

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 78 OF 2014

IN THE MATTER OF THE ESTATE OF SAMUEL KINUTHIA WAWERU (DECEASED)

WANJIRU WAWERU BENSON.....1ST ADMINISTRATOR

VERSUS

MARY WANJIKU KINUTHIA.....2ND ADMINISTARATOR

RULING

1. Wanjiru Waweru Benson and Mary Wanjiku Kinuthia are personal representatives of the estate of Samuel Kinuthia Waweru who died on 12th July, 2007. A Grant of representation intestate was issued to them pursuant to a court order of 17th October, 2018.

2. The court directed both parties to file and serve their applications for confirmation of the grant made to them. Wanjiru Waweru Benson took out summons for confirmation of grant dated 17th December, 2018. In her affidavit in support of the summons sworn on the same day, she stated that there were three properties in the estate of the deceased, namely; Property known as Dagoretti/Thogoto/1553, Dagoretti/Thogoto/1554 and Dagoretti/Thogoto/1555. She proposed the mode of distribution to be as follows:

ASSETS	BENEFICIARY	SHARES
Dagoretti/ Thogoto/1553	Wanjiru Waweru Benson, Garudada Waweru Marshall and Hamisi Amani Marshall(children to Maria Wanjiru Ndeithi (deceased)	Equally between Wanjiru Waweru Benson on one part and Garudadas Waweru Marshall and Hamisi Amani Marshall on the other part
Dagoretti/ Thogoto/1554	Mary Wanjiku Kinuthia	Absolute
Dagoretti/ Thogoto/1555	Wanjiru Waweru Benson and Anne Wambui Ndegwa in Trust for: i.Loise Njeri Kamau, ii.Anne Wambui Ndegwa(herself) iii.Lucy Mumbi Njeru iv.Jedidah Njambi Kararu v.Lawrence Githinji Waweru (Deceased) vi. Mary Wanjiru Ndeithi (Deceased), vii. Wanjiru Waweru Benson(herself) viii.Samuel Kinuthia Waweru (Deceased) ix.Medrine Wanjeri Chuchu	Absolute

3. She also deponed that the deceased was survived by one wife namely Mary Wanjiku Kinuthia, four children namely Agnes Njoki Kinithia, Maureen Wangari, Archbald Waweru Kinuthia and Alex Njuguna Kinuthia. She added that the deceased had siblings who were also entitled to his estate namely; Wanjiru Waweru Benson, the applicant herein, Loise Njeri Kamau, Anne Wambui Ndegwa, Lucy Mumbi Njeru, Jedidah Njambi Kararu, Lawrence Githinji Waweru(Deceased), Maria Wanjiru Ndeithi(Deceased) and Medrine Wanjeri Chuchu who were entitled to a share of the estate.

4. Simultaneously, the 2nd Administrator took out summons for confirmation of grant dated 17th December, 2018. In the affidavit in support of the summons she stated that she was the wife of the deceased and together they had raised four children who were all adults. She also attached a consent to the mode of distribution proposed executed by her four children. She proposed that the estate of the deceased should be

distributed in the following terms:

ASSET	BENEFICIARY	HEIR
Dagoretti/Thogoto/ 1553	i) Communal burial	0.049 Ha
	ii) Estate of Mary Wanjiru Ndeithi(deceased)	0.050 Ha
	iii) Wanjiru Waweru Benson	0.050 Ha
Dagoretti/Thogoto/ 1554	i) Mary Wanjiku Kinuthia	Equal Shares
	ii) Agnes Njoki Kinuthia	
	iii) Maureen Wangari Kinuthia	
	iv) Archibald Waweru Kinuthia	
	v) Alex Njuguna Kinuthia	
Dagoretti/Thogoto/ 1555	i) Mary Wanjiku Kinuthia	Equal Shares
	ii) Archibald Waweru Kinuthia	
	iii) Alex Njuguna Kinuthia	

5. When the matter came for hearing, the 1st Administrator testified that the deceased was her brother in a family of nine siblings. She stated that their father Archibald Kamau passed away in 1989 leaving behind property known as Dagoretti/Thogoto/292 measuring 1.92 Ha. The property was distributed into three equal shares. Her two brothers received a share each and their mother remained with one share pursuant to Succession Cause No. 1207 of 1990.

6. She testified that upon the demise of their mother in 1999 her sisters Medrine Wanjeri Chuchu, Loise Njeri Kamau and the deceased herein administered her estate. It was agreed that the whole share of their mother's estate would be transferred to the deceased to hold in trust for his sisters as their mother intended and since he was the one living in Thogoto. It was her case that the deceased had already made transfers to his other sisters except for herself and Maria Marshall Wanjiru who were living abroad at the time. In addition, she stated that her parents had built a house on parcel no. 1555 but it was the deceased and his wife who had been residing therein since the demise of their mother, and the deceased's widow has since denied the family access to their family home rendering her and her children homeless when they visit the country.

7. Anne Wambui Ndegwa testified in support of the 1st Administrator's case. She stated that she was a sister to the deceased in a family of nine. She reiterated sentiments made by the 1st Administrator on how their father's property was distributed upon his demise. She added that the share distributed to her mother was the combined plot numbers Dagoretti/Thogoto 1550,1551,1553,1552 and 1555. She averred that it was agreed that the properties would be transferred to the deceased herein since he resided in the area, to be held in trust for his female siblings who had not received any share directly from their father's estate to ease the distribution process.

8. Anne Wambui confirmed that she received ¼ acre from her mother's share from parcel no. 1552 when she was ready with the transfer funds and that the deceased had also transferred some of the properties to his other sisters. She indicated that the deceased had passed on before he could complete the process of transferring Dagoretti/Thogoto/1553 and 1555. She indicated that her sisters Loise Njeri Kamau, Lucy Mumbi Njeru, Jedidah Njambi and Medrine Wanjeri Chuchu received their portions from the deceased herein before his demise. It was her assertion that Maria Marshall Wanjiru and Margaret Wanjiru Benson were out of the country at the time and did not receive their portion which was to be excised from parcel no. 1553. She agreed with the distribution of the 2nd Petitioner with regard to parcels No. 1553 and 1554

9. The 2nd Administrator Mary Wanjiru Kinuthia gave testimony in support of her case. She stated that she had been married to the deceased since 1990 with whom they had four children. It was her case that the certificate of confirmation of grant in regard to the estate of her father-in-law Archibald Waweru Kamau was issued to the deceased, his mother Dorcas Wangari Waweru and his brother Lawrence Githinji Waweru. At the time, the property known as Dagoretti/Thogoto/292 was divided into three equal shares. She stated that upon the demise of her mother-in-law letters of administration were issued to her husband, together with Loise Njeri Kamau and Medrine Chuchu. When the grant was confirmed, they were all in agreement that her husband was to receive the entire share of their mother's estate. It was her case that this said grant was never challenged by anyone. That therefore, the grant in the estate of the late Dorcas Wangari Waweru issued on 10th December, 2002 bestowed upon her husband the whole share of his mother's estate.

10. She explained that the deceased subdivided plot no. 1553 into three. He built a house on parcel no. 1554 for her and his children, the

property which he had inherited from his father. She also agreed that the family home of their deceased's siblings was on parcel no. 1555 but she and her husband moved into that home when the deceased's mother got ill and there was no one to look after the premises. She prayed for her summons for confirmation of grant be confirmed in accordance with her proposal and confirmed that all parcels of land in issue originated from her father-in-law. She stated that the deceased had sold some of his inheritance save for parcel no. 1553, 1554 and 1555 and that her sisters-in-law's had received their portions save for Wanjiru Waweru Benson.

11. All the parties duly filed their submissions which the court has carefully considered. Having considered the record, the testimonies of the witnesses and the submissions of Learned Counsels, the issues that arise for determination are:

- i) Whether the properties in issue were held by the deceased in trust for his siblings making them heirs to his estate?
- ii) How the estate of the deceased should be distributed?

12. The issue of trusts was discussed in Zipporah Wanjiru Mwangi v. Zipporah Wanjiru Njoroge [2017] eKLR, where the Court of Appeal delivered itself as follows:-

“In succession proceedings where, as here, existence of a trust is alleged in respect of land claimed to be family land, it is appropriate to the court to give directions as to the procedure to be followed.

...

Where, as here, the issue (of trust) arises in succession proceedings whether the land is family land and therefore is subject to trust or whether it is owned absolutely by the deceased and therefore is not subject to distribution, the court hearing the succession proceedings has jurisdiction to determine the issue and to give appropriate directions on the hearing. This is in line with the jurisdiction vested in the High Court by Article 165(3) (a) of the Constitution and Section 47 of the Law of Succession Act, Cap 160”.

In re Estate of M'Mukira M'Arimi (Deceased) [2019] eKLR, the court felt that it was bound by the aforesaid pronouncement of the Court of Appeal and held:-

“On the basis of the foregoing and the objectors having claimed the existence of a trust, I hold that this court has jurisdiction to determine the objectors' claim in these proceedings.

..., a trust will not be implied or presumed unless it is to give effect to the intention of the parties. Before a trust can be implied, the intention of the parties to create a trust must clearly be determined and established. In the present case it was the objectors to prove the existence of the trust.”

Accordingly, this Court has jurisdiction to determine the issue of trust raised by the 1st Petitioner in this matter.

13. The distribution proposed by the 2nd Administrator for Dagoretti/Thogoto/1554 was not challenged. All parties were in agreement that the property was wholly owned by the deceased and was therefore available for distribution to his wife and children as proposed. The property known as Dagoretti/Thogoto/1553 is also not challenged. There was a general consensus that a portion of the property had been set aside as a communal burial ground and the rest of the property should be distributed to Wanjiru Waweru Benson and the Estate of Mary Wanjiru Ndeithi.

14. The question this court has been called upon to determine is whether the deceased held parcel number Dagoretti/Thogoto/1555 in trust for his siblings as claimed by the 1st Administrator. This is a matter of both fact and law. It is incumbent upon her to establish that such trust did exist. On the other hand, the 2nd Administrator denied the claim of trust. She was firm that the deceased had rightfully inherited the property from his mother with the consent of his siblings. She also stated that nowhere in the confirmed grant had it indicated that the deceased was holding the property in trust for his siblings.

15. As held in the case of Gichuhi v. Gichuhi [1982] EA 285, the party relying on the existence of a trust must prove through evidence the existence and creation of such trust. And in Ayoub v. Standard Bank of S. A [1963] EA 619, the Privy Council quoted with approval Cook v. Fountain [1676] 36 ER 984 at 987, where it was held:-

“So the trust if there be any, must either be implied by the law, or presumed by the court. There is one good, general, infallible rule that goes to both these kind of trust. It is such a general rule as never deceives; a general rule to which there is no exception, and that is this, the law never implies, the court never presumes a trust, but in a case of absolute necessity”.

16. From the foregoing, it was the duty of the 1st Administrator to prove the creation and existence of the alleged trust. As stated in the foregoing case, this court will not presume the existence of a trust but in a case of absolute necessity.

17. The undisputed facts from the evidence on record are that upon the demise of the deceased's father, his property was distributed between the deceased, his brother and his mother. His mother's property was a combination of parcel numbers Dagoretti/Thogoto 1550,1551,1552,1553 and 1555. Upon her demise, the entire estate devolved to the deceased herein pursuant to Succession Cause No. 649 of 2001. Subsequently the deceased transferred portions of the property he inherited from his mother to his siblings.

18. At the trial it became clear that a home for the family of Archibald Kamau Waweru and his wife Dorcas Wangari Waweru, had been built on parcel no. 1555. This was considered to be the home for the entire family and not the matrimonial home of the deceased herein. Despite the 2nd Administrator having her matrimonial home on parcel no. 1554 she was in occupation of the house in parcel no. 1555. The 1st Administrator claimed that her family had been denied access to their home by the 2nd Administrator to their detriment.

19. It would seem that right after the confirmation of the grant of his mother's estate, the deceased embarked on the process of distribution of her estate. It was not disputed that Loise Njeri received 1/8 acre, Anne Wambui Ndegwa ¼ acre, Lucy Mumbi 1/8 acre, Jedidah Kahuha 1/8 acre, Medrine Chuchu 1/8 acre all excised from their mother's estate. These are five of the seven daughters of Dorcas Wangari Waweru. They have since taken possession of their respective parcels.

20. The deceased had no difficulty distributing his mother's estate to his siblings. It was claimed by the 1st administrator that the deceased passed on before he could complete the process of transferring her share and that of the estate of Mary Wanjiru Ndeithi to her children. The concession by the 2nd Administrator to the distribution of parcel no. 1553 is relevant when considering the conduct of the deceased. It seems that the parties lived harmoniously and each developed their own portion which the deceased had sub-divided and distributed to them. To my mind, that was the conduct of a person who very well knew that he held the property in trust for his siblings.

21. This explains why all the property devolved to him, and he distributed all the property to his siblings, sold others but did not interfere with the portion comprising his parent's home. To my mind, the principle in **Gichuhi v. Gichuhi (1982) EA 285** that requires that "the party relying on the existence of a trust must prove through evidence the existence and creation of such trust" has in this case been satisfied. I am in no doubt that Parcel No. Dagoretti/Thogoto/1555, is the family home of the late Archibald Kamau Waweru and his wife the late Dorcas Wangari Waweru, the parents of Samuel Kinuthia Waweru (deceased).

22. Having extensively considered the evidence on record, I hereby distribute the property as follows:

ASSETS	BENEFICIARY	SHARES
Dagoretti/Thogoto/ 1553	i. Communal burial	0.049 Ha
	ii. Estate of Mary Wanjiru Ndeithi (deceased)	0.050 Ha
	iii. Wanjiru Waweru Benson	0.050 Ha
Dagoretti/Thogoto/ 1554	i) Mary Wanjiku Kinuthia and her children; ii) Agnes Njoki Kinuthia iii) Maureen Wangari Kinuthia iv) Archibald Waweru Kinuthia v) Alex Njuguna Kinuthia	Equal Shares
Dagoretti/Thogoto/ 1555	i. Loise Njeri Kamau, ii. Anne Wambui Ndegwa iii. Lucy Mumbi Njeru iv. Jedidah Njambi Kararu v. Estate of Lawrence Githinji Waweru vi. Estate of Mary Wanjiru Ndeithi , vii. Wanjiru Waweru Benson viii. Estate of Samuel Kinuthia	Equal Shares

	Waweru ix.Medrine Wanjeri Chuchu	
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SIGNED DATED AND DELIVERED IN OPEN COURT THIS 19TH DAY OF NOVEMBER, 2019.

L. A. ACHODE

HIGH COURT JUDGE

In the presence of Advocate for the 1st Administrator

In the presence ofAdvocate for the 2nd Administrator