



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**IN THE ESTATE OF JOHN GITAU WARUIRU (DECEASED)**  
**SUCCESSION CAUSE 53 OF 2009**  
**JUDGMENT**

**PLEADINGS**

The deceased died on 8<sup>th</sup> February 2002.

The administrators **James Kamau Elijohn** and **Hannah Wanjiro Gitao** filed petition for grant of letters of administration intestate and deposed the following as beneficiaries of deceased's estate;

- 1) **Grace Wariara**
- 2) **Rose Njoki Njau**
- 3) **Alice Wangare Githuku**
- 4) **Florence Wambui**
- 5) **Janet Njeri**
- 6) **Joyce Wanjiru Kibiku**
- 7) **Lilian Kinyatti**
- 8) **Edward Waruiru (deceased)**

The following was/is inventory of all assets and liabilities of the deceased's estate;

- a. **Kabete/Kibichiku/1677**
- b. **Kabete /Kibichiku/1676**
- c. **Maela/Ndabibi/Block 2/84**
- d. **KCB shares**
- e. **BAT LTD shares**
- f. **L.R.No 1556/18 -2.023& 2.231Ha Naivasha Township**
- g. **Kabete Muguga Coffee Growers Membership no 0315**
- h. **Kiambu Dairy & Pyrethrum Farmers' Cooperative Union Ltd –Account Number 2275-KNC-4323**

All beneficiaries signed consents to the administrators' appointment and filing of petition for grant. The grant was issued on 4<sup>th</sup> June 2009 to the administrators.

On 5<sup>th</sup> November 2009 the administrators filed summons for confirmation of grant and listed all beneficiaries and proposed mode of distribution. All beneficiaries consented by signing consents and appeared before **Kimaru J** on 29<sup>th</sup> March 2011. Those in Court are listed as follows;

- a. **James Kamau Elijohn**
- b. **Hannah Wanjiru Gitau**
- c. **Grace Wariara Mungai**
- d. **Alice Wangare**
- e. **Florence Wambui Gitau**
- f. **Rose Njoki**
- g. **Janet Njeri**
- h. **Joyce Wanjiru**

Lilian Kinyatti signed written consent before **Notary Public** on 22<sup>nd</sup> February 2011.

The certificate of confirmation of grant was granted/issued on 29<sup>th</sup> March 2011.

On 19<sup>th</sup> March 2013, the Applicants; **Florence Wambui & Janet Njeri** filed under certificate of urgency summons for revocation of grant of 4<sup>th</sup> June 2009 confirmed on 29<sup>th</sup> March 2011 on the following grounds;

- a) **The grant and confirmed grant were obtained fraudulently as Applicants' signatures were forged to obtain grant;**
- b) **The administrators caused some parcels of land to be registered in their names and have disposed them;**
- c) **The estate is in danger of being wasted by acts of the administrators and the beneficiaries have benefited at all.**

The Applicant's supporting affidavit, she deponed;

- a) **Kabete/Kibichiku/128 (4.1 acres) as per official search attached**
- b) **Maela/Ndabibi/Block (58 acres) as per official search attached**

These properties acreage was not disclosed to the Court during summons for confirmation of grant.

- c) **Naivasha Township LR No 1556/18 (20 acres)**
- d) **KCB account 00071251**

These 2 items were not included in the assets that comprise of deceased's estate in the petition for letters of administration.

## **HEARING**

**Janet Njeri Gitau (PW1)** relying on her supporting affidavit of the summons for revocation application testified that;

**Kabete/Kibichiku/128** formed their late father's estate and was the family homestead. They all live on built structures and with their children live. Barely, 6 months after their late father's demise, the administrators caused subdivision of the said suit property; into **Kabete/Kibichiku 1676/1677**. At the time they had not obtained letters of administration.

On 2<sup>nd</sup> April 2007, the Administrators misrepresented to the Chief that they were the only children of the deceased and obtained Chief's letter along these facts. The Chief Ms. Faith Wangare Ngugi deposed in her affidavit filed on 24<sup>th</sup> May 2015 that the administrators deceived her that they were 2 children of the deceased and she wrote them the letter annexed. Later **PW1** and **PW2** came and informed her that the deceased had 9 children. She wrote another letter.

The administrators filed **Succession Cause 53 of 2009**, obtained forged signatures of beneficiaries, and thereafter obtained a grant on 4<sup>th</sup>

June 2009.

On 5<sup>th</sup> November before expiry of 6 months and without leave of Court the administrators filed summons for confirmation of grant. Not all beneficiaries agreed to confirmation of grant although they attended Court.

Thereafter, they have not obtained any beneficial interest from the deceased's estate as stipulated in the distribution of deceased's estate outlined in the Summons for confirmation.

The Deceased son, the 1<sup>st</sup> administrator died in 2014 and since then on suit property; **Kabete/Kibichiku/128** now **Kabete/Kibichiku 1676/1677** his children have been harassing, threatening and denying some beneficiaries' children access to the family water well, the communal toilets, fencing of sections of the suit property and demolishing their structures.

With regard to **Maela Ndabibi/Block 2/84** comprised of 57 acres; the 1<sup>st</sup> Administrator/Respondent sold the suit property once the administrators obtained confirmed grant. They sold to one John Kangema Mwangi. The beneficiaries did not get any share of proceeds of sale of the said property.

The shares and money in the deceased's accounts were not disclosed and distributed to beneficiaries by administrators.

**Florence Wambui Gitau PW2** testified and relied on further affidavit filed on 10<sup>th</sup> July 2015 and corroborated **PW1's** testimony as follows;

Contrary to the Respondents' assertion that during the deceased's lifetime, he orally bequeathed the properties to the only son 1<sup>st</sup> Respondent; the land in Kibichiku and Naivasha. The deceased died intestate and he did not leave a written Will.

**PW2** stated that she bought 5 acres from her late father in **LR Maela/2/84** and attached Sale Agreement to the affidavit. She did not benefit from the confirmation of grant distribution of the estate. **Pw1** did not get 1 acre from the said property as indicated in confirmation of grant.

The 1<sup>st</sup> Respondent transferred the **Maela/Naivasha2/84 (58 acres)** from deceased's name to himself and sold the said property. He gave her a cheque of **Ksh 1,240,000/-** as value of her share which she accepted.

Since **PW1** and **PW2** filed cautions on the Kibichiku properties and pursued their beneficial interest since 2007/2008, their children are threatened harassed to be evicted from the premises as they ought not to claim as they are not beneficiaries. **PW1& PW2** and other beneficiaries are pursuing their beneficial interest to bequeath their children as 1<sup>st</sup> Respondent whose share is held by his children. Hence, eviction of the Applicants children does not arise and is not justified.

**PW3 Faith Wangare Ngugi** Assistant Chief Kibichiku testified that the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent came to her office and informed that they wanted the chief's letter and they were only 2 children of the deceased. The Letter marked **JM5** was written to that effect.

Later the Applicants **PW & PW2** came and informed her that some of the deceased's children were left out of list of beneficiaries, she wrote another letter.

**DW1 2<sup>nd</sup> Administrator Hannah Wanjiru Gitau** testified and relied on her Replying Affidavit of 5<sup>th</sup> May 2015 and stated as follows;

The application is misconceived bad in law and failed to disclose material facts

From her knowledge, 10 years before the deceased's demise he called all family members for a meeting;

**Kabete/Kibichiku/128** belonged to the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent was to get 1 acre.

Florence Wambui was bequeathed 5 acres **Naivasha LR 1556/18** Janet Njeri was bequeathed 1 acre at Naivasha Mararo(Kayole) and 3 acres in Naivasha Ndabibi.

**LR Maela/Ndabibi Block/2/28** did not all belong to the deceased alone, but included members of the deceased's extended family who bought their portion but it was registered under deceased's name. When the said suit property was sold, each beneficiary received money in form of his or her share. The Applicants were paid their share and they also sold their portions of land in Naivasha and that is why they are pursuing through their sons, the suit property in Kibichiku.

The grant and confirmed grant were lawfully obtained and distribution of estate was done fairly and conclusively.

**DW2 Alice Wangare Gathuku & DW3 Rose Njoki Njau** testified and relied on their joint affidavit filed on 5<sup>th</sup> May 2015 and testified as follows;

The deceased called a family meeting 10 years before his demise and stated that **LR Kabete/Kibichiku/128** should be distributed as follows;  $\frac{3}{4}$  of an acre to Hannah Wanjiru Gitau and the rest to his only son James Kamau EliJohn.

1<sup>st</sup> Applicant Florence Wambui was given 5 acres at **Naivasha LR 1556/18** and 2<sup>nd</sup> Applicant was given 1 acre at Naivasha, Mararo(Kayole)

and 3 acres at Naivasha.

Any other property the deceased did not mention was bequeathed to his son James Kamau Elijohn.

The suit property **LR Maela/ndabibi/Block2/28** belonged to deceased and other family members. Upon sale of the land by administrators' each beneficiary got the money of their share.

The deceased had 8 daughters and 5 of them namely; Grace Wariara, Rose Njoki Njau, Joyce Wanjiru Kibiku, Alice Wangare Gathuku and Lilian Kinyatti were not allocated any property and are not complaining. Yet the Applicants and 2<sup>nd</sup> administrators who were allocated the deceased's estate are the one complaining.

## **SUBMISSIONS**

The Applicants through Counsel submitted as follows;

After deceased's death and before obtaining a grant; the administrators caused subdivision of suit property **Kabete/Kibichiku1/28** into 1676 and 1677 and each took their portion.

**LR NO Naivasha/Mararo/Kayole1556/18** had no title, in 1991 the 1<sup>st</sup> administrator Subdivided the said property into 4 and had titles and sold all land except the land title he gave 2<sup>nd</sup> administrator **title 1556/131**.

The administrators misrepresented to the Chief PW3 that they were the only children of the deceased and hence obtained the forged Chief's letter and used it to process the titles until the Applicants reported the Chief that the deceased had 9 children.

When the administrators filed petition, they did not consult inform or seek consents of all family members; children of the deceased. Instead the signatures on the Consent forms filed in Court were forged.

During the summons for confirmation proceedings, the distribution of the estate, distribution of the estate was by and for 2 children of the deceased the administrators to the exclusion of the other 7 children without their knowledge and consents.

The Applicants relied on **Section 45 LSA** on preservation of deceased's estate to prevent intermeddling, **Section 38 LSA** which prescribes distribution of deceased's estate equally amongst children of deceased, **Section 71 (1) & (3) LSA** on appropriate distribution of the estate and **Section 76 LSA** on revocation of irregularly obtained grant.

The Respondents submitted through Counsel as follows;

During filing of petition to obtain a grant all beneficiaries gave consents as exhibited by documents in Court.

The Respondents relied on the deceased's meeting and distribution of his property during a family meeting.

In line with the deceased's wishes, the administrators distributed his estate to the 1<sup>st</sup> Administrator. The other children understood deceased's wishes and did not complain.

The Applicants were bequeathed their portions of land in Naivasha where they built their homes. They later sold their portions and squandered their proceeds. The Applicants want a portion of **LR Kabete/Kibichiko128** with intention to sell and use the proceeds.

A person has a right to distribute his property as he deemed fit and his known wishes in that regard should be respected and upheld when he passes on.

The Respondents cited the following cases;

***Peter Chira& Anor vs Nelson Gathogo [2002]***

***Martha Wanjiku Waweru vs Mary Wambui Waweru [2007]***

***Joseph Wairagu Migwi vs Mikielina Ngina Munga [2015]***

If any redistribution is to be done, it shall only involve those children of the deceased who did not get any share of the deceased's estate.

## **DETERMINATION**

After considering the evidence on record and submissions, the issue for determination is whether the grant issued on 4<sup>th</sup> June 2006 and confirmed on should be revoked under **Section 76 LSA**.

The deceased died on 8<sup>th</sup> February 2002. The Law of Succession Act came into force in 1981. Therefore the **LSA** applies to distribution of

deceased's estate.

The Respondents and some beneficiaries stated that the deceased in 1992; 10 years earlier the deceased held a family meeting and distributed his estate to his only son James Kamau Elijohn and a portion to the 2<sup>nd</sup> Administrator. The deceased did not leave a written Will. The oral discussion during the family meeting is not an oral Will in terms of **Section 9 of LSA**. Therefore, the deceased died intestate and rightly so, the administrators filed petition for letters of administration intestate. The distribution of the estate ought to be as prescribed in the LSA, amicable agreement and/or consent by beneficiaries of the estate.

On obtaining the grant, the Applicants deposed and testified in Court that the administrators did not consult and obtain consents in appointment of administrators and filing of petition. The signatures on the Consent forms filed in Court were forged. This fact was not controverted as 1<sup>st</sup> administrator died in 2014; the 2<sup>nd</sup> administrator attributed the process of obtaining grant to 1<sup>st</sup> Administrator. In the absence of evidence to the contrary, this Court finds the grant was obtained contrary to **Rule 26 of Probate & Administration Rules**.

This position is fortified by the evidence of PW3 the Chief whom the administrators approached and presented themselves as the only children of the deceased. They obtained Chief's letter and processed titles before they obtained a grant.

In ***Betty Sation Kisoso –v- Priscilla Jeruto Kisoso, Succession Cause No. 2119 OF 2010***, the Court rendered itself as follows:

***“[24] On the issue of confirmation of grant, the circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.*”**

***[25] A grant may also be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the Estate. See - Matheka and anor v Matheka [2005] 1 KLR pg 456.***

***It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required. (Emphasis added)”***

During confirmation of grant all beneficiaries were listed in the Summons. The proposed mode of distribution at paragraph 6 was that the suit properties were to be registered in the names of the administrators. The beneficiaries who were present consented. The certificate of confirmation of grant issued on 29<sup>th</sup> March 2011 indicates all properties were bequeathed to administrators wholly/jointly. So how come the affidavit in support of summons for confirmation, the proposal was the properties were to be registered in administrators names so as to hold in trust but the certificate the properties were to the administrators wholly?

The administrators failed in the interests of all beneficiaries, failed to disclose all material facts regarding distribution of deceased's estate and their beneficial share. The beneficiaries though listed as being present in Court; it is not clear on record what was agreed at the time amongst the beneficiaries. It is not clear whether, the estate was bequeathed to administrators as per their late father's wishes; or the beneficiaries waived their right to get any beneficial interest from the deceased's estate or they did not agree as they were not informed of the administrators actual intention; that is to withhold the whole estate to themselves and for their sole benefit.

From the certificate of confirmation of 29<sup>th</sup> March 2011, the administrators included a **Mr. John Kamau Kinyatti** who was not a beneficiary and did not disclose his existence to the Court or his interest in deceased's estate yet he was not one of the beneficiaries. This act of omission by administrators was contrary to **Section 71 of LSA** *proviso*; where it provides;

***“Provided that in cases of intestacy, the grant of letters of administration shall not be confirmed until the Court is satisfied as to respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”***

The Court was not informed of the actual distribution of deceased's estate as it was only indicated the properties would be registered in administrators' names. Once the Court approved, the certificate of confirmed grant indicated the properties were bequeathed to administrators wholly/jointly. Secondly, the presence of John Kamau Kinyatti was not disclosed to the Court and his share of deceased's estate.

The certificate of confirmation of grant discloses and fortifies the Applicants claim, that the grant and confirmed grant were unlawfully and irregularly obtained. They have not to date obtained any beneficial interest from the deceased's estate.

From the facts above the process and outcome of the distribution of deceased's estate was not properly and legally executed and falls in line with the prohibited acts/omissions prescribed by **Section 76 of LSA**. The administrators in obtaining grant forged Applicants' signatures. The summons for confirmation, the administrators despite having beneficiaries of the estate in Court and they gave their consents; the administrators proposed that the properties are registered in their names but in the certificate of confirmation of grant the whole estate including what was alleged in evidence during the hearing was bequeathed to Applicants was exclusively to the 2 administrators. A material fact that was not disclosed to the beneficiaries.

Finally, in the absence of a will the deceased's wishes cannot be implemented and since the deceased's estate is an intestate estate **Section 38 LSA** prescribes equal distribution of the estate amongst the children of the deceased. Practically it is almost impossible to ensure distribution equally with mathematical precision as was discussed in the case of ***Re: Katumanga*** case; the court stated;

*“The spirit of Part V, especially Sections 35, 38 and 40, is equal distribution, of the intestate estate amongst the children of the deceased. There have been debates on whether the distribution should be equal or equitable. My reading of these provisions is that they envisage equal distribution for the word used in Sections 35(5) and 38 is “equally” as opposed to “equitably”. This is the plain language of the provisions. The provisions are in mandatory terms – the property “shall ... be equally divided among the surviving children.” Equal distribution is envisaged regardless of the ages, gender and financial status of the children.”*

**DISPOSITION**

1. Therefore from the evidence above, this Court is satisfied that the grant and confirmed grant were irregularly obtained and is hereby revoked under Section 76 LSA;
2. A fresh grant is issued in the names of ;
  - a) Hannah Wanjiru Gitau
  - b) Florence Wambui
  - c) Janet Njeri
  - d) Joyce WanjiruKibiku
3. The administrators shall jointly consult with all beneficiaries on equal/equitable distribution of remaining assets, taking into account not to remove/eject any beneficiary/beneficiary’s family’s permanent structure; taking into account what some beneficiaries already have from the estate of the deceased;
4. The family of James Elijohn Kamau on suit property Kabete/Kibichiku/1677/1676 until equitable distribution is agreed and confirmation of grant process undertaken with consents of all beneficiaries is undertaken in Court;
5. Any challenge/application shall be made in any Court in Family Division of High Court;
6. Each party to bear own costs.

**DELIVERED DATED & SIGNED IN OPEN COURT ON 31<sup>ST</sup> MAY 2019.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**APPLICANTS – JANET NJERI GITAU & FLORENCE WAMBUI**

**MR. NJOGU FOR RESPONDENTS**

**COURT ASSISTANT – GRACE**

**Mr. Njogu:** I seek leave to appeal and be provided with certified copies of proceedings.

**Court :** The application is granted.

**M.W.MUIGAI**

**JUDGE**