



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO.72 OF 2014**

**IN THE MATTER OF THE ESTATE OF SAMUEL GATHERU NJUGUNA (DECEASED)**

**RULING**

1. The Deceased herein SAMUEL GATHERU NJUGUNA (Deceased) died intestate on 21<sup>st</sup> October, 1988 at Nairobi.
2. The Respondents SUSAN WANGUI THUMBI and WANJIRU GATHERU petitioned for letters of administration which were issued on 30.6.2014.
3. The two administrators filed for summons for confirmation on 12.2.2015.
4. On 1.2.2016, STEPHEN MUCHIRI GATHERU filed an Affidavit of Protest on the grounds that SUSAN WANGUI THUMBI separated with the deceased in 1972 and she bore a child named ANN WAMBUI who should not be included in the list of beneficiaries.
5. It is further stated in the Affidavit of Protest by STEPHEN MUCHIRI THUMBI that SUSAN WANGUI THUMBI has cunningly transferred plot No. 337/16 Makadara to her grandson without any authority.
6. The 1<sup>st</sup> Respondent SUSAN WANGUI THUMBI filed an Affidavit in reply to the Protest which is sworn on 16.2.2017 in which she deposed that she is the 1<sup>st</sup> wife of SAMUEL GATHERU NJUGUNA (the deceased herein) and that her co-administrator MARY WANJIRU NJUGUNA was the deceased's 2<sup>nd</sup> wife.
7. The 1<sup>st</sup> Respondent further stated that the family had a meeting on 1.8.2015 whereby it was unanimously agreed that one JOSEPHAT NJUGUNA and JAMES NJUGUNA (Sons from the 1<sup>st</sup> and 2<sup>nd</sup> house respectively) be enjoined as co-administrators to the Estate.
8. The Protestor did not attend the Meeting and also NANCY NJERI who was out of the Country and the 1<sup>st</sup> Administrator said this protest is provoked by the fact that the Protestor was not picked as an administrator.
9. The 1<sup>st</sup> Administrator denied transferring any property to her grandson and further deposed that ANN WAMBUI was the child of the deceased who brought her up and met her educational expenses.
10. The 1<sup>st</sup> Administrator deposed that the Protestor holds most of the properties of the deceased and continues solely deriving income from rental premises together with the operation of a butchery and a bar.
11. The Protestor filed a further affidavit dated 28.2.2018 in which he deposed that he is never invited to family meetings and further that it is the Administrators who hold most of the Properties and also that the 1<sup>st</sup> Administrator has intermeddled and even developed some of the properties and continues to collect rent.
12. NANCY NJERI GATHERU also filed a Protest dated 18.5.2018 in which she deposed that the 1<sup>st</sup> and 2<sup>nd</sup> Administrators forged their signatures to petition for Letters of Administration.
13. She further deposed that the 1<sup>st</sup> Protestor and herself were not invited for the meeting and further that the said Administrators are not being candid and have hatched a shrewd scheme of dealing with the Estate to the detriment of the beneficiaries.
14. On 25.9.2018, the 1<sup>st</sup> Protestor filed a summons for substitution seeking to have SUSAN WANGUI THUMBI and WANJIRU GATHERU substituted as the Administrators and asking for the following to be appointed.

1) **STEPHEN MUCHIRI**

2) **NANCY NJERI**

3) **MARY WANJIRU**

4) **JAMES NJUGUNA.**

15. The said Application was allowed on 15.1. 2019 and the four Administrators were directed to file a Summons for Confirmation within 30 days.

16. The Administrators filed a Summons for Confirmation date 6<sup>th</sup> March 2019 and again the administrators of the 1<sup>st</sup> family protested against the summons for confirmation.

17. The Parties gave viva voce evidence. NANCY NJERI GATHERU gave evidence as OW1. She said she is the 3<sup>rd</sup> born child of the deceased and SUSAN WANGUI.

18. She said that SUSAN WANGUI( their biological ) mother left them in 1972 when they were very young. She went with their brother called SAMUEL MUCHAI GATHERU.

19. She said their biological mother returned and assaulted a lady called Rebecca who was a friend to their father and she was jailed for 2 ½ years.

20. After that their biological mother went to live in Eldoret and when NANCY NJERI was sent to get her brother, she found SUSAN WANGUI her mother had remarried a man called NOAH WAITUGI.

21. She said her mother got a child with NOAH WAITUGI called ANN WAMBUI. OW1 said she came with both children to Athi River but their father chased away ANN WAMBUI and she took her back to Eldoret.

22. NANCY NJERI (OW1) said their biological mother returned when their father died claiming to be their father's wife and ANN to be their father's daughter.

23. She said their mother falsified the Birth Certificate for ANN WAMBUI to show that she was their father's child. She also changed the surname of ANN WAMBUI from WAITUGI to GATHERU to show their father as the father of ANN WAMBUI.

24. OW1 also said their mother SUSAN WANGUI has been intermeddling with the Estate of their father since she returned and she has sold some properties and has purchased properties in her name.

25. She is now asking that ANN WAMBUI be removed from the list of beneficiaries but SUSAN WANGUI be included as she is their biological mother on condition that all the properties she bought be subdivided.

26. SUSAN WANGUI also testified and said she never divorced the deceased and that he is the father of ANN WAMBUI. She said the property she bought was on loan and the shops she build are at a road reserve and can be demolished any time. She said the grand child they said she gave property was their sister Leah's son. She also said ANN WAMBUI should be allocated property as she is a child of the deceased.

27. The other witnesses who testified just reinforced the testimonies of both NANCY NJERI and SUSAN WANGUI.

28. The parties filed written submissions which I have duly considered. I find that it is not in dispute that the deceased and Susan Wangui Thumbi separated in 1972.

29. The issues for determination in this judgment are as follows:

**(i) Whether the deceased was the father of ANN WAMBUI**

**(ii) Who are the beneficiaries of the estate.**

**(iii) What is the mode of distribution of the property.**

30. On the issue as to whether ANN WAMBUI is the child of the deceased, the Applicants said that SUSAN WANGUI their biological mother separated with the deceased in 1972 and that she got married to a man called NOAH WAITUGI.

31. The Respondent denied those allegations and said she never divorced the deceased although they separated and that the deceased is the father of ANN WAMBUI.If the deceased was supporting ANN WAMBUI prior to his death,she would be regarded as a dependant under Section 29 of the succession Act whether or not the deceased was her biological father.

32. **Section 29** of the Law of Succession Act states as follows:

**Meaning of dependant**

***For the purposes 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, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers 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 prior to her death.***

33. The Law of Succession Act is very clear that the children of the deceased are entitled to inherit whether or not the deceased was supporting them immediately prior to his death.

34. In the current case, I find that there is no evidence that ANN WAMBUI was a dependant of the deceased prior to his death. The birth certificate is contested and her paternity is in dispute and I find that the said issue can only be determined by a DNA test.

35. In **HCK vs. EJK [2008]eKLR**, the court stated that prior to ordering any DNA testing even where a child is involved there was need to establish a link between the person claiming paternity and the one claiming non-paternity. The court stated and held as follows:

***"No reasonable court will order for a DNA test against a person in circumstances which do not appear to link the person with the child intended to be protected. There must therefore be facts strongly linking the respondent to the child. "***

36. I direct that ANN WAMBUI undergoes a DNA test to determine the issue of paternity.

37. The DNA test will be paid from the Estate and the same to be undertaken within 45 days of this date.

38. On the issue as to who the beneficiaries of the Estate are, again I find that the only disputed beneficiary is ANN WAMBUI whose fate will be determined by the DNA test.

39. The son of Leah Wairimu (deceased) will also stand in as beneficiary on behalf of the Estate of Leah Wairimu who was a daughter of the deceased.

40. On the issue as to how the property will be distributed, again I find that all the beneficiaries will share the estate equally with the widows being counted as a unit each.

41. **Section 40** of the Law of Succession Act deals with the issue of polygamous families and stipulates as follows:-

***"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 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."***

42. Again I find that the said issue will await the DNA test which will determine whether ANN WAMBUI is a child of the deceased.

43. I direct that the DR of this court makes arrangements for an independent provider to undertake the DNA test and the same to be paid by the Estate.

44. This matter will be mentioned after 45 days for the DNA tests to be availed and for further directions.

**DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 4<sup>TH</sup> DAY OF OCTOBER, 2019**

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.**