



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Succession Cause 650 of 2001**

**JOHN GIKANDI MAGONDU.....1ST PROTESTOR**

**-versus-**

**LOISE WANGARI MAGONDU.....PETITIONER**

**WILSON MACHARIA MAGONDU**

**alias WILSON KABURI MAGONDU.....2ND PROTESTOR**

**J U D G M E N T**

On 28th October 2010, this Court gave Letters of Administration Intestate in respect of the estate of Francis Magondu Githinji Mwara, deceased, to Loise Wangari Magondu, the Petitioner herein. The Petitioner thereafter took out the Summons for Confirmation of Grant dated 7th February 2011 seeking to have the Grant confirmed. John Gikandi Magondu (1st Protestor), Loise Wanjira Muthoga, David Kinyua Mwai, Zacharia Mwangi Muturi, Ephraim Ngure, Rose Wacuka Kanene, John Muthee Muchemi, Charles Njoroge Kariuki, Wachira Kariuki Macharia, Pauline Wamuhu Muriithi, Stevenson Githinji Mwai, Kibui Wanjau and Wilson Macharia Magondu (2nd Protestor), hereinafter referred to as the Protestors, each filed an Affidavit of Protest to oppose the Petitioner's Summons. The aforesaid dispute is the subject matter of this decision.

When the cause came up for hearing, this Court directed that the same be determined by affidavit evidence and by written submissions. I have considered the affidavit evidence plus the written submissions filed by both sides. In her affidavit filed in support of the Summons for Confirmation of Grant, the Petitioner identified the beneficiaries as follows:

1st House of Priscilla Wairimu – Deceased:

- (a) John Gikandi.**
- (b) Nelson Mwai.**
- (c) Peris Gathigia.**
- (d) Wilson Macharia.**
- (e) Lawrence Githinji (deceased but was survived by a wife and children).**

2nd House of Loise Wangari Magondu:

- (a) Joseph Githinji.**
- (b) Duncan Muthigani.**
- (c) Stephen Mwai.**
- (d) Susan Gathigia.**
- (e) Jackson Kihuha.**
- (f) Joyce Wambui.**
- (g) Catherine Wanja (deceased but is survived by Dennis Magondu).**
- (h) Fredrick Wachira.**
- (I) Jacob Muriithi.**

The Petitioner further identified the assets of the estate as follows:

- 1. *Magutu/Gatei/330.***
- 2. *Narumoru/Narumoru/Block I/Kieni East/862.***
- 3. *Narumoru/Narumoru/Block 1/Kieni East/307.***
- 4. *Narumoru/Narumoru/Block 1/Kieni East/558.***
- 5. *Nanyuki/Marura/Block 2 (Kariunga)/263.***
- 6. *Nanyuki/Marura/Block 2 (Kariunga) 264.***
- 7. *Murogo Farm (Pesi) Nanyuki.***
- 8. *Matetu/Kariunga.***
- 9. *Plot No.413 at Mwingi.***
- 10. *Plot No.91 at Mwingi.***
- 11. *100 Shares at Kenya Commercial Bank.***
- 12. *201 Shares at Kenya Tea Development Authority Farmers Company Limited.***
- 13. *13,486 shares at Ragati Tea Factory.***
- 14. *Standard Chartered Bank Account at Nyeri.***
- 15. *Nyeri Tea Sacco Account.***
- 16. *Kenya Commercial Bank Account at Mwingi.***
- 17. *Equity Bank Account No.0040101358196 at Karatina Branch.***

She proposed to have the estate distributed as follows:

- *The distribution of the estate listed above be done in accordance with Section 40 of the Law of Succession Act (CAP 160). All the deceased's assets with the exception of (xv) and (xvi) are to be divided between the first and second houses in the ratio of 1:2 that is 1/3 to the first house as the first house has five children while the second has nine and myself as the surviving widow.*
- *The Nyeri Tea Sacco Account and Kenya Commercial Bank Account at Mwingi were joint accounts held by myself and the deceased and the mode of operation was "either or survivor". For this reason, I am solely entitled to the funds in those accounts.*
- *The estate should also refund to me the sum of Ksh.188,000/= being the liabilities that I paid after the deceased died itemized as below:*

(i) *Kenya Power and Lighting Company Limited – Ksh.98,000/=.*

(ii) *Hospital Bill and Funeral Expenses - Ksh.90,000/=.*

- *The estate pays Telkom Kenya Limited Ksh.24,414.35 being outstanding balance which remains unpaid since the deceased's death.*

The Protestors opposed the Petitioner's mode of distribution. In the affidavit of Protest of **Wilson Macharia Magondu alias Wilson Kaburi Magondu**, it is stated that the deceased had expressed his wish to have the estate shared equally between the two houses. In paragraphs 3 and 4 of the Affidavit of Protest of **Wilson Macharia Magondu**, sworn on 12th July 2011 is deponed as follows:

"3. That the deceased had also done the following overt acts manifesting his wish that the property be shared between the two houses.

- He had physically sub-divided the ancestral land i.e. Land Parcel No.MAGUTU/GATEI/330 equally and each house was utilizing half share.*
  - He had bought and built two Plots at Mwingi namely Plot No.413 and 91.*
  - He had bought Land Parcel No. NANYUKI/MARURA/BLOCK 2/100 and sub-divided it into 2 each portion which was registered as Land Parcel No.NANYUKI/MARURA/BLOCK/263 and 264 which were registered in his own names.*
4. *During his life the only land which was being utilized by the family was Land Parcel No.Magutu/Gatei/330 with each house utilizing half share thereof".*

The aforesaid Protestor proposed the estate to be distributed as follows:

- **MAGUTU/GATEI/330 5.8 ACRES:**

- Loise Wangari Magondu – 2.9 Acres.
- John Gikandi Magondu – 2.9 Acres.

- **NARUMORU/NARUMORU/BLOCK 1/KIENI EAST 862 – 0.080 HA.:**

- Loise Wangari Magondu – 0.040 Ha.
- John Gikandi Magondu – 0.040 Ha.

- **NARUMORU/NARUMORU/BLOCK 1/KIENI EAST 307 – 7.87 Ha.:**

- Loise Wangari Magondu – 3.935 Ha.
- John Gikandi Magondu – 3.935 Ha.

- **NARUMORU/NARUMORU/KIENI EAST BLOCK 1/308 – 11.13 Ha.:**

- Loise Wangari Magondu – 5.565 Ha.
- John Gikandi Magondu – 5.565 Ha.

- **NARUMORU/NARUMORU/KIENI EAST BLOCK 1/65 – 3.17 Ha.:**

- Loise Wangari Magondu – 1.585 Ha.
- John Gikandi Magondu – 1.585 Ha.

- **NANYUKI/MARURA/BLOCK 2 (KARIUNGA) 263 – 28.34 Ha.:**

- John Gikandi Magondu – WHOLE.

- **NANYUKI/MARURA/BLOCK 2 (KARIUNGA) 264 – 28.34 Ha.:**

- Loise Wangari Magondu – WHOLE.

- **MUROGO FARM (PESI) NANYUKI:**

- Loise Wangari Magondu – HALF.
- John Gikandi Magondu – HALF.

- **PLOT NO.413 MWINGI:**

- Loise Wangari Magondu – HALF.
- John Gikandi Magondu – HALF.

- **PLOT NO.91 MWINGI:**

- Loise Wangari Magondu – HALF SHARE.
- John Gikandi Magondu – HALF SHARE.

- **100 SHARES OF KENYA COMMERCIAL BANK:**

- Loise Wangari Magondu – 50 SHARES.
- John Gikandi Magondu – 50 SHARES.

- **200 SHARES OF KTDA:**

- Loise Wangari Magondu – 101 SHARES.
- John Gikandi Magondu – 100 SHARES.

- **13,486 SHARES AT RAGATI TEA FACTORY:**

- Loise Wangari Magondu – 6,743.
- John Gikandi Magondu – 6,743.

- **SAVINGS AT STANDARD CHARTERED BANK ACCOUNT NO.01501452386 – Ksh.52,433.85:**

- Loise Wangari Magondu – HALF SHARE.
- John Gikandi Magondu – HALF SHARE.

- **SAVINGS AT NYERI TEA SACCO ACCOUNT NO.65310800213:**

- i. Loise Wangari Magondu – HALF SHARE.
- ii. John Gikandi Magondu – HALF SHARE.

- **SAVINGS AT KENYA COMMERCIAL BANK MWINGI ACCOUNT NO.:**

- i. Loise Wangari Magondu – HALF SHARE.
- ii. John Gikandi Magondu – HALF SHARE.

- **RENT COLLECTED FROM PLOT NO.413 AND 91 MWINGI SINCE 15/10/2001:**

- i. Loise Wangari Magondu – HALF SHARE.
- ii. John Gikandi Magondu – HALF SHARE.

- **TEA PROCEEDS:**

- i. Loise Wangari Magondu – HALF SHARE.
- ii. John Gikandi Magondu – HALF SHARE.

It is the submission of the Protestors that since Account No.0040101358196, with Equity Bank, Karatina Branch, was opened after the death of the deceased, it should not be included as part of the deceased's estate. The Protestors further urged this Court to issue orders compelling the Petitioner to make a complete and honest disclosure of all the assets of the estate, particularly monies held in banks, rental income collected from Mwingi Plots and Tea Proceeds paid to the estate after the deceased's demise. There is also an allegation that the clan elders of **Anjiru A Mbari Ya Waititu** deliberated on 16th November 2001 and resolved to distribute the estate equally between the two houses as per the deceased's wishes. One, Stephen Magondu, filed an affidavit to respond to the affidavit of Protest of Wilson Macharia in which he denied knowledge of the wishes of the deceased. He urged this Court to find that the clan elders did not have power to distribute the deceased's estate, hence the same be shared out in accordance with the provisions of the **Law of Succession Act**. He further pointed out that Account No.0040101358196 was opened in 2002 on the basis of a court order. There was also a suggestion that the accounts held at Nyeri Tea Sacco and Kenya Commercial Bank at Mwingi were in the joint names of the Petitioner and the deceased hence the same should automatically go to the Petitioner. According to the averments of John Gikandi Magondu, the deceased sub-divided *intervivos* **L.R. No.Magutu/Gatei/330** into two equal portions and gave a portion each to the two houses. It is further averred that the deceased caused **L.R. No.Nanyuki/Marura/Block 2/100** to be sub-divided into **L.R. No.Nanyuki/Marura/Block 2/263 and L.R. No. Nanyuki/Marura/Block 2/264** and allocated a portion to each house. **Loise Wanjiru Muthoga**, claimed that she bought two (2) acres to be excised from **L.R. No. Narumoru/Narumoru Kieni East Block 1/65 in 1998**, hence she should be included as a beneficiary as a Creditor. **David Kinyua Mwai** too protested claiming he bought three (3) Acres from the estate between 1996 and 2001, yet he was not included as one of the Creditors. He alleged that he purchased 3 acres to be excised from either **L.R. No. Narumoru/Narumoru Block 1/Kieni East/307 or L.R. No. Narumoru/Narumoru Block 1/Kieni East/558**. **Zachary Mwangi Muturi**, is another Protestor who claimed to have purchased two (2) acres from the estate in 1997 to be excised from either **L.R. No. Narumoru/Narumoru Block 1/Kieni East/308 Narumoru/Narumoru Block 1/Kieni East /558**.

**Narumoru/Narumoru Block 1/Kieni East/307**. This Protestor accused the Petitioner for failing to take into account his claim despite being a *bonafide* purchaser. **Ephraim Ngure**, on his part complained that the Petitioner had failed to include him as one of the estate's creditors having purchased 1 ½ Acres to be excised from **L.R. NO. Narumoru/Narumoru/Kieni East Block 1/65**. He alleged that he purchased the aforesaid parcel in 1998. **Rose Wacuka Kanene** has come forward alleging she bought 1 ½ Acres in 1997 to be excised from **L.R. No. Narumoru/Kieni East Block 1/65** and yet her right was not included in the sharing of the estate. **John Muthee Muchemi**, claimed that in 1996, that is, during the deceased's lifetime, he purchased 1 Acre to be excised from **L.R. No.Narumoru/Narumoru Block 1/Kieni East/307** but the Petitioner did not take his interest into account as a Creditor to the East. **Charles Njoroge Kariuki**, also protested claiming to have bought three (3) Acres from the estate in 1995 to be excised from **L.R. No.Narumoru/Narumoru Kieni East Block 1/65** which has not been factored by the

Petitioner while distributing the estate. **Wachira Kariuki Macharia**, is another Protestor who complained that the Petitioner had failed to indicate that he had purchased 2 Acres to be excised from **L.R. No. Narumoru/Narumoru Block 1/Kieni East/308 in 1997**. He alleged that he was surprised to later learn that the aforesaid parcel was sub-divided giving rise to:

**L.R. No. Narumoru/Narumoru Block 1/Kieni East/556,**

**L.R. No. Narumoru/Narumoru Block 1/Kieni East/557 and**

**L.R. No. Narumoru/Narumoru Block 1/Kieni East/558.**

He stated that his portion falls within the last sub-division i.e L.R. Narumoru/Narumoru Block 1/Kieni East/558: **Pauline Wamuhu Muriithi**, on her part claimed that between 1996 and 1999, he purchased three (3) Acres to be excised from either:

**L.R. No. Narumoru/Narumoru Block 1/Kieni East/307,**

**or**

**L.R. No. Narumoru/Narumoru Block 1/Kieni East/308,**

**or**

**L.R. No. Narumoru/Narumoru Block 1/Kieni East/558.**

It is her submission that the Petitioner failed to take into account her claim in her proposed distribution of the estate. **Mary Njoki Muchiri**, alleged in her Affidavit of Protest that the Petitioner failed to indicate that she had purchased a portion of land comprising:

**L.R. No. Narumoru/Narumoru Block 1/Kieni East/307,**

**or**

**L.R. No. Narumoru/Narumoru Block 1/Kieni East/308,**

**or**

**L.R. No. Narumoru/Narumoru Block 1/Kieni East/558.**

In his rejoinder to the Protestor's who claimed to have purchased land from the estate, John Gikandi Magondu, stated that those Protestors have failed to establish their claims. He alleged that those Protestors had previously attempted to lodge their claims against the estate but were found unmerited by various courts. Attached to the further affidavit of John Gikandi Magondu is a certified copy of a judgment delivered in Nyeri C.M.CR.C.No.4557 of 2004 in which Mary Njoki, David Kinyua, Wachira Kariuki Macharia and another were convicted for the offence of Forcible Detainer and sentenced to pay a fine of Ksh.20,000/=.

After a careful consideration of the evidence and the submissions, I think the following issues have arisen for determination:

**First**, is whether the estate should be shared equally between the two houses as proposed by Wilson Macharia Magondu or should be shared equally between the children of the deceased and the Petitioner, the deceased's widow.

**Secondly**, whether the other Protestors have genuine claims against the estate. The question is what remedy is available to these Protestors.

**Thirdly**, whether the deceased had expressed his wishes as to how the estate should be distributed while he was alive.

In my estimation, I think the most critical issue to determine first is whether we are dealing with the net estate. I say so because the bulk of the Protestors are claiming to be entitle to a share of the estate land on the basis that they purchased. In other words, the Protestors are stating that the estate owes them land or in the alternative, a refund of the purchase money. If that turns out to be correct, then the Protestors' claim will be regarded as a liability to the estate which must be settled before the estate can be shared. Though there is a denial of those claims by John Gikandi Magondu and Wilson Macharia Magondu, I do not think they have taken their time to consider the claim by each Protestor. It is not difficult to determine the mode of distributing the net estate in such estates. The fairest order I can make in this cause in view of the evidence presented is to postpone the Confirmation of Grant until the Protestors who allege to be Purchasers of Estates and Land have established their claim. I hereby make an order staying further proceedings in this success cause and direct the Protestors who are not beneficiaries to this estate to take out the relevant proceedings against the estate to prove their claims within three (3) months from the date of this judgment. Each party is to meet his or her own costs.

**Dated and delivered this 2nd day of November 2012.**

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**J. K. SERGON**

**JUDGE**