



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 249 OF 2012

**IN THE MATTER OF THE ESTATE OF MARY WAIRIMU KIMOTHO alias WAIRIMU
KIMOTHO (DECEASED)**

JUDGMENT

1. The deceased herein died on 9th August 1996.
2. Representation was sought in respect of her estate by Margaret Mwihaki Njoroge. She was expressed to have been survived by a daughter called Wambui Ngugi, and died possessed of a property known as Kabete/Kibichiku/205. The petitioner was claiming to be beneficially interested in the estate as her deceased husband, Njoroge Muthiora, was said to be entitled to Kabete/Kibichiku/205, which was initially registered in the name of Kimotho Wangige, which he held in trust for her husband but upon the death of Kimotho Wangige, the property was registered in the name of his widow, the deceased herein, Wairimu Kimotho, who also died before the issue could be resolved. A grant was accordingly made to her on 1st August 2012, which was confirmed on 15th August 2012 devolving Kabete/Kibichiku/205 to her absolutely.
3. On 7th January 2012, a summons for revocation of the grant was lodged at the registry by James Kariuki Ngugi, Nicholas Kibiku Mbugua and Moses Muturi Mbugua. Their case was that the administrator had failed to disclose to the court that the deceased had surviving grandchildren. It was also alleged that the administrator had not obtained the consents of the applicants to support her petition for representation. It was averred that she had misrepresented to the court that she was the sole survivor of the deceased, yet she was not an immediate member of his family.
4. In the affidavit in support, sworn by the first applicant, James Kariuki Ngugi. It is explained that the deceased herein was his grandmother, by virtue of being the mother of Wambui Ngugi. Upon her demise in 1996, the deceased was survived by his mother. The deceased's husband had predeceased her in 1964, and was survived by Ngugi Francis Kimotho, Simon Peter Kariuki Kimotho and John Mbugua Kimotho, who are all deceased. Ngugi Francis Kimotho had nine (9) children, while Simon Peter Kariuki Kimotho had four (4) children, and John Mbugua Kimotho had seven (7) children. He complained that the administrator had disinherited the grandchildren of the deceased. She caused the property to be subdivided and portions of it sold to third parties. The applicants have named the administrator and the buyers of some of the subplots as respondents to the application for revocation of grant.
5. There is a reply to the application by the fifth respondent, Geoffrey Mbugua Kariuki. He states that the applicants were strangers to him. He had acquired Kabete/Kibichiku/2967, a portion of Kabete/Kibichiku/205, as an innocent purchaser for value and he had subsequently developed the same. There is another affidavit by the 3rd respondent, Pauline Wanjeri Kariuki, in similar vein. Fraciah Wanjiru George, the 10th respondent also swore an affidavit in similar terms. There is also a similar affidavit by Edward Karanja Kamanu.

6. On her part, the administrator states that she issued citations for service upon the daughter of the deceased, who was served, but chose to ignore the citation. She asserts her right to the property. She concedes that there were tribunal proceedings over the property, which terminated in her favour, but the award of the tribunal was subsequently set aside by the High Court on a technicality. She concedes that the applicants occupy a portion of what was Kabete/Kibichiku/205.

7. There is a supplementary affidavit sworn by Gabriel Murira Muthiora. He states that the administrator is his sister in law, being the widow of his late brother, Stanley Njoroge Muthiora. He asserts that the land in question had been registered in the name of Kimotho Wangigi in trust for him and his late brother. He avers that he and his brother were sons of Muthiora wa Njoroge, who was a son of Njoroge Huria, a brother of Wangigi. Upon his demise, Njoroge Huria left his wife and children under the care of Wangigi. Both Wangigi and Njoroge were entitled to the land. Upon Njoroge's demise, his share was to be given to his son, Muthiora. Before Wangige died he had instructed his son Kimotho Wangige to ensure that Muthiora got his share of the land being Kabete/Kibichiku/205. When Kimotho died the land was then registered in the names of his widows, Wambui and Wairimu. When Wambui Kimotho passed on, the land was registered in the name of her son, James Mbugua Kimotho, and a grandson, Edward Njuguna Ngugi, together with Wairimu Kimotho.

8. I gave directions on 24th March 2014 that the application dated 7th January 2013 be disposed of by way of affidavit and oral evidence.

9. The hearing commenced on 7th April 2014. The first to take the stand was Moses Muturi Mbugua, the fourth applicant. He described himself as a temporary administrator of the estate of the deceased appointed in another cause, HCSC No. 525 of 2012. He mentioned that the matter started in 2006, when they were visited by three men from Nairobi, who alleged to have been told by their father Njoroge that they had land in Wangige and that their grandfather had a brother called Wangige Kimotho. They three informed them that the land at Wangige was left with Wangige Kimotho after Njoroge died, and before Wangige died, he informed his son, Kimotho Wangige of the matter. He testified that that was a matter of surprise to the family as it was not aware of a person called Njoroge in their lineage. The matter was referred to the elders, who concluded that the three were strangers. Those persons later filed a land case with the Land Disputes Tribunal claiming Kabete/Kibichiku/205. The tribunal awarded the land to Margaret Mwhaki Njoroge and Gabriel Murira. The family challenged the decision of the tribunal at the High Court in Nairobi HCJR No. 8 of 2008, where it was ruled that the tribunal had no jurisdiction over the matter. The decision of the tribunal was quashed on 27th October 2011. There was also a burial dispute where the administrator sought to stop burial of a family member on the disputed land. He stated that the administrator then moved the court in the instant cause for administration of the estate of the deceased. She also filed HCSC No. 248 of 2012 in respect of the estate of the brother of the witness's brother. After obtaining representation in this cause the administrator is said to have subdivided Kabete/Kibichiku/205 into two (2), being Kabete/Kibichiku/2945 and 2946. Parcel 2946 was allegedly subsequently subdivided into twenty-four (24) plots that the administrator started selling. He denied that citations had been served on some family members. He stated that the administrator herein moved the court under vacation rules alleging that her daughter was sick, while in fact she only wanted to start selling estate property. He testified that she came back to court to have the Deputy Registrar sign the relevant papers in the place of Edward Ngugi, who was still alive, and who had not been approached to sign the papers. He mentioned that the administrator had also filed ELC No. 1030 of 2012, where she sought that the court finds that the property was held in trust for her. The witness stated that he wanted the subdivisions cancelled and reverted to Kabete/Kibichiku/205 under the name of its original owners Wairimu Kimotho, James Kimotho and Edward Njuguna Ngugi. He explained the location of the property to be Wangige market, where all the children of the deceased were, except for James Mbugua Kimotho who had another land at Muthumu market.

10. On cross-examination, the witness started that he was not a claimant to the estate of Wairimu Kimotho, but was administrator of the estate of James Mbugua Kimotho. He explained that the land was ancestral land. He stated that the registered proprietors of the property were originally Mary Wambui Kimotho and Wairimu Kimotho. Edward Njuguna Ngugi was later added as to represent his side of the family after the demise of one of the original proprietors. He testified that the deceased resided on

Kabete/Kibichiku/205 before she died and she was buried there. He also said that many more family members were buried on the land. Wambui Ngugi was not residing on the land, but at Ngong. After her demise she was laid to rest on the land. He asserted that James Mbugua Kimotho had bought parcels of land elsewhere, and that he, the witness, was not claiming any stake in Kabete/Kibichiku/205. He asserted further that the administrator and Gabriel Muthiora were all strangers to him. He testified further that he was only seeking to protect his brother's interest in the estate. He mentioned that Edward Njuguna Ngugi was introduced into the title in Kabete/Kibichiku/205 through HCS No. 651 of 1994.

11. The next on the witness stand was Edward Njuguna Ngugi. He testified that James Mbugua Kimotho was his uncle, being the witness's grandmother's youngest child. The mother of the two was said to be Wambui Kimotho, the wife of Kimotho Wangige. He explained that Kabete/Kibichiku/205 was originally registered in the name of Kimotho Wangige, and upon his demise it was transmitted to his widows, Wambui and Wairimu. He stated that the administrator was not a member of the family, but a stranger intent on defrauding the family. He asserted that there was no member of their family by the name Muthiora. He stated that he lived on the land. He testified that the family has never sold estate land, but several people came over claiming to have bought the land. He asserted that the persons entitled to the land were Wairimu Kimotho, James Mbugua Kimotho and Edward Njuguna Ngugi. He explained that some of the applicants were grandchildren of Wairimu Kimotho. He stated that Kabete/Kibichiku/2945 was not constructed.

12. On cross-examination, the witness stated that his mother was buried on the disputed land in the 1950s. He said his claim was from the house of Wambui Kimotho, and not Wairimu Kimotho. He said the claimants from Wairimu Kimotho's house were Ngugi and Kibiku. He stated that he did not know the children of Margaret Mwhaki Kimotho; he only saw their names on paper. He said that when the surveyor attempted to get into the land they prevented him. The ground was not subdivided but there is subdivision on paper. He said that his family had land elsewhere, bought by his father.

13. The respondents opened their case on 25th June 2016, when Eliud Wambu testified. He stated that he knew the Wangige family. He claimed to know Njoroge, saying that his brother was married from that family. He said that Njoroge and Wangige were brothers. He said they paid bride price for his brother's wife to Wangige for Njoroge had already gone, and the only one available was Wangige. He said he lived at Chura, Kabete, which is not so far from Wangige. He stated that he did not know the disputed land. He testified that the marriage ceremonies were held at the home of Wangige. He said he was among the people who took goats to that home.

14. Gabriel Murira Muthiora took the witness stand next. He stated that he resided at Nakuru. He identified that administrator as his elder brother's wife. He named his elder brother as Stanley Njoroge Muthiora, who died in 1988. Their father was said to be Paul Muthiora Huria, son of Njoroge Kimotho. Njoroge Kimotho was said to be a brother of Wangige Kimotho. Kabete/Kibichiku/205 was allegedly registered during the colonial period, and as the witness's father was in detention the same was registered in the name of Kimotho as per the instructions of Wangige. After detention the witness's father worked with the Forestry Department and was based at Ngong. He went to Wangige to claim his share of the family land, but was allegedly threatened by the children of his brother. Before he died he allegedly instructed his wife to claim the land from James Mbugua Kimotho as he was the one responsible. He conceded to be among the three persons that the applicants mentioned as vising them about the land. They were referred to the Chief. When he conducted a search of the property, he established that it was registered in the names of James Mbugua Kimotho, Mary Wairimu Kimotho and Edward Njuguna Ngugi. The matter was not resolved at the Chief's office; instead it was escalated to the Land Disputes Tribunal. The tribunal ruled in their favour, and the other side appealed to the High Court. He said when tribunal visited the land it found only one house on the farm.

15. On cross-examination, he affirmed that his father was called Muthiora Njoroge. The said Njoroge had two (2) sons – Kimotho Njoroge and Muthiora Njoroge. He explained that his father had been detained in 1953. He said he was only seven (7) years old when his father visited the Wangige's over the disputed land. He stated that during demarcation the property was registered in the name of Kimotho Wangige, even though the latter had siblings, the property was not jointly registered and there was no evidence that

Kimotho Wangige was holding the property in trust for the rest. He alleged that Kimotho's siblings were not given a share of Kabete/Kibichiku/205 as they had been given land elsewhere, although he had no evidence of the same. He testified that after Kimotho died the property was registered in the names of widows, and he could not explain why his father's name was not included in the title at the time. He could not tell the extent of entitlement of his father in the land in question, and he could not tell whether Kimotho had other lands. He stated that the Kimotho side of the family did not name any of its children after Njoroge. He also said that the Njoroge side of the family did not use the Wangige name either. He stated that he and the administrator lived in Nakuru, but not on the same farm. He stated that he bought his own farm. He stated that prior to 2012 when the grant was confirmed, Kabete/Kibichiku/205 was virtually virgin land, except for one structure. It was subdivided thereafter and sold by the administrator. He said in 2008 when he visited the farm there was only one house on the farm.

16. The administrator testified next. She said that she was a resident of Nakuru. She conceded to filing this cause and HCSC No. 248 of 2012. She explained that she filed two causes given that the property had been subdivided by the Kiambu lands office. She also confirmed that the tribunal decision was reversed by the High Court on review in HCJR No. 108 she also conceded that she had filed ELC No. 567 of 2009 against the Wangige's, where it was ordered that Kabete/Kibichiku/205 be subdivided. She stated that that suit was still pending. She testified that the persons from her side of the family entitled to a share of Kabete/Kibichiku/205 were Gabriel Murira and herself, adding that the said Gabriel Murira had granted her a power of attorney to file the succession cause. She conceded that she was yet to give Gabriel Murira anything out of Kabete/Kibichiku/205, saying that the property was intact for nothing had been sold. She said the land shall be subdivided after the conclusion of the matter. Later, she said she had sold about eight (8) plots out of the property. She stated that she got a limited grant on 1st August 2012, and two months thereafter she had a confirmation of grant as she was sick. The certificate of confirmation of grant was rectified at some point and she was granted the entire parcel of land. She testified that when she went to the lands office at Kiambu she was questioned about the whereabouts of Mbugua and Njuguna, and it was after that that she came back to court for the rectification of the grant. She stated that when the surveyor visited the land to fix beacons he was chased away. She stated that she got both Kabete/Kibichiku/2945 and 2946. She subdivided Kabete/Kibichiku/2945 into four (4) portions, and put a caution on Kabete/Kibichiku/2946. She brought HCCC No. 1030 of 2012 to claim Kabete/Kibichiku/2946, claiming a trust in her favour. She conceded to have subdivided Kabete/Kibichiku/205 after the same was confirmed to her. She explained that the original owners of Kabete/Kibichiku/205 were James Mbugua Kimotho, Edward Njuguna Ngugi and Wairimu Kimotho.

17. At the close of the proceedings, the applicants moved the court for a site visit. The visit was conducted on 6th July 2015. At the scene was a surveyor called Moses Mbugua. According to him, the records in his possession showed that the land in question, Kabete/Kibichiku/205, was initially held by James Mbugua Kimotho, Edward Njuguna Ngugi and Margaret Mwhaki Njoroge following a succession on 22nd August 2012 done under RL7. The property was then partitioned vide a consent dated 6th September 2012. It was subdivided into two - Kabete/Kibichiku/2945 and 2946. Kabete/Kibichiku/2946 was then registered in the name of Margaret Mwhaki Njoroge on 4th October 2012. On the same date she obtained a consent for its subdivision into twenty-four (24) portions, that is Kabete/Kibichiku/2960 to 2983. For the purpose of the subdivision of Kabete/Kibichiku/205, it was only Margaret Mwhaki Njoroge who signed the relevant forms. James Mbugua and Edward Njuguna Ngugi did not sign; it is the Deputy Registrar who signed on their behalf. The order for subdivision was allegedly granted by Havelock J. Kabete/Kibichiku/2945 has not been subdivided.

18. The court was shown the extent of the land in question. It stands between the Wangige-Mwimuto Road and the Gitathiru River. The side touching the road is about sixty-eight (68) metres, running from a shop christened Oeep Kenya to a church named Full Gospel Church of Kenya. The side running between the road and the river is about two hundred and forty six (246) metres. The land was said to have been shared out between the two wives of Kimotho. The first wife got the portion with the permanent structures on the ground, while the second wife got the portion with the temporary structures.

19. On 6th July 2015, I directed the parties to file and exchange written submissions. I have gone through the record and noted that the parties did comply with the directions and have filed detailed written

submissions. I have carefully perused through the same and noted the points of law made therein.

20. From the material before me, I have noted that the estate herein relates to the estate of Mary Wairimu Kimotho. The administrator herein is not related to the deceased. She is neither her daughter or mother or grandchild. It is averred that the deceased had been survived by immediate relatives, a daughter and grandchildren. I have noted that citations were issued by the court for service upon the said child of the deceased, and there is an affidavit of service to the effect that the citation was dully served, but there was no reaction from the daughter of the deceased.

21. The real issue in this matter really turns on the property that made up the estate of the deceased, that is to say Kabete/Kibichiku/205. When the administrator applied for representation in the estate of the deceased she claimed that it was held in trust for her by the deceased. From the material before me, it would appear that the property was not as at the date of the petition registered in the sole name of the deceased. There is on record a certificate of official search dated 27th February 2012. It indicates that the proprietors of the said asset to be James Mbugua Kimotho, Edward Njuguna Ngugi and Wairimu Kimotho as from 25th July 2002. To her credit when she sought confirmation of the grant she did disclose the interests of the other two co-proprietors indicating that she only sought the share due to the deceased, but the entire property was devolved to her as per the certificate of confirmation of grant dated 15th August 2012. She moved later for rectification of the certificate to reflect that situation. Using this certificate she caused the property in question to be subdivided into two, Kabete/Kibichiku/2945 and 2946. Kabete/Kibichiku/2946 was registered in her name, it is not clear who got registered as proprietor of the Kabete/Kibichiku/2945, but she has laid claim to it in a suit she has filed against the James Mbugua Kimotho and Edward Njuguna Ngugi. Clearly, she is laying claim to the whole of what used to be Kabete/Kibichiku/205.

22. The administrator moved the court as a person claiming under a trust, yet no court had declared a trust in her favour. She had no decree from any court declaring that Kabete/Kibichiku/205 was held by the proprietors in trust for her. The probate court in this cause was not invited, at the point of appointment of administrators or confirmation of grant, to make such a declaration, and did not make any such declaration. Indeed, in the confirmation application, the administrator did not make any effort to demonstrate to the court the circumstances under which she was claiming existence of a trust in her favour. Without a declaration of trust, there cannot be any basis for the property of the deceased being devolved upon her to the disadvantage of persons who were the immediate descendants of the deceased. I am conscious of the tribunal award in her favour and that of her brother in law, but that award was set aside by the High Court. Title documents do not reflect any trust created in favour of anyone in Kabete/Kibichiku/205.

23. In the oral proceedings that were conducted before me, the respondents led evidence on the family tree of the parties. None of them sought to bring out the history of the subject land, in terms of when it was acquired by their alleged ancestor, before it was registered in the name of Kimotho Wangigi. No evidence was adduced as to whether the family of the first respondent was ever on the subject land at any time or at all before it was registered in the name of Kimotho Wangigi. No evidence was led of what transpired at the time of land demarcation and registration, in an effort to establish that it was in fact so registered in trust for family members who were not available at the time. From the material placed before me, I have been unable to find anything that would lead me to conclude that Kabete/Kibichiku/205 was held by its proprietors in trust for anybody, including the administrator herein.

24. When she sought confirmation of grant, I do note that she did not notify any of the immediate survivors of the deceased of the application. Neither the daughter of the deceased, nor her children were notified. It would appear that she in fact was laying claim to the entire Kabete/Kibichiku/205, yet she did not at all bring the application to the knowledge of the co-owners, James Mbugua Kimotho and Edward Njuguna Ngugi.

25. Rule 40 of the Probate and Administration Rules sets out the procedure for seeking confirmation of grants. To my mind the administrator did not comply with the requirements of that Rule. Rule 40(3), sets out what should be contained in the affidavit sworn in support of the application. Rule 40(3) (a) is in

mandatory terms. It states as follows:-

‘...there shall be filed with the summons an affidavit containing the following information and particulars so far as known to the applicant –

(a) The names, ages and addresses of the children of the deceased by whom he was survived (whether or not they were being maintained by him immediately prior to his death) and of such of his parents, stepparents, grandparents, grandchildren whom he had taken into his family as his own, brothers, half-brothers and half-sisters, as were living at his death and were being maintained by him immediately prior thereto with full details of the manner and extent and for what period they were being or had been so maintained....’

26. Under this provision the administrator was required to have disclosed in the affidavit supporting the application for confirmation of grant the persons set out therein. The deceased was survived by a daughter, she ought to have been disclosed, and so should have her children, the grandchildren of the deceased. If she had disclosed these persons, the court would no doubt have required her to issue citations on the said persons, or at rate served the application on them.

27. Rule 40(3)(a) should be read together with Rule 40(6) which states as follows:-

‘Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.’

28. Ideally, some of the persons who would file affidavits of protests would be those listed in Rule 40(3) (a). If the administrator had complied with Rule 40(3) (a), no doubt the court would have required service of the application on those persons or issued citations for service upon them. The estate the subject of those proceedings was that of their immediate relative, no doubt they were beneficially interested in its distribution and they ought to have been notified. The fact that they had been served with citations at the point of appointment of administrators is irrelevant as those earlier proceedings concerned appointment of administrators, while the confirmation proceedings concerned a different matter altogether, distribution of the estate.

29. Then there is Rule 40(8), which requires the filing of consents in writing by all dependants or other persons who may be beneficially entitled. Rule 40(8) is not in mandatory terms. However, it is a critical process in cases, such as the instant one, where the estate of the deceased is being administered by a person who is not an immediate member of the family and who is not ordinarily entitled to a share in the deceased’s estate, and who is proposing a distribution that completely excludes the immediate members of the family of the deceased. In this case no such consents were filed.

30. Rule 41(1) envisages that at the hearing of the confirmation application, attendance should be by the administrator applicant, protestor (if any) and ‘any other person interested.’ Such person interested can only attend upon being notified of the proceedings. Such notification would be mandatory in such case as the present where the estate is proposed to be devolved not to the survivors of the deceased, but to outsiders. Surely, the immediate survivors of the deceased ought to be heard at the hearing, and it was therefore incumbent upon the administrator to notify them of the hearing, if she was indeed acting in good faith.

31. In view of everything that I have said so far, I am satisfied that a proper case has been made out for revocation of the grant herein. the whole process of obtaining the grant herein, and confirming it, was not done above board. I have paid particular note of the speed with which the administrator went about having the grant confirmed and the plot in question subdivided and sold off to third parties. It was as if the administrator was racing against time for whatever reason.

32. The respondents have submitted extensively on section 93 of the Law of Succession Act, which protects purchases by third parties in good faith and without notice. However, that provision is not meant

to protect third parties and to punish family members. In this case, the estate has devolved upon a stranger to the estate who has not demonstrated that she was legally or in equity entitled to the property. She had no title to the property from which she could pass a good one to the purchasers. I agree with holdings of the court in *Adrian Nyamu Kiugu vs. Elizabeth Karimi Kiugu and Another* (2014) eKLR, *Jecinta Wanja Kamau vs. Rosemary Wanjiru Wanyoike and another* (2013) eKLR and *Jane Gachuki Gathecha vs. Priscilla Nyawira Gitongo and another* (2008) eKLR. The alleged purchasers cannot be protected by section 93 in such a case as the present where the seller is yet to establish that there was a trust in her favour that would have clothed her with the right to inherit the deceased's property and to thereafter dispose of it by sale. She acceded to that property by a process that was irregular, and the sales by her are therefore equally irregular.

33. The orders that I make in the end are as follows:-

- (a) That the grant made herein on 1st August 2012 to Margaret Mwhiki Njoroge is hereby revoked;
- (b) That the orders made on 15th August 2012 confirming the said grant are hereby set aside, and the certificate of confirmation of grant dated 15th August 2012 is hereby cancelled;
- (c) That any orders made thereafter to rectify the certificate of 15th August 2012 are hereby vacated;
- (d) That any transactions made on the strength of the said certificate of confirmation of grant, whether or not rectified, are hereby nullified;
- (e) That all the subdivisions made out of Kabete/Kibichiku/205 are hereby cancelled, and the Registrar responsible for the Kiambu Land Registry is hereby directed to restore the register in respect of Kabete/Kibichiku/205 to what it was on 23rd October 2006;
- (f) That for avoidance of doubt, the titles to be canceled and reverted to Kabete/Kibichiku/205 are Kabete/Kibichiku/2945, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982 and 2983;
- (g) That persons interested in the estate of the deceased to agree on appointment of administrator, failing which there is liberty for them to move the court appropriately in a process that shall include the immediate survivors of the deceased, the co-owners of Kabete/Kibichiku/205, creditors (if any) and all other claimants who have been identified so far;
- (h) That the property in question is situate within Kikuyu Sub-County of Kiambu County, consequently, I do hereby direct that the matter be transferred to the High Court of Kenya at Kiambu for final disposal; and
- (i) That there shall be no order as to costs.

34. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 26TH DAY OF OCTOBER, 2016.

W. MUSYOKA

JUDGE