



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**IN THE MATTER OF THE ESTATE OF NGANGA NGWIRI**

**(DECEASED)**

**SUCCESSION CAUSE 1212 OF 2001**

**(SUCCESSION CAUSE 365 OF 1999 KIAMBU LAW COURTS)**

**LUCY WAMBUI NGANGA.....1ST APPLICANT  
ANTHONY MUIRURI NGANGA.....2ND APPLICANT**

**VERSUS**

**FRANCIS MUNGA NGWIRI.....1ST OBJECTOR  
JOHANA NGWIRI.....2ND OBJECTOR**

**JUDGMENT**

**PLEADINGS**

By an application filed on 19th March 2003; the Applicants sought confirmation of grant issued on 25th November 2002. On 28th April 2003, the 1st Objector filed affidavit of protest to the confirmation of grant. This Court heard the Objection to confirmation of grant that culminated with the Ruling of 28th August 2015.

The import of the Ruling was that the evidence on record of 1st Objector only, who was not cross-examined, was not sufficient to inform final decision of this Court.

The Court orders were as follows;

- 1. The summons for confirmation of grant is stayed pending hearing on the Objector's claim and the Applicant's position.**
- 2. The parties; Objectors and Applicants and relevant family members to take a hearing date on priority basis for hearing *interpartes* of the matter through *viva voce* evidence within 60 days from today.**
- 3. Witness Summons to issue to the Sub Chief of the area to testify on membership of the deceased's immediate and extended family members and where they are situate on the suit property and for how long.**

**4. The court file shall be kept in the Strong room.**

**5. There shall be no orders as to costs.**

## **HEARING**

On 15th February 2016, the Court heard evidence from Mr. Peter Kamau Thagi; the Assistant Chief of Karia Sub Location Kihara Division; Kiambaa Sub County Kiambu County. He stated he has been Assistant Chief of the area since 2012.

He knew the family of the deceased Nganga Ngwiri and they live on the suit property; Kiambaa/Kihara/499. The deceased had 2 wives; Wambui and Nyambura and their children whom he knew some but not all 15 children. He stated that the deceased's late father had 4 wives which he admitted in cross-examination; he did not know them but was informed by the family.

On the suit property; Kiambaa/Kihara/499, the Assistant Chief confirmed that Nganga Ngwiri's family resides on part of the land; there are 11 houses on the land. Karori Ngwiri's family resides on the suit property and cultivates the land. Francis Munga Ngwiri cultivates the land but does not reside the suit property. There is a burial site on the said land. Other children of the deceased's father reside in Rift Valley.

The Counsel for the Objectors' informed Court that the issue of whether the suit property Kiambaa/Kihara/499 is ancestral land and the deceased was registered not as absolute owner but trustee to hold in trust for his family and his father's family was determined in ELC Division in **ELC 1682 of 2007** and a copy of the judgment was attached to the written submissions filed in Court.

The decision of the Court is;

***I therefore find in favour of the plaintiffs and hereby declare that the parcel of land known as L.R.Kiambaa/Kihara/499 is ancestral land and the same was registered in the name of Nganga Ngwiri in trust for himself and the entire family of the late Ngwiri Weru. I therefore allow the Originating Summons.***

## **SUBMISSIONS**

Both Counsels filed written submissions; Administrators filed submissions on 29th February 2016 and Objectors' filed submissions on 17th March 2017. The written submissions are based on the additional evidence in aid to the Court for final determination of the Protest and Confirmation of grant proceedings.

The Administrators/ Applicants deposed that the family of the deceased that consists of 2 widows and 15 children resides on 1/3 of the suit property L.R. Kiambaa/Kihara/499. the deceased's children are adults who have families that reside on the said property.

Of the deceased's brothers and sisters, most of them reside elsewhere and some in Rift Valley away from the suit property. They had been allocated other assets from their father's estate. The one other family that resides on the property is Karori Ngwiri's family.

The deceased allocated his brother land to reside on and he built his home and the family has been on the land from then to date. The deceased's family is agreeable to transfer the said portion to the family. The deceased's family proposed the suit property be shared at 2/3 of the property to them wholly and 1/3 to the rest of the deceased's siblings family to be shared amongst them.

The Objectors stated that the deceased's family comprised of 2 wives and 15 children. The deceased's father; Weru Ngwiri who originally owned the suit property L.R. Kiambaa/Kihara/499 had 4 wives namely; Njoki, Nduta, Nyambura and Gathoni. At the time of the deceased's death; he was embroiled in a tussle with his brothers over the said land.

The deceased's widow and son, Applicants filed in the High Court revocation of the grant issued to Objectors in **Kiambu Court Succession Cause 365 of 1999** and obtained a grant on 25th November 2002. The administrators filed summons for confirmation of grant on 19th March 2003. The Objectors filed affidavits of Protest to the summons for confirmation as they were left out and had no share. There was a contest on whether the suit property is trust or ancestral land to the family of Weru Ngwiri and the deceased was registered as trustee or the suit property is an asset that comprised wholly to the estate of the deceased. The issue was canvassed in ELC (OS) 1682 of 2007 culminating with judgment of 20th September 2013 as outlined above.

The Objectors relied on the case of *Gituanja vs Gituanja (2006)1KLR* whose import is that;

***The succession of land belonging to a deceased Kikuyu man with more than one wife is by houses***

The Objectors relied on **Section 33 of Law of Succession Act Cap 160** which provides;

***The law applicable to the distribution on intestacy of the categories of properties specified in Section 32 shall be the law or custom applicable to the deceased's community or tribe as the case maybe.***

**Section 32 of Law of Succession Act Cap 160** provides;

***The provisions of this Part shall not apply to;***

***a) agricultural land and crops thereon; or***

***b) livestock situated in such areas as the Minister may by notice in the Gazette specify.***

In light of the above, the Objectors proposed the mode of distribution of the suit property to be 4 equal parts for each of the deceased's fathers family divided in 4 houses as he had 4 wives.

### **ISSUE**

What is the mode of distribution of the estate of the deceased specifically suit property L.R. Kiambaa/Kihara?

### **DETERMINATION**

The law on distribution of the deceased's estate is governed by **Sections 38, 40 and 42 of Law of Succession Act Cap 160.**

The judgment of ELC Division of the High Court is of a Court of equal and competent jurisdiction and this Court is persuaded and shall adopt and rely on the determination that the suit property L.R.Kiambaa/Kihara is ancestral land.

The suit property was registered in the deceased's name as trustee for both his family and father's family.

Therefore the suit property ought to be distributed amongst the children of Weru Ngwiri; father to the deceased equally.

However, it is on record both in the instant suit and the ELC matter, that the Administrators /applicants deposed that the children of the deceased's father; Weru Ngwiri were allocated from his estate other properties as follows;

**1. Karori Ngwiri- Kiambaa/ Kihara/ T.271**

**2. Johana Ngugi- Kiambaa/Kihara/ T.270**

**3. Njenga Njoroge- Kiambaa/Kihara/T.65**

**4. Francis Munga Ngwiri-Kiambaa/Kihara/T.269**

**5. Muiruri Ngwiri- Kiambaa/T.64**

**6. Ndungu Ngwiri Kiambaa/Kihara T.272**

The green cards copies were attached to the 2nd Applicants affidavit of 14th June 2003.

**Section 38 of Law of Succession Act Cap 160** provides for intestate estate where there are children of the deceased; the distribution should be equal among the children but subject to **Sections 41 and 42 Of Law of Succession Act Cap 160**.

Of relevance is **Section 42 of Law of Succession Act Cap 160 provides**; if during the lifetime of the deceased or thereafter property was bequeathed to the child, grand child or house, then notwithstanding the provisions of **Section 38 Law of Succession act Cap 160**, the distribution shall not be equal but equitable; taking into account property from the deceased's estate already allocated to the beneficiary before the distribution of the deceased's estate.

With respect to the Objectors reliance on **Section 33 of Law of Succession Act Cap 160** as prescribing the appropriate mode of distribution; the provision is not applicable unless and until the Minister's Gazette Notice specifying the suit property L.R.Kiambaa/Kihara/449 is availed that is when Section 33 would apply.

Taking into account the following factors;

That the ELC Division of the High Court determined the suit property as ancestral land and no review or appeal seems to have been lodged, this Court adopts the same order

That the equal distribution of the suit property envisaged under **Section 38 of Law of Succession Act** is vitiated by the fact of the deceased's brothers' allocation of other assets from their late Father's estate as outlined above; which fact they have not denied or contested; and the fact that the deceased herein was not allocated any other land from their late father's estate; the mode of distribution cannot be equal amongst the children of Weru Ngwiri but equitable by taking into account the above-mentioned properties that they have already obtained beneficial interest as required by **Section 42 of law of Succession act Cap 160**.

The Assistant Chief's testimony was that the deceased's family and that of his late brother Karori Ngwiri reside on the land where it is developed. The Objectors reside away from the land but cultivate part of the land.

Consequently; the beneficiaries entitled to a share are the ones that reside and /or cultivate the land.

### **DISPOSITION**

Therefore, the Court orders;

1. The Kiambaa/ Kihara shall be distributed as follows;

**a. 1/2 of the suit property estimated as 2.5 acres to the family of Nganga Ngwiri**

**b. 1/2 acre or so; the portion where the deceased's brother's widow resides be transferred to her and family.**

**c. The 2 acres shared amongst the 3 houses of Ngwiri Weru.**

2. Each party to bear its own costs.

**DELIVERED SIGNED DATED IN OPEN COURT ON 25<sup>TH</sup> JANUARY 2017.**

**M. W. MUIGAI**

**JUDGE**