



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 91 OF 2009**

**IN THE MATTER OF THE ESTATE OF STEPHEN MBURU WANG'ONDU (DECEASED)**

**JUDGMENT**

1. The deceased herein died on 2<sup>nd</sup> June 1989 at the ripe age of 81 years of age. According to a letter dated 22<sup>nd</sup> October 2008 from the Chief of Kikuyu Location, Kiambu County, the deceased was survived by a son, daughters and grandchildren. The letter identified the survivors as Robinson Waweru Mburu (the son), Grace Wangari Mburu and Mary Nduta Mwaura (the daughters), the grandchildren being Alice Njeri Nyokabi, John Githegi Nyokabi, Joseph Karanja Nyokabi, Alice Wangui Nyokabi, Monica Wanjiku Nyokabi, Mary Nduta Nyokabi, Hannah Wambui Nyokabi, Grace Wangari Nyokabi, Wathoni Nyokabi, Stephen Mburu Nyokabi and Robinson Waweru Nyokabi. The letter had indicated that the family had agreed that representation to the estate be given to Grace Wangari Mburu, Robinson Waweru Mburu, John Githegi Nyokabi and Mary Nduta Mwaura.

2. Representation to his estate was sought by Grace Wangari Mburu, Robinson Waweru Mburu, John Githegi Nyokabi and Mary Nduta Mwaura in their alleged capacities as sons and daughters of the deceased, in a petition filed in in Limuru SPMSC No. 131 of 2008 on 1<sup>st</sup> November 2008. He was expressed to have been survived by the individuals named in the Chief's letter of 22<sup>nd</sup> October 2008. He allegedly died possessed of Muguga/Jet Scheme/649. A notice of the petition was published in the *Kenya Gazette* of 30<sup>th</sup> October 2009 as Gazette Notice No. 11657, but to date no grant has been made out of the cause.

3. Another cause was lodged in the same estate at the High Court at Nairobi in the instant case, being HCSC No. 91 of 2009, on 16<sup>th</sup> January 2009, by Robinson Waweru Mburu in his capacity as son of the deceased. He placed on record a letter from the Chief of Kikuyu Location dated 18<sup>th</sup> July 2005, which listed the fourteen individuals listed in his letter of 22<sup>nd</sup> October 2008. The letter had indicated that the family had agreed that representation to the estate be given to Grace Wangari Mburu, Robinson Waweru Mburu and Robinson Waweru Mburu. In his petition the petitioner indicated that the deceased had been survived by five (5) individuals, being Robinson Waweru Mburu (son), Monica Wanjiru Mburu (widow), Grace Wangari (daughter), Mary Nduta Mwaura (daughter) and John Gethengi Kuria (grandson). The deceased was expressed to have died possessed of a property described as Muguga Jet Scheme Plot No. 649. A grant of letters of administration intestate was made to Robinson Waweru Mburu on 21<sup>st</sup> September 2009.

4. On 1<sup>st</sup> September 2010, Mary Nduta Mwaura filed a summons in the High Court cause, dated 28<sup>th</sup> January 2010, seeking revocation of the grant made in that cause. In her affidavit sworn on 28<sup>th</sup> January 2010, she averred to be a daughter of the deceased, who had been survived by four children, being herself, the administrator herein, and Grace Wangari Mburu and Violet Nyokabi Mburu. Violet Nyokabi Mburu is said to have died thereafter leaving behind eleven (11) children. She discloses that the family

had filed the earlier cause in Limuru SPM CSC No. 131 of 2008, but the administrator subsequently and without consulting the rest of the family initiated the instant cause, where he has left out some of the survivors of the deceased. She contends that after obtaining the grant the administrator has been harassing her. She would like herself and Grace Wangari Mburu and John Githegi Nyokabi included as administrators in the instant cause.

5. There is on record an affidavit sworn on 3<sup>rd</sup> June 2010 by Joseph Karanja Nyokabi, Alice Wangui Nyokabi, Monica Wanjiku Nyokabi, Hannah Wambui Nyokabi, Robinson Waweru Nyokabi and Wathoni Nyokabi. The said affidavit was filed herein on 11<sup>th</sup> June 2010. They state that they are the children of Violet Nyokabi Mburu, a daughter of the deceased herein. They indicate that they have authorized their aunts, Mary Nduta Mwaura and Grace Wangari Mburu to pursue the matter on their behalf. They say that they had consented with their other siblings for the initiation of the cause in Limuru SPM CSC No. 131 of 2008. They state that the administrator herein initiated the instant cause without notice to them and without their consent. They contend that the process of obtaining the grant herein was defective for the administrator obtained it using signatures purported to be theirs yet they had not signed any of the documents that were presented in court.

6. On 14<sup>th</sup> June 2010, the court directed in this cause that the cause in Limuru SPM CSC No. 131 of 2008 be availed. The administrator herein was also directed to file a summons for confirmation of his grant., to be served on the applicants in the revocation application, who were given liberty to respond to the same.

7. The application for confirmation of grant was filed on 16<sup>th</sup> July 2010, dated 16<sup>th</sup> July 2010, it identified all the fourteen (14) individuals listed in the petition in Limuru SPM CSC No. 131 of 2008 as the survivors of the deceased. It proposes that the sole estate property, Muguga/Jet Scheme/649, be shared out between himself, Grace Wangari Mburu and John Githegi Nyokabi at the ratios of 4.5 acres, 1 acre and 1 acre. John Githegi Nyokabi is to be registered as trustee on his own behalf and that of his siblings, the children of Violet Nyokabi Mburu. He states that the proposed distribution had the consent of the whole family.

8. The record has several affidavits and other documents filed by the other parties concerning distribution, but it is not clear whether the same were lodged at the registry in response to the confirmation application for some appear to have been filed well before the said application was lodged at the registry. For example, there is an affidavit sworn on 30<sup>th</sup> June 2010 by Grace Wangari Mburu, Marty Nduta Mwaura, Joseph Karanja Nyokabi, Alice Wangui Nyokabi, Monica Wanjiku Nyokabi, Hannah Wambui Nyokabi, Stephen Mburu Nyokabi, Robinson Waweru Nyokabi and Wathoni Nyokabi. They propose that the sole asset of the deceased be shared out equally between the four children of the deceased - Robinson Waweru Mburu, Grace Wangari, Mary Nduta Mwaura and Violet Nyokabi Mburu – equally. As Violet Nyokabi is dead, her share is proposed to be shared out equally between seven (7) of her children, namely: Alice Wangari, Monica Wanjiku, Hannah Wambui, Stephan Mburu, Robinson Waweru and Wathoni Nyokabi. It is stated further that the administrator had not consulted them before coming up with his own proposed distribution. A consent document was lodged simultaneously with the said affidavit, duly signed by Grace Wangari Mburu, Marty Nduta Mwaura, Joseph Karanja Nyokabi, Alice Wangui Nyokabi, Monica Wanjiku Nyokabi, Hannah Wambui Nyokabi, Stephen Mburu Nyokabi, Robinson Waweru Nyokabi and Wathoni Nyokabi.

9. To that affidavit, the administrator swore an affidavit on 26<sup>th</sup> August 2010, filed herein on even date, he states that all his three sisters, that is to say Grace Wangari, Mary Nduta Mwaura and Violet Nyokabi Mburu had all been married, but Grace Wangari and Violet Nyokabi Mburu returned to their father's home even though their marriages were never dissolved. He says that Mary Nduta Mwaura is still married and at her matrimonial home. He alleges that the family had on 1<sup>st</sup> June 1992 agreed, led by their mother, Monica Wanjiku Mburu, on how to share the property, after which the property was subdivided and each one of them moved into and developed their respective portions. He argues that his sisters and the children also had shares at their respective husband's and father's family land, and it would be oppressive to equalize the subdivision. He concedes that after the 1992 subdivisions the legal formalities had not been completed. He alleges that his mother, Monica Wanjiku Mburu, had left a will, on the

alleged subdivision. A copy of the alleged will is attached to the affidavit. According to the alleged will, the land was shared out between Grace Wangari, Violet Nyokabi and Robinson Waweru, where the daughters got 1 acre each, while the son got one and half acres.

10. Grace Wangari Mburu and Mary Nduta Mwaura swore an affidavit on 16<sup>th</sup> November 2010 in reply to the administrator's affidavit. They argue that there was no impediment in law to inheriting their share of their father's estate. They dismiss the alleged will of Monicah Wanjiku Mburu on the grounds that the estate the subject of these proceedings is not that of the Monicah Wanjiku Mburu, but of her husband, and their father, Stephen Mburu Wang'ond. They contest the alleged subdivision of the property in 1992, saying that any such subdivision ought to have originated from the County land office at Kiambu.

11. In 2013, the children of Violet Nyokabi Mburu appeared to part ways with their aunts, Grace Wangari Mburu and Mary Nduta Mwaura for they swore an affidavit through John Githegi, on 6<sup>th</sup> May 2013, and executed a consent document on an unknown date, but filed in court on 8<sup>th</sup> November 2013. They confirm that the proposals in the summons for confirmation of grant were founded on family agreement and they express their consent to and approval of it.

12. The court did give directions on the disposal of the two applications, dated 28<sup>th</sup> January 2010 and 16<sup>th</sup> July 2010. Regarding the revocation application dated 28<sup>th</sup> January 2010, it was directed on 20<sup>th</sup> July 2010 that the same be disposed of by way of *viva voce* evidence. It was directed on 24<sup>th</sup> November 2010 that the dispute on the distribution of the estate be heard on 15<sup>th</sup> February 2011. It is my view that the said directions were in respect of the summons dated 16<sup>th</sup> July 2010. The hearing commenced on the due date. It is not clear whether the hearing related to the confirmation application or both. I shall proceed to determine both applications founded on the testimonies recorded from the witnesses during the oral hearing.

13. The first to take the stand was Grace Wangari. She gave vent to the affidavit that she had filed earlier in respect of both applications. She proposed that the estate of the deceased be disposed of equally between all the four children of the deceased. She mentioned that the deceased had another property at Rumuruti. She proposed that the same be disposed of equally. During cross-examination she conceded that she had been married, but separated from her husband and returned back to her father's home. She also mentioned that Violet had been married several times, but she was also separated from her last husband. When both of them returned to their father's land, they were allocated pieces of land to settle and cultivate. She stated that their mother had not subdivided the land as alleged by the administrator. The next on the stand was Mary Nduta. Her testimony too largely followed the pattern in the affidavits that she had filed in the matter. She alleged that their father had another parcel of land at Gilgil. She conceded on cross-examination that she was still married and lived with her husband.

14. The administrator's case opened on 9<sup>th</sup> July 2014. The administrator testified. His testimony was founded on the contents of his various affidavits. He asserted that the deceased did not own any other land. He emphasized the fact that all his sisters were married. He also stated that their mother had made a will which distributed the property in question, where the property was distributed according to the mode proposed in his confirmation application. The administrator called John Githegi as his witness. He said that their mother was unmarried, and her remains were buried on the deceased's farm. He supported the proposals in the administrator's proposals. He stated that his grandmother had distributed the estate according to the wishes of the deceased. He also called other witnesses who claimed to have been party to the events of 1992, and who affirmed that the property was distributed in that occasion.

15. At the conclusion of the proceedings, it was directed that the parties file written submissions. There has been compliance with the directions. The administrator filed his written submissions, but the protestor applicant did not. The same is understandable given that they were not represented. I have noted the arguments advanced in those written submissions, inclusive of the authorities cited.

16. The deceased herein died in 1989. This was eight or so years after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force. The estate is therefore for disposal under the provisions of that

law. It would appear that the deceased died intestate, for no valid will of his has been placed before me. A purported will of his wife was placed before the court to justify the distribution allegedly done in 1992. The alleged will is not that of the deceased herein, and therefore it cannot form a basis for distribution of his estate. The alleged will can only be used to dispose of her estate. There is nothing to show that the property of the deceased herein passed to the estate of his widow to justify disposal of his estate by her will.

17. As the deceased died intestate, his estate falls for disposal under Part V of the Act which governs intestate distribution of estates of persons who died after the Act had come into force. The deceased had been survived by a widow and children. The widow subsequently died. That would mean that the estate ought to be distributed in accordance with section 38 of the Act, which provides for distribution in situations where the intestate left children but no surviving spouse. The provision states as follows –

*‘Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.’*

18. The Law of Succession Act, in Part V, provides for distribution amongst children. The provision does not make any distinction between male and female children. It also does not discriminate between married and unmarried children. There is nothing in the Act, nor in any other law for that matter, that suggests that reference to children in these provisions ought to be read as referring only to male children or unmarried daughters. Consequently, distribution of the estate of an intestate who dies after the 1<sup>st</sup> July 1981 should be equally between all the children of the deceased, whether they be sons or daughters, married or single.

19. Where one of the children of the deceased is dead and had children, section 38 ought to be read together with section 41 of the Act. The share of such a child is taken by his or her child or children. If the children are more than one, they take the parent’s share equally. This is according to the principle of representation, for such children would be representing their dead parent. The share they take would not be theirs, for grandchildren do not inherit from their grandparents, they only from their grandparents estate what ought to have gone to their own parents. The children of Violet Nyokabi Mburu are therefore entitled to take the share due to her, and they ought thereafter to share it equally between themselves.

20. The estate of the deceased, from the material on record, only comprises of property at the Muguga Jet Scheme. The daughters referred to property either at Gilgil or Rumuruti, or both. None of them provided any evidence of the existence of these other assets.

21. It would appear that the proceedings that Kimaru J. envisaged were for confirmation of the grant herein. These proceedings would be subject to section 71 of the Law of Succession Act. Under that provision I am enjoined to determine whether or not the administrator ought to be allowed to proceed with administration. In determining that matter, I am required to consider whether the grant was obtained properly, and if so whether the administrator is administering or would administer the estate according to the law. I should also be satisfied that all the persons beneficially entitled have been ascertained, and allotted shares to the estate in accordance with the law.

22. Regarding confirmation of the administrator, I do note that the deceased was survived by the fourteen individuals listed in the two letters of the Chief of Kikuyu Location. The administrator in his petition identified all of them as survivors of the deceased. However, in the proposed distribution, he seeks to exclude one of them from benefit on the grounds that she was married and therefore not entitled to a share in her father’s estate. The distribution proposed is also skewed in his favour, as he gets four and half acres, while his two sisters are allotted one acre each. His argument is that the sisters were married also and that the grandchildren’s had their own fathers and were expected to get shares of property from their husbands and fathers, respectively.

23. An administrator who proposes distribution that favours himself, to the detriment of the other survivors of the deceased cannot possibly be expected to administer the estate according to the law. The

same can also be said of his attempt to interpret the law in a manner that is discriminatory. That clearly contravenes the provisions of the Constitution of Kenya, as well as the Law of Succession Act. He cannot be trusted to do justice to the persons beneficially entitled to a share in the estate of the deceased. The administrator has argued that the daughter of the deceased were married, and stood to benefit from the estates of their husbands. He argues that allotting them a share in their father's estate would be oppressive. I trust that the administrator is a married man. He testified to be the father of four children. That being the case, his wife, in due time, would be entitled to inherit from her father's side of the family. Either way, the administrator does not stand to lose anything. The law envisages equal treatment of all. It is the duty of this court to uphold that legal position.

24. The administrator has not properly ascertained the persons beneficially entitled to a share in the estate of the deceased. This emerges clearly from the documents on record and also from his oral testimony. It is the daughters of the deceased who have properly ascertained the beneficiaries of the instant estate. I have already stated that the only asset available for distribution is the Muguga property. There is no proof that he had property anywhere else. That is the only property that I can give orders on distribution. If any other property is traced after delivery of the judgment herein the same shall be disposed of as per the orders that I shall make here below.

25. In the end I shall make the following final orders:

**(a) That I hereby consolidate the cause herein with Limuru SPMCSC No. 131 of 2008, with the High Court cause being the lead file;**

**(b) That the grant made herein to Robinson Waweru Mburu on 21<sup>st</sup> September 2009 is hereby revoked;**

**(c) That I appoint Grace Wangari Mburu, Robinson Waweru Mburu, John Githegi Nyokabi and Mary Nduta Mwaura administrators of the estate herein, and a grant of letters of administration intestate shall issue accordingly to them;**

**(d) That I hereby declare that the deceased was survived by the following individuals - Robinson Waweru Mburu, Grace Wangari Mburu and Mary Nduta Mwaura, Alice Njeri Nyokabi, John Githegi Nyokabi, Joseph Karanja Nyokabi, Alice Wangui Nyokabi, Monica Wanjiku Nyokabi, Mary Nduta Nyokabi, Hannah Wambui Nyokabi, Grace Wangari Nyokabi, Wathoni Nyokabi, Stephen Mburu Nyokabi and Robinson Waweru Nyokabi.;**

**(e) That I declare that the estate of the deceased comprises of only one asset, Muguga/Jet Scheme/649;**

**(f) That the said property shall be distributed in terms of section 38 of the Law of Succession Act, so that the same is shared equally amongst the children of the deceased, that is to say Robinson Waweru Mburu, Grace Wangari Mburu, Mary Nduta Mwaura and the late Violet Nyokabi Mburu, with share due to the said Violet Nyokabi Mburu being shared equally amongst her children - Alice Njeri Nyokabi, John Githegi Nyokabi, Joseph Karanja Nyokabi, Alice Wangui Nyokabi, Monica Wanjiku Nyokabi, Mary Nduta Nyokabi, Hannah Wambui Nyokabi, Grace Wangari Nyokabi, Wathoni Nyokabi, Stephen Mburu Nyokabi and Robinson Waweru Nyokabi;**

**(g) That the grant made in (c) shall be confirmed in those terms, and a certificate of confirmation of grant shall issue accordingly;**

**(h) That as the estate the subject of these proceedings is wholly situated within Kiambu County I shall accordingly direct that the cause herein be transferred to the High Court of Kenya at Kiambu for final disposal; and**

**(i) That Robinson Waweru Mburu shall bear the costs of these proceedings.**

**DATED and SIGNED at NAIROBI this 3<sup>RD</sup> DAY OF MAY, 2017.**

**W. MUSYOKA**

**JUDGE**

**DELIVERED and SIGNED this 5<sup>TH</sup> DAY OF MAY, 2017.**

**M. MUIGAI**

**JUDGE**