



## **REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MILIMANI LAW COURTS, NAIROBI.**

**FAMILY DIVISION**

**IN THE MATTER OF SOLOMON NJEHU WANDIA (DECEASED)**

**SUCCESSION CAUSE NO.2281 OF 2008**

**HANNAH NYATHIRA KAMAU.....1<sup>ST</sup> APPLICANT**

**MARY NYAMBURA NJATHA.....2<sup>ND</sup> APPLICANT**

**MAGDALINE WANJIRU NJEHU.....3<sup>RD</sup> APPLICANT**

**AND**

**PETER NG'ANG'A NJEHU.....1<sup>ST</sup> RESPONDENT**

**WINFRED MUKAMI MBURU.....2<sup>ND</sup> RESPONDENT**

**ESTHER NJOKI.....3<sup>RD</sup> RESPONDENT**

**SARAH WAMAITHA NJENGA.....4<sup>TH</sup> RESPONDENT**

### **JUDGMENT**

#### **INTRODUCTION**

The deceased died on 31<sup>st</sup> July 2003.

Peter Nganga Njehu son to the deceased filed petition for grant of letters of administration intestate on 3<sup>rd</sup> September 2008 and obtained grant on 28<sup>th</sup> January 2009. According to the Petition and Affidavit in Support thereof, persons who were listed as those surviving the Deceased were:

- 1. Naomi Njeri Njehu-Widow**
- 2. Peter Ng'ang'a Njehu-Son(Adult)**
- 3. Sarah Wamaitha Kiarie-Daughter-in-law**
- 4. Samuel Kariuki Njehu-Son(Adult)**
- 5. Mary Nyambura Njatha-Daughter-Married**
- 6. Winfred Mukami Mburu-Daughter-Married**
- 7. Magdalene Wanjiru Njehu-Daughter-Married**
- 8. Hannah Nyathira Njehu-Daughter-Married**

## 9. Esther Njoki Kihara-Interested Party-Purchaser

The only asset listed as that left by the Deceased was Githunguri/Kanjai/1941 whose estimated value as at that time was Ksh. 1,000,000

By an application of summons for confirmation of grant filed on 19<sup>th</sup> August 2010, the grant was confirmed on 9<sup>th</sup> February 2011.

On 28<sup>th</sup> March 2011, the Applicants filed summons for revocation of grant seeking orders that the administrator Peter Nganga Njehu son to the deceased; be removed and replaced with Magdalene Wanjiru Njehu daughter of deceased. Secondly, that any distribution with regard to **Land parcel number Githunguri/Kianjai/1941** be halted.

On 15<sup>th</sup> October 2013; Hon Justice GBM Kariuki JJA (J) as he then was revoked the certificate of confirmation of grant ordered deletion of the alleged interested parties; Robert Mwangi Mburu and Esther Njoki Kihara respectively and ordered fresh application for confirmation of grant be filed and include the applicants/ beneficiaries of the deceased's estate.

On the 28<sup>th</sup> August 2015; the Applicants/Objectors jointly filed an application under Certificate of Urgency through Chamber Summons fortified by Section 3A of the Civil Procedure Act before this court, seeking that one Esther Njoki Kihara, an interested party in the deceased's estate, be removed from the list of beneficiaries and an order directed to the Registrar of Lands in Kiambu authorizing the titles registered under Esther Njoki Kihara pertaining to GITHUNGURI/KANJAI 1941 be cancelled.

On 13<sup>th</sup> July 2016, the administrator Applicant filed Summons seeking restraining orders against the Objectors/Applicants on suit property Githunguri/Kanjai/1941 as the application for confirmation of grant filed on 23<sup>rd</sup> October 2013 was /is pending. These Summons for confirmation of grant listed all beneficiaries and proposed mode of distribution of land parcel Githunguri/Kanjai/1941.

### HEARING

On 28<sup>th</sup> September 2017, hearing commenced; Esther Njoki Kihara (DW1) told the Court that in 2003, before the deceased died, he sent his son Francis Nganga Mburu to tell her to help pay Peter Nganga Njehu's medical bill as he was admitted in hospital. She paid Ksh. 155,000/= to Kijabe Hospital on behalf of the son; now the administrator of his estate.

His son was to refund the money once he was paid his benefits. His father said that if the money was not paid then she would be paid from the administrator's beneficial interest when distribution of land was done. She claims her portion of land as the money was not refunded.

Also; subsequent to deceased's death; she added the administrator more money to lodge the Succession Cause and the amount due and owing is Ksh 200,000/=.

Peter Nganga Njehu (DW2) confirmed in 2003, he was sick and admitted in Kijabe Hospital for 33 days. His brother; Francis Mburu Njehu (deceased) and the Purchaser's son, Ben Gachigi visited him in hospital. They later approached the deceased and then the Purchaser to help settle the medical bill. DW1 agreed and paid Ksh 155,000/=. The deceased told him to refund the money. He promised that if he did not do so, he would allocate DW1 land commensurate to the debt.

On distribution of the estate, Francis Mburu Njehu (deceased) distributed the estate to 4 sons of the deceased namely; himself, Peter Nganga, Samuel Kariuki and Simon Kiarie. Their mother, Naomi Njeri Njehu and 3 daughters were left out. He claimed that it was what their father stated during his lifetime. Peter Nganga Njehu after his brother's death, he filed this Succession Cause as administrator and distributed the deceased's estate according to Francis Mburu Njehu's plan.

Magdalene Wanjiru Njehu (PW1) objected to confirmation of grant as the daughters of the deceased were not consulted and did not give consent to the grant. During confirmation of grant; they were excluded and only daughters in law were included with surviving sons of the deceased in distribution of deceased's estate. She protested that their mother who is alive was evicted from her home where her husband, the deceased left her. The land is cultivated by Esther Njoki Kihara. The 3 daughters who protested to confirmation of granted confirmed that they were omitted from list of beneficiaries and were not involved or consulted and they did not consent to the proposed mode of distribution of the deceased's estate.

Instead they demand following a family meeting held on 9<sup>th</sup> August 2016, that they jointly with their mother are allocated 1 acre and to build a house and return their mother to her rightful place; her home and also to take care of her late husband's grave.

At the moment, their mother who is old over 90 years old and suffering loss of memory lives with her daughter Mary so as to take care of her.

Hannah Nyagira Kamau (PW2) and Mary Nyambura Njaga (PW3) corroborated PW1's testimony. PW2 denied signing the Consent to Making Grant form filed on 30<sup>th</sup> September 2008 more so her ID is 3049602 and not the number indicated on the Form.

In summons for confirmation of grant she was not included as beneficiary. The family did not agree on distribution of estate or the survey process. DW2 told their mother that she would be moved from her home and relocated to land near the river where she would live alone and her home area would be allocated to DW1.

DW3 stated that as daughters of the deceased their father, they are entitled to a share of the land. Peter Nganga Njehu refused and claimed that he had already sold the land. He allocated their mother's home to DW1 and she blocked them from accessing the land. DW3 always took

food to her mother in the mornings and evening and on one occasion while on her way to visit her mother, she was arrested for trespassing on Esther Njoki's land; the land that belongs to their mother. DW3 then took her mother to her home to take care of her after she was dispossessed of her land.

## ISSUES

The Petitioners then filed Summons for Confirmation of the Grant on 18<sup>th</sup> August 2009 accompanied by the Affidavit in Support of the Summons, the proposed mode of Distribution and Consent to the proposed mode of distribution. The mode of distribution was to be as follows:

1. **0.12 acres to Esther Njoki Kihara (Purchaser)**
2. **0.12 acres to Esther Njoki Kihara**
3. **0.12 acres to Winfred Mukami Mburu (daughter-in law)**
4. **0.12 acres to Sarah Wamaitha Njenga (daughter in law)**
5. **0.50 acres to Sarah Wamaitha Njeenga**
6. **0.50 acres to Winfred Mukami Mburu**
7. **0.50 acres to Robert Mwangi Mburu (Purchaser)**
8. **0.50 acres to Robert Mwangi Mburu**
9. **0.30 acres to Naomi Njeri Njehu ( widow of the deceased and mother to the beneficiaries)**

The Applicants herein then filed an application on 28<sup>th</sup> March 2011 seeking revocation of the grant, a fresh grant to be issued and a fresh certificate of confirmation of grant issued. Among the grounds adduced in the application were fraud, making of false statements and concealment of material facts.

On the 15<sup>th</sup> day of October, the High Court issued an order revoking the grant that had been issued and directed the 1<sup>st</sup> respondent to present a fresh application for confirmation of the grant and in addition, amend the list of beneficiaries to exclude Robert Mwangi Mburu.

Following the joint application made on the 28<sup>th</sup> of August 2015, the administrator of the estate approached the court on 13<sup>th</sup> July 2016 vide Chamber summons seeking to have the Court restrain the Respondents from selling or otherwise interfering with the aforementioned parcel of land. In his replying affidavit, sworn on the 12<sup>th</sup> of July 2016, he avers that the Applicants herein had allegedly trespassed on the 2<sup>nd</sup> Respondents portion and destroyed the crops planted by Esther Njoki Kihara which has led to criminal proceedings being instituted against them at the **Senior Principal Magistrates Court at Githunguri (Criminal Case No.1000 of 2015)**. The Applicants also allegedly colluded with strangers so as to subdivide the aforesaid land which would subsequently lead to the eviction of the 2<sup>nd</sup> Respondent who is a wife to the deceased's late son.

The case for determination before the Court relates to the affidavit of protest to the Respondents' application for confirmation of the grant as filed on 15<sup>th</sup> September 2017. In the said affidavit, the 1<sup>st</sup> Applicant averred that they consented to the said Peter Nganga Njehu being the legal administrator of the estate. The underlying issue was the mode of distribution which was deemed unfair towards the applicants. They further proposed that in addition to the agreed 1 acre, they should be allocated the cemetery and road as right of way to the other plots.

## DETERMINATION

The deceased's estate shall be distributed according to **Part V Law of Succession Act Cap 160 Laws of Kenya and the Probate and Administration Rules.**

Section 34 of the Act provides

*a person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.*

Section 35(1) of the Law of Succession Act, Cap 160 Laws of Kenya which provides:

*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.**

The grant was obtained without consultation, involvement and consents of daughters of the deceased who are the Protestors'/Applicants to the Summons of Confirmation filed on 23<sup>rd</sup> October 2013 pursuant to the Orders by Hon Justice GBM Kariuki on 15<sup>th</sup> October 2013.

However, it was mutually agreed that the bone of contention is not revocation of grant but distribution of the deceased's estate to the beneficiaries of the estate.

On one hand, the 4 sons of the deceased distributed the suit property Land Parcel Githunguri/Kanjai/1941 to and for themselves to the exclusion of their sisters. They also relocated their mother from her homestead and allocated this land to the Purchaser Esther Njoki Kihara who paid the administrator's medical bill and advanced him more funds to file the instant Succession Cause.

The daughters of the deceased were concerned with their mother age and state of health more so that she was uprooted from her home where her late husband allocated her and was relegated to downstream near the river.

This Court taking into consideration the evidence on record and submissions by parties finds as follows;

- a) The widow of the deceased had priority over all the children and ought to have lodged /filed the Succession Cause for grant of letters of administration as administrator under **Section 66 of Law of Succession Act**.
- b) The Respondent /Administrator has not conducted himself in line with his statutory mandate as administrator under **Section 82 & 83 of Law of Succession Act**; from the evidence that is uncontroverted; he apportioned land to the Purchaser, Esther Njoki Kihara by evicting his mother from her homestead; he unilaterally allocated land to his late brothers' widows and excluded his sisters from knowledge, consultation and/or consent to distribution of land and he sold land to Esther Njoki Kihara and **Robert Mwangi Mburu**; who did not in pleadings of oral testimony establish his claim over the suit property. He did not disclose funds from the sale and account for the same to other beneficiaries. From the above actions he failed in his fiduciary duty to account to the Court and beneficiaries.
- c) The deceased's widow Naomi Njeri Njehu had life interest in the deceased's estate over the children of the deceased and it is in bad taste that she was evicted from her home and had to be taken away by her daughter to safety and care. She has since died as the parties prepared submissions.
- d) The distribution of the deceased's estate ought to be equitable to all beneficiaries and the Court shall take into account the requirements in **Section 27 of Law of Succession Act**

## **DISTRIBUTION**

In consideration of the fact that Peter Nganga Njehu incurred a debt of Ksh 200,000/- from Esther Njoki Kihara in form of payment of his medical bills and additional funds to facilitate filing of this Succession Cause; the said Purchaser is a creditor to the deceased's estate and particularly the administrator's beneficial interest. In consideration of the fact that the daughters of the deceased made concerted efforts to keep safe and cared for their mother in old age and sickness until her death during this case; they are entitled to a fair share of their father's estate.

The Law of Succession Act amplified by Constitution of Kenya 2010 do not condone discrimination of children on the basis of gender. **PETER KARUMBI KEINGATI & 4 OTHERS vs DR ANN NYOKABI NGUITHI & 4 OTHERS COURT OF APPEAL CIVIL APPLICATION NO 235 OF 2014** on the issue of non discrimination of children for purposes of Succession. All children of the deceased are eligible to inherit from the deceased's estate.

Therefore, since all beneficiaries did not consent to the proposed mode of distribution as shown in paragraph 5 of affidavit in support of summons for confirmation filed on 4<sup>th</sup> November 2013 and as per the survey done and as per the attached mutation form; the distribution shall be as follows with regard to suit property Land Parcel Number **Githunguri/Kanjai/1941** which comprises of 3 acres or so;

- a) **The Family graveyard and road access shall be hived off the suit property available for use by and for all beneficiaries.**
- b) **Each of the daughters of the deceased shall ¼ acre of the suit property namely;**
  - i) **Magdalene Wanjiru Njehu,**
  - ii) **Hannah Nyathira Njehu and**
  - iii) **Mary Nyambura Njehu.**
- c) **The balance of 21/4 acres shall be divided amongst the 4 sons of the deceased namely;**

**i. Peter Nganga Njehu**

**ii. Francis Mburu Njehu (deceased)**

**iii. Samuel Kariuki (deceased)**

**iv. Simon Kiarie**

**d) Each of the parties shall obtain a share of the suit property without being moved from their present location and developments.**

**e) The Purchaser's interest of Esther Njoki Kihara shall be hived off the administrator's beneficial interest portion in settlement of the loan to Peter Nganga Njehu.**

**f) A grant shall issue in joint names of;**

**i. Magdalene Wanjiru Njehu**

**ii. Samuel kariuki Njehu**

**g) The deceased's widow's interest shall be shared by all their children equally.**

**DELIVERED DATED & SIGNED IN OPEN COURT ON 5<sup>TH</sup> FEBRUARY 2018**

**M.W.MUIGAI**

**JUDGE**