



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO.777 OF 1985

IN THE MATTER OF THE ESTATE OF KIMARI GITERE (DECEASED)

**JEMIMAH JANE WACHEKE KIMARI.....1ST OBJECTOR/
APPLICANT**

**FLORENCE WANGUI KIMARI.....2ND
OBJECTOR/APPLICANT**

**SHEM KIHORO KIMARI.....3RD
OBJECTOR/APPLICANT**

VERSUS

**JOYCE WANGARI KIMARI.....
RESPONDENT**

RULING

1. On 9th February 2011, Kimaru J, ordered that ***“all the Applications on record shall be dealt with in the Submissions to be filed. Written Submissions to be filed and exchanged by 8th March 2011. Highlighting of Submissions on 21st and 22nd March 2011”***

2. On 29th June 2011, Advocates appearing highlighted their written Submissions and from the Submissions by Mr. Kuria, Advocate for the Applicant, three Applications were pending for determination by the Court;

i) *Application dated 11th December 2006 by Jeremiah Jane Wacheke Kimari seeking orders that the grant issued on 16th July 1986 be revoked to the extent that it appointed Joyce Wangari Kimari as Co-Administrator. In the alternative, that Jemimah aforesaid be allowed to “join and co-operate with the Applicant in ensuring that they proceed diligently with the administration of the estate” within reasonable time or such specific time as may be ordered by the Court.*

ii) *Application dated 27th September 2007 by Florence Wangari Kimari and Shem Kihoro Kimari seeking orders that the grant issued to Wangari Kimari and Samuel Gitere Kimari and confirmed on 10th December 1993 be revoked to the extent that it relates to Wangari Kimari. Further, that a fresh grant be made to Shem Kihoro in place of Wangari Kimari.*

iii) *Application dated 15th June 2009 by Florence Wangui Kimari and Shem Kihoro Kimari seeking orders that the shares due to the Applicants in respect of titles*

Nos.Gatamaiyu/Kiairia/2333,Gatamaiyu/Gachoiri/1498, Githunguri/Kiairia/T.236, Plot No.28 Githunguri, Plot No.2 Gathanji (½ portion), Plot No.76 Githunguri (½ portion) be varied in the appointment already made.

3. A short background to the Applications is necessary and I note as follows;

i) The deceased, Kimari Gitere died intestate on 8th May 1985 and he left behind a number of beneficiaries and assets.

ii) On 16th July 1985, in a detailed judgment, Apaloo J. (as he then was), appointed Samuel Gitere and Wangari Kimari as Administrators, jointly. It is instructive that Samuel was the eldest son of the first house and Wangari was the second wife of the deceased. An Appeal against that decision (C.A. No.95/1986) was not allowed and so Apaloo J.'s decision was left to stand.

iii) The grant was confirmed on 10th December 1993 and the distribution of the estate was ordered as follows;

<u>"Name:</u>	<u>Description of Property:</u>	<u>Share of Heirs:</u>
Wangari Kimari	Githunguri/Kiaria/273	Equal Shares
&	Gatamaiyu/Gachoiri/316	Equal Shares
Samuel Gitere Kimari	Plot No.28 Githunguri	
Market	Equal Shares	
	Plot No.2 Gathanji	Equal Shares
	Plot No.76 Githunguri	
(½ portion)	Equal Shares	
Wangari Kimari		Equal Shares
&		Equal Shares
Samuel Gitere Kimari	ICDC Shares	
	Rioki Estate Shares	
	Kiairia Co-op Shares	
	Ndumberi Co-op Shares	
	Breweries Shares	
Wangari Kimari	Githunguri/Kiairia/T.236	Whole
Wangari Kimari	Githunguri/Kiairia/T.132	Whole
Samuel Gitere Kimari	Githunguri/Kiairia/T.133	Whole
Samuel Gitere Kimari	Githunguri/Kiairia/T.3	Whole
Samuel Gitere Kimari	M/V Reg. KFQ 997	Whole
Shem Kihoro Kimari	M/V/ Reg. KUG 737	Whole"

iv) *Florence Wangui Kimari and Shem Kihoro Kimari are both children of Wangari Kimari.*

v) *Disagreement cropped up when the Administrators distributed the estate after transferring all the properties to themselves jointly, initially.*

4. The Application dated 27th September 2007 was later withdrawn and so I must begin by determining those dated 11th December 2006 and 15th June 2009 as one because should I revoke the grant, then it follows that distribution has to be done afresh.

5. **What are the reasons why Jemimah wants the grant revoked?**

6. She swore Affidavits on 13th December 2006, 3rd November 2008, 10th June 2010 and 26th July 2010. In all those Affidavits the complaint made is that Wangari Kimari has ***“failed after due notice and without reasonable cause to proceed diligently with the administration [of the estate], vesting of assets and giving an account.”*** Apparently, Samuel Gitere died on 7th March 2006 and so Wangari was left as Administrator, together with Jemimah who was appointed Co-Administrator on 16th August 2006 and the former’s further complaint is that Wangari had unlawfully transferred Land parcels No.s Githunguri/Githunguri/165 and Githunguri T.209 to her daughter, Joyce Wachu Kimari, without due regard to the interests of other beneficiaries. In addition, that Wangari sub-divided Land parcel No.Githunguri/Kiairia/273 without notice to the beneficiaries of the estate, particularly those belonging to the First House. That she also fraudulently and unilaterally caused the sub-division of Land parcel No.Githunguri/Kiairia/273 and created parcels Nos.2333 (measuring 4.8. Hectares) and No.2334 (measuring 4.0 Hectares) contrary to the Certificate of Confirmation of Grant.

7. It is also Jemimah’s case that Wangari has continued to benefit from the status quo as regards the estate and that she has continued to receive benefits and proceeds from the estate without accounting to her co-Administrator or to the other beneficiaries.

8. It is also Jemimah’s contention that title No.2334 aforesaid was transferred to Samuel Gitere Kimari (deceased) and yet in his mother’s house, Jemimah, Dinnah Wambui and Elizabeth Wachu (*beneficiaries of the estate through George Kamau Kimari (deceased)*) had no share in it as was their entitlement.

9. In supporting Jemimah, Florence Wngui Kimari by her Affidavit sworn on 15th June 2009, depones that since the grant was issued, her mother has selfishly benefitted from the ICDC shares, Rioki Estate Shares, Kiaria Co-operative Shares, Ndumberi Co-operative Shares and Kenya Breweries Shares without due regard to the other beneficiaries. Further, that she sub-divided parcel No.Githunguri/Kiairia/2333 and transferred portions thereof to her daughters Charity Waceke Kimari, Ruth Njeri and her namesake and grandchild, Joyce Wangari Kimari.

10. That inspite of interventions by the area Chief and District Officer, Wangari has continued to deal with the estate in a discriminatory manner and there is therefore a need to revisit the said actions and remove her from any role in the finalization of the distribution.

11. I should add that in the Affidavit sworn on 5th November 2009, Florence has gone to great detail, commendably so, in showing that her mother distributed the estate in a manner that clearly disadvantaged some of her children and has argued that those actions were both improper and unlawful.

12. Wangari Kimari swore Affidavits on 8th May 2009 and 3rd August 2009 and the gist of her response is that she has at all times acted in accordance with the Law and that;

a) *Land parcel No.Githunguri/Kiairia/273 was sub-divided equally between the two houses of the deceased and on behalf of her house she had title No.2333 transmitted to her.*

b) *That she has continued to benefit from the 50% shares in Kiairia Farmers while her Co-Administrator benefits from the other 50% (it is unclear who is referred to by the term Co-Administrator;*

whether it is Samuel Gitere or Jemimah aforesaid)

- c) That she has received Kshs.4,000/- from Rioki Farmers and so she owes the first house Kshs.2,000/-.
- d) That there is no benefit from the Kenya Breweries shares as they are only three (3) in number and are therefore not viable.
- e) That no benefit accrues from Ndumberi Farmers.
- f) That Florence Wangui Kimari is entitled to Land parcel No. Githunguri/76 but the same has no title.
- g) That in total, her house is entitled to fifteen (15) acres of Land and since she had five (5) children, each of them was entitled to 3 acres each and she retaining a life interest.
- h) That she exercised powers under **Section 35** of the **Law of Succession Act** and appointed L.R.No.Githunguri/Gachoiri/1498 (measuring approximately 6 acres) between her son, Shem Kimari and her daughter, Florence Wangui Kimari and each is entitled to three acres thereof.
- i) That Florence Wangui Kimari abandoned her share of title number 1498 aforesaid and went to reside on plot No.T.236 which she was also entitled to inherit.
- j) That regarding Land parcel No.2333 aforesaid, upon Sub-division, she appointed 1.142 hectares together with Githunguri/Kiairia/2495 to her granddaughter Joyce Wangari Kimari on the instructions of Ruth Njeri Kimari who was entitled to it, and she also appointed Githunguri/Kiairia/2493 and 2496 to Winnie Wanjohi Kimari.
- k) That title No.Githunguri/Kiairia/T132 has been retained by her for her use for life.
- l) That the ICDC investment Co. Ltd shares have accrued some dividends which no one has claimed.
- m) That she has rented plot No.28 Githunguri at Kshs.5,000/- per month which she uses for her maintenance but it should otherwise be inherited by Winnie Wanjiru Kimari.
- n) That Plot No.2 Gathinje which has no title belongs to Shem Kiroko Kimari.
- o) That all the properties in her names should be inherited equally by her children upon her demise and that she is entitled to the properties for life.
- p) That Florence Wangui Kimari and Shem Kiroko Kimari have refused to have their share of the estate transmitted to them and none of them has signed the requisite transmissions forms.
- q) That Shem aforesaid had been give 9 acres of Land by the deceased during his lifetime with fully developed coffee plants and so he had more than his fair share of the estate.

13. With that background in mind, should the grant be revoked in as far as so relates to Joyce Wangari Kimari and should all the properties revert to the deceased's named pending redistribution?

14. It is the Law, as I understand it, that **Section 76** of the **Law of Succession Act** provides the grounds for annulling or revoking a grant. It provides as follows;

“A Grant of representation, whether or not confirmed, may at any time be revoked or annulled if the Court decides, either on 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; 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 inadvertently;*
- 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 the Court, within the time prescribed, any such inventory or account or administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or*
- e) *that the Grant has become useless and inoperative through subsequent circumstances.”*

15. In the instant case, the Applicants have invoked **Section 76 d(ii)** as the applicable Law and I have no hesitation in agreeing with them. The Grant was issued on 16th July 1986 and in doing so, Apaloo J. stated partly as follows;

“I think Samuel has made a strong case for joining the widow in obtaining a grant of L.A. To refuse to make a Grant in this way because the widow is taking an indefensible position with regard to Samuel and his full brother and sister, would be wrong. To accede to her wishes, would be the clearest prescription for strife and disharmony in the wider Kimari Gitere family.

Section 66 of the Succession Act, gives me a final discretion to decide to whom letters should be granted taking account of the overall interests of all children. Bearing in mind all the matters I have mentioned, I think the best interests of all the children and the ends of justice would be met by granting Letters of Administration in respect of the estate of the late Kimari Gitere to the widow Wangari Kimari and the Deceased’s eldest surviving son, Samuel Gitere jointly. And I propose to so order. In the event of the widow proving to be intransigent and willfully refusing to act jointly with Samuel, I would, if so invited, give consideration to the question of amending my order so as to restrict the grant to Samuel Gitere alone. I venture to hope that the widow would not, by her action, constrain me to take this action.”

16. The words used by the learned Judge that the conduct of the widow, Wangari, may be a prescription for strife and disharmony have become prophetic. It is now over twenty five (25) years since the grant was issued to her and she has been unable to finalise distribution of the estate. **Where is diligence with such a long period in mind?** **Section 83(e)** of the **Act** provides as follows;

“Personal representatives shall have the following duties:-

- a) ...
- b) ...
- c) ...
- d) ...

e) *within six months from the date of the Grant, to produce to the Court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;*

- f) ...
- g) ...
- h) ...
- i) ...”

17. The widow has failed to account for all dealings regarding the estate for twenty five (25) years and her explanations that she was entitled to do as she wished with the assets without either the approval of the Court or consultations with beneficiaries cannot be but on unlawful act on her part.

18. I should also state that the deceased was a polygamous man and the distribution of his estate should have been done in accordance with **Section 40** of the **Law of Succession Act** which provides as follows;

“1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of the children in each house, but also adding any wife surviving him as an additional unit to the number of children.

2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in Sections 35 to 38.”

19. I have elsewhere above shown that by her own admission, the widow distributed the estate under **Section 35** of the **Act** which relates to one widow and her children as opposed to a widow who is from only one house of the deceased and children from more than one house, a situation governed by **Section 40** of the **Act** as opposed to **Section 35** exclusively. Once she distributed the estate with that error in place, the whole process was rendered unlawful and the Grant rendered invalid.

20. I should add that from a clear reading of the opposing Affidavits one clear fact emerges; the widow not only favoured her own house in distribution but even within her own house, she favoured certain of her children as opposed to Florence and Shem. Again that discrimination negates the purpose of **Section 40** of the **Act** which was intended to ensure not only equality between the houses but also equality within separate houses. Her application of **Section 35**, even within her own house was flawed.

21. Having so said, it is obvious to me that the widow herein has acted with sheer impunity and all her depositions captured above show that she intended to distribute the estate without any regard to Law and so **Section 76** aforesaid can be properly invoked.

22. In the event, I will order that the Applications dated 11th December 2006 and 15th June 2009 be allowed in the following terms only;

i) *The Grant issued on 16th July 1986 in respect of Wangari Kimari be revoked and any one person as shall be agreed by members of her house be appointed in her place to join Jemimah, Jane, Wacheke, Kimari as Co-Administrators. In the event of disagreement, the Court shall invoke **Section 66** of the **Law of Succession Act** and appoint such a person.*

ii) *All the properties listed in the Petition for a grant of Letters of Administration as registered in the deceased’s names and any other property (if at all) not so listed, shall all revert to the deceased’s names pending fresh distribution. For avoidance of doubt, all titles issued and sub-divisions thereof are nullified.*

iii) *Parties to agree on a fresh mode of distribution taking into account any gifts by the deceased to any party and also taking into account the present occupancy of any parcel of Land by any beneficiary. If no agreement is reached within forty five (45) days, parties may file their Affidavits on distribution and the Court may proceed to distribute the estate in accordance with **Section 40** of the **Law of Succession Act**.*

iv) *Each party will bear its own costs.*

23. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 27TH DAY OF JANUARY, 2012.

27/1/2012

CORAM:

I. LENAOLA – JUDGE

Court Clerk – Miron

Mr. Kanonde for 1st respondent

Miss Lubano hold brief for Mr. Kuria for 2nd Respondent

ORDER

Ruling duly read.

ISAAC LENAOLA

JUDGE

FURTHER ORDER

Mention on 3rd May 2012 before G.B.M. Kariuki for directions.

ISAAC LENAOLA

JUDGE

27/1/2011