



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NUMBER 241 OF 2011**

**IN THE MATTER OF THE ESTATE OF SAMUEL NJAGI (DECEASED)**

**JANE MUTHONI NJAGI.....1<sup>ST</sup> PETITIONER**

**GIBSON MUNYI NJAGI.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**FRIDAH WANJIKU.....1<sup>ST</sup> OBJECTOR**

**WINFRED WAMBUI GATHUMA.....2<sup>ND</sup> OBJECTOR**

**RULING**

1. The deceased herein **SAMUEL NJAGI** died intestate on 24<sup>th</sup> March, 2011.
2. The Petitioners herein **JANE MUTHONI NJAGI & GIBSON MUNYI NJAGI** in their capacity as deceased's wife and son respectively petitioned this court for a grant of letters of administration intestate of his estate on 26<sup>th</sup> May, 2011 and on 5<sup>th</sup> August, 2011, the same was granted to them.
3. The following were listed as beneficiaries in the affidavit in support of the petition for letters of administration:-
  - JANE MUTHONI NJAGI-widow
  - GIBSON MUNYI NJAGI-son
  - KEVIN WAWERU NJAGI-son
  - NATASHA KARIMI-daughter
4. Vide chamber summons dated 23<sup>rd</sup> September, 2011 brought under **section 76 of the law of succession Act and Rule 44 of the Probate and Administration Rules**, the 1<sup>st</sup> objector/applicant herein sought that the letters of administration granted to the petitioners herein on 5<sup>th</sup> August 2011 be revoked and fresh one issued on grounds that the same was obtained fraudulently, without consent of the family and without disclosing that herself and the second objector were also the wives to the deceased and that the deceased had another child by the 2<sup>nd</sup> objector namely Natasha Karimi
5. She however withdrew this application vide parties' consent dated 23<sup>rd</sup> September, 2013 and filed in court on 2<sup>nd</sup> October, 2013.
6. On 7<sup>th</sup> November, 2013 the court adopted the said consent marking 1<sup>st</sup> objector's case withdrawn as its order.
7. The second objector, **WINFRED WAMBUI GATHUMA**, filed summons for revocation of grant dated 24<sup>th</sup> April, 2012 on 25<sup>th</sup> April 2021 pursuant to **section 76 of the law of succession Act and Rule 44 of the Probate and Administration Rules**.
8. She sought orders that the grant of letters of administration issued to the petitioners on 5<sup>th</sup> August, 2011 be stayed pending inter-partes hearing, that rental proceeds from the estate be deposited in the joint interest earning account of the advocates in the matter pending inter-partes hearing, the said letters of administration made to petitioners be revoked, and issued to herself and the costs of this Application be provided for.

9. The grounds for the application are set out on its face and it is supported by second Objector's Affidavit sworn on 25<sup>th</sup> April, 2021. She deposed that she was the legal wife to the deceased having celebrated their marriage on 8<sup>th</sup> March, 2002 and that they were blessed with one issue, NATASHA KARIMI.

10. She stated that she is aware the deceased cohabited with the 1<sup>st</sup> Petitioner herein and out of the union they were blessed with two sons, namely; Gibson Mirugi (the 2<sup>nd</sup> petitioner herein) and Kevin Waweru. That the 1<sup>st</sup> Petitioner abandoned her two sons and she raised them together with the deceased and at no point did the 1<sup>st</sup> Petitioner either visit the matrimonial home nor care about the welfare of her children.

11. She deposed that after the tragic and sudden death of her husband, the 1<sup>st</sup> Petitioner surfaced and together with her relatives they forced her and her daughter out of their Matrimonial home in MITI MINGI/MBARUK BLOCK 8/1956 and that the letters of administration issued on 5<sup>th</sup> August, 2011 to the petitioners were obtained fraudulently by concealment of material particulars and hence the same should be revoked.

12. The Petitioners did not file any replying affidavit is on record.

13. This matter proceeded by way of viva voice evidence.

14. On 14<sup>th</sup> June 2012, PW1, JANE MUTHONI NJAGI, testified that in 1990, she got married to the deceased under Embu customary Law and they were blessed with two sons. i.e. GIBSON NJAU & KELVIN WAWERU NJOROGI. That the deceased was shot by thugs on the 23<sup>rd</sup> March 2011. That by the time of his death he had married one Winfred Gathuma.

15. the 2<sup>nd</sup> objector herein and they were blessed with one child NATASHA KARIMI. That the deceased and the 2<sup>nd</sup> objector had separated in 2007 and that she got married elsewhere. She prayed that the deceased estate be distributed to her, her children and Natasha Karimi as they are the rightful beneficiaries. She said she was not aware of Fridah Muthoni.

16. She said that the deceased had three properties at KITI two of which were developed. She described them as number 234, 14 and 18. There was also a motor vehicle registration number KBH 583U. it was her prayer that the properties be given to the three children of the deceased.

17. PW2 GRACE MUNYI, mother to the deceased, confirmed that the deceased had married the petitioner and the 2<sup>nd</sup> objector one Winnie, who she said had run away with her grandchild by the same Karimi. She confirmed that he had two sons with the Petitioner.

18. The Second Objector was given time to prosecute her case vide a Ruling by *Emukule J* delivered on the on the 5<sup>th</sup> October 2021. This was on the basis that the second objector had even filed a certificate of marriage demonstrating that she the legal wife of the deceased.

19. I took over the matter from *A.K Ndung'u J* on the 14<sup>th</sup> October 2019. By 7<sup>th</sup> June 2021 the Objector had not prosecuted her case despite the matter being fixed for hearing several times on 14<sup>th</sup> June 2012, 23<sup>rd</sup> January 2020, 18<sup>th</sup> February 2021, 7<sup>th</sup> June 2021 and 1<sup>st</sup> November 2021 when the case was marked as closed.

### **ISSUES FOR DETERMINATION**

20. Whether or not this court should revoke the letters of Administration intestate issued to the Petitioners on 5<sup>th</sup> August, 2011.

### **ANALYSIS & DETERMINATION**

21. The Application for determination is premised on **section 76 of the Law of Succession Act, Cap 160, Laws of Kenya**. The said provision 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.”*

22. It is the law that in the event that a grant was obtained fraudulently by the making of false statement or by the concealment from the court of something material to the case, such grant is liable for revocation.

23. In this case, the 2<sup>nd</sup> objector claimed that she is the legal wife to the deceased. She attached a marriage certificate to that effect. This position is uncontroverted as the petitioners never filed any response to the objector's application.

24. The 1<sup>st</sup> petitioner and PW2 confirmed to this court that the second objector was married to the deceased but they separated and she is now married elsewhere. However, the petitioners never tendered any evidence to prove and or support this position, and the 2<sup>nd</sup> objector never showed up to testify.

25. The second objector in her affidavit acknowledged that the 1<sup>st</sup> petitioner cohabited with the deceased and together they were blessed with two children. She averred that by the time the deceased legally married her he had separated with the 1<sup>st</sup> Petitioner. Again no evidence was tendered of this alleged separation of 1<sup>st</sup> petitioner from the deceased. This was a case where the deceased married one wife under customary law, and married the other under civil law. Each knew about the other one but it is evident that the Petitioner was not aware of the civil marriage between the 2<sup>nd</sup> objector and the deceased.

26. What is unique about this case is that neither of the wives of the deceased denies the existence of the other. Each acknowledges that the deceased was married to the other and that there was a child or children born out of that relationship. It appears to me that that this is a matter where each of these women could lay a legitimate claim to be the widow of the deceased as provided for under **Section 3(5) of the Law of Succession Act**.

27. The petitioner clearly acknowledged that the objector was a wife of the deceased. She only contended that she had moved on and married elsewhere. She acknowledged the 2<sup>nd</sup> objector's child. These facts do not add up to concealment of material facts or fraud. It is evident from the deceased's mother that the deceased was known to have two wives but one had left. The petitioner acknowledged that relationship save that according to her it had ceased to exist. Had she completely concealed the existence of these two then there would have been concealment of material fact.

28. In the circumstances, it is my view that it is in the best interests of the beneficiaries herein that the grant issued to the petitioner alone be revoked and a fresh one re -issued to both the petitioner and the 2<sup>nd</sup> objector, with a rider that both or either of them is at liberty to file and serve summons for confirmation of grant within sixty (60) days hereof.

29. Hence the objection succeeds to the following extent;

*a. That the Grant of Letters of Administration of estate intestate made to JANE MUTHONI NJAGI & GIBSON MUNYI NJAGI on 5<sup>th</sup> August, be and is hereby revoked and a fresh one to issue to JANE MUTHONI NJAGI and WINFRED WAMBUI GATHUMA*

*b. The two administrators are at be at liberty to file summons for confirmation of grant either jointly or separately within 60 days hereof. The one who files to serve the other within seven days of filing.*

*c. Each party to bear its own costs.*

**DATED, DELIVERED VIA EMAIL THIS 26<sup>TH</sup> DAY OF DECEMBER, 2021.**

**Mumbua T Matheka**

**Judge**

**In the presence of:**

**CA: Edna**

**Kamonjo Kiburu& Co Advocates for the Petitioner**

**Denis Anyoka Moturi&Coo Advocates for the 2<sup>nd</sup> Objector**