



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.73 OF 2016**

**IN THE MATTER OF THE ESTATE OF WANJAMA MUKERE alias ARTHUR WANJAMA MUKERE GACHAU (DECEASED)**

**LEONARD MWANGI WANJAMA.....APPLICANT**

**VERSUS**

**ANTHONY MICHAEL WAMAGUTU WANJAMA....1<sup>ST</sup> RESPONDENT**

**PETER MUKERE WANJAMA.....2<sup>ND</sup> RESPONDENT**

**CHARLES NDEGWA NJERU.....3<sup>RD</sup> RESPONDENT**

**BENSON WANJAMA NJERU.....4<sup>TH</sup> RESPONDENT**

**JOYCE MUTHONI WANJAMA.....5<sup>TH</sup> RESPONDENT**

**EUTYCHUS KIMARU MUNDUI.....6<sup>TH</sup> RESPONDENT**

**RAHAB WANJIRU MUTHUI.....7<sup>TH</sup> RESPONDENT**

**LILIAN WANGARI NDIRITU.....8<sup>TH</sup> RESPONDENT**

**ESTHER WANJIRA MUCHIRI.....9<sup>TH</sup> RESPONDENT**

**RULING**

On 30<sup>th</sup> January 1990, a certificate of grant was issued finalizing the distribution of the estate of Wanjama Mukere (deceased) in the following terms:-

<b>Name</b>	<b>Description of Property</b>	<b>Share of Heirs</b>
GRACE WANJIRU WANJAMA	TETU/KARAIHU/518	0.809 ha
KEZIAH WAIRIMU WANJAMA	TETU MUTHUAINI/447	½ share
	TETU KIRITI/4	Equal share
CHARLES MUKERE WANJAMA	TETU/KARAIHU/518	2.5293 Ha

ANTHONY M.WAMAGUTU WANJAMA	//	2.5293 Ha
PETER MUKERE WANJAMA	//	2.52983Ha
LEONARD MWANGI WANJAMA	//	2.5293 Ha
CHARLES MUKERE WANJAMA	WIYUMIRIRIE FARMERS CO.LTD	1 share
CHARLES MUKERE WANJAMA	MATANYA ESTATE	2 shares
CHARLES MUKERE WANJAMA	KIGANJO/KAMIRU/8343/29	30.23
ANTHONY M.WAMAGUTU WANJAMA	//	30.66 Ha
PETER MUKERE WANJAMA	//	45.11 Ha
LEONARD MWANGI WANJAMA	//	40.87 HA

By an application dated 12<sup>th</sup> April 1995, one Andrea Wairagu Mukere and Esther Wanjira Muchiri sought the revocation of the grant dated 30<sup>th</sup> January 1990 to comply with the outcome of an arbitration award where each one of them was awarded 3 acres and 4 acres respectively out of Tetu/Karaihu/518.

Mr. K Wachira for the respondents (all the beneficiaries herein) filed grounds of opposition to that application. They were in agreement that something needed to be done about the award. They proposed that instead of revocation, the said grant be amended to accommodate the new beneficiaries. In the proposal everyone's share in Tetu/Karaihu/518 was to change from 2.5293 Ha to 2.226 Ha.

On 19<sup>th</sup> September 1995, the application was compromised by way of a consent where the grant dated 30<sup>th</sup> January 1990 issued in Nyeri SRMSucc Cause no 12 of 1989 was revoked and a fresh one issued. The only change to be made in the new certificate was the accommodation of the shares of Andrea and Esther in Tetu/Karaihu/518. The court was categorical. ***'All other details in the certificate of grant to be the same as in the confirmation dated 30.1.90'***.

While this order is on the file, there is no copy of the grant that was ordered to be issued on that date. It is that grant that should be in this file and not the one dated 30<sup>th</sup> January 1990. The question is, how would it have looked like?

On 27<sup>th</sup> March 2009 another consent was entered into to the effect that – ***a new grant be issued to Antony Michael Wamagutu Wanjama and the same be confirmed in terms of the letter of consent dated 26<sup>th</sup> January 2009 and the annexure thereto.***

I have perused the letter. It states ***"the parties have agreed that the disputed parcel of land no. TETU/KARAIHU/518 be shared as per the attached consent."***

The attached consent dated 3<sup>rd</sup> February 2009 headed L.R no. TETU/ KARAIHU/518 measuring 11.74Ha states ***"We Antony Michael Wamagutu Wanjama and Alexander Muthui Wairagu being the petitioner and objector respectively in Nyeri HCSucc Cause no 27 of 1990 and the undersigned have agreed that the above land be shared as follows"***.

This is what was subsequently reproduced in the amended certificate of confirmation of grant was issued dated 27<sup>th</sup> March 2009.

Name	Share of Heirs
L.R.NO.TETU/KARAIHU/518 measuring 11.71 Ha to be shared as follows:	
PETER MUKERE WANJAMA	4.152 Ha
CHARLES NDEGWA NJERU	1.012 Ha

BENSON WANJAMA NJERU	1.214 Ha
JOYCE MUTHONI WANJAMA	1.416 Ha
EUTYCHUS KIMARU MUNDUI	0.809 Ha
RAHAB WANJIRU MUNIU	0.4047 Ha
LILIAN WANGARI NDIRITU	0.8094 Ha
ESTHER WANJIRA MUCHIRI	1.619 Ha

It is in the backdrop of these events that on 20<sup>th</sup> April 2011 Leonard Mwangi Wanjama filed the Summons for Revocation/Annulment of the grant made on 27<sup>th</sup> March 2009 on the ground that it was obtained fraudulently by concealment from the court something material to the case and that the proceedings to obtain the grant were defective in substance.

In his supporting affidavit sworn on 15<sup>th</sup> April 2011 he deponed that grant was obtained pursuant to a consent dated 3<sup>rd</sup> February 2009 and as a result his name was completed omitted as a beneficiary to his father's estate. That his entitlement to Tetu/Karaihu/518 had unprocedurally been taken away from him and distributed to Peter Mukere Wanjama who now had 4.452 Ha instead of 2.5293 Ha

Peter Mukere Wanjama filed a replying affidavit sworn on 10<sup>th</sup> July 2017 but which was erroneously headed "supporting affidavit". He explained what happened. That he and the applicant were brothers – sons of Keziah Wairimu – the 2<sup>nd</sup> wife of the deceased. That the estate had been shared between the 2 wives and their children and he and the applicant were to share their mother's share of the estate equally and there were 11 acres of Tetu/Karaihu/518 5.5 acres Tetu/Muthuaini/1046 and shares in Mute Company in Nanyuki.

That however instead of doing this they had sat down as a family and agreed that the applicant would surrender his share in Tetu/Karaihu/518, to Peter who would in turn surrender his share in Tetu/Muthuaini/1046 and Mute Company to the Leonard. Consequently that their mother transferred Tetu/Muthuaini/1046 to the applicant, and the applicant got all their mother's shares in Mute Company.

That the foregoing was the reason why the applicant's name did not appear in the amended grant. He annexed what he referred to as the family agreement and mentioned the green card for Tetu/Muthuaini/1046. He was supported in this by the administrator of the Estate – Anthony Michael Wamagutu Wanjama who deponed that Peter Mukere told him and others that he and his brother had agreed that he would take their share in Tetu/Karaihu/518, and the applicant Tetu/Muthuaini/1046 and their mother's share in Mute Company.

The matter was heard by way of viva voce evidence.

In his testimony Leonard Mwangi Wanjama reiterated that the amendment to the original grant should not have taken away his inheritance in Tetu/Muthuaini/518. That he never participated in any meeting where the alleged tradeoffs were agreed upon. His signature to the consent dated 3<sup>rd</sup> February 2009 was never sought and he never attended any family meetings where the alleged agreements were made.

Peter Mukere Wannjama in his testimony confirmed that the applicant never attended the alleged family meeting that was attended by himself, their mother and their wives. At some point he alleged that indeed it was the Leonard who had recorded the proceedings of the meeting held on 7<sup>th</sup> December 2003 which states that 11 acres at Karaihu, the total shares at Mute Company, the Ihwa plot no. 4 plus all developments go to Peter Mukere. Ihwa plot no 7 and all developments and KTDA Gathuthi Tea factory go to Leonard Mwangi. In short that it was agreed he would get Tetu/Muthuaini/447 while Peter took Tetu/Karaihu/518.

It bears the signature of the two though the applicant denies it. The name of their mother appears therein but she has not appended her signature.

DW2, the Administrator confirmed that he acted on the word of Peter Mukere that they had agreed with Leonard Mwangi on how to share their mother's shares of the Estate of their father.

Counsel for each party filed submissions. For the applicant Mr.Ng'ang'a Munene pointed out that the operative grant in this case was the amended grant of 27<sup>th</sup> March 2009 which clearly left out the rest of the estate of the deceased, and the applicant, and the applicant as one of the beneficiaries and hence – clearly concealing the fact of his being beneficially entitled to the estate, and the specific shares.

He relied on the case of **Re Estate of Kiema Muthigani (Deceased) Catherine Wanjiru Kiema –Vs- Priscilla Nyambura Kiema.**

For the Respondent it is argued that the grant of 30<sup>th</sup> January 2009 was not revoked in its entirety. That the applicant had no issue with the amended grant and the only dispute was between the two brothers and not with regard to the entire estate. That the real issue was that the applicant wanted his share contrary to the agreement with his brother. That the two brothers were at liberty to litigate over that elsewhere as the deceased estate remained administered and distributed.

I have carefully set out the background to this application.

The only issue is whether the orders sought are warranted.

The basis for the amended grant issued on the 27<sup>th</sup> March 2009 was the consent dated 3<sup>rd</sup> February 2009. The applicant's name was not on that consent. Paul Mukere's explanation that it is because they had agreed on an alternative mode of sharing their inheritance is not borne by evidence.

The alleged agreement dated 7<sup>th</sup> December 2003 was denied by the applicant. The administrator testified that the applicant never admitted to having made any agreement with his brother, neither did he attend any of the meetings alleged to have led to the said consent.

From the record it is clear that on 19<sup>th</sup> September this court revoked the certificate of confirmation of grant issued 30<sup>th</sup> January 1990 and issued a fresh one providing for the excising of 7 acres out of Tetu/ Karaihu /518. That is the amended grant that was force before the 27<sup>th</sup> March 2009. Any amendments to the grant should reflect the whole grant as issued on the 19<sup>th</sup> September 1995.

I confirmed from the administrators and Mr. Kebuka Wachira advocate that indeed the grant that was made on 19<sup>th</sup> September 1995 was never obtained by the parties.

Confirmed that the estate had already been distributed as per the amendments of 27<sup>th</sup> March 2009.

The danger in the situation as it is now is that there is no valid grant in force for the entire estate of the Wanjama Mukere (deceased). The court cannot allow that situation to obtain yet there are orders on record.

Hence in my view the solution is not in a revocation but in ensuring that administrator complies with the orders of 19<sup>th</sup> September 1995 in addition to subsequent distribution of the estate. Upon the issuance of that grant, then issues between these two brothers will be clarified.

I think the grant would look as follows:

<b>Name</b>	<b>Description of Property</b>	<b>Share of Heirs</b>
GRACE WANJIRU WANJAMA	TETU/KARAIHU/518	0.809 ha
KEZIAH WAIRIMU WANJAMA	TETU MUTHUAINI/447	½ share
	TETU KIRITI/4	Equal share
CHARLES MUKERE WANJAMA	TETU/KARAIHU/518	2.5293 Ha
ANTHONY M.WAMAGUTU WANJAMA	//	2.5293 Ha
PETER MUKERE WANJAMA	//	2.52983Ha
LEONARD MWANGI WANJAMA	//	2.5293 Ha
ANDEREA WANAGU MUKERE		3 ACRES
		1.2145 Ha
ESTHER WANGU MUKERE		4 ACRES

		1.6194 Ha
CHARLES MUKERE WANJAMA	WIYUMIRIRIE FARMERS CO.LTD	1 share
CHARLES MUKERE WANJAMA	MATANYA ESTATE	2 shares
CHARLES MUKERE WANJAMA	KIGANJO/KAMIRU/8343/29	30.23
ANTHONY M.WAMAGUTU WANJAMA	//	30.66 Ha
PETER MUKERE WANJAMA	//	45.11 Ha
LEONARD MWANGI WANJAMA	//	40.87 HA

The amended grant then would look like this:

<b>Name</b>	<b>Description of Property</b>	<b>Share of Heirs</b>
GRACE WANJIRU WANJAMA	TETU/KARAIHU/518	0.809 ha
KEZIAH WAIRIMU WANJAMA	TETU MUTHUAINI/447	½ share
	TETU KIRITI/4	Equal share
CHARLES MUKERE WANJAMA	TETU/KARAIHU/518	2.5293 Ha
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PETER MUKERE WANJAMA	//	2.52983Ha
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CHARLES MUKERE WANJAMA	KIGANJO/KAMIRU/8343/29	30.23
ANTHONY M.WAMAGUTU WANJAMA	//	30.66 Ha
PETER MUKERE WANJAMA	//	45.11 Ha
LEONARD MWANGI WANJAMA	//	40.87 HA

When the new distribution was made pursuant to the consent which Leonard was not a party to his own shares ought not to have been affected as they appear in the grant as reissued on 19/9/1995.

The amendments herein below can now be inserted into this grant for a fresh grant to issue. the only changes now being that both Peter and Leonard's shares remain as per the grant as issued on 19<sup>th</sup> September 1995.

Name	Share of Heirs
L.R.NO.TETU/KARAIHU/518 measuring 11.71 Ha to be shared as follows:	
PETER MUKERE WANJAMA	4.152 Ha
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LILIAN WANGARI NDIRITU	0.8094 Ha
ESTHER WANJIRA MUCHIRI	1.619 Ha

It is so ordered.

**Dated, delivered and signed at Nyeri this 28<sup>th</sup> day of September 2018**

**Mumbua T Matheka**

**Judge**

In the presence of:

Albert

Ms. Wangeci Macharia hB for KebuKa for respondent