



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 350 OF 2012**

**FAITH MUTHONI MBUI**

**FRANCIS KARANI GATEI.....APPLICANTS**

**V E R S U S**

**JOHN GATEI COMBA.....1<sup>ST</sup> RESPONDENT(DECEASED)**

**JANE MUTHONI GATEI.....2<sup>ND</sup> RESPONDENT**

**FAITH NYAMBURA GATE.....3<sup>RD</sup> RESPONDENT**

**SUSAN WANJIKU GATEI.....4<sup>TH</sup> RESPONDENT**

**LUCY WAMBUI GATEI.....5<sup>TH</sup> RESPONDENT**

**JULIUS NDIRANGU MAINA.....6<sup>TH</sup> RESPONDENT**

**PERIS WAINOI GATEI.....7<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. John Gatei Comba was issued with grant of letters of administration of the estate of Comba Kunga and the same was confirmed on 04/02/2011 whereby the whole shares of the deceased's estates **Inoi/Kaittheri/395, 396 and 400** were given to him.

2. The applicants Faith Muthoni Mbui and Francis Karani Gatei filed an application dated 04/08/2011 seeking to revoke the said grant. They claim that the deceased was survived by 10 dependants as follows;

John Gatei Comba

Peter Murigu Comba

Faith Muthoni Mbui

Lucy Wanjiru Comba

Peris Wainoi Gatei

Jane Muthoni Gatei,

Faith Nyambura Gatei

Susan Wanjiru Gatei

Jacinta kagia Gatei

Lucy Wamutira Gatei

That they were not present during the confirmation of the grant. They further claim that they were not aware of the matter.

3. As per the proceedings on 21/07/2010, some beneficiaries were not present and the matter was SOG. However, later on the same day, they availed themselves and matter was fixed for confirmation on 04/02/2011. On the said date, it is indicated that they were all present in court and the grant was confirmed.

4. The applicants state that they conducted official search on the said estate and the proprietors are as follows;

**Inoi/Kaitheri/395** – Jane Muthoni Gatei, Faith Nyambura Gatei, Susan Wanjiru Gatei and Lucy Wambui Gatei (minor)

**Inoi/Kaitheri/396** – Peris Wainoi Gatei

**Inoi/Kaitheri/400** – Lucy Wambui Ndirangu

5. They pray that the grant be annulled, a fresh grant be issued and estate be distributed among all dependants and children of the deceased.

**6. Peris Wainoi Gatei now registered as proprietor of Inoi/Kaitheri/400 case:**

She stated that she is the wife of the administrator and informed them in April 2011 that he wanted to distribute **Inoi/Kaitheri/396** to herself, **Inoi/Kaitheri/395** to their four daughters and sell **Inoi/Kaitheri/400** to Lucy Wambui Ndirangu. The administrator applied for consent and application was approved

**7. John Gatei Comba**

He stated that before his death, the deceased had sub-divided his land **Inoi/Kaitheri/127** into 14 portions **Inoi/Kaitheri/395 – 408**.

- ***Inoi/Kaitheri/395-400** was given to him and the deceased obtained consent to transfer but he only managed to pay for stamp duty in respect of **Inoi/Kaitheri/397-399**.*
- ***Inoi/Kaitheri/401-406** was transferred to Peter Murigu Comba but he later sold them and relocated.*
- ***Inoi/Kaitheri/407** was registered in the deceased's names though he sold before his demise.*
- ***Inoi/Kaitheri/408** was transferred to the surveyor who did the sub-division.*

8. That all beneficiaries were present on 04/02/2011 and consented to the confirmation of grant and he be awarded **Inoi/Kaitheri/395, 396 and 400**.

The 1<sup>st</sup> and 6<sup>th</sup> respondents later passed away and were duly substituted.

9. The court had directed that this matter be heard by way of 'viva voce' evidence. The testimony by the applicant Faith Muthoni Mbui is that she is a daughter of the deceased Comba Kunga. That the deceased had subdivided his parcel of land during his lifetime into 14 plots. He gave John Gatei six(6) plots and Peter Murigu six plots. One plot he gave to the surveyor while he left plot No. 400 for his daughters. She claimed the plot from John Gatei but he failed to give. She claimed that plot No. 400 was left to her and her sister who is the mother Francis Karani.

10. Francis Karani on the other hand testified that he lives on plot No. 395 with permission of John Gatei who gave him a place to build in 2003. In cross-examination Francis Karani admitted that he was not given land by the deceased. According to the respondent Jane Muthoni Gatei, Francis Karani has his parents who are alive. That Francis Karani came to the plot recently and had obtained an identity to say he is the son of John Gatei but it was taken away when the matter was reported to the police.

11. The testimony by Jane Muthoni Gatei is that the deceased owned Plot No. Inoi/Kaitheri/127 which he sub-divided into 14 plots during his lifetime. He gave his two sons a total of twelve plots. He gave surveyor plot No. Inoi/Kaitheri/405. The deceased sold one plot No. Inoi/Kaitheri/400 to Lucy Wangui Ndirangu. John Gatei filed succession to transfer three plots which he had not transferred at the time the deceased died. DW-1- produced green cards for the plot to support her evidence.

12. I have considered the evidence by PW1 & 2 and find that it is contradictory whereas PW-1- claims that plot No. 400 was left for her and mother to PW-2-, the PW-2- changed tune and claimed that he was given a place to build by John Gatei which is plot No. 395. He stated that he was not given land by the deceased. I find that the claim by PW-1- is not supported by evidence. It has been proved by the transfer of land document that Comba Kunga transferred land Parcel No. 400 during his lifetime to John Gatei Comba. The plot was sold to Lucy Wambui Ndirangu and a title deed was issued to her. The green card exhibit -2- shows that the deceased Comba Kunga sold Land Parcel No. Inoi/Kaitheri/408 in 1991. The evidence by PW-1- that plot No. 400 was left for the daughters in disapproved.

13. It is not in dispute that at the time the deceased died on 30/6/00 he was survived by four children who are John Gatei Comba, Peter Murigu Comba, Faith Muthoni Mbui and Lucy Wanjira Comba. Francis Karani (PW-2-) is a grandson of the deceased whose mother is said to be alive. He has no claim over the estate of the deceased who is his grandfather.

14. It is clear from the evidence tendered that John Gatei Comba was given six plots during the lifetime of the deceased. He transferred three plots to himself but delayed in processing title deeds for plot No. Inoi/Kaitheri/395, 396 & 400 though the consent for transfer granted and the deceased had signed the transfer forms in his favour. Unfortunately the deceased died before he could obtain the title deeds. It is then he filed the succession Cause No. 61/2010 listing the 3 plots. The transfer by the deceased of six plots to John Gatei was valid as he had obtained the necessary consents from the Land Control Board. The transaction was completed during the lifetime of the deceased. The other son Peter Murigu sold all the six plots the deceased gave him and he relocated. A previous benefit to a beneficiary can only be considered where apart from the benefit the intestate has gifted a beneficiary in his lifetime if there is other property to be distributed. **Section 42 of the Law of Succession Act Cap 160 Laws of Kenya** provides:-

*Where*

*(a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for*

*the benefit of a child, grandchild or house; or*

*(b) property has been appointed or awarded to any child or grandchild under the provisions of*

*section 26 or section 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.*

This is not the case here as the deceased had distributed his entire estate during his lifetime. The claim by the applicant lacks merits as the plot which she is claiming Inoi/Kaitheri/400 was gifted to John Gatei Comba by the deceased. The plot which deceased left to himself was sold to the deceased in his lifetime.

15. The other issue which arises is revocation of grant. The Law on revocation of grant is anchored under **Section 76 of the Law of Succession Act Cap 160 Laws of Kenya (to be referred to as '(the Act)'** it provides:-

*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.*

*a. 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.*

A party seeking revocation or annulment of grant must prove that the proceedings to obtain the grant were defective in substance, that the grant was obtained fraudulently by making of a false statement or concealing from court something material to the case or the grant was obtained by making of untrue allegation of fact which is essential on a point of law to justify the grant irrespective of whether the allegation was made in ignorance or inadvertently. Where any of these grounds are proved, the party will have met the threshold for annulment or revocation of grant.

16. The applicants contend that the grant was obtained fraudulently by making of false statement and by concealment from court something material to the case. It is also stated that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant.

17. Faith Muthoni Mbui deposes that she is a daughter of Comba Kunga while Francis Karani Gatei is a son to Lucy Wanjiru Comba and therefore a grandson to the deceased Chomba Kunga. That the grant was confirmed without informing all the beneficiaries and dependants. Faith Muthoni Mbui and Lucy Wanjiru Mbui were not informed of the hearing on 4/2/2011.

18. I have perused the proceeding in Succession Cause No. 61/2010 in the estate of Comba Kunga. The estate of the deceased was listed as Inoi/Kaitheri/395, 396 and 400. At Paragraph -3- in form P&5, affidavit in support of petition for Letters of Administration the Petitioner (1<sup>st</sup> respondent) listed all the surviving children of the deceased including the applicant, 2<sup>nd</sup> applicant and the brother Peter Murigu. This shows that the petitioner never concealed the existence of other beneficiaries.

The petitioner was issued a Grant of Letters of Administration as no objection or protest was filed.

19. From the proceedings of the lower court, the application for Confirmation of Grant came up on 21/7/10 when the court noted that some listed beneficiaries were not present. The summons for Confirmation of Grant came up again on 4/2/2011 when the court listed all the beneficiaries who were present in court before the trial Magistrate Hon. H. N. Ndungu. The 1<sup>st</sup> applicant and Lucy Wanjiru Comba who is mother to Francis Karani (PW-2-) were present. They all consented to the Confirmation of Grant and the court proceeded to order that ***“By consent grant confirmed in the terms that John Gatei Comba get land parcel No. INoi/Kaitheri/395, 396 & 400”***. The court had no option in view of the consent and that being the case the parties are bound by the consent. For the court to interfere with the consent the party must prove the grounds under **Section 76 of the Act** and in addition, prove that there was fraud, mistake, misrepresentation, error or duress which same grounds can vitiate a contract. These the applicant has not proved. In **Tiwi Beach Hotel Ltd –v- Gabrielle Kathleen Brown H.C 136/92** It was held that:-

***“a consent has a contractual effect and can only be set aside on grounds which would justify setting aside a contract. A court cannot interfere with a consent judgment except in circumstances that would afford a good ground for varying or rescinding a contract.”***

20. At Paragraph 9 of the affidavit sworn by the applicants on 4/8/2011 they depose:-

***“That we were notified by the Administrator that the matter was slated for hearing on 4/2/11”.***

21. This is the date the grant was confirmed. At Para 10 they depose that they were not present as they were not aware of the date. The applicants are not candid. I am of the view that the allegation that they were not aware and that they were not present in court are false averments. The allegations are an afterthought which are clearly not true. I find that it has been proved that the deceased had obtained the consent and had executed transfers to transfer the properties to the petitioner with knowledge of all the beneficiaries who in turn appeared in court and consented that they be given to the petitioner. This was in line with the wishes of the deceased. The grant was confirmed. The petitioner transferred Plot No. Inoi/Kaitheri/396 to his wife, Inoi/Kaitheri/395 to his four daughters and sold Inoi/Kaitheri/400 to Lucy Wambui Ndirangu. The proceedings were open and lawful. The applicants have not proved any of the grounds set out under Section 76 of the Law of Succession Act to warrant this court to order that the grant be revoked. The application is without merits and is dismissed.

22. The matter herein is a Succession and revocation is expressly provided under **Section 76 of the Act**. However since there is prove that there was a consent the grounds for setting aside a consent Judgment applies.

**Dated at Kerugoya this 24<sup>th</sup> Day of January 2019.**

**L. W. GITARI**

**JUDGE**