



**THE REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 87 OF 2006**

**IN THE MATTER OF THE ESTATE OF JOHN KAMAU NDUNGU (DECEASED)**

**PHILOMENA WANJIKU KAMAU.....APPLICANT/ OBJECTOR**

**VERSUS**

**GLADYS NJOKI KAMAU.....1<sup>ST</sup> PETITIONER/ RESPONDENT**

**JAMES KAMAU NDUNGU .....2<sup>ND</sup> PETITIONER / RESPONDENT**

**MICHAEL MAINA KIHARA.....3<sup>RD</sup> PETITIONER/ RESPONDENT**

**JUDGMENT**

1. On the 17<sup>th</sup> of January 2006 Gladys Njoki Kamau and James Kamau Ndungu hereinafter referred to as the petitioners filed a petition for Letters of Administration intestate for the estate of John Kamau Ndungu who died on the 22<sup>nd</sup> of April 2005. They are the wife and brother of the deceased. In their affidavit in support they have listed the beneficiaries who survived the deceased being the widow, 2 sons and 2 daughters. Both were issued with a grant on the 16<sup>th</sup> of March 2006. On the 6<sup>th</sup> of August 2007 the petitioner filed an application to confirm the grant and the same was confirmed in court and a certificate of confirmed grant was issued on the 15<sup>th</sup> of April 2008, the properties listed in the schedule were to be registered in the name of the administrators in trust for the minor children in equal shares, the children being Naftali Ndungu Kamau, Julius Wanyoike Kamau, Judy Wanjiku Kamau and Maryann Njeri Kamau.
2. On the 22<sup>nd</sup> of May 2012 Philomena Wanjiku Kamau hereinafter referred to as the objector filed a Summons for Revocation of the grant. In her application she seeks the following orders;
  - i. That status quo as it was since the demise of John Kamau Ndungu in respect of all the properties forming the assets of the deceased's estate more particularly **Ngong/Ngong/3464** be maintained pending the hearing and final determination of the application for nullification and revocation of the grant filed.
  - ii. That the Administrators **Gladys Njoki Kamau and James Ndungu** be ordered to immediately give a detailed account of and deposit into court the proceeds of sale of **Ngong/Ngong/3464** to one Michael Maina Kihara ( Third Respondent)
  - iii. That the transfer and registration of the said parcel of land namely Ngong/Ngong/3464 to the said Michael Maina Kihara effected on the 24<sup>th</sup> of February 2012 at Ngong District Land Registry be nullified, revoked and or cancelled

- iv. That the grant of letters of administration intestate issued **Gladys Njoki Kamau and James Ndungu** the administrators' on the 16<sup>th</sup> day of March 2006 and confirmation on 15<sup>th</sup> April 2008 be revoked and or nullified
  - v. That the costs of the application be borne by the respondents.
3. The applicant filed a supporting affidavit together with the said application dated the 29<sup>th</sup> May 2012. The application was opposed by the 3<sup>rd</sup> respondent **Michael Maina Kihara** who filed an affidavit dated the 21<sup>st</sup> of May 2014. The administrators did not file any response to the applicant's application. By a ruling dated the 30<sup>th</sup> of April 2015 this court directed that the application for revocation be heard by way of viva voce evidence.
  4. The matter was heard on the 28/9/2015. Four witnesses testified during the objector's case. Pw1 was the objector, Pw2 was Felista Wanjiru Kamau, Pw3 was David Githaiga Kibe and Pw4 was Samuel Njuguna Ngige. The objector testified that the deceased John Kamau Ndungu was her late husband. They got married on the 1<sup>st</sup> of December 1978. They got married under Kikuyu customary law. Her late husband paid her parents dowry of Kshs. 1200/-. They have 4 children Anthony Ndungu Kamau a son, Judy Wanjiru Kamau named after the deceased's mother, Felister Wanjiru Kamau named after her mother and Elizabeth Njogu named after his elder sister. She produced their birth certificates together with their ID cards. That her late husband had properties a shamba in Rongai a, plot at **Muguga Gitaru 1600** bought in the year 2000, **Muguga Gitaru/T.375** in the deceased's name, **Ngong/Ngong/3464** which has been sold to Michael Kihara Maina, she discovered this from the green card. A shamba in Kajiado Oloshoro, in the name of Gladys the 1<sup>st</sup> administrator, a shamba in Nakuru Githinga/97. That Gladys was her co-wife but the younger one. That the deceased and her separated in 1988 and before their separation they had bought the properties the shamba in **Ngong/Ngong 3464** and plot **T.375** with the deceased, the latter plot has rental rooms was built in 1988 and the rent is collected entirely by Gladys. That all the properties were in the name of the deceased and that Gladys did not give her any of the properties. She testified further that Gladys took the money in the bank and NSSF money plus the 5 million paid for the plot sold to Michael Kihara. She was not given a part of the said money. She sought that the properties be divided equally.
  5. Felista testified that John Ndungu Kamau was her biological father he died 2005 and that objector is her mother, but at the time of her father's death her parents were separated. She mentioned her siblings and stated that their father's name appears in all their documents, that their father paid their fees. She admitted that Gladys was their step mother. David Githaiga Kibe testified that the deceased was known to him and the objector too. That he is the objector's uncle. That the deceased and the objector went to the objector's family and confirmed that they were husband and wife. That in 1979 the deceased paid some dowry, he slaughtered two lambs and paid 600/-. In 1985 they had another ceremony and the deceased paid Kshs. 1,200/-, he received part of the dowry. That the dowry upon their separation was not refunded to the deceased. He confirmed that the 2 had 4 children and named them and also that the deceased remarried after their separation. Pw4 was Samuel Njuguna Ngige a chief at Muguga location Kabete. He testified that he knew the deceased John Ndungu Kamau. That he knew that the deceased had two wives, the objector being the first wife and Gladys was the 2<sup>nd</sup> wife. That the objector and the deceased had 4 children, Gladys too had children with the deceased. He admitted writing the letter dated 12<sup>th</sup> May 2008.
  6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' did not respond to the application nor did they testify but the 3<sup>rd</sup> respondent filed a replying affidavit. The respondents were properly served with the hearing notice. The 3<sup>rd</sup> respondent in his affidavit avers that the objector is a complete stranger to him and that he is the registered owner of Ngong/Ngong/3464 having followed the due process of the law when purchasing the same from Gladys Njoki Kamau. That the objector should have objected to the letters of administration in 2006 if she had any interest in the estate and that she has been indolent in the cause and the orders sought a diversion of the due process of the law. That on the 6<sup>th</sup> of January 2012 he entered into a sale agreement with Gladys Njoki Kamau and Naftally Ndungu Kamau the registered owners of Ngong/Ngong/3464 and after the vendors obtained a

consent to transfer the property he paid the balance of the purchase price via RTGS on the 7<sup>th</sup> of February 2012 and thereafter he presented his documents to the Lands office and a title was issued on the 24<sup>th</sup> of February 2012. That his intention of purchasing the property was to subdivide the same which he has done and obtained all approvals in respect of the subdivision into 17 subplots and that the titles were issued against the approved mutations and that the mother title do not exist. That the objector's process is an abuse of the court process an afterthought and should be dismissed with costs.

7. The objector's filed written submissions. I have read them and this a summary of the said submissions; that the 2 administrators despite being served did not respond, that the applicant has rendered evidence that she was the wife of deceased as per the chief's letter, the National Registration documents that show the father's name in each child's ID card. That the said evidence was not controverted by the respondent's and therefore she is the wife of the deceased and the children her dependants' within the meaning of section 29 of the Law of Succession Act Cap160 and is entitled to his estate. That by failing to disclose that the deceased was polygamous the applicant's obtained the grant frequently. That it therefore follows that the transfer of the land known as **Ngong/Ngong/364** is a nullity and that the court by dint of section 93 of Cap 160 is entitled and is bound to invalidate and cancel the title No. Ngong/Ngong/364 issued to the 3<sup>rd</sup> respondent and restore the parcel of land to the deceased's name. That upon cancellation of the title the parcel of land shall be available for distribution to the legitimate dependants of the estate. On the issue of which properties are available for distribution and the extent of the shares each of the legitimate dependant is entitled to. It was submitted that two properties are not available for distribution namely; Ngong/Ngong/3463 and Muguga/Gitaru/375 which were acquired during the subsistence of the deceased's marriage to the applicant and before his marriage to the 1<sup>st</sup> respondent. That she has lived with the deceased as husband and wife up to 1988 when they separated and thereafter the deceased married the 1<sup>st</sup> respondent Gladys. That the applicant did not remarry nor did she get other children. That under the old Married Women and Properties Act 1888 the applicant is entitled to a share of the two properties which the deceased had acquired during the subsistence of their marriage and that their children are the sole heirs, that the said properties should not be available for distribution to the 2<sup>nd</sup> house. That the other remaining properties shown in the schedule in the certificate of confirmation dated the 15<sup>th</sup> of April 2008 can be distributed to the 2 houses as per the provisions of section 40 of Cap160, that is the net intestate shall be divided amongst the 2 houses as per the number of children with the 2 widows considered as additional units to their respective children. That each house has 4 children and taking into account 2 widows then each household will have 5 units, that all other assets excluding **plots 3463 and T.375** should be shared equally between the 2 households. To support her arguments the applicant relied on two cases namely; ***C.A No.2 of 2014 Kisumu Musa Nyaribari Gekone and 2 others vs. Peter Miyianda and another*** and ***High Court P&A Cause No. 2853 of 2003 Nairobi- In the Matter of the Estate of Christopher Jude Adela (Deceased) Rebecca Veronica Adela vs. Prisca Khatambi Kibukosya and another.***
8. I have considered the evidence adduced by the objector, the 3<sup>rd</sup> respondent's affidavit, the submissions, authorities cited and the law. The issues for determination are;
  - i. Is the objector a wife of the deceased?
  - ii. Should the court revoke the grant issued to the administrators' on the 16<sup>th</sup> March 2006 and confirmed on the 15<sup>th</sup> of August 2008?
  - iii. Should the administrators' give an account of the proceeds of sale of Ngong/Ngong/3464?
  - iv. Should the transfer and registration of the said parcel of land Ngong/Ngong/3464 to Michael Maina Kihara effected on the 24<sup>th</sup> of February 2012 at Ngong District Land Registry be nullified, revoked or cancelled
9. The 1<sup>st</sup> and 2<sup>nd</sup> respondents in their petition filed in court on the 17<sup>th</sup> of January 2006 did not include or mention the objector as the deceased's wife nor did they include the objector's children. The objector's evidence is that she is a wife of the deceased but they were separated and that they

had 4 children. To support her evidence she told this court that the deceased paid dowry and this was confirmed by Pw3 who took part in the dowry ceremony. There is also the evidence of the Chief of their area that she was the deceased's wife but were separated, this evidence in my view is sufficient to prove that she was the wife of the deceased. Her evidence was that they had 4 children and this was confirmed by Pw2 their daughter plus the records from the Department of National Registration Bureau tendered by the objector. There is also evidence that they were separated by not divorced. This evidence has not been controverted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

10. The objector's application is brought under section 76 of the Law of Succession Act which provides for revocation or annulment of grants. The objector's reasons for seeking revocation of the grant are that; the grant was obtained by fraudulently by making a false statement and concealment from the court, that the proceedings to obtain the grant are defective in substance in that no proper or any citations were set to all the dependants/ beneficiaries of the estate of the deceased, that the grant was made by means of untrue allegations of facts essential in point of law to justify the grant. Whilst petitioning the court for the grant the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not disclose that the deceased had another wife and children from the said marriage. The objector and children of the said marriage are dependants under section 29 of the Law of succession Act and have a right to inherit the deceased's estate. Section 76 of Cap. 160 gives the court the discretion to revoke a grant if the applicant can establish her case in line with the provisions of the Act Cap 160. The applicant's grounds for seeking the revocation fall within section 76 (a), (b) and (c). The 1<sup>st</sup> and 2<sup>nd</sup> respondents failed to include the applicant and her children as dependants/beneficiaries to the deceased's estate and in doing so they concealed from the court material facts to the case and thus they obtained the grant fraudulently by making a false statement that the 1<sup>st</sup> respondent and her children were the only beneficiaries to the estate. This court therefore revokes the grant that issued on the 16<sup>th</sup> day of March 2006 and confirmed on the 15<sup>th</sup> of April 2008.

11. It is deposed in the affidavit of the 3<sup>rd</sup> respondent that he bought the property **Ngong/Ngong/3464** for Kshs. 5,000,000/- that he has a title that was issued to him after he made an application at the Lands office and that he has subdivided the property into 17 subplots as shown in the approved mutations attached to his affidavit. As a court am aware of the provisions of section 93 of Cap. 160. Having read the affidavit of the 3<sup>rd</sup> respondent and noting the changes already made in the said property this court is reluctant to revoke the title issued to the 3<sup>rd</sup> respondent. However this court finds that the 1<sup>st</sup> and 2<sup>nd</sup> respondent should give a detailed account of the monies received from the sale of Ngong/Ngong/3463. For avoidance of doubt these are the orders granted to the objector;

- I. **That the letters of grant of administration intestate issued to Gladys Njoki Kamau and James Kamau Ndungu on the 16<sup>th</sup> of day of March 2006 and confirmed on the 15<sup>th</sup> April 2008 is hereby revoked.**
- II. **The administrators Gladys Njoki Kamau and James Kamau Ndungu shall give a detailed account of the proceeds of the sale of Ngong/Ngong/3464 to the objector and file an affidavit on the same in court within 60 days from the date of this judgment.**
- III. **That the properties forming the assets of the deceased's estate listed in the certificate of confirmed grant shall be maintained and not sold to 3<sup>rd</sup> parties.**
- IV. **The objector is at liberty to apply for grant and confirmation of the same if she so wishes.**
- V. **Costs of the application shall be in the cause. It is so ordered.**

Dated signed and delivered this 22<sup>nd</sup> day of June 2016

**R.E.OUGO**

**JUDGE**

**In the presence of;**

.....**Applicant**

.....**1<sup>st</sup> and 2<sup>nd</sup> Respondents**

.....**3<sup>rd</sup> Respondent**

**Charity**

**Court Clerk**