



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 1788 OF 2006
IN THE MATTER OF THE ESTATE OF NJIRIRI MUKOMA (DECEASED)

1. GEORGE MBURU NJIRIRI

2. SAMUEL MBURU NJIRIRI.....OBJECTORS

VERSUS

1. PATRICK MUCHAI NJIRIRI

2. NDUNGU NJENGA NJIRIRI

3. MORRIS MBURU NJIRIRI

4. JAMES KIMUNYA NJIRIRI

5. STEPHEN KARANJA NJIRIRI

6. KENNETH MBURU NJIRIRI.....RESPONDENTS

FINAL RULING

1. The applicants in this cause filed a petitioned for Letters of Administration Intestate at Limuru SRM Courts, Succession Cause No. 24 of 2002. Before the grant could be issued Jane Kabura Njiriri alias Kabura Njiriri, Morris Mburu Njiriri, Kenneth Mburu Njiriri, Stephen Karanja Njiriri, James Kimunya Njiriri, Lizy Njoki Njiriri alias Njoki Njiriri (Wa Kabura), Grace Gitiri Njiriri alias Gitiri Wa Wanja, Mary Wanjiru alias Wanjiru Wa Wanja, Jesse Karanja Njoki alias Stephen Karanja Njoki and Josephine Gitiri Kamuto alias Gitiri Kamuto filed a Notice of Objection to the making of a grant. Simultaneously Patrick Muchai Njiriri and Ndungu Njenga filed a Cross- Petition for Probate of a Written Will. The Objection was heard and a Ruling on the validity of the Will was read on the 5th May 2005. The Petitioners who are the Protestors in this cause filed an Appeal HCCA No. 32 of 2004 against the said decision and Justice Dulu in a judgment in dated the 24th of June 2010 upheld the decision of the SRM's Court. The Protestors filed an Appeal in the Court of Appeal CACA No. 182 of 2010 which was withdrawn on the 11th of November 2015. As this was going on the Petitioners in this matter Succession Cause No. 1788 of 2006 petitioned for a Grant of Probate of a Written Will on the 4th of August 2006.

2. Succession Cause no. 244 of 2002 was not returned to the SRM's Court after the withdrawal of the appeal in the Court of Appeal. The parties proceeded in Succession Cause no. 1788 of 2006. After the

Petition was filed by Patrick Muchai Ndungu and Ndungu Njenga they sought to have the grant confirmed vide their application dated the 5th December 2007. The Petitioners listed the person surviving the deceased the deceased's children. They sought to have the grant confirmed as per the Will dated the 19th of June 1997. The Will is attached. As per the petition the deceased survived by the following dependants;

- a) Jane Kabura Njiriri alias Kabura Njiriri (deceased – wife
- b) Morris Mburu Njiriri – son
- c) Kenneth Mukoma Njiriri – Son
- d) Joseph Kimunya Njiriri – son
- e) Stephen Karanja Njiriri-son
- f) James Kimunya Njiriri – son
- g) Njoki Njiriri(Wa Kabura) alias Lizzie Njori Njiriri –daughter
- h) Grace Nyambura Njiriri alias Gitiri wa Wanja – Daughter
- i) Mary Wanjiru Njiriri alias Wanjiru wa Wanja – Daughter
- j) Wainaina Njiriri alias Christopher Wainaina Njiriri – Son
- k) Ndungu Njiriri alias Julius Ndungu Njiriri (Deceased) – Son
- l) George Mburu Njiriri – son
- m) Samuel Mburu Njiriri –Son
- n) Joseph Wanyoik Njiriri alias Wanyoike Njiriri – son
- o) Jessie Karanja Mukoma alias Jessie Karanja Njoki – son
- p) Gitiri Kamuto alias Josphine Gitiri Kimani – Daughter
- q) Josphat Kinuthia Njiriri alias Wandaka Njiriri – Son.

The assets listed are;

- a) L.R. Limuru/Kamirithu/510
- b) L.R Limuru/Kimirithu/606
- c) LR. Limuru/Bibirioni/420
- d) Plot No. Tigoni/Mabroukie/Karanjee
- e) Kiambu Dairy & Pyrethrum Co-op A/C No. 403-LN-54
- f) Tiekunu Trading Centre No. 5 shop
- g) Limuru Kamirithu 2 acres where late Mukoma Njiriri is buried (title being processed).

The Will attached to the petitioners affidavit states as follows;

THE LAST WILL OF NJIRIRI MUKOMA

OF P.O BOX 554, LIMURU

I, NJIRIRI MUKOMA of post office Box Number 554, Limuru do solemnly hereby declare as follows:-

1. ***THAT*** this is my last will and testament.
2. ***THAT*** I hereby cancel and revoke all my previous wills and codicils.
3. ***THAT*** I hereby appoint messrs. Patrick Muchai Njiriri and councillor Ndungu Njenga to be the executors of this will.
4. ***THAT*** I give and bequeath my piece of land known as Land Reference No. LIMURU/THARUNI/510 to the under-mentioned beneficiaries and accordance with the acreage indicated against their names;-

(i) James Kimunya Njiriri - 7.8 acres -2

(ii) Stephen Karanja Njiriri – 7.8 acres -2

(iii) Gitiri Kamuto - 3.0 acres -1

Total - 18.6 acres

5. ***THAT*** I give and bequeath my piece of land known as land Reference No. LIMURU/BIBIRIONI/420 to the following beneficiaries and in accordance with the acreage indicated against their names:-

(i) Kenneth Mburu Njiriri - 5.65 acres -4

(ii) Joseph Kimunya Njiriri - 5.65 acres -2 =13.45

Total - 11.3 acres

6. ***THAT*** I give and bequeath my piece of land known as Land Reference No. LIMURU/KAMIRITHU/510 to the following beneficiaries and in accordance with the acreage shown against their respective names:-

(i) Joseph Kimunya Njiriri - 2.0 acres -2 = 15.45

(ii) Kenneth Mburu Njiriri - 2.0 acres -4=7.65

(iii) Wainaina Njiriri - 2.0 acres -3

(iv) Ndungu Njiriri - 2.6 acres -3

(v) Njoki Njiriri (Wa Kabura) - 2.0 acres -2

(vi) Gitiri Wa Wanja - 2.0 acres -4

(vii) Wanjira Wa Wanja - 2.0 acres -4

(viii) George Mburu Njiriri	- 2.0 acres -1
(ix) Samuel Mburu Njiriri	- 2.0 acres -3
(x) Wandaka Njiriri	- 2.0 acres-3
(xi) Stephen Karanja Njoki	- 2.0 acres-2
(xii) Wanyoike Njiriri	- <u>3.0 acres</u> -4
Totals	- 25.6 acres

8. **THAT** I give and bequeath my piece of land comprising two (2) acres where the late Mukoma's grave lies and whose Title Deed is being processed to Morris Mburu Njiriri (-2). I Request Morris Mburu Njiriri to maintain and tend the said grave of my father Mukoma Njiriri (deceased).

9. **THAT** I give and bequeath my shares in Tigoni/Mabroukie (Karanjee) together with any land allocated to the said shares to my wife Kabura Njiriri (-2).

9. **THAT** I give and bequeath my shares in Limuru pyrethrum Growers Bank and all the money in my account with that Bank to my wife Kabura Njiriri(-2).

10. **THAT** I give and bequeath my portion of the plot and shop at Tiikunu. Trading Centre to my son Stephen Karanja Njiriri (-2).

11. **THAT** I give and bequeath all my property real and personal not specifically given to any person in this will to my above named sons and daughters in equal shares.

IN WITNESS WHEREOF I NJIRIRI S/O MUKOMA have hereunto set my hand this.....Day of.....One Thousand Nine Hundred and Ninety-five in the presence of the Two Witness herein below mentioned who were all present at the same time.

SIGNED by the said

NJIRIRI MUKOMA

We TIMAN NJUNGU, advocate of P.O Box 46693 Nairobi and FREDRICK NJIRIRI MUHUNGA of P O Box 554, Limuru who were all present at the same time when NJIRIRI MUKOMA signed this **WILL** have hereunto set our respective hands as witnesses thereto.

SIGNED By the said

TIMAN NJUGI, ADVOCATE

SIGNED by the said

FREDRICK NJIRIRI MUHINGA

3. On the 18th March 2008 Samuel Mburu Njiriri, George Mburu Njiriri and Josphat Kinuthia Njiriri filed an affidavit of protest. They state that they only came to know of this cause when they were served with the Summons for Confirmation of the grant. They raised the issue that the petition in this cause had been filed yet there was an appeal pending in the High Court and there was a Cross- Petition in the Court at Limuru. Subsequently on the 15th of April 2008 the said protestors filed a Summons for Revocation or Annulment of the grant. Their ground for revocation is that the grant of probate was obtained fraudulently and that there was concealment of material facts to the court. That they were not consulted before the

cause was filed and that there was already another cause relating to the same deceased pending in court. On the 28th of June 2016 the application to substitute George Mburu Njiriri and Samuel Mburu Njiriri (both deceased) with Josphat Kinuthia Njiriri was allowed. He is son of the deceased.

4. On the 10th of November 2014 this Court directed that the Objection and the application for Confirmation of the Grant be heard together, parties were to proceed by way of viva voce evidence. The matter was subsequently heard. Morris Mburu Njiriri recalled the background of this matter adding that they want the grant confirmed as per the deceased's written Will. The status on the ground is that all the beneficiaries have been settled as per the Will and that everyone has been catered for including the objectors. That those who have not occupied their portions their land is still vacant. Since the matter started three of them have passed on. They are old and wish to hand over what they have to their children. During cross-examination he stated the portions given are as per the Will adding that the portion he occupies is 12 acres. That the said land was not given to him by his father and that it was not family land but it was land given to his mother by the county council in 1957 she paid for its rent every year. He denied that in meeting held on the 10/7/2010 they agreed to share the property equally. He stated the meeting was held to sell the trees not for demarcation. He denied that they had a meeting with the deceased where he expressed his wish to divide the properties equally amongst his children.

5. Two witnesses testified during the Protestor's case. Josphat Kinuthia Njiriri and Jimnah Njuguna Kimunya. Josphat Kinuthia Njiriri evidence was as follows; the deceased herein was my father. He died on 23rd September 2001. My father had the following wives and children as detailed below;

WECEKE NJIRIRI

- i. Gitiri Kamutu (Deceased)
- ii. Wanjiku Muigai
- iii. George Mburu (Deceased)
- iv. Wanjiru Gichuru
- v. Joseph Kimunya Njiriri

KABURA NJIRIRI

- i. Gitiri Ndungu Njenga (Deceased)
- ii. Morris Mburu
- iii. Loise Wambui
- iv. Peninah Wanjiru (Deceased)
- v. Stephene Karanja
- vi. Njoki Njiriri
- vii. Kimunya Njiriri

WANJERI NJIRIRI

- i. Samuel Mburu (Deceased)
- ii. Hannah Wambui (Deceased)

- iii. Josphat Kinuthia
- iv. Kimunya Njiriri
- v. Christopher Wainaina
- vi. Julius Ndungu (Deceased)

WANJA NJIRIRI

- i. Kenneth Mukoma (Deceased)
- ii. Wanjiku Njiriri (Deceased)
- iii. Grace Gitiri Njiriri
- iv. Wanjiru Njiriri
- v. Wanyoike Njiriri

After he had heard rumors about the Will from his brother Samuel Mburu, he went and asked his father who told him that he did not agree with the Will and asked him to call all the family members. He wrote a letter to all the family members which my father signed and is dated 27th June 2000. His father later called them for about 4 meetings and in all of them he told them that his properties should be shared equally among his children. Even before his death he desired for the documents with Timan Njugi Advocate to be collected, and the family members agreed that each contributes 200/=. Upon his demise and before his burial, the family held a meeting and especially to discuss the deceased's wishes. In the said meeting they tasked their cousin Jimnah Njuguna Kimunya to record the deliberations. It was agreed by all the members present and in the presence of 2 Chiefs from the area that the deceased's assets will be shared out equally among his beneficiaries. All members present signed the document. The members gave Jimnah Njuguna Kimunya and him the responsibility to go to Timan Njugi's home to collect all the documents he held of their father. They went to Timan house and he told her could not release the documents without payment of his legal fee amount to Kshs. 15,000/=. Thereafter they gave the said money to Morris Mburu who was to pay the advocate. The reason the money was given to Morris Mburu is because the advocate was well known to him. After their father's burial, and considering that the family members had agreed that he died without leaving a Will on 13th June 2002, George Mburu and Samuel Mburu filed Succession Cause No. 24 of 2002 in Limuru Chief Magistrate Court. Before the case could proceed an objection was lodged by the objectors in Succession cause No. 24 of 2002. The objectors also filed a Cross Petition for Probate of Written Will. As protestors, they oppose this cause and the mode of distribution because of the following reasons; the deceased died without leaving a Will. The purported Will only give a lion's share of the estate to one house of Kabura Njiriri whose daughter is married to the named Executor Ndung'u Njenga. This cause was filed when there were 2 cases pending namely: **Limuru Succession Cause NO. 24 OF 2002 and NAIROBI HCCA NO. 32 OF 2004**. The cross petition in Limuru court is still pending over the same estate of deceased. They were not consulted when this cause was being filled. As protestors, they propose that the deceased's estate be shared out equally among the beneficiaries as per the attached proposed schedule. Some of the beneficiaries especially Morris Mburu had already been given some properties by their father during land demarcation and had been caused to be registered in his name. The deceased assets are; LR. NO.Limuru/Tharuni/606 (18.6 Acres), LR. No.Limuru/Bibirioni/420(11.3Acres), LR. No. Limuru/Kamirithu/510 (25.6 Acres), 2 acres where Mukoma Njiriri lives, Shares in Togoni/Mabroukie (Karanjee). Shares in Limuru Pyrethrum Growers Bank. Plot and Shop – Tikunu Trading Centre. The said 7 assets to be shared out equally among the following 23 beneficiaries. Gitiri Kamutu (deceased), Wanjiku Muigai, George Mburu (deceased), Wanjiru Gichuru, Joseph Kimunya Njiriri, Gitiri Ndingu Njenga (deceased), Morris Mburu, Loise Wambui, Peninah Wanjiru (deceased), Stephen Karanja, Njoki Njiriri, Kimunya Njiriri, Samuel Mburu (deceased), Hannah Wambui (deceased) and, Josphat Kinuthia, Kimunya Njiriri, Christopher Wainaina, Julius Ndungu (deceased), Kenneth Mukoma (deceased), Wanjiku Njiriri

(deceased), Grace Gitiri Njiriri, Wanjiri Njiriri and Wanyoike Njiriri

Jimnah Njuguna Kimunya testified that the deceased was his uncle and his father was Jaziel Kimunya Mukoma who was younger to Njiriri Mukoma his father died in 1957. His uncle had 4 wives and he knew all of them. He was aware of the disagreement the family had over the Will. That it was decided they sit down and deliberate on that issue. All the members including the Area Chief present proposed that he be the secretary to write down what transpired. It was agreed in that meeting that the distribution of the deceased will be by all the family members and all documents relating to his Will be given to the family members. He wrote down that agreement and the people present signed. In that meeting it was mutually agreed that any distribution will be equally amongst his beneficiaries.

6. Parties filed submissions. The protestor narrated the sequence of events and evidence and submitted as follows; the present petition should be struck off as the same is incompetent and an abuse of the court process. That the matter in Limuru court is still pending and that the petitioners in this cause has not withdrawn their cross- petition. That it is fatal for the petitioners to file this cause in relation to the same deceased person. The cause offends Rule 4(1) of the Probate and Administration Rules. That this cause was filed 4 years after the Succession Cause at Limuru court was filed and gazetted as per the said Rule 4(1). That after filing this Succession Cause the petitioners did not consult or seek the consent of the protestors as required in law. That since the petitioners have opted not to be bound by the proceedings in the Limuru court they are estopped from relying on the said pleadings and decision in HCCA No. 32 of 2004. That the doctrine of res judicata cannot apply in this case as the applicant chose to be silent on the cross-petition in Limuru and the only inference that can be drawn is that by filing this cause in the High Court their position is that the Subordinate court did not have the jurisdiction to entertain the case. On the Will it was submitted that a Will which without explanation favours one house over the others goes against the Constitution and public policy and that all children of the deceased should be treated equally. That if the properties are distributed equally there will be no prejudice occasioned to the house of Kabura Njiriri, Wanjeri Njiriri and Wanja Njiriri. That the Constitution under Article 19,20,21,22,23 and 27 prohibits the enactment of any laws which are discriminatory and that a person cannot discriminate against beneficiaries who are supposed to share equally in the estate. It was submitted that the distribution should be as proposed by the protestors wherein all beneficiaries are inheriting the assets of the deceased equally which was the wish of the deceased.

7. The petitioners in their submissions reiterated the evidence and evaluated it. It was also submitted that the protestors cannot challenge the will as there is the High Court decision that upheld the Magistrates 'Courts decision that the deceased passed testate. It was submitted that this issue is res judicata. The Petitioner relied on the provisions of **Section 7 of the Civil Procedure Act** which provides that; “ *no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court*”.

DETERMINATION

8. The protestors have challenged the competence of this suit. It is not in dispute that the petitioners in this cause filed a cross- petition in the lower court. During the hearing of the appeal the lower court file was brought to the High Court but it was not returned to Limuru Court. The protestor did not raise this issue before the hearing of their protest. They subjected themselves to the jurisdiction of this court and they cannot now say that this cause is incompetent. The lower court file became a part of this cause once the High Court called for the said file. This suit is competent. Rule 4 (1) of the Law of Succession Act provides that;

(1) A High Court station registrar shall send to the principal registry a notice in Form 73 of every application made in his registry for a grant as soon as may be after the application has been filed and no such grant may be signed by the court until the receipt from the principal registry of a certificate in Form 30 to the effect that no other application made in respect of the estate of the

deceased has been granted or notified to the principal registry as pending; and such certificate shall be dispatched promptly by the principal registry to the High Court station registrar.

This Rule enables the Registrar to manage the filing of applications for grants and identification of similar applications filed in other registries. It is evident that the 2nd cause was not brought to the Registrar's attention. What the Registrar has to do in such circumstance is to summon the parties and have the applications consolidated for expeditious disposal of the application. I note further that the High Court did not order after the appeal was heard and determined that the lower court file be returned to Limuru for further hearing. However, am not saying that in the absence of such an order a party is entitled to file another application for grant for the same deceased person in another court. Lastly when I consider the listed assets of the deceased's their value was definitely beyond the jurisdiction of the lower court which was limited to Kshs. 100,000/- in the year 2002. This suit is therefore a competent suit.

9. The next issue is whether the protestors have proved their objection. The petitioners filed this cause in 2000 there is nothing to indicate that the protestors were informed of the filing of this cause. Should the grant be revoked? Considering the time the parties have been in court and noting that Section 76 of the Law of Succession Act provides that the court may revoke the grant and of the view that the grant should not be revoked. This matter before the Lower Court and High Court on an appeal shows the parties have been in Court since 2002. In order to expedite the matter the Court shall consider the protest on the mode of distribution and the application for confirmation of grant.

10. The protestors argued that there the deceased did not leave a Will and that the family decided that they should not rely on the Will. In HCCA No. 32 of 2004 Justice Dulu dealt with the issue of the Will the Court upheld the lower court's decision that there was a valid Will. Justice Dulu held as follows;

“on whether the Will was invalid because it disinherited or gave a smaller share of the estate to some beneficiaries, I will cite section 26 of the Act, which is the relevant section. It provides-

“26. Where a person dies after the commencement of this Act, and so far as succession of his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by the will, or by gift in contemplation of death of the law relating to intestacy, or the combination of the Will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”

Under the above provisions of the law, there is no requirement that the Will should provide equal distribution of assets among dependants. The word used is reasonable provision only. In the present case, provision has indeed been made for the appellants. Besides, the law does not say that the Will becomes invalid even if some dependants are not provided for. It only says that the court, if it deems it fit, may make reasonable provisions for that dependant who has not received reasonable provision for that dependant who has not received reasonable provision. Thirdly, the court can only exercise that power of making adequate provision, where there is an application. In my view, that application has to be made in the succession cause. It could come for appeal if the succession court declines to make that adequate provision. However, in our present case no such application was made in the succession case. It is too late in the day, to raise the matter in this appeal.

The protestors did not pursue their appeal in the Court of Appeal. To again raise the issue of the validity of the Will is not in order. The matter was dealt with and a decision given by the High Court. I agree with the Petitioner submission that the issue of the validity of the Will is Res Judicata.

11. In the petitioner's application for confirmation of the grant they seek to have the grant of letters confirmed and the estate determined as per the Will dated 9th June 1997 which Will this court has laid out as was written. The protestors submit that the estate should be distributed equally. The Will provides for all beneficiaries. Moses Mburu who testified in court stated that some of the beneficiaries have settled on

the portions that were provided and there is some land that is still vacant. The protester's issue is with the portion that has been given to the second house of Kabura Njiriri. I however note that there was no consent attached showing that all the beneficiaries consented to the application for confirmation. The Court record only has the affidavit of the joint administrators which details the beneficiaries but no consent from the said beneficiaries. For this court to deal with this matter conclusively, it is my view that all beneficiaries should appear in court to confirm their consent to distribute the estate as per the deceased's Will. The matter shall be mentioned on a date to be given in court when all parties including the executors shall appear before the court. This is the Court's partial judgment in the matter.

Dated, signed and delivered this **3rd** day of **November 2017**.

R. E. OUGO

JUDGE

In the presence of:

Christopher Njiriri Protestor in person

Mr. Olaha h/b Mr. Njenga for the Respondents

Ms. Charity Court Clerk

1. Further to the court's ruling dated **3rd day of November 2117** which I now amend to read **3rd day of November 2017**, the parties appeared before this court to indicate whether they had any objection to the grant being confirmed as per the deceased's will. The beneficiaries who appeared were, Patrick Muchai Njiriri, Ndungu Njenga, Stephen Karanja Njiriri, James Kimunya Njiriri, Lizzie Njoki Njiriri, Grace Gitiri Njiriri, Mary Wanjiru, Joseph Kimunya Njiriri, Joseph Wanyoike Njiriri and Jessie Karanja Mukoma confirmed that they were aware that there was a will and they had no objection to its contents. There were persons who appeared on behalf of the estate of the deceased beneficiaries namely; the estate of Morris Mburu Njiriri was represented by Julius Njiriri Mburu, the estate of Kenneth Mukoma Njiriri was represented by his wife Grace Wambui Mukoma, the estate of Josephine Gitiri Njiriri was represented by the daughter Hannah Wacheke Kimani, the estate of Jane Kabira was represented by the grandson Stephen Karanja Mburu, they too informed the court that they were aware of the Will and had no objection to its contents. Mr. Muriethi for the protestors indicated that though the protestors were in court they could not consent.

2. The court has indicated that the protestors did not pursue their appeal on the decision by Justice Dulu who upheld that there was a valid will. I therefore confirm the grant issued on the 12th January 2007. The deceased's estate shall be determined as per will dated the **9th June 1997**. I have also corrected typing errors in this Ruling. This being a family matter parties shall bear their own costs. It is so ordered.

Dated signed and delivered this **12th** day of **October 2018**

R.E. OUGO

JUDGE

In the presence of;

Mr. Mureithi For the Protestors

Mr. Oganya h/b for Mr. Njenga For the Respondents

Ms. Charity Court/ clerk