



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 1773 OF 2009

IN THE MATTER OF THE ESTATE OF GACHERI WAIGANJO

ALIAS HANNAH GACHERI WAIGANJO (DECEASED)

PHILOMENA MUTHONI MBUGUA

AGNES WANGUI MANGARA

JOSPINE WAKONYO NJIRIRI.....OBJECTORS/APPLICANTS

AND

PHILLIP MUTUGA WAIGANJO.....ADMINISTRATOR /RESPONDENT

R U L I N G

1. Gacheri Waiganjo Alias Hannah Gacheri Waiganjo whose Estate is in issue died on 7th August, 2000. One of the sons Philip Mutuga Waiganjo (hereinafter referred to as the deceased Administrator), successfully petitioned this court for letters of Administration intestate indicating that the deceased was survived by the following:

1. Thomas Mbugua Waiganjo - son
2. Monicah Wanjiku - daughter
3. Joseph Njoroge Waiganjo - son
4. Felister Muthoni Kamau - daughter
5. Philip Mutuga Waiganjo - son
6. Agnes Wangui Mangara - Daughter
7. Josephine Wakonyo Njiriri - daughter
8. Fredrick Gichure Wanjiku - Grandson
9. Patrick Warui Waiganjo - son

10. Joseph Mbugua Macharia - son-in-law

The grant of letters of Administration intestate was issued to Thomas Mbugua Waiganjo (hereinafter referred to as the deceased Petitioner), on 30th November 2001 and confirmed vide certificate of confirmation of Grant dated 8th April, 2003.

2. On 6th August, 2009, Philomena Muthoni Mbutia, Agnes Wangui Mangara and Josephine Wakonyo Njiriri (hereinafter referred to as the Objectors) filed summons for revocation of the grant. They also prayed for the cancellation of all transmissions, sub-divisions or transfers from the original parcel No. L.R. No. Limuru/Kamirithu/643 being:

i. Limuru/Kamirithu/2354

ii. Limuru/Kamirithu/2355 born out of Limuru/Kamirithu/643

iii. Limuru/Kamirithu/2357

iv. Limuru/Kamirithu/2358

v. Limuru/Kamirithu/2789

vi. Limuru/Kamirithu/3061

vii. Limuru/Kamirithu/3062

The Objector prayed that the above titles be consolidated and redistributed afresh.

3. The Objectors further prayed that the petition be amended to include a shop in Limuru Town, Limuru Municipality, Market Plot 21A at Rongai and shares in Limuru Dairy and Limuru Pyrethrum companies. Further that the Administrator do provide the accounts and distribution of the estate.

4. The application is premised on grounds that the certificate of confirmation was obtained fraudulently by concealment of facts: that the proceedings to obtain the grant and certificate were defective as no citations or consents from the Objectors were included: that the Objectors have been excluded from the bulk of the Estate and that the grant was obtained by means of untrue allegations that the Objectors had consented to the Petition or confirmation.

5. Philomena Muthoni Mbutia swore a supporting affidavit but later withdrew from the suit in the year 2015 for unclear reasons. Agnes Wangui Mangara and Josephine Wakonyo Njiriri then sought leave and did file a new supporting affidavit on 5th October, 2015 on the same grounds. In the affidavit the Objectors averred that they are daughters of the deceased and the Respondent is their brother.

6. In response the Respondent swore a replying affidavit on 10th December, 2009 in which he confirmed that the Objectors are his sisters. That when the grant was issued and subsequently confirmed in the year 2003, the Objectors had a period of six months within which to object to the confirmation of the said grant and they did not do so.

7. The Respondent argued that there was no need for the Objectors to be served with the citation upon filing of the petition since the court had already been furnished with the original Will of the deceased when Thomas Mbugua Waiganjo, the Respondent's late brother, petitioned for the grant of representation as provided under **section 51(3) of the Law of Succession**.

8. Upon perusing the pleadings and the submissions of the counsels on record I have framed the following issues for determination:

- i. Whether the Estate was testate or intestate.
- ii. Whether the beneficiaries of the Estate had notice of the filing of the petition for grant.
- iii. Whether there was equitable distribution of the Estate.

9. On the issue of the nature of the Estate and whether it was testate or intestate, the Respondent averred that the grant was confirmed in accordance with a Will and therefore, there was no need of filing consents in court before the confirmation was done, since no one objected to the contents of the Will in court.

10. The Respondent stated further that the deceased also retained a piece of land from the original parcel known as Limuru/Kamirithu/643, which she bequeathed to her grandchildren in her Will. He argued that a testator/testatrix has the right to will his/her Estate howsoever he/she wished and to have it so distributed upon his/her death. That therefore, if the deceased wished to give some of her property to her grandchildren then her wishes cannot be questioned.

11. The Objectors in a further affidavit deposed that the grant issued to the Respondent on 30th November, 2001 was intestate, and therefore the issue of an alleged will was an afterthought. That in any case the alleged Will is illegible, and is invalid since the deceased used thumbprints in 1999 as evidenced by the Land Board forms yet in the year 1994 she was said to have signed. The Objector argued that the alleged Will had never been seen or read by the Objectors. That the first witness to the Will, one Maria is deceased, while Joseph Mbugua and Mwangi Njihia are strangers to the Objectors.

12. Mr. Mutitu learned counsel for the Respondent pointed out that the Objectors have failed to acknowledge that the deceased left a valid will dated 1st September 1994, which gave directions on how to distribute her estate upon her death. That the Objectors have failed to disclose to the court that the mode of distribution of the deceased's Estate was pursuant to the deceased's last written will.

13. Counsel contended that the said will was made by a person of sound mind unless the contrary is proved. He referred the court to the decision of **Wanjau Wanyoike and 4 others vs Ernest Wanyoike Njuki Waweru and ano. Nairobi HCCC No. 147 of 1980** where the deceased's Will was nonetheless challenged by the Objectors.

14. Mrs. Muhuhu learned counsel for the Objector submitted that Part X of the Probate and Administration rules is clear on the procedure to follow when one seeks for Probate of Will. They must petition for Grant of Probate. Mrs. Muhuhu asserted that there was no will which was filed in the lower court.

15. To determine the question whether the Estate was testate or intestate, the court perused the lower court record in which the petition for the grant of representation was first made. The lower court record being P&A Succession cause No. 21 of 2001 Limuru was brought up from the lower court and forms part of the record now before court.

16. The court notes that the deceased Petitioner filed the Petition in Limuru Resident Magistrate's Court being P&A 21 of 2001 as an intestate Estate. In form P&A 80 he states as follows:

"I Thomas Mbugua Waiganjo of P.O. Box 207 Limuru HEREBY PETITION this honourable court for grant of Letters of Administration intestate of the estate of the above named GACHERI WAIGANJO Alias HANNAH GACHERI WAIGANJO who died on 7th August 2000." (emphasis mine)

In the said form P&A 80 it is repeated that the deceased died intestate domiciled in Kenya.

17. A perusal of the lower court record also reveals that there was no copy of the alleged will filed with the petition. In any case if there was a Will, which is denied by the Objector and which has not been demonstrated in any way by the Respondent, the Petition for grant of probate should have been filed in

the High Court which is vested with jurisdiction to entertain such a petition and a copy of the said will should have been attached.

18. The lower court record also indicates that the grant issued to the Petitioner Thomas Mbugua Waiganjo (deceased) on 30th November 2001 and confirmed vide certificate of confirmation of grant dated 8th April 2003 was for “**Letters of Administration intestate of all the estate of GACHERI WAIGANJO (also known as HANNAH GACHERI WAIGANJO)**”.

19. For the foregoing reasons, I make a finding of fact that the Estate of Gacheri Waiganjo alias Hannah Gacheri Waiganjo (deceased) was intestate.

20. The court then examined the record to establish whether all the beneficiaries of the Estate had notice of the filing of petition and whether they consented to such filing and mode of distribution. Agnes Wangui Mangara and Josephine Wakonyo, the 2nd and 3rd Objectors respectively filed a joint affidavit in support of the summons for revocation of grant. They deposed that they were not notified when the Petition was filed in 2001 or when the certificate of grant was confirmed in 2003.

21. The Objectors asserted that they came to learn of the Petition when they saw purchasers come to the parcel of land in July 2009, and decided to investigate the matter. Further that the Respondent in his replying affidavit, admitted to having not filed consent since there was a will.

22. The Objectors further averred that the Kenya Gazette Notice dated 12th April 2001 indicated the name of the deceased as Gacheri Waiganjo and yet she was known as Gacheri Andrew and the said change of name was done 13th June 2005 after her death.

23. In reply the Respondent contended that the grant was confirmed in accordance with a Will and there was therefore no need of filing consents in court before the confirmation was done, since no one objected to the contents of the Will in court. He argued that where a deceased person has left a will, no consents are required of the beneficiaries since the court adopts the Will and its contents as to the mode of distribution of the deceased persons Estate.

24. The Respondent attached in his affidavit, an application by the deceased changing her name while she was still alive on 13th April 1999 from Gacheri Andrew to Gacheri Waiganjo in order to be recognised as the real owner of Limuru/Kamirithu/643. For that reason the Kenya Gazette Notice dated 12th April 2001 indicated her name as Gacheri Waiganjo.

25. In her submissions Mrs. Muhuhu urged that no consent was sought from the Objectors, or citations served upon them notifying them of the filing of the Petition or Certificate of Confirmation. Counsel submitted further that under the Probate and Administration, **rules 26(2)** and **40(8)** for grant and confirmation of grant respectively, signed consents are mandatory.

26. Mr. Mutitu on the other hand maintained that for the Objectors to say that they learnt of the matter in 2009, is a falsehood intended to mislead the court since the Objectors had attended several meetings held by the family. The purposes of the meetings was the distribution of the deceased’s Estate and the Objectors attended in their capacity as the deceased’s daughters, together with the other beneficiaries of the Estate.

27. The court has considered the depositions in support and in opposition of the application and notes first, that it is not in dispute that the Petitioner did not give notice, or obtain consents of parties with priority for applying for the grant. The identities of the beneficiaries and their interests in the Estate are material facts and once it is established that their interests were concealed, the grant of representation issued is flawed. – See the decision of Majanja J in **Succession Cause No. 32 of 2014**.

28. **Section 51(1)(g)** of the Succession Act as read together with **Rule 26(1)** of the **Probate and Administration Rules**, provide that:

“Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”

The foregoing provisions of the law make no distinction between testate and intestate estates. In both circumstances notice must be given to every other person entitled in the same degree or priority to the applicant. There is evidence of change of name by the deceased Gacheri Waiganjo so that the name used in the Gazette Notice is in order. The Administrator should have served other beneficiaries and obtained their consent as to the mode of distribution.

29. An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require. – See Rule 26(2) of the Probate and Administration Rules.

30. Person entitled in the same degree or priority to the applicant. In these circumstances would be the Applicants and other surviving members of the family of Gacheri Waiganjo Alias Hannah Gacheri Waiganjo. Accordingly, the court finds and holds that the grant was obtained contrary to the provisions of the foregoing laws.

31. On whether there was equitable distribution of the Estate the Objectors deposed that Limuru/Kamirithu/643 was distributed only among the brothers, their sons and purchasers leaving out the applicants. That the Objectors conducted a search at Kiambu Lands Registry, which showed that Limuru/Kamirithu/643 had since been transmitted/subdivided into nine portions.

32. The Objectors contended that the only property alleged to have been given to them was Rare Farm whose acreage, or registration details are unknown. That the Respondent had already sold the shop in Limuru Town and he should be compelled to account for the proceeds and to deposit all the other share certificates excluded from the list of properties of the Estate in court.

33. The Objectors asserted that their signatures and those of the other beneficiaries in Form 37, used to obtain confirmation of grant were forged. They denied knowledge of a visit to Limuru Land Control Board, and wondered why it took the Respondent five years to go to the Land Board. The Objectors argued that the consent to subdivide the land dated 13th May 1999 became invalid as of the end of 1999 under the Land Control Act Cap 302.

34. The Objectors maintained that the Gacheri (Objector’s) family, were not present during the alleged meeting referred to by the Respondent and no agreement was ever reached for Thomas Mbugua (deceased) to administer the Estate. They contended that the Respondent had allocated the main Estate to himself, to their exclusion without any mandate from the family.

35. Mrs. Muhuhu pointed out on behalf of the Objectors that one Harrison Hinga Matiru the purchaser, also filed a replying affidavit sworn on 27th November 2009 in which he claimed to be a bona fide purchaser for value and had developed the 0.5 Acres of the parcel purchased. That since he averred that he personally knew the seller Patrick Warui Waiganjo, this shows that he knew the Objectors well too. Counsel urged the court to disregard the purchaser’s affidavit since he did not file any objection or seek to be joined as an Interested Party.

36. In response the Respondent swore a replying affidavit on 10th December, 2009 in which he confirmed that the Objectors are his sisters. That when the grant was issued and subsequently confirmed in the year 2003, the Objectors had a period of six months within which to object to the confirmation of the said grant but they did not do so.

37. According to the Respondent the land known as Limuru/Kamirithu/643 no longer exists, as it was subdivided by the deceased during her lifetime and distributed to four of her sons. Further that the said parcel of land was given new parcel numbers namely, Limuru/Kamirithu/2354, 2355, 2356, 2357 and 2358 respectively.

38. The Respondent attached minutes of the meeting of their clan or Community known as “Mbari ya Gichure” held on 26th August, 2000 which he insisted the Objectors attended. The Respondent stated that the Objectors did not raise any questions as to the mode of distribution of the Estate in that meeting.

39. The Respondent asserted that the deceased had indicated in her Will, the beneficiaries of the properties said to have been left out during the filing of the petition. These were said to be as follows:

i. Limuru Municipality Rongai Market Plot 21A

1. Thomas Mbugua Waiganjo

2. Philip Mutuga Waiganjo

3. Patrick Warui Waiganjo

4. Joseph Njoroge Waiganjo.

ii. Philip Mutuga Waiganjo - Shares in Limuru Dairy to.

iii. Patrick Warui Waiganjo - Shares in Limuru Pyrethrum Growers

The Respondent denied having sold the shop known as Limuru Municipality Rongai Market Plot 21A.

40. Mr. Mutitu submitted for the Respondent that, there exists no grant issued to the Respondent, Philip Mutuga Waiganjo in Limuru Resident Magistrate Succ. Cause No. 21 of 2001. That in the said cause, the certificate of confirmation of Grant was issued to Thomas Mbugua Waiganjo who is now deceased as indicated in the Objectors annexure.

41. Mr. Mutitu argued that the objection by the two Objectors, Agnes Wangui Magara and Josephine Wakonyo was an afterthought as they were aware about the filing of the succession proceedings at Limuru Court. Further that the Limuru court had jurisdiction in the year 2001 to handle succession matters.

42. It is imperative to note that the law gives this court wide discretion to revoke or annul a grant issued by the court, whether the said grant has been confirmed or not. **Section 76** of the Law of **Succession Act, Cap 160 Laws of Kenya** establishes the grounds upon which a grant of representation may be revoked thus:

“A grant of representation whether or not confirmed may at any time be revoked or annulled if the court decides, either on the 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 in advertently.

(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 court within the time prescribed any such inventory or account of administration as is required by the provisions of a paragraph (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular.

(e) That the grant has become useless and in operative through subsequent circumstances.

The grounds for revocation of a grant of representation are therefore well provided for statutorily, as outlined above.

43. In the cause before the court the Respondent admitted in his Replying affidavit that he did not see the need for the consents of other beneficiaries to be obtained since there was a Will. The court has already made findings first, that the Estate was intestate and therefore the question of a will did not arise and secondly, that under the provisions of the law the Petitioner was obligated to give notice to the other beneficiaries in the Estate and this was not done in this cause.

44. Monicah Wanjiku Waiganjo, the eldest daughter of the deceased swore a replying affidavit on 15th March 2010, and averred that she learnt of the present suit through the Objectors' affidavit herein and was not notified of the filing of the Petition, neither did she sign consent to the confirmation of grant.

46. The Objectors themselves were categorical that they were not notified when the Petition was filed in 2001, or when the certificate of grant was confirmed in 2003 and only learnt of the Petition when purchasers came to the parcel of land in July 2009.

46. From the affidavit evidence therefore, it is safe to conclude that the petitioner not only concealed the fact of the existence of other beneficiaries during the process of confirmation of grant but he also left them out of the distribution. The Objectors did not sign the minutes of the meeting held by the "Mbari Ya Gichure" Clan on 26th August 2000 where the Estate was said to have been distributed and they did not file consents to the distribution.

47. It is also not disputed that the Administrator left out one asset namely, Limuru Plot No. 21(A) which is a shop. The Objectors deposed that the Respondent was registered during the adjudication and demarcation process on behalf of the family on parcel No. Limuru/Kamirithu/248 which is 4 acres.

48. It is clear from the pleadings that the distribution in this Estate was not equitable since the Administrator gave himself, his brother and nephews the bulk of the prime assets of the Estate in Limuru. Under **Section 38** of the **Law of Succession Act** where an intestate has left a surviving child or children, but no spouse, the net intestate Estate shall, subject to the provisions of **Section 41** and **Section 42**, devolve upon the surviving child if there be only one, or shall be equally divided among the surviving children. The Act does not distinguish between male and female children.

49. In another vein, although not pleaded or argued before this court, the court cannot shut its eyes to the fact that although the Resident Magistrate's Court at Limuru had jurisdiction in the year 2001 to handle succession matters, it lacked pecuniary jurisdiction to issue the grant dated 30th November 2001. The Estate of the deceased was obviously worth more than the limit of Kshs.100,000/= which was provided for at the time by **Section 48 Law of Succession Act**, for the subordinate Courts in matters of succession.

50. Inconvenience to those who inherited what should rightfully have gone to other beneficiaries, cannot be reason enough to let matters lie when some beneficiaries have been disinherited. In any case there is no evidence that the Estate was gifted by will or inter vivos as the two pronged argument of the Respondent seems to suggest.

51. For the foregoing reasons I find in favour of the Applicants in the application dated 6th August 2009, and order that:

1. The Administrator move with alacrity to re-distribute the Estate of the deceased in a more equitable manner.
2. The Estate be distributed among the ten beneficiaries in equal share, unless any of them relinquishes part of their share and if so this shall be stated in court.
3. The Administrators shall within 3(three) months of this ruling file a schedule of the proposed re-distribution of the Estate.
4. No orders as to costs.

SIGNED DATED and DELIVERED in open court this 27th day of **October, 2016**.

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L. A. ACHODE

JUDGE