



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Peter Kimani Gichuhi (Deceased) (Succession Cause
352 of 2015) [2022] KEHC 3363 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 3363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 352 OF 2015
RB NGETICH, J
MAY 26, 2022**

BETWEEN

MARY NJERI KIMANI PETITIONER

AND

VERONICAH WAIRIMU KIMANI OBJECTOR

JUDGMENT

1. This matter relates to the estate of Peter Kimani Gichuhi who died intestate on December 16, 1998. The public trustee petitioned for letters of administration intestate on behalf of the petitioner through the petition dated September 25, 2015, and the grant of letters of administration was issued on May 20, 2016.
2. The deceased's beneficiaries are as hereunder: -
 - 1) Margaret Njeri kimani (widow)
 - 2) Jane Nyaguthii Kimani
 - 3) Nancy Muthoni Kimani
 - 4) Beatrice Nyambura Kimani
 - 5) Rebeca nyambura Kimani
 - 6) Cecilia wanja Kimani
 - 7) silvester Gichuhi Kimani
 - 8) Ahmed Maina Kimani
 - 9) Faith Wambui Kimani and



- 10) Nahasho Gatu Kimani.
3. One property Dundori/Lanet Block 2/131 (Tabuga) is listed as comprising the estate of the deceased.
4. The objectors filed a summons for revocation of the grant dated March 7, 2017 seeking the following prayers: -
- a. Spent
 - b. That the grant of letters of Administration to the Public Trustee of the republic of Kenya on behalf of Mary Njeri Kimani made on May 20, 2016 be revoked.
 - c. That this honorable court be pleased to inhibit any further dealing on land parcel no. Dundori/Lanet Block 2/131 (Tabuga).
 - d. This honorable court be pleased to injunct the petitioner Mary Njeri, by herself, her servants, children, employees, agents and anyone working through her from disposing of, alienating, charging, wasting, planting, ploughing, leasing and in other way adversely dealing with land parcel number Dundori/Lanet Block 2/131 (Tabuga).
 - e. That pending the hearing of this application, this honourable court be pleased to order the petitioner to surrender the original title deed for LR No. Dundori/Lanet Block 2/131 (Tabuga).
 - f. That the intended objector applicant be allowed to file a notice of objection, Answer to the petition and cross-application to the petition out of time.
 - g. That the petitioner/ respondent be restrained from administering the estate of the deceased pending the hearing and final determination of this application.
 - h. That the petitioner does pay the costs of this application.
5. The application is premised on the grounds that the grant was obtained fraudulently through concealment of material facts and the deceased estate may go to waste if the petitioners are allowed to continue administering the estate of the deceased.
6. The application is supported by the annexed affidavit of Veronica Wairimu Kimani reiterating the grounds in support of the application. The objector's contention is that she is the second wife of the deceased but the petitioner failed to disclose to the court the existence of the second house while obtaining the grant. She averred that the deceased had 13 children and 2 wives, comprising of 8 beneficiaries from the 1st house and 7 beneficiaries from the second house as listed hereunder: -

First house

1. Mary Njeri Kimani - widow
2. Sylvester Gachuhi Kimani - son
3. Jane Nyaguthii Kimani – daughter
4. Ahmed Maina Kimani - son
5. Nahashon Kimani - son
6. Wanja Kimani – daughter
7. Wambui Kimani - daughter
8. Wanjiru Kimani - daughter



Second house

1. Veronica Wairimu Kimani – widow
 2. Samwel Gichuki Kimani - son
 3. Jane Nyaguthii Kimani - daughter
 4. Joseph Muraya Kimani – son
 5. Margaret Gathoni Kimani - daughter
 6. Miriam Wangui Kimani - daughter
 7. Catherine Wanja Kimani - daughter
7. The objector averred that she had cited the petitioner in Nakuru Succession Cause No. 130 of 2016 but she failed to appear before the Court and the Court proceeded to allow the objector to file a petition for letters of administration of the estate of the deceased.

Objector's Case

8. PW1 Jane Nyaguthie Kimani adopted her witness statement dated March 8, 2019 and her late mother's affidavit dated August 3, 2017 as evidence. She stated that Peter Kimani is her late father who died on December 16, 1998 and produced death certificate to confirm the same. She testified that her mother who died on October 19, 2018 was a second wife to Peter Kimani while the petitioner was the 1st wife. She said the petitioner had 9 children but two (2) namely Muthoni Kimani and Beatrice Kimani are deceased, while the objector's mother had 8 children and 2 are deceased.
9. She produced the chief's letter dated February 3, 2016 which states the deceased was survived by 2 wives. She said her mother learned of the transfer of the property to the petitioner when she conducted a search through the surveyor, who also produced a copy of the green card to the property and said her mother was not involved by the petitioner in obtaining a grant of representation of administration of the estate of the deceased.
10. She further stated that all the siblings of the deceased are named Kimani and both families participated in the burial of the deceased. She produced photographs taken during the funeral and it shows the objector and the petitioner seated near the casket as wives of the deceased.
11. The objector further stated that property LR No. Dundori/Lanet Block 2/131 (Tabuga) was divided equally between the two houses and the petitioner build a house on her portion while the objector builds a granary on her portion. She stated that the families lived in harmony and both the petitioner and the objector took care of the deceased when he was unwell.
12. She urged the Court to cancel and remove the petitioners' names on the titles and proceed to find the deceased Peter Kimani had two wives and distribute the estate according to the two houses
13. On cross-examination by Mr. Njoroge for the petitioner, she said her deceased mother was married to the late Peter Kimani under Kikuyu Customary law in 1998. She further stated that they have ploughed the land in question and put up a granary to store maize, though she could not tell who purchased the property.
14. She confirmed that her siblings bear the name of the deceased as per the identity cards. She said Namis was born in 1965 but was issued with identity card in the year 1996, while Margaret was born in 1969 and her identity card was issued in 1996 whereas Joseph was born in 1968 and his identity card was in 1999. She maintains they did not change their identity cards.



15. On photograph produced as exhibit 3, the objector said it does not show the business belonged to her mother but to her stepmother and father. She further stated that the partnership agreement marked Exhibit 14 does not indicate that her mother was a wife to the deceased. She said it is only her mother and stepmother who stood near the coffin during the burial of the late Peter Kimani.
16. PW2 Sara Njoki adopted her witness statement dated March 8, 2019 as her evidence. She said she was a friend to the objector's mother late Veronica and the deceased herein Peter Kimani. She said she knows the late Wairimu as a neighbor and stated that the deceased Peter Kimani had two wives and children. She said the deceased farmed on late Peter Kimani's farm in Tabuga and was also a businesswoman who run a hotel and clothes business.
17. On cross-examination, she states she does not know who purchased the property and confirmed the late Veronica and Peter were living together as husband and wife.
18. PW3 Mwaura Muraya adopted his witness statement dated March 8, 2019. He said he is the brother of the deceased Veronicah Wairimu and the late Veronicah Wairimu was married to the deceased Peter Kimani under the Kikuyu customary law and had children. He said the late Peter Kimani had 2 wives and the children were named after their maternal grandparents save for Joseph Muraya and Kihumba who are named after their father and grandparent respectively. He said the deceased Veronica ploughed the deceased land in Tabuga.
19. On cross-examination, he said her sister was married in 1978 but could not remember the exact date.

Petitioner's Case

20. DW1 Mary Njeri adopted her witness statement dated July 5, 2019 and the list of documents dated even date. She said she lives in Tabuga and that she got married to the deceased through a Christian marriage in the year 1959 and produced a marriage certificate in court as exhibit; she said they were blessed with 9 children of whom 2 are deceased but have left-behind children.
21. The petitioner testified that parcel No. Dundori/Lanet Block 2/131 is hers and her husband. She said she purchased it at Kshs 350/= from Kamau Buana but was registered in the name of her husband. She stated she has built on the parcel together with her sons and other people who had jointly built with her late husband. She said the parcel is not sub-divided.
22. On cross-examination, she said she is also known as Mary Nyakairo, and Nyakairo is her maternal grandmother. She further stated she didn't know the woman seated with her in front of the coffin on the left side during the funeral of the deceased. She denied knowing Veronica as a wife to the deceased. She said the late Veronica she was not living with the deceased as the deceased was conducting business in Mombasa. She stated that she was not aware that her husband had moved to Nakuru and was conducting business in Nakuru.

Objectors Submissions

23. Counsel filed submissions dated March 3, 2022. She submitted that the grant issued to the petitioner on 20th May 2016 was through concealment of material facts and the same ought to be revoked under Section 76 of the *Law of Succession*. She submitted that the petitioner misdirected the Court that she was the sole beneficiary of the estate of the deceased Peter Kimani yet she was aware of the existence of the second family.
24. Counsel further submitted that prior to his death, the deceased was living with his second wife a fact which the petitioner ignored and added that the petitioner ought to have notified all beneficiaries when



applying for letters of administration as per Section 26 of the *Probate and Administration Rules*, and the failure by the petitioner to inform the objectors' family renders the proceedings for the grant of administration defective in substance.

25. The objector's Advocate cited the case of *Re Estate of Wahome Mwenje Ngonoro Deceased* (2016) eKLR where the Court stated as follows: -

“The evidently deliberate failure by the respondent to involve the applicants at the time of filing these proceedings, failure to list them among the beneficiaries or seek their consent or renunciation was in my view in bad faith and amounts to concealment of material facts. my conclusion is that the proceedings leading to the issuance of the grant are defective in substance and that material information was not disclosed to the court in that the court been made aware that there were other beneficiaries who were interested in the deceased's estate, the court would have hesitated to issue the grant.”

26. Counsel further submitted the petitioner ignored the citation by the objector and proceeded to transmit the parcel of land in her name. It is further contended the petitioner has failed to prove her contribution to the purchase of the property as per Section 7 of the *Matrimonial Property Act*.

27. The Court was urged to revoke the grant and proceed to make an order for costs in favour of the objectors.

Petitioner's Case

28. Counsel filed submissions dated March 14, 2022 and filed on March 16, 2022, it is contended the deceased Veroninah was not married to Peter Kimani as their proof of marriage was not adduced before the Court. Further, it was submitted the objector's witness 3 contradicted the objector's statement and stated the marriage was celebrated in 1970 and there was no marriage ceremony in 1998.

29. Further counsel submits the deceased Peter had no capacity to contract another marriage after marrying the petitioner under the African Christian Marriage and Divorce Act.

30. Further, counsel submitted that the objector has failed to prove they are entitled to a share of the deceased estate; that national identity cards are not proof of paternity and cited the case of *Estate of Komu Muthigani (Deceased)* (2019) eKLR where the court pronounced itself as follows: -

“Evidently an identity card cannot by itself be proof of paternity hence C if claims that the three children are children of the deceased she still has to establish the same. C was known to the petitioner but not as a co-wife.”

31. Counsel further submitted that the presence of the objector at the funeral of the deceased is not proof of marriage to the deceased; added that the objectors have not met the threshold to revoke the grant as per Section 76 of The *Law of Succession Act* and urged this court to dismiss the application for revocation of the grant.

Analysis And Determination

32. I have considered evidence adduced and the submissions by counsels in support of their various arguments and I frame the following as the issues for determination: -

- i. Whether the objector/applicant was a wife of the deceased?
- ii. Whether the grant issued herein on 20th May 2016 be revoked?



iii. What should be the mode of distribution of the estate of the deceased?

(i) Whether the objector is the legal wife of the deceased

33. Section 29 sets out the meaning of who a defendant is an estate. Section 29 provides: -

“For the purpose of this part, defendant means: -

- a) The wife of wives or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death.
- b) Such of the deceased’s parents, step parents, grandparents, grand-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters as were being maintained by the deceased immediately prior to his death and
- c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

34. The petitioner’s argument is that the petitioner further argues the deceased having married her under the Christian marriage did not have capacity to marry the objector. She said the objector was not a wife of the deceased and she failed to proof the existence of the marriage and thus is not a dependant.

35. Section 37 of the *Marriage Act* provide as follows; -

“Any person who is married under this act shall be incapable of contracting a valid marriage under any native law or custom.”

36. The courts applied Section 37 of the *marriage Act* before 1981 when parliament added section 3(5) of the *law of succession Act* which carters for women married under customary law by men who had previously or subsequently contracted statutory marriages and who have been abandoned or neglected. Such women are entitled to be provided for from the estate of the deceased. This include women who are considered wives by presumption.

37. Section 3(5) The *Law of Succession Act* 1981 of the Act provides as follows: -

“Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the proposes of this Act, and in particular Sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”

38. In the case of The matter of *Irene Njeri Macharia vs Margaret wairimu Njomo and another* Nairobi Court of Appeal Number 139 of 1994 the Court overturned the ruling in The matter of Reuben Nzioka Mutua (deceased) and held as follows: -

“Section 3(5) of the *Law of succession Act* is meant to protect women who marry men under customary law, who are already married to or who subsequently marry under woman under statute. The woman married under customary law is regarded as a wife for succession purposes, notwithstanding that by virtue section 37 of the *marriage Act* the man had no



capacity to marry her... and in particular sections 29 and 40 thereof and her children within the meaning of this Act.”

39. In the instant case, the objector Joyce Nyaguthii contends the mother was married to the deceased and was living with the deceased prior to his demise and they were blessed with six children. In support of her argument, she adduced photographs showing the mother was present and recognized as a wife during the burial of the deceased. The objector’s witnesses testified that the objector was married and living with the deceased.
40. From the evidence adduced, there is prove that the objector’s mother lived with the deceased and sired children together. Neighbors knew them as husband and wife and even if there was no sufficient prove of customary marriage, there exist presumption of marriage and the objector’s mother was therefore a wife of the deceased for purposes of succession Act and her children are entitled to inherit from the estate of the deceased.

(ii) Whether the grant issued herein on 20th May 2016 be revoked?

41. The second issue I will discuss is whether the applicant’s application meets the threshold for the revocation of a grant within the meaning of Section 76 of the *Law of Succession Act*.
42. Section 76 of the *Law of Succession Act* states as follows:

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any 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 fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that 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 one year from the date thereof, or such longer period as the court order or allow; 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 paragraphs (e) and (g) of section 83 or has produced any such inventory



or account which is false in any material particular;

or

- (e) that the grant has become useless and inoperative through subsequent circumstances.”

43. In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No.158 of 2000, Mwita J. made remarks on the guiding principles for the revocation of a grant.

“(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

44. Under section 76, a Court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or by an application of a party.

45. The objector herein invited the court to revoke the grant obtained on the ground that the same was obtained through concealment of material facts. The objector contends that the petitioner failed to disclose to the Court the existence of other beneficiaries entitled to the estate of the deceased. According to the petition filed by the petitioner I do note that the petitioner only listed beneficiaries of the first house and did not include the second house. The objector Veronica died before the matter was concluded and her daughter Jane Nyaguthii testified on the objector’s behalf adopting her witness statement.

46. The chief’s letter dated February 3, 2016 indicate that the deceased was survived by two wives. He proceeded to list the two wives being the petitioner as the first wife and objector’s mother as the second wife and listed 9 children for the first wife and 8 children for the second wife,

47. It was the objector’s submission that the petitioner obtained the confirmed grant by way of concealment of material facts that she failed to disclose the existence of the second family and also failed to obtain consent from them when obtaining the grant as per Section 26 of the *Law of Succession*.

48. Part VII Rule 26(1) and 2 of the *Probate and Administration Rules* which provides as follows: -

“Rule 26 (1) Letters of Administration shall not be granted to any applicant without notice to any other person entitled in the same degree as or in priority of the applicant.

- 2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of communication, or written consent in Form 38 or 39, by all persons so entitled in equality or priority be supported by an affidavit of the applicant and such other evidence as the court may require.”

49. In light of the above, I invoke the inherent powers of this court granted under Article 159 of *the Constitution* and Section 76 of the *Law of Succession Act* and proceed to revoke the letters of grant of administration issued to the petitioner and subsequent confirmation as it was obtained fraudulently by concealment of material facts of other beneficiaries to the deceased.



50. Having established the deceased had married two wives, he was therefore polygamous at the time of his death. The applicable law applicable in distribution of his estate is section 40 which stipulates thus: -

- “(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net 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.
- (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38”

51. Further the Court of Appeal in *Scolastica Ndululu Suva vs. Agnes Nthenya Suva* [2019] eKLR the Court expressed itself at paras 15-21 as: -

“In *Mary Rono vs Jane Rono & another (supra)*, Waki JA in the leading judgment, accepted the proposition that the Court had the discretion in ensuring a fair distribution of the deceased’s estate but that the discretion must be exercised judicially on sound legal and factual basis. In the same judgment, Omollo JA stated the position more clearly as follows: ‘My understanding of that section is that while the net intestate estate is to be distributed according to houses each house being treated as a unit, yet the judge doing the distribution still has a discretion to take into account or consider the number of children in each house. If Parliament had intended that they must be equality between houses they would have been no need to provide in the section that the number of children in each house be taken into account. Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work injustice particularly in the case of a young child who is still to be maintained, educated and generally seen through life. If such a child whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied that the Act does not provide for that kind of equality.’

52. From the foregoing, therefore the estate of the deceased ought to be divided equally adding surviving spouse as an additional unit.

53. Final Orders

- 1) The certificate of confirmation of grant is revoked and set aside.
- 2) The title deed obtained pursuant to the confirmed grant is hereby cancelled and the estate reverts back to the name of the deceased.
- 3) The estate of the deceased be divided equally between the two house depending on the number of children in each house in a ratio of 10:8. The first house comprising of 9 children and surviving spouse making a total of 10 units and the second house comprising of 8 children making 8 units.
- 4) The petitioner and the late Veronica wairimu’s daughter Jane Nyaguthie to jointly administer the estate of the deceased.



5) Each party to bear own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT KIAMBU THIS 26TH DAY OF MAY, 2022.

RACHEL NGETICH

JUDGE

In the presence of:

Kemboi - Court Assistant

Mr. Njoroge for Petitioner

Mr. Ouma holding brief for Ms. Mukira for Objector

