



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO.130 OF 2017

(FORMERLY NAIROBI H.C. SUCCESSION CAUSE NO. 691 OF 1995)

IN THE MATTER OF THE ESTATE OF WAWERU MWANIKI GATUHA (DECEASED)

JANE WAMBUI WAWERU.....OBJECTOR

VERSUS

STEPHEN MUTEMBEI.....1ST ADMINISTRATOR

PETER MWANGI WAWERU.....2ND ADMINISTRATOR

R U L I N G

Before me is the Amended summons for confirmation of grant dated 24/02/2020. It was filed by Kariuki Mwangi Advocate on behalf of the petitioner/applicant, Stephen Mutembei and Peter Mwangi Waweru.

The applicants seek prayers that the grant of letters of administration made to Stephen Mutembei Waweru and Peter Mwangi Waweru be confirmed in accordance with the court order made on 04/12/2019.

Before I consider the submissions of Counsel on the above summons, I must put in perspective the background of this case. A summons for confirmation dated 22/05/2009 was filed by the petitioners seeking confirmation of grant made on 17/04/1997. The petitioner filed their proposed mode of distribution but a protest was filed by Charles Mwaniki Waweru, a child of the deceased from the 2nd house. The protest was heard and determined by Hon. Musyoka J. His ruling is dated 11/12/2014. The estate comprised of only one property namely, Nyandarua/Mkungu/48 and it was distributed as follows;

1)

a) 30 acres to Peter Karanja Kiarie;

b) 5 acres to Francis Kaidu Kinuthia;

c) 2 acres to Joseph Njoroge Kimani;

d) 5 acres to Charles Mwaniki Waweru;

2) The balance of the land shall be distributed in accordance with the provisions of Sections 40 and 42 of the Act;

3) To facilitate the distribution stated in (1) and (2) above, the estate land Nyandarua/Mkungu/48 shall be valued before final orders on distribution are made;

4) Valuation to be done within 45 days.

After the said valuation was done, Hon. J. Musyoka made the following further orders on 03/05/2017;

1) That Nyandarua/Mkungu/48 should be distributed as follows;

a) 30 acres to Peter Karanja Kiarie;

b) 5 acres to Francis Kaigu Kinuthia;

c) 2 acres to Joseph Njoroge Kimani;

2) The balance of the land shall be distributed in accordance with the provisions of Sections 40 and 42 of the Act;

3) The deceased had married twice. The two widows and all their children put together number thirteen (13). The 29.3 hectares or 72.4 acres should be divided into thirteen equal units, each of the children shall take a unit. The distribution shall take into account any settlement or occupation or development by any of the survivors.

4) Distribution of the remaining free property of the deceased shall be in the terms set out above. The estate shall be distributed according to the terms of the ruling herein of 11th December, 2014 and paragraph 3 here above. A certificate of confirmation of grant shall issue thereafter accordingly.”

After this order was made, the matter was transferred to Nyahururu High Court which has territorial jurisdiction over the subject land.

Since this matter was placed before me, it has been mentioned severally to determine whether Charles Mwaniki Waweru who had been given 5 acres of land as a gift inter vivos during the deceased's lifetime is entitled to be included in the 13 beneficiaries and whether he should benefit from the remaining 72 acres.

Since the parties did not agree, directions were taken that they file submissions for the court to consider and interpret J. Musyoka's ruling of 11/12/2014 and 03/05/2017. I wish to clarify that this matter is not for review of J. Musyoka's orders nor is it a fresh determination on the summons dated 22/05/2009.

On 04/12/2019, after the court established that the parties could not agree on the mode of distribution in terms of the ruling of J. Musyoka, the court directed the petitioner to amend the summons dated 22/05/2009 so that the issues raised by Counsel could be addressed by this court. The parties agreed to file written submissions.

It is not in issue that the deceased had two wives hence two houses and the beneficiaries are as follows;

1) Naomi Wanjiku Waweru

2) Stephen Mutembei Waweru

3) Peter Mwangi Waweru

4) Eliud Mwaniki Waweru (deceased) represented by the widow Beatrice Waitheera Mwaniki

5) Mary Njoki Wangai

6) J.M. Mburu Waweru

7) Hannah Mwhaki Waweru (deceased) represented by the son Eliud Mwaniki Waweru

8) Jane Wangui Waweru (also known as Jane Nyaguthu Waweru or Jane Nyaguthi Waweru)

9) Joseph Mburu Waweru

10) Joseph Warari Waweru

Second House:

1) Jane Wambui Curu – Widow

2) Naomi Wachuka Ndungu

3) Charles Mwaniki Waweru

It is also not in dispute that part of the estate had been sold to three purchasers as follows;

a) Peter Karanja Kiarie – 30 acres

b) Njoroge Kimani Njoroge (deceased) represented by Veronica Wamaitha Njoroge (widow) – 2 acres

c) Francis Kaigu Kinuthia (deceased) represented by Anne Wangari F.K. Kinuthia (widow) – 5 acres

It is also not in dispute that during his life the deceased had gifted Charles Mwaniki Waweru with 5 acres of land. The estate of the deceased comprised 46.5 hectares or 114.9 acres. After deducting the undisputed parcels, the land that is available for distribution to the rest of the survivors was 29.3 hectares or 72.4 acres. The issue that the parties could not resolve is whether, Charles Mwaniki Waweru having been given 5 acres as a gift inter vivos, was he entitled to part of the 72.4 acres.

Mr. Kariuki Mwangi, counsel for the applicants submitted that **Section 42 of the Law of Succession Act** which provides that property given to any child or grandchild during the life of the deceased shall be taken into account during distribution to ensure equity when sharing the properties of a deceased person so that some do not benefit more than others. He argued that the said Charles Mwaniki should not be allowed to inherit a further share of the 72 remaining acres because it must have been the deceased's wish that he gets 5 acres only. Counsel cited the case of **Joseph Wairuga Migwi vs Mikielina Ngina Munga (2016) eKLR** where the court held that express wishes of the deceased cannot be ignored. Counsel also argued that since it is not easy to achieve equality, the court should adopt the concept of equity and fairness as was held in **Mary Rono vs Jane Rono & William Rono (2005) eKLR** where the court observed that the Act does not envisage a situation where each beneficiary has to get an equal portion because it would be unjust for some of the children e.g. where there are grown up and young children. He therefore suggested that the distribution should be that five acres go to Charles Mwaniki and the remaining 72 acres be distributed equally amongst the remaining survivors in accordance with the judgment of J. Musyoka at paragraph 21 (2) and that it would be unfair to allocate Charles Mwaniki Waweru a further portion as that would amount to unjust enrichment.

Counsel also urged that they are bound by the consent recorded in court on 17/12/2018 which the objectors are misinterpreting of J. Musyoka. Counsel urged that **Section 40 of the Succession Act** does not take away the court's discretion and relied on the decision in **Scolastica Ndululu Suva vs Agnes Nthenya Suva (2019) eKLR** where the court held that the court has a discretion to take into account all factual circumstances of each case. Counsel urged that pursuant to the order of 17/12/2018, the district surveyor Nyandarua visited the land and prepared a report dated 18/07/2019 in accordance with J. Musyoka's directions taking into account the settlement, and occupation and developments by beneficiaries and that the said report should be adopted by the court.

According to Counsel, the parties are bound by the consent order of 17/12/2018 which has the effect of a contract and can only be set aside upon certain conditions, like a contract. See **Flora Wasike vs Destimo Wamboko (1988) 1 KAR 625 and Michael Mubea Kamau vs Robert Wanyika Machina CA No. 305/2002.**

On the allegation that the applicants have added another person to the list of beneficiaries i.e. Jane Wanjiru Waweru; it was submitted that the allegation is incorrect as evidenced by her affidavit dated 03/03/2020 where she depones that she is alias Jane Nyaguthu Waweru or Jane Nyaguthi Waweru and her name appears in the consent of 19/1/1995 and affidavit in support of the petition dated 10/04/1995.

On the question of who would meet the costs, the same were provided for in the judgment that 0.9 acres would be sold to cater for survey and related expenses; that if one of the administrators catered for the costs, then he can recover from the estate. See **Christine Wangari Gachigi & 3 Others vs Elizabeth Wambui (2014) eKLR** where the court held that the estate must cater for expenses incidental to the administrator.

In relation to the share of Naomi Mwangi Waweru, it was Counsel's submission that it can only devolve to her biological children as provided in **Section 29 of the Act.**

Mr. Kariuki urged the court to distribute the estate in terms of the schedule annexed to the amended submissions dated 24/02/2020.

Mr. Rakoro, Counsel for the objectors filed submissions on 07/05/2020. It was submitted that in the affidavit filed with the summons for confirmation dated 22/05/2009 there was no beneficiary named as Jane Wanjiru Waweru and the deceased had no such daughter.

Counsel argued that J. Musyoka in his ruling directed inter alia that the estate be divided in accordance with **Section 40 and 42 of the Act.** According to Counsel, the grant was confirmed and what remained was the certificate of confirmation hence the valuation. After valuation the court gave further order that the distribution be in accordance with the order of 11/12/2014 and paragraph 3 of the order of that day. Counsel urged that it is clear that the court had settled the issue of distribution of the balance of the 72.4 acres having excised off the purchaser's portion and the gift to Charles Mwaniki Waweru. According to Counsel, the 72.4 acres was to be divided into 13 units meaning that Charles Mwaniki Waweru was one of the units, meaning that apart from the 5 acres gift, he would get another 5.85 acres from the 72.4 acres; that on 17/12/2018, a consent was entered into and one of the terms that the 72 acres be distributed into equal portions and that included Charles Mwaniki; that even if Charles Mwaniki was not to share in the 72 acres the 12 units would get 5.85 acres each which was discriminatory to Charles Mwaniki. Counsel argued that the grant was confirmed and it cannot be done twice because the rulings of 11/12/2014 and 03/05/2017 have not been revoked or set aside or appealed from.

It is also Counsel's submission that Naomi Wanjiku Waweru died before the summons for confirmation was filed and determined; that a grant has not been issued for her estate and no consent on her estate should be dealt with; that the suggestion that her 5.85 acres be held in trust for her children is unlawful; that instead, her share should revert to the estate of the deceased and distributed to the 12 units. It was argued that the court do dismiss the amended summons dated 24/02/2020.

I have considered the submissions of both Counsel. The first issue I will deal with is whether Jane Wanjiru Waweru is one of the deceased's children and a beneficiary.

In his ruling, J. Musyoka made a finding that the deceased was survived by two houses, the 1st house composed the 1st widow Naomi Wanjiku Waweru and her nine children while the second house comprised of the 2nd widow Jane Wambui and her two children. In the amended summons, one of the named beneficiaries in the first house is Jane Wanjiru Waweru. The said Jane Wanjiru Waweru swore an affidavit dated 03/03/2020 in which she quotes her identity card as 2954330, a daughter of the deceased and that she is the same one referred to as Jane Nyaguthi Waweru or Jane Nyaguthu Waweru. In the affidavit in support of the petition for letters of administration dated 19/01/1995, the said Jane Nyaguthu was listed as a daughter of the deceased. I find the objection to inclusion of Jane Nyaguthu in the list of survivors of the first house as being untenable

I now come to the main issue on the distribution of deceased's estate. I wish to point out that primary judgment by J. Musyoka is the one dated 11/12/2014. The determination of the court must be read from paragraph 19 of the judgment. The court said;

19. It emerges from the ruling of 07/05/2009 that the protestor had been given 5 acres out of the estate land by the deceased. This was an inter vivos gift. Such gifts are addressed in Section 42 of the Law of Succession Act, they ought to be taken into account in distribution. The court had this in mind when it was directed on 7th May that the estate be divided in accord with the provisions of Sections 40 and 42 of the Act;

20. In distributing the estate of the deceased among the survivors, the interests of the third parties as well as the interests of the protestor as defined in the ruling of 07/05/2009 shall be taken care of first;

21. Nyandarua/Mkungu/48 should be distributed as follows;

1. a. 30 acres to Peter Karanja Kiarie

b. 5 acres to Francis Kaigu Kinuthia

c. 2 acres to Joseph Njoroge Kimani

d. 5 acres to Charles Mwaniki Waweru

2. The balance of the land shall be distributed in accordance with the provisions of Sections 40 and 42 of the Act;

3. To facilitate the distribution stated in (1) and (2) above, the estate land, Nyandarua/Mkungu/48 shall be valued before final orders on distribution are made;

4. Valuation to be done within 45 days;

5. Mention on 28/01/2015 to confirm valuation and for further orders.”

The court was very clear that the 5 acres that were given to the protestor Charles Mwaniki Waweru had to be taken into account during the distribution pursuant to Section 42 of the Law of Succession Act. The court went ahead to affirm that position in paragraph 21 (2) of the judgment that in distributing the balance of the estate, Section 40 and 42 of the Act was applicable.

The ruling of 03/05/2017 was the implementation of the judgment of 11/12/2014 in terms of paragraph 21 (3) (4) and (5) of that ruling. Indeed, in paragraph 1 of the ruling of 03/05/2017, the court started by adopting the orders made on 11/12/2014.

At paragraph 21 of the orders of 11/12/2014 the Judge had ordered as follows;

“21 Nyandarua/Mkungu/48 should be distributed as follows;

a) 30 acres to Peter Karanja Kiarie;

b) 5 acres to Francis Kaigu Kinuthia;

c) 2 acres to Joseph Njoroge Kimani;

d) 5 acres to Charles Mwaniki Waweru.”

It is the same order that is imported in the ruling of 03/05/2017 where the Judge said;

“On 11/12/2014 I made the following orders;

1) That Nyandarua/Mkungu/48 shall be distributed as follows;

a) 30 acres to Karanja Kiarie

b) 5 acres to Francis Kaigu Kinuthia

c) 2 acres to Joseph Njoroge Kimani

2)

3)”

However, on 3/5/2017 the Judge omitted to include clause No. 1 (d) – that is, “the 5 acres given to Charles Mwaniki Waweru.” As a result of that omission, the Judge then went ahead to include Charles Mwaniki Waweru in the number of survivors or units to benefit from the remaining 72.4 acres wherein the Judge had held at paragraph 19 of his judgment that the 5 acres that Charles Mwaniki Waweru was given as a gift inter vivos had to be taken into account during distribution.

To emphasize the fact that the Judge was merely implementing the ruling of 11/12/2014, the Judge repeated at paragraph 4 of the ruling of 03/05/2017 that the estate had to be distributed according to the terms of the ruling of 11/12/2014. Section 40 and 42 of the Law of Succession Act provide as follows;

“40. Where an intestate was polygamous;

1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children;

2. The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.

42. Previous benefits to be brought into account, 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.”

I agree with the holding in Scholastica’s Ndululu’s case (Supra) 2019 that;

“It is therefore evident that although Section 40 of the Law of Succession Act provides a general provision for distribution of the estate of a polygamous deceased person, the court has the discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.”

Section 42 is clear that whatever Charles Mwaniki Waweru had received during the deceased’s lifetime must be considered as the same had already been excised from the estate. If Charles Mwaniki were to be considered afresh, that is to get an equal share with other beneficiaries, it would be unfair and discriminatory because it would mean that Charles Mwaniki would get over 10 acres while others get only 5 acres. I agree with the submission that Section 42 of the Act is meant to protect the wishes of the deceased by ensuring that what the deceased wished to bequeath to Charles Mwaniki during his life was done. But this section also serves to enable the court maintain equity in sharing out the deceased’s estate so that fairness is achieved.

On 17/12/2018, the parties recorded a consent which captured J. Musyoka’s decision, save that at paragraph (F) it was agreed that 0.9 acres be sold to cater for valuation survey and further related expenses. That leaves a balance of 71.5 acres available for distribution amongst the remaining survivors. It is Mr. Rakoro’s submission that if Charles Mwaniki does not benefit from the 72 acres, it means that others will get more land. I make reference to the provisions of Section 40 of the Act. In Rono vrs Rono Supra – Omolo J. A. had this to say;

“my understanding of that section is that while the net intestate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution has a discretion to take into account or consider the number of children in each house. If parliament had intended that there must be equality between houses, there would have been no need to provide in the section that the number of children in each house be taken into account.

Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained and generally seen through life. If such a child whether girl or boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied the Act did not provide for such equality.”

I am guided by the above finding that the Act never intended that equal distribution means that each beneficiary gets an equal share but that the distribution should be equitable considering the circumstances of each case. In this case, Charles Mwaniki Waweru already got 5 acres of land during the life of the deceased. If each of the other 12 survivors gets 5 acres, the balance will be 11.5 acres. The 11.5 acres should then be shared amongst the 13 survivors including Charles Mwaniki, each would get 0.85 acres more. Since there are no special circumstances that would warrant the court to give one beneficiary more than the others, I will distribute the balance of 72 acres as follows; the 12 beneficiaries will get 5.85 acres each and the remaining 0.85 acres to go to Charles Mwaniki Waweru. In the end, each beneficiary will get 5.85 acres.

As to what should happen to the entitlement of Naomi Wanjiku, the widow of the deceased who died during the pendency of this matter, the objectors have submitted that since there was no consent from her beneficiaries or children, on how to deal with her estate it was suggested that the 5.85 acres should revert back to the deceased’s estate and distributed amongst the 12 remaining units as per the surveyor’s report dated 22/07/2019. I think this suggestion by the objector contradicts her own submissions. The protestor had submitted that the grant was already confirmed and cannot be confirmed twice. If that is the case, it means that Naomi’s share had already passed to her and cannot revert to the deceased’s estate. In my view, the 1st house (Naomi’s children) will decide whether or not to share the land amongst themselves or the

same to be made part of her estate. It should not be the concern of the 2nd house.

The objectors urged the court to dismiss the amended summons for reason that the grant was confirmed vide the orders made on 11/12/2014 and 03/05/2017. I do agree with the above submission because J. Musyoka distributed the estate vide the orders of 11/12/2014 and 03/05/2017, and the grant was to be confirmed in those terms. It just transpired that the Counsel did not seem to agree on what the court's order with regard to Charles Mwaniki Waweru's share, which this court has endeavoured to clarify. There was no need of filing an amended summons and I therefore dismiss the amended summons dated 24/02/2020. It is Mr. Rakoro, Counsel for the objector, who on 04/12/2019, suggested that Mr. Kariuki should amend the summons so that they could argue it. For that reason, each party should bear their own costs.

In the end, the deceased's estate comprising Nyandarua/Mkungu/48 measuring 114.9 acres will be distributed in accordance with the court's ruling of 11/04/2014, 03/05/2017 and consent of 17/12/2018 as follows;

1) 30 acres to Peter Karanja Kairu

2) 5 acres to Francis Kaigu Kinuthia

3) 2 acres to Joseph Njoroge Kimani

4) 5 acres Charles Mwaniki Waweru

5) 0.9 acres to be sold to cover valuation, survey and further related expenses. If any of the beneficiaries has expended his money towards those expenses, then the estate should refund him.

6) The 71.5 acres free land be subdivided as follows; each of the 12 beneficiaries to get 5.85 acres each.

Charles Mwaniki Waweru to get another 0.85 acres out of that portion.

7) The Government surveyor to survey the entire parcel of land and the ground and take into account any settlement or occupation or development by any of the survivors in accordance with the above orders.

8) Each party to bear its own costs.

Dated, Signed and Delivered at NYAHURURU this 7th day of October 2020.

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R.P.V. Wendoh

JUDGE

PRESENT:

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Mr Rakoro for objector and holding brief for 2nd Administrator

Ms Wanjiru for 1st Administrator

Henry Court assistant