



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**SUCCESSION CAUSE NO. 9 OF 2015**

**IN THE MATTER OF THE ESTATE OF MARY WANJIKU WAWERU (DECEASED)**  
**ISAIAH GICHIMU WAWERU.....APPLICANT**

**-VERSUS-**

**ELIJAH NGANGA WAWERU.....RESPONDENT**

**FORMERLY**

*CM’s Succession Cause No. 49 of 2010*

*In the matter of the estate of Mary Wanjiku Waweru (Deceased)*

*Isaiah Gichimu Waweru.....1<sup>st</sup> Petitioner*

*Elijah Nganga Waweru.....2<sup>nd</sup> Petitioner*

**CONSOLIDATED WITH**

*CM’s Succession Cause 134 of 2010*

*In the matter of the estate of Mary Wanjiku Waweru (Deceased)*

*Elijah Nganga Waweru .....1<sup>st</sup> Petitioner*

*Joel Njihia Waweru.....2<sup>nd</sup> Petitioner*

**RULING**

1. Mary Wanjiku Waweru (the deceased herein) died intestate on 11<sup>th</sup> December 1998. In the year 2010, two separate Petitions for the grant of Letters of Administration in respect of her estate were filed in the Chief Magistrate’s Court Naivasha. The first is Succession Cause No. 49 of 2010 (now High Court Succession Cause No. 9 of 2015 hereinafter the first Petition). It was

purportedly filed on 23/3/2010 by Isaiah Gichimu Waweru (a step son of the deceased hereinafter the 1<sup>st</sup> Petitioner) and Elijah Nganga Waweru (a son to the deceased). Other siblings named in the Petition are:

- a. Joel Njihia Waweru - Son
- b. Racheal Wangari Waweru - Daughter
- c. John Waweru Ng'ang'a - Grand son

2. The sole asset listed in the cause is a land parcel NYANDARUA/KARATI/1108. A grant was issued to the Petitioners on 10<sup>th</sup> May, 2010 but has not been confirmed for reasons that will come out shortly.

3. On 15<sup>th</sup> July, 2010 the second Petition (hereinafter the second Petition) for Letters of Administration Intestate, Succession Cause No. 134 of 2010 was filed by one Elijah Nganga Waweru and Njihia Waweru, with the consent of their sibling Rechael (sic) Wangari Waweru and John Ng'ang'a Waweru. The persons listed in the said Petition as having survived the deceased are:

- a. Elijah Nganga Waweru - Son
- b. Joel Njihai Waweru - Son
- c. Rechael (sic) Wangari Waweru - Daughter
- d. John Waweru Nganga - Grandson

4. Due notices for publication issued on 2/12/2010 but it is not clear whether the said notices were published in the Kenya Gazette. What had happened prior to the notices is that the two purported Petitioners in Succession Cause 49 of 2010 applied to confirm the grant made to them. The summons for confirmation was filed on 10/11/2010.

5. On the 31/12/2010 however, Elijah Nganga Waweru (1<sup>st</sup> Petitioner in the second Petition) and the 2<sup>nd</sup> Petitioner in the first Petition filed an affidavit of protest against the confirmation of the grant. Claiming that he was unaware of the filing of the Succession Cause 49 of 2010 he asserted that he is the eldest son of the deceased while the 1<sup>st</sup> Petitioner in the cause, though raised from an early age by the deceased is his step brother, a son of his father's third wife Esther Wangui Waweru (deceased).

6. He named four children of the said deceased wife, in addition to the 1<sup>st</sup> Petitioner as

- a. Zacharia Nganga
- b. Daniel Ngotho
- c. Beth Nyokabi
- d. Naomi Wanjiku

7. He asserted that the first wife of their deceased father was one Sarah Wanjiru Kahuthu who had the following children:

- a. Beth Wanjiru Waweru
- b. Elias Nganga Waweru
- c. Hezron Mwangi Waweru
- d. Stephen Ngotho Waweru

8. He contended that the beneficiaries of the estate of the deceased herein are himself, Joel Njihia Waweru, Racheal Wangari Waweru and John Nganga Waweru (as listed in Succession Cause 134 of 2010). It is his position that the 1<sup>st</sup> Petitioner in Succession 49 of 2010 is not a son and therefore beneficiary of his mother's estate. And further that the land parcel number NYANDARUA/KARATI/1108 was the deceased's share of the estate of their later father

(Johana) in Nakuru Succession Cause 18 of 1987 where the 1<sup>st</sup> Petitioner also received his share of the estate of Johana. For this reason he proposed that the estate of his mother be distributed between the children and grandchildren of the house of Mary Wanjiku Waweru only.

9. In response, the 1<sup>st</sup> Petitioner swore a replying affidavit confirming indeed that their late father Johana Waweru Nganga had 3 wives and that his co-petitioner and now protestor was a step brother and son of the deceased Mary Wanjiku Waweru (2<sup>nd</sup> wife to Johana). He disputes that the co-petitioner was unaware of the filing of the first petition. Confirming that he was raised by the deceased Mary Wanjiku Waweru upon the early demise of his own mother (Esther Wangari), the 1<sup>st</sup> Petitioner maintains that he became a child to the former under “African custom”. He disputes the deposition that the land parcel NYANDARUA/KARATI/1108 was owned absolutely by the deceased and states that because she was the sole surviving widow of the deceased, the title deed was issued in her name.
10. He admitted the succession proceedings before the High Court Nakuru in respect of the estate of Johana distributing among the beneficiaries, himself included, the properties of their said deceased father. He proposed that the land parcel NYANDARUA/KARATI/1108 be shared between two households: the two houses of Mary Wanjiku Waweru and Esther Wangari Waweru, leaving out the third house of (Sarah Wanjiru Kahuthu) for the reason that the said family “had not taken care of the land”.
11. Further that the ten daughters of their deceased father should be given one acre among themselves and a similar acreage be set aside for the benefit of the grandson John Waweru Nganga. He stated that even though he had received his share in the NAKURU Succession Cause, the deceased herein during her lifetime held the land registered in her name merely as a trustee for the children of Johana and thus he is entitled to claim as a beneficiary of her estate.
12. At the hearing of the summons for confirmation of the grant in the first Petition, the court having heard the respective parties refused to confirm the grant. Although it was agreed to dispose of the issue through oral hearing, what followed was a long delay occasioned by the subsequent application by Elijah Nganga Waweru for injunctive orders against his co-petitioner. Eventually it was agreed to have the same granted by consent to pave way for the hearing. After another hiatus the hearing in respect of the protest commenced on 17/4/2013 but was not finalized.
13. On 4/6/2014 the matter was taken over by a new presiding magistrate who agreed with the counsels appearing before him that the value of the estate exceeded his jurisdiction. The matter was thereafter placed before this court for directions. On 17/3/2015 before this court the parties agreed to dispose of the protest by way of written submissions.
14. The submissions on both sides reiterate the affidavits filed in respect of the protest to the confirmation of the grant by the two parties. I note however that there are some references made therein to the proceedings in the lower court. These proceedings were not concluded. Also, the counsel for the parties on appearing before me consented to dispose of the outstanding protest by way of written submissions. The lower court proceedings therefore have no relevance to the determination of the matter at hand.
15. Before referring the first petition to the High Court, the trial magistrate had agreed with the observation by counsel concerning his pecuniary jurisdiction under section 48 of the Law of Succession Act. Initially the learned magistrate marked the matter stood over generally and directed the parties to move the court “appropriately”. However he subsequently allowed the parties to fix the matter for mention before this court for directions.
16. The value of the estate was not quantified at any stage, and possibly by 2014 the same may have escalated beyond the pecuniary limit set under Section 48 of the Act. However, apart from the possible high value of the estate by 2014, the lower court was also entitled to refer this matter to

the High Court under rule 40 (8) and 9 of the Probate and Administration Rules.

17. Rule 40 (8) reads as follows:

**“Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.”**

18. Rule 40 (9) is in the following terms:

**“In giving directions the magistrate’s court may in the case before it either order that the application for confirmation should proceed in that court, or at the request of any party or of its own motion order that it be transferred to the High Court and give all necessary consequential directions in that behalf to enable the application to be dealt with by the High Court.”**

19. As I have observed, once the directions were taken before this court as to the disposal of the protest, the parties could not go back to the evidence taken in the partial hearing in the lower court. The court has now considered the affidavits before the court and the submissions of counsel. I have also called for and perused the file in respect of the second Petition (CM’s Succession Cause No. 134 of 2010).

20. Turning to the substance of the protest itself, I think it is important to state at the outset that the present matter relates to the administration of the estate of Mary Wanjiku Waweru, and not her husband the late Johana Waweru Nganga. This court cannot purport either directly or indirectly to sit on appeal on the orders of the High Court in Nakuru High Court Succession Cause 18 of 1987 wherein a grant was issued to Merry Wanjiku Waweru *aka* Mary Wanjiku Waweru.

21. In the said grant, the estate of Johana consisting of Plot No. 339 Karate Scheme was distributed among the stated heirs, including the present protagonists. It would seem that subsequent to the distribution each beneficiary was registered as proprietor of the subdivisions of land parcel described as plot 339 Karate Scheme. Hence the deceased Mary Wanjiku Waweru became the registered owner of the plot number NYANDARUA/KARATI/1108 and obtained documents of title under the Registered Land Act.

22. The three key questions raised by this dispute are:

- a. **Whether the 1<sup>st</sup> Petitioner in the first Petition is a son of the deceased Mary Wanjiku Waweru and whether the protester, his alleged co-petitioner was party to the filing of the first petition.**
- b. **Whether the deceased Mary Wanjiku Waweru held the property registered in her name in trust for all the children of Johana Waweru.**
- c. **What orders ought to be made in respect of the protest.**

**Whether the 1<sup>st</sup> Petitioner in the first Petition is a son of the deceased Mary Wanjiku Waweru and whether the protester, his alleged co-petitioner was party to the filing of the first petition.**

23. The 1<sup>st</sup> Petitioner in the first Petition is admittedly a step child of Mary Wanjiku Waweru, raised by her from an early age after the death of his own mother. In support of the alleged mother/son

relationship the 1<sup>st</sup> Petitioner alludes in his affidavit in answer to the protest to “African custom.” Properly speaking the said Petitioner was for all intents and purposes a child of the deceased widow. However for purposes of succession, I do not believe he qualifies as a child of the deceased.

24. The interpretation Section of the Law of Succession Act is Section 3. Under Section 3 (2) the term “child” refers to one’s natural child including, for a female person, a child born to her out of wedlock, and regarding a male person, a child whom “he has expressly recognized or infact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

25. Clearly, the law did not anticipate the recognition or acceptance of a child other than her own by a female person. In other words, while the male so to speak can “adopt” a child not born to him as his own for purposes of succession, a woman’s child was a natural child born inside marriage or out of wedlock. Of course, within marriage the latter could be “adopted” by the male (husband) as his own child. Section 3 (3) goes on to state that:

**“A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.”**

26. Thus, the 1<sup>st</sup> Petitioner in the first Petition is not a child of the deceased widow for purposes of succession. Looking at the first Petition for letters of administration and accompanying affidavit, I note that neither of them bear the signatures of the Protester (second Petitioner) even though he is named as a co-petitioner. Equally the consent to the petition for grant is signed by only one of the listed entitled persons namely, John Waweru Nganga but not by Joel Njihia Waweru or Racheal Wangari Nganga. These are the same persons listed as beneficiaries in the summons for the confirmation of grant filed herein. And these make up the undisputed natural children of the deceased widow, in addition to a grandson, John Waweru Ng’ang’a.

27. Evidently there were other children in the houses of the two other widows of Johana. The Petitioners in the first Petition did not name these parties. Indeed from his own mother’s house, it is only the 1<sup>st</sup> Petitioner who appears involved in this succession. It is not clear whether his siblings had notice of the proceedings. Suffice to say that on the facts before me Isaiah Gichimu Waweru is not a son of the deceased widow and that his purported co-petitioner who is Protester had either no notice of or declined to give consent to the petition.

28. Notably, the first Petition was lodged together with an introduction letter (photocopied) from the Senior Chief Nyakio location dated 11/1/2010. Surprisingly, while a copy of the letter was used in first Petition, its original was filed with the second Petition in Succession Cause 134 of 2010. That seems to fortify the view that the Petitioner Isaiah Gichimu Waweru may have run ahead of the actual children of the deceased widow and filed the first Petition without their full involvement and due consent.

**Whether the deceased Mary Wanjiku Waweru held the property registered in her name in trust for all the children of Johana Waweru.**

29. It is true that the land parcel NYANDARUA/KARATI/1108 which is the subject of the two succession causes devolved upon the deceased widow from the estate of her deceased husband Johana. It was one of the subdivisions out of the original plot described as number 339 KARATE SCHEME. She was also the sole administrator.

30. As Johana was polygamous the estate appears to have been distributed in accordance with section 40 (1) & (2) of the Law of Succession Act even though the ten daughters of Johana were seemingly left out. Pursuant to the distribution under the grant, three sons of Esther Wangari the 3<sup>rd</sup> wife (also deceased) namely Zakaria Nganga Waweru, Isaiah Gichimu Waweru (1<sup>st</sup> Petitioner) and Daniel Ngotho Waweru received 3, 4, 5, and 4 acres of land respectively, totaling 11.5 acres

for their house. The children of the late Sarah Wanjiru (1<sup>st</sup> wife) received the following shares Elias Nganga Waweru, (3.5 acres), Isaiah Ngotho Waweru aka Stephen Ngotho Waweru (3.5 acres). Total being 7 acres. Hezron Ngotho Mwangi the last son is not listed under the grant.

31. Elijah Nganga Waweru (protester) and Joel Njihia Waweru of the house of Mary Wanjiku Waweru (2<sup>nd</sup> wife) received 5.75 acres each while their own mother (deceased herein) received 5.77 acres. Total acreage is 17.27. One Peter Maina Gitau whose relationship to the late Johana is not explained (possibly a purchaser) got 5 acres. None of the female children of the deceased (about 10) got anything on the face of the grant.
32. Thus each house was catered for, more or less even though the deceased Mary Wanjiku's house got the lions share. Reasons to justify this have been advanced, including, the fact, not disputed by the 1<sup>st</sup> Petitioner herein that she raised all or some of the children of her deceased co-wives. As the only surviving spouse the deceased must have contributed to the accumulation and management of the estate notwithstanding the fact that no evidence was tendered to support the statement that she settled loans owed to the Settlement Fund Trustees in respect of the original land parcel, which was apparently in a settlement scheme known as KARATE.
33. Despite the gazette of the first petition only the present protestor (and his siblings) have appeared to lay a claim on behalf of their mother's house (by protesting and filing a separate Petition No. 134 of 2010). None of the other children in the houses of the 3 deceased widows apparently challenged the grant in Nakuru or have appeared in this court to claim any stake in the property vested in the deceased through the Nakuru grant. As I intimated earlier, this court cannot redistribute the estate of Johana Waweru – that was completed in Nakuru Succession Cause 18 of 1987.
34. The deceased Mary Wanjiku Waweru received an additional unit of 5.77 acres in her own capacity as a widow in accordance with Section 40 (1) of the Law of Succession Act. Mary Wanjiku Waweru became the registered owner (absolute proprietor) of land parcel NYANDARUA/KARATI/1108. She acquired a registrable interest, not the life interest as anticipated under Section 35 (1). The confirmed grant has no reservations regarding the portion of land designated for the benefit of the deceased widow. There is no mention of a life interest in the grant.
35. This is what Musyoka J, observed concerning life interest in **Tau Katungi –Versus- Margrethe Thorning Katungi & Another [2014] eKLR:**

**“Life interest confers a limited right to the surviving spouse over the intestate estate. He or she does not enjoy absolute ownership over the property. They cannot deal with it as if it was their own. By virtue of Section 37 of the Act, a surviving spouse cannot during life interest dispose of any property subject to that life interest without the consent of all the adult children, co-trustees and the court. This is meant to safeguard the interest of the children who are the ultimate beneficiaries of the property the subject of life interest. It is in this respect that the life interest operates as a trust over the property the subject thereof, a trust held by the surviving spouse from the benefit of the surviving children.**

**[T]he life interest is terminable upon death of the holder or through the remarriage of the widow. It is also terminable through the exercise of the power of appointment provided for under Section 35 (2) and (3) of the Law of Succession Act.....[which] enables the holder of the life interest to distribute the property the subject of the life interest prior to the life interest determining (through death remarriage). He or she can distribute any or all the property the subject of life interest.”**

36. In this case, it could be argued that Mary Wanjiku Waweru as the sole administrator of Johana's estate, brought forward the determination of the life interest by immediately exercising her power

of appointment at the confirmation of the grant. She therefore became an absolute proprietor of the portion appropriated for herself. Ditto other beneficiaries including the first Petitioner.

37. Thus the life interest and resultant trust if any in respect of the property of Johana determined upon the registration of the deceased (and no other beneficiaries) as the owner of land allotted, without any objection from other beneficiaries or children of Johana, for herself. The process resulted in a title in her name under the Registered Land Act. Her estate is therefore governed by Section 38 of the Law of Succession Act which provides:-

**“Where an intestate has left a surviving child or children but no spouse, the net intestate 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.”**

38. The arguments made by the 1<sup>st</sup> Petitioner appear to assume that the polygamous nature of the marriage of Johana Waweru should somehow govern the devolution of the free estate of his wife, Mary Wanjiku Waweru. Johana was polygamous by virtue of having 3 wives but once his estate was distributed, each house became independent and governed by Section 35 to 38 of the Law of Succession Act (See Section 40 (2)). The fact that Mary Wanjiku Waweru had been a wife in a polygamous marriage did not make her the mother of all the children of her deceased co-wives for purposes of succession.

39. The two distinctive factors in this matter are that the deceased widow acquired an indefeasible registrable interest and though the 1<sup>st</sup> Petitioner herein was the son of the late Johana, he was not Mary Wanjiku's son. I find and hold that no trust, legal or constructive has been established in respect of the land parcel NYANDARUA/KARATI/1108 which makes up the estate of the deceased widow.

#### **What orders ought to be made in respect of the protest**

40. Having found that the 1<sup>st</sup> Petitioner herein was a son of the deceased Johana but not the deceased herein albeit a step son, and further that the 1<sup>st</sup> Petitioner did not have the consent of the children of the deceased herein to apply for a grant, and further that even the Petition itself was not properly executed, I must find that the grant issued in his name and that of the protestor was a culmination of proceedings that were defective in substance in terms of Section 76 of the Law of Succession Act.

41. On my own motion I do hereby annul the said grant as issued in the first Petition on 10<sup>th</sup> of May, 2010. Consequently, the question of its confirmation does not arise. And having perused the parallel Succession Cause 134 of 2010 filed by protestor and his brother on 15/7/2010, I would direct that the said file be consolidated with the

present petition and that a grant does issue in the name of the Petitioners in Succession Cause No. 134 of 2010 forthwith. Needless to say, the said grant will be confirmed after the expiry of 6 months.

42. It will be expected of the Petitioners to include and involve in their summons for confirmation all the surviving children (sons and daughters) of the house of the deceased Mary Wanjiku Waweru and to obtain their consent, and to demonstrate the family's proposed mode of distribution of their mother's estate. In view of the family ties existing between the parties herein, each will bear their own costs.

**Delivered and signed at Naivasha this 10<sup>th</sup> day of July, 2015.**

In the presence of:-

Mr. Obino for 1<sup>st</sup> Petitioner

Mr. Gichuki for 2<sup>nd</sup> Petitioner/Protester

Court Assistant Barasa Elphas

**C. W. MEOLI**

**JUDGE**