



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**SUCCESSION CASE NO. 57 OF 2017**

**(FORMERLY NAIROBI SUCC. CAUSE NO. 777 OF 2010)**

**IN THE MATTER OF THE ESTATE OF HELLEN WAMBUI KURIA (DECEASED)**

**RULING**

1. Before me is the Summons filed on 30<sup>th</sup> April, 2014, for Confirmation of Grant of letters of administration to the Estate of Hellen Wambui Kuria (Deceased). The Grant to be confirmed was issued to **Samuel Kungu Kuria** as the Administrator of the estate of the deceased.

2. On 26/07/2018, when the matter came up for hearing of the Application Mr. Makumi, counsel for the Protestors informed the court that they had a partial consent to record in regard to the mode of distribution of the sole asset estate namely **Githunguri/Kanjai/979** Kuria which was as follows:-

<b><u>BENEFICIARY</u></b>	<b><u>SHARE</u></b>
i) Njeri Chuchu.....	2 acres
ii) Esther Wanjiru Kimani 1 <sup>st</sup> wife(Joseph Macharia Kuria).....	1 acre
iii) Ruth Waruguru Kago 2 <sup>nd</sup> wife(Joseph Macharia kuria).....	1 acre
iv) Samuel Kungu Kuria.....	1 acre
v) Josephine Njoki Kagunda.....	1 acre
vi) Hannah wangui Macharia.....	1 acre
vii) Ruth Njeri Kuria.....	1 acre
viii) Hosea Ndogo Kuria.....	1 acre
ix) Esther Wanjiru Kimani wife of (Benson Kamau Kuria) .....	1 acre

3. It was further agreed that Njeri Chuchu, Samuel Kungu Kuria, Joseph Njoki Kagunda, Hannah Wangari Macharia, Ruth Njeri Kuria, Hosea Ndogo Kuria and Esther Wanjiru Kimani (1<sup>st</sup> wife) do hold their shares absolutely.

4. The only issue for determination therefore, was said to be whether **Ruth Waruguru Kago** (2<sup>nd</sup> wife of Joseph Macharia Kuria) and **Esther Wanjiru Kimani** (wife of Benson Kamau Kuria) should hold their shares absolutely or in trust for their children. The court directed that parties file affidavits and submissions in regard to the above issue.

5. On 7<sup>th</sup> September, 2018, **Esther Wanjiru Kimani** and **Ruth Waruguru Kago** the Protestors herein, filed their affidavits in support of absolute interest in their share of the deceased's estate. The said affidavits were similar in content. They deposed that they are wives of the late sons of the deceased. They contended that they made an application and were included as dependants having being omitted at initial stages of the cause. That a consent on the mode of distribution was recorded but it was not agreed how they would hold their respective entitlements. That the proposal by the Administrator that they should hold their share as trustees to their children and not absolutely is discriminatory as the other beneficiaries are holding their shares absolutely. They deposed that in the absence of a surviving spouse to the deceased herein the estate devolves to the surviving children equally and absolutely. They considered themselves among the children of

the deceased.

6. **Samuel Kungu Kuria** the administrator, in his replying affidavit stated that the applicants took out letters of administration to their respective late husbands' estates and as such are entitled to the personal and household effects of the deceased absolutely and a life interest in the whole residue of the net intestate estate as provided under Section 35 of the Law of Succession Act.

7. In submissions, **Esther Wanjiru Kimani** and **Ruth Waruguru Kago** contended that where the deceased is survived by children only, the property is shared among the children equally and who hold their shares absolutely and that shares are only held in trust where the children of the intestate himself are minors. It was submitted that the children of the Protestors cannot inherit directly from the estate of their grandparent unless the deceased had taken and maintained them in which case they would have been listed as dependents.

8. Counsel contended that Ruth Waruguru Kago had successfully applied and was granted reasonable provision in the deceased's estate. Reliance was placed on the case of **Yunes Kerubo Oruta & another v George Kombo Oruta & another (2015) eKLR** where Nagillah J quoted Musyoka J in the **Estates of John Musombayi Katumanga (deceased) (2014) eKLR** where it was held that a granddaughter is not an heir as grandchildren are not to inherit from grand parents so long as their own parents are alive. The same position was held in the case of **Cleopa Amutala Namayiv Judith Were (2015) eKLR**. In conclusion counsel stated that as long as the Protestors are alive and their children having not applied to be provided as dependants, the Protestors should not hold their share in trust for their children.

9. **Samuel Kungu Kuria** in his submissions reiterated that the applicants by taking out letters of administration to their husbands' estates became entitled to the estate of their late husbands and not the estate of the deceased. He quoted the case of **In Re Estate of John Musambayi Katumanga (deceased) (2014) eKLR** where it was held that where the deceased is survived by a spouse and children, the surviving spouse is entitled to a life interest. Finally, it was submitted that the Protestors left their matrimonial homes soon after the death of their husbands, thus the Administrator was apprehensive that if granted absolute ownership they would sell their parcels of land and leave their children landless; thus his intention was to protect the interest of the children some of whom are minors.

10. The court has considered the matters canvassed by the parties regarding the shares of the estate assigned by consent to **Ruth Waruguru Kago** and **Esther Wanjiru Kimani**, the Protestors herein. The said allotment was by a consent recorded on 26<sup>th</sup> July, 2018, essentially compromising in part the summons for confirmation of grant filed by the Petitioner on 30<sup>th</sup> April 2014 in so far as the mode of distribution was concerned. Through the consent the Protestors were accommodated to each receive each an acre of the land parcel LR GITHUNGURI/KANJAI/979.

10. The sole question that the parties left to be determined by the court is whether the Protestors are entitled to an absolute or life interest in the shares of the estate assigned to them. In answering this question it is inevitable to consider the status of the Protestors vis-à-vis the deceased. The estate under consideration relates to **Hellen Wambui Kuria**. She was the mother of **Joseph Macharia Kuria** and **Benson Kimani Kuria** who are the deceased husbands of **Ruth Waruguru Kago** and **Esther Wanjiru Kimani**, respectively. It appears that the former son pre-deceased the intestate deceased herein.

11. Thus, it is not in their own right that the said protesting widows had a stake in the estate. Rather, their status is based on their relationship as wives of the deceased sons of the intestate. Indeed the said protestors did apply for grant of letters of administration in respect of their deceased's husbands before applying to be included in the distribution of the estate herein.

12. The protestors have made heavy weather of the ruling by **Ougo J** delivered on 24<sup>th</sup> March 2016 regarding their protests and Ruth Waruguru's application under Section 26 and 29 of the Law of Succession Act. This latter application filed on 25<sup>th</sup> March 2015 clearly spelt out the locus of **Ruth Waruguru Kago** in relation to the deceased. Grounds 1 and 2 of the application were that:

**"1. THAT the Applicant is the 2<sup>nd</sup> wife of the late JOSEPH MACHARIA KURIA who was the biological son of the deceased HELLEN WAMBUI KURIA.**

**2. THAT the Applicant was supported by his (sic) husband JOSEPH MACHARIA KURIA they had been blessed with two children"**.

13. These grounds were further amplified in the supporting affidavit of **Ruth Waruguru Kago** wherein she deposed *inter alia* that:

**"4. THAT my relationship with the deceased is through his (sic) son the late JOSEPH MACHARIA KURIA who was my husband....**

**5. THAT...**

**(c) My late husband supported me through the deceased estate.**

**(d) I have already taken out a grant of representation in respect of my late husband's estate....**

**(e) That my children and I have no one to turn to (and) pray that this Honourable Court makes adequate provision from my mother-in-law's estate as my late husband was entitled to (sic)". (emphasis added)**

14. Earlier, through her Affidavit of Protest filed on 4<sup>th</sup> June 2014 **Ruth Waruguru Kago** described herself as a beneficiary/defendant, together with her minor children, to the estate of the deceased by virtue of her marriage to the intestate's son, **Joseph Macharia Kuria**.

15. On her part, **Esther Wanjiru Kimani** swore an Affidavit of Protest filed on 4<sup>th</sup> June 2014. Therein she deposed *inter alia* that she was a dependant/beneficiary of the estate herein by virtue of having been married to the intestate's son **Benson Kamau Kuria** who died in 2013. At paragraph 7 of the affidavit she stated:

**“THAT my deceased husband and I were blessed with 4 children – Veronica Njeri kamau, Hellen Wambui Kamau, Antony Kuria Kamau and Fredrick Kimani Kamau respectively who are minors and also depend on the estate herein.”**

16. On 23<sup>rd</sup> November 2015 **Ruth Waruguru Kago** filed a supplementary affidavit in answer to the response by her co-wife **Esther Wanjiru Macharia** in opposition to her summons under section 26 Law of Succession Act. The said Replying affidavit (filed on 10<sup>th</sup> November 2015) did not dispute Ruth Waruguru's status as the wife of **Joseph Macharia Kuria** but contained accusations against Ruth Waruguru in regard to the filing for letters of administration and intermeddling with and committing waste in respect of the said husband's estate as well as alleging her marriage to a third party.

17. In refuting these allegations, Ruth's Supplementary affidavit reiterated her position as the wife of the deceased husband and deposed as follows;

**“8 THAT in further response to paragraph 9 of the Replying affidavit I sired two children with the deceased and as such I not only make my claim on my own behalf but on behalf of my children who are entitled to succeed their grandmother's estate through their father who has since passed on (sic) ....**

**13 THAT in response to paragraph 13 of the Replying affidavit I once again reiterate..... that as a wife to a child of the deceased I lie in priority alongside the deceased other siblings and should be equally provided far as I am eligible for adequate provision as both heir and dependant more so having sired children with the deceased's son and heir to her estate.”**  
**(sic). (emphasis added).**

18. In light of the above depositions, this court was struck by the new stance adopted by the two protestors in their most recent affidavits seeking to acquire absolute title of the shares given to them, to the evident exclusion of their children, repeatedly mentioned in earlier affidavits. At paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13,15, 16 of the affidavit filed on 7<sup>th</sup> September 2018 Ruth Waruguru Kago jettisons her children with her deceased husband and asserts her entitlement to an absolute interest.

19. Indeed at paragraph 7, Ruth asserts that she is the “child” of the intestate herein and not a widow, and at paragraph 13 deposes that **“this matter does not relate to my husband's estate where the property would have been divided ..... to my children and I given a hovering life interest.....”** (sic) Ditto for **Esther Wanjiru Kimani** who asserted *inter alia* in her affidavit filed on 7<sup>th</sup> September 2018:-

**“7. THAT I am succeeding in the deceased estate NOT as mother to my children BUT as a child of the deceased having taken out letters of administration in respect of my late husband's estate stepped into his shoes to succeed what he would otherwise have succeeded were he alive.”** (sic). (emphasis added)

20. There can be no dispute that the two widows' claims are based on the fact that they were spouses of the deceased children of the intestate, had taken out letters of administration and had children with their deceased spouses. The two Protestors did not thereby become children of the deceased in the terms contemplated in Section 3(2), (3) and 4 of the Law of Succession Act. Indeed if they were such children, they did not require to first obtain letters of administration in order to pursue this matter as they have.

21. Thus in these circumstances, Section 38 and 41 of the Law Succession Act cannot apply to them as they have argued in this case. With regard to **Esther Wanjiru Kimani** the second reason why the Sections are inapplicable is that her husband did not predecease the deceased, having died in 2013, some eight years since the intestate herein had died. Unlike Ruth, she did not apply to be declared a dependent under Section 26 of the Law of Succession Act.

22. My position is that the two protestors in this case are not children of the intestate for purposes of Section 38, 41 and 42 of the Law of Succession Act. They have been treated as beneficiaries by dint of the consent recorded on 28<sup>th</sup> July 2018 by virtue of their status as widows of the deceased sons of the intestate. See also in **Re Estate of Gachara Gikonyo [2016] e KLR**.

23. The second argument raised by the counsel for Ruth Waruguru Kago is that the ruling of **Ougo J** set her up as a dependent of the estate of the deceased herein. No such statement is found in the entire ruling. Nor indeed in the portion thereof cited to support the argument. The court directed in that ruling that adequate provision be made **“for Ruth being one of the beneficiaries of the estate”** by virtue of her position as the second wife of the deceased son of the intestate. Besides, a daughter-in-law to an intestate is not included in Section 29(b) of the Law of Succession Act as one of the persons who may move the court under Section 26 of the Law of Succession Act to be declared a dependent in respect of whom reasonable provision ought to be made.

24. **Ougo J's** direction in my view was executed in part through the subsequent consent recorded in respect of the **“mode of distribution of the estate.”** The consent treated the Protestors as beneficiaries and not as dependants for whom provision was being made, there being no declaration to that effect. I agree with the position taken by the Administrator that the Protestors are entitled to the shares due to estates of their husbands as the wives to the said husbands and not as children of the deceased herein. Indeed, that was clear in their initial affidavits before the court.

25. Having earlier invoked the fact that they were seeking the shares due to their husbands on their own behalf and on behalf of their minor children, it is not open to the Protestors, now that their respective shares have been identified to repudiate the claim earlier laid on behalf of their children and to seek to benefit alone from their husbands' share of the deceased's estate. The argument that they have been

discriminated against has no basis; as between the Administrator and other beneficiaries, they have agreed to a different arrangement and unlike the Protestors none of these other parties had claimed to be pursuing the estate on behalf of their children as the Protestors did.

26. The change of tune by the Protestors can only be attributed to a desire to disinherit their own acclaimed minor children. Contrary to what the Protestors now contend, this is not a case where the grandchildren are demanding to inherit directly from their grandparents. Rather, it is a case where the Respondents themselves approached the court on behalf of their respective husbands' estates, supposedly for the benefit of themselves and their children. But now that the benefit appears to have been achieved the Protestors have decided that only they matter for purposes of distribution. Parties cannot be allowed to approbate and reprobate in this manner. This court is particularly concerned that the Protestors had asserted in their previous affidavits, and which fact is now not disputed, that there are minor children involved. Under Article 53 of the Constitution the court is obligated to give attention to the best interests of children.

27. The Administrator is keen to ensure that the children of his deceased brothers are not disinherited and is not averse at all to them receiving an inheritance, albeit not directly. In light of this stance, and the consent recorded before me, it is apparent that the administrators has accepted that the wives and children of their deceased brother get a share of the inheritance and the opposition is now surprisingly coming from the protestors themselves.

28. In view of all the foregoing, and mindful of the fact that some of the children of the intestate's deceased sons may be minors, the court is duly bound to bear their best interest in mind. More so, as the Protestors have now evinced every intention to appropriate their husband's shares for their exclusive enjoyment.

29. In the circumstances, this court rules that the Protestors **Ruth Waruguru Kago** and **Esther Wanjiru Kimani** ought to benefit from their respective husbands' estates in the manner provided in Section 35 of the Law of Succession Act which provides that:

**“35. 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).....**

**(4).....**

**(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”.**

29. Under this provision, the children of the intestate's sons can only benefit from their respective fathers' estates shares after the determination of the Protestors' life interest. Thus it cannot be correctly argued in this case that they are benefitting directly from the estate of their grandmother, as now asserted by the Protestors. What in essence this court is doing is delineating the interests falling within the estates of the intestate's deceased sons as a subset, in the same manner it would within one unit or house of many houses in a polygamous family. The alternative would have been the more convoluted route of directing that the shares due to the intestate's deceased sons having been identified in these proceedings, be distributed in the succession causes that were filed by the two Protestors before approaching this court. Such a course would entail unnecessary delay and expense to the parties.

30. In the result the grant issued herein is confirmed in terms of the mode of distribution consented to on 26/7/18, but subject to the qualification with regard to the shares assigned to **Ruth Waruguru Kago** and **Esther Wanjiru Kimani** that the two protestors will enjoy a life interest in the estates of their deceased husbands, and that upon the determination thereof, the estates will be shared equally between their children who survive them.

Parties will bear own costs in light of the nature of the dispute.

**DELIVERED AND SIGNED AT KIAMBU THIS 2<sup>ND</sup> DAY OF APRIL 2019**

**C. MEOLI**

**JUDGE**

**In the Presence of:-**

Mr. Olaka holding brief for Makumi for Ruth Kago, Hosea Kuria and Esther Wanjiru Kimani

Administrator – Absent

Kevin – Court Clerk