



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO.1547 OF 2013

IN THE MATTER OF THE ESTATE OF STANLEY MUTURI GITHAE (DECEASED)

JOHN GATHEE GITHAE.....PETITIONER

VERSUS

ROSE WANJIRU MUTURI.....ADMINISTRATIX

JUDGMENT

1. The applicant filed the Notice of Motion dated 27th March 2014. He seeks orders that no grant of representation to the estate of Stanley Muturi Githae who died on 8th April 2013 having been so confirmed such reasonable provisions be now made for the applicant as a dependant of the deceased out of his net estate, That the property known as **L.R. No. 13285/2** be granted to the applicant. The application is based on grounds that the deceased was the applicant's brother who took him at the tender age and raised him as his own son until he attained the age of majority. That the deceased did continue providing for the applicant up to the time of his demise. That further the deceased set aside a portion of land known as **L.R. 13285/2** wherein he put up a house for the applicant and also allowed the applicant to set up a car garage. That since the said demise of the deceased the applicant has been living and working from the said **L.R. No. 13285/2**. That the petitioner neglected and refused to disclose that the applicant was a dependant of the deceased. That the grant in the estate was issued to Rose Wanjiru Muturi on 25th September 2013 and the same is yet to be confirmed.

2. In his affidavit in support of the said application he avers that the deceased took him up when he was a child of tender age after the death of his mother. That he initially lived with the deceased's 1st wife Elizabeth Wairimu at Ngara Estate and that it was the deceased who educated him from primary to tertiary level. That sometimes around 1979 the deceased sat him down and informed him that he had taken him as his son and they continued having a cordial relationship with him and later on they moved to Lavington where he was introduced to Rose Wanjiru Muturi and the deceased continued paying for his school fees. That later he acquired employment in Mombasa where he worked for 6 years and later on returned to Nairobi where the deceased advised him to start his own business which was situated at **L.R. 13285** but after subdivision of the said parcel of land his workshop moved to **L.R. No. 13285/2** and the deceased put up a house nearby where he would live. That he learnt that the deceased's wife Rose Wanjiru had on 1st July 2013 petitioned for grant of letters of administration which she was issued with on 25th September 2013. He stated that currently he was self-employed and running a garage which fetches enough to live by and also offer support his wife who lives in Mombasa. That since the demise of the deceased he has been carrying in his business at the premises with no confrontation until 20th March 2014 when the fence to his premises was brought down and iron sheets nailed to bar the entrance into his house and workshop. On 24th March 2014 he was served with a 7 days' notice to vacate from the

premises and remove all his properties. He avers that he stands to be disinherited, as he has no other home.

3. The respondent filed her replying affidavit dated 5th May 2013. She avers that the deceased was the elder brother to the applicant and he had on various occasions sought help from the deceased who accorded it to him. That the deceased was a beneficiary of his late father's estate in regards to **Githii/Ithanji/337** in Nyeri that he declined to be included in the list of beneficiaries on behalf of his late mother but afforded his siblings the opportunity and John Gathee accepted to be named as a beneficiary in his place. She avers that the applicant has never been a beneficiary of the deceased and cannot be defined as a dependant as stipulated under section 29 of the Law of Succession Act. That though the applicant had on various occasions lived with the deceased he did so as a sign of good gesture and there was never any interest to give him beneficial interest to him adding that the applicant also lived with his other siblings in Mombasa. That the applicant is the registered owner of a property **L.R. No. Kajiado/Kitengela/44844** in Ongata Rongai Tuala area which he acquired with the help of the deceased. She added that **L.R. No. 13285/2/3/4/8/9/10 & 11** were jointly held in her and her husband's name. She added that the applicant is a beneficiary of his late father's estate and cannot now claim to be his brother's beneficiary.

4. John Gathee Githae adopted his affidavit in support of the application and in his testimony in court he stated that the deceased was his elder brother and it was the deceased that took him up when his mother died, took him to school and that he had lived with him and his family for over 53 years and until his demise. That the deceased who took him to primary, secondary and later enrolled him to an apprenticeship in 1980. He stated that he did not have any toilet, bathroom, or steady water supply and has to go far for his sanitation though he wants to connect his own water. He urged the court to declare him a dependant and give him permission to reinstate his work place and to live in L.R. no. 13285/2.

5. On cross examination he stated that it was the deceased who put up for him a house at the suit property in 2010 as before that he was living in a different portion and at the time the land had not been subdivided. Adding that he used the said container as his office, store and a working space. Prior to that he had worked in Mombasa for 6 years doing small jobs and came back to Nairobi in July 2003 and went to the deceased's home. He stated that he had also lived with his sister but they fell out after an altercation with her leading to his arrest and he was jailed for 3 months. Upon his release, he worked at Mamba Village. That he had a number of stepbrothers who had been assisted and educated by the deceased. That he started his Auto Wax in 2009 and registered the same in 2010. That he purchased **Kjd/Kitengela/44844** in October 2012. He stated that it was the deceased's son who informed him that the said parcel of land was available, as he had bought his. He took him to the agent and 3 weeks later he paid 320,000/- which was part of his savings and the land was going for 420,000/-. He denied having gotten any assistance from the deceased to purchase the said parcel of land he however, could not tell the value of the said parcel of land. He denied being a beneficiary of his late father's estate. That on 24/3/2015 he held a meeting with his sister and she had with the respondent that she would him to his plot in Tawal and build for him a three-bedroom house with water. That though he wanted to move he wanted to move close to his customers. He stated that he was not married.

6. Rose Wanjiru Muturi in her testimony stated that she was married to the deceased for over 44 years and their union had been blessed with 2 children. That she and her husband stayed with John the deceased's brother on and off. For 2 months after fourth form while waiting to join college and after college and later was at Ogembo Tea Factory before being sent away when he was allegedly caught stealing. That her husband sent the police to arrest them but they disappeared to Mombasa only to reappear in 1996. She added that her late husband had may siblings about 40 some of whom they helped educate until college. That she heard that John was married and had 2 children. She denied knowing Elizabeth Wairimu Maina who she claims to have learnt of from John. That after the demise of her father in law the deceased being the eldest in the family was called to go subdivide the land bought he declined stating he was not interested since he had his own land. That John agreed to take the parcel of land that was given to her husband. That they subdivided the Karen property in 2010 and the process was concluded in 2011 at the said time John was still living there in a temporary structure on the land that they had sold but later on moved to the portion of land that was not sold. That after the demise of her husband the parcels of land were registered into her name. That they proceeded to develop the said parcels of land except the one that

John was occupying due to the prevailing court order. The said parcels of land were registered in joint names and the proceeds from the parcel of land that was sold was also kept in a joint account. She denied that John was to live there adding that he was to go purchase another plot to occupy. She stated that she agreed to give John 2 of her containers transported them to the said parcel of land and also put for him water from the neighboring bore hole. Later John stated that he wanted a plot that was next to the road but she refused. She stated that she had finished constructing the other plots except the one occupied by John adding that she is of ill health and spends a lot of money on medical and would have been collecting rent from the said property had she constructed where John is occupying. She urged the court to decide the case in her favor.

7. On cross-examination, she reiterated her examination in chief stating that the containers were put on the said parcel of land in 2010. She denied that John was a beneficiary to the deceased. Adding that she was unable to chase him after her husband died because he is a relative.

8. Timothy Mburu Muturi a son to the deceased stated that he assisted his uncle to purchasing the property **Kajiado/Kitengela 44844** by pointing out the said property which he stated was next to his. That his father assisted his uncle financially and that he gave his uncle the proceeds from the sale of the vehicle. He stated that the land in issue is 1/8 of an acre valued at about 1.1 million. He stated that there was an approved drawing of a 4-bedroom house and they were to do 6, 4 bedroom units which were to be rented out to get income. On cross-examination, he clarified that the vehicle that was sold was a Subaru belonging to her mother.

9. Parties filed written submissions. The applicant in his submissions pointed out 2 issues for determination;

i Whether the applicant is a dependent in the Estate of Stanley Muturi Githae (deceased)?

ii Whether the applicant is entitled to a share in the estate of Stanley Muturi Githae (Deceased)?

10. The applicant submits that the deceased who died on 8th April 2013 was his biological brother and he has lived with him since the demise of their mother in 1978 just after completing his o' level examinations. He stated that it was his brother who paid for the applicant's school fees and maintenance as he pursued higher learning in National Industrial Vocational Training Program in Kisumu and later gave the applicant apprenticeship in Nairobi and he later acquired employment in Mombasa where he was based for 6 years but later on returned to the deceased's home in Karen where the deceased assisted him to set up a business to repair motor vehicles which was situated in L.R. No. 13285 which was later subdivided into 7 plots of ½ acre each. Upon the said subdivision, his workshop was moved to L.R. No. 13285/2 where it stands to-date. On 1st July 2013 the respondent the deceased's widow filed for grant of letters of administrations intestate of the deceased's estate but omitted to include him as one of the beneficiaries of the deceased's estate. He stated that the deceased left behind various properties **L.R.13285/2, L.R.13285/3, L.R. 13285/4, L.R. 13285/8, L.R. 13285/9, L.R. 13285/10, L.R. 13285/11, L.R. 3734/272** which have rental houses built on them. He stated that he continues to run his business in the suit premises and the same fetches him an income to provide and cater to his family where he has been peacefully occupying until 20th March 2014 when the fence near his home and workshop was brought down and iron sheets nailed to bar him entry or exit to the suit premises and that the respondent on 24th March 2014 served him a 7 days' notice to vacate the suit parcel of land.

11. It was submitted that Section 29 defines a dependant as, *“(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;*

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

12. That Section 26 of the Law of Succession Act provides that, *“where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”*

He relied on the case of **Samuel Githu & Another –vs- Rose Njeri Hiuhu, Civil Appeal No. 82 of 2003** and **In the matter of the Estate of Kellington Mwanzia Musyoka succession cause no 2645 of 2003.**

13. On the issue of whether he is entitled to share in the estate of Stanley Muturi Githae he submitted that section 27 provides, *“In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.”*

14. That Section 28 of the Law of succession provides that, *“In considering whether any order should be made under this Part, and if so what order, the court shall have regard to-*

(a) the nature and amount of the deceased’s property;

(b) any past, present or future capital, or income from any source of the dependant;

(c) the existing and future means and needs of the dependant;

(d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;

(e) the conduct of the dependant in relation to the deceased;

(f) the situation and circumstances of the deceased’s other dependants and the beneficiaries under any will;

(g) the general circumstances of the case, including, so far as can be ascertained, the testator’s reasons for not making provision for the dependant..”

15. He submitted that the respondent did not adduce any evidence to prove that the said parcel of land was purchased using the sale proceeds of her motor vehicle adding he had adduced sufficient evidence on savings made from his business which were withdrawn and used to purchase the said parcel of land adding that the said parcel of land was not an advancement from the deceased but a property acquired from his savings. He relied on the case of **Aurenzia Gikiri Njeru –vs- Kimani Kibenge and Others, Civil Appeal No. 75 of 2008.**

16. The applicant submitted further that he was a dependant of the deceased as he was born and raised by the deceased and the applicant even allowed him to use **L.R. No. 13285/2** here, he also put up his house and garage and where he has continued to live and working since the demise of the deceased. He urged the court to allow him have the said portion of land that he is in occupation of.

17. The respondent in her submissions affirms that the deceased provided for the applicant’s education while he was a child from primary to tertiary and even offered an apprenticeship in Nairobi and a brief employment at his company. All these actions, she states were to prepare the applicant to be able to support himself in life and who now is self-sufficient. It was submitted that in the test for dependency as

was observed in the case of ***In RE Joshua Orwa Ojodeh (deceased) 2014 eKLR***. “can be classified as a dependent so long as she is able to demonstrate that she was dependent on her deceased son immediately prior to his death. Ideally before the court can exercise discretion under section 26 of the Act, it must be established that the applicant was dependent on the deceased immediately prior to the deceased’s demise.”

18. That though the applicant argues that he was dependent on the deceased prior to his demise, the respondent argues otherwise. She referred this court to the applicant’s own admission in his affidavits and testimony that he had established a garage business through which she was able to earn a living enabling him get enough income to buy essential items for himself and support his wife. That it was through proceeds from the said business that he was able to purchase a parcel of land **Kjd/Kitengela/44844**. The respondent submits that the applicant intends to exploit the goodwill extended to him by claiming that he is entitled to a share of the deceased’s estate by virtue of having lived with the deceased. She relied on the case of ***MILLICENT NJERI MBUGUA WAMBUI WAINAINA [2008]Eklr*** where it was held that, “From the foregoing definition of a dependent does not qualify as such. The respondent’s argument to the contrary clearly does not hold water. Much as the learned judge was right in holding that “a dependant of a deceased person is not just his wife or wives or children...” the learned magistrate ought to have considered the respondent’s claim to dependency. Much as the respondent may have lied with the deceased and his wife and after her husband Pricilla died, she continued to live with Pricilla’s husband until he died, she continued to live with Pricilla’s husband until he died and she buried him, those facts per se do not confer on the respondent the title of a dependant.”

19. It was submitted that the applicant in claiming that the deceased took him as his own son was calculated to hoodwink and mislead the court as the applicant had clarified in his affidavit that the deceased was his blood brother. Further that the applicant was a heir to his late father’s estate as per the chief’s letter dated 7th October 1993 and his acceptance that he would inherit the deceased’s share of their father’s inheritance. That section 26 clearly provides for provisions for dependant’s not adequately provided for. It provides that, “Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”

Further, that the discretion for reasonable provision as provided for under section 27 of the Law of Succession Act which states that, “In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.” on this she was guided by the case of ***Succesison cause no. 1183 of 2002, In the matter of the estate of benson Omondi Awinyo(deceased)*** where it was held that, “the court has discretion to order that a specific share of the deceased’s property be given to the dependant but in doing so the court should take into account certain circumstances such as provided under Section 28 of the Law of Succession.

20. It was submitted that the applicant had failed to prove his claim to the deceased’s estate in regards to any past, present or future capital or income from any source of the dependant as the applicant had in his own admission given information on his employment history. In regards to his existing and future means and needs the applicant lives alone and does not have any family on the suit property and from his testimony he earns enough money to cater to himself and his alleged wife. The respondent submits that the deceased never made any advancement or other gifts to the dependant during his lifetime and in her testimony stated that her motor vehicle was sold and proceeds given to the applicant to purchase land in Kajiado. It was submitted that the applicant and deceased’s relationship was not cordial and that the same had deteriorated when the applicant disappeared from the deceased’s company. It was further, submitted that consideration should be made of the other dependants and beneficiaries of the deceased noting that the respondent was unemployed and she her children and grandchildren rely on the rental income the property earns.

21. The respondent refutes applicant's claims that the deceased intentionally put aside L.R. 13285/2 for him and it was where the deceased set up a workshop for him. She submits that the suit property upon subdivision into L.R. 132285/2,3,4,8,9,10 and were jointly registered in both the deceased's and respondent's names. Further that the applicant admitted to having worked and lived in temporary structures since he came back from Mombasa and despite the deceased having died on 8th April 2013 this she claims was a clear indication that the deceased never did not allow the applicant to make permanent occupation of the suit parcel of land.

22. It was submitted that the deceased having been survived by one wife and children his estate devolved under section 35 of the Law of Succession Act of this which provides that, "35. (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to- (a) the personal and household effects of the deceased absolutely;

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power."

In support of this she relied on the case of **RE Estate of John Musambayi Katumanga- deceased (deceased)[2014] eKLR**, where it was held that, going from the above provision, where a deceased person is survived by a spouse and children. As such, the other relatives are not entitled to a share in the intestate estate of such a person. The spouse and child are entitled to the estate to the exclusion of all other relatives. The excluded relatives includes the parents of the deceased. Parents of the deceased are only entitled where there is no surviving spouse or child." This she submits is clear from provisions of Section 39 of the Law of Succession which provides that, "(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none."

23. That **In Re Estate Of John Musambayi Katumanga – (Decesaed) [2014] EkLr** where it was held that, "As mentioned earlier the deceased was survived by a spouse. She describes herself as a housewife who was wholly dependent on her late husband. Under Part V, a surviving spouse is entitled absolutely to the deceased spouse's chattels and a life interest in the remainder. The surviving spouse, particularly the widow, is regarded as having the greatest stake in the estate. Spouses during marriage take care of each other. They depend on one another for a variety of material and emotional things. The dependency is usually higher on the part of the wife. In the traditional step-up the wife takes care of the home and the children, while the husband is out looking for resources for the family's sustenance. Often the women are housewives or persons holding lowly jobs, which afford them time to be close to their homes and family. It is in recognition of this arrangement that the law of marriage imposes a duty on husbands to provide for and maintain their wives. This duty remains even after death, but this time the burden is on the estate. It is because of it that the surviving spouse takes the household goods and enjoys a life interest in the capital assets."

24. It was her submissions that the deceased in this instance is survived by a spouse and as such other relatives are not entitled to a share of the estate. She relied on the case of **Re of the Estate of Joshua Orwa Ojodeh –Deceased [2014] eKLR**, "Going by the above provision, where a deceased person is survived by spouse and child or children, the other relatives are not entitled to a share in the intestate estate of such person. The spouse and child are entitled to the estate to the exclusion of all the other

relatives. The excluded relatives include the parents of the deceased. Parents are only entitled where there is no surviving spouse or child.”

25. It was submitted that the applicant being a brother falls within the exclusion clause as provided for in Section 39(1)(c).

26. The succession proceedings relates to the estate of the late Stanley Muturi Githae who died intestate on 8th April 2013. The deceased’s wife Rose Wanjiku Macharia petitioned this court for grant of letters of administration intestate on 1st July 2013. They were issued with the said grant on 25th September 2013.

27. The deceased to whom this estate proceedings relate died intestate and is survived by one wife and two sons. In this case the succession cause devolves under 35 of the Law of Succession Act which provides that, *“(1). Subject to the provisions of Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to –*

(a) The personal and household effects of the deceased absolutely; and

(b) A life interest in the whole residue of the net intestate estate. Provided that, if the surviving spouse is a widow, that interest shall determine upon her remarriage to any person.

(5) Subject to the provisions of Sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children,”

Going by the above provision, where a deceased person is survived by spouse and child or children, the spouse and child are entitled to the estate to the exclusion of all the other relatives.

28. The applicant claims to be a dependant to the deceased. Section 29 defines who is a dependant and provides as follows; *“(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;*

(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

29. It is not in dispute that the applicant was a younger brother to the deceased. The respondent in her testimony has stated that indeed the deceased is the one who saw the applicant through primary, secondary school and even enrolled him to a vocational training. Through the said period the applicant would stay with them in their home in Lavington and later on in Karen. However, the applicant upon maturity did secure a job in Mombasa where he proceeded to work for a period of 6 years. I believe whilst working the applicant used to earn a living and was able to cater to his basic needs I doubt at the said point in time he was still dependant on the deceased to provide for him as he had means to sustain himself.

30. Further, upon his return to Nairobi the applicant was housed by the deceased this I believe was to give him time to organize himself which he did by registering a mechanic business in 2009 which he runs to date. From his own testimony the applicant owns a parcel of land which he claims he purchased from his own savings. From the fore going it is clear that the applicant who is aged 53 is earning a living is able to cater to his bills. The applicant owns a property registered as **Kajiado/Kitengela 44844** which the respondent claim was purchased with some of the money realized from the sale of her motor vehicle Subaru which her son Timothy Mburu Muturi in his testimony avers belong to the respondent. In the case of ***Re of the Estate of Joshua Orwa Ojodehh – (Deceased) [2014] eKLR***, it was held that, *“The law ensures that widows and orphans are given first priority in terms of access to the property of a dead husband and father. The other relatives, including parents, are relegated to a secondary position, and*

only access the property in the event that there is no widow or child, or if they convince the court in a proper application that they were dependent on their dead child or sibling or other relative and that the court should then make provision for them out of the estate of the dead child. These provisions are designed to obviate the possibility of widows and orphaned children being rendered destitute, as they would be if they are forced to share their inheritance with the parents and siblings of the deceased. Quite clearly therefore under succession law, parents are not in the same footing with widows and children.”

31. I fail to understand how a person capable to provide his basic needs and even purchase property was still dependant on the deceased. The applicant is also said to have benefited from his late father’s estate in **L.R. Githii/Ithanji/337**. I find that the applicant has failed to demonstrate that he was a dependant of the deceased immediately prior to his death. Therefore having found so the applicant is not entitled to inherit L.R. No.13285/2 and should surrender the same to the rightful beneficiaries of the deceased. The applicant can if he so wishes can vacate the said premises with the container he claims operates as his home and office to his location choice. The applicant’s application is dismissed with cost. It is so ordered.

Dated, signed and delivered this **9th** day of **November 2016**.

R. E. OUGO

JUDGE

In the presence of;

.....**For the Petitioner**

.....**For the Respondent/Objector**

Ms. Charity

Court Clerk