



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO.243 OF 2016**

**IN THE MATTER OF THE ESTATE OF THE LATE GATHIGA GACAGO MATHINGI (DECEASED)**

**GRACE WANGUI MWANGI.....APPLICANT**

**VERSUS**

**JECINTA NDUTA.....RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. This is an appeal against the learned ruling of the Ag. Principal Magistrate at Nyahururu in the matter of the estate of the late Gathiga Gacago Mathigi (Deceased) delivered on the 13th November, 2014

2. The appeal is premised on the following grounds:

1. That the Learned trial Magistrate erred in law and in fact by considering an application dated 4th June, 2014 by the respondent who was not properly enjoined in the Succession Cause.

2. That the Learned trial Magistrate erred in law and in fact in failing to find that the respondent's claim filed through an application dated 4th June, 2014 was brought through the wrong forum.

3. The Learned trial Magistrate erred in law and in fact in finding that the respondent was a former wife of Reuben Mwangi (deceased) and entitled to his estate.

4. That the Learned trial Magistrate erred in law and in fact in finding that **Peter Migwi Nduta** and **Stephen Maina Nduta** were sons of Reuben Mwangi (deceased) and entitled to his estate.

5. That the Learned trial Magistrate erred in law and in fact by distributing the entitlement of Reuben Mwangi (deceased) from the estate of his father Gathiga Gacago Mathigi into two equal shares between the appellant and the respondent.

6. That the learned trial Magistrate erred in law and in fact in failing to consider the appellant's contribution in developing her deceased's husband land parcel and the number of years that they have been residing together as husband and wife in distributing his estate.

7. That the learned trial Magistrate erred in law and in fact in holding that the appellant and the respondent were to replace Reuben Mwangi (deceased) in Nyahururu Senior Principal Magistrate's Court Succession cause No.47 of 2004.

8. That the learned trial Magistrate erred in law in applying the wrong principles and the law in deciding the case.

9. That the learned trial Magistrate lacked pecuniary jurisdiction to hear and determine the dispute before him.

3. It is sought that the said ruling be set aside and the application dated 4th June, 2014 be dismissed with costs and the appellant be granted the entire share of her deceased husband's entitlement for LR No.Nyandarua/Sabugo/421.

4. Directions were given on the 20th April, 2016 that the appeal be disposed off by way of written submissions.

5. It is the appellant's case that Gathiga Gacago Mathigi died intestate and was survived by three (3) sons namely David Maina Gathiga, Reuben Mwangi Gathiga (deceased) and Josephat Muguviyi Gathiga. His estate comprised of LR. No.Nyandarua/Sabugo/421. A grant of letters of administration was issued to David Maina Gathiga and confirmed on 21st April, 2009 in Nyahururu Succession Cause No.47 of 2004.

6. The respondent through a chamber summons dated 4th June, 2014 sought an order that the administrator be ordered to make a reasonable provision for the applicant as a dependant. It is submitted that she did not hold letters of administration *ad litem* or otherwise to enable her to file the said application or commence any proceedings on behalf of the estate of Reuben Mwangi Gathiga. The dispute before the lower court related to the share of Reuben Mwangi Gathiga who died on 3th June, 2012.

7. The appellant states that the respondent was not a dependant of the late Gathiga Gacago and legally entitled to his estate. Her evidence before the lower court was that she was a former wife of Reuben Mwangi (deceased). It is urged that **Section 29** of the **Law of Succession Act (Cap 160 Laws of Kenya)** defines who a dependant is.

8. The court is faulted for entertaining the respondent's prayer for a provision of the deceased's estate as a dependant. She ought to have filed a fresh succession cause in respect of the estate of Reuben Mwangi Gathiga. The respondent and her two (2) sons were not Gathiga Gacago's dependants. I am referred to the decision in Civil Appeal No.292 of 2003, **Benson Mungai V. Eliud Chege**.

9. The application dated 4th June, 2014 was allegedly brought under **Sections 26** and **27** of the **Law of Succession Act**. The said sections fall under part III which deal with provision for dependants. Section 30 of the Act is clear that:

**“No application under this part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by Section 71.”**

10. The grant issued to David Maina Gathiga in respect of the estate of Gathiga Gacago was confirmed on 21st April, 2009. The trial magistrate is faulted for applying the wrong principles of law.

11. It is submitted that the trial magistrate erred in deciding that 1/3 share entitlement of the late Gathiga Gacago be allocated to Jacinta Nduta and Grace Wangui Mwangi in equal shares. The respondent was seeking a share of Reuben Mwangi Gathiga and not Gathiga Gacago Mathigi. It is counsel's submission that the dispute on the estate of Reuben Mwangi Gathiga ought to have been dealt with in a completely different forum i.e. a fresh succession cause for the estate of Reuben Mwangi.

12. The respondent is accused of failing to adduce sufficient evidence to prove that indeed she was a former wife and legally entitled to the estate. The appellant's contribution in developing the estate for over forty (40) years was not given consideration at all to warrant the respondent and her sons get ½ share of the estate.

13. The jurisdiction of the Magistrate's court to deal with the estate is challenged on ground that the estate exceeded Kshs.100,000/= and therefore the trial magistrate had no power under **Section 48** of **Law of Succession Act** to entertain the application. The land was 8.1ha (20 acres).

14. Mr. Ombati for the respondent submitted that the respondent was a widow of one Reuben Mwangi Gathiga who was a beneficiary of the estate of Gathiga Gacago Mathigi.

15. Reuben Mwangi Gathiga died when the matter was pending in a Nyahururu court and the court properly enjoined the Appellant and the Respondent to replace the deceased. The court heard the witnesses and concluded that the respondent was a former wife of Reuben Mwangi.

**16. Section 29** of the **Law of Succession Act** states;

**“Dependant means:**

**1. The wife or wives or former wife or wives and children of the deceased whether or not maintained by the deceased immediately prior to his death.”**

17. It is urged that the succession cause at Nyahururu had not been concluded by the time the husband of the appellant and respondent died and hence there was no need to file a separate cause while the other was pending in court.

18. It is urged that the Succession Cause at Nyahururu had not been concluded by the time the husband of the appellant and respondent died and hence there was no need to file a separate cause while the other was pending in court.

19. The appellant benefited from the Nyahururu Succession Cause and cannot question the jurisdiction of the court on appeal. She is estopped from denying jurisdiction.

20. It is summed up that the appellant did not challenge the chamber summons in the lower court and hence cannot challenge it on appeal.

#### **ANALYSIS AND DETERMINATION**

21. I have considered the grounds of appeal and the oral submission of counsel. The substantial point for decision in this appeal is whether

the Learned Magistrate erred in law in entertaining the application dated 4th June, 2014 enjoining the respondent in these proceedings as a dependant of the deceased. Did the respondent need to ventilate her claim through a fresh succession cause in respect of the estate of Reuben Mwangi Gathiga instead of finding entry in the matter of the estate Gathiga Gacago Mathigi?

22. The uncontested facts are that:

1. Reuben Mwangi Gathiga (deceased) is a son to Gathiga Gacago Mathigi (deceased).
2. Reuben Mwangi Gathiga is entitled to 1/3 of the estate of Gathiga Gacago Mathigi.
3. Two (2) wives, Grace Wangui Mwangi and Jecinta Nduta lay a claim to this 1/3 share.
4. There is a dispute over whether Jecinta is actually a wife.
5. Jecinta approached the court vide a notice of motion dated 4th June, 2014 seeking that the administrator of the estate of Gathiga Gacago Mathigi be ordered to make reasonable provision for Jecinta as a beneficiary.
6. By then the grant had been confirmed on the 21st April, 2009.

23. The procedure adopted by the Learned trial Magistrate as gleaned from the record is as follows:

(I) On 7th August, 2014, the trial magistrate expressed himself thus:

**Court:**

**“I have seen the letter of the chief dated 24/02/2012 and filed herein. I have also heard from the administrator of the estate herein. The applicant herein was a wife to the deceased whose share is yet to be subdivided. The issue of the Kshs.60,000/= was just to be used to file a succession cause in court which has already been done. I do hereby find that the applicant herein was a dependant of the deceased and do hereby order that the land which was allocated to the deceased be divided equally into 6 equal portions.”**

**A. P. NDEGE**

**AG. PRINCIPAL MAGISTRATE**

**07/08/14**

24. Grace Wangui (the appellant herein) then stated:

**“I do herein have witnesses to confirm that the applicant was not a wife. Let me be given a chance.”**

The court went ahead to state:

**Court:**

**“Then I will turn the proceedings to a protest/objection proceedings by Grace Wangui. I do set aside my earlier order. Parties to come with their witnesses for a *viva voce* hearing. The burden herein is on Grace Wangui to prove that the applicant was not a dependant of the deceased on 21/08/14. The Executive Officer to organize for a Kikuyu translator.”**

25. The procedure adopted by the trial court was clearly in error. The grant had been confirmed way back on 21/4/2009. Whatever grouse one had with the confirmed grant, the only open recourse within the Law was to seek a revocation or annulment of the grant as provided for under **Section 76** of the **Law of Succession Act**.

26. The trial court misdirected itself by entertaining the application dated 4th June, 2014 and proceeding to treat the same as a protest which it went ahead to hear and determine. The Law of Succession Act opens no such window when a grant has been confirmed.

27. It is obvious from the record that Jecinta Nduta was not a dependant of Gathiga Gacago Mathigi (deceased) but an alleged dependant of Reuben Mwangi Gathigi (deceased). She could only prove dependency in proceedings relating to the estate of her alleged husband Reuben Mwangi Gathigi (deceased). Once a dispute arose in the matter of the estate of Reuben Mwangi Gathigi (deceased), no legal procedure existed to re-open a protest to an already confirmed grant in respect of the estate of Gathiga Gacago Mathigi. A separate cause was necessary to deal with this particular dispute.

28. I agree with counsel for the appellant in his submission that the application dated 4th June, 2014 and which was brought under **Sections 26** and **27** of the **Law of Succession Act** was a non-starter. The said sections fall under part III which deals with provision for dependants. **Section 30** of the Act states:

**“No application under this part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by Section 71”**

29. For the above stated reason the learned magistrate erred by applying the wrong principles and the Law in arriving at his decision.

30. The appeal herein thus succeeds. The same is allowed. The ruling and decree of the lower court is set aside and in lieu thereof the application dated 4th June, 2014 is hereby dismissed with costs to the appellant.

31. It is quite clear that a serious dispute has arisen over the estate of Reuben Mwangi Gathiga. Reuben Mwangi Gathiga was entitled to 1/3 of the estate of Gathiga Gacago Mathigi in which grant has been confirmed.

In view of the dispute arising among the heirs of Reuben Mwangi Gathiga, the administrator of the estate of Gathiga Gacago Mathigi is hereby ordered to transmit the share of Reuben Mwangi Gathiga to the estate of Reuben Mwangi Gathiga whereupon all interested parties in the estate of Reuben Mwangi Gathiga and not limited to the appellant and the Respondent herein be at liberty to initiate the process of succeeding Reuben Mwangi Gathiga

**Dated, Signed and Delivered at Nakuru this 8th day of February, 2017.**

**A. K. NDUNG'U**

**JUDGE**