



**In re Estate of Nganga Kamau (Deceased) (Succession Cause
432 of 2015) [2024] KEHC 1684 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 1684 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 432 OF 2015
SM MOHOCHI, J
JANUARY 25, 2024**

BETWEEN

FAITH NYAMBURA KAMAU APPLICANT

AND

PETER MUCHERU 1ST RESPONDENT

ANN WANJA 2ND RESPONDENT

PAUL WANYINYI 3RD RESPONDENT

MARTHA WANJERI 4TH RESPONDENT

RULING

1. The Late Ng'ang'a Kamau passed away on 10th April 2015 and he left behind a surviving widow, Mary Nyaguthi Ng'ang'a who was initially issued with a Grant of letter of Administration intestate on the 12th January 2016. Unfortunately, Mary Nyaguthi Ng'ang'a succumbed and died on the 28th December 2015.
2. The Late Ng'ang'a Kamau was survived by
 - (1) Mary Nyaguthie Nganga -Widow-(Deceased),
 - (2) John Nyaga Nganga - Son,
 - (3) Patrick Mwaniki Mangi - Grandson,
 - (4) Samwel Kamau Nganga –Son (Deceased)
 - (5) David Kiarie Nganga -Son,
 - (6) Paul Wanyinyi Nganga -Son,



- (7) Ann Wanja -Daughter,
 - (8) Martha Wanjeri Nganga- Daughter,
 - (9) Peter Mucheru Nganga- Son,
 - (10) Simon Kanjas Nganga- Son,
 - (11) Milkah Wanjiru Nganga-Daughter,
 - (12) Margret Muthiri Nganga - Daughter,
 - (13) Elizaberth Wambui Nganga- Daughter.
3. Samwel Kamau Nganga a son of the deceased unfortunately succumbed and died on the 8th November 2015 and the Applicant Faith Nyambura Kamau in 1st Application Dated 25th January 2022 is the surviving widow of Samwel Kamau Nganga and a daughter in law of the Deceased in this cause.
 4. Following the demise of Mary Nyaguthi Ng'ang'a whose grant appointing her a personal representative was made posthumously, a substitution was successfully effected replacing the deceased personal representative with Peter Mucheru Nganga, Ann Wanja, Paul Wanyinyi Nganga and Martha Wanjeri Nganga made on the 17th May 2016.
 5. The Personal Representatives moved the Court for confirmation of grant on the 18th May 2017 and in support of the summons included a general consent form which Faith Nyambura Kamau has executed as she was listed to inherit 1.5 acres to hold in trust of Martha Wanjeri, Milkah Wanjiru Nganga and Margaret Muthiri Nganga (all minors). Subsequently on the 15th October 2018, a further Consent was filed which Faith Nyambura Kamau has executed as she was listed to inherit 2.5 acres.
 6. The 1st Application Chamber Summons by Faith Nyambura dated 25th January 2022 filed Pursuant to Section 5 of the Judicature Act, Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules seeking the following reliefs;
 - i. Seeking to cite Peter Mucheru, Ann Wanja, Paul Wanyinyi and Martha Wanjeri for contempt for defiance of the orders issued by this Court on 24th June, 2021.
 - ii. That the Court compels them to fully with the terms of the order of the Court dated the 2nd July, 2021, and the Court be pleased to deny the Respondents herein any audience until they have produced a full and accurate inventory of the assets and liabilities together with the accounts of the estate of the deceased.
 - iii. That, the cost of this application be provided for and be borne by the Respondent.
 7. The 2nd Application is a Summons for rectification of grant dated 16th March 2022 seeking that, the Certificate for Confirmation of Grant dated 13th November,2018 be rectified such that, all the properties distributed to Faith Nyambura are held in trust by the Administrators of the Estate of the Late Nganga Kamau.
 8. The Respondent equally filed an affidavit in support of the summons. This affidavit includes evidence that their late brother Samuel Kamau had another family Jane Wairimu Mburu (second wife) and a daughter., Leah Wanjiru, whom they recognize as beneficiaries in the estate and therefore should receive a share of the inheritance.
 9. The Applicant, Faith Nyambura Kamau, filed a response vide a Replying Affidavit dated 16th August,2022 challenging the Summons for Rectification of the Grant.



10. Jane Wairimu Mburu, who is allegedly a wife of the late Samuel Kamau, has Sworn a Replying Affidavit dated 15th November, 2022 where she asserts her relationship with the late Samuel Kamau and the dependency of herself and their daughter on him.
11. The parties presented their evidence through *viva voce* evidence from the 2nd May 2023 to the 14th July 2023.

The Applicant's Case

12. The 1st Applicant premised her Application on the following grounds:
 - i. That, on the 2nd July, 2021 orders were issued by Hon. Lady Justice Mumbua T. Matheka requiring the Respondents/Administrators to produce to Court, within sixty (60) days, a full and accurate statement of account of the properties of the Late Nganga Kamau from the time of the deceased's death to date.
 - ii. That, further the Court ordered the Respondents/ Administrators to strictly distribute the estate as per the schedule confirming the grant dated 13th November, 2018.
 - iii. That, the original order was extracted and duly served upon the Respondents/Administrators herein on the 8th July, 2021.
 - iv. That, the Respondents/Administrators ought to be held accountable and compelled by this Court to respect due process and for the Court to stamp its authority that Court orders must not be issued in vain.
 - v. That, the refusal and neglect by the Respondents/Administrators to comply with the orders of the Court have stalled the process of administration of the estate contemplated by Court in the other terms of the said order.
 - vi. That, it is in the best interest of justice and for purposes of upholding the dignity and honour of this Court that the orders sought herein be granted.
 - vii. That, the Applicant has no other means of enforcing the orders of the Court issued by the Honourable Judge.
13. In a nutshell Faith Nyambura Kamau wanted the Respondents/Administrators compelled to sign off the transmission forms and distribute to her the portion entitlement to the estate of her deceased husband to hold in trust for her minor daughters. The Applicant contends that, the Administrators have failed and or refused to distribute by way of transmission the share of a deceased husband.

The Respondents/Administrators Case

14. It is the Respondent/Administrators submissions that, the issues for this Court's determination are three: -
 - i. Whether Jane Wairimu Mburu has established that she is the wife of the late Samuel Kamau.
 - ii. Whether Jane Wairimu Mburu and Leah Wanjiru, should be recognized as dependents and beneficiaries in the Estate of Samuel Kamau.
 - iii. Distribution of the Estate.
15. That Jane Wairimu, is the wife of the deceased since they were married under customary law and lived together for over ten (10) years and that, the *Marriage Act*, 2014 Section 6(1) (c) recognizes Customary



marriages as a type of marriage in Kenya, the Judicature Act Section 3(2) also recognizes customary law as a system of marriage in Kenya. That Jane Nyambura in her Replying affidavit stated that, she and the deceased Samuel Kamau contracted a customary marriage which is a type of marriage recognized in the Kenyan Law.

16. That Section 43 of the Marriage Act governs customary marriages and states that, this type of marriage is celebrated in accordance with the customs of the communities of one or both of the parties that intend on getting married and further sub-section 2 states that;

“where there is a requirement that dowry is required to prove customary marriage, the payment of token amount of dowry shall be sufficient to prove customary marriage.

17. The Respondents contend that it is Jane Wairimu assertion that, the deceased acknowledgement of their marriage, paid dowry at their home in Wanjohi in Olkalou and that there was indeed a marriage between her and the deceased, Samuel Kamau.

18. Furthermore, the 1st Respondent corroborates the averment when he stated in Court that Jane was introduced to him by their late brother and he was also present during their introduction.

19. Jane Wairimu testified and stated that from their marriage they were blessed with two issues; Peter Mburu (1996) who passed away and Leah Wairimu (1997).

20. That the Respondents and Jane Wairimu have proven on a balance of probability as envisioned in Section 107 of the Evidence Act of the existence of a customary marriage between herself and the deceased.

21. Reliance is placed on the decided Court of Appeal case in *Eliud Maina versus Margaret Wanjiru Gachanga* (2019) eKLR states that:

“Customary law is not static. Like all other human inventions, it is dynamic and keeps evolving from generation to generation..... To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete... The bottom line appears that the essential steps ceremonies must be performed irrespective of the form which they performed.”

22. The Respondents were pre-occupied in showcasing that Jane Wairimu has proven beyond a balance of probability that indeed there existed a customary marriage and that she was and/or is the wife of the late Samuel Kamau Nganga.

23. The Respondents submit that, Wairimu has proved on a balance of probability that she is and/or was the wife of the late Samuel Kamau, and it is therefore just and fair to conclude that Section 29(a) of the Law of Succession (Amendment) Act 2021 applies in this case, that Jane Wairimu has disposed her burden of proof as invoked in Section 107 of the Evidence Act that she is and/or a spouse of the Late Samuel Kamau and Leah Wanjiru is the child of the deceased, therefore according to this section they need not prove that the deceased was providing for them immediately prior to his death and are rightful beneficiaries in the Estate of Samuel Kamau.

24. The Respondents in a departure away from the substantive prayer as is contained in their Application dated 16th March 2022 by moving away from seeking that, the Certificate for Confirmation of Grant dated 13th November, 2018 be rectified such that, all the properties distributed to Faith Nyambura are held in trust by the Administrators of the Estate of the Late Nganga Kamau.



25. The Respondents contend that Jane Wairimu has exhaustively proven to Court that she is and/or was the wife of the Late Samuel Kamau hence he was in a polygamist union, which distribution of the Estate is guided by Section 40 of the *Law of Succession Act*, CAP 160. This section provides that
- “where an intestate has married more than once under any system of law permitting polygamy, his person and household effects and the residue of the intestate estate, shall in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.”
26. This position is reiterated in the case of *Rono versus Rono* Civil Appeal No.66 of 2002 where Waki JA stated inter alia that “more importantly, Section 40 of the *Act* which applies to the estate makes provision for distribution of the estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.”
27. Further the case *In the matter of the Estate of Nelson Kimotho Mbiti(deceased)* HCSC No. 169 of 2000, Koome J directed that the estate of a polygamist be divided in accordance with the provisions of Section 40 of the *Act*.
28. In light of the foregoing, the Estate of the late Samuel Kamau (deceased) should be distributed in accordance with the principles of Section 40, the Late Samuel Kamau was in a polygamist union with two wives it is therefore prudent that the Jane Wairimu Mburu be included in the distribution of the Estate of the late Samuel Kamau.
29. The Respondents in the matter herein have prayed that the Certificate for Confirmation of Grant dated 13th November, 2018 be rectified such that all the properties distributed to Faith Nyambura are held in trust by the administrators of the Estate of the Late Nganga Kamau since Jane Wairimu and her daughter will stand prejudiced as they will be excluded from having a share of the inheritance.
30. It is the Respondents submissions that Jane Wairimu has proven that she is wife of the late Samuel Kamau, she and her daughter are dependents in the Estate of the late Samuel Kamau and she should therefore be included in the distribution of the Estate of the Late Samuel Kamau in accordance with Section 40 of the *Act*.
31. In this case, the Applicant got a share of the late Samuel Kamau’s share from the estate of Nganga Kamau, but in light of this revelation, the administrators applied to have the property held in trust since if the same would be admitted as such, the other family of the late Samuel Kamau would be left out.
32. Thus, the humble prayer to have the grant rectified to enable the interest of the Jane and Leah met, in the interest of justice.

Analysis & Determination

33. Since the Confirmation of Grant dated 13th November, 2018, the Administrators undertook distribution with regards to the other Twelve (12) beneficiaries in the estate of the deceased and have deliberately failed and/or refused to distribute the share to the estate Samwel Kamau Nganga (deceased) of 2.5 acres excision from Dundori/Lanet Block 2/75 in favour of Faith Nyambura Kamau to be registered to hold in trust of Martha Wanjeri Milkah Wanjiru Nganga and Margaret Muthiri Nganga (all minors)



34. In fact, prior to filing of the 1st Application dated 25th January 2022 Faith Nyambura had successfully filed a similar Application dated 2nd November 2020 an application that was allowed without contest and the Administrators have failed to comply with.
35. It cannot be forgotten that the reliefs being sought by both the Applicant and Respondents/Administrators are equitable in nature and as such the maxims of equity that include;
- i. equity acts in personam,
 - ii. equity acts on the conscience,
 - iii. one who seeks equity must do equity,
 - iv. equity will not suffer a wrong to be without remedy,
 - v. he who comes in equity must come with clean hands; and
 - vi. Equity delights to do justice and not by halves.
36. This Court has agonized trying to obtain reason/justification as to why the Administrators have failed to undertake the distribution subject of this ruling. The only indirect reason was that, they wanted rectification of grant such that all the properties distributed to Faith Nyambura are held in trust by the administrators of the Estate of the Late Nganga Kamau since Jane Wairimu and her daughter Leah Wanjiru will stand prejudiced as they will be excluded from having a share of the inheritance.
37. Orders of the Court must be complied with, and in this instance the Administrators are not moving the Court with clean hands having disobeyed previous Court orders, their starting point ought to have been on why for six (6) years they have not distributed this single property?
38. It is also not lost that the house where Faith Nyambura was residing in until 2015 was razed to the ground by the brother in law and that upon the demise of the late Samwel Kamau Nganga (deceased) an attempt at a hurried burial within days was thwarted by Faith Nyambura when she obtained Court orders, until she was included in the funeral arrangement.
39. This Court can thus safely note that Faith Nyambura has had a roller-coaster engagement with his in-laws since the demise of her husband having been chased away by the deceased and upon her return after his demise, she was once more rendered homeless with a criminal attack which was resolved with a consent that the Administrators shall support her in constructing a home thereon.
40. The Respondents/Administrators called the 1st witness Jane Wairimu Mburu in support of the 2nd Application. It a rather surprising twist of events the Administrators called the witness who testified that the deceased was her husband, that she was the second wife and that they had undertaken an incomplete Kikuyu Customary Marriage by having an introduction, dowry was never paid except a gift, they never took any photos.
41. The question to be answered is whether the rectification sought in the 2nd Application could be carried through under Section 74 of the [Law of Succession Act](#)?
42. Rectification of grants is provided for in Section 74 of the [Law of Succession Act](#), Cap 160, Laws of Kenya and Rule 43(1) of the [Probate and Administration Rules](#). Section 74 provides as follows:
- “74. Errors may be rectified by Court:
- Errors in names and descriptions, or in setting forth the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the



Court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”

43. Rule 43(1) provides as follows:

“Where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or descriptions of any person or thing or as to the time or place of death of the deceased or, in the case of a limited grant, the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was made.”

44. From the language of Section 74 of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules, the scope of rectification of grants of representation is limited to errors in names and descriptions, or in setting forth the time and place of the deceased’s death, or the purpose in a limited grant. I may add that such other minor errors in that genre could also be rectified.

45. Other major or substantial issues should be addressed through application for review of judgment or appeal. See In the matter of the estate of Geoffrey Kinuthia Nyamwinga (deceased) [2013] eKLR where the Court stated;

“The law on rectification or alteration of grants is Section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules..... What these provisions mean is that errors may be rectified by the Court where they relate to names or descriptions, or setting out of the time or place of the deceased’s death. The effect is that the power to order rectification is limited to those situations, and therefore the power given to the Court by these provisions is not general.....”

46. The 2nd Application dated 16th March 2022 seeks to substantially alter the confirmed grant by introducing a new beneficiary hitherto unknown and that such is not an error envisioned for rectification under Section 74 of the Law of Succession Act and Rule 43(1) of the Probate and Administration Rules.

47. The Appropriate approach by the Respondents/Administrators would have been to invoke the jurisdiction to review of decisions of a probate Court which is governed by Rule 63 of the Probate and Administration Rules, which provides as follows: -

“63. Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the Court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons



shall be those existing and in force immediately prior to the coming into operation of these Rules.”

48. In the case of *John Mundia Njoroge & 9 others vs. Cecilia Muthoni Njoroge & Another* [2016] eKLR, the Court had this to say with regards to Rule 63 of the *Probate and Administration Rules*:

“As stated above, the only provisions of the *Civil Procedure Rules* imported to the *Law of Succession Act* are orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attending witnesses, affidavits, review and computation of time. Clearly, Order 45 relating to review is one of the *Civil Procedure Rules* imported into succession practice by rule 63 of the *Probate and Administration Rules*. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in Order 45 of the *Civil Procedure Rules*.”

49. A party seeking review of orders, in a probate and succession matter, is bound by the provisions of Order 45 (1) of the *Civil Procedure Rules* which provides that;

“1.

(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay”

50. Order 45 provides for three circumstances in which an order for review can successfully be made, the Applicant must satisfy and show-case to the Court any of the three circumstances;

- i. there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed. A party may successfully apply for review,
- ii. secondly, if he can demonstrate to the Court that there has been some mistake or error apparent on the face of the record.
- iii. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.



51. It is trite law that an application for review should be made without unreasonable delay. I am of the view that, the 2nd Application fails on that front as the Application was filed four years after the grant was confirmed and it was filed in response to summons to be cited for contempt by the Applicant. The 2nd Application appears an afterthought and reactionary. If Jane Wairimu and her daughter Leah Wanjiru are so desirous of arguing their case, they may institute a citation against Faith Nyambura in the yet-to-be instituted succession cause of late Samwel Kamau Nganga (deceased).
52. In *Stephen Gathua Kimani vs. Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR, the Court had occasion to deal with cases of apparent long delay in seeking review, by holding that:
- “One thing is clear in this application. The delay of one year has not been explained. Perhaps, it’s important to recall the last sentence of Order 45 Rule 1 (1) (b) which reads “... may apply for review of judgement to the Court which passed the decree or made the order without unreasonable delay.”
- The logical question that follows is, was the present application made without unreasonable delay” Or is a delay of one year reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant one year to file an application in Court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed an unreasonable delay.
- Such a long delay must be sufficiently explained.”
53. This Court notes that the estate is substantially settled and finds that it shall be in the best interests of the estate of the deceased and the estate Samwel Kamau Nganga (deceased) share to be strictly distributed as per the schedule confirming the grant dated 13th November, 2018 to the widow to hold in trust for her minor daughters.
54. In *the Matter of the Estate of Karanja Kigo* [2015] eKLR and *Priscilla Waruguru Gathigo v Virginia Kanugu Gathigo* (2004) eKLR These cases mention at least five elements that must be satisfied for there to be a valid Kikuyu Customary Marriage:
- a. Capacity which includes age, physical and mental conditions and marital status;
 - b. Consents of the family of the couple and, if the intended bride is a second or subsequent wife, the consent of the senior wife;
 - c. The ceremonial slaughtering of a ram in a rite called Ngurario;
 - d. Ruracio (bride price) partly paid;
 - e. Commencement of cohabitation.
55. This Court is not persuaded that Jane Wairimu was the 2nd wife to the late Samwel Kamau Nganga by virtue of customary marriage and that they were blessed with a daughter Leah Wanjiru. No evidence was led to prove that Leah Wanjiru is the deceased daughter.
56. This Court while finding that, the disregard of Court orders as is manifested by the Administrators would constitute contempt of Court to which the administrators could be cited or other penal sanctions imposed on them. It will be in the broader interest of justice to issue reliefs and orders that are intended to settle the estate and resolve wrangles and thus all reliefs sought for in the 1st Application were duly considered.



57. Accordingly, the Court allows the 1st Application dated 25th January 2022 and disallows the Summons dated 16th March 2022, (2nd Application) in its entirety, on the following terms: -

- i. The Administrators shall prepare and execute within the next sixty (60) Days from today, all requisite transmission forms to effect the distribution of 2.5 acres excision from Dundori/Lanet Block 2/75 and hand them over to Faith Nyambura Kamau to be registered to hold in trust of Martha Wanjeri, Milkah Wanjiru Nganga and Margaret Muthiri Nganga (all minors).
- ii. Failure on the part of the Administrators to comply with (i) above, shall result in the Deputy Registrar of the High Court, executing all requisite transmission forms, to effect the distribution of 2.5 acres excision from Dundori/Lanet Block 2/75, in favour of Faith Nyambura Kamau to be registered to hold in trust of Martha Wanjeri Milkah Wanjiru Nganga and Margaret Muthiri Nganga (all minors).
- iii. . The 2nd Application dated 16th March 2022 is hereby dismissed for want of merit.
- iv. The Administrators shall within the next ninety (90) days from the date hereof file an affidavit detailing all the distribution undertaken and if the estate is settled then to bring the succession to a close.
- v. This being a family matter, parties shall bear their respective costs.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 25TH DAY OF JANUARY, 2024.

S. MOHOCHI

JUDGE

