



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 742 OF 2011**

***(IN THE MATTER OF THE ESTATE OF NJERI KARANJA (DECEASED))***

**MONICAH NJERI MWANGI.....APPLICANT**

**VERSUS**

**PETER KARANJA MWANGI.....PROTESTOR**

**JUDGMENT**

On 9<sup>th</sup> December, 1999, Mary Wambui Mwangi petitioned the Principal Magistrates' Court at Murang'a for grant of letters of administration intestate in respect of the estate of Njeri Karanja (herein "the deceased") who, according to the petition, died at the age of 99 years on 21<sup>st</sup> March, 1999. She was then domiciled in Kenya and her last known place of residence was Ichagaki location in Murang'a County.

According to the affidavit in support of the petition, the deceased, though a woman, is said to have been survived by three "wives" named as:

1. Mary Wambui Mwangi, the previous petitioner;
2. Monica Njeri Mwangi, the applicant; and,
3. Lydia Wanjiku Mwangi.

She is also said to have been survived by Joseph Kamande Mwangi described as her son and two purchasers named as John Kamande Ngugi and Joseph Kamande Mwangi.

Her net intestate estate was a parcel of land registered as Loc. 7/Ichagaki/645 and whose estimated value was indicated in the affidavit in support of petition to be Kshs. 200,000/=.

The grant was made to the petitioner on 8<sup>th</sup> September, 2000 and on 24<sup>th</sup> May, 2001 she filed the summons for confirmation of grant in and proposed to have the deceased's estate distributed as follows:

1. Monica Njeri Mwangi (1.4 acres)
2. John Kamande Ngugi (2.0)
3. Erastus Mwaura Ndungu (1 acre)
4. Joseph Kamande Mwangi and Mary Wambui Mwangi (2.6 acres, the latter's share being restricted to life interest only)
5. Lydia Wanjiku Mwangi (3 acres)

By an affidavit sworn on 20<sup>th</sup> June, 2001 and filed in court the following day, Peter Karanja Mwangi, the present protestor, protested against the confirmation on the ground that certain beneficiaries and dependants had been omitted from the list of heirs. He named them as:

1. Peter Karanja Mwangi (Grandson)

2. John Kanyutu (Grandson)

3. Josephine Wamboi Mwangi (Granddaughter)

He denied that Monica Njeri Mwangi was the deceased's wife or that John Kamande Mwangi and Erastus Mwaura Ndungu were buyers of any part of the estate as suggested by the applicant in the summons for confirmation of grant. According to him, Monica Njeri had her own portion of land registered as Loc. 7/Ichagaki/613 which she is alleged to have inherited from one Kanuthu who was the deceased's co-wife.

He proposed that the estate be shared out equally amongst:

1. Mary Wambui Mwangi

2. Lydia Wanjiku

3. Joseph Kamande Mwangi

4. Peter Karanja Mwangi

5. John Kanyutu Mwangi and,

6. Josephine Wambui Mwangi.

Another affidavit of protest was filed by John Kanyutu Mwangi on 26<sup>th</sup> June, 2001 essentially agreeing with the depositions of Peter Karanja Mwangi.

While the summons for confirmation of grant previously filed by Mary Wambui Mwangi was still pending for disposal, Monica Njeri Mwangi filed another summons for confirmation of grant dated 18<sup>th</sup> August, 2010 on the even date. On her part, she listed the following people as having survived the deceased:

1. Mary Wambui Mwangi (deceased)

2. Monica Njeri Mwangi(wife)

3. John Kanyutu Mwangi(son)

4. Joseph Kamande Mwangi (son)

5. Lydia Wanjiku Mwangi (deceased)

6. Peter Karanja Mwangi (son)

She proposed to have 5.5 acres of the estate and the rest shared out as follows:

1. Joseph Kamande Mwangi (2.5 acres)

2. John Kanyutu Mwangi (1.0 acres)

3. Peter Karanja Mwangi (1.0 acres)

As they did in response to the previous similar summons, Peter Karanja Mwangi and John Kanyutu Mwangi filed affidavits of protest to this second summons. John Kanyutu described himself as the grandson of the deceased. The deceased, according to him, was survived by Lydia Wanjiku Mwangi (who in turn was survived by; Josephine Wambui, Peter Karanja, John Kanyutu Mwangi, Mercy Wangui Wanyoike and Mary Mbaire Maina); Mary Wambui Mwangi (survived by Wairimu Mburu, Wangui Kamande, Wanjiru and Joseph Kamande).

He proposed to have the deceased's estate distributed equally amongst Peter Karanja (3.3 acres), Joseph Kamande (3.3 acres) and John Kanyutu (3.3 acres). He also swore that Monica Njeri Mwangi was not the deceased's wife but was a wife of one Ngugi Munyoike. Peter Karanja Mwangi made similar depositions in his own affidavit of protest.

When parties appeared before the lower court on 6<sup>th</sup> December, 2010 for directions on the hearing of the protests, the learned magistrate transferred the cause to this Court upon the application by counsel for the administratrix on the ground that the lower court did not have the requisite pecuniary jurisdiction to dispose of the matter.

On 23<sup>rd</sup> August, 2013, this honourable court (Sergon, J) delivered a judgment on the summons dated 18<sup>th</sup> August, 2010 and the protests against it; the judgment, however, restricted itself to the issue whether Monica Njeri Mwangi owned an acre of Loc. 7/Ichagaki/645 in her own right and which, therefore, was not part of the estate. The learned judge opined that it is for this reason that Monica Njeri Mwangi sought to have a larger share of the estate than the rest of the beneficiaries.

Having so held my learned brother invoked Rule 41(3) of the Probate and Administration Rules and ordered Monica Njeri Mwangi to take out the necessary civil proceedings to establish her claim on the estate. This cause was thus stayed pending the outcome of Monica Mwangi's claim.

That claim was subsequently lodged in the Chief Magistrates' court at Murang'a as Civil Suit No. 21 of 2014. In the suit, Joseph Kamande Mwangi was named as the defendant; however, he neither entered appearance nor filed any defence. Accordingly, the suit proceeded *ex parte*. By a judgment delivered on 4<sup>th</sup> September, 2015 the claimant's suit was defeated; in dismissing the claim, the learned magistrate (Hon. J.J. Masiga, Resident Magistrate) held, inter alia, that the deceased's entire estate was registered in her name and there was no evidence that the applicant owned any part of it.

Armed with the judgment of the magistrate's court, Peter Karanja Mwangi filed yet another summons for confirmation of grant dated 1<sup>st</sup> October, 2015. He asked the court to confirm a grant allegedly made to him on 20<sup>th</sup> September, 2001 in respect of the same deceased's estate. He proposed to have the estate shared equally among Joseph Kamande, John Kanyutu and himself with each of them getting 3.3 acres.

Monica Njeri Mwangi responded to the summons for confirmation of grant and filed an affidavit of protest in which she, among other things, denied that Peter Karanja Mwangi is an administrator of the deceased's estate. As far as the distribution of the estate is concerned, she appeared to depart from her earlier position proposed in the affidavit in support of her own version of the summons for confirmation of grant and proposed that she should have 3 acres of the estate while Peter Karanja Mwangi and John Kanyutu Mwangi should share another 3 acres equally; the rest of the estate should devolve upon Joseph Kamande Mwangi who should get 3 acres and John Kamande Ngugi whom she proposed to give 1 acre.

On 12<sup>th</sup> June, 2017, this Court directed that the protest be heard by way of oral evidence.

Before I delve into the evidence and, considering the number of summonses and counter-summonses filed for confirmation of the grant, it is necessary to put matters into their proper perspective from the very outset.

My first instinct upon studying the record was to strike out the entire cause because, on the petitioner's own admission, it was filed in a court deficient of jurisdiction. I was inclined to take this path because if the lower court did not have the requisite jurisdiction then the cause was, strictly speaking, a nullity and there was nothing to transfer to this honourable court. However, I am minded that this cause was filed almost 20 years ago; to keep the parties in court any longer by striking out their cause so that they have to begin the process afresh will not be of any help to either of them. I doubt such decision would also be useful to the court since it is inevitable that a fresh petition will be filed and the issues raised in this petition will, in all likelihood, be the same issues that will be raised in the subsequent petition and most probably the result of the latter petition will not necessarily be different from what I will end up with in the present cause.

More importantly, by its judgment of dated 23<sup>rd</sup> August, 2013, this court assumed jurisdiction of the cause and directed specific steps to be taken. Those steps were taken to the extent that the court cannot turn around and dismiss the parties from the judgment seat back to the drawing board. For all these reasons, it would, in these circumstances, be prudent to sustain the cause and determine it on merits rather than strike it out. I must hasten to add that I have been constrained to take this rather unusual step because not only the circumstances appear to me to be exceptional but also because, so I suppose, the path I have taken is mete and just.

Equally important to put in its right perspective is the grant sought to be confirmed. The administratrix died on 15<sup>th</sup> August, 2006; she was purportedly substituted in the proceedings by Monica Njeri Mwangi on 2<sup>nd</sup> August, 2010. Having been so substituted, parties proceeded on the presumption that Monica Njeri was the administratrix of the deceased's estate. It is no wonder that the prayer for confirmation in the summons for confirmation of grant dated 18<sup>th</sup> day of August, 2010 was made in the following terms:

***1. That the grant of letters of administration intestate made to MARY WAMBUI MWANGI now deceased and I was substituted in her stead on 2.8.2010 by this Honourable Court in this cause be confirmed.***

As a matter of law, the grant made in the name of Mary Wambui Mwangi ought to have been revoked for the reason that it had become inoperative or useless upon her demise. (See section 76 (e) of the Law of Succession Act. A fresh grant should have then been made in the name of any other person who was eligible for such a grant.

Strictly speaking, there is no grant to be confirmed since what the applicant seeks to confirm is a grant in a deceased's person's name. However, for the same reason that I have sought to sustain this cause and conclude it on merits, and considering that even this honorable court has, by its judgment of 23<sup>rd</sup> August, 2013 proceeded on the assumption that Monica Njeri is the administratrix of the deceased's estate, I would rather ratify, so to speak, the appointment of Monica Njeri as the administratrix of the deceased's intestate estate.

I reiterate that I have had to take this step to avoid further delay in disposal of this matter and also being conscious of the fact that even if a fresh petition was filed, there is bound to be no difference between what has been said in support of or in protest against confirmation of the grant.

I trust that in taking the course I have taken, I am fortified by section 47 of the Act which empowers this court to '*pronounce such decrees and make such orders as may be expedient*'; in this regard, I am convinced that any step taken towards resolving a matter that has lagged in court for almost two decades is what the Act would consider as '*expedient*'. Rule 73 of the Probate and Administration Rules is to the same effect; that this honourable court has power to make such orders as are necessary in order to meet the ends of justice or to prevent abuse of the process of the court.

One final thing I have to consider is which of the three summonses for confirmation of grant this court should address as such in determination of this cause. As noted, the initial summons dated 18<sup>th</sup> May, 2001 was filed by Mary Wambui Mwangi; the second one was

filed by Monica Njeri dated 18<sup>th</sup> August, 2010 and the final summons dated 1<sup>st</sup> October, 2015 was filed by Peter Karanja Mwangi on 5<sup>th</sup> October, 2015.

The first summons sought to confirm the grant made to Mary Wambui Mwangi; that summons was overtaken by events when the latter died before the grant was confirmed. The summons by Peter Karanja does not have any basis, legal or otherwise, because it is made on the presumption that a grant of the letters of administration was made in his name. This is of course contrary to the evidence available; to be precise, there is no evidence that the grant was ever made to the said Peter Karanja. The summons was therefore non-starter *ab initio* and it is hereby dismissed.

The only summons thus left for consideration is the one by Monica Njeri; as much as Monica Njeri herself is described as the protestor and Peter Karanja as the applicant, it is this summons by Monica Njeri and the protests against it that this court has to consider.

Turning back to the evidence, Monica Njeri testified that the deceased was her mother-in-law. The latter had married Mary Wambui, the initial petitioner. Monica Njeri herself was the wife of Kamuthu Wanjiru. Kamuthu Wanjiru and Njeri Karanja (the deceased) were both married to one Karanja. Upon the demise of Karanja, each of his two wives, got a wife for herself and it is in these circumstances that she married Kamuthu Wanjiru. Njeri Karanja's wife was Mary Wambui, the initial petitioner.

She testified further that she knew Peter Karanja as the son of Lydia Wanjiku who only happened to live at Njeri Karanja's home. Since Lydia Wanjiku was not of the deceased's family, she was of the view that her son was not entitled to a share of her estate. She changed her story, however, during cross-examination and acknowledged that Lydia Wanjiku and Mary Wambui were the wives of Njeri Karanja and Lydia Wanjiku's children, including Peter Karanja were entitled to a share of the deceased's estate.

The witness also appeared to shift her position on her relationship with the deceased; she described the deceased as her step-mother. She denied, in the same breath, that she is the wife of one Ngugi or that she lived with him. According to her the deceased shared out her land to her children, Lydia Wanjiku and Mary Wambui before she died. She was entitled to Kanuthu's portion. She acknowledged Peter Kamande to be her own son and went further to propose that he should in fact get what she, herself, is entitled to.

Peter Karanja Mwangi, on the other hand, testified that he was the son of Mwangi Karanja. The latter, according to his evidence, was the son of Njeri Karanja, and therefore he was the deceased's grandson. His mother was Lydia Wanjiku but who was deceased as well. Similarly, his father had died but he could not tell when died. He was, however, aware that he was buried on Njeri Karanja's land and it is on the same parcel of land that he had settled. He admitted in cross-examination that in spite of his evidence, he had described himself as the son of Njeri Karanja in his affidavit.

Peter Karanja Mwangi also admitted that he was aware that Kanuthu Karanja was the co-wife of Njeri Karanja but that she did not have children. He named his siblings as Josphine Wambui, Peter Karanja, Mary Mbaire, Mercy Wangui and John Kanyotu. He admitted that he had described himself in the affidavit as a son to the deceased.

This is the evidence I was confronted with.

To say that the competing claimants' relationship to the deceased is complex would be an understatement, in my humble view. The imprecision in the parties' evidence did not help matters; if anything, they clouded the issues even further. Be that as it may, this court now has a rather not so easy task of making some sense out of the material before it and decide the dispute, one way or the other.

The phenomenon of woman to woman marriage which appears to be central in this cause is not alien to the Kikuyu community from which the deceased hailed and thus it is probable that she may have been a party to such union. The contesting parties also hail from the same community and all they were required to demonstrate was their status in that union to the extent that their competing claims were tied to such union directly or indirectly.

If her evidence is anything to go by, Monica Njeri's role in this union appears not to have been that clear-cut. As earlier noted, she initially described the deceased as her mother-in-law only to change later in her testimony and say that the deceased was in fact her step-mother. In her affidavit of protest sworn on 8<sup>th</sup> May, 2017 she alleged that she was the deceased's daughter yet in the affidavit in support of her summons for confirmation of grant sworn on 18<sup>th</sup> August, 2010 she deposed that she was the deceased's daughter.

With this sort of uncertainty, Monica Njeri cannot be taken to have established her relationship with the deceased to such an extent as is necessary to lay a claim on her estate. But even if I were to take her at her own word, her claim to the estate either on the basis of consanguinity or marriage is still remote, at most. Take, for instance, the version of her evidence that she was the wife of one Kamuthu Wanjiru. As I understood this part of her evidence, Kamuthu was the deceased's co-wife their common husband being one Karanja. But the estate in issue is neither Kamuthu's nor Karanja's. It has not been demonstrated that either Kamuthu had any interest, proprietary or otherwise, in the property registered in her co-wife's name or that the property had been inherited from their common husband so that the deceased may be said to have been holding it in trust for herself and for the benefit of Kamuthu. In the latter case, Monica Njeri would perhaps be argued to be pursuing her female husband's inheritance from her father-in-law.

I need not speculate what the decision of this court would have been if any of the other scenarios which Monica Njeri has presented to court as representing her status vis-à-vis the deceased was to apply; it is simply not the business of this court to interrogate each of them and adopt what it thinks suits her claim. It was always her duty to establish her claim on a balance of probabilities; a burden she has not discharged to my satisfaction.

As much as Monica Njeri sort of made a mess of her own case, I cannot fail to note that she consistently acknowledged the protestor and his brother John Kanyutu as the deceased's heirs and therefore entitled to her estate; this is apparent in her affidavit in support of her summons for confirmation of grant and the affidavit of protest against the protestor's version of the summons for confirmation of grant. In those two

affidavits, she proposed to have the estate distributed in such a way that the two brothers together with one Joseph Kamande Mwangi would get a share.

The protestor himself and his brother were categorical that the deceased was survived by two daughters-in-law whom they named as Lydia Wanjiku Mwangi and Mary Wambui Mwangi. These two were also deceased but their respective children survived them. Lydia Wanjiku Mwangi's children were named as:

1. Josephine Wambui
2. Peter Karanja
3. John Kanyutu Mwangi
4. Mercy Wangui Wanyoike
5. Mary Mbaire Maina

Mary Wambui Mwangi's children were named as:

1. Wairimu Mburu
2. Wangui Kamande
3. Wanjiru
4. Joseph Kamande

Their evidence was largely uncontested. As a matter of fact, Monica Njeri admitted that prior to her death, the deceased shared out her land to Lydia Wanjiku and Mary Wambui and that their respective children were entitled to their shares. As far as she was concerned, she could only get Kamuthu's portion; even then, she fell short of demonstrating any claim that Kamuthu could possibly have had in the deceased's estate.

One of the documents the protestor and his brother exhibited in court to demonstrate that the applicant was not the deceased's heir and therefore had no portion in her estate was a copy of the eulogy in respect of Peter Kamande Mwangi. In that eulogy, the latter was described as the fourth child of Ngugi Munyoike and Monica Njeri. In the absence of any evidence to the contrary, this evidence was proof enough that Monica Njeri was married elsewhere and was not connected to the deceased at all or in a way that she would have any claim to her estate.

In conclusion, I would allow the protestor's protest and direct the deceased's estate, being Title No. Loc. 7/Ichagaki/645, to be shared equally amongst the following persons:

1. Josephine Wambui
2. Peter Karanja
3. John Kanyutu Mwangi
4. Mercy Wangui Wanyoike
5. Mary Mbaire maina
6. Wairimu Mburu
7. Wangui Kamande
8. Wanjiru
9. Joseph Kamande

Parties will bear their respective costs. Orders accordingly.

**Dated, signed and delivered in open court this 8<sup>th</sup> day of March, 2019**

Ngaah Jairus

**JUDGE**