



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.1804 OF 2011**

**IN THE MATTER OF THE ESTATE OF ASAPH NGIYA GICHUE**

**ALIAS NGIA GICHUHI ALIAS NGIYA GICHUHI (DECEASED)**

**ISAAC GICHUHI GITHIRI.....APPLICANT**

**VERSUS**

**VIRGINIA WAHU NGIYA.....1<sup>ST</sup> RESPONDENT**

**LEAH WANJIRU NGIYA.....2<sup>ND</sup>RESPONDENT**

**RULING**

The grant of letters of administration in respect of the estate of Asaph Ngiya Gichue *alias* Ngia Gichuhi *alias* Ngiya Gichuhi, was issued to Virginia Wahu Ngiya and Leah Wanjiru Ngiya (the Respondents) by the Limuru Senior Principal Magistrate's Court in Succession Cause No.89 of 2010. The grant was confirmed on 6<sup>th</sup> July 2011. In the certificate of confirmation of grant, it was indicated that Virginia Wahu Ngiya, Joseph Ndungu Ngiya, Amos Kamau Migwi and Samuel Kinyanjui Migwi would inherit, in equal shares, the parcel of land registered as LR. No. Limuru/Ngecha/459 (hereinafter referred to as the suit parcel of land).

On 23<sup>rd</sup> November 2011, Isaac Gichuhi Githiri, the Applicant herein, filed summons pursuant to **Section 76** of the **Law of Succession Act** seeking to have the grant that was issued and confirmed to the Respondents revoked on the grounds that, firstly, that the distribution of the estate of the deceased had gone against the distribution agreement of the beneficiaries that was agreed on 23<sup>rd</sup> May 2011, and secondly, that the grant was obtained by concealment of material facts from the court, which included the fact that the Applicant had been excluded from benefiting from the estate of the deceased yet he was one of the beneficiaries and further that his consent was not obtained before the said grant was confirmed. The application is supported by the annexed affidavit of the Applicant. In the affidavit, the Applicant swore that on 29<sup>th</sup> May 2003, the greater family of the deceased met and agreed that the suit parcel of land would be distributed equally between the four (4) houses. The Applicant stated that the suit parcel of land was registered in the joint names of the deceased and three (3) others, namely, Mwaura Gichuhi, Githire Gichuhi and Wapolo Wambiru. The Applicant annexed a copy of the certificate of title to his affidavit as annexure **"IGG 1"**. The Applicant further annexed the agreement dated 29<sup>th</sup> May 2003 which provided that the suit parcel of land would be distributed equally between the houses of Nduta, Wanjeri, Wanjiku and Wangui. The members of the family also agreed to contribute towards the costs of subdivision of the land. The Applicant deponed that contrary to this agreement, the Respondent had proceeded to obtain the grant and subsequently excluded him as a beneficiary of the estate of the deceased. In the premises therefore, he urged the court to revoke the grant to negate the possibility of him being rendered homeless and destitute.

The Application is opposed. Virginia Wahu Ngiya, the 1<sup>st</sup> Respondent and Samuel Kinyanjui Migwi swore replying affidavits in opposition to the application. The 1<sup>st</sup> Respondent swore that the Applicant was the son of Githire Gichuhi, the brother of the deceased. According to her, the father of the Applicant moved out of the suit property in 1970 and relocated to Nakuru. She deponed that the said Githire Gichuhi sold his portion of the suit parcel of land to the deceased. It was the purchase consideration that

he obtained from the same that he (Githire Gichuhi) purchased the land in Nakuru. The 1<sup>st</sup> Respondent did not however annex any document to support her claim that the said Githire Gichuhi sold the land to the deceased. She further denied the assertion by the Applicant to the effect that the family had met and agreed that the Applicant be included as a beneficiary of the estate of the deceased. She accused the Applicant of attempting to extort money from her by demanding to be paid for the land that was long time ago sold by his father. She denied the claim by the Applicant that she had concealed material facts from the court or that he would be rendered homeless. She stated that the Applicant had a property in Nakuru. She urged the court to take into consideration the fact that she had been in possession of the suit parcel of land for a period of more than forty-one (41) years and it would be unfair in the circumstances to dispossess her of the land.

The 1<sup>st</sup> Respondent submitted in court that she had acquired title to the parcel of land by adverse possession. It was her case that the Applicant was estopped from claiming the land taking into consideration the fact that she had extensively developed the land and further that she had caused the said parcel of land to be divided into various portions of land that had already been distributed to the beneficiaries. In the further replying affidavit of Samuel Kinyanjui Migwi, he deponed that the father of the Applicant had sold the land to the deceased and relocated to Nakuru. He stated that the 1<sup>st</sup> Respondent had resided on the suit parcel of land for more than forty (40) years since the father of the Applicant relocated to Nakuru. He deponed that he was the one, among others, who had contributed towards the cost of subdivision of the suit parcel of land. He accused the Applicant of contributing nothing towards the said cost of subdivision. He further stated that the Applicant had filed the present summons with the sole aim of extorting money from the family. The Respondent urged the court to dismiss the summons with costs.

Prior to the hearing of the summons, counsel for the Applicant filed written submission. At the hearing of the summons, this court heard oral rival submission made by Mr. Mwaura for the Applicant and by Mr. Gathu for the Respondents. This court has carefully considered the said submission. It has also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the Applicant made a case for this court to revoke the grant that was issued to the Respondents by the Limuru Subordinate Court. The application is predicated on **Section 76(b) of the Law of Succession Act** which grants this court jurisdiction to annul or revoke a grant where it is established that a grant was obtained either by the making of false statements or by concealment from the court of something that is material to the case. According to the Applicant, the Respondents, in their petition before the Limuru Subordinate Court, failed to disclose to the court the fact that his father was a co-owner of the suit parcel of land, and secondly, the fact that the larger family in which the family of the deceased was part of, had agreed in 2003 on the mode of subdivision of the suit parcel of land. The Respondents countered the Applicant's case by stating that the father of the Applicant had sold his share in the suit parcel of land in 1970 and had relocated to Nakuru. It was the Respondents' case that the Applicant had no claim whatsoever over the suit parcel of land.

Upon evaluation of the facts of the case, there are certain facts which are undisputed. It is not disputed that the parcel of land registered as LR. No. Limuru/Ngecha/459 was registered in the names of four (4) brothers, namely, Ngia Gichuhi (the deceased), Mwaura Gichuhi, Githire Gichuhi (the father of the Applicant) and Wapolo Wambiru. The Applicant annexed a copy of the title issued to the four (4) in the affidavit in support of this application. The Respondents did not dispute this fact. The Respondents stated that the father of the Applicant had sold his share to the deceased. The Respondents did not however produce any documentary evidence to support this assertion. Any agreement for the sale of land is required by law to be in writing. This court can only conclude that the claim by the Respondents that the father of the Applicant sold his share in the suit parcel of land is not supported by evidence.

Another puzzling aspect of this case is how the Respondents were able to petition the court to inherit the entire suit parcel of land yet the deceased owned a quarter share in the suit parcel of land. The court had no authority to deal with the other three quarter shares which belonged to the three brothers of the deceased. It was therefore wrong for the Respondents to purport that the Limuru Subordinate Court had authorized them to inherit the portion of land that is the share of the father of the Applicant. That portion remains in the name of the father of the Applicant unless it was transferred by the father of the Applicant

to the deceased prior to his death. Another aspect of the case that the Respondents were unable to respond to was the claim by the Applicant which was to the effect that the greater family in which the deceased was a member had agreed to distribute the land into four (4) equal portions. The Applicant established that a meeting had been held on 29<sup>th</sup> May 2003 by the members of the family where it was agreed that the suit parcel of land be divided in accordance with the four shares reflecting the registered proprietorship of the land. This court holds that such meeting did indeed take place and the greater family in which the deceased's family was part of agreed to subdivide the land as contained in the minutes of the meeting annexed to the Applicant's affidavit in support of the application. In the petition for a grant of letters of administration intestate which was lodged in Limuru Subordinate Court by the Respondents, the Respondents failed to put the court in the picture of what had transpired in the greater family meeting that was held in 2003.

In the premises therefore, this court holds that the Applicant established to the required standard of proof on a balance of probabilities that the Respondents obtained the grant of letters of administration intestate in respect of the estate of the deceased by concealing from the court facts that were material to the case. These facts include the fact that the deceased was not the sole registered owner of the suit parcel of land. The summons for revocation of grant dated 16<sup>th</sup> August 2011 shall be allowed as a result of which the grant that was issued and confirmed to the Respondents by the Senior Principal Magistrate's Court, Limuru in Succession Cause No.89 of 2010 is hereby revoked. The rectified certificate of confirmation of grant issued on 6<sup>th</sup> July 2011 is also revoked. Any transactions done pursuant to the said certificate of confirmation of grant in respect of LR. No. Limuru/Ngecha/459 including any survey or subdivision is hereby ordered cancelled. The title in respect of the above parcel of land shall revert to the name of the four (4) original registered owners (including the deceased) pending hearing and determination of the dispute by this court. The Applicant shall have the costs of the summons. It is so ordered.

**DATED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY, 2014**

**L. KIMARU**

**JUDGE**