



Case Number:	Succession Cause 309 of 2006
Date Delivered:	29 Oct 2021
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Maureen Akinyi Odera
Citation:	In re Estate of Waweru Wahinya Kuibiga (Deceased) [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Family
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 309 OF 2006**

**IN THE MATTER OF THE ESTATE OF WAWERU**

**WAHINYA KUIBIGA ALIAS WAWERU WAHINYA KUIBITA DECEASED)**

**BEATRICE WANJIKU NGUHI**

**ROBERT THIONGO KARIUKI**

**FRANCIS MWANIKI WAWERU**

**ANDREW PHORO WAWERU.....APPLICANTS**

**VERSUS**

**GICHERU WAHINYA WAWERU**

**FRANCIS NDUNGU WAWERU**

**MARY NJERI KARIUKI.....RESPONDENTS**

**RULING**

1. Before this Court for the Chamber Summons dated 3<sup>rd</sup> May 2021 which the Applicants seek orders as follows -

**“1. Spent.**

**2. THAT the typing in the name JANE MUTHIORA WAWERU**

**in the amended confirmed grant dated 31<sup>st</sup> January 2020, be rectified to read JOHN MUTHIORA WAWERU.**

**3. THAT two the beneficiaries of the deceased ESTHER**

**WAMBUI KARIUKI and JOHN MUTHIORA WAWERU having since died, the beneficiaries for their respective shares be substituted respectively with the estate of ESTHER WAMBUI KARIUKI and the estate of JOHN MUTHIORA WAWERU for the respective shares of inheritance.**

**4. THAT the share of inheritance of the house of (Irene**

**Waweru, deceased) out of Asset L.R. DAGORETTI/RIRUTA/1303; the subdivision known as DAGORETTI/RIRUTA/7392 due to the beneficiaries FRANCIS NDUNGU WAWERU; JOHN MUTHIORA WAWERU, GICHERU WAWERU**

**WAHINYA; ESTHER WAMBUI KARIUKI; MARY NJERI KARIUKI & CATHERINE NGUHI WAWERU (Deceased) be allocated equally to her children Beatrice Wanjiku Nguhi, Leonard Munyua Mbugua, Samuel Kamau Nguhi & David Kirui Nguhi be sold by way of public auction and the proceeds thereof be shared out to the beneficiaries proportionally in terms of the confirmed grant dated 9/7/2011 and further amended on 31/1/2020.**

**5. THAT the Deputy Registrar of the High Court do sign any**

**documents required to be signed on the part of any of the parties herein for purposes of effecting the orders made by this court.**

**6. THAT the costs be incurred by the administrators and/or on their behalf in the process of disposal of the asset L.R. 7392 be off set from the proceeds of the sale of property prior to the distribution of the proceeds of sale.**

**7. THAT costs of this application be provided for”.**

2. The Application was premised upon **section 74 Law of Succession Act, Rules 43 & 49 Probate & Administration Rules** and all enabling provisions of law and was supported by the Affidavit of even date sworn by **BEATRICE WANJIKU NGUHI, FRANCIS MWANIKI WAWERU** and **ANDREW PHORO WAWERU** the four Administrators/Applicants.

3. The 1<sup>st</sup> Respondent **FRANCIS NDUNGU WAWERU** filed a Replying Affidavit dated **2<sup>nd</sup> June 2021** opposing the Application. Likewise, the 1<sup>st</sup> Respondent **GICHERU WAHINYA WAWERU** and the 3<sup>rd</sup> Respondent **MARY NJERI KARIUKI** both filed Replying Affidavit dated **2<sup>nd</sup> June 2021** in opposition to the Application. The application was canvassed by way of written submission. The Applicant filed the written submissions dated **8<sup>th</sup> July 2021** whilst the Respondents relied on their written submissions dated **27<sup>th</sup> July 2021**.

#### **BACKGROUND**

4. This Succession Cause relates to the estate of **WAWERU WAHINYA KUIBIGA alias KUIBITA** (hereinafter ‘**the Deceased**’) who died intestate on **26<sup>th</sup> July 2004**. The deceased was survived by the following:-

#### **“1<sup>st</sup> House of Irene Wangui Waweru (Deceased)**

- a) John Muthiora Waweru – Son
- b) Francis Ndungu Waweru – Son
- c) Gicheru Waweru Wahinya – Son
- d) Esther Wambui Kariuki – Daughter
- e) Mary Njeri Kariuki – Daughter

#### **2<sup>nd</sup> House of Rahab Wanjiru Waweru – (Deceased)**

- f) Sammy Kamau Waweru – Son
- g) Francis Kariuki Waweru – Son
- h) Eunice Wanjiru Ndungu – Son

i) Ephantus Ndungu Waweru – Son

j) Siphorah Nguhi Njoka – Daughter

**3<sup>rd</sup> House of Grace Njambi Waweru – (alive)**

k) Grace Njambi Waweru – (Wife/Widow)

l) Samuel Wahinya Waweru – Son

m) Andrew Phoro Waweru – Son

n) Mary Wanjiru Waweru – Daughter

o) Margaret Wanjiku Wagura – Daughter

p) Zipporah Nguhi Waweru – Daughter

q) Teresia Wansohi Waweru – Daughter

r) Franics Mungai Waweru – Son

s) Samuel Mwarangu Waweru – Son

5. Following the demise of the Deceased, Grant of Letters of Administration Intestate was issued to the four Applicants on **13<sup>th</sup> May 2008** The said Grant was duly confirmed on **19<sup>th</sup> July 2011** and was further amended on **31<sup>st</sup> January 2020**.

6. The only assets of the estate was **LR. No. DAGORETTI/RIRUTA/1303**. The said parcel of land was sub-divided into three portions representing the three houses of the Deceased. From the sub-division, the following three parcels of land were obtained.

**(i) L.R. No Dagoretti/Riruta/7391.**

**(ii) L.R. No. Dagoretti/Riruta/7392. Each comprising 0.56 Ha.**

**(iii) L.R. No Dagoretti/Riruta/7393.**

7. Following the subdivision of **L.R. No Dagoretti/Riruta/1303** into **three** parcels of land, the Administrators in compliance with the mode of distribution as set out in the confirmed Grant effected transfer of two out of the **three** subdivisions as follows: -

a) Title Number **Dagoretti/Riruta/7391** – to the **3<sup>rd</sup> wife** – **Grace Njambi Waweru** to hold in trust for herself and her children in equal shares.

b) Title No. **L.R. No Dagoretti/Riruta/7393** to the **2<sup>nd</sup> House** of **Rahab Wanjiru Waweru**. (Deceased)

8. The Applicants state that todate they have been unable to effect transfer of the **3<sup>rd</sup>** portion being **Title No. Dagorett/Riruta/7392** which had been allocated to the **1<sup>st</sup>** House of **Irene Wangui Waweru** due to lack of co-operation by some beneficiaries who had declined to submit their personal documents and have refused to sign to facilitate said transfer.

9. It was averred that one of the sons of **Irene Wangui Waweru** namely **Francis Ndungu Waweru** (the **2<sup>nd</sup>** Respondent) solely

occupies parcel **7392** and is actively preventing the sharing out of said parcel of land to the other beneficiaries entitled to the same, arguing that the parcel of land is too small to be shared.

10. The Applicants contend that given that in a judgement dated **17<sup>th</sup> June 2016**, the court determined that the best solution was to sell the parcel **7392** and divide the proceeds of sale equally amongst all the beneficiaries and given that their attempts to transfer has been thwarted they urge that court grant the orders sought for sale by public auction of the suit land as no prejudice would be suffered by the beneficiaries.

11. The 2<sup>nd</sup> Respondent vehemently opposed this application. The 2<sup>nd</sup> Respondent averred that before he died the Deceased had allocated the entire property to himself and that his two brothers were to inherit **Title No. Dagoretti/Riruta/1302**, which was registered in the name of their mother **Irene Wangui Waweru**.

12. The 2<sup>nd</sup> Respondent averred that he had developed parcel No **7392** on his own and he opposed any sale of the property because he claimed the Deceased had indicated that no one should sell his land. The 2<sup>nd</sup> Respondent claimed that he would be subjected to a curse if he allowed the land to be sold.

13. The 2<sup>nd</sup> Respondent suggested that the property be divided into two portions, one portion going to the children of his deceased siblings, (grandchildren of the deceased) and the second portion remaining in his family. He argued that he stood to lose a lot if the land was sold as he had invested heavily in the property.

14. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents vide their Affidavits dated **2<sup>nd</sup> June 2021** supported the stand taken by the 2<sup>nd</sup> Respondent. The two averred that the suit property had been given to the 2<sup>nd</sup> Respondent by their father whilst the two other brothers were bequeathed **L.R. No Dagoretti/Riruta/1302**, which was registered in their mother's name. They both assert that the 2<sup>nd</sup> Respondent has carried out developments on the suit land. They proposed that the suit land be sub-divided into two parcels, the grandsons of the Deceased to get one portion whilst Francis was to get the other portion.

#### **Analysis and Determination**

15. I have considered the application dated **3<sup>rd</sup> May 2021**, as well as the Replies filed thereto.

16. By prayer No. 2 the Applicants seek orders to rectify the confirmed Grant as amended on **31<sup>st</sup> January 2020** to correct an error in the name of one of the beneficiaries whose name was indicated as '**JANE**' MUTHIORA WAWERU instead of the correct name being **JOHN MUTHIORA WAWERU**.

17. **Section 74 of the Law of Succession Act, Cap 160, Laws of Kenya** provides for rectification of Grants as follows:-

**"Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court.**

18. Similarly, **Rule 43(1) of the Probate and Administration Rules** provides -

**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 the death of the deceased, or in the cause of a limited grant, the purpose for which the grant was made, he shall apply by summons".**

19. None of the parties to this Succession Cause have opposed this prayer to rectify the Grant so as to correct name of the said beneficiary. It is clear to this court that the indication of the name as '**Jane**' instead of '**John**' is an error. Throughout the proceedings and in all the other documents filed in this matter the said beneficiary has been referred to as '**JOHN**' MUTHIORA WAWERU. This error falls in the category of errors which the court is empowered under **section 74** to rectify. I therefore grant prayer (2) of this application for rectification of the Grant.

20. Vide prayer (3) of the application it has been sought to have two of the beneficiaries of the Deceased, **ESTHER WAMBUI**

**KARIUKI** and **JOHN MUTHIORA WAWERU** who are now deceased, substituted by the beneficiaries of their respective estates.

21. The fact that the two named beneficiaries are now also deceased is not in any doubt and has not been disputed by any of the parties to this Succession Cause. Annexed to the Supporting Affidavit dated **3<sup>rd</sup> May 2021** are copies of the Death Certificate of **Esther Wambui Kariuki** who passed away on **10<sup>th</sup> December 2018** (Death Certificate Serial No. **040882 (Annexure ‘BRFA ‘6’)**) and the Death Certificate of **John Muthiora Waweru** who died on **24<sup>th</sup> December 2015** Death Certificate Serial No. **0432431 (Annexure ‘BRFA ‘7’)**

22. The children of the deceased beneficiaries are considered all the ‘**survivors**’ of their deceased parents and are entitled to the share of the estate that belonged to their parents. **In RE: ESTATE OF JOSEPH GICHUKI REUNGE [2016] eKLR Hon JUSTICE WILLIAM MUSYOKA** observed as follows: -

**“should the estate devolve only amongst the living children of the deceased” Where the deceased is survived by a child who subsequently dies before the estate is ....distributed, the estate of such (deceased) child would be entitled to the share that would have gone to the said child were he alive at the distribution. His estate would be entitled to a share equal to that of his siblings”.**

23. That is precisely the situation that pertains here, **Esther Wambui Kariuki** and **John Muthoni Waweru** who were both children of the Deceased were entitled to a share of the estate. However, the two having died before the estate was distributed their respective shares devolve to their survivors. Accordingly, I allow prayer (3) of the application.

24. The Applicants have expressed frustrations they have faced in trying to transfer parcel **No. 7392** to the rightful beneficiaries. Indeed the Applicants as the Administrators of the estate of the Deceased deserve commendation for their fidelity to their role as administrators and in having already transferred Parcels **7391** and **7393** to the rightful beneficiaries.

25. The Applicants contend that the 2<sup>nd</sup> Respondent **Francis Ndungu Kariuki** has thwarted their efforts to distribute the estate of the deceased. That the 2<sup>nd</sup> Respondent is in sole occupation of the suit land and that some of the beneficiaries have declined to submit copies of their personal documents to enable the subdivision and transfer of the suit land.

26. The 2<sup>nd</sup> Respondent does not dispute the sharing of the suit land. Likewise, the other beneficiaries from the house of **Irene Wangui Waweru** do not contest the sharing of the suit land. They only argue that the land should be divided into two portions to be shared equally between **Francis** (2<sup>nd</sup> Respondent) on the one hand and the other beneficiaries on the other hand. The issue of who should get what out of the estate has long been settled.

27. In such a case where there is a stalemate the court is entitled to invoke its powers under **Rule 73** of the **Probate and Administration Rules** which authorizes a court to **“make any order or may be necessary for the ends of justice and to prevent the abuse of the process of court”**

28. This is a very old succession matter which was filed way back in the year **2006 (fifteen (15) years)** ago. The estate has been partially distributed. The 2<sup>nd</sup> and 3<sup>rd</sup> Houses have received their share of the estate and nobody is complaining. The problem has arisen amongst the beneficiaries in the 1<sup>st</sup> House who have thwarted and frustrated efforts being made by the Administrators to settle the estate. The court cannot condone this state of affairs. Accordingly, I do direct that the beneficiaries co-operate with the Administrators and provide the documents necessary to facilitate the transfer of **Title No. Dagoretti/Riruta/7392** in terms of the certificate of confirmed Grant dated **31<sup>st</sup> January 2020**.

29. In the event that the beneficiaries fail to comply within **twenty one (21)** days from the date of this Ruling then I direct that the property be sold by the Administrators and the proceeds of such sale be shared equally amongst the beneficiaries of the 1<sup>st</sup> House.

30. Finally and in conclusion, I make the following orders –

(1) Prayer (2) seeking rectification of the Grant is allowed.

(2) Prayer (3) seeking substitution of the names of the beneficiaries of the estates of **Esther Wambui Kariuki** and **John Muthiora Waweru** as beneficiaries to the estate of the Deceased is allowed.

(3) The beneficiaries of the 1<sup>st</sup> House are directed to provide within **twenty one** days hereto all documents necessary to facilitate the transfer by the Administrators of the subdivision known as **DAGORETTI/RIRUTA/7392** due to the said beneficiaries.

(4) In the event the beneficiaries fail to comply within **twenty one (21)** days as directed then **DAGORETTI/RIRUTA/7392** due to the beneficiaries **FRANCIS NDUNGU WAWERU; JOHN MUTHIORA WAWERU (Deceased), GICHERU WAWERU WAHINYA; ESTHER WAMBUI KARIUKI (Deceased); MARY NJERI KARIUKI & CATHERINE NGUHI WAWERU shall be sold by the Administrators and the proceeds thereof be shared out to the beneficiaries proportionately in terms of the confirmed grant dated 9/7/2011 and further amended on 31/1/2020.**

(5) The Deputy Registrar of the High Court is directed to sign any documents required to be signed on the part of any of the parties herein for purposes of effecting the orders made by this court.

(6) The costs be incurred by the administrators and/or on their behalf in the process of disposal of the asset **LR. 7392** be off set from the proceeds of the sale of property prior to the distribution of the proceeds of sale.

(7) This being a family matter each side shall bear its own costs.

**DATED IN NAIROBI THIS 29TH DAY OF OCTOBER 2021.**

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**MAUREEN A. ODERO**

**JUDGE**



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