**

i. L.R.NO. Kitengela 4016	Nunga, Wathoni,  Wambui & Wairimu
ii. Naivasha unity farm (200 shares)	Nunga, Wathoni,  Wambui & Wairimu
iii. Plot 490 (209/2378)	Njeri, Munyua, Kimani,  Mugo, Mwathi,  Gichuhi, Thini, Thuo,  Nyokabi
iv. Remainder of Moiben	Njeri, Munyua, Kimani,  Mugo, Mwathi,  Gichuhi, Thini, Thuo,  Nyokabi
v. Interest in Naivasha/Maraigishu Block 8/239	Mwathi Waiyaki
vi. L.R.NO. Nyandarua/Silibwet/381	Njeri, Munyua, Kimani,  Mugo, Mwathi,  Gichuhi, Thini, Thuo,  Nyokabi
vii. Dagoretti/Kinoo/2482(Portion A)	}
viii. Dagoretti/Kinoo/2484 (Portion C)	}
ix. Dagoretti/Kinoo/2486 (Portion E)	}
x. Dagoretti/Kinoo/2503 (Portion X)	} To be held by Trustees
xi. Dagoretti/Kinoo/2508 (Portion C1)	}
xii. Dagoretti/Kinoo/2492(Plot L)	}
xiii. 150 shares Kiambu MaziwaHouse	}
xiv. 690 shares Brookebond Kenya Limited	}

31. From the above list which the trustees did not challenge the Estate of **Dr. Benjamin Githieya Waiyaki** was not provided for at all by Elizabeth either in life nor in death, and even if one was to consider the property gifted by Elizabeth to Eunice's son in 1998, the same is negligible as compared to what she gifted her other children. It does not come out clear though why the deceased failed the estate of her late son Dr. Benjamin Githieya Waiyaki; why the widow was by passed and her matrimonial home quietly gifted to her 3-year-old son; more so Eunice having been a young widow then and also being the representative of her husband's estate. The said estate of Dr. Benjamin Githieya was not considered in the will either laying bear and thwarting the expectations of his survivors.

32. The court will not hesitate to observe that the Estate of Dr. Benjamin Githieya Waiyaki was certainly treated with disdain and contempt by Elizabeth both in life and in death. She did not treat them equal to her other children. And no reason came forth from the Trustee to explain the unfortunate situation.

33. As for the Estate of KM the court finds that John is rightly before the court on his own behalf as a grandson seeking for his father's share of inheritance. He is magnanimous enough in his quest to say that he is claiming his father's inheritance to benefit him and his siblings and so that together they may get what ought to have gone to the father as did his uncles and aunts. To urge that he is not properly before the court is archaic as it is seeking to have substantive justice thrown away at the altar of procedural technicalities which the Kenyan law currently frowns upon, as espoused in Article 159 (d) & (e) of the Kenyan Constitution 2010 and Section 1A & 3A of the Civil Procedure Act.

34. The grim picture the court gets having heard the case is that the survivors of the Estate of Dr. Benjamin Githieya Waiyaki were reduced to destitute by their own grandmother during her life time and in death, and the Trustees of her Will are perpetuating the same, dangling some properties to the children of the estate with conditions they are uncomfortable with and leaving out the widow as though she is not a survivor.

35. As for the Estate of KM two of the properties claimed are not captured in the Will. Could they have been gifted to KM but the titles withheld? If so, the same ought to go to his survivors once they have put their house in order by obtaining a grant of probate.

36. The law in recognising tribulations such what has befallen some of the heirs herein provide for a remedy in **Sections 26 & 27** of the Act. Case law equally supports the court's intervention in situations where members of a family are left out of inheritance as demonstrated above.

37. Notable is that the objectors have not asked for the legacies gifted to other dependants to be interfered with, they seek to be provided for from the residue, and propose to be allocated properties they have occupied, used and/or developed during the life time of the deceased though not necessarily with her consent.

38. From the analysis above this court's view is that the expectations of the objectors are not out of place, they are in tandem with the obligation placed on the maker of a Will not to hurt those close to them in kindred and to consider them when making bequests. It is equally a moral responsibility owed by a testator to his kin. To quote the wise words in **Banks vs Good Fellow** (supra), the testator ought to gift those who are "**Object of their affection**" and to meet their expectations that "**on his death effects shall be theirs instead of strangers**". And further the words in **Ndolo & Ndolo**(supra) "**But like all freedoms to which all of us are entitled freedom to dispose of property given by Section 5 must be exercised with responsibility and a testator exercising that freedom must bear in mind that in that enforcement of that freedom, he or she is not entitled to hurt those for whom he was responsible during his or her life time.**"

39. **Based on the above the court is enjoined to remedy the situation the objectors find themselves in as failure to do so will negate the very epitome of Chapter Two of the Kenyan Constitution that lays emphasize on the Principles of justice, fairness, equity, non-discrimination, human rights and dignity. Secondly there is need to enforce the legal and moral responsibility and duty owed to the objectors.**

40. **Consequently**, the objectors succeed in their quest for reasonable provision to the extent that the Trustees are directed and ordered to provide for them from the residue of the estate of Elizabeth by transferring and availing the following properties; -

**a. To the estate of Dr. Benjamin Githieya**

**i. Dagoretti/Kinoo/2482(Plot A) &**

**ii. A portion of Dagoretti/Kinoo/2503(Plot X)**

**b. As for Dagoretti/Kinoo/2484(Plot C) (Cemetery), since several members of the extended family have been interred on the said land and despite Eunice's usage of the same the court declines to grant the same and in its place directs and orders the Trustees to allocate from the Residue a property similar in size and value as Dagoretti/Kinoo/2484(Plot C) to the estate of Dr. Benjamin Githieya Waiyaki.**

**c. To the children of KM properties**

**Dagoretti/Kinoo/2492 (Plot L),**

**d. For avoidance of doubt property Dagoretti/Kinoo/2484(Plot C) will remain as registered in the names of Brian Tiras Waiyaki. The title be released to him.**

**e. The Trustees are further directed and ordered to ensure that they avail to the children of KM properties;**

**i. Dagoretti/Kinoo/2493(Plot M) &**

**ii. Dagoretti/Kinoo/2498(Plot S)**

**And should the titles still be in the name of the deceased herein, to cause transfer of the same to the representative of the estate of KM.**

**f. The Trustees do meet the costs of the suit.**

**DATED, SIGNED and DELIVERED at NAIROBI this 15<sup>th</sup> DAY OF OCTOBER, 2020.**

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**ALI-ARONI**

**JUDGE**