



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Succession Cause 74 of 2006

**IN THE MATTER OF
THE ESTATE OF
NDIRANGU KARITI
.....DECEASED**

**JOHN KARITI
GITHAIGA.....
.....PETITIONER**

VERSUS

**MARY WANJIRU
GITHAIGA**

**DAVID WACHIRA
GITHAIGA.....
.....OBJECTORS**

RULING

On the 11th day of July 2006, a Grant of Letters of Administration in respect of the Estate of **NDIRANGU KARITI**, deceased, was made to **JOHN KARITI GITHAIGA**, **MARY WANJIRU GITHAIGA** and **DAVID WACHIRA GITHAIGA** hereinafter referred to as the “Objectors” took out the Summons for Revocation of Grant dated 4th July 2008 pursuant to the provisions of *Section 76 (b) and (c)* of the Law of Succession Act and under *rule 44 (1)* of the Probate and Administration Rules in which they have applied for the grant to be revoked and/or annulled. The duo swore a joint affidavit which they filed in support of the summons for revocation of grant. John Kariti Githaiga hereinafter referred to as the “Petitioner” opposed the application by filing the replying affidavit he swore on 3rd October 2008. This Court gave directions to the effect that the summons for Revocation of Grant be determined by reception of oral evidence.

When the application came up for hearing the objectors presented the evidence of two witnesses whereas the Petitioner tendered the evidence of four witnesses. The first to take the witness box on the Objectors’ side was David Wachira Githaiga (P. W. 1). He said the Petitioner filed the succession proceedings without involving him. P. W. 1 said the late Ndirangu Kariti was his uncle who had two sisters and two brothers. P. W. 1 claimed that the deceased did not bequeath parcel No. **MUHITO/MUYU/817** to the Petitioner. P. W. 1 produced minutes of a family meeting held on 18th July

2005 in which it was resolved that the aforesaid parcel of land be subdivided into three equal portions where a portion will be given to the Petitioner and the Objectors. P. W. 1 denied having been cited to indicate whether or not he would take up Letters of Administration in respect of the deceased's Estate. Mary Wanjiku Githaiga (P. W. 2) claimed that the late Ndirangu Kariti was her uncle. She said she got married but later separated. She stated that her late uncle was not married. She claimed that she is entitled to inherit a portion of the land. She said she was not notified of these succession proceedings. She denied having been served with any citation proceedings. She also stated that she was not aware that the deceased had bequeath to the Petitioner parcel No. **MUHITO/MUYU/817**.

The Petitioner testified and summoned the evidence of three other witnesses to support his case. John Kariti Githaiga (D. W. 1) stated that he sought for a letter from the area chief to authorize him take up succession proceedings in respect of the Estate of the deceased. The deceased was his uncle. He claimed he notified the Objectors of his intention to file these succession proceedings. D. W. 1 claimed he engaged the services of a process server to effect service upon the Objectors. He stated that his intention to take up Letters of Administration in respect of the deceased's Estate were published in the Kenya Gazette hence he did not conceal any material fact. He said his uncle (deceased) gave him the land because he and his wife took care of the deceased when he was ailing. On cross-examination the Petitioner admitted that he did not inform the Objectors of his intention to file these succession proceedings. He, however, said that they were aware of the existence of these proceedings. D. W. 1 further admitted that he participated in the family meeting of 18th July 2005. He said that no one disputed his claim in that meeting. Esther Wangui Kabango (D. W. 2), a sister to the Objectors and Petitioner told this court that she was aware that the deceased gave the land in dispute to the Petitioner. D. W. 2 said she was also notified of the existence of these succession proceedings. She said she renounced her interest over the deceased's Estate. D. W. 2 said she was aware that the Objectors were informed of the existence of these proceedings. D. W. 2 said the land should be inherited by the Petitioner because he and his wife were the ones who took care of the deceased. D. W. 2 said that the Objectors did not assist the deceased at all. D. W. 2 said the deceased told her that he had bequeath her land to the Petitioner solely. Margaret Kariti (D. W. 3) told this court that she took care of the deceased when he was sick while the Objectors lived in Nairobi. D. W. 3 said she used to tender and pick up the deceased's coffee. She said she heard the deceased tell her husband (D. W. 1) that he would bequeath the land in dispute to him. D. W. 3 said she was told by the deceased while he was in hospital that he had given her husband his land. Joseph Gachiengo, (D. W. 4), a neighbour of the deceased confirmed in his evidence that D.W.3 assisted the deceased when he was ailing. He said D. W. 3 used to tender and pick the deceased's coffee.

At the close of evidence both sides were permitted to file written submissions which they did. I have considered the evidence tendered by the Objectors and the Petitioner plus their written submissions. It is apparent from the Summons for Revocation of Grant that the Objectors are seeking to have the grant revoked on the following grounds:

“(a) That the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case.

(b) 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.”

From the evidence tendered the following issues arose for the determination of this court:

First: Whether or not the Objectors are entitled to share the deceased's Estate.

Secondly: Whether or not the deceased made an oral will leaving to the Petitioner to solely inherit parcel No. MUHITO/MUYU/817.

Thirdly: Whether the grant was obtained fraudulently to warrant a revocation.

There is no doubt that the Objectors and the Petitioner stand on equal chance to share the deceased's estate. Under *Section 39 (1)* of the Law of Succession Act, where an intestate has left no surviving

spouse or children, the net estate shall devolve upon the kindred of the intestate in the following order (a) Father or if dead (b) Mother or if dead (c) Brothers and sisters any child or children of brothers and sisters in equal shares. In this cause it is not in dispute that the Petitioner and the Objectors are nephews and a niece of the deceased hence they are all entitled to share in equal share the deceased's estate.

The second issue to tackle is whether the deceased made an

oral will. There are two witnesses who claimed the deceased told them that he had bequeath his land to the Petitioner. They are Esther Wangui Kabango (D. W. 2) and Margaret Kariti (D. W. 3). Under *Section 9 (1)* of the Law of Succession Act, the law expressly states that no oral will shall be valid unless it is made before two or more competent witnesses and the testator dies within a period of three months from the date of making the will. It is apparent from the evidence tendered that the aforesaid witnesses did not specify the exact dates when the deceased expressed his wish to them. It would appear the deceased made his wishes known when he was ailing either at home or when he was in hospital. I am also aware that it is a matter of common notoriety that the rural folk do not keep records of time when receiving and keeping information of that kind. I can only estimate time. I am satisfied that in the circumstances of this case that the deceased made an oral will. The deceased had made his wish open by his conduct. The Petitioner lived with the deceased. The Petitioner tendered and picked the deceased's coffee. His wife, Margaret Kariti (D. W. 3) took care of the deceased. There is evidence that once in a while the Objectors passed by to say hi. It is a matter of common knowledge that during such visits people are likely to take home gifts in form of clothes, food and money. The deceased was mainly taken care of by D. W. 3 and the Petitioner.

The third issue which arose for my determination is

whether or not the grant was obtained by fraud. I have considered the evidence tendered by both sides plus the written submissions filed by learned counsels. I have carefully perused the letter written by the Chief, Muhito Location dated 21st December 2005. That letter has listed the names of the Petitioner and the Objectors as beneficiaries. I am also satisfied that the citation documents were served upon the Objectors and their sister Esther Wangui Kabango (D. W. 2). There is evidence that Mary Wanjiku Githaiga (P. W. 2) was personally served in her house Nairobi while David Wachira (P. W. 1) was served at his home in Mukurweini. They denied service but I do not think they were candid in view of the glaring evidence of service. I am convinced the Petitioner did not make a false statement. The Petitioner included the Objectors in the Succession forms and he even caused the citations to be served upon them. The Objectors did not object to the grant nor did they protest the confirmation of grant. In the end I find that the Objectors have failed to prove any of the grounds under *Section 76* of the Law of Succession Act to justify the revocation of the grant. The Objectors were not innocent. They knew that the Petitioner had filed succession proceedings to succeed the deceased. The deceased's conduct before his death indicated his preference when it came to decide who should inherit his property upon his death. He favoured the Petitioner because he took care of the deceased's needs in form of his care and meeting his hospital bills.

In the final analysis, I find no merit in the Summons for Revocation of Annulment of Grant dated 4th July 2008. The same is ordered dismissed with costs to the Petitioner. I find that the Petitioner validly obtained the grant which was confirmed on 14th February 2007. The Petitioner was solely entitled to inherit the deceased's assets.

Dated and delivered this 13th day of November 2009.

J. K. SERGON

JUDGE