



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 199 OF 2011**

**IN THE MATTER OF THE ESTATE OF EDWARD KIHARA MUTTU (DECEASED)**

**JAMES MUIRURI KIHARA .....1<sup>ST</sup> APPLICANT**

**NJAU KANYOGE .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**ROSE WANGUI NGURE .....1<sup>ST</sup> RESPONDENT**

**PAUL MWAURA .....2<sup>ND</sup> RESPONDENT**

**HARIT AMRITLALA .....3<sup>RD</sup> RESPONDENT**

**RULING**

**1)** Edward Kihara Muttu (the Deceased) to whose Estate this proceedings relate, died testate on 10<sup>th</sup> November 2010. Grant of Probate with Written Will was issued to Rose Wangui Ngure (the widow), Paul Mwaura and Harit Amritlal Shah on the 7<sup>th</sup> day of October 2011 and confirmed on 10<sup>th</sup> July 2012.

**2)** On 11<sup>th</sup> September 2014 the Objectors filed a Summons for revocation of Grant praying that the Grant of Probate with Written Will confirmed on 10<sup>th</sup> July 2012 be revoked; the Will of the deceased dated 26<sup>th</sup> September 2010 be nullified and the Estate be declared as an Intestate one for purposes of administration and subsequent distribution. They also prayed that widow and James Muiruri Kihara be appointed as the joint Administrators of the Estate. In the alternative, they prayed that the mode of distribution of the Estate as provided for in the Will of the deceased and confirmed by the court, be amended to provide for a distribution of five and a half Acres (5.5) out of L.R. No. 4884/1 Nairobi, for the first Family and this Estate to be held by the Applicants herein on their own behalf and on behalf of their late sister, Naomi Wambui Thige's Estate.

**1)** The Summons for revocation is premised on grounds that:

1) The proceedings for obtaining the grant and its confirmation were done secretly at a time when the Applicants were in discussion with their step mother Rose Wangui Ngure, towards an amicable family settlement on the distribution of the Estate, and when the Applicants had been requested by the Respondents' Advocates not to take any precipitate action.

2) The proceedings for obtaining the said Grant were tainted with material non-disclosure

of vital information germane to this Estate.

3) The Respondents obtained the Grant fraudulently by concealment of the material fact that the deceased had two families and that the Applicants are beneficiaries of the deceased person's Estate hence entitled to a fair share thereof.

4) None of the Applicants, being duly entitled beneficiaries of the deceased's Estate, were notified/consulted on the issue of the Grant and the distribution of the Estate or the proceedings before this Court.

5) The distribution as per the Confirmed Grant is unjust and unfair and has failed to make reasonable provision for the Applicants who are legally entitled to the deceased's Estate.

6) The Respondents are proceeding to distribute the Estate without due regard to the interests of the Applicants.

7) The Applicants are apprehensive that the Respondents may deal adversely with the Estate thereby alienating the Applicants' interest therein.

3) The supporting affidavit thereto was sworn by **James Muiruri Kihara** on his own behalf and on behalf of his brother **Njau Kanyoge**. In the said affidavit he deponed that the deceased had two families as follows:

**1<sup>ST</sup> FAMILY**

- i. Sarah Wangui Kihara (Deceased)
- ii. Samuel Njau Kanyoge
- iii. James Muiruri
- iv. Naomi Wambui Thuge (Deceased – June 2014)

**2<sup>ND</sup> FAMILY**

- i. Rose Wangui Ngure (Widow)
- ii. Chris Muttu Kihara
- iii. Neema Njeri Kihara

4. The background of this matter according to the Applicant, is that the deceased married their mother, **Sarah Wangui Kihara**, (hereinafter called Sarah) in the year 1957, after which they cohabited in England and later in Kenya. The said Sarah passed away on 13<sup>th</sup> February 1989 at Nairobi Hospital in Nairobi, leaving behind an Estate comprising of the following assets:

- a) L.R. No. 4884/1 Nairobi – 11 Acres
- b) Komothai/Kiratina/280
- c) 480 Shares of Mathina Agriculture Co. Limited
- d) Cash at the National bank of Kenya A/c. No.031050913

That the said assets devolved to their father, the deceased herein, in trust for the entire family.

4) The deponent avers that before her demise, their mother had indicated that her three children would inherit her Estate and she had indeed bequeathed to them, her share of the parcel of land L.R. No. 4884/1 Nairobi, which she purchased in the late sixties via a loan from National Bank of Kenya. The land was however registered in the joint names of their mother and the deceased herein. It was subsequently transferred to the name of the deceased herein after their mother's death.

5) The deponent contends that they as the family of Sarah, have always had the understanding with the deceased herein, that he was holding L.R. No. 4884/1 Nairobi in trust for both families, as their portion thereof was bequeathed to them by their mother. That it is well after the passing away of their mother that their father began his second family. That in or around October 2009, it came to their attention that their father was in the process of sub-dividing and selling off the parcel L.R. 4884/1 Nairobi, without disclosing to, or consulting them despite their interest and stake therein and their mother's wishes.

6) Consequently, they lodged a Caveat against the parcel L.R. No. 4884/1 Nairobi, to prevent their father from any further dealings with the land and subsequently, commenced negotiations with the deceased. The negotiations stalled following the deceased's unwillingness to engage them further, and a measure of bitterness over their insistence to receive a fair portion of their mother's property. The deceased passed away before the matter could be resolved.

7) The deponent states that soon thereafter, he opened negotiations with the widow to try and resolve the matter. That she requested for time to collate the Estate debts in order for them to be better guided during deliberations towards an amicable settlement, which request he granted in good will. To their shock and dismay the widow's Advocates, vide a letter dated 9<sup>th</sup> May 2013, forwarded to them copies of a supposed Will, Grant of Probate and Certificate of Confirmation of Grant to the Estate of their late father. By the same letter, the said Advocates informed their Advocates that M/s. Desai, Sarvia & Pallan Advocates had been instructed to deal with the matter.

8) Subsequently they received a notice dated 4<sup>th</sup> July 2014 from the Ministry of Lands, directing them to remove their Caveat against the property L.R. No. 4884/1 Nairobi within forty-five (45) days, failure to which the Registrar of Government Lands would do so himself without further reference to them. It is therefore his view that all pretensions by the said widow and her promises to settle this matter were nothing more than a tactic to buy time to finalize the distribution of the Estate and in particular, to alienate the disputed L.R. 4884/1.

9) The deponent avers that in the application for Grant and confirmation thereof, the widow and her co-Executors had a duty to disclose to the Court all surviving beneficiaries of the deceased and that failure to do so amounts to material nondisclosure and fraudulent concealment of material facts which is a ground for revocation of the Grant issued and confirmed herein.

10) The Application was opposed in the replying affidavit sworn on 23<sup>rd</sup> September, 2014 by the widow. On the first ground that the Application was brought on behalf of the two Applicants and their deceased sister Naomi, Mr. Sarvia learned counsel for the Respondent argued that Naomi passed away before the application was filed and there was no evidence of her survivors or grant of representation to her estate.

11) To the ground that the grant herein should be revoked for reasons of concealment of a material fact that there existed a first family, Mr. Sarvia contended that **Section 51** of the laws of succession which sets out how an application for grant of probate is to be made had been complied with. Further that sub section (2) thereof sets out in mandatory terms, the information that must be included and there was no requirement, room or format for the names of any of the children of the deceased to be disclosed.

12) As to the prayer which seeks an alternative that the distribution in the will be modified to allow for five and half of acres of the suit property to be transferred to the Applicants absolutely, Mr. Sarvia maintained that the Deceased in his will had very clearly expressed his wishes as to how his entire estate would devolve. That in any case, the application having been brought after the confirmation of grant, the

court lacked jurisdiction to entertain it.

13) Mr. Sarvia clarified that the negotiations between the Applicants and the deceased before his death and which are referred to by the Applicants, were intended to get the applicants to remove a caveat which they had placed on this suit property, so that the Deceased could sell part of the property to enable him seek treatment abroad. He denied that this amounted to recognition that they had a claim in the property. He argued that no agreement was reached and the caveat was not withdrawn, so that the land has never been subdivided. That instead the Deceased treated the negotiations as ended and it is pertinent that the Deceased's Will was written on 28<sup>th</sup> September 2010, well after the said negotiations had ended. Mr. Sarvia urged the court to consider the conduct of the Applicants towards the Deceased and the Testator's reason for not providing for them in the will.

14) I have carefully examined the documents on record, the evidence tendered by way of affidavit and the rival submissions. My view is that what is for determination is the entitlement of the two Objectors to the Estate of the Deceased herein.

15) On the first ground that the Application was brought on behalf of the two Applicants and their deceased sister Naomi, I note that Naomi passed away before the application was filed and there was no evidence of her survivors or grant of representation to her estate. I will therefore not belabor this issue.

16) On the main issue the Objectors assert that although the entire Estate of the deceased is worth Kshs.219,707,433.15, they have no interest in the assets of the Estate save for five and half (5.5) Acres of L.R. No. 4884/1 Nairobi.

17) From the pleadings however, it can be deduced that L.R. No.4884/1 forms the bulk of the Estate of the Deceased and on its own is worth more than Kshs.200 million. There is also no dispute that it was acquired during the subsistence of the Deceased and his first wife Sarah and subsequently registered in their names as joint tenants.

18) Given that Sarah, the mother of the Applicants was a joint tenant with the deceased with respect to ownership of L.R. No. 4884/1 Nairobi, following her death her interest in the Estate united or merged with that of the deceased by virtue of the principle of survivorship or *jus accrescendi* and became the property of the Deceased herein. The interest of Sarah was lost as it fused with the interest of the deceased, and therefore her interest is not available for distribution as part of this Estate. The property is now only available for distribution as an asset in the Estate of the deceased Edward Kihara Muttu who was the last tenant.

19) The deceased left behind a will dated 26<sup>th</sup> September 2010 in which he bequeathed his entire estate to his widow and his two biological children. The record shows that at the confirmation stage the biological children were disclosed. The Applicants are neither the biological children of the Deceased, nor dependants as set out under **Section 29 Law of Succession Act**, although it has not been disputed that they are his step children. No basis has been provided to warrant the nullification of the Deceased's Will or a declaration that his Estate was intestate as prayed by the Applicants, since no issue has been raised as to the validity of the Will, which is the only ground upon which a court can nullify a will.

20) While the court has the power to make reasonable provision for dependants of the Deceased, the Applicants do not qualify as such dependants since they are adults and were not dependent upon him while he was alive. The Deceased wrote his Will well after the collapse of the negotiations between him and the Applicants.

21) I therefore find that the court in the circumstances of this case, has no power to interfere with the Deceased's Will when its validity has not been challenged.

**SIGNED DATED and DELIVERED** in open court this **28<sup>th</sup> day of January 2015.**

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**L. A. ACHODE**

**JUDGE**