

**IN THE COURT OF  
APPEAL AT NYERI**

**(CORAM: KANTAI, ALI-ARONI & MUCHELULE,**

**JJ.A.) CIVIL APPEAL NO. 130 OF 2020**

**BETWEEN**

**PATRICIA HADIJA WAGAKI.....APPELLANT**

**AND**

**JOSEPH MURIITHI MATHINJI.....RESPONDENT**

*(Being an appeal against the Judgment of the High Court at  
Nanyuki (M. Kasango, J.) delivered on 19<sup>th</sup> April, 2018*

*in*

***H.C. Succ Cause No. 64 of 2016.)***

\*\*\*\*\*

**JUDGMENT OF THE COURT**

This is a first appeal arising from the judgment by the High Court of Kenya at Nanyuki which distributed the Estate of the late Wagaki Mathinji. Our mandate on first appeal is to re-appraise the evidence, draw inferences of fact and arrive at our own independent findings- see the case of ***Nairobi Bottlers Limited vs. Imbuga (Civil Appeal E661 of 2022) [2024] KECA 434 (KLR)***.

The estate in issue was that of Wagaki Mathinji also known as Alima Joseph Saku who died sometime in August 1978. Her daughter Miriam Wangui John petitioned for grant of letters of

administration in Nanyuki SPMC No. 41 of 2008 wherein it was

stated that the deceased had two daughters, Miriam Wangui John and Elena Wanjiru; as well as a deceased son named Daniel Mathinji, who was represented in the petition by his spouse, Irene Nyaruai (she also died in the course of proceedings in the High Court). The deceased was said to own Plot 350 Marmanet Forest Settlement Scheme. The wife of the late Daniel Mathinji (Irene Nyaruai) filed an objection to the petition stating that there was another unmentioned property namely Plot L2 Rumuruti Town. The objector also stated that the petitioner (Miriam Wangui John) was married and had inherited many properties from her late husband while the deceased had intended the two properties aforementioned to be inherited by the late, Daniel Mathinji. The objector also challenged the pecuniary jurisdiction of the subordinate court; which led to the file being transferred to the High Court at Nyeri, and it became HCSC No. 900 of 2012. The petitioner (Miriam Wangui John) was given the grant of letters of administration issued on 10<sup>th</sup> May, 2013. She filed an application dated 26<sup>th</sup> September, 2013 to confirm the grant and listed the beneficiaries as herself and the objector Irene Nyaruai. The petitioner listed only plot 350 Marmanet Forest for distribution and proposed that she jointly with Wanjiru George Thomlison receive 4 acres of the property while the objector, Irene Nyaruai, receives 1 acre. The grant was confirmed on 10<sup>th</sup> June, 2014.

The objector filed an application dated 28<sup>th</sup> July, 2015 seeking revocation of the grant for making false statements and

the

introduction of a stranger as a beneficiary of the estate. The objector also sought to have herself substituted with Joseph Mathinji, her son, as a beneficiary and additionally sought to have the other property Plot L2 Rumuruti Town included in the distribution. She also said that the petitioner ought to be restrained from interfering with Plot 350, which had reportedly now become LR Laikipia/Marmanet Extension/350. She also stated that the petitioner knew all along that she was unwell and that she did not sign the consent to confirmation of the grant but went ahead to file the application for confirmation of grant. The objector proposed an alternative mode of distribution where she would receive plot 350 wholly and plot L2 Rumuruti town would be registered to the petitioner jointly with Elena Wanjiru.

Eileen Wanjiru Tomlinson filed an affidavit stating that she was the other daughter to the deceased and that the objector and her husband had been given a property measuring 5 acres with the understanding that the petitioner would retain Plot 350, but the objector and her husband sold their gift. She also said that she was not aware of the deceased having a property in Rumuruti Town but the petitioner did own a property in Rumuruti Town. The petitioner swore an affidavit confirming that Plot L2 Rumuruti Town was her land and not part of the estate.

After considering the matter, the court delivered a judgment on 19<sup>th</sup> April, 2018 wherein the court revoked the grant issued on

10<sup>th</sup> May, 2013 to Miriam Wangui John as well as the confirmed grant of 10<sup>th</sup> June, 2014. The court distributed the estate by giving 2.67 acres of the property equally to Miriam John and Eileen Wangui while the balance of 4 acres was distributed to the children of the objector (Irene Nyaruai) as she had passed away before the judgment was delivered. The court also held that Plot L2 Rumuruti Town belonged to the estate and divided the same equally between Miriam John and Eileen Wangui.

Patricia Hadija Wagaki (the appellant) was substituted in place of the petitioner (Miriam Wangui John) who passed away. On 7<sup>th</sup> August, 2020, she was allowed to file this appeal out of time. The Memorandum of Appeal is dated 3<sup>rd</sup> September, 2020 seeking to have the High Court judgment set aside and substituted with an order dismissing the application for revocation of grant. The appellant states that the court discriminated against the petitioner and her co-beneficiary and relied on wrong information as Plot L2 Rumuruti Town did not belong to the estate. The appellant's submissions are dated 14<sup>th</sup> November, 2023 in support of the appeal.

The respondent has filed submissions dated 9<sup>th</sup> January, 2024 asking the court to dismiss the appeal.

This appeal was heard on 10<sup>th</sup> June, 2025 on the Court's virtual platform. Learned counsel **Mr. Mwangi** appeared for the

appellant while learned counsel **Mr. Chweya** appeared for the respondent.

It is not disputed that the late Wagaki Mathinji passed away leaving behind two daughters namely Miriam Wangui John and Elena Wanjiru who is also referred to as Eileen Wanjiru Tomlinson and Wanjiru George Tomlinson. The deceased also had a son named Daniel Mathinji who passed away and was represented in the succession proceedings by his wife Irene Nyaruai. Irene Nyaruai is now deceased and is represented by her son, the respondent. The main bone of contention between the parties herein concerns the inheritance of land parcel number 350 Marmanet Forest Settlement Scheme. The other additional issue is the question as to whether Plot L2 Rumuruti Town belongs to the estate of the deceased.

It is not disputed that parcel 350 Marmanet Forest was owned by the deceased. In the judgment by the High Court, the court gave 2.67 acres of the property equally to Miriam John and Eileen Wangui while the balance of 4 acres was distributed equally to the children of the objector (Irene Nyaruai).

We are of the respectful view that the learned Judge erred in this mode of distribution. **Section 38** of the **Law of Succession Act** indicates clearly that:

**“38. Where intestate has left a surviving child**

**or children but no spouse**

**Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”**

Consequently, we find that the learned Judge erred in considering the grandchildren of the late Daniel Mathinji as separate units and undertaking distribution that was unequal to the children of the deceased. The law required that the deceased’s children take priority in the distribution of the estate as grandchildren did not have a first right in distribution of the estate; they could only step into the shoes of their deceased parent. The Judge erred by giving equal priority to grandchildren in distribution of the estate of the deceased. We therefore set aside the distribution of parcel 350 Marmanet Forest as given by the court. The said property measures about 2.7 hectares and shall be divided equally to Eileen Wangui Tomlinson, to the estate of Miriam Wangui John and to the estate of Daniel Mathanji.

We find no reason to differ with the decision by the learned Judge that Plot L2 Rumuruti town belonged to the deceased. The rent demand notice on record from the Town Council of Rumuruti, which appears on page 29 of the record of appeal, has not been controverted. Therefore, it is a justified finding that the property, Plot L2 Rumuruti Town, also belonged to the deceased. However, we are of the view that the property ought to be held jointly in the

names of the three children of the deceased herein in accordance with section 38 of the Law of Succession Act. It is so ordered.

This appeal succeeds to the extent stated above. There shall be no order as to costs considering the relationship between the parties.

**Dated and delivered at Nyeri this 11<sup>th</sup> day of December, 2025.**

**S. ole KANTAI**

.....  
**JUDGE OF**

**APPEAL ALI -**

**ARONI**

.....  
**JUDGE OF APPEAL**

**A. O. MUCHELULE**

.....  
**JUDGE OF APPEAL**

*I certify that this is  
a true copy of the  
original*

***Signed***  
**DEPUTY REGISTRAR**