

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
(CORAM: R. MWONGO, J.)
SUCCESSION CAUSE NO. 25 OF 2012
(FORMERLY EMBU CHIEF MAGISTRATE'S COURT SUCC. 279 OF 2017)
IN THE MATTER OF THE ESTATE OF NTHIGA MBOGO (DECEASED)

CATHERINE WANYAGA NTHIGA.....1ST ADMINISTRATOR/RESPONDENT

BONIFACE KATHEE NDWIGA.....2ND ADMINISTRATOR/RESPONDENT

-VERSUS-

JOSEPH NDWIGA MBOGO.....PROTESTOR

R U L I N G

Background

1. The deceased died on 19th May 2006. The respondents petitioned for a grant of letters of administration in the estate of the deceased and the same was issued to them on 20th September 2012. They then filed summons for confirmation the grant and the estate was in due course distributed. However, the distribution was set aside by this court through a judgment delivered on 22nd January 2020. The court ordered that the estate be distributed afresh, and administrators filed summons for confirmation of grant pursuant to the judgment.

The Summons for Confirmation of Grant

2. The administrators filed summons for confirmation of grant dated 24th April 2024 through which they seek confirmation of the grant. They stated that the estate of the deceased comprises of land parcel no. Ngandori/Kiriari/2279. They proposed the following mode of distribution:
 - a) Catherine Wanyaga Nthiga- 0.40Ha
 - b) Boniface Kathee Ndwiga- 0.20 Ha
 - c) Charles C. Njiru Wanthiga to hold in trust for Victor Mwenda Njiru- 0.20Ha

The Protest

3. The protestor filed an affidavit of protest objecting to the proposed mode of distribution. He stated that the deceased, his father, left him the whole of land parcel no. Ngandori/Kiriari/2279 and asked him to give a part of it to the 1st administrator. That this was said by the deceased in the presence of Robison Nyaga, the 1st protestor's brother. That the 1st administrator is his sister and the 2nd administrator is his son.

4. He stated that Victor Mwenda Njiru is his brother's son and grandson of the deceased, who was already provided for by the deceased before he died. He argued that the grandchildren of the deceased should inherit his estate through their parents and not directly, unless their parents were dead. He contended that he had been excluded from the estate of the deceased yet he is a son of the deceased. He opposed the distribution proposed and termed it as unfair and that it goes against the wishes of the deceased when he was still alive.

Reply to Protest

5. In his reply to the protest, the 1st administrator deposed that on 22nd March 1997, the deceased called a meeting in which he expressly stated that the protestor was not a beneficiary in land parcel no. Ngandori/Kiriari/2279 because he had already given him land parcel number Kyeni/Kigumo/2315. The deceased also stated that the land parcel no. Ngandori/Kiriari/2279 would be distributed as stated in the summons for confirmation. She deposed that the protestor was a present member in the said meeting whose minutes she produced as evidence. She urged the court to dismiss the protest and confirm the grant.

The Evidence at the trial

6. The matter was heard *viva voce*.
7. AW1 was the protestor who relied on the averments made in his affidavit of protest as his evidence in chief. He stated that it was the wish of the deceased that land parcel no. Ngandori/Kiriari/2279 should be left solely to him, and that he would give out a portion of it to the 1st administrator at his discretion. He said that the deceased told him this when he was alone with him one day before he died. He stated that he is already living on the said land and he has developed it. He denied being given land elsewhere by the deceased and stated that the deceased told him that the land parcel no. Ngandori/Kiriari/2279 would be left to him and the 1st administrator. In cross-examination, he stated that he was prepared to take the land and give ½ acre to the 1st administrator. He stated that he spoke to the deceased on 18th May, 2006 just before he died on 19th May 2006.
8. RW1, the 1st administrator stated that the deceased had wished that upon his death, she be given 1 acre out of land parcel no. Ngandori/Kiriari/2279. That the remaining portion was to be distributed amongst his grandchildren. She referred to the minutes of a meeting held in 1997 where the whole family was present. In cross-examination, she stated that all the members present at the meeting,

except the protestor, signed the minutes although he was present. She stated that she did not have any proof that the deceased had given the protestor another piece of land separate from land parcel no. Ngandori/Kiriari/2279 as deposited.

Parties' Submissions to the protest

9. The protestor filed his written submissions in which he relied on section 29 of the Law of Succession Act and the case of **In the Matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] KEHC 1930 (KLR)**. He argued that he is a direct dependant of the deceased; and that the grandchildren of the deceased cannot inherit directly from his estate when their own parents are still alive. For this argument, reliance was placed on the cases of **Cleopa Amutala Namayi v Judith Were [2015] KEHC 6000 (KLR)**, **Eddah Wangu & another v Sacilia Magwi Kivuti (Deceased) Substituted with Ribereta Ngai [2021] eKLR** and **Re Estate of Wahome Njoki Wakagoto (2013) eKLR**. He urged the court to exercise justice and grant him the estate.

Issues for Determination

10. The issue for determination is how the estate of the deceased should be distributed.

Analysis and Determination

11. The 1st administrator and the protestor are children of the deceased while the 2nd administrator and Victor Mwenda, the other proposed beneficiary are his grandchildren. The administrators proposed a mode of distribution based on minutes of a meeting held on 22nd March 1997 when the deceased was still alive. According to the 1st administrator, it was the wish of the deceased that the land be distributed, as proposed, to his daughter and 2 grandchildren.

12. In her testimony, RW1, the 1st administrator, acknowledged that the protestor was present during the meeting, but that he did not sign the minutes as the other members present signed them. The protestor contests the mode of distribution proposed on the grounds that the grandchildren of the deceased cannot inherit directly from his estate while their parents are still alive. He denied having been given any other piece of land by the deceased. The 1st administrator could not prove that indeed the deceased had left the protestor land elsewhere.

13. What, then, is the effect of the minutes of the meeting held on 22nd March 1997 when the deceased was still alive? If the meeting culminated in the deceased's

wishes on how his estate should be distributed, do the minutes amount to a valid will in law? The answer is in the negative.

14. Under Section 3(1) of the Law of Succession Act, ***"will" means the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, duly made and executed according to the provisions of Part II, and includes a codicil.***
15. The test for validity of a will is set out under section 11 of the Law of Succession Act. Part II of the Act provides for the various features that constitute a valid will. At the point of petitioning for a grant, the administrators informed the court that the deceased died intestate and the succession proceedings were undertaken as intestate proceedings. This means that the minutes could not be held to be a valid will carrying the executable wishes of the deceased while he was still alive.
16. Moreover, given that all parties proceeded with succession in the estate as an intestate estate, the court should strictly apply the provisions of the Law of Succession Act for intestate proceedings. The wishes of the deceased before his death do not, and cannot, be brought to bear to outweigh the provisions of the Law of Succession Act for purposes of distribution of the intestate estate. Therefore, distribution of this estate is subject to the intestate provisions of the Law of Succession Act.
17. The law is clear and the Courts have held on many occasions that the grandchildren of the deceased can only inherit directly from their grandparents where their own parents are dead. It is the position in law that the children of the deceased take priority in inheritance before their own children. In ***In re Estate of the Late Joshua Mangula Osore (Deceased) [2025] KEHC 17492 (KLR)***, the court held:

"12. The law is clear that grandchildren can inherit the estate of their grandparents through their parents. In the case of Re Estate of Florence Mukami Kinyua (Deceased) (2018) eKLR Matheka J stated:

"A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parents' share in the estate of the grandparents. This was stated in Re Estate of Wahome Njoki Wakagoto (2013) eKLR where it was held:- Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981.

The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.'"

This was also the position of the courts in **In the Matter of the estate of Veronica Njoki Wakagoto (Deceased) (supra)** and **Re Estate of Wahome Njoki Wakagoto (supra)**.

Conclusions and Disposition

18. On the basis of the above provisions of the law and the authorities, I hold that the estate of the deceased is to be inherited by the children of the deceased and not their children as the named beneficiaries.
19. Accordingly, the protest herein succeeds.
20. Since there is no further claim by any other sibling at this point, the court hereby directs the administrators to file a summons for confirmation with a list of beneficiaries interested in the estate together with the relevant consent form and mention the matter forthwith for final orders, and in any event within 45 days of the date hereof.
21. Should the administrator fail to file the summons as ordered above, the estate of the deceased shall be distributed to the 1st administrator Catherine Wanyaga Nthiga, the Protestor Joseph Ndwiga and Charles C. Njiru Wathiga in equal shares.
22. Orders accordingly.

Delivered, dated and signed at Embu High Court this 18th day of February, 2026.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Mugane for Protestor

2. Catherine Wanyaga Nthiga
3. Francis Munyao - Court Assistant