



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 1089 OF 1993**

**IN THE MATTER OF THE ESTATE OF JAMES GITHAGUI KANGAU (DECEASED)**

**TABITHA NJERI GITHAGUI ..... OBJECTOR**

**V E R S U S**

**LUCY NYAMBURA GITHAGUI ..... 1<sup>ST</sup> PETITIONER**

**CATHERINE WANGARI ..... 2<sup>ND</sup> PETITIONER**

**PETER NJOROGE GITHAGUI ..... 3<sup>RD</sup> PETITIONER**

**JUDGMENT**

1. The summons the subject of these proceedings is dated 29<sup>th</sup> February 2000. It is brought at the instance of an administrator called Josephine Wanjiru Kungu.
2. In her affidavit sworn on 29<sup>th</sup> February 2000, she states that the grant of 10<sup>th</sup> November 1999 had be made to her jointly with three (3) others. She avers that her father was a polygamist having married five (5) times. His wives were Tabitha Njeri Githagui Kangau, Peris Njeri Githagui Kangahu, Rahab Wambui Githagui Kangau, Teresia Wanjiku Githagui Kangau and Ruth Njeri Githagui Kangau. The deceased was pre-deceased by the fifth wife, Ruth Njeri; but survived by four (4) widows – Tabitha Njeri, Peris Njoki, Rahab Wambui and Teresia Wanjiku.
3. The deceased had twenty one (21) children with his five wives. He had four (4) children with his first wife, two (2) children with his second wife, five (5) children with his third wife, five (5) children with his fourth wife and five (5) children with his fifth wife.
4. He died possessed of a property known as LR Dagoretti/Kinoo/592. The applicant proposes that the property be distributed amongst all twenty children of the deceased that is excluding Stephen Ndungu. All the children are to get 0.2hectares, except for Peter Njoroqe who is allocated 0.4hectares and Joseph Ndungu who gets 0.26 hectares. The two surviving widows at the time of the proposed distribution – Rahab Wambui Githagui and Teresia Wanjiku Githagui – were awarded 0.2 hectares each.
5. The application is opposed. Rahab Wambui Githagui, Teresiah Wanjiku Githagui, Lucy Nyambura Githagui and Catherine Wangari Githagui swore what they called an opposing affidavit on 4<sup>th</sup> October 2000. Ideally, this should have an affidavit of protest for that is what is provided for under rule 40(5) of the Probate and Administration Rules. But no matter, what should be of primary importance in the affidavit is its substance but not its form. Curiously that affidavit was sworn on 4<sup>th</sup> October 2000 but

filed in court on 4<sup>th</sup> September 2000!

6. The deponents of the affidavit of 4<sup>th</sup> October 2000 concede that the contents of the application dated 29<sup>th</sup> February 2000 are factually correct, except for a few matters in respect of which they have made corrections. They oppose the application on the distribution proposed by the applicant. They state that the first house should not get a share from the estate for it benefited from an *inter vivos* gift of 4.35 acres during the deceased's lifetime and state that the members of that house ought to share the property equally amongst themselves. They state that the remaining property should be shared equally amongst all the remaining houses – that is to say the second, third, fourth and fifth houses. The property is to be shared equally between the households, with each one of them taking 2.80 acres, thereafter the 2.80 acres are to be shared equally amongst all the members of each household.

7. The affidavit sworn on 4<sup>th</sup> October 2000 has several annexures attached to it. There is a document in Kikuyu language dated 13<sup>th</sup> December 1963, with an English translation, signed by S. N. Kiarie, Kiambuthi Wamwiri, David Wamagata, W. Gichangi and Amos Githegi. It purports to settle a dispute between Stephen Ndungu and an unnamed “myself” and “my family.” It purports to give Stephen Ndungu and his mother, Tabitha Muthoni, 2 acres and 2.35 acres, respectively, out of an unnamed parcel of land. The other document is a Certificate of Official Search dated 5<sup>th</sup> September 2000 in respect of Dagoretti/Kinoo/582, showing that a caution and a restriction have been placed against the title by Josephine Wangui Githagui.

8. The application is also opposed by Gitau wa Njuguna. He swore on 4<sup>th</sup> October 2000 what he calls a further affidavit. He is a cousin of the deceased. He avers that the deceased gave his son, Stephen Ndungu, a piece of the land, measuring 2.00 acres in 1963. He also avers that the deceased gave his first wife another parcel of land measuring 2.35 acres at the same time. He further avers that at his death he called elders and his brothers and told them that he wanted the remaining parcel of land divided equally amongst the other four (4) houses.

9. The applicant responded to the two affidavits of protest by her further affidavit sworn on 13<sup>th</sup> March 2001. She pleads ignorance of the alleged *inter vivos* gift of 1963 which allegedly gave her family 4.35 acres. She dismisses the document of 13<sup>th</sup> December 1963 as a forgery, stating that the alleged subdivision related to a property known as LR No. Dagoretti/Kinoo/149. The said property was then registered for the first time in the name of Stephen Ndungu, the applicant's blood sister, arguing that it was never owned by the deceased. Gitau wa Njuguna is dismissed as a busybody who is not related to the deceased.

10. Attached to the applicant's further affidavit is a green card in respect of Dagoretti/Kinoo/149. It shows that the register in respect of the said property was opened on 17<sup>th</sup> November 1958 in the name of Stephen Ndungu Githagui. The last entry on the register is dated 16<sup>th</sup> December 1977.

11. Directions were given on 14<sup>th</sup> March 2001 that the said application be disposed of by way of *viva voce* evidence. These directions were reaffirmed on 26<sup>th</sup> June 2001.

12. The issues for determination before Waweru J. on 30<sup>th</sup> September 2003 were in the following terms;

**“(1) Did land parcel (LR Dagoretti/Kinoo/149) registered in the name of Stephen Ndungu, now deceased (and a son of the Deceased's 1<sup>st</sup> household) belong to the deceased or was it purchased by the said Stephen Ndungu for valuable consideration?”**

**(2) If the land belonged to the deceased can Stephen Ndungu's registration as purported thereof be considered to have been a gift *inter vivos* to him and his mother's household by the Deceased, and if so in what proportion?**

**(3) Is any member of the first household entitled to a share of the deceased's present estate?”**

13. The oral hearing commenced on 30<sup>th</sup> September 2003 before Waweru J. The applicant testified as PW1. After giving a background of the family, which accords with the papers filed in court, she testified that the deceased owned Dagoretti/Kinoo/582 and a plot at Kinoo Village, being Plot No. 337. She produced a Certificate of Official Search in respect of Dagoretti/Kinoo/582, which showed the deceased as proprietor. She testified that Dagoretti/Kinoo/149 belonged to her deceased brother Stephen Ndungu.

14. The applicant continued with her testimony on 26<sup>th</sup> October 2005 before Koome J. She told the court that she had done a search at the lands office on Ndumberi/Ndumberi/149 which revealed that her brother obtained title to it in 1958. She was a young girl at the time and she did not know how her late brother acquired the title. So far as she was concerned her father had his own title while her brother had his own. She then produced a certified copy of the title search. She testified further that her father acquired his title to Dagoretti/Kinoo/582 in 1975. She testified that she filed a caution against the title Dagoretti/Kinoo/582 because her half siblings were selling portions of it.

15. On cross-examination she stated that she was married and lived in her own compound. She reiterated that she did not know how Stephen Ndungu acquired Dagoretti/Kinoo/149 as she was still young then. She averred that Amos Githinji was not related to the family, although he was the deceased's age mate. She testified that she was not aware of the 1963 proceedings, as she had been married by then. She and her husband acquired a portion of Dagoretti/Kinoo/149 from her brother by sale. Dagoretti/Kinoo/149 was subdivided into two – she and her husband got Dagoretti/Kinoo/627 therefrom while Stephen Ndungu remained with Dagoretti/Kinoo/628. Her position is that Dagoretti/Kinoo/582 ought to be divided equally among all the children on the deceased. She attested that she did not propose that Stephen Ndungu gets nothing, nor that Peter Njoroge gets 0.4 hectares. She further testified that her mother had a house on Dagoretti/Kinoo/582 and used to cultivate the land. She denied that her mother had previously been given 2.3acres by the deceased, and that her brother, Stephen Ndungu, was given 3.5acres as trustee for his mother.

16. On re-examination, she stated that there was a meeting held in 1963 at the Chief's office, but she was not present. She opined that the meeting had nothing to do with Dagoretti/Kinoo/149. She stated that Dagoretti/Kinoo/149 belonged to Stephen Ndungu, and the same was shared out amongst his children. None of it was given to his sisters.

17. After PW1 testified, the applicant closed his case.

18. The respondents opened their case on 17<sup>th</sup> September 2013 before Kimaru J. The first to testify was Teresia Wanjiku, the only surviving widow of the deceased. She stated that the deceased owned only one piece of land at Kinoo. Before he died he gave his first wife, Tabitha Njeri, 2.35 acres out of the land and to a son of Tabitha Njeri, called Stephen Ndungu, 2 acres. The land was subdivided into two portions to facilitate the excision. One portion was given to one wife and the other to the other four wives. The four wives got 2.8 acres while the first wife and her son got in total 4.35 acres. The applicant was said to be residing on the portion given to her mother and therefore she is not entitled to a share in Dagoretti/Kinoo/582. The witness stated that she did not know how the land was acquired, but each person in the family owned a piece of the land, although some had sold their shares. She said that she had divided her 2.8 acres among her children. She had sold some plots out of it for her own maintenance.

19. The respondents' second witness was Catherine Wangare Githagui. She is the daughter of the deceased by his fifth wife. She testified that her father owned two parcels of land, being LR No. Dagoretti/Kinoo/582, where she resided, and LR No. Dagoretti/Kinoo/149. She stated that according to the search she had done the two parcels of land were originally Parcel No. 146. In 1975 a footpath was created on the land and the piece of land was renamed Parcel No. 582. The second, third, fourth and fifth families are said to reside on Dagoretti/Kinoo/582, while the first family is said to reside on Dagoretti/Kinoo/149. The wives of the deceased are said to have been cultivating on both parcels of land. The land, meaning both parcels, were registered during the time of land demarcation in 1958. Originally it was ancestral land that the deceased had inherited from his father. The deceased was said to have sat in 1963 with family elders and subdivided Dagoretti/Kinoo/149 into portions and gave 2.35 acres to his first wife and 2.00acres to his son, Stephen Ndungu. She stated that Dagoretti/Kinoo/146 and

Dagoretti/Kinoo/149 were registered on the same day on 17<sup>th</sup> November 1958. Parcel No. 146 in the name of the deceased and parcel No. 149 in the name of Stephen Ndungu. She stated that parcel No. 149 belonged to the deceased, but was registered in the name of Stephen Ndungu, to take care of on behalf of the first house. She further testified that both Stephen Ndungu and his mother are dead and were both buried in parcel No. 149. The land has been subdivided between the family of Stephen Ndungu and the applicant.

20. On cross-examination, Catherine Wangare Githagui, reiterated that Dagoretti/Kinoo/149 was property of the deceased but registered in 1959 in the name of Stephen Ndungu, while the deceased was registered as the owner of Dagoretti/Kinoo/582. She claimed that the deceased had told his brothers of what he had done in 1958 regarding Dagoretti/Kinoo/149. She explained that there was a dispute between the deceased and Stephen Ndungu. The document allegedly made in 1963 was not signed by Stephen Ndungu, only the witnesses signed it. She confirmed that the decision of 1963 was not reflected in the land register for Dagoretti/Kinoo/149 and she was not able to explain why. The first family was said to have been given 4.35 acres. The green card indicated that the land had been subdivided, but she did not agree that the said land measured 1.7 acres only and not 4.35 acres. She did not participate in nor know that Dagoretti/Kinoo/149 was subdivided into Dagoretti/Kinoo/627 and 628. She confirmed that the deceased was alive in 1977 when the subdivision was done, but she could not tell whether or not he approved the subdivision. She stated that Dagoretti/Kinoo/582 had been subdivided into four portions according to the last four houses of the deceased.

21. The respondents' last witness was Freshia Wambui Ndungu. She was the widow of Stephen Ndungu. She stated that she was married to the said Stephen Ndungu in 1961 and that he had been given Dagoretti/Kinoo/149 by his father. She averred that they lived in Kinoo, but that mother in law lived in Nairobi. Before the mother in law died she had relocated to Kinoo to live with her daughter, the applicant herein. Her evidence was that when she got married to the family, she was told by her husband that her mother in law had been given land by the deceased, but she did not know whether it was divided between her husband and her mother in law. Her husband is said to have given one acre to the applicant and subdivided the rest amongst his sons. It was subdivided in two portions – parcel No. 627 in her husband's name, while parcel No. 628 was in the name of the applicant's husband. Parcel No. 627 was subdivided further amongst the children of Stephen Ndungu. She asserted that her husband did not want to inherit any part of Dagoretti/Kinoo/582, and as members of his household they did not want any part of it and that it was only the applicant who was following up the issue. She was of the view that Dagoretti/Kinoo/582 should be shared out among the last four houses, adding that the said parcel has since been subdivided.

22. During cross-examination she stated that at the time she got married to her husband the former already had the land registered in his name and she did not know how he got the land. According to her, the applicant's husband did not purchase a portion of Dagoretti/Kinoo/149 from her husband. It was a half share given to the applicant. She stated that she got her own inheritance from her husband and she was therefore not interested in inheriting from Dagoretti/Kinoo/582.

23. At the close of the respondent's case, the court directed the parties to file written submissions. The applicant's written submissions are dated 16<sup>th</sup> September 2014 and were filed in court on 17<sup>th</sup> September 2014. The respondent's submissions are dated 23<sup>rd</sup> September 2014 and were filed in court on 25<sup>th</sup> September 2014. Both sides have summarised the facts of the case and their respective parties positions on the matter. The applicant has cited case law and attached copies of the authorities that they were relying on.

24. I must state that I did not hear any of the parties to this dispute. The matter was placed on my table following the transfer of my colleague, Kimaru J., from the Family Division.

25. The issues for determination were identified on 30<sup>th</sup> September 2003 and they revolve around Dagoretti/Kinoo/149. The same can be summarised into whether the said property was estate property.

26. The material that has been placed before me clearly indicates that Dagoretti/Kinoo/149 was

registered in 1958 under the Registered Land Act in the name of Stephen Ndungu, a son of the deceased. The contention by the applicant is that that was adequate evidence that the said property did not form part of the estate of the deceased.

27. On their part the respondents concede the registration of Dagoretti/Kinoo/149 in the name of Stephen Ndungu, but argue that the said property was originally ancestral property given to Stephen Ndungu by his father, the deceased. He was registered as proprietor of the property to hold in trust for his mother and her side of the deceased's family.

28. To support their case, the respondents have referred me to a document written in Kikuyu language, with an English translation provided, dated 13<sup>th</sup> December 1963. The said document was purported to be in respect of a farm number 149 Kinoo – Dagoretti. It purported to subdivide the farm between Stephen Ndungu and his mother, Tabitha Muthoni. However, the author of the document was not indicated, neither does it bear the signature of the alleged author. It does however bear signatures that are meant to be of the persons who were witnesses to the agreement reached over the matter. It is also of note that the two other persons alleged to have been party to the settlement, that is to say Stephen Ndungu and his mother, Tabitha Muthoni, did not sign the alleged settlement.

29. In view of the matters that I have raised in paragraph 28 above, I am reluctant to give much value to the document dated 13<sup>th</sup> December 1963. This is particularly so considering that it purports to be settling a property that had been 1958 registered in the name of Stephen Ndungu under the Registered Land Act. In my view not much weight can be given to the said document.

30. From the record, although the witnesses for the respondents did state categorically that the said Dagoretti/Kinoo/149 was ancestral land, no evidence was laid before me which could lead me to conclude indeed that the said property was such land initially belonging to the deceased. Yet it is only upon such evidence being adduced that I would have been persuaded that Stephen Ndungu had been registered as trustee on behalf of the first house. None of the witnesses who testified for the respondent were able to give the background to Dagoretti/Kinoo/149 prior to the registration in 1958 in the name of Stephen Ndungu. Much of their testimony dwelt more on the events after the registration.

31. Was the property purchased by Stephen Ndungu? The applicant alleges that the former acquired the said property through purchase, yet no material evidence of the purchase was placed before the court.

32. In answer to issue number 1 in the issues identified in paragraph 12 hereinabove as to whether Dagoretti/Kinoo/149 belonged to the deceased but registered in the name of the applicant's brother, I find insufficient material upon which I can conclude that the Dagoretti/Kino/149 belonged to the deceased for it was registered in 1958 in the name of the applicant's brother's name. No material has been placed before court as proof that he was registered as such in trust for anyone. There is also no evidence that person registered as owner in 1958 had acquired the same for valuable considerable.

33. In answer to issue number 2, it is my finding, flowing from paragraph 32 above, that there is no material upon which I can hold that the said property was a gift *inter vivos* to Stephen Ndungu and his mother's household. The property was registered in his name in 1958. None of the parties adduced evidence on what exactly transpired in 1958. Their evidence was confirmed to the alleged events of 1963, at which time the property had already been registered in the name of Stephen Ndungu. If the events of 1963 were meant to gift Stephen Ndungu and his mother, then the gift failed for the deceased was in effect attempting to make a gift of property which did not belong to him.

34. In answer to issue number 3, as to whether any member of the first household is entitled to a share of the deceased's parent estate, it is my finding that as it has not been established that Dagoretti/Kinoo/149 was estate property, all the members of the said household are entitled to a share in the said estate. However, I do note that some of the members have renounced their interest while others do not appear to be interested in the property at all, leaving only the applicant as the sole person claiming interest in the said property. She shall therefore be the person to be allotted a share in Dagoretti/Kinoo/582 for the first house.

35. The deceased was a polygamist who died intestate in 1991. Distribution of his estate is subject to Section 40 of the Law of Succession Act, which provides as follows:-

**“40(1) Where an estate 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 in 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.”**

36. The effect of Section 40 is that the property, other than the personal and household effects are to be shared equally among the survivors, with the widows enjoying life interest.

37. My attention has been drawn to the holding by Koome J, in *In the matter of the Estate of Mwangi Gitire (deceased) HCSC No. 1033 of 1996*, which I fully agree with, that the provisions of Section 40 of the Act are in mandatory terms. For full effect Koome J. said-

**“the court has no discretion in the matter and was bound to use Section 40 of the Act which provides that the estate be divided between the houses taking into account the number of children in each house.”**

38. I am persuaded from the material before me that there is merit in the proposals made in the application dated 29<sup>th</sup> February 2000. I do hereby allow the said application and confirm the grant herein. Dagoretti/Kinoo/582-

- a. Shall be divided equally among all the children of the deceased, including the estate of any who have since departed, except for Stephen Ndungu Githagui;**
- b. Any surviving spouse or spouses shall be counted among or in addition to the children and shall take a share equivalent to that going to any individual child;**
- c. Costs shall be in the cause.**

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

**W. MUSYOKA**

**JUDGE**

**In the presence of Mr. Karanja advocate for the Applicant.**

**No appearance for the Respondent.**