



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
SUCCESSION CAUSE 3481 OF 2005

IN THE MATTER OF THE ESTATE OF KIRUNDI MBIU- DECEASED
HANNAH WAIRIMU KIRUNDIOBJECTOR/APPLICANT

VERSUS

ESTHER NJOKI

LOISE WANJIRU MBIYU

MARTHA KIRUMBI MBIYU

JANE MUTHONI NJOROGE.....ADMINISTRATORS/RESPONDENTS

RULING

The Summons for revocation of a grant of letter of administration relating to the estate of **KIRUNDI MBIU**, is dated 16th December, 2005. It was brought by Hannah Wairimu Kirundi who is one of the two daughters of the deceased. She filed the application also protecting the interest of the other daughter of the deceased, named as Milkah Kirundi.

As the objection pending, two of the original Administrators i.e. David Mbiu and John Njoroge, died. David Mbiu's estate was transmitted to his two wives Martha and Loise Wanjiru Mbiu, the 2nd and 3rd administrators/respondents herein. John Njoroge's estate was transmitted to his wife Jane Muthoni Njoroge, the 4th administrator herein. Grants of letters of administration were issued to each deceased aforementioned.

The records and evidence show that the deceased Kirundi Mbiu had five children, namely – David Mbiu, Milkah Wanjiku, Esther Njoki, Hannah Wairimu and John Njoroge. When the deceased died, there is evidence to show that Hannah Wairimu and Milkah Wanjiku lived away in Malindi. It is not denied that David Mbiu Kirumbi, Njoroge Kirumbi and Esther Njoki Kirumbi, filed Kiambu Succession Cause Number 202 of 1980. They obtained a grant of letters of administration under which they failed to name Hannah Wairimu and Milkah Wanjiku among the survivors of dependants of their deceased father, Kirumbi Mbiu. The result was that during distribution of the deceased's estate which was L.R. No.Kiambaa/Kanuga/375 measuring 7.5 acres, the estate was divided as follows:-

1. **David Mbiu Kirumbi** - 3.25 acres
2. **Njoroje Kirumbi** - 3.20 acres
3. **Esther Njoki Kirumbi** - 1.05 acres

The distribution thus, left out the interest of Milkah Wanjiku and Hannah Wairimu, who were then living away in Malindi.

It is not surprising therefore that when the latter two came home from Malindi, they demanded their share. The applicants testified that when they returned home, their brothers, David Mbiu and John Njoroje, were alive. There is undisputed evidence too that there was an agreement that the estate would be shared a fresh so that each dependant would get an equal share of 1.5 acres.

It is further claimed by the applicant, and not denied by the respondents, that all the five abovementioned dependants, signed an affidavit which they filed in court for rectification marked **“ENKI.”**

Although as stated above the respondents failed to file a replying affidavit to deny any representations made by the applicant herein, this court has carefully examined the applicant’s affidavit sworn in support of this application on 16th December, 2004. The affidavit is witnessed by one Mumo Mutoru, a Commissioner for Oaths who also practices as an advocate at P.O. Box 678, Kiambu.

Clearly what the Commissioner of Oaths accepts as the application for rectification, a copy of which is annexed to this application, is a document appearing to have been created by supra-imposing a Notice of Motion upon another document with grounds of a different application relating to an earlier rectification application filed by David Mbiu Kirumbi, Njoroje Kirumbi and Esther Njoki Kirumbi. The correct application for rectification by the three persons abovementioned, appears to have been filed in Kiambu under Succession Cause No.202 of 1980 in 1985 with a view to include 0.25 of an acre inadvertently left out of the estate. They wanted it included in the estate so that it could be distributed among the three. As one Andrew Kanyoni Gachoka Advocate, who was their advocates swore in paragraph 7 of his affidavit sworn on 12th August, 2004, the two applicants had died before the rectification sought in the application dated 12th August, 2004 and filed on 19th August, 2004, was heard.

For Hannah Wairimu to appear to swear on 16th December, 2004 that she and her brothers and sisters had agreed to subdivide the 7.5 acres estate of the deceased before the two brothers died, or that they had agreed to share so as to get 1.5 acres each, is therefore clearly a white lie. Indeed the affidavit Hannah Wairimu refers to as marked **“ENKI”** and sworn by all the five children of the deceased, is one which was sworn by David Mbiu, Njoroje Kirumbi and Esther Kirumbi on 16th April, 1985 before the Kiambu District Magistrate. Furthermore, the contents of the affidavit purported to have been sworn by Hannah Wairimu on 16th December, 2004 contains what are clearly, false statements. For example she purported to claim that she was one of the petitioners in Succession Cause 202 of 1980 and yet her name does not appear there. Indeed she claims she was in Malindi then.

A scheme of cheating like the one cited above, in this court’s view, could not be managed by Hannah Wairimu, an uneducated woman from the countryside. It must have been planned and executed most probably by those who drafted, polished and filed this application, who in the record appear to be M/S Gachoka & Co., Advocates. This court will accordingly seek a clear explanation from Gachoka & Co before the court decides what should be done.

Turning however to the application before the court, there is clear evidence that David Mbiu, Njoroje Kirumbi and Esther Njoki Kirumbi apparently took the Grant of letters of administration, confirmed it and distributed the estate of the deceased Kirumbi Mbiu. They did so while deliberately excluding the interests of the applicant Hannah Wairimu and Milkah Wanjiku who were as well the children of the deceased. Failure to disclose to the Kiambu Court in Succession Cause No. 202 of 1980 that Hannah

Wairimu and Milka Wanjiku were as well the children of the deceased and that they also were entitled to share in the estate, was a concealment which, in my view, went to the root of the process of issuing the grant. In this court's view, the concealment amounted to fraud and is an issue which cannot allow the grant to stand in the nature it was issued.

It is the finding of this court therefore, that despite the probable armature but deliberate scheme by the advocates of the applicant to mislead this court to revoke the said grant issued to David Mbiu, Esther Njoki and John Njoroge in Succession Cause No. 202 of 1980, the applicant have nevertheless a meritorious case to revoke or vary the grant.

The court has further considered the matter and found that the respondents were however, the proper persons to petition for the grant as they did, although their concealment led to unfairness in distribution. It is the further view and finding of the court, accordingly, to preserve the grant issued but modify the distribution. The respondents did not file any replying affidavit which would help the court in that score. The applicants, although with intention to cheat through their advocates, appear to be suggesting that each of the five children should be given an equal share of 1.5 acre which will cover fully the estate of 7.5 acres.

I have carefully considered the matter. I note that Esther Njoki, being a daughter who stood to get married, was originally given one acre while the two sons had taken 3.25 acres and 3.2 acres, respectively. This mode of distribution suggested to the court that sons would receive a little more than the daughters. While I understand this premise to be merely customary justification based on the ground that daughters would be married elsewhere where they would stand to be taken care of by their husbands, such basis for distribution stands to be contentious day by day as customary approach in these matters loses justification.

Doing the best I can nevertheless, I would take away one acre each from David Mbiu Kirumbi and John Njoroge Kirumbi respectively and give such acre to Milka Wanjiku and Hannah Wairimu, respectively.

The result of such redistribution would be as follows:

1. David Mbiu represented by Martha Wanjiku

And Lois Wanjiru Mbiu 2.25 acres

2. John Njoroge represented by Jane Muthoni Njoroge 2.20 acres

3. Esther Njoki Kirumbi 1.05 acres

4. Hannah Wairimu Kirumbi 1.00 acres

5. Milka Wanjiku 1.00 acres

I have considered the question as to how the redistribution would be conducted. In my view the present title to Martha Wanjiku and Lois Wanjiru on the one hand and Jane Muthoni Njoroge on the other hand, should be cancelled by the District Registrar Kiambu. Then from each of the two titles he should subdivide and take away an acre each and give to Hannah Wairimu Kirumbi and to Milka Wanjiku the said one acre each.

The title of Esther Njoki Kirumbi should go untouched. Orders are made accordingly.

Due to the nature of the matter, I find that no order should be made as to costs.

Dated and delivered at Nairobi this 30th day of June, 2008

D.A. ONYANCHA

JUDGE