



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 1040 OF 2004**  
**IN THE MATTER OF THE ESTATE OF MWENJA KAGIRI (DECEASED)**  
**GRACE NYAMBURA MBUGUA &**  
**AMOS NDUNGU MBUGUA .....PETITIONERS**  
**VERSUS**  
**FELIX KIMANI MBUGUA .....RESPONDENT**

**JUDGMENT**

1. By an application dated this 24<sup>th</sup> January 2006 and brought under section 76 and Rule 44 of the Law of Succession Act Cap 160 Laws of Kenya, The applicant seeks the following orders.

- i. That the grant of letters of administration to Grace Nyambura Mbugua and Amos Ndungu Mbugua, made on 29<sup>th</sup> April 2005 in the High Court of Kenya Succession Cause No. 1040 of 2004 be revoked.
- ii. That pending (1) above, there be a stay of execution of all orders issued in High Court of Kenya Succession Cause 1040 of 2004 pending the hearing and determination of this application.
- iii. That costs of this application be provided for.

2. The application is based on grounds that; Grace Nyambura Mbugua and Amos Ndungu Mbugua concealed material facts from court when they applied for the said grant adding that **L.R. No. Githunguri/Kiaria/2232** which was listed as the only asset forming the estate of the deceased ought not to have been listed as the only asset forming the estate of the deceased as the same has been given out by the deceased during his lifetime as follows;

- i. A gift of 3 acres to his two sons- Felix Kimani Mbugua and Simon Kagiri Mbugua
- ii. Sold the 0.6 acres to Zachary Ndungu Kagwe.

That the applicants were not notified of the proceedings leading to the grant and were thus unable to present their case to the court. The petitioner having been chased away by the deceased had deliberately left out many assets unlisted. The petitioner is about to confirm the grant and distribute an asset which does not form part of the deceased.

3. Felix Kimani Mbugua filed three affidavits dated 24<sup>th</sup> January 2006 stated 21/1/2005, 26/6/2014 and

21/4/2015. He avers as follows; that Justice Ransley had on 20th December 2001 cancelled the title to **L.R. No. Githunguri/Kiaria/2232** and the same reverted to

- i. L.R. No. Githunguri/Kiaria/687
- ii. L.R. No. Githunguri/Kiaria/1999
- iii. L.R. No. Githunguri/Kiaria/1970

4. That the deceased had gifted the applicant and Simon Kagiri Mbugua to formalize the deceased had subdivided L.R. No. Githunguri/Kiaria/687 and created other titles. L.R.No. Githunguri/Kiaria/1969 which he registered jointly in the names of Simon Kagiri Mbugua and Felix Kimani Mbugua with **L.R. No. Githunguri/Kiaria/1970** being registered in the deceased's names. Further the deceased sold 0.6 acres to Zachary Ndungu Kagwe who has been in possession of the same since July 2000 thus at the time of the deceased's demise the said property **L.R. No. Githunguri/Kiaria/2232** no longer formed part of his estate. Further that after the determination of Civil suit no. 577 of 2000 filed by the petitioners the deceased made an oral will distributing all his other assets.

- i. Githunguri/Kiaria/1970 to  
Monicah Wanjiru Mbugua 1acre  
Zachary Ndungu Kagwe 0.6 acres purchaser
- ii. **L.R. Ruiru East/Juja East Block 2/4515** to Stephen Chege Mwaniki whole share as purchaser.
- iii. 90 shares in Kenya breweries to Naomi Wambui
- iv. 5 ordinary shares in Ndumberi Farmers Company Ltd to Teresiah Wanjiku
- v. 4 shares in Thome Farmers No. 4 Ltd to Grace Nyambura & her children
- vi. 3 shares in Weiteithie Gwaka Investments Ltd. 2 shares in farm 2 and 1 share in farm 3 gifted to  
share No. 1 Naomi Wairimu  
Share No. 2 Grace Wambui  
Share No. 3 Grace Wambui
- vii. 2 shares in Mbo – I – Kamiti Farmers Company Ltd to Grace Wambui
- viii. Proceeds in account Catholic Church development Fund to Fredrick Kimani Mbugua.

5. The applicant avers that from the foregoing the petitioners are not entitled to any share in **L.R. No. Githunguri/Kiaria/687** or **1969** or **1970** or the purported 2232 and he urged the court to revoke the grant issued on 29th April 2005. In his further affidavit filed in court on the 21<sup>st</sup> April 2015 he attached copies of title deeds to parcels No. 1969, 1970, Ruiru East/Juja East Block 2/4515. Kenya Breweries share certificate ( 90 shares), Ndumberi Farmers Company Limited certificate no. 873 in the deceased's name, Thome Farmers No. 4 Limited certificate no. 27121 of four shares in the name of the deceased, share certificate of Witeithie Gwaka Investment Ltd for plot A 558 dated 26<sup>th</sup> May 1978 certificate No. 1840, plot no. 966 A dated 6<sup>th</sup> September 1979 certificate No. 164 and plot no. B 578 dated 2<sup>nd</sup> June 1978 certificate No. 1887, Mboi Kamiti Farmers Company Limited certificate no. 13158 and an acknowledgment dates 20<sup>th</sup> February 2001 on monies received Kshs 115,000/- from Zachary Ndungu Kagwe by Mbugua Mwenja Kagiri as part and final payment of purchase price of 60 points out of parcel

6. Grace Nyambura Mbugua and Amos Ndungu Mbugua filed an affidavit dated 20<sup>th</sup> of April 2006. Grace also filed the affidavit dated 16<sup>th</sup> of May 2013 and 7<sup>th</sup> of July 2013. They denied allegations of fraud by concealment levied against them by the applicant. Though Grace admits that at the time of the demise of the deceased they were not living together having ceased cohabitation in 1985 but was at all the time still married to the deceased. They aver that they had no knowledge of any disposition of **L.R. No. Githunguri/Kiaria/2232** as they relied on the certificate of search issued to them on 29/10/2003 adding that the subsequent registration of the parcel in the names of Felix Kimani Mbugua and Simon Kagiri Mbugua does not prima facie absolute transfer adding that the same could only be held in trust for all the family members that are entitled to inherit. They argued that the ruling by Justice Ransley merely set aside the tribunal's decision to award the claimants **2 acres** from the said parcel of land but did not in any way determine the vestature of the said property. They state that in their petition they listed all members of the deceased's family and served them with citations to take out grant of letters of administration adding that they made full and frank disclosure. They aver that the deceased left no valid will and the applicant's attempt to bring in an oral will long after the lapse of 3 years is useless. In her affidavit dated 16<sup>th</sup> May 2013 Grace avers that the deceased had three wives and that at the time of his death he had subdivided the L.R. No. Githunguri/Kiaria/687 into two parcels namely L.R. No. Githunguri/Kiaria/1969 (measuring 1.241Ha) and L.R. No. Githunguri/Kiaria/1970 (measuring 0.647 Ha). Parcel No. 1969 was registered in the name of Simon Kagiri Mbugua and Felix Kimani Mbugua who are also co-administrators and dependents of the estate. That prior to the subdivision the deceased had a dispute with Wacheke Boro and the Kiambu Land Disputes Tribunal had awarded Wacheke Boro her parcel which had been registered as L.R. Githunguri/Kiaria/2232 but the same was over ruled by the High Court in Misc Application No. 975 of 2000. That the only parcel of land that was in his name at the time of his death was Githunguri/Kiaria/1970 measuring approximately 0.642 Ha. That Parcel No. 1970 should be shared equally between the dependents of the 2<sup>nd</sup> and 3<sup>rd</sup> families. That all other assets itemized by the co-administrators objector are factious and imaginary and if they do exist, the 1<sup>st</sup> family can inherit the same. That the court in its judgment in Civil Appeal No. 70 of 1990 (divorce cause) had ordered that his children with the deceased should not be disinherited. That the deceased had registered the parcel no Githunguri/Kiaria/1969 in joint names of Simon Kagiri Mbugua and Felix Kimani Mbugua due to the fact that he was afraid of losing the land because of the said tribunal dispute and also was in his attempt to defeat justice and disinherit his children due to the CA No. 70 of 1990. That the alleged 4 shares in Thome Farmers No. LTD does not exist. That the objectors have not demonstrated any interest that thee exist a purchaser by the name Zachary Ndungu Kagwe.

7. Monica Wanjiru Mbugua Mwenja replying affidavit dated 26<sup>th</sup> June 2013 states she is the widow of the deceased. Her proposal for mode of distribution is as per the objector's proposal.

8. Parties testified in court. Felix Kimani Mbugua adopted his affidavits as his evidence and added the following that Grace was not the wife of the deceased and that she has a 4 acre shamba in Thome. That parcel No. 2232 does not exist as his father subdivided it. In cross-examination he testified that his father had three wives, his mother three children, Grace five children and the third wife three children. That his father's second wife petitioned for a divorce. That the four acres in Thome is the only inheritance Grace got . He was not a witness at the tribunal. That he has no claim over parcel No. 1970 which is still in his father's name neither his siblings. That all he wants is that his father's wishes be done.

9. Amos Ndungu Mbugua filed a replying affidavit dated 23<sup>rd</sup> October 2015 and testified that his father had three wives namely Monica Wanjiru (deceased), Grace Nyambura his mother and Monica Wanjiru his third wife. Felix Kimani Mbugua is his brother and they are three in their family. That in the 2<sup>nd</sup> house he is the 1<sup>st</sup> born followed by Rahab Mumbi then Samson Kimani, Naomi Wambui and Mary Muthoni. The third house of Monica has three children namely Wanjiku Mbugua, Kimani Mbugua and Naomi Mbugua. They admitted that his father and mother divorced before he died. They had a house in parcel no. 1970. His mother moved out and rented a house in Githunguri but they were left in plot no. 1970. That in 2002 when his father died Felix and Simon brought problems and they demolished his father's house. They went and looked for their mother and filed suit in court. The shamba was divided and parcel

No. 1969 were given to Felix and Simon whilst parcel 1970 remained in his father's name. The 1<sup>st</sup> family was in parcel No. 1969 and parcel no. 1970 was ploughed by the 2<sup>nd</sup> and 3<sup>rd</sup> family. That when he went to verify the existence of the same shamba some were not there. There was no shamba in Thome Farmer No. 4, it is a share. That for Ndumberi Company Farmers limited there is one certificate but two are not there. That in plot in Witeithie is a normal plot. That certificate No 1840 and 1887 have no plots. That they seek to be given Parcel No 1970. It is about 1.60. That the 2<sup>nd</sup> house should be given a plot at Thika. His sisters and step sisters to be given the ones in Ruiru. That Mzee did not tell them that he sold the shamba to Zachary neither has Zachary told them that he bought the shamba. In cross examination he admitted that all beneficiaries were to be catered for. That he has no title and that Zachary should file his complaint in court. That there was no oral Will by his father as he was near when his father died. That whenever he heard his father say that the property be divided in the manner stated.

10. The objectors in their submissions filed on the 27<sup>th</sup> October 2016 they reiterated the averments in their testimony in court and as averred in their affidavits. The objector added that **Title No. Githunguri/Kiaria/687** previously registered in the names of the deceased had since been subdivided into two **Title No. Githunguri/Kiaria/1969** measuring 1.214 Ha which was to be shared between Felix Kimani Mbugua and Simon Kagiri Mbugua and **Title No. Githunguri/Kiaria/1970** measuring 0.647 Ha was sold off to Zachary Ndungu Kagwe who has had occupation of the said parcel for over 13 years. The said sale is known to the family members and there is a sale agreement to that effect. He added that the petitioner was separated from the deceased and divorced in 1987 and as such does not qualify to be considered as a dependent of the deceased within the meaning of section 29 of the Act. He lists the following people as beneficiaries of the deceased.

i. Monica Wanjiru Mbugua- widow

ii. Wanjiku Mbugua – daughter

iii. Wambui Mbugua – daughter

iv. Kimani Mbugua – son

v. Felix Kimani Mbugua –son

vi. Simon Kagiri Mbugua-son

vii. Wambui Mbugua – daughter

viii. Amos Ndungu – son

11. The applicant proposes the distribution to be done as follows;

i. Githunguri/Kiaria/1970 to

Monica Wanjiru Mbugua 1 Acre

Zachary Ndungu Kagwe -0.6 acre purchaser for value

ii. L.R. Ruiru East/Juja East block 2/4515 - Stephen Chege Mwaniki purchaser for value

iii. 90 shares in Kenya Breweries Ltd. - Naomi Wambui

iv. 5 Ordinary shares in Ndumberi Farmers Company Teresia Wanjiku

v. 4 Shares in Thome Farmers No. 4 Ltd – Grace Nyambura's children

vi. 3 shares in Weiteithie Gwaka Investment Ltd 2 shares in farm 2 and 1 share in farm 3 as a gift to:

Share No. 1 Naomi Wambui

Share no. 2 and 3 to Grace Wambui

vii. 2 shares in Mboi- Kamiti Farmers Company Ltd – Grace Wambui

viii. Proceeds in account Catholic Church Development – Monica Wanjiru Mbugua

12. The petitioner submitted that the deceased had 3 wives, he was survived by the 2<sup>nd</sup> and 3<sup>rd</sup> wife and that during his life time he divorced his 2<sup>nd</sup> wife the core petitioner and that the following are the defendants and beneficiaries of the estate;

**1<sup>st</sup> house**

i. Wanjiru Mbugua – deceased widow

ii. Felix Kimani Mbugua

iii. Simon Kagiri Mbugua

iv. Wambui Mbugua

**2<sup>nd</sup> house**

i. Grace Nyambura Mbugua – Divorced

ii. Amos Ndungu

iii. Rahab Mumbi Mbugua

iv. Kimani Mbugua

v. Wambui Mbugua

vi. Muthoni Mbugua

**3<sup>rd</sup> house**

i. Monica Wanjiru Mbugua

ii. Wanjiku Mbugua

iii. Wambui Mbugua - minor

iv. Kimani Mbugua – minor

13. It is submitted that there is a dispute as to assets to the estate as some of the properties listed by the objectors do not exist and that the only genuine existing properties are;

a) Githunguri/Kiairia/1969

b) Githunguri/Kiairie/1970

- c) Ruiru East/Juja East Block/ 2/4514
- d) Kenya Breweries Ltd shares Certificate
- e) Witeithie Gwaka Investment Ltd Share Certificate 164 in plot no. 966A.
- f) Mboi Kamiti Farmers Ltd shares.

While the following properties were none existing.

- a) Thome Famers No. 4 Limited.
- b) Ndumberi Farmers Company Ltd
- c) Witeithie Gwaka Investment Ltd (share certificate in Plot No. A558)
- d) Witeithie Gwaka Investment Ltd (share certificate in Plot No. B578)

14. It was submitted that the parties are in agreement that **Githunguri/Kiairia/1969** measures 1.214 Ha. That evidence adduced was that the 2nd and 3rd family were in possession of the land parcel **Githunguri/Kiairia/1970** till the deceased passed on and it was then that two sons from the 1st family chased the children of the 2nd family from the said parcel of land and even demolished the house they were living in adding that the said parcel was never sold to a third party. The petitioners argue that the said parcel of land should be shared equally by the two families 2nd and 3<sup>rd</sup> as table below.

2 <sup>nd</sup> Family	Share	
Amos Ndungu	0.3235 Ha jointly share	Absolute
Rahab Mbugua		
Kimani Mbugua		
Wambui Mbugua		

3 <sup>rd</sup> Family	share	
Wanjiku Mbugua	0.3235Ha Monica Wanjiru Mbugua to hold in trust and on behalf of the children	In Trust of herself and:- Wanjiku Mbugua Wambui Mbugua Kimani Mbugua
Wambui Mbugua		
Kimani Mbugua		

15. That considering the number of children in the 2nd family and having gotten a smaller share from **Githunguri/Kiairia/1970** they proposed that they be given Witeithie Gwaka Investment Ltd share certificate 164 in plot no. 966A. That **Ruiru East/Juja East Block/2/4515** be shared by all daughters of the deceased. Mboi Kamiti Farmers Ltd. and Kenya Breweries Ltd. Shares be shared by all beneficiaries surviving the deceased.

## DETERMINATION

16. Having considered the affidavits, evidence and submissions in the law as provided in the Law of Succession Act Cap 160 these are the court's findings. The objectors aver that the deceased left an oral will but the same cannot stand as it has been overtaken by time and falls short of the requirements as set out in Section 9 which provides that,

*“Oral wills*

*(1) No oral will shall be valid unless—*

*(a) it is made before two or more competent witnesses; and*

*(b) the testator dies within a period of three months from the date of making the will.”*

The deceased in this case died on 5th April 2003 that was more than **3 years ago** the objector has also not indicated any witnesses if at all that were present when the deceased made the said will as such the same cannot stand as such the estate devolves under intestacy and the rules of intestacy will apply.

17. The deceased died intestate and he was polygamist and had married three wives and was blessed with 11 children. The deceased's estate will devolve under Section 40 of the Law of Succession Act. 40 which provides that;

*“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.*

*(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”*

18. The objector avers that the petitioner having divorced the deceased is not entitled to inherit from the deceased's estate. Section 29 provides, For the purposes of this Part, "dependant" means—

*(a) the wife or wives, or **former wife or wives**, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*

The petitioner was initially married to the deceased but later on they divorced for purposes of these proceedings she is a former wife and is classified as a dependant under Section 29 of the Law of Succession.

The properties that are not disputed are as follows;

- i. Githunguri/Kiairia/1969
- ii. Githunguri/Kiairia/1970
- iii. Ruiru East/Juja East Block/2/4515
- iv. Kenya Breweries Ltd
- v. Weiteithie Gwaka Investment plot A558
- vi. Weiteithie Gwaka Investment plot A578

The petitioner proposes that the 1<sup>st</sup> family should not claim any portion from L.R.

Githunguri/Kiairia/1970. It is alleged that 0.6 acres of **Githunguri/Kiairia/1969** had since been sold to Zachary Ndungu Kagwe. I note that was attached was an acknowledgment to an agreement dated 20<sup>th</sup> February 2001. Am persuaded that Zachary bought 60 points out of land parcel number Githunguri/Kiairia/1970 as evident in the acknowledgment attached to the further affidavit of Felix Mbugua filed in court on the 21<sup>st</sup> April 2015 and as admitted in the affidavit of Samson Kimani Mbugua alias Kimani Mbugua a son of the deceased whose mother is the petitioner Grace Nyambura Mbugua and the brother to Amos Ndungu Mbugua. Having considered all the above the deceased's estate shall be determined as follows on the undisputed properties.

1st house ½ share of Githunguri/Kiairia/1969

2nd house Githunguri/Kiairia/1970

3rd house ½ share of Githunguri/Kiairia/1970

1st house - Kenya Breweries Ltd

2nd House - Weiteithie Gwaka Investment plot A558

3rd House - Weiteithie Gwaka Investment plot A578

Mboi Kimiti Farmers Ltd Shares to the 2<sup>nd</sup> and 3<sup>rd</sup> House.

Thome Farmers No. 4 share to Grace Nyambura

0.6 acres to Zachary Ndungu Kagwe- purchaser

Ruiru East/Juja East Block/2/4515 to Stephen Chege Mwaniki- purchaser

Costs shall be in the cause.

**Dated, signed and delivered this 13<sup>th</sup> day of July 2017.**

**R. E. OUGO**

**JUDGE**

In the presence of;

**Mr. Wachira holding brief Mr. Kariuki Njiru For the Applicant**

**Respondent Felix Mbugua in person**

**MS. Charity Court Clerk**