



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.403 OF 2009

**IN THE MATTER OF THE ESTATE OF THE LATE JOHN GACHUHI MUTEGO-
(DECEASED)**

LEONARD WAWERU GICHUHI.....1ST APPLICANT

MARY WANJIKU GICHUHI.....2ND APPLICANT

ESTHER WANGARI THUITA.....3RD APPLICANT

VERSUS

MARAY WANJIKU MANGARA.....1ST RESPONDENT

ESTHER WANJIKU MUHIU.....2ND RESPONDENT

WANJIKU KIMANI RUO.....3RD RESPONDENT

NYAKIAMBI WOMEN GROUP.....4TH RESPONDENT

RULING

The summons for revocation of grant, the subject of this ruling is dated 7th April, 2016. Leonard Waweru Gachuhi, Mary Wanjiku Gachuki and Esther Wangari Thuita (hereinafter the applicants) seek orders:

1. Spent

2. Spent

3. THAT the honourable court be pleased to grant a mandatory injunction compelling the respondent to forthwith surrender to the applicants as representatives of the deceased family title document for land parcel No.LR NO.1024 MIRERA SUSWA SOUTHERN NAIVASHA MUNICIPALITY .

4. Spent

5. Spent

6. Spent

7. THAT this honourable court be pleased to revoke and annul the grant of letters of administration herein issued to the respondents on 1st February, 2011.

8. THAT this honourable court be pleased to revoke the confirmed grant of letters of administration herein issued to the respondents on 25th November, 2011.

9. THAT this honourable court be pleased to find and hold that any purchasers' interest or claim that the respondents may have against the estate of the deceased John Gichuhi Mutege in respect of land parcel **No.LR NO.1024 MIRERA SUSWA SOUTHERN NAIVASHA MUNICIPALITY** can only be lodged as a land matter in the Environment and Land Court pursuant to **Article 162** of the **Constitution** and can therefore not be a subject of this cause.

10. THAT this honourable court be pleased to revoke and annul any document and process done by the respondents pursuant to the Revoked/Annulled grant of letters of administration dated 1st February, 2011 and the Revoked/Annulled confirmed grant of letters of administration dated 25th November, 2011.

11. THAT this honourable court be pleased to give such appropriate directions as are necessary for the administration of the estate of the late **JOHN GICHUHI MUTEGO**.

12. THAT this honourable court be pleased to hold and find that the rightful heirs of the estate of the late **JOHN GICHUHI MUTEGO** are as contained in the letter dated 4th April, 2016 by the Chief, Kihingo Location.

13. THAT the costs hereof be borne by the respondents in any event.

The summons is supported by a joint affidavit by the applicants and on grounds listed on the face of the application viz:

1. THAT the late **JOHN GICHUHI MUTEGO** whose estate is the subject of this cause passed on on 13th February, 2001.

2. THAT the said deceased had the following heirs/beneficiaries:

a) 1st wife GRACE MUTHONI GICHUHI (DECEASED) who has the following children:

John Ndungu Gichuhi - 56 years

Moses Gitau Gichuhi - 52 years

Ruth Njeri Gichuhi - 49 years

Eunice Wambui Gichuhi - deceased

Mary Waithera Gichuhi - 47 years.

b) 2nd wife JENNIFER WAMBUI GICHUHI who has the following children:

i. Hannah Ngendo Gichuhi - Deceased

ii. Francis Ndungu Gichuhi - born 1972

iii. Leonard Waweru Gichuhi - born 1973

iv. Michael Gitau Gichuhi - born 1978

v Salome Njambi Gichuhi - born 1981

c) 3rd wife – MARY WANJIKU GICHUHI who has the following children:

i. Michael Ndungu Gichuhi - 37 years

ii. Francis Ndungu Gichuhi - 36 years

iii. Catherine Ngendo Gichuhi- 34 years

iv. Anthony Gitau Gichuhi - 31 years

v. Damaris Nduta Gichuhi - 27 years.

d) 4th wife – ESTHER WANGARI THUITA who has the following children:

Naomi Wanjiru Gichuhi - 39 years

Leah Wangechi Gichuhi - 35 years

Alex Ndungu Gichuhi - 34 years

Faith Ngendo Gichuhi - 5 years

3. THAT one of the properties owned by the deceased is the property known as parcels **No.LR NO.1024 MIRERA SUSWA SOUTHERN NAIVASHA MUNICIPALITY** measuring approximately 127 acres (51.6ha).

4. THAT the deceased had charged the said property at some point with MS Barclays Bank Limited though the loan was cleared by his family which was awaiting a discharge of charge.

5. THAT out of the blues, the deceased's family have heard from vernacular radio station that a group calling itself Nyakiambi Women Group is inviting its members and families to invade the deceased's land parcel **No.LR NO.1024 MIRERA SUSWA SOUTHERN NAIVASHA MUNICIPALITY** on 8th April, 2016 to sub-divided the land among its alleged members and evict the deceased's family from the said land.

6. THAT upon enquiry from Barclays Bank Limited Nairobi where the deceased's title for land parcel **No.LR NO.1024 MIRERA SUSWA SOUTHERN NAIVASHA MUNICIPALITY** was being held, the deceased's family was shocked to discover that the same title had already been released to the 1st, 2nd and 3rd respondents representing themselves and purporting to be the administrators of the estate of John Gichuhi Mutego.

7. THAT the deceased's family have further discovered that the said respondents have already obtained a confirmed grant in this cause on the basis of which they want to sub-divide the said land among the purported members of a group called Nyakiambi Women Group where they purport to be trustees.

8. THAT upon perusal of the court file herein, the deceased's family has discovered that the respondents obtained the grant of letters of administration herein through a citation that was never served upon the deceased's family members.

9. THAT the deceased's family have further discovered that the said grant was obtained fraudulently and by concealment of material fact wherein the respondents herein had false affidavits of service sworn claiming that a family member of the deceased had been served with the citation which is not the case.

10. THAT the respondents further concealed from the court material facts including the extent of the

deceased's estate and all the beneficiaries herein.

11. THAT the respondents obtained the said grant and confirmed grant fraudulently by claiming a purchaser's interest against the deceased's estate which purchaser's interest was not even proved.

12. THAT in any case, any purchaser's interest can only be determined by the Environment and Land Court within the meaning of **Article 162** of the **Constitution** and is not a matter for determination by this court.

13. THAT the proceedings herein are deceitful and fraudulent attempt by the respondents and their cronies to grab a prime property of 127 acres from the deceased's estate by blatantly abusing the court process.

14. THAT it is clear from the outset that the court had difficulties in issuing the grant herein in exclusion of the deceased's widows and children as evidenced by the further affidavit the respondents had to file on 31st May, 2010.

15. THAT this court should not allow a situation whereby a party who is unable to sustain a claim over interest in land in the Environment and Land Court abuses the court process by instituting a succession cause that it conceals from the deceased's family members and beneficiaries and then abuses an irregular grant to sustain a non-existence claim to land and evict a deceased's family.

16. THAT threats of eviction of deceased family members from the parcel No. **No.LR NO.1024 MIRERA SUSWA SOUTHERN NAIVASHA MUNICIPALITY** on 8th April, 2016 as announced in vernacular radio stations through goons acting at the behest of the respondents herein is real and it is only proper that appropriate orders herein be issued.

17. THAT deceased's family members reside and do farming activities in the land in question and appropriate orders ought to be given to prevent a breach of the peace.

1. The application is opposed and in a replying affidavit Mary Wanjiku Mangara and Esther Wanjiku Muhiu in their capacities as representatives of Nyakiambi Women Group aver that they entered into a sale agreement with the deceased John Gichuhi Mutego on 8th April, 1989 for the sale of LR. No.1024/Naivasha.

A dispute arose between the deceased and the purchaser which led to interventions by Ms. Gathinji and Company Advocates who were acting for the vendor.

3. It is urged that the said land was subject to Nakuru Civil Suit No.113 of 1997 (O.S.) which was determined in favour of Nyakiambi Women Group.

4. The applicants are accused of unexplained delay in filing for a succession cause given that the deceased died in 2001.

5. The cause herein, it is urged, was duly advertised as per law required and nobody came forward to object.

6. The replying affidavit elicited a supplementary affidavit in which the applicants have stated that Nyakiambi Women Group entered into a sale agreement with the deceased. The group however, reached the agreement and the same was rescinded. It is urged that part of the purchase price remained unpaid.

7. It is averred that Nakuru Civil Suit No. 113 of 1997 (O.S) was dismissed for want of proof. In any event, the respondents ought to have executed the decree if at all they had won in Civil Suit No. 113 of 1997.

8. In a further supplementary affidavit, the respondents are accused of forgeries which have since been confirmed by a document examiner, Emmanuel Kenga.

9. In further replying affidavit, the respondents deny the acts of forgeries alleged and the report by Mr. Kenga is maligned for not having any legal basis.

10. Directions were taken that the application be disposed by way of written submissions. Both parties duly complied.

11. I have had occasion to consider the summons for revocation of grant and the affidavits for and against and have had the opportunity to consider the submissions of learned counsel and put into account all aspects of the submissions including what i may not mention here.

12. Of determination in these proceedings in whether the applicants have achieved the required threshold for revocation of grant which threshold is clearly provided for under **Section 76** of the **Law of Succession Act**. I will reproduce it here to put this matter in perspective:

“S.76 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;

(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 has ordered or allowed; 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.”

13. Looking at the material before me, I note a lot of unnecessary energy has been expended on the propriety or otherwise of the purported sale of **LR NO.,1024 MIRERA SUSWA SOUTHERN NAIVASHA MUNICIPALITY** to the group Nyakiambi Women Group. That, I must state, is not an issue for determination at this stage of proceedings such as this.

14. The undisputed fact is that Mary Wanjiku Mangara, Esther Wanjiku Muhiu and Wanjiku Kimani Ruo were issued with joint letters of administration in respect of the estate of the deceased which letters were confirmed on the 25th November, 2011. This was after a citation to accept or refuse letters of administration intestate had been taken out by Mary Wanjiku Mangara on behalf of Nyakiambi Women Group against the widows and sons and daughters of the deceased.

15. It is clear from the proceedings that the respondents' interest in the estate of the deceased was that of purchasers. From the contention by the respondents and acknowledgement by the applicants, the respondents did enter into an agreement for sale with the deceased. However, there is acknowledgment on record that the said sale was subject to disputes which culminated in a litigation being Nakuru High Court Civil Suit No.113 of 1997 (O.S.) Certainly, the respondents had a stone to grind with the estate of the deceased herein.

16. As indicated earlier, the question to ask is whether the route taken in seeking a redress was a regular one and which is beyond reproach when subjected to the mirror in **Section 76 of the Law of Succession Act.**

17. The First and fundamental question is whether the applicants and other beneficiaries in higher priority in the administration of the estate herein than the respondents were duly notified of the succession cause.

18. A citation is said to have been served on the widows of the deceased namely Jennifer Wambui, Mary Wanjiku and Esther Wangari.

19. The process server, James Njuguna Thuku in his affidavit of service states in respect of that service as follows:

“3. That on the said date in company of the said Gichuru Wa Kamotho, we set off from Naivasha and on arrival at Nakuru, we boarded a Mau Narok matatu and proceeded past Egerton University. At around 2.15p.m. we alighted at “Kwa Mbari ya Mutego” stage which is approximately ½ a kilometer from Kihingo Shopping Centre. We turned on (sic) our left as one faces Mau Narok and entered into a compound with a permanent building which is about 100m from Ramdic Primary School where we met an elderly male adult. I introduced myself to him and told him the purpose of our visit which was to serve the said document and he identified himself as son to John Gichuhi Mutego (deceased) but indicated that he had strict instructions from his mother not to sign any document on her behalf or any other person. He accepted service and promised to deliver the copies to all the addressed persons since they were well known to him BUT he refused to disclose his name.”

20. This service is obviously wanting in many respects. The person who received the service is not identified (he refused to disclose his name), the said person is said to have indicated he had express instructions not to receive service on behalf of the mother. He is left with process for other persons other than his mother's and whether the same were delivered or not remains a matter of conjecture.

21. This service was not proper and it renders the citation proceedings the basis upon which a grant was issued irregular. Even assuming that the service was proper, the legal requirement was for the respondents to serve the citation on all survivors of the deceased ranking higher in priority not only the widows allegedly served. By failing to cite other beneficiaries who ranked higher in priority and notably the children, the grant issued pursuant to such citation becomes irregular.

22. Again **Rule 7(7) of the Probate and Administration rules** states as follows:

“7(7) Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has-

a) renounced his right generally to apply for a grant; or

b) consented in writing to the making of the grant to the applicant; or

c) been issued with a citation calling upon him either to renounce such right or to apply

for a grant.”

23. It is quite apparent that other than the widows of the deceased, the deceased was survived by many children. None of them is shown to have renounced their right generally to apply for a grant, neither consented in writing to the making of the grant by the respondents and none has been shown to have been issued with a citation calling upon him to either renounce such right or to apply for a grant.

24. Of more important concern is the main petition for letters of administration intestate. In the form P & A5 filed in court and more specifically in the affidavit in support of petition for letters of administration intestate paragraph 4 thereof, it is stated by the petitioners:

“4. The deceased died intestate and left the following surviving him:

a) Mary Wanjiku Mangara

b) Ether Wanjiku Muhiu

c) Wanjiku Kimani Ruo”

25. That averment on oath is outrightly untruthful. The three (3) named persons were not survivors of the deceased. The closest they could come as claimants to the estate was as creditors having purchased as alleged part of the estate which had not been transferred to them during the lifetime of the deceased.

26. **Section 51 of the Law of Succession Act** provides:

“51. (1)An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

2) An application shall include information as to-

a) the full names of the deceased;

b) the date and place of his death;

c) his last known place of residence;

d) the relationship (if any) of the applicant to the deceased;

e) whether or not the deceased left a valid will;

f) the present address of any executor appointed by any such valid Will;

g) in case of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

h) a full inventory of all assets and liabilities of the deceased; and

i) such other matters as may be prescribed.”

27. At the time of petitioning for letters of administration, the respondent knew that the deceased was survived by widows and children. This information is concealed from the court when the petition is lodged.

28. Even assuming a citation was regularly lodged and ignored by dependants and beneficiaries of the deceased (survivors) this is no licence to omit to indicate in the petition for letters of administration for

the information of the court that the deceased had survivors especially when such survivors are within the knowledge of the petitioner(s).

29. By stating that Mary Wanjiku, Esther Wanjiku Muhiu and Wanjiku Kimani Ruo were survivors of the deceased without clarifying their standing in respect of the relationship with the deceased or standing in respect of the estate, the petitioners were guilty of concealment of something material to the case.

30. This court (Musyoka, J) in **Re: The Estate of Dorcas Wanjiku – Deceased**, (2014) eKLR while addressing this issue had this to say:

“Creditors, as mentioned earlier, are neither heirs nor survivors nor beneficiaries nor dependants. They ought not to be listed in the petition as survivors, except in the column for liabilities. Ideally creditors should wait for the heirs, beneficiaries, survivors and dependants to apply for grant, failing which they, the creditors, would then become entitled to have citations issued. Where grant is not sought after they have issued citations, they should then ask the court to allow them to petition for a grant to be made to them. Where the heirs, dependants, survivors and beneficiaries obtain the grant, the creditors should, after the appointment of the administrators, prove their claim to the administrators, and if the administrators fail to honour their claims then move the court appropriately. Where the claim is comprised in a valid decree of a competent court, the creditor will seek to enforce the decree against the administrators, preferably in a civil action filed in the civil court.”

31. Matters are compounded further by the existence of the suit High Court Civil Suit No.113 of 1997 (O.S). It has been stated from the respondents that the said suit was compromised through a consent. While from the record, I have been unable to see any copy of the said consent either as an annexure or a stand alone document, it is inexplicable why it was necessary for the respondents to stake their claim to the suit land through a succession cause in 2009, when they ought to have executed the decree in H.C.C.C. No.113 of 1997 against the estate if at all they had orders in their favour. This casts a lot of uncertainty on the existence of the consent alluded to and on the general bonafides of the respondents.

32. As seen in the estate of Dorcas Wanjiku (supra), where a claim against an estate is comprised in a valid decree of a competent court, the creditor will seek to enforce the decree against the administrators, preferably in a civil action in the civil suit. Nothing would have been easier than for the petitioners to take this route if a consent existed.

33. It will be noticed that I have steered clear of the issue of the propriety or otherwise of the purported sale of the subject land. This is for good reasons. The determination of those issues is better left to the outcome in H.C.C.C. No.113 of 1997 (and strangely a consent is said to be recorded there but is not enforced for reasons I cannot comprehend) or in any other suit filed in a court of competent jurisdiction.

34. Suffice it to state that the said sale is disputed. The claim by the respondent is one touching on *“the use and occupation of, and title to, land.”* The probate court is not clothed with the jurisdiction to determine the issues arising therefrom. (See **Article 162(2)(b)** of the **Constitution**)

35. Whether the deceased sold land to the respondents is both a matter of fact and law. It is incumbent upon the respondents to show that the sale existed and was successfully completed.

36. As this court (Musyoka, J) held in **Re: Estate of Mbai Wainaina (deceased)**, 2015, eKLR and I quote verbatim for the full meaning and effect:

“Even if there was material establishing that there was such a trust, I doubt that that would be a matter for the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such

issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”

37. The cumulative effect of the above and for all the reasons above stated, I am satisfied that the grant herein was one obtained and confirmed through concealment of material facts and based on untrue allegations of fact. It is one that merits revocation within the threshold set in **Section 76** of the **Law of Succession Act**.

38. I accordingly revoke the grant issued to Mary Wanjiku Mangara, Esther Wanjiku Muhiu and Wanjiku Kimani Ruo.

39. The following orders are to issue:

- a) The grant of letters of administration issued to Mary Wanjiku Mangara, Esther Wanjiku Muhiu and Wanjiku Kimani Ruo is hereby revoked. The same be returned for cancellation.
- b) Leonard Waweru Gichuhi, Mary Wanjiku Gichuhi and Esther Wangari Thuita are hereby appointed the administrators of the estate of John Gichuhi Mutego (deceased)
- c) The Deputy Registrar is to issue the three (3) with a grant of letters of administration intestate in this cause.
- d) The respondents be and are hereby ordered to surrender to the applicants (the administrators of the estate of John Gichuhi Mutego) the title document in respect of **LR NO.1024 MIRERA SUSWA SOUTHERN NAIVASHA MUNICIPALITY**.
- e) All processes and documents made on the strength of the revoked grant are declared a nullity.
- f) The administrators of the estate of John Gichuhi Mutego to apply for confirmation of grant expeditiously in any event not later than ninety (90) days from the date hereof.
- g) In the circumstances of this case, each party to bear its own costs.

Dated, Signed and Delivered at Nakuru this 30th day of March, 2017

A. K. NDUNG'U

JUDGE