



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 328 OF 2015

IN THE MATTER OF THE ESTATE OF KIHAGI MBUTHIA (DECEASED)

JUDGMENT

1. The deceased herein, Kihagi Mbuthia, died intestate on 3rd October 1973. His widow Wairimu Kihagi petitioned for letters of administration intestate in Succession Cause no. 281 of 1995 at the SRM's Court, Kerugoya, on 11th October 1995. The grant was issued on 15th March 1996.

2. The administrator applied for confirmation of the grant on 19th March 1996. She stated that the deceased was survived by herself and two sons, Kinyua Kihagi and Mugambi Kihagi. She also stated that she had a purchaser, John Nderitu Ngiboini, who had paid her all her dues and hence entitled to a share of the estate.

3. The grant was confirmed on 2nd April 1996 wherein the sole disclosed property of the deceased, Iriaini/Kairia/439 (3.7 acres) was distributed as follows:-

No.	Heir	Property	Size
1.	John Nderitu Ngiboini	Iriaini/Kairia/ 439	1.36
2.	Kinyua Kihagi (Now deceased)	Iriaini/Kairia/ 439	0.462
3.	Mugambi Kihagi	Iriaini/Kairia/ 439	0.925
4.	Lucy Wairimu Kihagi (Now deceased)	Iriaini/Kairia/ 439	0.925

5. John Mugambi Kihagi refused to sign the necessary documents to facilitate the transfer of Iriaini/Kairia/439 to the beneficiaries according to the Certificate of Confirmation of the grant dated 2nd April 1996. The administrator filed an application on 11th April 1996 to have the court's executive officer sign the documents for the subdivision of the property.

6. John Mugambi Kihagi filed a Replying Affidavit dated 13th May 1996 to the said application stating that as a son of the deceased he did not recognize the interest of John Nderitu Ngiboini.

7. In a ruling dated 15th May 1996, the Senior Resident magistrate gave orders authorizing the Executive Officer Kerugoya Court to sign on behalf of John Mugambi Kihagi to effect the distribution of the estate in accordance with the Certificate of Confirmation dated 2nd April 1996 mentioned above.

8. The court also clarified that the 0.925 acres of Iriaini/Kairia/439 given to Lucy Wairimu Kihagi would be held in trust for her benefit and that of her daughter, Mary Wanjugu.

9. John Mugambi Kihagi's reason for refusing to sign the subdivision document was because his brother, Eustus Muchiri (Now deceased) had one acre of Iriaini/Kairia/992 and her mother had Iriaini/Kairia/1040 which according to him were part of the estate. He lamented that it would have been unfair for him to get only 0.925 of Iriaini/Kairia/439. The court however in held that there was no proof that these

properties formed part of the estate.

10. Dissatisfied with the decision in Succession Cause no. 281 of 1995 John Mugambi Kihagi filed Memorandum of appeal dated 23rd May 1996 dated 15th May 1996 in Nyeri H.C Civil Appeal No. 28 of 1996. This appeal has not been prosecuted to conclusion.

11. There is a mutation form dated 24th May 1996 on record showing that Iriaini/Kairia/439 was subdivided into 0.550ha, 0.187ha, 0.374ha and 0.374 ha in accordance with the Certificate of Confirmation of Grant. There are copies of title deeds for Iriaini/Kairia/826 (0.550 ha to John Nderitu Ngiboine), Iriaini/Kairia/827 (0.187 ha to Kinyua Kihagi) and Iriaini/Kairia/828 (0.3743 to Lucy Wairimu Kihagi). These titles came from the subdivision of Iriaini/Kairia/439.

12. On 15th May 1996 Mary Wanjugu Kihagi, the daughter of the deceased filed an affidavit in the said succession cause challenging an alleged transfer of Iriaini/Kairia/1474 by the administrator to John Mugambi Kihagi, her brother, on 27th June 1995. This application was also not prosecuted.

13. On 27th June 1996 the same Mary Wanjugu Kihagi filed a chamber summons application in Misc. Cause 79 of 1996 under Sections 76 and 97 of the Law of Succession Act and Rule 44 of the P & A Rules seeking that the grant given to her mother on 16th May 1996 in Succession Cause No. 281 be revoked.

14. She alleged that the administrator failed to disclose all the property left behind by the deceased as follows:-

i. Iriaini/Karia/439

ii. Iriaini/Karia1040

iii. Iriaini/karia/992

15. The deceased had more surviving heirs than indicated by the administrator in Succession Cause 281 as follows: -

i. Lucy Wairimu Kihagi (Widow-Now deceased)

ii. Kinyua Kihagi (Son-Now deceased)

iii. Wambui Kihagi (Daughter-married)

iv. Muhuri Kihagi (Son-Now deceased)

v. Wanjiru Macharia (Daughter- Now deceased)

vi. Wanjugu Kihagi (Daughter-applicant)

vii. Ngina Kihagi (Daughter-married)

viii. John Mugambi Kihagi (Son)

16. The application for revocation was not prosecuted to conclusion.

17. On 2nd February 2005 the said Mary Wanjugu Kihagi filed an application for injunctions in Misc. App. 79 of 1996. By then the suit had been consolidated with Civil Suit No. 262 of 1996 and the said Succession Cause 281 of 1995. In Civil Suit 262 of 1996 John Nderitu Ngiboine sued Mary Wanjugu Kihagi, John Mugambi Kihagi, Muhuri Wanjugu and Eustace Muhuri Kihagi as heirs of the estate of Kihagi Mbutia (deceased). He sought to assert his rights on Iriaini/Kairia/826. He stated that Eustace Muhuri Kihagi had sold him all his share in the estate of the deceased and Kinyua Kihagi sold him half his share and that is how he ended up with Iriaini/Kairia/826 measuring 1.36 acres out of Iriaini/Kairia/439.

18. In the application dated 2nd February 2005 Mary Wanjugu Kihagi sought John Nderitu Ngiboine, John Mugambi Kihagi, Muhuri Wanjugu, Kinyua Kihagi and Eustace Muhuri Kihagi to be restrained from dealing with Iriaini/Karia/828, which was a part of the subdivision of the original Iriaini/Karia/439. In her supporting affidavit she deponed that in Succession cause no 281 of 1995 her mother was to hold one share in her favour in trust. That no Iriaini/ Kairia/828 was that parcel of land on which she resided. That it had been sold to John Nderitu Ngiboine..

19. John Nderitu Ngiboine responded to the said application via a Replying Affidavit dated 3rd May 2005 . He deponed that following the determination of Kerogoya SRM Succession no. 281 of 1995 LR Iriaini/Kairia/439 was not subdivided as stated by Mary Wanjugu Kihagi but instead as follows: -

i. Iriaini/Kairia/1526 in the name of John Nderitu Ngiboine

ii. Iriani/Kairia/1527 in the name of Kinyua Kihagi

iii. Iriani/Kairia/1528 in the name of Lucy Wairimu Kihagi and Mary Wanjugu

iv. Iriani/Kairia/1529 in the name of John John Mugambi Kihagi.

20. He also deponed that he purchased the shares of the applicant's brothers Kinyua Kihagi (Deceased) and Muhuri Kihagi (deceased). That since the death of Mary's mother Lucy Wairimu Kihagi died, Mary had taken the exclusive possession of Iriani/Kairia/1528.

21. The estate of the deceased was also the subject of succession proceedings in the district magistrate's court at Karatina in Civil Case No. 90 of 1974. Here a share of the deceased of 1 acre in Iriani/Kairia/321 (Measuring 7.7 acres) was given to his son Eustace Muhuri. The land was co-owned by the deceased and one Mugo Njoka. Mugo Njoka kept the remaining 6.7 acres of the property.

22. What is now pending for determination before this court is a summons for revocation of grant by John Mugambi Kihagi dated 10th April 2015 and filed on 21st April 2015 (Succession Cause 328 of 2015) brought under section 76(1) of the Laws of Succession Act and rule 44(1) of the P&A Rules. It is brought against Mary Wanjugu Kihagi and John Nderitu Ngibuini. The Applicant seeks to have the grant confirmed on 2nd April 1996 revoked. He wants all the titles derived from Iriani/Kairia/439 be cancelled and the original title restored to be given to him.

23. It seeks orders that: -

i. The grant of letters of administration confirmed on 2nd April 1996 in Kerugoya PM SUCC Cause No.281/1995 be revoked and/annulled.

ii. That all the title deeds to parcels resulting from the subdivision of L.R Iriani/Kairia/439 be cancelled and/or reconsolidated to the original Iriani/Kairia/439.

iii. That upon the said cancellation and/ consolidation LR Iriani/Kairia/439 be allocated as follows: -

a. Ann Ngima Ngari - 1/3 share

b. Esther Wambui Kinyua - 1/3 share

c. John Mugambi Kihagi - 1/3 share

24. The grounds for the application are that: -

i. It was obtained fraudulently by making false statement or by concealment from the court of something material to the case.

ii. It was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently and/or deliberately with intention to mislead the court.

iii. The grant has become inoperative due to the death of 2 of the beneficiaries.

iv. The respondents are strangers to the estate parcel No.Iriani/Kairia/439.

25. The application is supported by the affidavit sworn by Ann Ngima Ngari sworn on 13th April 2015. She depones that she has the authority of the 2nd and 3rd applicants to swear the said affidavit. The main grounds are that the applicants are children of Kihagi Mbutia deceased that a succession cause was filed in Kerugoya court behind their backs, without their consent by an unknown person yet the deceased and his properties were domiciled in Nyeri District. That the 2nd respondent John Nderitu Ngibuini was a stranger to the estate of the deceased as he was neither a child/beneficiary/dependant of the deceased. The 1st respondent Mary Wanjugu Kihagi though their sister, was never a party to the cause and she fraudulently took over their mother's share of the 439 yet their father had already allocated her Iriani/Kairia/1040.

26. She also deponed that their names were deliberately omitted from the cause as beneficiaries. She annexed the grant as confirmed, certificate of search showing that the 1st respondent was the registered proprietor of Title No.Iriani/Kairia/1528. She also indicated that the respondents failed to disclose that the parcel 439 was family land which ought to have been inherited by family members.

27. The application was vehemently opposed by the respondents.

28. The 1st respondent did so through her replying affidavit sworn and filed on 20th June 2016. She deponed that the applicants were all aware of the Kerugoya cause and the 3rd applicant actively participated. She annexed the proceedings in Kerugoya Succession Cause 281/1995, an application by the 1st applicant filed on 30th March 2015 Kerugoya HCC Misc.Application 9/2015 seeking the review and setting aside of Kerugoya SRM Succession cause No.281/1995 showing that Lucy Wairimu Kihagi deceased was holding in trust 0.925 acres of LR Iriani/Kairia/439 for Mary Wanjugu Kihagi, her contention being that when the grant was confirmed the share went to Lucy Wairimu

Kihagi absolutely. She annexed a copy of the form P&A 54. She also annexed HCC Appeal No.28/1996 filed by the 3rd Respondent seeking the quashing/setting aside of the Ruling of Hon. F.F.Wanjiku SRM dated 15th May 1996 in succession cause 281/1995. She also annexed the green card for L.R Iriaini/Kairia/1040.

29. The 2nd respondent filed his replying affidavit sworn on 28th May 2015 on the same date.

30. He denied that the grant had been obtained fraudulently. That the same had been fully executed, and that he was not a stranger to the process as he was a beneficiary in the confirmed grant. He went on to depone that there was inordinate delay as the application for revocation was brought 20 years after the same was confirmed that the 3rd applicant had filed an appeal on 23rd May 1996- that the summons was misconceived, lacked merit and ought to be dismissed with costs- in any event the applicants could not seek the cancellation of registration of property of deceased persons.

31. By notice dated 7th July 2016 and filed on 8th July 2016 the 1st and 2nd applicants sought to withdraw from the Summons for Revocation of grant. They were granted the order on 25th September 2016. On the same date the Hon. Mativo Judge issued an order that the following files be produced.

i. Kerugoya PM Succ Cause 281/1995

ii. Karatina RMCC No.90/1974

iii. Nyeri HCCA 28/1996

iv. Nyeri HCC 262/1996

v. Nyeri HCC Misc.79/1996

32. The matter came for hearing on 14th June 2017.

33. The applicant testified that the deceased died in 1973 intestate. That he was the last born but had sisters the 2 applicants and the 1st respondent. His mother had also passed away. He said his father had several properties: -

i. Parcel No.Iriaini/Kairia /992 which was dealt with in Karatina RMCC No.90/1974 and inherited by Eustace Muchiri.

ii. Iriaini/Kairia /1040

iii. Iriaini/Kairia /439 where he said someone filed a Succession Cause No.281/1995 in Kerugoya Court he was summoned to that court where he found his mother now deceased, the 2nd respondent, his late brother Joseph Kinyua Kihagi. That land was shared out whereby the 2nd respondent received the lion's share of his father's estate, 1.36 acres his brother Kinyua 0.462 acres, his mother 0.925 acres, and he was given 0.925 acres. That he protested against this distribution and proceeded to file an Appeal 79/1996 which was never heard. There was also another application in HCC Nyeri 262/1996.

34. He testified that his sister the 1st respondent was not a party to the Succession Cause 281/1995 and was not given anything but somehow transferred their mother's share to herself in 2015 without filing in Succession Cause. He testified that in the Kerugoya case those beneficially entitled were never heard as the matter was dealt with on a mention date.

35. He now wanted the grant revoked and the whole parcel of land be transmitted to him as the sole heir.

36. On cross-examination he told the court that the succession cause should not have been heard in Kerugoya. That he refused to sign transmission documents because he was not aware of the proceedings, that his sister the 1st respondent knew what happened to No.1040 which was their mother's property. He denied any knowledge of any proceedings to rectify the grant in 281/1995 to show that the same was to be held in trust for his mother 1st respondent. He said he was not aware that his appeal was dismissed.

37. He also said that since his sisters had left the application, he wanted the whole portion for himself. He said that his 2 brothers could not have sold their shares in their father's property as they had no property to sell. He was not aware that the 2nd respondent had bought land.

38. The 1st respondent testified that the deceased was her father. She denied that her father gave her parcel No. Iriaini/Kairia /1040. That she inherited a portion of 439 out of the Succession Cause 281/1995. She said her sister Anne was already married that is why she got nothing. In 1996 she sued her mother to give her portion in Nyeri Misc. Application 79/1996 and her mother gave her her share of the property.

39. On cross-examination she said she did not understand why her name was in the '1st grant' as confirmed but appeared in the '2nd grant' where the parcel was held in trust. She said that her brother Kinyua left his property to his children. She said she knew the 1st respondent as a buyer. She said the grant she produced in court was issued on 16th May 1996 showing that her mother's share was held in trust for her -1st respondent.

40. The 2nd respondent testified that with regard to the Succession cause in Kerugoya Muturi and Kinyua sold him their shares. By 1996 each of the 'beneficiaries' had his/her title deed.

41. On cross-examination he said he did not know Kihagi Mbutia. He never saw him. He was not related to Kihagi Mbutia, he bought land from Muturi and Kinyua. He said that their mother never sold him anything, neither did the 1st respondent sell him anything. He said they had a written sale agreement with the 2 of them. He did not see the need to involve the applicant (Mugambi) in the land buying issues. He said when he went to the deceased home the 1st respondent had a home there with her children.

42. Parties closed their cases and were given time to file written submissions.

43. It is not in dispute that the 1st two applicants withdrew from the application. Does that change the substance of Summons for Revocation/Annulment grant?

44. In the submissions filed by counsel for the 1st respondent counsel submitted that Ann Ngima had filed the supporting affidavit on her own behalf and on behalf of the other applicants and upon her withdrawal the 3rd (now applicant) did not file any other affidavit.

45. In my view the fact that Ann had sworn the affidavit on her, and on the behalf of the Applicant leaves the supporting affidavit intact despite her withdrawal. The only difference is that upon their withdrawal the applicant now sought through his oral evidence, the whole share of parcel No. Iriaini/Kairia /439 and not 1/3 as deponed by Ann.

46. The issues for determination are whether

i. The grant was obtained in succession cause No.281/1995 falls within the provisions of section 76(1) of the Laws of Succession Act.

ii. Whether the court had jurisdiction

iii. Whether the 1st respondent was a party to the cause 281/1995

iv. Whether 2nd respondent was a stranger to the estate

v. What orders to issue.

Analysis and Determination

47. From the evidence before me, it is clear that a lot of activity took place in the Estate of Kihagi Mbutia with the same being succeeded in bits and pieces in various proceedings in various courts, including civil suits.

4. In Kerugoya Court several cases have been filed –numerous applications and many not prosecuted to conclusion. It is a classic case of the abuse of the process of court.

48. The only visible asset of the estate of the deceased is LR Iriaini/Kairia /439. The cause was filed in Kerugoya. The deceased died in Kairia/Iriaini/Nyeri according to the certificate of death issued on 1st November 1993, on 3rd October 1973.

49. Section 49 of the Laws of Succession Act clearly provides for the territorial jurisdiction of magistrates courts as *“the area a deceased person had his last known place of residence”*.

50. The Deceased did not have his property in Kerugoya, neither was he domiciled there. Hence there is no doubt that the applicant has a point that the Cause was filed in a court without jurisdiction. In the words of Nyarangi JA in Owners of Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Ltd (1989) KLR 1

“...Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

51. The deceased died before this Act came into force. However, section 2 provides

(2) 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.

Hence even though the death occurred before this Act came into force, the Act is applicable, as deceased died intestate and in any case most of these legal proceedings took place within the LOSA. , including the grant under attack.

52. It is on record that Mary Wanjugu the 1st respondent was not in the grant issued on 2nd April 1996. Her name appeared in the one issued on 16th May 1996 where her name was added. This was pursuant to submissions made by the counsel during the hearing of an application for

the Executive officer to execute the transmission documents.

53. From the proceeding it is clear that Mary Wanjugu was added to the proceedings irregularly. The summons for confirmation of grant was not amended. There was no affidavit by the said Lucy Kihagi to support the submissions by the Counsel and orders were made without basis. I agree with the applicant that the inclusion Mary Wanjugu in the certificate of confirmation of grant DEX 3 was irregular.

54. I have carefully perused the petition in succession number 281 of 1995. In the affidavit of support for letters of administration sworn by the petitioner on 5 October, 1995. She deponed at paragraph 5;

“the deceased was intestate and left the following surviving him;

a. Lucy Wairimu Kihagi Widow aged over 70 years

b. Kinyua Kihagi son aged over 55 years

c. John Nderitu Ngibuini purchaser of 1.36 acres out of the estate”

55. This was clearly not true because she had other children and the 2nd respondent was not a purchaser from the deceased.

56. In the affidavit of support of Summons for confirmation of grant dated 19 March, 1996 at paragraph 5 she deponed- that the grant was issued to her on 12th of March 1996 and she sought confirmation of the same stating;

“I have a purchaser who has been supporting me with the money needed in this succession, who have paid me all my dues and I would like to give him his share for he is becoming impatient”

57. She proceeded to distribute the estate, the purchaser herself and her 2 sons. There was no disclosure that there were daughters, including the 1st applicant and her sisters. There was no evidence that John Nderitu Ngibuini bought the land from the deceased. In fact, from the affidavit of support the land transaction was not with the deceased, but with his widow after his death, and before the cause was even filed.

58. This is contradictory to what the 2nd respondent told the court that he bought the land from Kinyua and Mugambi Kihagi. That they sold him their shares of the Estate. Even if he bought it from them or from the widow those alleged sales were null and void as neither had any interest which they could to pass before the cause was filed and grant of representation issued. This is the purport of section 82(ii) of the LOSA which states **“no immovable property shall be sold BEFORE confirmation of the grant”**.

59. In the circumstances even the buyer’s title is not protected under s. 93 of the Law of succession Act which states: Validity of transfer not affected by revocation of representation

1. All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act. (emphasis mine)

60. What the 2nd respondent did with the widow or her sons amounted to intermeddling with the estate of a deceased person contrary to Section 45 of the Laws of Succession Act which states: -

1. “Except so far as is expressly authorized by this Act or any other written law, or by 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”.

61. It goes without saying that following the death of the deceased herein his estate was protected by the law. The purported sale, or taking possession of the deceased property without the authority of law, or grant as was required, amounted to intermeddling.

62. This is fortified by the proviso to section 82 (b) at (ii) states in mandatory terms that ***no immovable property shall be sold before confirmation of the grant; See also Jecinta Wanja Kamau vs. Rosemary Wanjiru Wanyoike and Another [2013] eKLR*** where the appellant therein unsuccessfully sought protection under section 93, this Court sitting in Nyeri stated:

“Before the appellant could seek protection as a purchaser under Section 93 of the Act she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser.

63. The second respondent did not make any effort to prove purchase. The evidence before this court from the affidavit in support of the summons for confirmation of grant is that he was supporting the widow with money for the succession cause. It is on the basis of that support that she was to give him a share of the estate. That cannot amount to purchase, even from the widow or the sons. It was an arrangement that was based on an illegality, especially the fact that it was entered into after the coming into force of the LOSA.

64. The upshot is that the deceased died intestate. He had children and a widow who survived him. The widow who would have enjoyed a life interest of the estate also died. One of the other beneficiaries also died. The 1st respondent forced her way into the grant irregularly taking the widow’s share which was to be registered in her name and in trust for her daughters. The 2nd respondent did not purchase from the

deceased. The applicable law would be s. 38. **Where intestate has left a surviving child or children but no spouse**

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

65. So, having considered all the evidence, perused through all the available file related to this cause, it is my considered view that **the** grant as issued to Lucy Wairimu Kihagi in Succession Cause 281 of 1995 falls within the ambit of s. 76 of the Law of Succession Act, which states **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**—and begs to be revoked. It is not too late in the day. Courts will, as I do, frown, at any attempt to plead ‘long time’ when a party has committed illegalities in obtaining a grant. That is why it can be revoked any time as limitation does not apply. **Hence** the following orders are appropriate in the circumstances.

1. The Summons for revocation of grant dated 10th April 2015 is and is hereby allowed.
2. That the grant made to Lucy Wairimu Kihagi in Succession Cause 281 of 1995 is revoked. A fresh grant to issue to the applicant John Mugambi Kihagi.
3. That all subsequent actions in Iriaini/Kairia /439 following the issuance and confirmation of the said grant are nullified all the titles to revert that the original title number Iriaini/Kairia /439. The Land Registrar to act accordingly.
4. The estate LR Iriaini/Kairia/439 be shared equally among **ALL** the children of the deceased or their surviving children, if they be deceased themselves.
5. Each party to bear its own costs
6. Leave to Appeal granted

Dated delivered and signed at Nyeri this 27th Day of June 2019

Mumbua T Matheka

Judge

In the presence of:

CA Juliet

Ms. Gichana for Waweru for Applicant

1st Respondent in person

Mr. Karingithi for 2nd Respondent