



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 435 OF 2013

IN THE MATTER OF THE ESTATE OF KANYI WAMAI (DCD)

(Formerly Kerugoya Succ No. 262/2011)

DORCAS WAMUYU KANYI.....PETITIONER

V E R S U S

FAITH WANGITHI GICHUKI.....1ST PROTESTOR

PRISCILLA WAMBUI KANYI.....2ND PROTESTOR

JUDGMENT

1. This matter relates to the estate of Kanyi Wamai, deceased who died on 3/10/2003. A grant of Letters of Administration was issued to Dorcas Wamuyu Kanyi on 24/11/11. She proceeded to file an application for Confirmation of Grant on 28/5/2012 and listed the names of the beneficiaries and how the estate should devolve. In her Supporting Affidavit sworn on 28/5/2012 she lists the beneficiaries and identification of their shares as follows:-

- a) Dorcas Wamuyu Kanyi – Daughter
- b) Priscilla Wambui Kanyi – 3rd Wife
- c) Esther Njoki Kanyi – Daughter
- d) Nicholas Kariuki Kanyi – Son
- e) Freshia Nyawira Kanyi – Daughter
- f) Ann Wambui Kanyi – Daughter
- g) Jeniffer Nyawira – Daughter
- h) Jane Wangechi Kanyi – Daughter
- i) Kaburi Kanyi – Son
- j) Eunice Muchugu – Daughter
- k) Jackson Mwangi Kanyi – Son
- l) Justus Muriithi Kanyi – Son
- m) Patricia Wamwirua Kanyi – Daughter
- n) Robinson Mbuitu Kanyi – Daughter

- o) Wamuyu Kanyi – Daughter
- p) Stephen Kabiru Kanyi – Son
- q) Bonfautula Mwangi Kanyi – son
- r) Muthoni Kanyi – Daughter
- s) Wamwirua Kanyi – Daughter
- t) Faith Wangechi Kanyi – Daughter
- u) John W. Kanyi – Son
- v) Patrick Kiama Kanyi – Son
- w) James Kariuki Kanyi – son
- x) George Kabara Kanyi – son
- y) Eliud Weru Kanyi – Son
- z) Muti Kanyi – Son.

2. The deceased was survived by the following other dependant:-

- Geoffrey Kanyi Mbaria – Grandson.

3. The identification and shares of all persons beneficially entitled to the said estate have been ascertained and determined as follows:-

LAND PARCEL MWERUA/KAGIOINI/16

- a) Dorcas Wamuyu Kanyi
- b) Priscilla Wambui Kanyi
- c) Esther Njoki Kanyi –
- d) Nicholas Kariuki Kanyi
- e) Freshia Nyawira Kanyi
- f) Ann Wambui Kanyi
- g) Jeniffer Nyawira
- h) Jane Wangechi Kanyi
- i) Geoffrey Kanyi Mbaria
- j) Karuri Kanyi
- k) Eunice Muchugu
- l) Jackson Mwangi Kanyi
- m) Justus Muriithi Kanyi
- n) Patricia Wamwirua Kanyi
- o) Robinson Mbuitu Kanyi
- p) Wamuyu Kanyi

- q) Stephen Kabiru Kanyi
- r) Bonfautula Mwangi Kanyi
- s) Muthoni Kanyi
- t) Wamwirua Kanyi
- u) Faith Wangechi Kanyi
- v) John W. Kanyi
- w) Patrick Kiama Kanyi
- x) James Kariuki Kanyi
- y) George Kabara Kanyi
- z) Eliud Weru Kanyi
- aa) Muti Kanyi - All to share equally

LAND PARCEL NO. MWERUA/KAGIOINI/230

- a) Dorcas Wamuyu Kanyi
- b) Priscilla Wambui Kanyi
- c) Esther Njoki Kanyi –
- d) Nicholas Kariuki Kanyi
- e) Freshia Nyawira Kanyi
- f) Ann Wambui Kanyi
- g) Jeniffer Nyawira
- h) Jane Wangechi Kanyi
- i) Geoffrey Kanyi Mbaria
- j) Karuri Kanyi
- k) Eunice Muchugu
- l) Jackson Mwangi Kanyi
- m) Justus Muriithi Kanyi
- n) Patricia Wamwirua Kanyi
- o) Robinson Mbuitu Kanyi
- p) Wamuyu Kanyi
- q) Stephen Kabiru Kanyi
- r) Bonfautula Mwangi Kanyi
- s) Muthoni Kanyi
- t) Wamwirua Kanyi

- u) Faith Wangechi Kanyi
- v) John W. Kanyi
- w) Patrick Kiama Kanyi
- x) James Kariuki Kanyi
- y) George Kabara Kanyi
- z) Eliud Weru Kanyi
- aa) Muti Kanyi - All to share equally

PLOT NO. KIINI/NYANGIO/565

- a) Dorcas Wamuyu Kanyi
- b) Priscilla Wambui Kanyi
- c) Esther Njoki Kanyi –
- d) Nicholas Kariuki Kanyi
- e) Freshia Nyawira Kanyi
- f) Ann Wambui Kanyi
- g) Jeniffer Nyawira
- h) Jane Wangechi Kanyi
- i) Geoffrey Kanyi Mbaria
- j) Karuri Kanyi
- k) Eunice Muchugu
- l) Jackson Mwangi Kanyi
- m) Justus Muriithi Kanyi
- n) Patricia Wamwirua Kanyi
- o) Robinson Mbuitu Kanyi
- p) Wamuyu Kanyi
- q) Stephen Kabiru Kanyi
- r) Bonfautula Mwangi Kanyi
- s) Muthoni Kanyi
- t) Wamwirua Kanyi
- u) Faith Wangechi Kanyi
- v) John W. Kanyi
- w) Patrick Kiama Kanyi
- x) James Kariuki Kanyi

y) George Kabara Kanyi

z) Eliud Weru Kanyi

Muti Kanyi - All to share equally.

4. Affidavit of protest was filed by Faith Wangithi Githuku claiming that she was the wife of the son of the deceased by name Joseph Maina Kanyi. That the petitioner excluded her from the estate of the deceased and included her step child. That herself and her children will be rendered destitute.

5. Priscilla Wambui Kanyi also filed an affidavit of protest. She claims to be the 3rd wife of the deceased who ranks in priority before the petitioner who is a daughter of the deceased. She is opposed to the mode of distribution and proposes the mode of distribution to be as follows: -

A. MWERUA/KAGIOINI/16 – To be shared as follows: -

i) Priscilla Wambui Kanyi – 0.35 Ha.

ii) John W. Kanyi – 0.50 Ha.

iii) Patrick Kiama Kanyi – 0.50 Ha.

iv) James Kariuki Kanyi – 0.50 Ha.

v) George Karaba Kanyi – 0.50 Ha.

vi) Eliud Waweru Kanyi – 0.50 Ha.

vii) Bonfantula Mwangi Kanyi – 0.50 Ha.

viii) Pius Mutunga Mue – 0.80 Ha.

ix) Stephen Kabiru Kanyi – 0.50 Ha.

B. MWERUA/KAGIOINI/230 – To be shared as follows:-

i) Jane Wangechi Kanyi – 0.10 Ha.

ii) Freshia Nyawira Kanyi – 0.10 Ha.

iii) Dorcas Wamuyu Kanyi – 0.10 Ha.

iv) Ann Wambui Kanyi – 0.10 Ha.

v) Ann Wamuyu – 0.10 Ha.

vi) Vascalina Muthoni – 0.10 Ha.

vii) Fausia Muthoni – 0.10 Ha.

viii) Mercy Nditi – 0.10 Ha.

ix) Patricia Wamwirua Kanyi – 0.10 Ha.

x) Esther Njoki – 0.10 Ha.

xi) Eunice Mucugu – 0.10 Ha.

xii) Faith Wangithi – 0.40 Ha.

xiii) Nicholas Kariuki Kanyi – 0.60 Ha.

xiv) Jackson Mwangi Kanyi – 0.60 Ha.

xv) Robinson Mbuitu – 0.60 Ha.

xvi) Justus Muriithi – 0.60 Ha.

xvii) Priscila Wambui – 0.19 Ha.

C. LAND PARCEL NO. KIINE/NYANGIO/565 –Measuring 2.4 Ha be shared as follows:-

i) Priscilla Wambui Kanyi &

ii) Dorcas Wamuyu Kanyi Jointly to hold in trust for Other family members.

6. A purported affidavit was also filed by Jackson Mwangi Kanyi who at Para -2- submitted that the deceased left the following properties: -

a) Land Parcel No. Mwerua/Kagioni/16

b) Land Parcel No. Mwerua/Kagioni/230

c) Plot. No. Kiini/Nyangio/565

d) Kianyaga Plot B11

e) Thigirichi Plot No. 19

f) Kianjege Plot No. 10

g) Thingirichi Plot No. 2

h) Land No Kiini/Nyangio/376

He also listed the children of the deceased.

7. An affidavit of protest was also filed by Rose Mumbi Kinyua claiming a purchaser's interest. She claims that Patrick Kiama Kanyi who is a son of the deceased sold to her ½ an Acre out of land Parcel No. Mwerua/Kagioini/16 at a consideration of Kshs 450,000/- on 1/11/2013. Later on 18/2/2014 Patrick Kiama Kanyi agreed to sell to her 0.10 Ha at a consideration of Kshs 225,000/- out of the said land Parcel. Again on 18/2/2016 Patrick Kiama Kanyi sold to her ¼ of an acre at a consideration of Kshs 225,000/- making a total of One Acre. She claims that she is entitled to One Acre of Land Parcel No. Mwerua/Kagioini/16. She has annexed the respective sale agreements as annexures RMK, 1, 2 & 3.

8. An affidavit of protest was filed by Joseph Mangi Wambugu claiming a purchaser's interest. He avers that he bought half an acre (1/2) out of Land Parcel No. Mwerua/Kagioini/230 from George Karaba Kanyi who is one of the beneficiaries. He annexed the agreement and consent of the beneficiaries annexure JMW-01 & 02. He took possession and has been on the land. That he be included in the grant.

9. A further affidavit of protest was filed by Mary Wambui Kigundu claiming purchasers interest she depones that on 6/5/13 she purchased 0.20 Ha out of Land Parcel No. Mwerua/Kagioini from Priscilla Wambui Kanyi a beneficiary of the estate of the deceased. She prays that her name be included in the confirmed grant. Though she alleged that she annexed the said agreement, no agreement marked MWK 01 was annexed.

10. The matter proceeded by way of 'viva voce' evidence. The parties adduced evidence. The petitioner submits that the estate be distributed equally among the three houses. She also submits that the protestors bought land from the sons of the deceased and from the 3rd wife and should claim from them and not from the estate of the deceased.

11. The issues for determination are: -

i) What comprises the estate of the deceased.

ii) The protest.

iii) Distribution of the estate.

(i) **Estate of the deceased.**

The law of succession Act defines estate. **Section 3 of the Law of Succession Act Cap 160 Laws of Kenya** (to be referred to as the **Act**) defines "**Estate**" – "**means the free property of a deceased person.**"

As such when a person files a succession cause in the estate of a deceased person, it must relate to the free property of the deceased.

This means that the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interests has not been terminated by his death. **Justice Ondunga In the matter of the estate of Job Ndunda Muthike deceased Succession Cause 112/2014 (2018) eKLR** defined free property and stated as follows:

“Coming back to the definition of free property, in view of what we have stated above it is quite clear that the phrase connotes not only personal property of a deceased person but also property which was in his possession or control or under his power and the disposal of which would legally have required his authority but for his death- “

12. These means that there are properties which the deceased could not dispose off freely during his lifetime and in respect of which his interest has been terminated by his death. Such property does not form part of the free property of the deceased. So if the deceased had during his lifetime dealt with the property in a manner that he could not freely dispose it off, it does not form part of his free property.

13. In the **Matter of the Estate of the Late Silas Kagina Gichovi – Deceased, Christopher Ndaru Kagina –v- Esther Mbandi Kagina & Another (2016) eKLR** – Justice Mativo stated:-

“Also if a deceased person has during his lifetime sold, transferred, disposed or in any way manner given out his properties either in exchange of consideration or as gifts intervivos, such gifts or properties whether transfer had been registered or not do not form part of the deceased estate. Infact the law of succession in my view protects ad preserve transactions made by the deceased during his lifetime.”

14. The petitioner attached certificate of official search for land parcel No. Mwerua/Kagioini/16 which shows that on 20/4/2000 charge to Kirinyaga District Sacco Society Ltd to secure a sum of Five Hundred Thousand Kenya Shillings (500,000/-).

15. As for land parcel No. Kiine/Nyangio/565 the certificate of official search shows the proprietor as the County Council of Kirinyaga. The certificate of official search for Mwerua/Kagioini/230 indicates that the land has a charge, reserves the right under **Section 70**. On 22/2/83 the land was charged to Nationwide Finance Company Limited to secure a Sum Kshs 180,000/- (with other land Kiine/Nyangio/565/10). Charge No. 4 reserves the right under **Section 83 & 84**. None these properties were the free properties of the deceased as the deceased had charged the properties to secure loans and one is not even in the name of the deceased. The petitioner had sworn an affidavit that deceased died before he repaid the loan and the bank had started a public auction for land parcel No. Mwerua/Kagioini/230, Kiine/Nyangio/565/10.

16. The petitioner as the administrator of the estate was under an obligation to ensure that the sum deceased owned to the bank was paid and discharge of charge issued. **Section 83(d) of the Act** provides: *“Personal representatives shall have the following duties – to ascertain and pay out of the estate of the deceased all his debts.”*

17. The petitioner did not discharge this duty and the properties are still charged to the bank. The deceased died intestate. **Section 34 of the Act** provides that a person is deemed to die intestate of all his free property of which he has not made a will which is capable of taking effect. My view is that the deceased having charged his properties to the bank and obtained loans, the properties were no longer his free properties. I find that the properties are not available for distribution.

The petitioner listed shares with Kimmi Housing Co-op Ltd and shares with Fortune Sacco Ltd.

2. Protests

The protestors Mwangi Wambugu, Rose Mumbi and Mary Wambui Kigundu claim to have entered agreements to buy pieces of land from some of the beneficiaries of the estate of the deceased. It is noted that the grant had not been confirmed and it is only the administrator who can dispose of the land of the deceased and even then only after the grant has been confirmed. **Section 82 ii of the Act** provides:-

“No immovable property shall be sold before the confirmation of grant.” The **Act** makes it an offence to intermeddle with the estate of the deceased. **Section 45(1) of the Act** provides: -

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose take possession or dispose of, or otherwise intermeddle with any free property of a deceased person. Any person who contravenes the provisions of this Section shall:-

a) Be guilty of an offence and liable to a fine not exceeding Ten Thousand shillings or to a term of imprisonment not exceeding One year or to both such fine and imprisonment.

b) ----- “

18. A sale of land to 3rd parties before the grant is confirmed amounts to intermeddling with the estate of the deceased. The Act expressly prohibits sale of immovable property before the grant is confirmed. The transaction on the parcels of land required the consent of the **Land Control Board** under the **Land Control Act** such consent could not be obtained as the land was charged to the bank and the grant had not been confirmed so the beneficiaries had not obtained titles which they could transfer to 3rd parties. The protestors are not beneficiaries entitled to the estate of the deceased and the fact that they had entered contracts with beneficiaries of the deceased does not entitle them to be included in the grant. My view is that the agreements entered by the protestors PW-1- Mwangi Wambugu with George Karaba Kanyi, PW-

2- Rose Mumbi with Patrick Kiama Kanyi and PW-3- Mary Wambui Kigundu with Priscilla Wambui Kanyi amounts to intermeddling with the estate, are null and void for having been entered before the grant was confirmed and for want of consent of Land Control Board. They are not enforceable. The protestor can only claim refund of the purchase price.

3. Distribution of the estate: -

There is no dispute that the deceased was polygamous and had married three wives. Distribution of the estate should be under **Section 40 of the Law of Succession Act** which provides:-

“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.” The petitioner Dorcas Wamuyu Kanyi and Priscilla Wambui Kanyi in their submissions have agreed that the distribution should be under **Section 40 of the Act**. Only free estate of the deceased is available for distribution.

In Conclusion

I find that the protests by – Mwangi Wambugu

- Rose Mumbi
- Mary Wambui Kigundu are without merits and are dismissed.

21. Land Parcels No. Mwerua/Kagioini/16, Mwerua/Kagioini/230 are not free estate of the deceased and are therefore not available for distribution.

- **Plot No. 10 at Kianjege has not been proved as forming the estate of the deceased.**
- **Shares in Fortune Sacco and Shares with Kimmi Housing Co-operative Society shall be shared equally among the three houses as provided under Section 40 of the Act.**
- **Each party to bear its own costs.**

Dated at Kerugoya this 18th Day of October 2019.

L. W. GITARI

JUDGE

Read out in open court,

Ms Githaiga holding brief for Ms Wangechi for Applicant

Petitioner; Present

1st Protestor – Present

Court Assistant; Gichia

L. W. GITARI

JUDGE