



**In re Estate of Kamau Rungathu (Deceased) (Succession Cause
479 of 1994) [2022] KEHC 14417 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14417 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 479 OF 1994
HK CHEMITEI, J
OCTOBER 31, 2022
IN THE ESTATE OF KAMAU RUNGATHU (DECEASED)**

BETWEEN

**JANE WANGARI KAMAU 1ST APPLICANT
MARY NJERI KAMAU 2ND APPLICANT
ELIZABETH WANJIKU KAMAU 3RD APPLICANT**

AND

**GEORGE WAWERU KAMAU 1ST RESPONDENT
PAUL WAWERU KAHARA 2ND RESPONDENT**

JUDGMENT

1. The Deceased died on April 23, 1989. He had two wives. Alice Nyambura was the first wife. She pre-deceased the Deceased. She had two children: Paul Waweru, the 2nd Respondent, and Ann Wambui. Mukami Kamau Nginyo was the second wife. She had six children: George Waweru, the 1st Respondent, the three Applicants: Jane Wangari Kamau; Mary Njeri Kamau and Elizabeth Wanjiku Kamau; as well as two others who pre-deceased the Deceased.
2. The Grant of Letters of Administration to the estate of the Deceased was issued to -Mukami Kamau Nginyo – the 2nd wife to the Deceased - on July 17, 1995 and confirmed on October 26, 2007. The only asset listed in the Certificate of Confirmation of Grant is the land known as Kabazi/Munanda Block 2/128 Mahiga (hereinafter, “the Suit Property”). By the Certificate of Confirmation, the Suit Property was to be shared between the said Mukami Kamau Nginyo and the 2nd Respondent – each representing the two houses of the Deceased.
3. The Certificate of Confirmation of Grant was later amended via a Consent dated December 06, 2011. The terms of the consent were that the 2nd and 3rd Respondents who identified themselves as the only



- beneficiaries to the Deceased's estate would share the 2 and ½ -acres Suit Property equally with each one of them getting 1 and ¼ acres. The Amended Certificate of Confirmation of Grant dated May 17, 2012 was again rectified on February 07, 2013 to replace Mukami Kamau Nginyo with the 1st and 2nd Respondents as administrators.
4. The Applicants are aggrieved by the mode of distribution contained in the Rectified Certificate of Confirmation of Grant. They filed the Summons for Revocation/ Annulment of grant dated February 07, 2014, supported by the grounds on the face of the application and the Affidavit of Jane Wangari Kamau (Jane) dated February 07, 2014.
 5. Jane depones that none of the Applicants signed consents for both the confirmation of the Grant on October 26, 2007 and its subsequent rectification on May 17, 2012 and that any consents purportedly signed by the Applicants are forgeries, null and void. Her claim is that the rectified grant has completely omitted them despite their entitlement to inherit from their late father's estate. She claims that the Respondents have disinherited the Applicants on the basis that daughters are not supposed to inherit. Jane, further depones that the only parcel of land belonging to their father has been divided into two with each of her brothers getting an equal share.
 6. The Application is also supported by the affidavits of Mary Njeri Kamau and Elizabeth Wanjiku Kamau both dated January 04, 2021. They depone that they are biological daughters of the Deceased. They contend that the Respondents did not follow the law by excluding the daughters from distribution. They deny that there was any will or proof that the Deceased intended to distribute the property equally between their brothers. They allege that the grant was obtained falsely since the Applicants were not aware of the distribution of the Deceased's estate and contend that the said distribution is discriminatory.
 7. The Application is opposed through the Affidavit of George Waweru Kamau filed in Court on January 10, 2019. He depones that he is the first-born son of the 2nd wife of the Deceased and that his father called the family and divided the suit property between his two wives. He deposes that he is the only son to the 2nd wife while his stepmother also has one son, the 2nd Respondent herein. According to him, the Deceased stated that the suit property be equally divided and shared between him and his stepbrother. He denies any allegations of fraud in pursuing the case.
 8. In response, the Applicants filed an Affidavit on January 25, 2019 sworn by Jane. She reiterates that the Respondents excluded other children of the Deceased within the meaning of Section 29 of the [*Law of Succession Act*](#). She denies that their father called the family and divided the land. She demands that the Respondents provide proof of any such division. She further states that the Respondents had another parcel of land in Subukia which they sold. Jane maintains that the grant was obtained falsely since the Applicants, who are daughters of the Deceased were not aware of the distribution and they should not have been excluded.
 9. She denies that their father left behind any will distributing the suit property and states that the Applicants were never involved in the filing of the Petition or the confirmation of the grant and that the same was done by the Respondents to exclude other dependants.
 10. The Application was heard by viva voce evidence. PW1 was Jane Wangari, a daughter to the Deceased. She testified that the Deceased had two wives; her mother- Joyce Mukami and Nyambura who are both deceased. The 1st wife, Nyambura had two children – Paul Waweru and Ann Wambui while the 2nd wife Joyce Mukami had 6 children namely George Waweru, herself- Jane Wangari, Mary Njeri, Elizabeth Wanjiku, and Veronica Wambui and Ndekie Wanjiru who are both deceased.



11. It was her testimony that all along she lived in the Deceased's house and brought up all her 4 children. She denied that that the Deceased called them for a meeting to decide on the question of inheritance or to distribute his property. Instead, she recalled that the Deceased gave portions of the land to her and others to cultivate while he was still alive – but not as an inheritance.
12. It was also her testimony that George and Paul had been given portions to build their house and to bring up their children and that after their father died, they were left with their mother, who also became old and died. According to her, their mother explicitly told George to ensure that her- Jane's children had to get the inheritance from the Deceased because they had been brought up in the homestead but George and Paul refused and said that daughters can never inherit and took their mother to Court.
13. According to her, their mother fought for them in the case but when she died, George and Paul distributed the land between the two of them, after which they were forced to go and rent shambas as daughters of the Deceased. This she said was unfair and she approached the Court to get any rightful share together with her sisters.
14. On cross examination, she testified that she was married in Tanzania to a Kenyan husband, but they got divorced and that she had separated from her husband and she came back to Kenya long before the Deceased died. She also testified that they were not involved in the case before and it was their mother who was fighting for them, since George had sued their mother.
15. It was her testimony that George had later told them that the Court had said that the land only belongs to him and Paul but that they never agreed, and they did not think that the Court could make that decision without hearing their side. She further testified that upon checking the Court file they found out that the grant had been confirmed giving all the land to George and Paul. It was her testimony that although they did not know exactly when the grant was confirmed, they came to Court as soon as they learnt of the confirmation.
16. PW2, Elizabeth Wanjiku Kamau testified that she is the last-born daughter of the Deceased. According to her, George and Paul unfairly distributed the land belonging to their father and left her and her sisters out. She asked the Court to give her a share of her father's land because it is her birth right and she did not have any other inheritance. She equally denied the claim that their father gave all the land to Paul and George and proposed that that the land should be divided equally among all the children of the Deceased.
17. It was her testimony that she has three children who were brought up in the homestead since she was never married, but that George and Paul had told them to leave because the land is theirs and she had to go and live with her mother, who never said that the shamba belonged to George and Paul.
18. On cross examination, she recalled that she used to bring their mother to Court, but they were not part of the case initially and only decided to revoke the grant when they learnt that all the shamba had been given to George and Paul. They were dissatisfied with the same and believe the land should have been given to all children of the Deceased.
19. PW3 was Mary Njeri, also a daughter of the Deceased. She testified that when both their parents died, they heard that George and Paul had sub-divided the land between themselves. This she said was unfair and that their father never said that the land should be given only to the boys. She expressed her desire to get her inheritance and for them -the Applicants to get a share of the Deceased's property.
20. On cross examination, she testified that she is married but has always been interested in the case from the beginning because she always wanted part of her inheritance. She denied knowing that the Court had decided that the land should only be shared between the two brothers.



21. DW1 was George Waweru, a son to the Deceased and the 1st Respondent/Administrator. He testified that the Deceased had 2 wives: The 1st wife was Alice Nyambura who had 2 Children – Paul Waweru and Ann Wambui, while the 2nd wife was Joyce Mukami, who had 6 children; himself- George Waweru, Veronica Wambui and Ndekie -who are both deceased, Mary Njeri, Jane Wangari and Elizabeth Wanjiku.
22. He testified that since 1983 the Deceased held meetings of his family in their homestead. According to him, there was a meeting attended by himself and his wife, Paul Waweru and his wife, his mother Joyce Mukami and his stepmother Alice Nyambura. It was his testimony that at that meeting, the Deceased said he had only one parcel of land that he wanted subdivided between his two eldest children that is himself and Paul Waweru since Paul and him represented each house. According to him, the Deceased said that the daughters who were married should get their inheritance where they are married.
23. He further testified that the Deceased had called an elder named Waweru Ng'ari to witness his wishes but that the said elder had later died. According to him, they were all satisfied, and they later continued living on the land. After their father died in 1989, they filed the Succession matter so that the shamba could be transmitted to them as their father had said. It was his testimony that his mother and Paul Waweru became the Petitioners in the case and were made administrators of the estate.
24. He testified that he and Paul then approached his mother and informed her of the need to have the property transmitted as per the Deceased's wishes. They then brought the case to Court and the Court agreed that the land should be divided between Paul and himself.
25. It was further his testimony that after their sisters got the letters, they did nothing until 2014 when they brought this application and that he did not understand why they had sued him, yet they divided the shamba as per their father's wishes and the Court agreed with them, thus concluding the case.
26. On cross examination, he maintained that the sisters knew about the case and their father subdividing the land into two but never raised any issues. He maintained that the only person in the alleged meeting held in 1986 was Paul's wife and Waweru Ng'ari was the witness. He further testified that the Court had agreed with them about the distribution, which was done when their mother was alive, and she was satisfied. He denied that the Deceased had a shamba in Subukia and testified that the Subukia shamba was his alone.
27. DW2 was Jane Wambui who testified that she is the wife to Paul Waweru. According to her, the Applicants were not being truthful. It was her testimony that the Deceased called a meeting of herself, her husband, George and George's wife and informed them that he was sick and that he wanted the Kabazi land to be divided between Paul and George, but the Subukia land should remain in the name of Mukami -the 2nd wife. It was her testimony that later on, the Deceased told Mukami -the 2nd wife that the Subukia land should be given to George and after a short while, their father-in-law died and was buried in the Kabazi shamba.
28. It was her testimony that the Applicants were all present when the Succession matter was filed, and they used to bring their mother to Court. It was therefore her testimony that the Applicants were involved all through – even when the Court decided that the land should be divided between the two sons.
29. On cross examination, she testified that she was present when the meeting was held. She denied having left Paul Waweru's home for her home in Gahara and testified that she was present when their father-in-law died.
30. She later testified that she was aware there was land in Subukia and it was sold by George Waweru but that she did not know who was given the Subukia land by the Deceased or how it was subdivided. It



- was also her testimony that the Applicants had been absent at the meeting called by the Deceased but that she did not know why the Deceased had not called the Applicants to the meeting.
31. Parties filed submissions. The Applicants' submissions are dated May 25, 2022. The Applicants reiterate that they were denied the right to inherit their father's property by virtue of them being women, an action they deem discriminatory. They maintain that they only learnt of the succession after the Respondents had obtained and confirmed the grant. They deny signing any consents to the mode of distribution and insist that their purported signatures are forgeries. The Applicants maintain that the mode of distribution was unfair and rely on *In the Matter of the Estate of Tabitha Waithera Kamau (Deceased)* [2011] eKLR
 32. They cite the provisions of Section 76 of the *Law of Succession Act* and *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] eKLR on the circumstances that can lead to the revocation of a grant. They urge the Court to find that first, the proceedings to obtain the grant were defective in substance. Second, that the grant was obtained fraudulently by the making of false statement or by the concealment from the court something material to the case and third, 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.
 33. The Applicants reiterate that the mode of distribution was unfair and discriminatory and contend that the estate ought to be distributed equally among the beneficiaries.
 34. The Respondents' submissions are dated July 06, 2022. The Respondents submit that the Deceased's estate was distributed fairly. They contend that although the Applicants seek revocation on the basis of fraud and forgery of signatures, they have failed to produce the alleged forged documents and as such the claim is unsubstantiated. They rely on *Felix Cira Misbeck v Republic* [2020] eKLR where the Court laid out the conditions for forgery and submit that the Applicants have not met those conditions.
 35. The Respondents contend that the Deceased exercised his testamentary freedom in a state of contemplating death and divided the property into two between his sons from each wife. They submit that the appropriate law in this case would be Section 40 of the *Law of Succession Act* under which provisions, the net estate of the Deceased ought to be distributed according to houses, each being treated as a unit.
 36. They rely on *Koinange & 13 Others v Charles Karuga Koinange* [1986] eKLR and argue that the Deceased divided his property in accordance with Kikuyu Customary Law. They submit that under Section 51 of the *Evidence Act*, the existence of any general custom is admissible in evidence if it is given by a person who is likely to know of its existence. In this case they argue, the wishes of the Deceased were witnessed, and testimony offered by two of his wives, who were parties to the suit before their demise as well as parties who were present at the alleged meeting.
 37. The Respondents have cited *Rabab Njeri Kariuki v Joyce Waruguru Kariuki & 2 others* [2016] eKLR. They submit that the Applicants are adults who are well-settled in their lives and are usurping the wishes of the Deceased in a bid to evict the Respondents from the land, rightfully acquired from the Deceased.
 38. The Respondents also submit that the grant was confirmed in 2013, transmission effected, subdivision done, and titles issued to the Respondents. They maintain that the process of Petitioning the Court, surveying land subdivision was never done in secrecy and yet the Applicants never objected to the same. To them, the delay in objecting to the distribution was calculated to be made after the demise of their mothers and witnesses to the Deceased's wishes. They rely on Succession Cause No. 71 of 2015 *Judith Naiyai Ramaita & Another v James Koote Ramaita* and urge the Court to consider fairness and justice



in deciding this case and not to uproot the families of the Respondents who have been living on the suit property. They pray that the Court maintain the Grant as confirmed.

39. The starting point should be that the Deceased died intestate. It is for this reason, that the Respondents petitioned the Court for distribution of the Deceased's estate under the rules of intestacy. The Respondents have however suggested that the Deceased made a gift in contemplation of death.

40. Section 31 of the *Law of Succession Act* sets out the characteristics of a gift in contemplation of death as follows:

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. Does the 'gift in contemplation of death' alluded to by the Respondents meet the above characteristics? In my view, it does not. First, no evidence was adduced to show the circumstances under which the Deceased at the time of the alleged meeting in 1986 was contemplating his death. This is buttressed by the lapse of time between 1986 when the gift in contemplation of death was allegedly made and the death of the Deceased in 1989 of as well as the indication that the Deceased died of old age.

42. The above provisions of the law are such that a gift in contemplation death must meet all of the above conditions for it to be considered as such. In the instant case, other than stating in evidence that the Deceased was sick when he called for the meeting, the Respondents did not sufficiently demonstrate the Deceased was anticipating death in the near future.

43. Having so established, the two issues for determination are:

- I. Whether there exist sufficient grounds for revocation of the grant herein; and



- II. What is the appropriate mode of distribution in the event the grant is revoked.
44. The Applicants are seeking revocation of the Grant under the conditions given under Section 76 (a), (b) and (c) of the *Law of Succession Act*. Throughout these proceedings and from the documents or record, the Respondents led the Court to believe that they were the only two beneficiaries of the Deceased's estate. At the same time, from the evidence of PW2 and DW2 that the Applicants accompanied their mother to these proceedings, it is evident that the Applicants or some of them were aware of these proceedings.
45. Even though these proceedings commenced before the 2010 Constitution- particularly Article 27, there existed Rule 7(e) of the Probate and Administration Rules requiring the person petitioning the Court for administration of a Deceased's Estate to inform the Court of all possible beneficiaries of the Deceased, even when they may not benefit from the Deceased's estate. It is possible that on one hand, the Respondents may have been oblivious of those provisions of the law. On the other hand, the Applicants equally seem to have been oblivious of their right to move the Court and to participate in the proceeding in their own capacity.
46. There are no consents signed by the Applicants on record and while the allegation of forgery cannot be sustained, it is trite that the exclusion of a beneficiary from succession proceedings as is in this case, amounts to concealment of material facts and is a valid ground for the revocation of a grant. -See *Benson Champu Kaparewo v Rabeca Chepkuto Kiperenge* [2019] eKLR.
47. In the present case, there is no doubt that the Applicants, who are biological children of the Deceased and therefore, at least potential beneficiaries to the estate, were not involved in the succession matter. While the Respondents attempt to justify their exclusion for the ostensible reason that the Deceased had distributed the estate to the exclusion of the Applicants, as held above, this Court finds no evidence of such distribution. In any event, even if the Respondents believed so, they were obliged to list the Applicants as beneficiaries and involve them in the Succession Cause so that they can make their case. As it happened here, they were excluded. That is fatal for the integrity of the grant issued herein.
48. In order to resolve the issues in the estate once and for all, it is important to reach the second question of mode of distribution. The Applicants propose that the suit property be shared equally among all the children of the Deceased, while the Respondents propose that the Suit Property remain with them, in equal shares.
49. The Law on distribution of an estate where the Deceased was intestate is found under Section 40 of the *Law of Succession Act*. The said Section provides as follows:
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.
50. The literal interpretation of the above provision is that the estate is first distributed among the houses, depending on the number of children in each house, with any surviving spouse being an additional unit. Thereafter, the assets allocated to each house are distributed within the house in accordance with sections 35 to 38 of the *Law of Succession Act*.



51. The Courts have however cautioned against the uniform application of Section 40. In *Scolastica Ndululu Suva v Agnes Nthenya Suva* [2019] eKLR the Court of Appeal recommended a case-to case application of Section 40 of the *Law of Succession Act* as follows:

It is therefore evident, that, although section 40 of the *Law of Succession Act* provides a general provision for the distribution of the estate of a polygamous deceased person, the court has discretion to take into account factual circumstances of the particular case that may be relevant in ensuring equitable and fair distribution of the estate.

52. The Court of Appeal further observed in *Jane Nyambura Ndungu v Beatrice Wangari Ndungu & 2 others* [2021] eKLR

Section 40 of the *Law of Succession Act* is not a magic pill which can be applied to resolve all issues pertaining to distribution of a deceased person's estate. In as much as section 40 LSA talks of "Equal Shares" the distribution must also be equitable.

53. The common thread from the above case law is that Section 40 of the *Law of Succession Act* is meant to ensure the equitable distribution of the estate and not necessarily the equal distribution. In arriving at the mode of distribution, the Court is to be guided by the facts of each case including the circumstances of the beneficiaries at the time of distribution.

54. The circumstances of this case are that the Deceased's two wives are deceased. From the first house, Paul Waweru died in the course of these proceedings and is survived by his widow, DW2. It has not been expressed whether Ann Wambui is interested in the estate. From the Second House, Ndekie and Veronicah are deceased leaving the 1st Respondent and the three Applicants herein. The interests of their estates have equally not been expressed.

55. Having considered the above circumstances, I make the following orders:

- I. The Certificate of Confirmation of Grant dated issued on October 26, 2007 as subsequently amended and/ or rectified on May 17, 2012 and February 7, 2013 be and is hereby revoked.
- II. Instead, a new grant shall issue jointly to Jane Wambui (representing the first house) and Jane Wangari (representing the second house).
- III. The Suit Property shall be distributed between the first house and the second house at the ratio of 2:6
- IV. The share of the first house shall be divided equally between the Estate of Paul Waweru and Ann Wambui.
- V. The share of the second house shall be divided equally among George Waweru Kamau, Jane Wangari Kamau, Mary Njeri Kamau, Elizabeth Wanjiku Kamau, the estate of Veronicah Wambui and the estate of Ndekie Wanjiru.
- VI. This being a family matter, each party will bear their own costs.

56. Orders accordingly.

Dated at Nairobi this 17th Day of October, 2022

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JOEL NGUGI



JUDGE

Delivered at Nakuru this 31st day of October, 2022

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HILLARY CHEMITEI

JUDGE

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