



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 222 OF 1991

IN THE MATTER OF THE ESTATE OF THE LATE MATHAI KIMANI (DECEASED)

PERIS WANJA KIMEMIA.....APPLICANT

-VERSUS-

MARY NJERI KIMEMIA.....RESPONDENT

JUDGMENT

1. The exact date of the Deceased's death is contested, but both parties agree that he died intestate sometime in 1969. This Succession Cause was filed by Kimemia Mwaniki (Mwaniki), a son to the Deceased. Mwaniki later died in 1993 and his widow, the Respondent herein, took over the Cause and was substituted as the Administrator of the Deceased's estate. She was issued with a Grant of Letters of Administration on 12/11/2008 and the same were confirmed on 18/02/2011.
2. In the Petition for Letters of Administration intestate, Mwaniki named himself and three others as the beneficiaries of the estate of the Deceased. The other three are:
 - a. Njenga Mwaniki – who is described as an “adult.”
 - b. John Kimemia Mwaniki – who is described as an “adult son.”
 - c. Wanjiku Mwaniki – described as “widow.”
3. Mwaniki does not explain why he thought he had priority to file for the Letters of Administration especially when the widow of the Deceased was still alive. There is no evidence that the other three beneficiaries consented to the filing or were informed about the filing. Suffice it to say that, as aforesaid, Mwaniki died on 13/03/1993. His wife, the Respondent, brought an application under Section 76(e) of the Law of Succession Act, to be substituted as the Administrator.
4. In her Application to be substituted as the Administrator to the estate herein, the Respondent did not name or serve the original three other beneficiaries of the estate. Instead, the Respondent attached a letter from the Chief of Turi Location in Nakuru County naming the Respondent's children as beneficiaries to the estate of Mwaniki. So, while this Succession Cause relates to the Deceased herein (Mathai Kimani), the Chief's letter the Respondent attached to justify substitution was with respect, not to the estate of the Deceased herein, but to the estate of Mwaniki.
5. Having secured the substitution as an Administrator, the Respondent was granted the Certificate of Grant of Letters of Administration Intestate. He thereafter applied for the confirmation of the Grant. In her Summons for Confirmation of the Grant, the Respondent names six beneficiaries and attaches a Consent to Confirmation of Grant signed by all six. The six named beneficiaries are the children of the Respondent. None of the original three other beneficiaries identified in the Original Petition for Letters of Administration Intestate were named as beneficiaries. There is also no evidence that they were informed or were aware of the proceedings.
6. The Respondent identifies only one asset as available for distribution, namely, the parcel of land known as LR Dagoretti/Riruta/S.642 (“Suit Property”). She indicates in her application that all the beneficiaries have consented to the whole share being transmitted to her.
7. The Certificate of Confirmation of Grant was issued by Justice Anyara Emukule on 18/02/2011.
8. There was a lull in activity until 24/11/2017 when Peris Wanja Kimemia (the “Applicant”), suing in her capacity as the Administrator of the Estate of the Late John Kimemia Mathai (“John”) filed the instant Application.
9. The Applicant is a widow to John. The Applicant is the Administrator of John's estate, *vide* the Certificate of Confirmation of Grant issued

in *Nairobi Succession Cause No. 2900 of 2008*. As alluded to above, John was also a son to the Deceased herein. As such, John and Mwaniki were siblings. John had been identified in the original Petition for Letters of Administration filed herein by Mwaniki as one of the beneficiaries as described above.

10. The Applicant has brought the present Summons for Revocation of Grant seeking the following orders:

1. *Spent*

2. *Spent*

3. *Spent*

4. *THAT the confirmed grant of letters of administration intestate purportedly granted to MARY NJERI KIMEMIA sued as the Respondent herein, issued on 18th February 2011 be hereby revoked by this Honourable Court.*

5. *THAT the Honourable Court be and is hereby pleased to issue a Declaration to the effect that the Applicant herein is the bona fide Administrator over the property known as DAGORETTI/RIRUTA/S.642 by virtue of the Certificate of Confirmation of Grant issued to her and dated 16th January 2012*

6. *THAT this Honourable Court do issue an order of injunction to compel MARY NJERI KIMEMIA to transfer the property known as DAGORETTI/RITUTA/S.642 in the name of the Applicant herein and more specifically PERIS WANJA KIMEMIA.*

7. *THAT the cost of this Application be jointly and severally borne by the Respondents herein.*

11. At the hearing of the Application, the parties agreed to adopt their witness statements and affidavits and be cross examined on the same. In this Judgment the Applicant's witnesses have been identified with the appellation 'PW' while the Respondent's witnesses are identified as 'DW'.

12. PW1 was Peris Wanja Kimemia, the Applicant. She adopted her Affidavits of 24/11/2017 and 17/06/2019 in which she stated that she got married to John Kimemia Mathai on 13/09/1983 and moved into his house on Dagoretti/Riruta/S.642. After their marriage, they developed the property together; erecting a one-bedroom house for themselves and 30 rental units. They paid all the necessary statutory dues to the government in relation to the property which she stated she continues to pay to date.

13. The Applicant deposed that after her husband's death on 09/08/2006, he was buried on the subject property at the wishes of his family. She stated that her husband had occupied the property since 1971, after inheriting it from his father. This inheritance she said was effected by a letter from Limuru elders from Kihingo village, addressed to the Commissioner of Lands. The letter sought to divide the property of the Deceased.

14. She contended that the Deceased herein having been polygamous had divided land to the two houses, with her late husband and his brother allocated land in Riruta and Timboroa and the other siblings allocated land in Elburgon.

15. The Applicant contended further that her late husband was the first born yet him and the Deceased's children from the 1st House were excluded at the filing of Petition. She deposed that her husband had tried to obtain Letter of Administration of the Deceased's estate but died before he could obtain a Death Certificate. After the death of her husband, the Applicant said she became the administrator of his estate and proceeded to follow up on the status of the land from the Lands Registry in April 2013, where she obtained a copy of the Green Card showing that the property still belonged to the Deceased herein. It was until 07/10/2017 when she was approached by one Elijah Kamuyu and an unknown woman who were inquiring about the sale of the property.

16. Later, on 10/10/2017, through a search conducted by her advocates she learnt that the property was registered to the Respondent and a title had been issued on 30/03/2017. Her advocates wrote to the Registrar of Lands, for a restriction to be placed on the property, but there was no response. On 16/09/2017, the said Elijah Kamuyu informed her that he had authority from the Respondent to sell the land. It was upon visiting the Lands Registry that her advocates learnt of the present succession cause.

17. The Applicant deposed that despite being aware that her and her late husband were residing on the property, the Respondent maliciously excluded them from the succession proceedings, yet they would have wished to participate in the same. According to the Applicant, the proceedings leading to the Respondent being appointed Administrator were meant to disinherit her late husband and the grant was obtained fraudulently through making false statements. For instance, she denied that the Deceased died on 12/09/1969 at Lengalo Forest but rather he died on 05/07/1969 at Singaro Forest, Nandi District.

18. Another material fact the Respondent alleged was concealed was that the Deceased had other surviving beneficiaries and the Suit Property had been allocated to her late husband. According to the Applicant, the Respondent had no authority to be Administrator of the Deceased's estate and transferring the property to herself amounts to intermeddling. She denied the allegation that her and her family had been asked to vacate the premises and expressed her apprehension that the Respondent would dispose the property unless this Court intervened.

19. In her further Affidavit dated 14/06/2018, the Applicant contended that both Dagoretti/Riruta/S.642 and Dagoretti/Riruta/S.62 were gifted to her late husband by the Deceased and that the Respondent's husband was allocated land in Elburgon. She insisted that she has been living on the subject property and had even improved the rental units thereupon. She pointed to the Chief's letter from Ngando Location, which she said corroborated that she has been living on the property. She testified that the discrepancy in the Title indicated on the Certificate

of Confirmation of Grant for John was due to a typographical error.

20. On cross examination, the Respondent denied knowing the existence of Dagoretti/RirutaA/S.62 or that her husband was aware of the Succession proceedings.

21. PW2 was Mary Muthoni Njenga (“Mary”). She adopted her affidavit dated 14/06/18. Her deposition was to the effect that she knew John and became friends with him when she moved to the neighbourhood of the Suit Property. She deposed that the late John Kimemia often told her that he had inherited the land from his father who often visited him on the property. She stated that she had never heard of anyone else claiming the subject land and that upon John’s death, his wife- the Applicant and her children had continued to live there and that the Respondent was unknown to her.

22. On cross examination Mary said she would not know everyone who visited the Applicant and what claims they would have (on the property).

23. DW1 was Mary Njeri Kimemia, the Respondent. She adopted her Replying Affidavit dated 15/05/208 in which she stated that the Deceased died on 12/09/1969 and at the time of his demise left among other properties; Dagoretti/RirutaA/S.62 and Dagoretti/Riruta/S.642. According to the Respondent Dagoretti/Riruta/S.62 was gifted to John while Dagoretti/Riruta/S.642 was gifted to Mwaniki, who failed to transfer it to himself during his lifetime.

24. The Respondent testified that John took advantage of Mwaniki living in Elburgon and unlawfully took Dagoretti/Riruta/S.642 having disposed Dagoretti/Riruta/S.62. She denied that the land in Elburgon was bequeathed to John by the Deceased but that her husband lived in a Settlement Scheme. The Respondent also denied that the late John was buried on the subject property but rather at Chemere Village in Timboroa. She faulted the Applicant’s attestation to events surrounding the property before 1983 when she -the Applicant got married to John.

25. She also questioned the reliability of the letter from the Elders purporting to grant the parcel of land to John in the absence of a valid will. The Respondent deposed that after learning that the Applicant had taken possession of the subject property, they registered a caution over the same.

26. According to her, the late John lived in Trans Nzoia as shown in his Death Certificate and there was no evidence that he indeed resided on the subject property. She also pointed to the description of the property in the Certificate of Confirmation of Grant in the Estate of John Kimemia Mathai’s as L. R Dagoretti/Kangemi 642 and not Dagoretti/ Riruta/S. 642. She contended that her late husband at the time of obtaining the Grant herein advertised the same in the Kenya Gazette and there was no objection from the Applicant or an attempt to have the Deceased’s estate administered.

27. To the Respondent, order 3 and 6 of the Applicant’s Summons cannot be granted by this Court, being a Probate Court. She stated that despite several attempts to evict the Applicant, the Applicant and her late husband refused to vacate the subject property to date.

28. On cross examination, she testified that the land in Elburgon was given to them by the President. She testified further that her husband had one other sibling and the 2nd wife had four children, but she was not aware if the other children were included in the proceedings and when the matter came up for confirmation not all of them came. She testified that she did not include the other properties of the Deceased because they were given to the Deceased’s other children.

29. She said that she paid (rates) for the property but did not have proof of the same since her deceased husband paid for the same.

30. DW2 was Margaret Wairimu Kimemia (“Margaret”) who adopted her Affidavit dated 24/06/2019. Margaret is the daughter of the Respondent and Mwaniki. She essentially approved the Respondent’s assertions that her father, Mwaniki bought the land in Elburgon and settled there even though he was gifted the subject land.

31. Margaret stated that they had never benefited from the grant in this case since the Applicant had refused to vacate the land and that her father Mwaniki was the first registered owner of the land in Elburgon; the same having been given to him in a settlement scheme.

32. On cross examination, Margaret testified that the Elburgon land had been distributed in 1983 but the titles became ready in 1989 and that the Deceased was buried in Singaro, Uasin Gishu, where he used to live with his wives and the parcel of land there inherited by one of the Deceased’s sons called Njenga.

33. Margaret also testified that having been born in 1978, she was only given this information by her late father as to how the property was to be distributed and denied ever trying to sell the subject land. She also testified that Elijah Kimuyu was her husband and they had visited the land but their aim was never to sell it but that they wanted the Applicant to vacate. She testified that they had been paying rent since the title came out.

34. The parties filed submissions. The Applicant’s submissions are dated 01/08/2021. It is submitted for the Applicant that it was common practice in 1971 for land in the estate of the Deceased to be distributed through a letter to the Commissioner of Lands since it was before the Law of Succession Act came into effect.

35. The Applicant relies on several decisions of this Court which, she says, stipulate what should happen where a deceased died intestate prior to the commencement of the Law of Succession Act. In particular, she relies on *Philis Michere Mucembi v Wamai Muchembi [2010] eKLR*. The Applicant argues that the estate of the Deceased ought to be distributed in accordance with the letter of 28/08/1971 and not the Law of Succession Act.

36. The Applicant submits that her late husband was able to register Dagoretti/ Riruta.S.62 in his name and dispose of the same but could not do so for Dagoretti/RirutaA/S.642 since the Deceased had registered a caution on it and he was unable to obtain a death certificate to enable him to process the same.

37. The Applicant relies on Section 76(b) of the Law of Succession Act and submits that by concealing the existence of other beneficiaries, not disclosing that the subject property had been given to the Applicant's late husband and that the Deceased had other properties, the Grant issued to the Respondent out to be revoked. She insists that the Succession proceedings were conducted secretly so that the Applicant's family never found out about it. The Applicant cites Rule 7(e) of the Probate and Administration Rules and relies on the cases of **Jamleck Maina Njoroge v Mary Wanjiru Mwangi [2015] eKLR, Re; Estate of Philip Kiprono Bett (Deceased) (2005) eKLR and Re: Estate of Hellen Wangari Wathiai (Deceased) [2021] eKLR.**

38. The Applicant also cites the provisions of Rule 26 of the Probate and Administration Rules to the effect that a grant should not be given to a person without notification to persons entitled under the same degree. She cites the case of **Re Estate of Lesinko Sokorte Kiraiyo (Deceased) [2017] eKLR** and the application of Rule 26 therein.

39. The Applicant submits that upon revocation, the issue of distribution of Dagoretti/Rirutaa/S.642 does not arise since the same was already distributed by the Deceased, who died prior to the enactment of the Law of Succession Act. In the alternative, the Applicant submits that the suit should be heard afresh to establish those who should benefit from the Deceased's estate and all the assets belonging to the estate.

40. The Respondent's submissions are dated 06/10/2021. The Respondent submits that since Mwaniki died intestate, she succeeded his rights and powers to the estate of the Deceased herein under the provisions of Section 79 and 82 of the Laws of Succession Act.

41. The Respondent also submits that the Suit Property formed part of the Deceased's estate but had been gifted to the Respondent's husband who was yet to transfer it, unlike the land in Elburgon which belonged to Mwaniki.

42. It is also the Respondent's submission that the transfer of the property having been done after the confirmation of the Grant, the issue of intermeddling does not arise. She relies on **Abuya Awino (Deceased) [2019]eKLR.** Instead, the Respondent says, it is the Applicant who has been intermeddling with the estate of the Deceased in the pretext of having a confirmed grant, when the property in that grant is described differently from the subject property, in essence, contravening the provisions of Section 45 of the Law of Succession Act.

43. The Respondent argues that the grant was procedurally obtained as required under Section 51 of the Law of Succession Act and does not therefore meet the criteria for revocation set out under Section 76 of the Law of Succession Act. She cites the case of **Re Estate of Agwang Wasiro (Deceased) [2020].**

44. The Respondent also submits that the payment of statutory fees is not proof of ownership and the payment of land rates and rent by the Applicant does not mean the Applicant owns the property.

45. The Respondent argues the Applicant is therefore not entitled to the reliefs sought and that the property cannot revert to the Applicant since she never owned it in the first place. She cites the case of **Estate of Alois Abuya Awino (Deceased) [2019] eKLR.**

46. Lastly, the Respondent argues that in case the Court finds it fit to revoke the grant herein, then the subject property ought to be distributed equally to the parties herein. The Respondent cites the case of **Chebet Kimugai v Margaret Chepkiror Charito [2017] eKLR**

47. From the foregoing, there two issues for determination. First, whether the Law of Succession Act Applies to the Deceased's estate and secondly, whether Grant of Letters of Administration on 12/11/2008 and confirmed on 18/02/2011 should be revoked and consequently, whether the title issued to the Respondent ought to be cancelled.

48. The Deceased died in 1969, before the commencement of the Law of Succession Act. Section 2(2) of the Law of succession Act provides as follows:

The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.

49. This is to say that although the Law of Succession Act is not applicable to his estate, the Court is to proceed with its administration in as far as possible in accordance with the Act.

50. The Applicant is seeking revocation of the grant on the grounds that the same was obtained through concealment of material facts, to wit exclusion of the Deceased's other properties, concealment of John and other beneficiaries and that the subject property had been given to John. This would fall under Section 76(b) of the Law of Succession Act.

51. The evidence tendered in the trial yields the following conclusions:

a. While Mwaniki disclosed the existence of John and two other beneficiaries in his Petition for Letters of Administration Intestate, he did not disclose the names of all the beneficiaries to the estate. It is also apparent that he did not inform or obtain the consent of the other beneficiaries to petition for the Letters of Administration.

b. It is also apparent that the Petition for Letters of Administration intestate as filed, as well as subsequent filings in Court did not include a comprehensive list of all the assets owned by the Deceased.

c. When the Respondent applied to be substituted as the Administrator in the estate herein, she did not name the other beneficiaries to the estate. Instead, she named her own children as beneficiaries. While her children are beneficiaries to the estate of her husband, they are not direct beneficiaries to the estate herein.

d. There is no evidence that the Respondent served or informed the other beneficiaries to the estate of the Deceased herein – including John – of her application to be substituted.

e. When the Respondent filed her Summons for Confirmation of Grant, again, she mis-names her own children as beneficiaries to this estate and failed to name or serve the other beneficiaries to the estate – including John.

f. Whereas the Applicant has amply demonstrated that she and John have lived in the Suit Property since at least 1983, the question whether the Suit Property had been bequeathed to John by the Deceased during his lifetime remains open. Not enough material has been placed before the Court for a definitive finding on the question. This would impinge on the question of distribution of the Suit Property.

52. The obvious fact here is that the Respondent (and earlier, her husband), failed to disclose material facts to the Court when petitioning for letters of Administration, and in later filings. The first duty a Petitioner has when filing for letters of administration is to inform the Court of all material facts. In the instant case, the existence of other beneficiaries also amounts to a material fact. The Applicant and John were not just any other third parties who were to wait to be notified by a Gazette Notice of the existence of the Succession proceedings. In **Benson Champu Kaparewo v Rabeca Chepkuto Kiperenge [2019] eKLR**, the Court of Appeal held that the exclusion of a Beneficiary from succession proceedings amounted to concealment of material facts.

53. The Respondent's claim that the Applicant or John never tried to administer the estate of the Deceased cannot stand. The Respondent and her late husband knew of the existence of John and the Applicant and had several chances to cite them or involve them in the proceedings but chose not to. This is enough to trigger the revocation of the Letters of Administration granted herein. Since the Respondent proceeded to utilize the Certificate of Grant issued herein to effect a transfer of the property of the Deceased to herself, and since the Certificate of Grant was unlawfully obtained, it follows that the transfer of property to herself cannot stand. It, too, must be un-done. Nothing comes out of an illegality. *Ex dolo malo non oritur actio*: no action arises from deceit or illegality.

54. From the foregoing, the disposition of the case will be as follows:

i. The Grant of Letters of Administration issued on 12/11/2008 and confirmed on 18/02/2011 is hereby revoked.

ii. Either party to be at liberty to file for Letters of Administration to include all the other Beneficiaries and properties of the Deceased. The proper distribution of the asset(s) of the Deceased will be determined in that cause.

iii. The title to DAGORETTI/RIRUTA/S.642 currently held by the Respondent be and is hereby cancelled.

iv. This being a family matter each party shall bear their own costs.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF DECEMBER 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.