



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. E033 OF 2021

GABRIEL GITONGA KARAGU.....APPELLANT

VERSUS

FAITH WAWIRA KARAGU.....1ST RESPONDENT

**MERCY NYAWIRA KANYI.....2ND
RESPONDENT**

PATRICK MURAGE KANYI.....3RD RESPONDENT

ANTHONY IRUNGU KANYI.....4TH RESPONDENT

CHRISTOPHER NGARI KANYI.....5TH RESPONDENT

SAMSON MUNENE KANYI.....6TH RESPONDENT

**JUDY NJERI ELIUD.....7TH
RESPONDENT**

IAN KARAGU MURIITHI.....8TH RESPONDENT

**JOHN KIMANI NYAGA.....9TH
RESPONDENT**

**EUNICE WANJIKU NYAGA.....10TH
RESPONDENT**

DANIEL GITHAKA NYAGA.....11TH RESPONDENT

**JUDY NYAWIRA NYAGA.....12TH
RESPONDENT**

**(An appeal from the Judgment of Hon. M. Kivuti (S.R.M) in Baricho Succession Cause No.
89 of 2016 delivered on 19/8/2021)**

JUDGMENT

- [1] On 24/12/2019, Wawira Karagu Gituku, the wife to the deceased, filed Summons for Confirmation of Grant where, at paragraph 5 of the affidavit in support thereof, she proposed how **L.R No. MWERUA/KAGIO/267 (henceforth called the estate property)** was to be distributed.
- [2] Daniel Githaka Karagu swore an affidavit of protest on 8/1/2019 on his behalf and that of Lucy Wanja Nyaga, Peterson Ndambiri Karagu, James Kibugi Karagu and Johnson Mithamo Karagu urging that deceased had 28,400 shares at Barclays Bank of Kenya Limited, which ought to be shared equally among the 9 beneficiaries of the deceased.
- [3] Faith Wawira Karagu swore an affidavit in reply to the Protest on 5/3/2019 proposing that the estate property should be shared according to the number of children in each house. In her view, the distribution should take into account the portion each child was shown by the deceased to occupy and/or develop.
- [4] Gabriel Gitonga Karagu, the Appellant herein swore an affidavit of protest on 19/10/2020 objecting to the inclusion of Mercy Murage Kanyi, Patrick Murage Kanyi, Anthony Irungu Kanyi, Christopher Ngari Kanyi and Samson Munene Kanyi, the children of his deceased sister namely Nancy Wamaitha Kanyi.
- [5] Mercy Nyawira Kanyi swore an affidavit of protest on 7/12/2020 urging that the estate property ought to be shared equally among all the beneficiaries of the deceased.
- [6] Upon full hearing of the case, the trial court distributed the estate property and the Barclays Bank shares equally between the 2 houses as follows:

In the end, the 1st to 5th protestors' protest and the 6th protestor's protest fail and both are dismissed. The 7th to 13th protestors' protest succeeds. The estate of the deceased comprising parcel number Mwerua/Kagio/267 and shares in Barclays Bank of Kenya shall be distributed in equal shares between the two houses. The Grant of Letters of Administration of the estate of the deceased is confirmed in the following terms:

1. Parcel Number MWERUA/KAGIO/267

(i) 3.7 acres - Wawira Kiragu Gituku

(ii) 3.7 acres - Lucy Wanja Nyaga, Daniel Githaka Karagu, Peterson Ndambiri Karagu, James Kibugi Karagu and Johnson Mithamo Karagu jointly.

2. Shares in Barclays Bank of Kenya

(i) ½ of total shares - Wawira Kiragu Gituku.

(ii) ½ of total shares - Lucy Wanja Nyaga, Daniel Githaka Kiragu, Peterson Ndambi Karagu, James Kibugi Karagu and Johnson Mithamo Karagu jointly.

For the avoidance of doubt, since the Applicant's house had agreed that their share be registered in her name as their trustee, Nancy Wamaitha's share shall be counted as part of the Applicant's house's share of both MWERUA/KAGIO/267 and Shares in Barclays Bank of Kenya. In sharing out the land, it shall be ensured as practically possible that the beneficiaries get the portions of the land which they have been occupying and have developed."

The Appeal

[7] On appeal, the Appellant filed his memorandum of appeal on 17/9/2021 raising 5 grounds as follows:

1. *The Honourable Magistrate erred in law and fact by holding that half share of the Estate of the deceased comprised on L.R MWERUA/KAGIO/267 measuring 3.7 Acres and being the entitlement to the 2nd House of the deceased be shared equally between the children of the deceased and some Grandchildren of the deceased being the 2nd to 8th Respondents and which finding is against the relevant Provisions of the Law of Succession Act Cap 160 Laws of Kenya applicable to the circumstances of the estate of the deceased herein.*
2. *The Honourable Magistrate erred in law and fact by delivering a finding which was contrary to the weight of evidence adduced by the Appellant and the peculiar circumstances of the matter before her.*
3. *The Honorable Magistrate erred in law and fact by not finding that, the circumstances of the matter does not warrant the grand children of the deceased getting a share out of the estate of the deceased comprised on LR MWERUA/KAGIO/267.*
4. *The Honourable Magistrate erred in law and fact by not fully consider the evidence and submissions by the Appellant hence arrived at a wrong finding not supported by law and fact of the matter.*

5. *The Honourable Magistrate erred in law and fact by delivering a Judgment against the weight of evidence, the relevant law and decided case law on the subject matter.*

Duty of the court

- [8] This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See **Selle v Associated Motor Boat Co. & others [1968] E.A. 123**).

Oral Evidence

- [9] **PW1 Daniel Githaka Karagu**, testified that, *“Karagu Gituru deceased was my father. He died in 1989. He left 2 wives behind Sofia Muthoni Karagu was the eldest and my mother. She died in the year 2006. She had 5 children. Lucy Wanja, myself, Peterson Ndambiri Karagu, Johnson Mithamo Karagu and James Kibugi Karagu in the order of birth. The 2nd wife is Faith Wawira Karagu. Her children are Emily Wanja, Gabriel Gitonga Karagu, Judy Njeri Eliud. The other children of Faith Wawira Mugo and Murithi passed away. The deceased had a parcel of land No Mwerua/Kagio/267 and some shares in the bank. The land is about 7 acres in size. The shares are held in BBK. They are 28,400 as indicated in the dividend notice attached to my protest. I produce it as an exhibit. Exhibit 1. The parcel should be shared between the 2 houses equally with each house getting 3.5 acres. The Petitioner share should be registered in her name and our share be registered in our names as our mother is deceased. This should also apply to the BBK shares. Stanley Kanyi is my brother in law. He had married Wamaitha Karagu who is the Petitioners deceased daughter. She passed on many years ago and she was married by her husband in Nguguini in their land. She left behind several children. She died after my father. Her children were not my father’s dependants. Kanyi is unhealthy man and he has settled his children on his land. They do not depend on the Petitioner and they have to date not done so.”*

[10] On cross examination, he stated that, *“The Petitioner's children are Mary Wanja, Gabriel Gitonga and Judy Njeri Eliud who are alive. The others who are deceased are Wamaitha Kanyi, Samson Mugo and Mureithi Kanyi. The Petitioner is nearly 100 years old and I cannot confirm that her grandchildren visit her regularly. Wamaitha is entitled to a share of the estate. I do not live on the subject parcel of Land. The deceased showed my brothers and I portion to cultivate.*

[11] **PW2 Gabriel Gitonga Karani**, testified that, *“The deceased was my father. He died in 1989. He had 2 wives. My step mother was Sofia Muthoni Karagu who died years after my father. She bore 5 children are all alive. The 2nd wife, faith Wawira Karagu who was born in 1924 bore Mary Wanja, Nancy Wamaitha Kanyi (deceased), I, Jackson Mureithi Karagu, Samson Mugo (deceased) and Judy Njeri Eliud. Nancy Wamaitha was married to Michael Kanyi. Daniel who is still alive. She had 5 children as listed in my affidavit. She and her children were not dependent on the deceased. She was buried in her husband’s farm in Nguguini village. All her children are adults. There are not dependent on the Petitioner. Kanyi is a wealthy man. They should not get a share of the deceased’s property. The parcel of land left behind by the deceased is Mwerua/Kagio/267 which is 7.4 acres. It should be shared into 2 equal parts as the deceased had subdivided it into two amongst the houses. The shares in BBK should be shared into 2 parts between the 2 houses.”*

[12] On cross examination, he stated that, *“Am a son of the Petitioner. The grand children of my father are not entitled to a share. Ian Karagu is not known to me. The names of the 2nd set of Protestors who are grandchildren of the deceased were not included in the 1s chief’s letter. We had agreed as a family to have the property subdivided equally between the houses. Wamaitha’s share should be given to the Petitioner. I live on the deceased’s land and I have not sold my share.”*

[13] **PW3 Mercy Nyawira Kanyi**, testified that, *“I swore an affidavit of protest on 7/12/2020. The deceased was my grandfather. Am a child of Nancy Wamaitha (deceased.) I pray that my mother should be given a share of the estate. I produce the copy or chief’s letters as an exhibit P Exhibit 2, an agreement of sale dated 31/01/2019, P Exhibit 3, Loan agreement dated 6/7/2019 P. Exhibit 4.”*

[14] On cross examination, she stated that, *“I pray for a share of the deceased’s estate by virtue of being his grandchildren. My father is Michael Kanyi Ngari. My mother passed on 10/6/1997 and she was buried on my father’s land. Her matrimonial home is in Kagio. I did not take out letters of administration for my late mother’s estate. We were not dependent on the deceased in this cause.”*

[15] **DW1 Faith Wawira Karagu**, testified that, *“I filed summons in confirmation of grant on 24/12/2018. The deceased was my husband. I was his 2nd wife. 3 of my children are alive. 3 are deceased. The eldest is Mary Wanja, Murithi, Mugo Wanjiru and Wanjiku The deceased left behind a parcel of land where I live on. I pray that the parcel be shared equally between the houses.”*

Submissions

[16] The Appellant urges that the 2nd to 6th Respondents are grandchildren of the deceased, who reside at their father’s place, and cites **Cleopa Amutala Namayi v Judith Were Succession Cause 457 of 2005 [2015] eKLR.**

[17] The 2nd to 8th Respondents urge that they are entitled to the share of their deceased mother, **Nancy Wamaitha**, and cite **Re Estate of Veronica Njoki Wakagoto (Deceased) | 2013] eKLR and Re Estate of Florence Mukami Kinyua (Deceased) [2018] eKLR.**

[18] The 9th to 12th Respondents urge that the Appellant has not demonstrated any error in law, misdirection or improper exercise of discretion by the trial court, and cite **Rono v Rono (2005) & another (Civil Appeal 66 of 2002) [2005] KECA 326 (KLR) (29 April 2005) (Judgment) and In the Matter of the Estate of Veronica Njoki Wakagoto (deceased) (2013) eKLR.**

Analysis and Determination

[19] From the grounds of appeal, the issue for determination is whether the 2nd to 6th Respondents were beneficiaries of the estate of the deceased.

[20] PW1 conceded in his testimony that, ***“Stanley Kanyi is my brother in law. He had married Wamaitha Karagu who is the Petitioners deceased daughter. She passed on many years ago and she was married by her husband in Nguguini in their land. She left behind several children. She died after my father.”*** His testimony was consistent with that of PW2 who restated that, ***“The 2nd wife, faith Wawira Karagu who was born***

in 1924 bore Mary Wanja, Nancy Wamaitha Kanyi (deceased), I, Jackson Mureithi Karagu, Samson Mugo (deceased) and Judy Njeri Eliud. Nancy Wamaitha was married to Michael Kanyi.”

[21] From the totality of the evidence on record, it is clear that **the mother** to the 2nd to 6th Respondents namely **Nancy Wamaitha** was a daughter of the deceased with his 2nd wife, **Faith Wawira Karagu**, and she was, therefore, entitled to a share of the estate.

[22] Now that the said **Nancy Wamaitha** is deceased, the trial court properly directed that her share in the estate of the deceased would devolve to her estate, which comprises of her children, the 2nd to the 6th Respondents herein, as follows,

“Similarly, Nancy Wamaitha; the mother of the 7th to 14th protestors herein is entitled to a share of the deceased’s estate. Since there is no evidence that PW3 or any of her siblings have taken out Letters of Administration, their late mother’s share of the estate of the deceased herein will devolve to her estate. The said share would thereafter have to be dealt with in accordance with the Law of Succession if and when the trust is dissolved and the share of the Applicant’s house is distributed.”

Consequently, the Court finds no justification to interfere with the findings and orders of the trial court in the matter.

ORDERS

[23] Accordingly, for the reasons set out above, the Court finds that the appeal has no merit and it is dismissed.

[24] There shall be no order as to costs in the succession matter.

Orders accordingly.

DATED AND DELIVERED THIS 30TH DAY OF APRIL 2026.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. G. Kahiga of Kiguru Kahiga & Co. Advocates for the Appellant.

Mr. Ngata Kamau of Ngata Kamau for 2-8 Respondents.

Mr. Munyoki of Ndegwa & Ndegwa Advocates for 9-12 respondents.

Mr. Ndungu Chege of Ndungu Chege Associates for 1-5 Interested Parties.