



**REPUBLIC OF KENYA**

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

**Miscellaneous Application 164 of 2000**

**IN THE MATTER OF THE ESTATE OF MUGATHO WARINGU - DECEASED**

**BETWEEN**

**ELIZABETH WAMBUI .....1<sup>ST</sup> APPLICANT**

**AMOS MWANGI KANYI .....2<sup>ND</sup> APPLICANT**

**JOHNAH MWANGI KANYI .....3<sup>RD</sup> APPLICANT**

**SIMON MWANGI MWENDA ..... 4<sup>TH</sup> APPLICANT**

**PAUL KAMAU KIROGOTHI .....5<sup>TH</sup> APPLICANT**

**VERSUS**

**JAMES GICHIMU GICHUHI .....1<sup>ST</sup> RESPONDENT**

**GICHUHI MURIU .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**MUGATHO WARINGU** deceased died in the 1930's. His estate comprised of the following properties:-

1 LOC. 9/ICHICHI/168

2 LOC.9/ICHICHI/T.189

3. LOC.9/ICHICHI/T.188

4.LOC.9/ICHICHI/T.190

5. LOC.9/ICHICHI/T.191

Gichuhi Muriu petitioned for grant of Letters of Administration intestate of his estate in Resident Magistrates Court Muranga Being Succession Cause No. 166 of 1982. A grant was issued to him on 3<sup>rd</sup> May 1984. In circumstances that are not clear, from the record of the Muranga Court file the grant was confirmed on 29<sup>th</sup> November 1999. At this stage I wish to state that I perused the Magistrate's Court

record and found that the documents and the proceedings are muddled up to the extent that one is only able to follow what took place after much perusal. I could not trace hand written proceedings and the typed ones are not filed in order. Before confirmation of the grant the Magistrate's Court on 27<sup>th</sup> November 1986 referred to the Chief of Location 9 to arbitrate over the dispute between the parties. The court did not formulate the dispute or issues which the Chief was to arbitrate over. It also did not clarify the parties that were involved in the said dispute. What the court is now dealing with in this judgment is the further amended summons for revocation of grant amended on 16<sup>th</sup> November 2007. The application is brought by 5 applicants as can be seen from the heading of this judgment. The respondents are two but at the hearing only James Gichimu Gichuhi appeared with counsel. In the affidavit in support of that application and other affidavits sworn on behalf of all the applicants and also from the evidence tendered before court the on behalf of the applicant following emerges:-

That after the succession cause was filed at Muranga Court the first respondent objected to the petition for grant. After a lengthy hearing that application was dismissed on 3<sup>rd</sup> May 1994. There was an application filed for confirmation of grant by the petitioner, that is, the second respondent herein, and the Resident Magistrate's court as stated before referred the matter for arbitration. On 8<sup>th</sup> November 1998 the District Officer of Muranga heard the dispute. In their award the elders granted the first respondent an extra 6.85 acres out of the estate of the deceased. They however did not determine the shares of the other beneficiaries who were enumerated in the award. The award was read by the Magistrate's Court on 28<sup>th</sup> November 1991. The petitioner filed an application to set aside that award. However thereafter he became mentally sick and did not follow the matter because he was confined in prison and mental hospitals from time to time. The first respondent despite knowing the state of the petitioner's health and without informing the applicants herein applied for the dismissal of the application for setting aside the award. It is not clear whether that application was heard because of the state of the lower court's record as stated before. The applicant's case is that the first respondent mysteriously extracted a certificate of confirmation from the lower court which certificate was at variance with the DO's award. That confirmed grant gave the first respondent more land. It was in the following terms:-

<u>NAME</u>	<u>DESCRIPTION OF PROPERTY</u>	<u>SHARE OF HEIRS</u>
GICHUHI MURIU		6.0 Acres
SIMON MWANGI MWENDA		6.0 Acres
MWANGI KANYI	LOC. 9/ICHICHI/168	6.0 Acres
JOHNAH MWANGI KANYI		6.0 Acres
ELIZABETH WAMBUI		6.0 Acres
JAMES GICHIMU GICHUHI		12.85 Acres
JAMES GICHIMU GICHUHI	LOC. 9/ICHICHI/T.189	SOLE PROPRIETOR

After extracting that certificate of confirmed grant the first respondent proceeded to apply for authority for the Executive Officer of the court to sign his transfer. In so doing the first respondent failed to seek the consent of the administrator. One of the applicants Elizabeth Wambui deponed that the deceased property namely LOC.9/ ICHICHI/168 was 36.85 acres. She stated in her affidavit and in evidence before court that she had planted 9000 tea bushes on that land which tea bushes assisted her and her children in their livelihood. Those tea bushes she stated occupy a portion of the land leaving the rest of the land free for cultivation and occupation. That she and the other applicants were unaware of the applications being made in the lower court by the first respondent. It was not until in middle of the year 2000 when the first respondent came on the land with policemen and surveyors that she realized of the state of affairs. The surveyors proceeded to partition the land and in so doing took away from her the tea bushes she had planted. As a consequence she filed an application for revocation of grant in September

2000. The first respondent responded to that application by trying to chase her out of the land and cutting down her trees. His actions were stopped by an injunction issued by the court. The first respondent did not specifically deny what was stated in the affidavits in support of the summons for revocation. He simply faulted the application by saying that it was bad in law. He argued that the applicants ought to have appealed against the order issued by the DO. The first respondent did however acknowledge by an affidavit dated 27<sup>th</sup> March 2006 that Paul Kamau Korogothi had purchased the share of land of the second respondent. Paul Kamau Korogothi himself did swear an affidavit dated 9<sup>th</sup> January 2001. He confirmed that he purchased four plots from the 2<sup>nd</sup> respondent in 1968. That those plots were LOC.9/ICHICHI/188, 189, 190 and 191. The first respondent in his evidence before court stated that the deceased in this estate was his grandfather. His mother whom he did not name was still alive and was 96 years old. His father died in 1953. Before his death he had purchased some land. That he began to pursue the land purchased by his father in 1982. To that end he filed an objection in Muranga Succession Cause No. 166 of 1982. The matter was referred to DO 1 Muranga and was taken before elders. They gave their award whereby they awarded him 6.85 acres representing the land that his father had purchased. That decision of the elders was not challenged either in the lower court or in the High Court. The award was made the judgment of the court in 1993. That he did seek through the court for the authority of the executive officer to sign all the transfer documents. He obtained the transfer in his favour and the remainder of the land was registered in the name of the 2<sup>nd</sup> respondent as the administrator. He obtained land control board consent before transfer. The land was divided into two whereby he obtained registration in his name of 12.85 acres. The remainder 24 acres was registered in the name of the administrator. That he had registered himself on the east side of the land because on the west side has graves. He however stated that he is now ready to accept his portion on any side of the land if the court so orders. He also is willing to compensate first applicant for the tea bushes that she planted. He did not subdivide the remainder of the land to the other beneficiaries because he is not the administrator. On being cross examined he stated that the application he made in the lower court were served on the advocates representing the applicants herein. They however failed to attend court.

The question that the court needs to pose to itself is whether there is a basis for revocation of grant. It is clear that confirmation of the lower court grant was not sought by the administrator the 2<sup>nd</sup> respondent. That goes contrary to the prevailing law and as stated in the case of IBRAHIM OKOYONA vs ZIPORAH MUSI AND DAVID WAFWOBI (1982 – 88) 1KAR 1074 the court of appeal held as follows:-

***“At any rate that is the position taken now for two reasons. The first is that there could be no distribution of the estate of the deceased whilst it was uncertain who the administrator or administrators actually were. If the grant to Ibrahim was to be revoked then, the registration of the land in his name was in doubt. If Ibrahim had no sole grant, he would act unlawfully. The same goes to Zipporah. She could not agree to distribute the estate before she had Letters of Administration (See Burns vs Camphill (1952) 1K B 15).”***

Even in the confirmation by the lower court the court failed to follow the award of panel of elders. That award is in the following terms:-

### **DECISION OF THE ELDERS PANEL**

1. That the objector Mr. James Gichimu Gichuhi (objector) has a right to inherit his father's share of the land comprising 36.85 acres as per evidence adduced since it is clear that his father's portion of land was consolidated together with that of his grandfather.
2. That it is not clear as to the acreage of the two portions i.e. his father's and his grandfather's.
3. That in the absence of (2) above, the panel awards 6.85 acres to the objector Mr. James Gichimu Gichuhi as his portion inherited from his father.
4. That the balance of 30 acres is to be classified as that originally belonging to the objector's grandfather be subdivided among the living beneficiaries as per customary law.

5. That the beneficiaries are for (4) above.

- a) Mr. Gichuki Muriu
- b) Simion Mwangi Mwenda
- c) Mwangi Kanyi
- d) Johnah Mwangi
- e) Paul Kamau Kirongothi
- f) James Gichimu
- g) Elizabeth Wambui

The above are the deceased's surviving children

This decision is unanimous

From that award it is clear that the first respondent was to get his father's share from his grandfather's parcel of land of 36.85 i.e. Parcel No. 168. The elders' award shows very clearly that the elders were not sure on the size of land of the first respondent's father. Despite not being clear on this they proceeded to give the first respondent 6.85 acres over and above what the other beneficiaries were to get. That finding was irregular and cannot be given effect by this court. Additionally there is no clear evidence of the exact size of the 1<sup>st</sup> respondent's deceased father's land from the proceedings and the evidence. The first respondent by an affidavit sworn on 5<sup>th</sup> November 1984 filed in the lower court stated that he was claiming from this estate and in particular from parcel no. 168, ten acres which belonged to his father. At the hearing before the panel of elders the first respondent in evidence spoke of his father's share which was 22 acres. He called witness who supported his claim. On being cross examined by the elders and on being reminded what he had stated before the Assistant Chief that his father's claim was 15 acres, the first respondent denied the same. It is as a consequence of that anomaly that the elders in their decision stated:

***“It is not clear as to the acreage of the two portions i.e. his father's and his grandfather's.”***

Having been unable to determine the acreage of the first respondent's father the panel of elders erred in granting him 6.85 acres. As this case proceeded for hearing the parties not only addressed themselves to the application for revocation of grant but also addressed themselves to the issue of distribution of the estate. It must be clear from the summary of the evidence before court in this judgment that the grant issued by the lower court ought to be revoked. The grant was issued to the 2<sup>nd</sup> respondent. At sometimes during the hearing of the matter before court and before confirmation of grant he unfortunately became mentally sick and is sick to date. He is therefore unable to carry out the duties of an administrator. It was illegal for the first respondent to have sought confirmation of grant when in his knowledge the 2<sup>nd</sup> respondent was incapable of carrying out the duties of distribution. In addition the grant is for revocation for the confirmed grant fails to follow the award of the panel of elders. That award is however unenforceable because it fails to correctly distribute the estate amongst the beneficiaries. The deceased having died in 1930's and this matter having been in the court since 1981 I am of the view that it is imperative that litigation comes to an end. The court is of the view that the 2<sup>nd</sup> respondent sold 4 plots to the 5<sup>th</sup> applicant in 1968. Consistently throughout the proceedings all the parties have accepted that position. That includes the first respondent. That being so the just decision of this court would be to award the four plots to the fifth applicant. The equivalent acreage of those plots will be deducted from the share of the 2<sup>nd</sup> respondent since he was the one who sold those plots to him. The deceased died in 1930's. This was before the Law of Succession Act was enacted. S. 2(2) of that Act provides:-

***“The estate of persons dying before the commencement of this Act are subject to the written laws and***

***customs applying to the date of death, but nevertheless the administration of their estate shall commence and proceed as far as possible in accordance with this Act.”***

The applicant’s counsel was therefore correct in his submissions that the estate property should be divided equally between the wives of the deceased namely Wambui 1<sup>st</sup> wife, Wanjiku 2<sup>nd</sup> wife and Wanjiru 3<sup>rd</sup> wife as per Kikuyu Custom. The book of Eugene Cotran Vol. II Reinstatement of African Law provides:-

***“Estate of a married man with two or more wives, sons and daughters***

***‘The general principle here is that the house (githaka) of each wife gets an equal share of the property, irrespective of the number of children in each house;-***

***(a)LAND. Each house gets an equal***

***share of the land. The rules for***

***distribution within the house are as in***

***1 (a) below:-***

***1. (a) LAND. A slightly larger share may go to the eldest son, but otherwise the sons share the land equally. The larger share is unspecified and will only be received if the eldest son proves in the eyes of the muhiriga elders to be a good muramati. In other words, the larger share is not a right, but may be given at the discretion of the elders. It must be made clear that the land referred to here applies to the total area of land that the deceased had, including land over which he might during his lifetime have given cultivation rights to any of his sons, e.g. if the deceased had ten acres, of which he had during his lifetime given five to his eldest son to cultivate, the area of land to be divided is all the ten acres and not the remaining five.***

***The widow is entitled to remain on that piece of land given to her by the deceased on marriage. She has full rights of use and cultivation over this land during her lifetime. On her death, and in the absence of a will to the contrary, her portion is divided equally among the sons.”***

Having made the finding that the estate of deceased is governed by Kikuyu Customary Law the court will then proceed to distribute the property.

The judgment of this court is as follows:-

- 1. That the grant issued to Gichuhi Muriu on 3<sup>rd</sup> May 1984 is hereby revoked.***
- 2. The confirmed grant issued on 29<sup>th</sup> November 1999 is hereby set aside.***
- 3. The court hereby issues a fresh grant in the name of ELIZABETH WAMBUI.***
- 4. The Land Registrar is hereby ordered to cancel titles issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondent being of title no. Loc. 9/Ichichi/1096, 1097 and T189 and revert to the original titles of the deceased MUGATHO WARINGU. In so doing the registrar shall not require the production of the titles issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondent.***
- 5. The court does hereby order distribution of the estate of the deceased as follows:-***
  - To Paul Kamau Korogothi parcel nos. Loc 9/Ichichi/T189, T188, T190 and T191.***
  - Parcel No. Loc.9/Ichichi/168 shall be divided amongst the three houses of the deceased with each house getting 12.45 acres except where deduction is made in respect of the first house. Those houses***

*are of Wambui (1<sup>st</sup> Wife), Wanjiku (2<sup>nd</sup> wife) and Wanjiru (3<sup>rd</sup> Wife).*

- The second house the beneficiaries are Amos Mwangi Kanyi and Johnah Mwangi Kanyi. They shall share equally 12.45 of Loc.9/Ichichi/168.*
- The third house the beneficiaries are Zakayo Gichuhi, Simon Maina and Elizabeth Wambui. They shall share equally 12.45 acres of Loc.9/Ichichi/168.*
- In the first house the beneficiaries are James Gichimu, Simon Mwangi Mwenda, and Gichuhi Muriu. They shall share equally the balance of acres of Loc.9/Ichichi/168 after distribution to 2<sup>nd</sup> and 3<sup>rd</sup> house as above, except that Gichuhi Muriu having sold 4 plots to Paul Kamau Kirogothi will have 0.52 acres deducted from his share of the first house said share of Loc.9/Ichichi/168.*

*6. The first respondent will bear the costs of all*

*the applicants.*

*Dated and delivered this 26<sup>th</sup> day of January 2009.*

**MARY KASANGO**

**JUDGE**