



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 1113 OF 2003**

**IN THE MATTER OF THE ESTATE OF RUTH MURUGI MUGO (DECEASED)**

**SAMUEL NGIGI MWANGI ..... PETITIONER**

**V E R S U S**

**ESTHER GATHIRU KIHARA ..... OBJECTOR**

**JUDGMENT**

1. This matter relates to the estate of Ruth Murugi Mugo, who died on 19<sup>th</sup> October 2002.
2. Representation to the estate was sought by Esther Gathiru Kihara, in her capacity as daughter of the deceased, in a petition lodged in court on 8<sup>th</sup> May, 2003. The deceased was expressed to have been survived by his daughter – Esther Gathiru Kihara – and two grandchildren – Gitau Kariuki Mugo and Cecilia Kiyoo Kuria. She was said to have died possessed of an asset described as Komothai/Kiratina/690. A grant of letters of administration intestate was duly made to the petitioner on 16<sup>th</sup> July 2003.
3. Before an application could be filed in court for the confirmation of the grant, an application dated 5<sup>th</sup> January 2004 was lodged in court on 9<sup>th</sup> January 2004 by one Samuel Ngigi Mwangi. The applicant sought in the application for reasonable provision to be made for him as a dependant of the deceased out of the estate.
4. The grounds upon which the application is premised are set out on the face of the application, as well as in the affidavit of the applicant sworn on 5<sup>th</sup> January 2004. The general grounds are that the applicant is a lawful grandson of the deceased, who was dependent on the deceased for his upkeep. The deceased is said to have been proprietor of Komothai/Kiratina/690, out of which she gave the applicant half ( $\frac{1}{2}$ ) portion. The applicant alleges to have been in occupation of the subject property for over thirty six (36) years during which time he had undertaken major economic activities thereon.
5. In the affidavit sworn on 5<sup>th</sup> January 2004, the applicant reiterates the grounds set out on the face of the application, adding that the administrator of the estate was a married daughter of the

- deceased, who had forcibly entered the said parcel of land after the death of the deceased and was accused of committing wanton waste on the subject property. He complains that he was not notified of the bringing of the succession proceedings and states that his name was omitted from the list of survivors of the deceased. He asserts his entitlement to half of the landed property as well as the residuary estate.
6. Upon being served with the application, the administrator swore an affidavit on 17<sup>th</sup> March 2004. The affidavit was filed in court on the same date, 17<sup>th</sup> March 2004. The administrator states that the applicant is not a grandson of the deceased, but rather a step grandson of the deceased, being a grandson of the deceased's co-wife called Grace Wambui Mugo. She contests the allegation that the applicant had been given a portion of the subject property and that he had extensively developed the same. She asserts that as a daughter of the deceased, she had a superior right to the estate. She denounces the applicant as a distant relative who is not entitled to a share in the estate.
  7. The applicant passed away on 19<sup>th</sup> April 2007, and a limited grant of letters of administration *ad litem* to his estate was made on 13<sup>th</sup> March 2008 to Mary Wanjiku Ngigi. The dead applicant was substituted in these proceedings on 28<sup>th</sup> June 2010 by the said Mary Wanjiku Ngigi.
  8. Directions on the disposal of the application dated 5<sup>th</sup> January 2004 were given on 22<sup>nd</sup> March 2004. The application was to be disposed of by way of *viva voce* evidence.
  9. The hearing of the matter commenced on 13<sup>th</sup> April 2005 before Aluoch J. The notes of the presiding Judge prior to the taking of oral evidence indicate that the deceased had been married to one Mugo Mboche, a polygamist with five wives. The said five wives were Ruth Mwangi Mugo, Grace Wambui Mugo, Grace Wamuhu, Wanjiru Mugo and Manga. The applicant, Samuel, was a grandson of Grace, his father was Mwangi Mugo, a son of Grace.
  10. The applicant testified on 13<sup>th</sup> April 2005. He averred that he lived on the deceased's land and used to cultivate half of the land, while the other half was occupied by another grandson of the deceased, Gitau Kariuki, who lived with her. He stated that he grew coffee, maize, bananas, potatoes and blue gum trees. When the deceased died the two occupants of the land buried her on it. The deceased also had a bank account with Kenya Commercial Bank at its Ruiru branch and shares with the Komothai Cofee Cooperative Society Ltd. He complained that when the administrator sought the grant of representation over her mother's estate she did not inform him, neither did she include his name in the list of survivors. She only listed herself and two other persons. He stated that the two were from the house of Kuria Mugo, a son of the first wife of Mugo Mboche. The deceased, Ruth Mugo, was said to have had only one child, the administrator, who was married in Ting'ang'a, Kiambu, and who did not cultivate the subject land. She only began to cultivate the property after the deceased's death.
  11. During cross examination, the applicant stated that the deceased was his grandmother having been a co-wife of his own biological grandmother. The land that he lived on was given to him by his late father, but the same had not been given to his father by the deceased, Ruth Murugi Mugo. He asserted that his four brothers and three sisters were not entitled to the deceased's land, for it was only he and Gitau Mugo who were entitled to it, they being the ones who took care of the deceased after the administrator was married. He stated that he had been in occupation of the property since 1967. He stated further that he had no house on the deceased's land, but in the land given to him by his late father. He stated that Kuria Mugo had his own land, being Komothai/Kiratina/691, which did not belong to the deceased.
  12. The administrator testified before me on 18<sup>th</sup> September 2014. She stated that the deceased was her mother, who was one of the five (5) wives of his father, Mugo Mbochi. She named the five wives of her father as Wambui Mugo, Gladys Wangui, Tabitha Wanjiru, Manga Mugo and Ruth Murugi Mugo. She asserted that each hosue had been given their land, and the deceased's land was Komothai/Kiratina/690. She explained that the applicant was from the second house of Grace

Wambui Mugo, and he was a grandson of the said Grace Wambui Mugo. His inheritance, it was asserted, should come from that house. She argued that although the original applicant had brothers and sisters none of them were interested in the estate of the deceased. She explained that there was a house on Komothai/Kiratina/690 which had been built by Gitau Kariuki Mugo, who was a step-nephew of the administrator from the first house. His mother was said to have died shortly after his father and he was taken in by the deceased. She denied that the original applicant had been on the land for over thirty (30) years, nor had he planted anything on the land. She conceded though that she was married.

13. At cross-examination, she explained that she was the only child of the deceased and was married. After her marriage, her mother, the deceased, was left with Gitau Kariuki and his wife. She stated that the original applicant and Gitau Kariuki Mugo used to refer to her mother as “grandmother” and that she, the administrator, was their aunt. She explained that Gitau Kariuki’s inheritance was in her mother’s estate as he had been taken in as a child by the said deceased person, although he was from the house of Wambui Mugo Mboche. On Cecilia Kiyoo, she explained that she came from the first house, and was being allotted a share because the administrator’s father had allotted her one (1) acre from the land.
14. The deceased herein died in 2003, and therefore her estate is subject to the Law of Succession Act which came into force in 1981.
15. The application dated 5<sup>th</sup> January 2004 seeks reasonable provision for the applicant. I have noted that the application does not cite the provisions of the law under which it was brought. However, reasonable provision is provided for under Part III of the Law of Succession Act. The application is provided for and should be brought under Section 26 of the Act by or on behalf of any of the persons falling under the category of persons defined as dependants in Section 29 of the Act.
16. The discretion given under Section 26 of the Act to a court to make reasonable provision for a person who is not otherwise adequately provided for is exercisable only in favour of persons who fall within the definition of dependant set out in Section 29 of the Act.
17. Section 29 of the Act provides as follows-
  - “29. 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;**
    - b. Such of the deceased’s parent, step-parents, grandparents, grandchildren, stepchildren, 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.”**
18. The initial applicant claimed to be a grandchild of the deceased, and therefore he sought to bring himself under Section 29(b) of the Act. The question that I have to determine first, is whether he was a grandchild of the deceased, before I consider whether he was being maintained by the deceased immediately before she died.
19. From the material before me, there is no dispute that the deceased had only one child, the administrator herein, Esther Gathiru Kihara. There is no dispute too that the original applicant, Samuel Ngigi Mwangi, was not a child of Esther Gathiru Kihara, and therefore he was not a biological grandchild of the deceased, Ruth Murugi Mugo. The relationship between the original applicant and the deceased was that of step-relative. He was a step-grandchild of the deceased, and she his step-grandmother, as his biological grandmother was the deceased’s co-wife called

Grace Wambui Mugo. Grace Wambui Mugo was therefore his biological grandmother, and he her grandson. Consequently, the applicant was not a grandson of the deceased.

20. The definition of dependants in Section 29(b) of the Act includes “grandparents” and “grandchildren” but it does not include “step-grandparents” and “step-grandchildren.” It includes “stepparents” and “stepchildren.” My reading of this provision is that the omission or failure to make reference to “step-grandparents” and “step-grandchildren” was meant to exclude such relatives from the definition. If Parliament intended to include them nothing would have stopped it from doing so, just as it had done with “step-parents” and “step-children.” The language of Section 29(b) of the Act appears to confine “grandchildren” and “grandparents” to the biological “grandchildren” and “grandparents” of the deceased.

21. My conclusion therefore is that the original applicant was not a grandchild of the deceased, and therefore he did not fall within the definition of dependant in Section 29(b) of the Act. Consequently, he had no capacity to mount an application under Section 26 of the Act for reasonable provision and the court cannot exercise the discretion granted to it by Section 26 to make reasonable provision for him.

22. Having concluded that the original applicant was not a grandchild of the deceased and therefore he could not possibly be her dependant, it would be academic for me to dwell on the other issues that also arise in the application dated 5<sup>th</sup> January 2004.

23. The said application is available only for the purpose of dismissal and I do hereby dismiss the same, with costs to the administrator. The administrator is at liberty to apply for confirmation of the grant on record.

**DATED, SIGNED and DELIVERED at NAIROBI this 10<sup>TH</sup> DAY OF JULY, 2015.**

**W. MUSYOKA**

**JUDGE**

**No appearance for the Petitioner**

**No appearance for the Objector**