



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 306 OF 2013**

**IN THE MATTER OF THE ESTATE OF ELIZABETH NDUTA NGORU (DECEASED)**

**ESTHER WAMBUI KANYI.....1<sup>ST</sup> OBJECTOR/APPLICANT**

**TERESIA WANJIKU KAMAU.....2<sup>ND</sup> OBJECTOR/APPLICANT**

**VERSUS**

**NJERI NJOGU.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**JACINTA WANJIRU NDUNGU.....2<sup>ND</sup> PETITIONER/RESPONDENT**

**JUDGEMENT**

1. The deceased herein died intestate on the 5<sup>th</sup> September 1994 as reflected in her burial permit. Her death certificate which has been tainted by the objectors gives the date as 9<sup>th</sup> September 1994. The Petitioners petitioned for grant of representation as her surviving daughters. They listed only one asset namely, **L.R. Dagoretti/Waithaka/818** for purposes of distribution.

2. On 28<sup>th</sup> July 2014 a Certificate of Confirmation of Grant was issued to the Petitioners. The same distributed **L.R. Dagoretti/Waithaka/818** between Njeri Njogu and Jacinta Wanjiru Ndungu in equal shares.

3. However, on the 4<sup>th</sup> of March 2016, **Esther Wambui Kanyi & Teresia Wanjiku Karanja** (*Objectors herein*) filed summons for revocation of grant on grounds that the Petitioners used false documents when petitioning for the grant and concealed from court material facts.

4. From the pleadings and in evidence it is not in dispute that the deceased had four children namely;

**i. Njeri Ngoru**

**ii. Jacinta Wanjiru Ndungu**

**iii. Grace Kanyi**

**iv. Susan Wairimu**

5. Further It is not in dispute that during her life time the deceased owned three properties namely; -

**(a) Gatamayu/Kagaa/512**

**(b) Dagoretti/Waithaka/ 818**

**(c) Dagoretti/Waithaka/ T.28**

6. There is also consensus that during her left time the deceased gifted two properties as follow; -

**i. Gatamayu/Kagaa/512 to Grace Kanyi &**

## ii. **Dagoretti/Waithaka/ T.28 to Njeri Njogu**

7. Evidence before court indicates that both Grace and Njeri returned home and were given land to settle by their mother. While Teresia and Susan remained Married. Grace stayed initially with the deceased in Dagoretti/Waithaka/818 but thereafter relocated to Gatamayu/Kagaa/512 together with the deceased but left behind her children in Dagoretti/Waithaka/818.

8. It is the case for the Applicants that the deceased gifted their mother both Gatamaiyu/Kagaa/512 and Dagoretti/Waithaka/818 and which properties their mother Grace distributed to them during her lifetime. Further their aunt's Teresia and Susan were not gifted any land as they were married daughters.

9. The case for the petitioners on the other hand is that Grace was gifted only Gatamaiyu/Kigaa/512 while Njeru Ngoru was gifted Dagorett/Waithaka/T.128 and that Dagoretti/Waithaka/818 remained free property available for distribution and remained in the deceased name save for the administrators application.

10. The matter proceeded by way of *viva voce* evidence as directed by the court. The evidence adduced by the parties as follows; -

### **APPLICANTS EVIDENCE**

**Esther Wambui Kanyi & Teresia Wanjiku** adopted their affidavits dated 4<sup>th</sup> March 2016 & 18<sup>th</sup> October 2016. Their evidence is to the effect that they were not aware of the proceedings before court. And therefore, the matter proceeded without their knowledge and participation. They are the grand children of the deceased from her daughter Grace Kanyi and ought to have been involved in the succession proceedings.

Further the deceased had only two properties to her name namely; -**Dagoretti/Waithaka 818 & Dagoretti/ Waithaka/ T.128** which she distributed during her life time to Grace Kanyi & Njeri Ngoru respectively.

Further their mother Grace Kanyi distributed her property **Dagoretti/Waithaka/818** to her own children namely; Esther Wambui, John Njoroge, Joseph Ngugi, Teresia Wanjiku & Peter Ndungu by an agreement dated 3<sup>rd</sup> April 1999 and they have since developed their portions. Further their deceased mother was given **Gatamayu/ Kagaa/512** by their grandfather and there has never been any contestation on the same.

Grace died in the year 2011 but they are yet to apply for Succession Proceedings.

It was their case further that Jacinta and Susan though children of the deceased did not get any land since they were married daughters.

11. **Benard Kipkemoi Lietich, a Land Registrar**, testified that Title to parcel **Dagoretti/Waithaka/818** is in the name of Elizabeth Nduta, and was issued by the Nairobi Land Registry on 18<sup>th</sup> November 1993. He further stated that thereafter another title was issued to **Njeri Ngoru & Jacinta Wanjiru Ngoru** on the 29<sup>th</sup> of June 2015. The second title was issued upon an application by the two as administrators.

12. On her part **Njeri Ngoru** adopted her replying Affidavit dated 31<sup>st</sup> March 2016. She stated that the children of Grace Kanyi some of whom are the objectors occupy **Dagoretti/Waithaka/818** and **Gatamayu/Kagaa/512** and have sold a portion thereof.

Currently **Gatamayu/Kagaa/512** is registered in Grace Kanyi's name, Grace Kanyi having transferred the property to her name and this Petitioner does not have an interest in the same. She however has an interest in **Dagorretti/Waithaka/818** as the same was given to her and Grace Kanyi by the deceased.

13. In relation to **Dagoretti/Waithaka/T128** it was her testimony that the deceased was the registered owner as at 16<sup>th</sup> April 1975. But the same was given to her.

14. **Francis Turitu** a son of the 2<sup>nd</sup> Petitioner since deceased adopted his witness statement dated 5<sup>th</sup> October 2018. He told the court that Gatamayu Kagaa/512 was given to Grace Kanyi while Dagoretti/Waithaka/T.128 to Njeri Ngoru. He did not however know whether the properties had titles or when the same were given out. He stated further that Grace Kanyi's family knew about these Succession proceedings and deliberately failed to attend court. That Susan Wairimu's family were not interested in the case. He is in court following his mother's entitlement.

### **SUBMISSIONS**

#### **OBJECTORS SUBMISSIONS**

15. Their consent was not sought when the Court was moved for the grant of letters of Administration. That they only became aware of these proceedings when they were served with pleadings in **Environmental and Land Court Case No. 160 of 2016** wherein the Petitioners were seeking to evict them from **Dagoretti/Waithaka/818**. There was material concealment of the beneficiaries of the estate and properties of the Estate hence these proceedings are defective in substance and in form.

16. They further urged the court to take into account the long period of time the case had been in court, how the Petitioners had intermeddled with the estate of the deceased. And the fact that as grandchildren they are direct beneficiaries of the estate of the deceased.

17. Further, between 1960 and 1961 the deceased orally gifted **Dagoretti/Waithaka/818** to their mother and at the same time gifted **Dagoretti/Waithaka/T128** to Elizabeth Njeri Ngoru They have been living on the land ever since. That Parcel **Gatamayu/Kaaga/512** was gifted by the deceased father during his lifetime.

18. They cited amongst others the following authorities in support of their submissions; **Estate of Joseph Kilonzo Musyoka (2018) eklr, Margaret Gacuku Simon v Marisela Nkatha Makinya (2017) eklr, Eric John Mutemi & Anor versus Agnes Mumbanu Kinako (2016) eklr, John Mutongoria Hububa v Thomas Kegocha Mosabi (2014) eklr, Yunes kerubo Orina & Another v George Kombo Oruta, James Masanya Ontiri Igendia v Magoro Marungo & Another (2014) eklr, in re Estate of the late Gideon Manthi Nzioka ( deceased) (2015) eklr, Dan Oduya Kodwa v Samuel Otieno Odwar & Anor (2016) eklr, In re estate of M' Riaji Kithiano ( deceased) (2017) eklr, In re Estate of Justus M' Murithii Mbarigi (Deceased) (2019) eklr, Monica Njeri Kamau v Peter Monari Onkoba (2019) Eklr,**

#### **RESPONDENTS SUBMISSIONS.**

19. The Respondents on their part urged that they petitioned for Grant of Letters of Administration as children of the deceased who rank in priority and only listed one parcel of land for purposes of administration namely; **Dagoretti/Waithaka/ 818** as it is the only property available for distribution. The deceased was survived by five children and for now only Njeri Ngoru is alive. Further during her life time, the deceased owned three properties namely;

- i. Gatamayu/Kagaa/512**
- ii. Dagoretti/Waithaka/818**
- iii. Dagoretti/Waithaka/ T.128**

20. The deceased gifted two properties during her life time namely;

- i. Gatamayu/Kagaa/512 to Grace Kanyi &**
- ii. Dagoretti/Waithaka/T.128 to Njeri Ngoru.**

And the only property in Contention is **Dagoretti/ Waithaka/818** as it is in dispute whether the deceased gifted the same to Grace Kanyi, in contemplation of death as alleged a the deceased died of a stroke and cannot be said to have contemplated her death. Further the objectors ignored overtures to join in the proceedings and cannot complain of intermeddling.

21. Lastly, the objectors have failed to demonstrate that they are representatives of their mother's Estate and as the only remaining child of the deceased the Njeri Ngoru is fit to administer the Estate.

22. The Respondents filed list of authorities dated 5<sup>th</sup> August 2020 citing the following authorities; **Re Estate of Tuaruchiu Marete (Deceased) [2019]. Re estate of the Late Gideon Manthi Nzioka (Deceased) [2015] eklr, Re Estate of Kabue Ole Lapete (deceased) [2018] eklr, In the matter of the Estate of Gathima Chege (deceased) Nairobi High Court Succession Cause No. 1955 of 1996.**

#### **ANALYSIS & DETERMINATION**

23. The court has considered the testimonies of the witnesses herein submissions & authorities filed by the parties and it has formed the opinion that the following issues are the for determination;

- (a) Whether there are sufficient grounds to revoke the grant**
- (b) Whether the Petitioner is fit to remain as an administrator of the Estate**
- (c) What properties did the decease leave behind ? & Whether there has been intermeddling of the Estate**
- (d) How should the Estate be distributed?**

24. Section 76 of the Law of Succession Act (Chapter 160 of the Laws of Kenya) provides as follows:

*“A grant of representation whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion: -*

*a. That the proceedings to obtain the grant were defective in substance;*

*b. That the grant was obtained by the making of a false statement or by concealment of from the court of something material to the case.*

*c. That the grant was made by an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the*

*allegation was made in ignorance or inadvertently.*

*d. The person to whom the grant was made has failed, after due notice and without reasonable cause either: -*

*i. To apply for confirmation of the grant within a year from the date thereof or such longer period as the court has ordered or allowed; or*

*ii. To proceed diligently with the administration of the estate; or*

*iii. To produce to the court, within the time prescribed any such inventory or account of administration as is required by the provisions of paragraph (e) and (g) of section 83 or has produced such investigation or account which is false in any material particular; or*

*e. That the grant has become useless and inoperative through subsequent circumstances.”*

25. In this case grave concerns have been raised on the procedure used to petition and later on obtain the grant issued on 16<sup>th</sup> of July 2013. The first concern is whether the death certificate Entry Number 06600020/12 was procured fraudulently. **Rule 11 (3) Registration of Persons Rules, 1984** provides for the recovery of an identity card before issuance of a burial Permit under the **Birth and Death Registration Act (Cap 149)**.

26. **In re Estate of Justus M’murithi M’bagiri (Deceased) [2019] eKLR** the Court faced with a similar challenge stated as follows;

**“There is a whole procedure of obtaining a death certificate and pertinent documents such as burial permit and original identity card of the deceased should be submitted to the registrar’s office. In fact, the ID must be surrendered. I smell forgery herein.”**

27. The petitioners have not countered the Objectors allegation that the death certificate was obtained fraudulently as they still hold the original burial permit and the deceased identity card, nor have the petitioners explained how they obtained the death certificate. The 1<sup>st</sup> petitioner conceded that the objectors were in possession of the burial permit. With the above-mentioned anomalies, including different date reflected on the death certificate as opposed to the burial permit and with no explanation from the 1<sup>st</sup> petitioner, it seems that the method used in obtaining the death certificate was unorthodox and the death certificate in possession of the petitioners herein was fraudulently obtained.

28. The objectors have alluded to concealment of material facts. In the petition as only property **Dagoretti/Waithaka/818** was listed. In evidence all parties allude to other two properties; **-Dagoretti/Waithaka/T128 and Gatamayu /Kaaga/512** which the petitioners failed to list. The petitioners also failed to disclose all the beneficiaries of the estate. It has been revealed in the proceedings that the deceased had five children namely; **Wanjiku Ngoru, Susan Wairimu Ngoru (deceased), Njeri Ngoru, Jacinta Wanjiru Ndungu, Grace Kanyi (deceased)**. It took the intervention of the court for the petitioners to reveal that Grace Kanyi and Susan Wairimu (both deceased) had left behind children. The properties were also revealed only in response to the summons for revocation of grant. There was therefore clear concealment of material facts.

29. It is a requirement under **Rule 26 and 40 of the Probate of Administration Rules** that notice ought to be issued to persons *of the same degree or in priority* before filing letters of Administration. The petitioners herein are the only surviving daughters of the estate. They had sisters who are deceased and whose estates have a stake in the matter. The objectors raise their claim as grandchildren of the deceased. Upon the demise of their mother the objectors acquired an interest in her Estate. They ought to have been informed prior to filing of the petition and involved in the process.

30. Another allegation cited by the objectors as a ground for revocation is the allegation of the presence of the 1<sup>st</sup> objector during the hearing of Summons for confirmation of grant. The record shows that the 1<sup>st</sup> Objector signed the consent to mode of distribution and appeared in court on 28<sup>th</sup> July 2014 when the grant was confirmed. The 1<sup>st</sup> objector denied signing the consent form or appearing in court. The 1<sup>st</sup> petitioner was evasive to these averments during cross-examination. She denied knowledge of the consent and pleaded loss of memory as to what had transpired during the proceedings. The availability of one *Elizabeth Wanjiru* during the confirmation of grant and the consent that was fraudulently made reveals the discrepancies in the proceedings leading to the issuance of the grant.

31. The court therefore finds it fit to revoke the grant for the reasons above. And in order to move this long outstanding mater forward the court appoints the following persons as administrators; -

**i. Njeri Ngoru**

**ii. Esther Wambui Kanyi &**

**iii. Francis Thuritu Ndiba.**

32. From the evidence on record the beneficiaries have all interfered with the estate on various assumptions. Both the objectors and Petitioners may be said to have intermeddled in the Estate in one way or another.

33. Grandchildren of a deceased person cannot directly inherit the person. However, they are entitled to take the place of their parents (who

are the direct beneficiaries of the estate) upon their parent's demise. In **Re Estate of Wahome Njoki Wakagoto (2013) eKLR** the court stated as follows: -

**“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1<sup>st</sup> 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.”**

34. The objectors herein being grandchildren of the deceased are entitled to step in the shoes of their mother hence entitled to inherit the share of their deceased mother; Grace Kanyi.

35. It is noted that the deceased died intestate. Section 38 of the law of succession Act states; -

**“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”**

(Emphasize added)

36. The above section of the law does not make a distinction on the status of the children whether married or unmarried. It treats female, male, married and unmarried children equally irrespective of gender or status.

37. The law further mandates this court while considering distribution to take into account any gifts given by the deceased during her/his lifetime. Section 42 of the Law of Succession Act provides that:

**“Where-**

**(a) an intestate has, during his lifetime or by will, paid, given or settled any property for or the benefit of a child, grandchild or house; or**

**(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35,**

**that property shall be taken into account in**

**determining the share of the set intestate estate**

**finally, accruing to the child grandchild or house.”**

38. The objectors have submitted that Parcel No. **Gatamayu/Kagaa/512** and **Dagoretti/Waithaka/818** were gifts granted to their mother during the lifetime of the deceased. They rely on a document ostensibly signed by their mother where she transferred the said properties to them. And not where their grandmother transferred to their mother.

39. The documents before Court indicate that Grace Kanyi acquired title to Gatamayu/Kagaa/512 on 19<sup>th</sup> June 2007 and whose acreage is 2.67 Hectares. Njeri Ngoru acquired title to Dagoretti/Waithaka/T128 on 27<sup>th</sup> November 2002. And Dagoretti/Waithaka/818 was in the name of the deceased and subsequently transferred to the administrators herein on 29<sup>th</sup> June 2015.

40. **Section 31 of the Law of Succession Act** Provides as follows;

**“Characteristics**

**A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if**  
—

**a. the person making the gift is at the time**

**contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and**

**b. a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and**

**c. there is delivery to the intended beneficiary of possession or the means of possession of the property or of the documents or**

other evidence of title thereto; and

d. a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive that illness or danger; and

e. the person making that gift dies from any cause without having survived that same illness or danger; and

f. the intended beneficiary survives the person who made the gift to him:

Provided that—

(i) no gift made in contemplation of death shall be valid if the death is caused by suicide;

(ii) the person making the gift may, at any time before his death, lawfully request its return.

41. In *Halsbury's Laws of England*, 4<sup>th</sup> edition, volume 20(1) para 70 the same provides that: -

**“The subsequent acts of the donor may give the intended donee a right to enforce an incomplete gift. Thus, if a donor puts the donee into possession of a piece of land and tells him that he has given it to him so that he may build a house on it, and the donee accordingly, and with the donor’s assent, expends money in building a house, the donee can call on the donor or his representatives to complete the gift”.**

42. In *Malcom Bell v DANIEL Toroitich Arap Moi & another* [2012] eKLR the Court of Appeal cited *Halsbury Laws of England Vol 18* paragraphs 755 on page 396:

**“The Court will not complete an incomplete gift. Where a gift rests merely in promise (written or verbal) or unfulfilled intention, it is incomplete and imperfect and the court will not compel the intending donor, or those claiming under him, to complete and perfect it ....**

**An incomplete gift can be revoked any time there is a locus penitential so long as the gift is incomplete. No question of conscience enters into the matter for there is no consideration. ...”**

43. In *re Estate of M’Raiji Kithiano (Deceased)* [2017] eKLR the court held as follows;

**“.....although occupation may be a consideration in appropriate cases, mere occupation of the estate property does not in itself amount to gift *inter vivos* by the deceased or give the person in occupation any or exclusive right of entitlement to the particular estate property. Much more is required to establish the promise or unfulfilled intention by the donor to make the gift and the donor’s subsequent conduct which gave the donee a right to enforce the promise or unfulfilled intention to make a gift *inter vivos*. If for example the donee had applied for and obtained consent to transfer the suit land to the Applicant, perhaps the result of these proceedings could have been different. But nothing of the sort is present here. I therefore dismiss the claim based on gift *inter vivos* and find that the suit land is part of the estate.....”**

44. The deceased did not transfer any of her three properties to her children, though it is generally accepted by all that she gifted two namely Gatamay/Kigaa/512 and Dagoretti/Waithaka/T.128. Having noted the acceptance, it is clear that Grace Kanyi’s action of distributing Dagoretti/Waithaka/818 prior to filing of succession proceedings was an act of intermeddling with the estate of the deceased. Neither is there any evidence of the intent of the deceased herein to transfer the same to Grace Kanyi and even if there was such an intent the same was an incomplete gift. The result is therefore that Dagoretti/Waithaka/818 was not gifted and is part of the estate available for distribution

45. How then should this one property be distributed ? The court considers the case of two daughters Jacinta and Susan who have not had a slice of the deceased Estate and the fact that Grace Kanyi & Njeri Ngoru each got a property from the deceased and is of the view that this being the case fairness can only be achieved if Dagoretti/Waithaka/818 goes to Susan and Jacinta or their estate whatever the case in equal shares.

46. Any developments on the same were illegal and amount to intermeddling. That applies to any subdivisions or sells, which are null and void.

47. Each party to bare their own Costs.

**DATED SIGNED AND DELIVERED IN NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY 2022**

**ALI-ARONI**

**JUDGE**

**In the presence of**

.....Advocate for the

**Petitioners/respondents**

..... Advocate for the Objectors

**Amina/Martin Court Assistants**