



**REPUBLIC OF KENYA**

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

**Succession Cause No.1378 Of 1999**

**IN THE MATTER OF THE ESTATE OF NDEITHI NYAGA WANUGU Alias NDIITHI NYAGA  
WANUGU (DECEASED)**

**JOHN NJOGO NDEITHI... ..APPLICANT**

**VERSUS**

**NAOMI WANJA NDIITHI .....RESPONDENT**

**JUDGMENT**

Ndeithi Nyaga Wanugu *alias* Ndiithi Nyaga Wanugu, the deceased to whose estate these proceedings relate died on 22<sup>nd</sup> April 1995. On 16<sup>th</sup> April 1998, Naomi Wanja Ndiithi (Petitioner) petitioned the Chief Magistrate's Court at Kiambu (**Succession Cause No.102 of 1998**) to be issued with a grant of letters of administration intestate to administer the estate of the deceased. In the petition, the Petitioner disclosed the following as the dependants of the deceased: herself as the widow of the deceased and Martha Wanjiru Ndiithi and Rakeli Wangui Ndiithi, the daughters of the deceased. She listed a property registered as LR. No. Escarpment/Kinari Block 1/1159 (the suit property) measuring three (3) Hectares as the only asset comprising the estate of the deceased. The Petitioner was issued with a grant of letters of administration intestate by the said court on 3<sup>rd</sup> July 1998. The grant was confirmed on 24<sup>th</sup> February 1999. The suit property was distributed between the Petitioner and one Esther Njeri Mbugua who was to get 0.2 hectares. In subsequent proceedings, it transpired that Esther Njeri Mbugua was a purchaser.

On 28<sup>th</sup> June 1999, John Njogo Ndeithi (the Applicant) filed summons before this court pursuant to the provisions of **Section 76** of the **Law of Succession Act** and **Rule 44** of the **Probate and Administration Rules** seeking to have the grant that was issued to the Respondent by the Kiambu Chief Magistrate's Court to be annulled on the grounds that the Petitioner had obtained the said grant by means of untrue allegations of facts. The Applicant further stated that the grant was obtained after the Respondent had concealed from the said court material facts that, if disclosed, would have meant that the court would not have distributed the properties that comprise the estate of the deceased in the manner that it did. In the affidavit in support of the summons, the Applicant stated that the Respondent failed to disclose to the court the fact that the deceased had another wife by the name Michere Ndeithi and three (3) children namely: Margaret Gacheri, Njoki Ndeithi and John Njogo Ndeithi. The Applicant deponed that, prior to petitioning the court to be issued with the grant, the Respondent neither sought nor obtained their consent. In essence, the Applicant stated that the Respondent fraudulently excluded them from benefiting from the only property that comprised the estate of the deceased.

Upon being served with the summons, the Respondent filed a replying affidavit in opposition to the application. She averred that she was married to the deceased in 1954. She denied there ever existing another wife prior or subsequent to her getting married to the deceased. She disowned the Applicant and denied his claim to the effect that he was the son of the deceased. She explained that the suit parcel of land was allocated to the deceased by the government in 1988 and therefore the same did not comprise ancestral land. She deponed that although the Applicant lived within the neighbourhood, he never at any time laid claim on the suit parcel of land during the lifetime of the deceased. She urged the court to dismiss the summons for revocation of grant.

Directions were issued by the court in regard to the manner in which the summons for revocation of grant would be disposed of. The court directed that the dispute be determined upon the parties adducing *viva*

voce evidence. Hearing commenced before Koome J (as she was then). The Applicant called three (3) witnesses. He testified as PW1. Wainaina Nyaya testified as PW2. PW3 was Susan Njeri Munyunda. From the evidence adduced, it was the Applicant's case that the deceased was his father. The deceased married his mother Marui Michere. They were blessed with four (4) children, one of whom is deceased. He named the children as himself, Margaret Gacheri and Njoki Ndeithi. Margaret and Njoki are married. The Applicant testified that in 1954, their mother Michere developed a mental disease which resulted in her hospitalization at Mathare Hospital. Their mother had been in and out of the said hospital during the entire period. The Applicant acknowledged the fact that the deceased married the Respondent sometime in 1958 under Kikuyu Customary Law. The deceased and the Respondent were blessed with two (2) children, both daughters.

The Applicant's evidence to the effect that the deceased was married to his mother was corroborated by PW2 Wainaina Nyaya, the brother of the deceased and PW3 Susan Njeri Munyunda, the sister of the deceased. They both testified that the deceased was married to Michere, the mother of the Applicant before she developed a mental illness which resulted in her hospitalization and confinement at Mathare Hospital. It was after Michere's hospitalization that the deceased married the Respondent. It was the Applicant's case that prior to his death, the family of the deceased had attempted to resolve the issue in relation to how the suit property was to be shared between the two wives of the deceased. The attempt had been in vain. It was the Applicant's case that he was entitled to be recognized as a dependant of the deceased. He was also entitled to benefit from a portion of the property that comprised the estate of the deceased.

The Respondent was the only one who testified in defence of her case. She testified that when she got married to the deceased, she was never made aware that the deceased had another wife prior to her marriage. She stated that during the entire period that she stayed with the deceased, no one claimed the land that they were residing in. It was her testimony that she only became aware that the Applicant was seeking part of the suit parcel of land after the death of the deceased. This was when she sought to obtain letters of administration to administer the estate of the deceased. She denied the assertion that the deceased was ever married to another woman before he married her. She told the court that she did not know that the deceased had children with another woman. As regard the Applicant, she testified that at no time had the Applicant lived with the deceased during the entire period that she was married to the deceased. She reiterated that she only became aware of the Applicant's claim after the deceased's death. This was when the Applicant begun laying claim on the suit parcel of land. She conceded that she sold a portion of the suit parcel of land to one Esther Mbugua in order to enable her support herself. She testified that she sold a portion of the suit parcel of land that she was entitled to inherit from the estate of the deceased. Her entitlement was one and a half (1½) acres. She urged the court to dismiss the summons for revocation of grant.

After the close of both the Applicant's and the Respondent's respective cases, counsel for the parties filed written closing submission in support of their respective clients' cases. This court has carefully considered the evidence that was adduced in this case. It has also read the written closing submission filed by the parties herein. The issue for determination in this case is whether the Applicant established a case that he is a child of the deceased and therefore entitled to be considered as his dependant as envisaged under **Section 29(a)** of the **Law of Succession Act**. Upon evaluating the evidence adduced, it was clear to this court that the Applicant indeed established that he was a son of the deceased. He testified that prior to the deceased getting married to the Respondent, he was married to his mother Michere. Michere developed a mental disease that resulted in her hospitalization at Mathare Hospital. Over the period of more than fifty (50) years, the said Michere has been in and out of the said hospital. It was after the hospitalization of Michere that the deceased married the Respondent. During their marriage, the deceased and Michere were blessed with four (4) children, three daughters and a son. One of the daughters is deceased. The two daughters are married.

It is only the Applicant who is seeking to be considered as a dependant of the deceased. The Applicant's evidence in regard to the existence of the marriage between the deceased and his mother was corroborated by the testimony of PW2 and PW3, the brother and sister respectively of the deceased. The Respondent, other than denying the existence of the marriage between the deceased and Michere, did not adduce any

evidence to rebut the evidence that was adduced by the Applicant and his witnesses. In the premises therefore, this court holds that the Applicant established, to the required standard of proof on a balance of probabilities, that he is a child of the deceased and therefore is a dependant in accordance **Section 29(a)** of the **Law of Succession Act**. It therefore follows that the Respondent concealed material facts from the court when she petitioned the Kiambu Subordinate Court to be issued with a grant of letters of administration intestate in respect of the estate of the deceased. She concealed from the court the fact that the deceased had another family. This other family includes the Applicant. In the circumstances therefore, the grant issued to the Respondent by the said court cannot stand. It is hereby annulled in accordance with **Section 76(b)** of the **Law of Succession Act**.

So that all the issues in dispute in this succession can be determined once and for all, this court will proceed to issue orders that will conclusively determine the case. This court hereby issues a new grant to Naomi Wanja Ndiithi and John Njogo Ndeithi. That grant is confirmed on the following terms: John Njogo Ndeithi shall inherit a portion of the parcel of land known as LR. No. Escarpment/Kinari Block 1/1159 measuring one and a half (1½) acres. The rest of the parcel of land shall be inherited by Naomi Wanja Ndiithi. There shall be no orders as to costs.

**DATED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER, 2014.**

**L. KIMARU**

**JUDGE**