



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**IN THE MATTER OF THE ESTATE OF NJOROGI KAMURU (DECEASED)**  
**SUCCESSION CAUSE NO. 3490 OF 2004**

**JUDGMENT**

**INTRODUCTION**

Njoroge Kamuru, the deceased to whose estate these proceedings relate died on the 21<sup>st</sup> September 2009.

The deceased had two wives (all deceased) being:

1. Grace Wairimu –widow (deceased)
  - a. Njenga Mata Njoroge – son (deceased)
  - b. Ngugi Njoroge- son (deceased)
2. Elisa Njoroge –
3. Widow (deceased)
  - a. Cecilia Wanjiru Njoroge- daughter (deceased)

The children of the deceased are survived by:

1. Njenga Mata Njoroge’s family
  - a. M N- granddaughter (incapacitated)
  - b. Grace Wairimu - granddaughter
  - c. Regina Ann Wairimu- granddaughter
  - d. James Peter Muthenyu- grandson
2. Ngugi Njoroge’s family-
  - a. Teresia Wanjiku Ngugi-widow
  - b. Johnson Njoroge Kamuru
  - c. Margaret Njoki Ngugi
  - d. Cecilia Ngonyo Ngugi
  - e. Grace Wairimu Ngugi
  - f. Joseph Mbugua Ngugi

g. Mary Wambui Ngugi

The full inventory of the assets that were listed as those left by the Deceased were:

**NDUMBERI/RIABAI/705**

**Money at the Public Trustee**

**KANGANGI MKT PLOT NO 21-sold by the 2 administrators**

### **BACKGROUND**

James Peter Mathenyu and Teresia Wanjiku obtained grant of letters of administration on the 29<sup>th</sup> of July 1999 and the same was confirmed on 7<sup>th</sup> July 2004. Regina Ann Wairimu then filed for revocation of the grant because not all beneficiaries were disclosed. The deceased had 2 wives and the petition only stated one part of his family. Further, the two administrators sold one of the deceased's plots; Plot 21 Kiambu town and refused to account the proceeds to the beneficiaries. Justice Kalpana H. **Rawal** ordered the two administrators to refund the proceeds to the estate failure to which their respective shares shall be held by the remaining beneficiaries. The final mode of distribution of assets was also granted.

Susan Wangare Mathenyu, wife to James Peter Mathenyu then filed an application claiming that the husband's share was smaller than what should be allocated to him under customary law as he was the only grandson to the deceased. Hon. Justice L. Kimaru on 9<sup>th</sup> July 2010 dismissed this application for review of Hon L.J.Rawal's judgment of 27<sup>th</sup> July 2007 by Susan Wangare Muthenyu as she had no *locus standi*.

On the 8<sup>th</sup> of November 2013, the grant was confirmed by Hon. Justice W. Musyoka and the name of Cecilia Wanjiru Njoroge (deceased) was amended to include the administrators of her estate, namely Jane Waringa and Susan Muthoni.

Regina Ann Wairimu then filed an application for orders that the District Surveyor of Kiambu be ordered to complete all survey works so that the property can be distributed and the Court ordered that the subdivision proceed as per the confirmed grant.

Susan Mathenyu then went ahead to register a caution and inhibition on the deceased's property claiming to be a beneficiary of the estate. She further went ahead to institute a suit in the Environment and Lands Court under **ELC 129 of 2014** claiming adverse possession and a temporary injunction until the case is heard and determined. The temporary injunction was granted. The application was however dismissed and the temporary injunction orders were therefore vacated. The surveyor was still unable to proceed due to the caution and inhibition registered against the land and the Kiambu Land Registrar had refused to remove the same unless a court order is issued.

On the 29<sup>th</sup> of February 2016, Hon. Justice W Musyoka issued orders to the District Lands Registrar to remove the caution lodged and restraining Susan Mathenyu from intermeddling and interfering with the distribution of the estate of the deceased.

It is therefore against the afore set out background that four applications were filed. They are dated 1<sup>st</sup> November 2016, 5<sup>th</sup> December 2016 and 2 applications filed on the 30<sup>th</sup> of September 2016.

### **The 2 Applications dated 30<sup>th</sup> September 2016.**

Both of the applications have been brought by Mary Njoki, through next friend and guardian Susan Wangari Mathenyu through summons under **section 47 of the Law of Succession Act and Rule 49 and 73 of the probate and administration rules**. The first application seeks orders that the application be certified urgent and heard ex-parte as well as the respondents or any other person claiming interest be restrained from any dealings relating to **Ndumberi/Riabai 6448, Ndumberi/Riabai 6458, Ndumberi/Riabai 6459, Ndumberi/Riabai 6460 and Ndumberi/Riabai 6461** pending *interpartes* hearing of this application and the summons for revocation of grant and also an order as to costs. The application is supported by the affidavit of Susan Wangari Mathenyu. She depones that the applicant is a beneficiary of the estate and the suit property was divided contrary to the mode of distribution indicated in the certificate for confirmation of grant. In addition to this, the Respondents are selling the land and therefore it is necessary for the orders to be granted so as to protect the applicant's interest

The second application sought revocation of the confirmed grant made to James Peter Mathenyu for lack of **diligence** when implementing the terms of the grant; failure to produce an inventory of administration of deceased's estate. On the issue of lack of diligence, the applicant deponed that the portion belonging to Mary Njoki was to be registered under the administrators' names but that was not the case. Since the land is not registered under her name, and the house she resides in is on the same portion, she is at risk of becoming homeless and therefore the grant should be revoked and a new subdivision should be ordered by this Court.

### **Application dated 1<sup>st</sup> November 2016**

This application is at the instance of Grace Wairimu Mwangi and Peter James Mathenyu. It was brought by way of summons and the orders sought were:

- 1. That the respondent Peter James Mathenyu, his agents, servants, employees or any other related person be evicted from the said suit property and any structures put up in the property that is L.R.Ndumberi.Riabai/705 which was subdivided into L.R.No.Ndumberi/Riabai/6460 and 6461 be demolished.**

**2. That the OCS Kiambu Police Station be ordered to provide security during the time of the process of eviction and demolition of any structures put up on L.R Ndumberi/Riabai/705 which was sub-divided into L.R No. Ndumberi/Riabai/6460 and 6461 as the Respondent is likely to use violence to prevent the eviction process to take place**

**3. That the Land Surveyor be ordered to return the beacons which were removed by the respondent one James Peter Mathenyu or L.R No.Ndumberi/Riabai/705 which was subdivided into L.R No. Ndumberi/Riabai.6460 and 6461.**

The grounds in support of this application as deponed in the supporting affidavit are that Peter James Mathenyu has failed to cooperate with the stipulated orders in relation to the suit property by putting up structures. The applicants therefore pray that the court issues an order for eviction against him as well as provision of security at the time of the demolitions and eviction due to the likelihood of violence.

Peter James Mathenyu opposed this application through a replying affidavit dated 5<sup>th</sup> December 2016. He deponed that L.R Ndumberi/Riabai/705 was subdivided illegally without her knowledge and no Land Surveyor has come to the land at any time since the owners/occupants should be notified first plus he would know if anyone came to the property since he resides there.

Still in relation to the alleged illegal subdivision, James Mathenyu alleges that the signature on the mutation form was forged since he would not consent to subdivision that would lead to the demolition of his home. Due to the alleged forgery thereof, the Respondent conducted a search and discovered that the land had been subdivided contrary to the orders issued by the court and titles had been issued. He also objects to the allegation of removing beacons as he submitted that the said beacons had not been marked or placed. He therefore prays that the application is dismissed.

#### **4<sup>th</sup> Application dated 7<sup>th</sup> February 2016**

The 4<sup>th</sup>Application is a Chamber Summons brought under **Section 47 of the Law of Succession Act** in which the applicant Regina Anna Wairimu Mata seeks the following orders:

**1. That the two Applications filed by way of summons by Susan Wangari Mathenyu on 30<sup>th</sup> September 2016 be struck out with costs**

**2. That Susan Wangari Mathenyu be declared a vexatious litigant and she be barred from filing any further or future applications in this cause**

**3. Costs of this application be provided for**

In support of the application, Regina Anna Wairimu swore an affidavit in these terms; that Justice L. Kimaru vide the ruling dated 9<sup>th</sup> July 2010 declared that Susan Mathenyu lacks *locus standi* and therefore cannot bring an application in relation to the portions allocated to the beneficiaries; that she has filed many more applications thus making the distribution process impossible which resulted to an order removing the caution and inhibition that was registered against the suit property as well as a restraining order to Susan from intermeddling with the deceased's estate and that Susan has continued to file two other applications despite the property being distributed in accordance with the confirmation of the grant. The reason, according to the applicant, behind the myriad of applications is because the husband to Susan, James Peter Mathenyu was dispossessed the land by the court therefore she is at risk of being homeless.

#### **HEARING**

The matter proceeded for oral hearing on the 27<sup>th</sup> of March 2017. Regina Wairimu Mata, PW1 submitted that they got a surveyor to subdivide the land as per the certificate of confirmation of grant. They, alongside the surveyor then obtained the mutation forms and the letters of consent. James Peter Mathenyu signed all the requisite documents which he alleges he did not. In relation to the proceeds of Plot 21 at Kangangi Market, she stated that Teresia Wanjiku refunded the 200,000 but James Peter Mathenyu did not comply with orders by L.J Rawal of 27<sup>th</sup> July 2007.

Susan Wangeci Mathenyu by Court Ruling of 9<sup>th</sup> July 2010 of Kimaru J,Court Ruling of L.J Gacheru ELC of 24<sup>th</sup> February 2015 and orders by Musyoka J of 29<sup>th</sup> February 2016 were all in effect declaring the Applicant lacking Locus standi to file applications as she is not a beneficiary of deceased's estate.

James Peter Mathenyu, DW1 told the Court that when his siblings went for survey and he was not present and the mutation forms that were presented, the surveyor did not come to the land. He was therefore not involved in the subdivision process and subsequently did not sign the forms. He discovered the land was being subdivided when he received the eviction letter. He stated that if the land is resurveyed, he would get a portion of it as well as hold Mary Njoki's property as trustee.

He also admitted to selling plot 21 at Kangangi Market and not accounting for the proceeds. He however wanted to refund the proceeds of the sale but the beneficiaries refused.

#### **ISSUES FOR DETERMINATION**

I have given due consideration to the parties' pleadings and submissions and the following are the issues for determination in the disposal of this matter:

- a. Has Peter James Mathenyu discharged his powers and duties as administrator in relation to the estate as provided by Section 79, 82 and 83 of the Law of Succession Act?
- b. Should the subdivision of the land be upheld and whether eviction orders should be issued against Peter James Mathenyu and family?
- c. Does Susan Wangari Mathenyu have the *locus standi* to file the present applications?

### **DETERMINATION**

The first issue raised was whether Peter James Mathenyu has performed the duties and obligations of an administrator as set out under Section 83 of the Law of Succession Act. Before the grant was confirmed, the deceased's estate consisted of two properties namely Ndumberi/Riabai/705 and Kiangangi Market Plot No.21. The two administrators sold the latter and Lady Justice K.H Rawal (now retired) ordered the two administrators to "**refund the amount of sale proceeds, failure to which their respective shares of the estate shall be held by the remaining beneficiaries in equal portions.**" Teresia Wanjiku Ngugi refunded most of the money but James Peter Mathenyu has not refunded the money to any of the beneficiaries up to date.

**Section 82(b) (ii) of the Law of Succession Act** provides that despite the powers of the personal representative to sell or otherwise turn to account, all or any part of the assets vested in them, they are restricted from selling any immovable property before the confirmation of the grant. The two administrators in this case did not have the power to sell the land and since the sale was already complete and the proceeds had already been transferred to the administrators, the Court ordered them to refund the amount to all the beneficiaries which James did not.

Further, vide **Section 83 of the Law of Succession Act** personal representatives have the duty to:

**"(f)...distribute or to retain on trust all assets remaining after payment of expenses and debts....."**

**(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate...."**

The grant in relation to the estate of the deceased was confirmed on the 8<sup>th</sup> of November 2013 and rectified on the 29<sup>th</sup> of August 2016. The executor should have already completed the distribution and each beneficiary should have been allocated their portions, except in the case of Mary Njoki where James was to hold her property in trust. The administrator has also not filed an application to court seeking an extension of time.

In this instant case, the beneficiaries of the estate instead initiated the subdivision of the suit property and allegedly forged James Peter's signature in the mutation forms and consents. Despite the allegations of forgery, the administrator should have invited a surveyor as soon as possible. What emerges before me is that the administrator failed to discharge his duty since he had not refunded the amount ordered by the court and therefore the assets he had built on the deceased's property are at risk of being demolished as his share is to be shared by the other beneficiaries. He therefore delayed the sub-division as his share devolved to the other beneficiaries.

The second issue for determination by this Court is whether the subdivision of the land should be upheld. James Peter Mathenyu conducted a search at the Lands Registry regarding the suit property and he was surprised to find out that the Suit Land had already been subdivided and title deeds issued thereto. The subdivision also cut through his home and some of his rental houses. Upon obtaining a copy of the Mutation Forms, he alleged that the signature that was appended was not his and was therefore forged. Since the property was already subdivided, 2 of the beneficiaries have sought eviction orders against James since the plot where his house is situated has been allocated to someone else. Furthermore, he allegedly removed the beacons subdividing the land.

In order to determine whether the sub-division is to be upheld, it is important to evaluate first whether it was done according to the confirmed grant and second if it was fairly done. **Section 79 of the Law of Succession Act** stipulates that "**all the property of the deceased shall vest in him as a personal representative**"

In *Re Estate of NdibaThande- (Deceased) [2013] eKLR*, the Court provided that "**The effect of Section 79 of the Law of Succession Act is to clothe the administrator of the estate of the deceased with all the rights that the deceased had over his property, and similarly impose upon the administration all the duties that the deceased had over his property.**"

Ideally therefore, no other person is allowed to deal with the property of the deceased other than the administrators. This position is fortified by **Section 45(1) of the Law of Succession Act** which provides that:

**(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."**

The above provision of the law prohibits anyone from dealing with the estate unless they have been authorized. Authority in this case is derived from the Certificate of confirmation of grant to the administrators. Therefore, anyone who interferes or deals with any of the assets belonging to the estate without the authority or consent of the administrators intermeddles with the estate.

In this instant case, there are two administrators of the deceased's estate namely James Peter Mathenyu and Teresia Wanjiku Ngugi. The Rectified Certificate of Confirmation of Grant dated had indicated the mode of distribution of the land.

The administrators had the duty to ensure that they get a surveyor who would sub-divide the land as per the provided mode of distribution. The administrators were also supposed to cooperate and sign the required documents such as the copies of the mutation form as well as the consent forms.

In the replying affidavit filed by James dated 5<sup>th</sup> December 2016, he deponed that he had not been informed that the sub-division had already taken place. He also vehemently denied that he was present when the process took place and that he had signed the mutation forms as well as the consent. The mutation form however indicates that the persons interested in the subdivision were the two administrators and both of their signatures/marks have been appended at the end of the form. These allegations of forgery are however criminal in nature and cannot be addressed by this forum.

Teresia Wanjiku, the other administrator has not raised any issue so far regarding the sub-division or the signatures on the consent and mutation forms. It is therefore presumed that she was aware that the sub-division was taking place and that she actually signed the forms. This therefore shows that the co-administrators are not communicating/ co-operating when making decisions that relate to the estate as one of the administrators, James Peter, does not seem to be aware of the sub-division that took place. Further, the beneficiaries of the estate should not deal with the property of the deceased even when the administrators do not distribute the estate.

Back to the question on whether the sub-division should be upheld, I am of the opinion that it should not be upheld as the beneficiaries went ahead and divided the land without one of the administrator's authority. The names on the title are also not as per the Certificate of Confirmation of grant as one of the properties was to be held by James Peter Mathenyu as trustee for Mary Njoki but is registered under Grace, Regina and Peter as joint trustees.

In addition, half of LR. Riabai/Ndumberi/705 was to be divided equally among Grace, Regina and Mary whose portion would be held by James Peter as trustee. Grace and Regina each have 0.26 hectares while the total land allocated to Mary is 0.23 hectares which indicates that Mary's portion was not equal to her other two siblings as was provided in the Certificate of confirmation of grant. The sub-division was therefore not done fairly and in accordance to the confirmed grant dated 8<sup>th</sup> November 2013 and rectified on 29<sup>th</sup> August, 2016.

The final issue that was raised was whether Susan Wangari Mathenyu has the *locus standi* to bring an application in relation to the distribution of the property to the beneficiaries of the estate of the deceased. The two applications have been filed by Susan Wangari on behalf of Mary Njoki as her next friend and guardian. Justice L. Kimaru, in the ruling dated 9<sup>th</sup> July 2010, stated that Susan had no *locus standi* when she instituted a suit regarding the portion of land that had been allocated to her husband, James Peter Mathenyu. Susan later lodged an inhibition and caution against the suit property and the Court ordered the District Lands Registrar of Kiambu District to remove it and a further restraining order was issued against her from intermeddling or interfering with the distribution of the land.

The applications before this Court have been filed on behalf of Mary Njoki who is a beneficiary of the estate. Mary Njoki has been living with Susan Mathenyu and James Peter Mathenyu as she cannot take care of herself due to her mental state. Susan and James have been residing with Mary on the property. Upon subdividing the land, Mary was given three plots namely Ndumberi/Riabai/6458, 6459 and 6448. The house they reside in is located in the property registered under Grace Wairimu.

In addition to the above, the mode of distribution in the Certificate of confirmation of grant was that half of Ndumberi/Riabai/705 was to be divided equally among Grace, Regina and Mary Njoki. Mary Njoki's share was to be further sub-divided equally and be registered in the names of James Peter Mathenyu on his behalf and to hold in trust for Mary Njoki. Upon sub-division, one of her shares was registered under Grace Wairimu, Regina Wairimu and James Peter as joint trustees. Her share was also smaller than the other beneficiaries' share indicating that the division was not equal.

Regina Wairimu, in opposition to the applications submitted that the Court in its ruling dated 9<sup>th</sup> July, 2010 had declared that Susan Mathenyu has no *locus standi* to file proceedings in this matter. The application before the Court at the time was on the share of her husband as a beneficiary to the estate. Since the husband had not lodged an application and had the capability of representing himself, the Court dismissed her application on the grounds that she lacked *locus standi*. However, the two present applications were filed on behalf of another beneficiary who is under her care and cannot represent herself due to her mental status.

It is therefore my opinion that Susan Mathenyu has the *locus standi* to institute this suit since she is representing a beneficiary of the estate who cannot represent herself due to her mental status. This is because it is in Mary's best interests as her share of the estate is at risk as it has been registered contrary to the agreed mode of distribution. Further, she is at risk of being homeless if the sub-division is to be upheld since the portion where her home lies is registered under other beneficiaries.

## **DISPOSITION**

In the circumstances the Court holds as follows:

- a) That subdivision of that property known as NDUMBERI/RIABAI/705 is invalid, null and void. All the resultant parcels from the subdivision are hereby revoked. The County Lands Registrar, Kiambu is ordered to cancel all the said entries/titles and revert back to the original title in the name of the deceased.**
- b) The two administrators and beneficiaries to appoint a Land Surveyor as soon as possible and the sub-division of the land to be conducted in the presence of all parties taking into account Mary's share and the house she resides in.**
- c) The 1<sup>st</sup> and 2<sup>nd</sup> administrators shall render to the court a full and accurate account in respect of the subdivision of the property within six months.**

d) There shall be no eviction of any party/beneficiary from the permanent settlement and the subdivision shall be approved by court and with consents of the beneficiaries.

e) There shall be no order as to costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2018.

M. W. MUIGAI

JUDGE OF FAMILY DIVISION OF THE HIGH COURT

IN THE PRESENCE OF:

MR. WAHOME FOR APPLICANT

MR. OGORO FOR RESPONDENT