



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 818 OF 1993**

**IN THE MATTER OF THE ESTATE OF THE LATE PAUL MUKUI WAIRIRE(DECEASED)**

**RULING**

**Back ground**

1. **Paul Mukui Wairire** (*the deceased herein*) died intestate on 3<sup>rd</sup> August 1989. **James Kimata Mukui** petitioned for grant of letters of administration on 22<sup>nd</sup> June 1992, where he listed the below mentioned persons as the survivors namely;

- a. **Phillip Munyoroku Mukui,**
- b. **Kimata Mukui,**
- c. **Mary Wanjiru,**
- d. **Monicah Wanjiru Mukui,**
- e. **Joseph Gitonga Mukui,**
- f. **David Mukanu Mukui.**

He also listed the following items as assets of the Estate;

- a. **Ndaragu/Karatu/583 (1.8Ha),**
- b. **Ndaragu/ Karatu/522 (16.7Acres),**
- c. **Ndaragu/ Kamunyaka/221 (2.88Ha),**
- d. **Ndaragu/Karatu/T112, 144, 115, 116, 117 & 30,**
- e. **Ndaragu/ Gachagare /341 (61.0 acres),**
- f. **Ndaragu/Karatu/Plot No.1,**
- g. **Shares with I.C.D.C Inv Co. Ltd,**
- h. **Shares with K.T.D.A-Matataru Tea Factory,**
- i. **Shares with Witithie Gwaka Inv (Cert No.xxx).**

2. Grant of letters of administration were issued to the said Petitioner on 24<sup>th</sup> August 1993.

Summons for confirmation of Grant was filed on 16<sup>th</sup> July 1996.

David Mukanu Mukui and Mary Muchene Mukui filed protests against confirmation of the said Grant.

3. Parties however recorded a consent to the mode of distribution on 11<sup>th</sup> November 2016. The same was adopted by the court on 22<sup>nd</sup> November 2016 and Certificate of confirmation of grant issued on the same date.

4. Since then, various applications have been filed seeking varied orders and mainly for revocation of the grant.

The *first* application is dated 21<sup>st</sup> March 2017 filed by **Joseph Gitonga (Joseph) Mukui, Phillip Munyokoru Mukui(Philip) and Mary Wanjiku Mukui(Mary)**. Joseph swore the affidavit in support of the application on his own behalf and on behalf of his co applicants. They claimed non-disclosure of material facts. Joseph on his part claimed he was denied his share of Ndaragu/Karatu/583 and the petitioner was in the process of evicting him vide an application filed in the **Environment and Land Court Case No. 109 of 2017** at Thika Law Courts. It was claimed that Phillip was given a lesser share and Mary did get a share in Ndaragu/ Karatu/T130.

5. The *Second* Application is dated 3<sup>rd</sup> September 2018 filed by **Lucy Wanjiku Karanja (Lucy) and Eunice Kigenji Mungai (Eunice)** in their capacity as daughters of the deceased. They allege that their consent was not obtained, they were unaware of the succession proceedings were left out of inheritance.

6. **Margaret Waceke Mwangi, a daughter of the deceased**, also filed an affidavit dated 24/9/2019 in response to the summons made by **Lucy & Eunice**. She stated that since 1993 the applicants never made it known that they were interested in any of the deceased property. That they were both aware of these proceedings but never sought to participate in the same. They have been indolent for 20 years and should not at this stage when the court has finalized its proceedings seek to stake a claim in the estate of the deceased.

She further averred that there was a meeting where the beneficiaries were informed of the distribution of the assets that were owned by the deceased (*minutes of meeting marked as MWM1*). Further she stated that the deceased was categorical during his lifetime that married daughters could not inherit unless the elder brothers gave them the property. And both **Lucy & Eunice** are well aware of their father's wishes.

7. **Samuel Kimani Ndumbi, a brother-in-law to the deceased** also filed an affidavit in response to the summons filed by **Lucy and Eunice**. He shared similar sentiments as **Margaret**. He similarly averred that the deceased was categorical that the daughters were not to inherit from his estate. He also deponed that the Kamunyaka parcel was to be sold and proceeds divided to the beneficiaries. He averred that the parcel was subdivided and was devolved to Benson Ndumbi and remainder known as Ndarugu/Gacharage/633, measuring 24 acres was inherited by his son once he passed on. He claimed that the daughters raising their claim 25 years later was in an effort to drag the case further.

8. The *Third* Application was filed on 11<sup>th</sup> February 2019 by **Andrew Kamari Muthabaku**. He claims to have bought Ndaragu/Gacharage /341 from Phillip Munyoki Mukui. He made reference to Sale Agreements dated 22/11/1993, 12/12/1994 & 10/8/2001. He informed the court further that he has developed the suit premises by planting tea bushes, avocado trees, installing power in the year 2016 and building a farm house. That after the demise of Phillip, on or about 12/11/2018, the deceased beneficiaries moved into the property, removed beacons contesting the sale and Mary Wanjiku Munyokoru (wife to Phillip) stole 30 kilos of tea, a matter that has been reported and was on going Gatundu Law Courts. He however, acknowledged that at the time of the sale the property was still in the names of the deceased herein.

9. The *fourth* Application was filed on 28<sup>th</sup> February 2019 by **John Mwaura Muthabuku**. He also claimed to have bought 1 acre from Monica Wanjiku Mukui vide Sale Agreements dated 15/10/2002 & 11/11/2003. He claimed Monica Wanjiku Mukui died before she could transfer the same to him. He was also aware that at the time of the purchase that the property was still in the name of the deceased.

10. **Zachary Waruiru Mukui** also filed an application dated 17<sup>th</sup> April 2019 seeking the transfer of Ndaragu/Karatu T116 & 117 to himself. He alleged to have bought the same from David, Joseph & Mary vide Sale Agreement dated 8/12/1994. he too was aware that the said parcels of land were registered in the name of the deceased herein but stated that they were in agreement with the vendors that after the proceedings have been finalized the same would be transferred to his name.

11. The Petitioner herein replied to the summons through numerous Affidavits.

In reply to the summons filed by **Joseph, Phillip and Mary**, the Petitioner challenged the Affidavit Joseph swore on behalf of Philip and Mary as he did not provide authority letter to swear the same on their behalf. Further, he argued that the said parties were fully engaged in the proceedings and the delay of over 20 years in resolving this succession was due to their intermeddling with the Estate. He denied concealing material facts to the court as alleged and further stated that Joseph had leased out part of the estate to 3<sup>rd</sup> parties and which required the court's intervention the Land and environment case Thika case No. 109 of 2017 against the said applicant & the third parties.

He denied that he gave a lesser share to Phillip. He averred that Phillip was granted 3.3 Acres in LR Ndarugu/Karatu/619 which he since sold to a third Party.

In reply to Mary's claim, he stated that the parcel No. Ndaragu/Karatu T130 was granted to David Makaru Mukui. He however conceded that there was an error in issuing Ndaragu/Karatu/T116 to himself and Joseph Gitonga Mukui instead of Monica Wanjiku Mukui. Further he opined that Ndaragu/Karatu/117 should also devolve to Monica Wanjiku Mukui.

12. He introduced three other properties that were omitted from the list of assets and proposed that the same be distributed as follows;

(i) **Ndaragu/Karatu/T115 to James Kimuta Mukui & John Gitonga Mukui.**

(ii) Ndaragu/Karatu/T105 to Phillip Munyoroku & David Mukaru Mukui.

(iii) Ndaragu/Karatu/469 to James Kimata Mukui.

13. In reply to the Application made by Andrew Kamari Muthabaku & John Mwaura Muthabaku it was the Petitioner's case that the same were defective as they were made against persons who are now deceased namely, Phillip Munyoroku & Monica Wanjiku Mukui. They were both aware when entering into the agreements for purchase of the suit properties that the same had not devolved to the beneficiaries of the estate of the deceased. Further their claims cannot lie with the estate but with the beneficiaries with whom they entered into agreements with.

14. The Petitioner was of the same sentiments in response to the application filed by Zachary Waruiru Mukui and urged that the claim on Ndaragu/Gacharage/T116 & T117 cannot lie as against the estate but against **David, Joseph & Mary**.

15. **Virginia Muthoni Munyoroku & Paul Mukui Gitonga** on their part filed an application dated 20<sup>th</sup> July 2020 seeking inhibitory Orders to issue against parcel No. Ndarugu/Gacharage/341 & Ndarugu/Karatu/522. Their main contention was that the inhibitory Orders ought to issue pending the hearing and determination of the various applications for revocation of grant pending to be heard.

This court on 23/7/2020 issued the inhibitory Orders pending the hearing and determination of the pending matters.

16. On 5/11/2019 the Court directed the parties to canvass **ALL** the Applications by way of written submissions. At the time of writing this ruling only the petitioner had filed his submissions to the respective summons.

### Analysis and Determination

17. The issues raised by the applicants are not novel. They revolve around the interest of the daughters, beneficiaries of the estate and the interest of the alleged purchasers.

18. The circumstances in which a grant may be revoked or annulled are set out in Section 76 of the Law of Succession Act as follows:

**“Revocation or annulment of 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.**

19. The first Application dated 21<sup>st</sup> March 2017, filed by **Joseph, Phillip & Mary** has been challenged in two respects. Firstly, the representative capacity of **Joseph** to make averments on behalf of **Phillip** and **Mary**. Secondly, is the denial by the petitioner that he concealed material facts to the court. There is no letter of authority from **Phillip & Mary** giving **Joseph** the authority to swear on their behalf. Ideally a person swearing on behalf of others ought to prove the authority granting him/her such mandate. The court has nonetheless considered issues raised in the application as **Joseph** also raised the same on his own behalf.

20. On the *second limb*. The Court has considered the history of this matter. **Phillip, Mary** and **Joseph** consented to the grant of letters of administration being issued to the Petitioner. They were therefore present from the commencement of these proceedings. Further After seeking for revocation of grant much earlier, they filed a consent as to the mode of distribution and which consent the court adopted resulting to the existing mode of distribution. The said applicants were provided for in the said distribution. In their prayer (s) they do not seek to rebut the consent and/or have it set aside. Their averment (s) do not therefore support the conditions set out for revocation and/or annulment of grant i.e.

**“ (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. “**

Their application at best is an afterthought. They failed to adduce sufficient reasons to revoke the grant or tamper with the distribution as they consented to several years back. The application is dismissed with costs.

21. Next for consideration is the application dated 11<sup>th</sup> February 2019 filed by **Andrew Kamari Muthabaku, John Mwaura Muthabaku & Zachary Waruiri Mukui**. Their claim is based on the fact that they bought land belonging to the estate from some of the beneficiaries during the pendency of these proceedings. It is worth to note that the grant herein was confirmed on 22/11/2016. All the parcels were bought before the confirmation of the grant.

Section 82 of the Act provides: -

**"Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -**

**a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;**

**b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best;**

**Provided that -**

**i. the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and**

**ii. no immovable property shall be sold before confirmation of the grant;"(emphasis added)**

Only the duly appointed representatives could sell assets but not immovable assets. Any such sale could only be done with leave.

22. The law regarding intermeddling with the estate of a deceased person is well codified in the Section 45 of the Law of Succession Act which provides as follows:

**“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**

**(2) Any person who contravenes the provisions of this section shall—**

**(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and**

**(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration”.**

23. According to Musyoka, J in **Veronica Njoki Wakagoto (Deceased) [2013] eKLR**:

**“The effect of [section 45] ...is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”**

24. In the case of **Muriuki Hassan.v. Rose Kanyua and 4 others [2014] eKLR**, when faced with a situation of sale of property belonging to an estate before succession was undertaken, Makau J held: -

**"The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased's beneficiaries and the sale of land to them is challenged in this application. In such circumstances, the interested parties' interest cannot be considered in this matter and the remedy for them is if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan."**

25. **In Jane Kagige Geoffrey & another v Wallace Ileri Njeru & 2 others [2016] eKLR** the Court also held as follows;

**“The net effect of the foregoing is clear; before a grant has been issued and confirmed, no part of the estate of the deceased may be dealt with in a manner that amounts to intermeddling. This includes those not entitled therewith taking possession of, disposition, or alienation, as well as trespassing onto the property. Such acts are subject to reversal by the court summarily.**

The spirit behind sections 45 and 82 of the Act, in my view, is to preserve the property of a deceased person until the beneficiaries and their respective shares are identified, ascertained and distributed. If intermeddling is allowed, the likelihood of the innocent beneficiaries being prejudiced by having their shares affected by reduction is real whereby, there may be no settlement and or peaceful co-existence or end to disputes between the family members. In this regard, it is for the purposes of preserving the social fabric, cohesion and peaceful co-existence of or end to disputes between family members who are beneficiaries to estates, that the law restricts, indeed prohibits any dealings with an estate until the grant is confirmed. The net effect of the aforesaid provisions of the law and decided cases is that, the estate of the deceased cannot be dealt with without the sanction of the court. Before the grant of letters of administration are confirmed, no one including the administrators of the estate of the deceased can deal with the property of a deceased by way of intermeddling therewith or effect a sale of immovable property belonging to the estate. Anyone who purports to purchase property from the estate before confirmation therefore does so at his own peril....”

26. The case of **Muriuki Hassan and Jane Kagige Geoffrey (supra)** clearly address the place of purchasers who bought part of the estate prior to confirmation of grant. This Court resonates with the import of the two decisions. Applying the same to the facts deponed the purchasers clearly knew that the parcels were in the name of the deceased. They moved to buy the same fully aware of the perils of such agreements. The beneficiaries were intermeddling with the estate of deceased, actions frowned upon by the provisions of Section 45 of the Act. Section 82 negates their power to sell while the succession proceedings are ongoing. The purchasers cannot therefore seek an equitable remedy whereas they have come to court with unclean hands. Their remedy only lies against their respective vendors but not against the estate. To this end the summons dated 11/2/2019, 28/2/2019, 17/4/2019 have not satisfied the threshold set out in Section 76 of the Act. The same are dismissed.

27. The application dated 3<sup>rd</sup> September 2018 was filed by **Lucy & Eunice** daughters of the deceased who wish to stake their claim in the estate. They contend that their consent for purposes of obtaining the grant of letters of administration, on the mode of distribution was never obtained and further they were disinherited. In rebuttal the Petitioner urges that the two were part of the proceedings. The claim being made has come twenty-five (25) too late. Further they are married daughters and the deceased was categorical that they would only inherit if their brothers agree.

28. To start with the deceased died intestate. No written or oral will was produced before court and the talk of wish of the deceased cannot hold in the circumstances.

The place of daughters to inherit gained its place in the Kenyan society prior to, and since the enactment of the Constitution 2010. See; **Rono vs. Rono [2008] 1 KLR 803 & In Re Estate of Thuku Soroko Gikunju (Deceased) [2017] eKLR.**

Courts have held that it is discriminatory and an upfront to **Article 27 of the Constitution** to disinherit daughters from their claim in the estate of their deceased parents.

29. Hon. Kimaru, J. in **Peter Karumbi Keingati & 4 Others vs. Dr. Ann Nyokabi Nguithi [2014] eKLR** held thus:

**“...The decision by a daughter or a son to get married has no bearing at all to whether or not such a son or daughter is entitled to inherit the property that comprise the estate of their deceased parents...This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for these discriminative cultural practices against women to be buried in history.”**

30. As demonstrated by written law and case law daughters are entitled to inherit from the estate of their parents whether married or unmarried unless they renounce the right to so inherit. **Lucy and Eunice** are therefore within their right to move the court seeking for what they believe is rightfully theirs.

31. As to the delay in bringing their claim, looking at the pleadings neither **Lucy and Eunice** were mentioned. Further there is no indication that they were aware of the proceedings either. The meeting of the elders attached in the sworn affidavit of Margaret Waceke Mwangi does indicate that they were a party to those proceedings. Their consent was never obtained in any of the stages where the same was necessary.

32. The agreement on distribution was in 2016, They were not party to the same and it is notable that the grant was confirmed pursuant to the said agreement. The application subject matter was filed in 2018 it seeks to revoke the grant and the confirmed grant issued in the year 2016. They filed the summons in the year 2018 barely two years since confirmation. And therefore, their claim cannot be said to have been brought 25 years late. The two daughters have a serious claim. It is worthy of consideration.

33. **Lucy & Eunice** are children of the deceased and did not become less of his children, neither did they lose their right of inheritance upon marriage. They remain beneficiaries of the estate regardless of their status and must of right inherit their father’s estate unless if they renounced their right which is not the case here. The retrogressive and archaic thinking of disinheriting married daughters must be frowned upon in the strongest term. The law is loud and clear on this. Indeed, in this instance their existence was concealed at the point of petitioning for the grant and their consent never obtained.

34. The court was informed by the administrator that Ndaragu/Karagu/T116,117,115,105 & Ndaragu/Karatu/469 are yet to be distributed. The court has also taken note that the petitioner conceded that Ndaragu/Karagu/116 & 117 ought to have gone to Monica Wanjiku Mukui.

The administrator seeks to amend the confirmed grant to factor in the parcels not distributed and form part and parcel of the estate i.e.,

Ndaragu/Karagu/T116,117,115,105 & Ndaragu/Karatu/469.

35. Before making final Orders on the claim by **Lucy & Eunice** and that of the Petitioner, the Petitioner is hereby directed to give acreages of the said properties as this information will enable the court determine the prayer for amendment and for the court to arrive at fair and just decision having found that the **Lucy and Eunice** are entitled to inherit their father's estate.

36. As relates to the Application dated 20<sup>th</sup> July 2021 the court will finalize the same when giving final orders on **Lucy and Eunice's** application.

**DATED SIGNED & DELIVERED IN NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER 2021**

**ALI-ARONI**

**JUDGE**