



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**Succession Cause 1298 of 2006**

**IN THE MATTER OF THE ESTATE OF KIMANI GICHUHI *alias* KANGACHU GICHUHI -  
(DECEASED)**

**EUNICE MUMBI GATHEE.....APPLICANT**

**VERSUS**

**JOHN KAMANDE KIMANI.....1<sup>ST</sup> RESPONDENT**

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

**R U L I N G**

1. The Petition filed on 13<sup>th</sup> June 2006 was premised on the allegations that the deceased herein, Kimani Gichuhi *alias* Kangachu Gichuhi had died on 24<sup>th</sup> November 2001 at Mathingira Iganyo area and had left a Will which was annexed to the Petition. The Petitioners were John Kamande Kimani *alias* Kamande and Paul Mwangi *alias* Kangi who said that they were the deceased's sons named in the Will as Executors thereof. The Will was allegedly executed on 30<sup>th</sup> September 1978 and was drawn by M/s. Kamonde & Ndunda Advocates.

2. A grant of Probate of a Written Will was issued to the Petitioners on 17<sup>th</sup> May 2007 and on 14<sup>th</sup> March 2008, the two filed a Summons for confirmation of the Grant. A Consent signed by eight (8) Sons and two (2) Daughters of the deceased as well as his Widow, Elenetta Wanjiku Kimani, was expressive of the fact that no one, at the time, had any objection to the grant being confirmed.

3. On 18<sup>th</sup> August 2009 however, Eunice Mumbi Gathee filed a summons for Revocation of Grant and in her Supporting Affidavit sworn on 11<sup>th</sup> August 2009 and in the Further Affidavit sworn on 13<sup>th</sup> January 2010, her case was as follows;

4. That she was "*the administratrix*" of the estate of the deceased herein who, according to her, was a polygamous man with the following persons who survived him;

- |             |                                |          |                                    |
|-------------|--------------------------------|----------|------------------------------------|
| <b>"i)</b>  | <b><i>Gathee Kangachu</i></b>  | <b>-</b> | <b><i>Deceased</i></b>             |
| <b>ii)</b>  | <b><i>Mwangi Kangachu</i></b>  | <b>-</b> | <b><i>Son</i></b>                  |
| <b>iii)</b> | <b><i>David Muchoki</i></b>    | <b>-</b> | <b><i>Son</i></b>                  |
| <b>iv)</b>  | <b><i>Wairimu Kangachu</i></b> | <b>-</b> | <b><i>Son</i></b>                  |
| <b>v)</b>   | <b><i>Lucy Wanjira</i></b>     | <b>-</b> | <b><i>Daughter (unmarried)</i></b> |

vi)	<i>Ennereta Wanjiku</i>	-	<i>Widow</i>
vii)	<i>John Kamande</i>	-	<i>Son</i>
viii)	<i>Paul Mwangi Kimani</i>	-	<i>Son</i>
ix)	<i>Njuguna Kimani</i>	-	<i>Son</i>
x)	<i>Ngigi Kimani</i>	-	<i>Son</i>
xi)	<i>Kamau Kimani</i>	-	<i>Son</i>
xii)	<i>Ng'ang'a Kimani</i>	-	<i>Son</i>
xiii)	<i>Muchoki Kimani</i>	-	<i>Son</i>
iv)	<i>Njogu Kimani</i>	-	<i>Son</i>
xv)	<i>Wanjiru Kimani</i>	-	<i>Daughter (married)</i>
xvi)	<i>Muthoni Kimani</i>	-	<i>Daughter (married)</i>

5. Further, that he could not have left a Will and if he did, the Will annexed to the Petition was incapable of being used to distribute his estate because the property that he allegedly bequeathed was non-existent. It was her argument in that regard that the property known as Loc.17/Iganjo/933 had been subdivided by the deceased sometime in 1980 and four portions were created out of it. That the deceased then transferred two parcels thereof and retained parcels Nos.Loc.17/Iganjo/1101 and 1104 in his names. That there being no Will to dispose of the two properties, then it followed that the deceased had actually died intestate and she (Eunice Mumbi Gatheo), had a lawful claim to that part of the estate and that she was left out during distribution, deliberately, by the Petitioners.

6. It is her prayer that the estate be distributed as if it was that of an intestate person and all the beneficiaries should be taken into account, herself included.

7. Paul Mwangi Kimani filed a Replying Affidavit on 3<sup>rd</sup> march 2010 and admitted that the deceased had indeed subdivided parcel No.933 during his lifetime but since the balance of the land was part of his legacy, then the Will was not invalidated at all.

8. I have taken into account the Submissions by the Advocates for the parties and to my mind only one issue needs to be addressed; since it is admitted that the deceased indeed executed a Will and bequeathed Land parcel No.933 to certain person but later sub-divided it and sold off two portions, **can the distribution of the remainder be made under the Will or did his actions invalidate the Will?**

9. The question can only be answered with reference to the doctrine of ademption which is provided for by **Section 23** of the **Law of Succession Act** which provides as follows;

***“Testamentary gifts and dispositions shall fail by way of lapse or ademption in the circumstances and manner and to the extent provided by the Second Schedule.”***

10. Further, to that, **Rules 8** and **9** of the First Schedule to the **Act** provide as follows;

***“(1 If property which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the gift cannot take effect by reason of the subject thereof having been withdrawn from the operation of the will; and where a gift fails on this account it is said to be “adeemed”.***

***(2)There must be a substantial change in the subject of a specific legacy to cause ademption and a merely nominal change shall not have that effect.***

***Where property specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change is caused by a wrongful conversion, the gift shall not be adeemed, but there the change is caused by the authority of any written law, whether or not approved by the testator, there shall be ademption unless the written law effecting the conversion provides otherwise.”***

11. In his book, Law of Succession, LawAfrica, William Musyoka wrote as follows at page 72;

***“Ademption is likely to occur because the property has been sold, given away or destroyed during the testator’s lifetime. According to the Court in Durrant vs. Friend (1852) 5 De G and Sm 343, where it is unclear which happens first, the death of the testator or the destruction of the property, the property is deemed to have perished before the testator so that the gift is adeemed. Under paragraph 8(2) there must be a substantial change in the subject matter to cause ademption, mere nominal change is not sufficient.”***

12. I am deeply persuaded by that reasoning and in the instant case, the deceased stated partly as follows in his Will;

***“I GIVE AND BEQUEATH my Land parcel No.Loc.17/Iganjo/933 to all my male issues of the marriage between myself and my wife WANJIKU in equal shares.”***

13. It is not in doubt that the deceased prior to his death, sub-divided the above Land parcel and in Law, the same ceased to exist. **Section 89** of the **Registered Land Act, Cap.300** provides as follows;

***“No part of the land comprised in a register shall be transferred unless the proprietor has first subdivided the land and new registers have been opened in respect of each subdivision.”***

14. Once a new register has been opened in respect of the new portions then the old ceases to exist and in the case before me, the sub-division was deemed to have attracted the doctrine of ademption and so the Will was invalidated and the bequest cannot be sustained. I accept the Applicant’s argument in that regard.

**15. How then should Land parcels Nos.Loc.17/Iganjo/1101 and 1104 be distributed?**

16. Once the Will has been invalidated, then it follows that the deceased’s estate shall be distributed under the intestacy rules and that being the case the following are the proper Orders to make;

***i) The grant issued on 17th May 2007 is hereby revoked.***

***ii) Parties may agree on who should be named as Adminsitrators of the estate within thirty (30) days failure to which the Court will invoke Section 66 of the Law of Succession Act and appoint such Administrators.***

***iii) Distribution of the estate will thereafter be done in the usual manner and Eunice Mumbi Gathee will be allowed to establish her claim, if at all, to the estate.***

***iv) No order as to costs.***

17. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JANUARY, 2012.**

**CORAM**

ISAAC LENAOLA – JUDGE

Miron – Court Clerk

Mr. Kamonde for Petitioner

No Appearance for Applicant

**ORDER**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**