



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 18 OF 2016**

**IN THE MATTER OF THE ESTATE OF JOSPHAT GITHUTHA MUTUA ALIAS**

**JOSPHAT GITHUTHA ALIAS JOSPHAT GITHUTHA MUTUA KUNGU(DECEASED)**

**JANE NJERI GITHUTHA.....BENEFICIARY/APPLICANT**

**VERSUS**

**KIMAMA GITHUTHA KUNGU.....RESPONDENT**

**RULING**

1. On 29/10/2012, Kimama Githutha Kungu (“Kimama”) filed a Petition for Letters of Administration intestate with respect to the estate of the late Josphat Githutha Mutua (Deceased) at the Thika Chief Magistrate’s Court. The case was assigned Succession Cause No. 624 of 2012.

2. On the same day, Kimama took out a Citation to accept or refuse Letters of Administration intestate to the following persons:

- a. Margaret Njoki Githutha
- b. John Mutua Githutha
- c. Magdaline Nyambura Chege
- d. Rosemary Muthoni Githutha
- e. Jane Njeri Githutha
- f. Joyce Wanjiku Githutha
- g. Agnes Wangui Githutha
- h. David Kiragu Githutha
- i. Petronila Mwhaki Githutha
- j. Kimama Githutha Kung’u
- k. Mary Nyambura Kung’u

3. On 14/12/2012, the firm of J.K. Ngaruiya entered appearance on behalf of all the citees. In addition, he filed a Cross-Petition for Letters of Administration on behalf of Margaret Njoki Githutha and John Mutua Githutha. Margaret is one of the surviving spouses of the Deceased while John is her daughter and, therefore, a son of the Deceased. They also duly filed an objection and an Answer to Kimama’s Petition. In an amendment to their Cross-Petition, Margaret and John disclosed that the Deceased had left a will which had named Barclays Bank as the Executor. They did this vide a Notice to Amend their Application of grant which is dated 12/04/2014.

4. On 11/10/2013, during a regularly scheduled hearing by the parties, the Hon. Martha Mutuku ordered the Manager, Barclays Bank of Kenya, Moi Branch do deposit the will with the Executive Officer, Thika Law Courts. The Bank obliged by forwarding the will to the Thika Law Courts.

5. Kimama responded to the production of the will by filing an Application in which he sought to
6. Kimama's Application was heard by viva voce evidence with the Learned Trial Magistrate giving a short ruling dismissing it on 10/12/2014. It is important to reproduce the ruling in its entirety:
7. It is quite obvious that the "normal" procedures of gazettelement that the Learned Trial Magistrate had ordered was never followed. Indeed, it would seem that what the Learned Trial Magistrate intended by his ruling was that the Succession Matter would now be subjected to a full hearing as a contested matter. It should be recalled that at this point there was a Petition for Grant of Letters of Administration Intestate by Kimama and a Cross Petition by Margaret and John. In addition, there was, pending, a Notice to amend the Cross Petition filed under Rule 14(ii) of the Probate and Administration Rules. This Application was intended to transform the proceedings from one for grant of letters of administration intestate to grant of letters with Will Annexed pursuant to the discovery and deposit of the will with the Court.
8. However, instead of any of these Applications being heard, Kimama filed an Application to be issued with Letters of Administration. It is unclear how, in the face of the pending applications in the file, the Application was processed in the registry and Letters of Administration issued to Kimama on 22/12/2014. There is no dispute that at the time Kimama was issued with the Letters of Administration on 22/12/2014 there was a Cross-Petition pending as well as an Application to amend that Cross-Petition. It is also not in dispute that at the time the Letters of Administration were being issued to Kimama, there was, known to the Court, a Will which was deposited in Court and which had not been declared invalid. It follows that it was highly irregular for the Court to have issued Letters of Administration in these circumstances.
9. Quite strangely, despite these obvious irregularities, when Margaret and John applied to set aside the orders of 22/12/2014, their Application was dismissed on 31/07/2015 for lack of merit. Reading the file, I am unable to fathom how or why the Learned Magistrate reached the conclusion that he did just as I am unable to understand how an imperfectly timed application for issuance of grant of Letters of Administration to Kimama was granted. In any event, that is how the cookie crumbled. Faced with this state of affairs, one of the other beneficiaries, the current Applicant filed the present Application seeking revocation or annulment of the Letters of Administration issued to Kimama.
10. As I understand it, the Summons for Revocation is based on five grounds.
11. First, the Applicant, who is a beneficiary, claims that all beneficiaries were not taken into account as required under Sections 26, 29 and 40(1) of the Law of Succession Act.
12. Second, the Applicant argues that the Letters of Administration were issued unprocedurally because under sections 35 and 66 of the Law of Succession Act as well as Rule 7(7) of the Probate and Administration Rules, the surviving spouse has a hierarchical priority to take out Letters of Administration yet in this case, Kimama, a son, was granted the Letters of Administration in the face of protests by the surviving spouse. In this regard, the Applicant relied on In the Matter of the Estate of Paul Mutemi Kamwaki (Deceased) (Kitui HC Succ. No. 220 of 2015) and In the Matter of the Estate of Stanley Franklin Habwe (HC Succ No. 2747 of 2002).
13. Third, the Applicant further argues that the Letters of Administration were unprocedurally issued because they were granted when there was a Cross-Petition and other Applications pending by the time it was issued.
14. Fourth, the Applicant says that Letters of Administration intestate should never have been issued in the face of a will which was never a subject of a court ruling as to its validity.
15. Lastly, the Applicant is persuaded that Kimama (the Administrator) lacks the capacity to administer the estate as per the law required as exhibited by his actions. The Applicant says that Kimama has demonstrated that he is incapable of effectively playing his role as an administrator as required under sections 79 and 83 of the Law of Succession Act. This is because, the Applicant says, Kimama has used his role as Administrator to instill fear in other beneficiaries and cause wanton damage to the estate. She says that he has also collected money from the County Commissioner's Offices secretly and used it without the knowledge of the other beneficiaries. He has, the Applicant claims, also collected dividends from Kyanjau Housing without accounting for the same.
16. On his part, Kimama claims that the proceedings are an abuse of the process of the Court. This is because, he says, the Applicant was aware all along about the proceedings in the lower Court as she was served with a Citation and an Advocate entered appearance on her behalf. In addition, Kimama says, the Applicant's mother and brother engaged in protracted litigation on the matter in the lower Court.
17. Regarding the argument that the grant was issued without due regard to the interests of other beneficiaries, Kimama says that he obtained a letter from the Area Chief prior to commencing the proceedings and that the letter showed all the beneficiaries. Further, all the beneficiaries were served with citations.
18. Kimama argues that the Applicant and the other objectors "abandoned the issue" when they chose to participate in the intestate succession. They also did not diligently pursue their Application to amend the grant to include the alleged will of the Deceased. It is, thus, too late for them to insist on the will.
19. Finally, Kimama contests that the Letters were granted unprocedurally. He says that all the beneficiaries were served with Citations so it was up to them to diligently pursue their objections. Further, he argues that the lower Court had adequately dealt with the issue of the will after it directed that that the matter be gazetted. After this, Kimama argues, it must be assumed that the Applicant and the other objectors abandoned their application on the will. Consequently, Kimama argues, it was procedural for the lower Court to issue the Letters of Administration to him.
20. Further, Kimama argues that Margaret could not have validly petitioned for Letters of Administration because she is not a legitimate wife of the deceased. He argues that the Deceased was married to Petronilla Mwhaki at St. Mary's Catholic Church, Nakuru. He attached a copy

of the Marriage Certificate to evidence this.

21. I have considered the Summons for Revocation, the supporting and Replying Affidavits as well as the Written Submissions by the parties. I have also perused the entire lower Court file which I called for. In my view, this is a rather simple matter at this stage once it is stripped of the unnecessary complexities and, it seems, sheenanigans cooked at the Court registry. I have easily dismissed the allegation that the Respondent filed for Letters of Administration secretly and without informing the other beneficiaries. There is ample evidence to show that the Respondent served the other beneficiaries with Citations. This belies the argument that the Applicant here did not know about the Respondent's Petition.

22. However, the other three related grounds for revocation by the Applicant have some force to them.

23. It is not in dispute that the Respondent (Kimama) petitioned for Letters of Administration and issued citations to a number of people including the Applicant, Margaret and John. It is also not in dispute that all the Citees entered appearance and objected to the grant of the Letters of Administration to the Respondent. It is also not in dispute that Margaret and John cross-petitioned for Letters of Administration and later, after the discovery of a will, sought to amend their summons to annex the will. It is, further, not in dispute that during the proceedings in the lower Court, the Court called for the will of the Deceased in the possession of Barclays Bank and the same was deposited in Court but its validity and/or its enforceability was never canvassed. It is also not in dispute that the efforts by the Respondent to exclude the will were futile as the Court held that the "normal" procedure be followed. It is further not in dispute that the Respondent was somehow able to obtain Letters of Administration even though there were no objection proceedings (despite objections have been filed) and the issue of the will was never taken up and determined one way or the other. It is, also, not in dispute that the Letters of Administration were issued in the face of a validly filed Cross-Petition which remained undetermined.

24. This procedural history cannot be any clearer that there were massive irregularities in the issuance of the Letters of Administration to the Respondent. It was not open to the lower Court to issue the Letters of Administration to the Respondent in the face of the Cross-Petition and pending Application in the Cause. It was even more irregular for the Court to issue the Letters of Administration in the face of a will whose authenticity, validity and extent of enforceability the Court had not determined even though it had ordered that it be deposited in Court. There really can be no other conclusion than that the Letters of Administration were irregularly issued before all the issues in the Succession Cause could be ventilated and determined.

25. While it is true that the parties are divided on whether Margaret is a wife or not – with Kimama claiming she is not – it is noteworthy that Kimama himself included Margaret (and the Applicant – who is a daughter of Margaret) as a beneficiary and issued Citations to them. This implies that Kimama at least acknowledged the possibility that the Applicant and her mother were beneficiaries. Only a hearing of the Cross-Petition would have determined the true extent of their kinship or dependency to the Deceased. Similarly, only a full hearing would have determined the extent of the validity of the Will. As it were, the Respondent jumped the gun and obtained Letters of Administration prematurely and irregularly.

**26. This, therefore, leads to only one avenue: the Letters of Administration issued to the Respondent, Kimama Githutha Kungu in Thika Succession Cause No. 624 of 2012 were irregularly and unprocedurally issued. As such, the same must be revoked forthwith and they are hereby so revoked.**

**27. This returns the Succession Cause to the *status quo* as it was before the Respondent filed for the Letters of Administration. The Cause must be listed for directions for a full hearing on the Petition and Cross-Petition.**

28. Orders accordingly.

**Dated and delivered at Kiambu this 27<sup>th</sup> day of July, 2017.**

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**JOEL NGUGI**

**JUDGE**