



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2025 OF 2006

IN THE MATTER OF THE ESTATE HANNAH GACHAMBI KABATHA (DECEASED)

FRANCIS GITHIAKA KABATHA.....APPLICANT

VERSUS

JOSEPH WACHIURI KABATHA.....1ST RESPONDENT

JOHN GATHIGE.....2ND RESPONDENT

JUDGMENT

1. The application for determination is the Notice of Motion dated 9/5/2008. The application is brought under Section 76 a, b, & c of the Law of Succession Act Cap (160) Laws of Kenya and rules 44 and 73 of the Probate and Administration Rules. The applicant seeks revocation of grant made out to Joseph Wachiuri Kabatha and John Gathige on 16th January 2007 on grounds that;

- i. That the grant was obtained fraudulently by making false statements and concealing from court of something material to the court.
- ii. That the grant was obtained by means of untrue allegations of facts essential.
- iii. That proceedings to obtain the grant were defective in substance
- iv. That costs of this application be provided for.

2. The application is based on the applicant affidavit dated the 9/5/2008. The applicant depones as follows that; the deceased was his step mother and the petitioners his step brothers; that the petitioners failed to disclose all the names of survivors' dependents and or heirs to the estate of the deceased as per the chief's letter. That it is known that he and his sister Cecilia Njoki are entitled to 1 acre of **L.R. No. Kaisagai/Chepkoilel Block/5/412 Kiriita Kitale** information the petitioners kept from the court. The petitioners gave false information by naming Wilson Kamonye as owed by the deceased while it is them that are who sold their interest to him. That the petitioners sought to distribute the 2 acres knowing very well it belonged to him and his the sister adding that the petitioners have since transferred the suit parcel of land to Wilson Kamonye knowing that the said parcel of land belongs to his late father Charles Kabatha Wachiuri and he gave it to the deceased to subdivide as follows;

Veronica Wanjiku- 1 acre

Francis Gathiaka – 1 acre

Cecilia Njoki – 1 acre

Hannah Gachambi – 1 acre

Adding that Veronica Wanjiku gave up her right to the 1 acre to take up the deceased's share in another parcel of land hence the petitioner's interest was only 2 acres. That on 3/9/2001 before Chief Kirenga they all agreed to sell the whole parcel of land to Wilson Kamonye but later on he and Cecilia decided to keep their portions but the petitioners went ahead to dispose their portion without consent. That the petitioners have fraudulently and secretly transferred their rightful inheritance to Wilson Kamonye.

3. John Gathige Karanja in his replying affidavit dated the 29/9/10 avers that as a trustee and personal representative of the house where the applicants come from he is the one who gave consent for their house. That after confirmation of grant each house was supposed to get a share of the estate of the deceased which was to be obtained from the trustee of the six houses. He denied allegations that the application for grant of letters of administrations were made fraudulently adding that they did convene meetings on the modalities the shares were to be distributed .

4. Joseph Wachiuri Kabatha in his replying affidavit dated 29/09/2010 avers that he was the only one charged with the administration of Hannah Gachambi Kabatha and she had instructed prior to her demise that she had sold the land in Kitale and the same should be transferred to Wilson Kamonye Kuria. He refutes averment made by Cecilia Njoki that the petitioners concealed information since the information had been disclosed to the court and consent had been given to him. Adding that all parties were well aware that the shares to the land were given to respective house.

5. PW1 Francis Gathika Kabatha a step son to the deceased, testified as follows that his late father had 6 wives namely; Mariah Njeri, Margaret Nyambura, Muthoni Kabetha; Njeri Murungaru, Anna Gachambi and Veronicah Wanjiku. Before his late father died in 1989 he distributed his land according to Kikuyu customary law giving each child their share. That he, Monica Wanjiku his step mother and Veronica each got 1 acre each of L.R. No. **Kaisagai/Chepkoilel Block/5/412 Kiriita Kitale**. Margaret Nyambura did not have any children. That Margaret now deceased received 1 acre, Veronica Wanjiku another stepmother received 1 acre over **L.R. No. Kaisagai/Chepkoile Block/5/412 Kiriita Kitale**. However, Veronica exchanged the said parcel of land with another parcel of land with Gachambi. The matter was discussed by the family but they could not agree and at that point they went to the chief. They wanted to sell the land and even entered into an agreement dated 3/9/2001 where they were to sell each acre for Kshs. 75,000/- but later on changed he mind adding that he did not know that Hannah had not been paid but that Kamonye had promised to pay the purchase price in October 2001. That the Registrar asked for the title deed and he was surprised to learn later on that the land was transferred to one Wilson Kamonye

6. PW2 John Njoroge Muthee a chief of Kirenga Location around the year 2001 testified that he knew the deceased and the parties herein. That he had received a letter dated 23/4/2001 from the Land Registrar asking him to sit with elders and parties to resolve the matter. After deliberations the elders agreed that the parcel of land be subdivided into 4 parcels whereby Joseph Wachiuri, John Gathige Cecilia and Francis Githiaka each got 1 acre. They had agreed that they would sell the said parcel of land for Kshs. 300,000/- Francis and Cecilia agreed to sell their parcels at Kshs.75,000 while Hannah the deceased agreed to pay Kshs. 154,000/-. He also stated that the parties later on changed their minds on the sale and at the time no purchase price had been paid for the parcels of land and he did another letter in the presence of the family members which they signed.

7. PW3 Veronica Wanjiku Kabatha stated that she was a co-wife to the deceased adding that their Charles Kabatha had 6 wives namely; Mariah Njeri , Catherine Nyambura, Teresiah Muthoni, Nyahangi or Njeri, Hannah Gachambi and Veronica Wanjiku. That the shares at Kinifa Farmers had been sold by her late husband. Further that the land 1 acre was given to Hannah Gachambi, the land was given to Hannah to be trustee for herself. Francis Githiaka and Cecilia Njoki also got 1 acre each. That Catherine also gave her share to Hannah Gachambi and Peter Macharia and each got 1.3 acres. Hannah agreed to take her 1 acre and give her back 30 points. She gave the 30 points to her children when she decided to sell her plot. Hannah got 2 acres of the said parcel of land. That when they went to the chief it was agreed that

they sell that parcel of land however, the sellers changed their minds and did not sell. She denies allegations that Wachiuri's mother had sold the parcels of land before she died adding that Cecilia and Githiaka are entitled to retain 1 acre each of the said parcel of land as they were given the land by their late father.

8. In cross examination, she stated that Hannah Gachambi had been given 6 acres in Lari which her children shared. That Hannah had also been given 3 acres at Theri which her children still have and it was the Kitale one that they shared 1 acre each. At the time the same was shared, the land was in their husband's name but he transferred the same to Gachambi when he became ill as the society refused to enter all their names in the registrar but their children were witnesses. That she exchanged her share with Hannah and when she was selling her one acre she called her children and asked them to sell their 30 points. That before Hannah died Wilson Kamonye used to lease the said parcel of land and they share the money Willson paid she has no claim to the said land.

9. PW4 Joseph Wachiuri Kabatha a son to Hannah Njeri (Nyahangi) and step son to the deceased testified that his father whilst distributing the parcel of land distributed it to Cecilia, Njoki, Hannah Gachambi and Veronicah Wanjiku with each getting 1 acre each. He was not given a share because he had already been given another plot. Francis Githiaka was also given 2 acres. Francis and Cecilia were each given an acre because they used to take care of their late father. It was agreed that Veronicah and Hannah exchange their plots. He added that his mother's house has no claim on the land adding that although they had discussed the issue of selling the land there was no money exchanged as the sellers changed their minds. The buyer was Willson. That Hannah had not sold the land before she died. In cross examination he reiterated his evidence and added that Wilson used to cultivate the land.

10. Pw5 Cecilia Njoki Waweru testified that the deceased is their step mother. That the petitioners failed to disclose all the names of the survivors, dependants and or heirs to the estate of the deceased. That she and the applicant are entitled to an acre each on L.R Kaisagai/Chepkoilel Block 5/4/12 Kiriita but the petitioners did not inform the court. That the petitioners gave false statements in the petition by naming Willson Kamonye as owed by the deceased while it is the petitioners who sold their interests to him. That the said land in question belonged to her late father Charles Kabatha Wachiuri who gave it to the deceased to divide an acre each to Veronica Wanjiku, Francis Githiaka, herself and Hannah Gachambi. Veronica however gave her one acre to Hannah the deceased. That though called by the chief on the 3.9.2001 she and Francis later on decided not to sell their portions but the petitioners went to dispose their shares without their consent and knowledge.

11. In cross examination too she denied that she had agreed to sell the land and that Kahiga their brother was to represent them as a household and that he took money on their behalf. That she wants the land and not the money. She has not seen the title. Hannah held the land in trust for them. Her share was not a family share but hers.

12. DW1, Joseph Wachiuri Kabatha is son to the late Hannah Gachambi. He testified that they petitioned for grant as per the instruction of Hannah Njambi the deceased. That the objectors are his step-brothers. That before the deceased died she started selling the said parcel of land and there was no letter to indicate that she changed her mind as alleged and upon writing the said agreement they went to the chief and Kamonye was supposed to pay her, she had been paid her Kshs. 154,000/- and she gave out the title. She started using the money to treat herself. During cross-examination, he stated that the chief's letter gave names of the house representatives and who was to inherit. They had held a meeting and all houses were represented. They were to divide their parcels as they had done. That he did not include Francis and Cecilia or show that Wilson was entitled to their portions. He did not indicate that Willson was buying their mother's share and theirs too. He added that he did not go to confirm that if Francis and Cecilia had been paid their shares as he was not involved and he transferred the land to Wilson Kamonye. He stated that Cecilia was the trustee to his mother's house. That there was no indication that Cecilia had changed her minds to sell and there was no letter to that effect. That all 6 houses had given their consent for the sale as they had agreed on no written consent. That he had consent from the family to file the suit and when he filed for letters of administration he only listed beneficiaries of his house adding that Joseph was the houses's representative and witness.

13. **DW2, Wilson Kamonye**, stated that the deceased sold to him a shamba **L.R. No. Kaisagai/Chepkoile Block/5/412 Kiriita Kitale** over 10 years back and her sons were aware of this. He stated that he and the parties went to the chief and it was decided that they sell the parcel of land to him and got a title to the same after the grant was issued. He stated that he paid money to his lawyer for each individual for their share of the said parcel of land this included 2 acres belonging to Hannah, 1 acre belonging to Francis Gathiaka and 1 acre belonging to Cecilia Njoki's family. He is claiming the said land. He got the title after the grant was issued. He bought it for Ksh.70000/-. He has cultivated the land since he bought it. That the deceased informed her son Joseph Wachiuri Kabatha that she had sold the land to him and to make sure that he had received the land according to her will before her death. That the objectors have been aware of this and that they had now position to him being granted the parcel of land at the meeting and he is wondering why the sudden change of tone. That there was no fraudulent transaction that was done and the whole process was done in good faith with consent and knowledge of the parties and he paid the full purchase price.

14. In cross-examination he stated he paid John Gathiga their portion for their family Kshs. 70,000/- he also paid Joseph. That Joseph's mother took her money due to her illness. He paid the monies before the lawyer and not at the chief's place. He bought the two share of Hannah. Cecilia was not there when he paid neither did she know that she had a shamba. He was the Vice Chairman of Kiriita and knew about the shareholding.

15. **DW3 John Gathiga Karanja** confirmed that his late father had 6 wives. He stated that there was an issue regarding the suit parcel of land. That they went to the chief and drew an agreement with the deceased's wife for sale of the suit property to one Wilson Kamonye and he paid the purchase price as agreed. That at the time he was with Joseph Kaluga who accepted the money on behalf of 3rd house. He stated that he signed the sale agreement since one share belonged to his family of Njeri. That he, his brother Peter Macharia and his brother's wife Waruguru went to the lawyers office. He added that they sold one acre for Kshs. 300,000/- and divided the money before the lawyer and also subdivided Francis's money amongst themselves adding that he could not recall whether Wilson gave him kshs.70,000. He stated that although Francis was entitled to a share he refused to go when he called him. On re-examination he stated that each house got Kshs. 75,000/- which they divided amongst themselves.

16. **DW4 Mariam Njoki Kahiga** a wife to Joseph Kabatia testified that Cecilia Njoki is her sister in law. That the land in Kitale belonged to his mother Loise Muthoni , Gachamia and Njeri. She stated that she used to hear that the land which belonged to their parents had been sold and money was given to her husband for their house at that time he was the only son. That the husband used to tell her that he never attended the meeting at the chief's place adding that he knows the husband got money but could not tell whether he shared it with Cecilia or if she ever had a share of the said parcel of land. During cross-examination she admitted that she did not attend any of the meetings at the chief and that what she had testified is what she was told. That she does not know if Cecilia had a shamba in Kitale.

17. Parties filed written submissions. The applicant listed 3 main issues for determination;

- i. Were the petitioners/respondents bound to disclose the interest of the applicant and her step sister Cecilia Njoki Kabatha in the petition and why?
- ii. Did the non-disclosure infringe on their rights in the entitlement portion of land and
- iii. Does their non-disclosure amount to a procedural defect in the petition and the distribution of the estate of the deceased/.

18. It was submitted that the chief's letter dated 4/4/2006 indicated that Francis Githiaka Kabatha and Cecilia Njoki Kabatha were both entitled to 1 acre each yet the petitioner failed to disclose. They sort to point out discrepancies in their affidavits stating that in one Joseph Wachiuri Kabatha claims that the deceased had sold the parcel of land before her demise while another replying affidavit dated 29/9/10 claims shares of land were to be given to respective houses to with it as they wished, that the discrepancies show that the deceased did not own the land wholly. Further it was submitted that John

Gathige the person who is said to have received the payment did not know if Francis Githiaka Kabatha and Cecilia Njoki Kabatha ever received anything though he acknowledged that they were entitled to a share. That from the evidence it is evident that; LR. No. Kaisagat/Chepkoile 5/412 did not wholly belong to the deceased. That the same was sold to Wilson Kamonye and proceeds were paid after the deceased passed away. That the applicant and Cecilia Njoki were not paid any proceeds of sale of their shares. That the applicant and Cecilia Njoki were not included in the petition as beneficiaries and were not consulted during distribution and confirmation of grant and they did not give consent to have their shares transferred to Wilson Kamonye the purchaser. That Section 66 provides that, “*When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—*

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:”

19. It was submitted that from the said provision anyone with an interest should be included. Further that the purchaser Wilson Kamonye paid the purchase price to the 1st administrator after the demise of the deceased. That no evidence was adduced to show when the said monies were paid adding that there were consents that were not sought from some of the interested parties. That the said sale of the suit property cannot be covered under Section 93 of the Succession Act and since they were not included their action could only be termed as intermeddling with the estate.

20. The objector relied on **Succession cause no. 729 of 2014**, a case where the petitioner concealed this fact to the court and left out his step siblings in the petition disinheriting them and sold part of the estate to a purchaser. The Honorable Judge found that the petitioner had not complied with Section 51 of the Law of Succession was not followed where a petitioner is bound to disclose names of all beneficiaries of the deceased further it was held that **Section 55 and 82** of the Act prohibited administrators from selling the land before the grant is confirmed. The applicant submit that the petitioners failed to disclose all the beneficiaries of all the beneficiaries of the estate adding that also sold and included a stranger into the proposal for distribution. They could only have transferred their interest after the confirmation of grant which would have required consent of all beneficiaries. They urged the court to revoke the grant issued on 31/7/2007 as the process was defective and there was concealment of material facts from court.

21. The respondents in their submissions stated that the deceased Hannah Gachambi Kabatha had two properties being; **L.R. No. Kaisagai/Chepkoile Block/5/412 Kiriita Kitale** and **L.R. No. Lari/Kiambaa/395**. That the petitioners have no claim over the 2nd property which belongs to the house of the deceased. Further, that the petitioner and his siblings are the only rightful beneficiaries hence the process to effect the undisputed facts cannot be said to be fraudulent. It was submitted that parties had earlier on agreed to sell their share of the said land there is an agreement and even a letter written to the Land Registrar to that effect. That the buyer was clearly known he had paid some money and only awaited completion of formalities. It was further submitted that the evidence tendered has not established fraud false statement of concealment of material facts to this court. Adding that it would be unreasonable to list all houses surviving their late father since he had already distributed his estate before his demise. That the estate has been fully distributed and all the beneficiaries settled. They relied on **Succession Cause no. 407/1997, Lady Justice M. Muigai** declined to revoke a grant and merely amended it in a manner that served the ends of justice.

Determination

22. The applicant seeks revocation of grant issued in regards to the estate of the deceased. Section 76 of the Law of Succession, provides that, “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;”

It is not in dispute that the land in question L.R. No. Kaisagai/Chepkoile Block/5/412 located in Kiriita Kitale initially belonged to their father the late Charles Kabatha Waciuri. Their late father was polygamous and had 6 wives. Before his demise he distributed his said parcel of land as follows;

i. Veronica Wanjiku- 1 acre

ii. Francis Gathiaka – 1 acre

iii. Cecilia Njoki – 1 acre

iv. Hannah Gachambi – 1 acre

23. Veronica swapped her share with Hannah and acquired another parcel of land elsewhere. This meant that Hannah got 2 acres from the suit parcel of land. It is alleged that the parties involved agreed to sell the said parcel of land to one Wilson Kamonye and a sale agreement dated was drawn. The agreement was that Cecilia and Francis would sell the said parcel of land for Kshs. 75,000 while Hannah the deceased agreed to sell for Kshs. 154,000/-. From evidence tendered by the applicant witness John Njoroge Muthee a chief of Kirega Location who mediated the parties land issue stated that after the discussion Cecilia and Francis refused to sell their parcel of land. Hence from the said evidence only 2 acres of land was free for sell unless Francis and Cecilia agreed to transfer or sell their share. John Gathiga in his testimony stated that when money for the sale of the suit parcel of land was being paid Francis was not present and since he had been informed he did not go and when they received the money they shared out their money and also money for his share. There was no mention of Cecilia getting money or share of the land entitled to her. From the foregoing evidence it is clear that Cecilia and Francis were both entitled to a share of 1 acre from the distribution of the land from their late father. The entire parcel of land is said to have been sold together with Hannah Gachambi’s share of 2 acres.

24. There is nothing to show if any consent was sought from Cecilia or Francis in the said sale. It appears that the said sale assumed that the entire suit parcel of land was owned by the deceased Hannah Gachambi. Since the said parcel of land had not been divided and parties obtained individual title documents it can be assumed that the late Hannah Gachambi was holding the same in trust of the other beneficiaries and their consent to the dealing of the said parcel of land should have been sought. Failure to do so was tantamount to denying them their rightful inheritance or disinheriting them. Section 76 of the Law of Succession Act provides that, “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) The 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;”

25. I find that the petitioners in petitioning for grant of letters of administration failed to disclose to this

court that the suit parcel of land belonged not only to Hannah's beneficiaries but also to the applicants as such I revoke the grant of letters of administration granted to Joseph Waciuri and John Gathige on 16th January 2007 and confirmed on 31st October 2007. A new grant to be issued to Joseph Waciuri, John Gathige, Francis Gathiaka and Cecilia Njoki. I order that parties to include the applicants in the proposed distribution as per their entitled shares. Parties to apply for confirmation of the grant thereafter to ensure there is no further delay in concluding this estate. Costs in the cause. It is so ordered.

Dated, signed and delivered this 23rd day of June 2017.

R. E. OUGO

JUDGE

In the presence of;

Ms. Nyaga holding brief Mrs Muhuhu For the Applicants

Mr. Muraya holding brief for Mr. Mwenda For the Respondents

Ms. Charity Court Clerk