



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 1341 OF 1993

IN THE MATTER OF THE ESTATE OF WACHIRA GITHINJI(DECEASED)

NELSON MUCHANGI WACHIRA.....PETITIONER

-VERSUS-

SAMUEL MIGUI WACHIRA.....PROTESTER

JUDGMENT

This matter has had a long and chequered life.

Wachira Githinji died on 12th August 1993 at the age of 91 years as per the certificate of death dated 14th September 1993.

The Chief Konyu Location, one Mr. C. K Mugweru issued a letter 15th October 1993, and the petitioner later in the P&A 5 dated 18th October 1993 listed his survivors as

- DADESON GITHINJI SON 60
- NGUBIA CHARLES JOHNSON SON 58
- SUSAN NJUGU WACHIRA (UNMARRIED DAUGHTER) 55
- NELSON MUCHANGI WACHIRA SON 52
- SAMWEL MIGWI SON 47
- REBECCA NJAMBI NJAGA (MARRIED DAUGHTER) 42

His assets were described as;

- LR KONYU/ICHUGA/1573 1.801 HA
- LR KONYU/ICHUGA/1476 0.8 HA
- BARCLAYS BANK (KARATINA) ACCOUNT NO 1:455
- NYERI DISTRICT COOPERATIVE UNION SAVINGS ACCOUNT NO 1418
- KENYA POST OFFICE SAVINGS BANK KKAV 359.5
- INTEREST IN JOHN AND HADDAD PARTNERSHIP PLOT 8

Grant of letters of administration intestate was issued on the 16th March 1994 to Dadeson Githinji and Ngubia Charles Johnson

On the 2nd October 1997, they filed summons for confirmation of grant.

They proposed that the two parcels of land KONYU/ICHUGA/1573 1.801 HA and LR KONYU/ICHUGA/1476 0.8 HA above be shared equally among

- DADESON GITHINJI SON 60
- NGUBIA CHARLES JOHNSON SON 58
- SUSAN NJUGU WACHIRA (UNMARRIED DAUGHTER) 55
- NELSON MUCHANGI WACHIRA SON 52

The record shows that on 23rd February 2005 another summons for the confirmation of grant was filed this time by Ngubia Charles Johnson alone. He proposed that the estate be distributed as here below;

Property	Heirs	Size
KONYU/ICHUGA/1573 1.801 HA	Nelson Muchangi Wachira	0.4300 ha
	Ngubia Charles Johnson	0.1212 ha
	Susan Njugu Wachira	0.4002 ha
	SDA Church East Africa	0.2000 ha
	Joseph Mwangi Wanjohi	0.6527 ha
KONYU/ICHUGA/1476 0.810 HA	Susan Njugu Wachira	0.0541 ha
	Nelson Muchangi Wachira	0.02234 ha
	Ngubia Charles Johnson	0.5325 ha

This application was never prosecuted. An attempt by Nelson Muchangi to substitute himself as the administrator vide the summons general filed on the 30th March 2006, on account of the illness and inability to complete the task on the part of Ngubia Charles Githinji was dismissed by Justice Khamoni on 31st May 2006.

He filed another application on the 27th July 2006, seeking the revocation of the grant issued on 16th March 1994, reporting that Dadeson Githinji was now deceased and Ngubia Charles was incapacitated by illness.

The order was granted on 26th March 2007, revoking the grant and appointing him as the administrator. This was followed by a summons general filed on the 14th June 2007 by Samwel Migwi Wachira seeking the setting aside of those orders on the ground that Nelson was not fit to be an administrator as he had already intermeddled with the estate by selling a portion of Konyu/Ichuga/ 1573, and that the said application had not been served on the other beneficiaries or their advocates.

Nelson opposed the application vide his replying affidavit sworn on the 19th September 2007.

The application was heard by Okwengu J. She set a date for the ruling only to realise that the application was seeking to set aside orders issued by Makhandia J as he then was and since he was still within jurisdiction, she set aside her proceedings suo motu and directed that the application be heard before that Judge.

The application came before Makhandia J on 5th June 2008. It was fixed for hearing on the 16th July 2008 when it did not proceed as one counsel was unwell. It was referred to the registry for hearing date.

In the meantime, Nelson filed a summons for confirmation of grant on the 21st April 2009. By this time even Rebecca was deceased. He made the following proposal on distribution.

Property	Heirs	Size
KONYU/ICHUGA/1573 1.801 HA	Nelson Muchangi Wachira	0.4300 ha
	Ngubia Charles Johnson	0.1212 ha
	Susan Njugu Wachira	0.6002 ha
	George Wahome Githinji	0.6527 ha
KONYU/ICHUGA/1476 0.810 HA	Susan Njugu Wachira	0.0541 ha
	Nelson Muchangi Wachira	0.02234 ha
	Ngubia Charles Johnson	0.5325 ha

Samwel Migwi Wachira filed an Affidavit of protest against the summons for confirmation of grant on 15th May 2009. In the affidavit he demonstrated how the petitioner Nelson had meddled with the estate of the deceased.

That he Samwel had been pushed to file a suit at the Karatina Law Courts to pursue the issue. Nelson had disposed of part of 1476 to M/S Victors Chapel, and the estate of the Susan Wanjugu deceased. That George Wahome was a grandson of the deceased Dadeson, who had no consent from the children of Dadeson to inherit the said portion. In addition, he had left out one of the deceased's properties, PLOT NO. 8 KIAWARIGI MARKET. He made another proposal.

Property	Heirs	Size
KONYU/ICHUGA/1476 0.810 HA	Nelson Muchangi Wachira	0.435 ha
	Ngubia Charles Johnson	0.375 ha
KONYU/ICHUGA/1476 1.801 HA	The family of Dadeson Githinji Wachira	0.435 ha
	The family of Rebecca Njambi	0.435 ha
	Samwel Migwi Wachira	0.435 ha
	Susan Njugu Wachira	0.435 ha
	Ngubia Charles Johnson	0.06 ha
PLOT NO.8. KIAWARIGI MARKET	The family of Dadeson Githinji Wachira	

On the 16th February 2012 the court Wakiaga J issued directions that the matter be heard by way of written submissions and affidavits, to be filed within 30 days of the order.

On 11th July 2014 Nelson filed a further affidavit responding to the affidavit of protest. He deponed that the protester had been settled by the deceased during his lifetime on LR Konyu/Ichuga/ 1574 1.699 ha. That Rebecca Njambi's children had told him that their mother as a married daughter was not interested in the estate of the deceased. That Susan was now deceased leaving her two daughters Winnie Njambi and Rose Wanjiru, and that the Susan's portion was to be registered in Winnie's name on her behalf and that of her sister.

All the while, the Petitioner was represented by Kebuka Wachira advocate, Gori Ombongi came on record for the Seventh Adventist Church, and Gachiri Kariuki for the protester. The latter filed a Notice of Motion on the 21st September 2016, seeking an extension of Wakiaga J's order to enable the protester file submissions, and also for the court to grant orders /directions for the purpose of concluding the matter.

The application was granted on 9th February 2017.

The matter finally landed on my desk on 9th November 2017. By then all the parties had complied.

The matter was fixed for Judgment on the 18th December 2017. For some strange inadvertence it was not diarized and was returned to the registry.

This was later discovered and the file placed before me for writing of the judgment.

The protester, petitioner and 'purchaser' have each filed submissions which I have considered.

In the protester's submissions he reveals that the deceased had 7 children. The one missing out from the list is one Leah Wangui Kamonde, deceased.

In his submissions he demonstrated that the Petitioner had perpetrated the intermeddling with the estate of the deceased. He maintained that the deceased had in his lifetime bought and shared out property to all his children and hence the only undistributed estate was Konyu/Ichuga/1476 and 1573 and a Plot no. 8 Kiamariga.

The Petitioner and the 'purchaser' filed joint submissions where the only issue appeared to be to secure the rights of a purchaser alleged to have purchased a portion out of Susan Njugu's share, pending the finalization of the cause.

Because this cause had dragged for long the protester demonstrated that he had filed a dispute before the District Land Tribunal Karatina, and the matters had been held in abeyance by the Karatina court pending the determination of this cause.

The intermeddlers had however proceeded to develop their portion in disobedience of the court orders.

The Issues are:

1. Who are the beneficiaries of the deceased?
2. What is his estate?
3. Who is beneficially entitled and what are their respective shares?

I have carefully considered the submissions by both parties.

First it is clear from the record now that the deceased had seven children, two of who were married and did not have any interest in their father's estate.

Secondly, there is no evidence at all that the deceased Wachira Githinji sold his property to anyone before his demise. The Law of Succession is clear on when any transfer of property of a deceased person can happen.

Section 45 of the Law of Succession Act states;

45. No intermeddling with property of deceased person

(1) 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.

(2) 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; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

The administrator herein had no authority to dispose of any portion of the estate. No beneficiary had any property to dispose of before the process of succession was completed.

In addition, the s. 82 provides for the powers of personal representatives in the following terms:

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant;

The deceased had not sold his property to anybody before he died. No administrator had any power to dispose of any portion of that property, hence any purported sale was null and void.

I have considered the proposed mode of distribution in the summons for confirmation of grant and the protest.

There is an understanding that the deceased had three undistributed pieces of property. With regard to the distribution it is clear that the only the children of the deceased would be beneficiaries in equal shares as per the provisions of s. 38 of the Law of Succession Act. Any children of the deceased's children can only inherit through their parents, by getting what would have been their parents' share.

In the Matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR

I am persuaded by what the court had to say;

Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.

I need not say more on the subject.

The proposal by the protester ensures an equal distribution of the estate to the beneficiaries.

In conclusion I find and hold as follows:

1. The beneficiaries to the deceased are his children as per the provisions of s. 38 of the Law of Succession Act, and in this case, also the children of the deceased's deceased children who would inherit their parents' shares.
2. All of the deceased "estate" or 'the free property' comprises of
 - a. LR KONYU/ICHUGA/1573 1.801 HA
 - b. LR KONYU/ICHUGA/1476 0.8 HA
 - c. BARCLAYS BANK (KARATINA) ACCOUNT NO 1:455
 - d. NYERI DISTRICT COOPERATIVE UNION SAVINGS ACCOUNT NO 1418
 - e. KENYA POST OFFICE SAVINGS BANK KKAV 359.5
 - f. INTEREST IN JOHN AND HADDAD PARTNERSHIP PLOT 8(PLOT NO. 8 KIAWARIGI MARKET)
3. That under s. 82 of the Law of Succession Act the neither Petitioner nor any beneficiary had any authority to sell the deceased's property before the confirmation of the grant. Any purported sale amounts to intermeddling and is null and void.
4. The grant confirmed on the 16th April 2009 is and is hereby revoked.
5. A fresh grant to issue in the name of the protester
6. The grant is and is hereby confirmed in the following terms:
 - i. The monies in the following accounts be shared equally among the beneficiaries (five equal shares)
 - a. BARCLAYS BANK (KARATINA) ACCOUNT NO 1:455
 - b. NYERI DISTRICT COOPERATIVE UNION SAVINGS ACCOUNT NO 1418
 - c. KENYA POST OFFICE SAVINGS BANK KKAV 359.5

ii. The land be shared out as follows:

KONYU/ICHUGA/1476 0.810 HA	Nelson Muchangi Wachira	0.435 ha
	Ngubia Charles Johnson	0.375 ha
KONYU/ICHUGA/1476 1.801 HA	The family of Dadeson Githinji Wachira (to be registered in the name of the widow in trust for herself and all their children in equal shares)	0.435 ha
	The family of Rebecca Njambi (to be registered in the names her children in equal shares).	0.435 ha
	Samwel Migwi Wachira	0.435 ha
	Susan Njugu Wachira (to be registered in the names of her children in equal shares)	0.435 ha
	Ngubia Charles Johnson (to be registered in the name of the widow in trust for herself and all their children in equal shares)	0.06 ha
PLOT NO. 8 KIAWARIGI MARKET	The family of Dadeson Githinji Wachira (to be registered in the name of the widow in trust for herself and all their children in equal shares)	

Each Party to bear its own costs

Delivered, dated, and signed at Nyeri this 12th June 2018.

MUMBUA T. MATHEKA

JUDGE

Court Assistant: Atelu

Ms. Muchai for protester

Mr. Ndirangu for Petition