



REPUBLIC OF KENYA



**In re Estate of Bethuero Githogori Njoroge - Deceased (Succession Cause
396 of 2010) [2023] KEHC 223 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 396 OF 2010
HK CHEMITEI, J
JANUARY 26, 2023
IN THE ESTATE OF BETHUERO GITHOGORI NJOROGE (DECEASED)**

BETWEEN

DANIEL KIRAGU GITHOGORI & 7 OTHERS APPLICANT

AND

MARY WANJIRO & 7 OTHERS RESPONDENT

RULING

1. The Deceased died on December 25, 2009. The 1st Respondent, Petitioned the Court for Letters of Administration with Will Annexed on 12/08/2010. The Will, hereinafter ‘the impugned will’ is dated February 22, 2022. It *inter alia*, appointed the 1st Respondent as the executor, identified the Deceased’s assets and mode of distribution as hereunder:
 - a. To my five sons namely Ngure Mbugua Githogori, David Njoroge Githogori, George Kareithi Githogori, Peter Kimani Githogori, Samwel Kamau Githogori each shall get 10 acres from my parcel of land L. R. NO. 8507/10
 - b. To My wife Mary Wanjiro and my two daughters Monica Wanja Githogori and Grace Nyogabi shall share equally 10 acres of land being part of L.R. NO. 8507/10
 - c. My said wife and 5 sons shall share my cows equally
2. The Grant of Letters of Administration was subsequently issued to the 1st Respondent on November 16, 2010 and confirmed on 06/12/2012 as per the aforementioned mode of distribution. Thereafter, the Applicants filed the Summons for Revocation of Grant dated August 14, 2012.
3. When the matter came up on 08/02/2016, Ndungu J. ordered the exhumation of the Deceased’s remains and DNA testing for both the Applicants and Respondents. This order was never complied with, instead, the matter was set for *viva voce* hearing.



4. After several adjournments, the matter finally came up for hearing on April 4, 2019. Only one witness testified in the Applicants' case. The hearing was interrupted when the Respondents' advocate requested for time for parties to negotiate a mode of distribution. This again never materialised. Instead, the parties entered a consent to the effect that Applicants whose paternity was not contested, would be admitted as beneficiaries while two of the Applicants whose paternity was contested would be subjected to a DNA test and their samples compared to two of the Respondents. The two Respondents failed to attend the DNA testing as agreed.
5. Counsel for the parties appeared before me again on November 11, 2021. They recorded a consent to the effect that the Applicants over whom there was no contestation whether they were children of the Deceased to be admitted as such and further that the two Applicants over whom the Petitioners doubted about their paternity to be subjected to DNA testing on terms agreed by the parties and recorded in the consent. In particular, the Petitioners were to forward two names from whom sample DNA profiles were to be collected for purposes of comparing with the DNA profiles of the two Applicants whose paternity was doubted.
6. Despite the elaborate consent, the Petitioners never complied with the orders. They neither forwarded names of the two siblings for the harvesting of the samples nor presented themselves for the harvesting. Indeed, neither the Petitioners nor their counsel, Mr. Simiyu set foot in Court or appeared virtually again in the matter. The matter came up before me on February 22, 2022, and on April 25, 2022. In each instance, both the Protestors and their Counsel were not in attendance.
7. In response, the Court directed that the Summons for Revocation of Grant dated August 14, 2012 to be argued by way of Written Submissions. The Summons seeks the following orders:
 1. Spent
 2. That the Grant of Letters of administration intestate issued on the 16th November 2010 and the Certificate of Confirmation of Grant issued to the 1st Respondent herein – Mary Wanjiro on the 6th June 2012 by this Honourable Court be revoked or annulled as the Respondents fraudulently obtained the grant for the estate of Bethuero Githogori Njoroge by fraudulently representing to the Court that she and her children are the only beneficiaries of the estate whereas the Deceased was survived by other Beneficiaries.
 3. That the Petitioner obtained the grant for the estate of Bethuero Githogori Njoroge (Deceased) by falsely alleging that the Deceased was survived by her and her six children while knowingly concealing the fact that the Deceased was a polygamous man of three wives and seventeen beneficiaries who are his biological children.
 4. That this Honourable Court be pleased to bar, injunct and restrain the Respondents herein from distributing, subdividing, alienating and/ or disposing any property of the Deceased including parcel of land L.R. 8507/10 Londiani in exclusion of the Applicants who are also rightful beneficiaries of the estate of Bethuero Githogori Njoroge (Deceased) pending the hearing and determination of this cause.
 5. That cost of this application be provided for.
8. The Court directed the Applicants' counsel to serve the Petitioner's counsel with the Court's directions on hearing. The Applicant's counsel obliged and filed an Affidavit of Service as directed by the Court. While the Applicants' counsel filed and served their written submissions, the Petitioners did not. The Court will, therefore, proceed to give its ruling based on the material that is on record.



9. The Application is supported by the grounds on the face of it and the Affidavit of Daniel Kiragu Githogori- (hereinafter, the 1st applicant) a son to the Deceased. He depones that the Deceased was a polygamous man who had three wives and 15 children, who are beneficiaries of his estate and not the Respondents alone. He faults the Respondents of misleading the Court that they are the only beneficiaries and thus being issued with a Certificate of Grant. He has listed the beneficiaries of the Deceased as Phyllisila Wangui as a Widow, Tabitha Wangare, also a widow, who is deceased and whose children are Daniel Kirago Githogori, Albert Kariithi Githongori, Josiah Njoroge Githogori, Paul Mwaura Githogori, Naomi Wanjiru Githogori, Samuel Kamau Githogori, Joshua Mihunyo Githogori and John Kiniti Githogori.
10. He has also listed Mary Wanjiru as a widow and her children as Ngure Mbugua Githogori, David Njoroge Githongori, George Kareithi Githongori, Peter Kimani Githogori, Samuel Kamau Githogori, Monica Wanja Githogori, Grace Nyokabi Githogori and Mary Wanjiru Githogori
11. The 1st Applicant depones that the Respondents filed the Petition for grant of letters of administration for the Deceased's estate and the Court issued a Certificate of Confirmation of Grant on June 6, 2012. He depones that in the said Petition, the Respondents fraudulently concealed from the Court the existence of the Applicants and secretly guarded the existence of any Petition pending in Court.
12. He depones further that the 1st Respondent falsely misrepresented before the Court that the Deceased had an informal will, whose existence the Applicants deny. The 1st Applicant claims that the said Will is a forgery as the Deceased acknowledged the Applicants as his children and that they took care of him when he was alive.
13. According to the 1st Applicant, the Respondent is the third wife of the Deceased, while their mother was the second wife with whom their father lived as husband and wife and had eight children. He depones that they learnt that the Respondent had been issued with a Certificate of Confirmation of Grant by the Court and that upon perusal of the Court file, realised that the same was obtained through fraudulent means and ought to be revoked and/ or annulled.
14. He contends that the estate of the Deceased ought to be distributed among all the beneficiaries, as the Deceased died intestate and that it is in the interest of justice that the Grant of Letters of Administration Intestate and the Certificate of Confirmation of Grant issued to the Respondent be Revoked to enable the Applicants participate in the proceedings. He believes that there is imminent danger of the 1st Respondent distributing the estate to the Applicants' detriment.
15. The Respondents opposed the Application through the Affidavit of Mary Wanjiru. She depones that she is the bona fide wife of the Deceased and that the Deceased wrote a will, which did not mention the Applicants. She depones that the will is genuine and that she intends to challenge the Applicants to prove that the same is a forgery.
16. She depones further that the suit property was purchased by herself and not the Applicants' mother and that during the burial, she singlehandedly shouldered the funeral expenses in the Applicants' absence. She believes that the Applicants are only laying claim to the estate after the Deceased's death and thus contends it is fair that the application be dismissed.
17. In response, the Applicants filed the Affidavit dated October 17, 2012 sworn by the 1st Applicant. He maintains that the Deceased had three wives and sixteen children and that after the Applicants' mother's death, her remains as well as those of the Deceased and the Applicants' late brother Mbugua Kariithi were interred on L. R. 8507/10 Londiani, which is the suit property. This he contends is proof that the suit property belongs to all of them. He points to a Burial Programme annexed as DKG1



wherein he says it was stated that the Deceased had three wives and sixteen children and not seven children as indicated in the Certificate of Confirmation of Grant.

18. According to the 1st Applicant, the Annexed Will is not attested and as such, it is invalid and cannot be used as the basis for vesting the Deceased's property. He alleges that the suit property was purchased before the 1st Respondent got married to the Deceased and that the Applicants' elder brother used to till the land before the Deceased married the 1st Respondent
19. The 1st Applicant denies the assertion that the 1st Respondent shouldered the entire burial of the Deceased. He depones the whole family participated in all aspects of the Deceased's burial and that he was actually, in charge of the guests as indicated in the burial programme. He maintains that the Grant ought to be revoked so that the Applicants can participate in the proceedings.
20. The Applicants' submissions are dated 10/05/2022. The Applicants submit that the annexed will is invalid. They rely on Section 11 of the [Law of Succession Act](#) which sets out the requirements for a valid will. First, they point out that there are two versions of the will, one allegedly stamped by S.K. A Chelule and one unstamped will. They contend that neither the Advocate nor the witness mentioned in the will has been called to ascertain the authenticity of the will and to confirm that the mark in the will belonged to the Deceased. Secondly, they point out that the will is drawn in English which the Deceased never understood, since he never received any formal education in his lifetime, yet no certificate of translation has been adduced, further casting doubt on its authenticity.
21. The Applicants submit that the Grant should be revoked, for the reason that it was made fraudulently. They contend that it has not been controverted that they are children of the Deceased entitled to be part of proceedings in relation to his estate. They cite Section 76 of the [Law of Succession Act](#) and submit that they were left out of the process of petitioning and confirmation despite being children. They contend that the Respondents' failure to serve or notify the Applicants of this cause was in violation of Rules 26 (1) and (2) of the [Probate and Administration Rules](#).
22. The Applicants propose that had they been notified of these proceedings, they would have objected to the same, since not being bequeathed in the will they consider fraudulent did not extinguish their rights as children and beneficiaries of the Deceased.
23. The Applicants reiterate that their existence was concealed from the Court at the time of making the Grant, while the Respondents misrepresented to the Court that they were the only beneficiaries and as such, the Grant was made by an untrue allegation of fact. The Applicants rely on [In Re Estate of Mathai Kimani \(Deceased\)](#) [2021] eKLR where the Court stated the duty of a Petitioner to disclose all material facts. They further rely on [In Re Estate Shem Kitanga \(Deceased\)](#) [2018] eKLR in which the Court found that the failure to disclose all beneficiaries as sufficient cause for revocation of a grant. They also rely on [In Re Estate of Moses Wachira Kimotho \(Deceased\)](#) [2009] eKLR in which the court stated the importance of disclosing all material facts, as well as [Rahab Nyakangu Waithanji v Fredrick Thuku Waithanje](#) [2019] eKLR
24. Finally, they cite the provisions of Section 47 of the [Law of succession Act](#) and Rule 73 of the [Probate and Administration Rules](#) and submit that the required threshold to revoke the Grant.
25. From the foregoing, the single issue for determination is whether the Grant herein ought to be revoked.
26. But first, I note that issue of validity of the will raised by the Applicants, which in my view, goes to the core of the proceedings, particularly, whether the Deceased died testate or intestate as well as the mode of distribution of the Deceased's estate. While it is possible to determine the issue of distribution



through the material on record, the issue of validity of the will would be best determined through *viva voce* hearing.

27. The importance of *viva voce* evidence was expressed by Mativo J. in [Gerald Macharia Njogu v Samuel Macharia Murimi](#) [2016] eKLR as follows:

The advantage of oral evidence is that the witness is available for cross-examination, and thus the strength of evidence may be tested. That is why reliable *viva voce* evidence is sometimes given more weight.

Turning to this case, there is a will annexed to the petition. The objector is contesting the will and states that the same is invalid. The issues in dispute are both matters of law and facts. While the matters of law may basically be provided for under the provisions governing making of wills under the law, the facts surrounding the making of the said will and or the grounds for opposing the said will are in my view issues of fact which call for the parties to give oral evidence, call witnesses and be subjected to cross-examination to enable the court to assess the credibility, relevancy and trustworthiness of the evidence and effectively and competently resolve the matters in controversy.

28. In the instant case, *viva voce* evidence would allow the parties to express their various versions on the validity of the will as well as the mode of distribution
29. The circumstances under which a Grant may be revoked are as set out under Section 76 of the [Law of Succession Act](#). The Applicants in this case contend that the grant was obtained fraudulently and by concealment of material facts since the Respondents misled the Court to believe that they were the sole beneficiaries of the Deceased's estate.
30. The Respondent's argument is that they proceeded on the basis of the Impugned Will since it only listed the Respondents as Beneficiaries. In my view, this argument is unsustainable for two reasons: First, even in the existence of a will, the Executor, as a Personal Representative of the estate of the Deceased is duty bound to disclose to the Court all the persons entitled to benefit from the Deceased's estate. Secondly, even if one was to presume that the Impugned Will is valid, any excluded Dependents ought to be notified, so as to choose whether to make any application for reasonable provision.
31. In the instant case, the grant was issued and confirmed on the flawed basis that the Respondents were the only beneficiaries of the Deceased's estate. In the circumstances of this case and for the reasons advanced above, there is justifiable cause for revocation of the grant issued to the 1st Respondent. I therefore make the following orders:
- I. The Grant of Letters of administration dated November 16, 2010 and the Certificate of Confirmation of Grant issued to Mary Wanjiro on June 6, 2012 be and is hereby revoked.
 - II. The parties to appear before the Judge assigned to this Succession Cause for directions on the substantive resolution of the matter including how the issue of validity of the will shall be litigated, and, thereafter, the mode of distribution.
 - III. Each party to bear its own costs
32. Orders accordingly

DATED DELIVERED AT NAKURU THIS 16TH DAY OF JANUARY, 2023

JOEL NGUGI

JUDGE



DELIVERED AT NAKURU THIS 26TH DAY OF JANUARY, 2023

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HILLARY CHEMITEI

JUDGE

