



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Succession Case 1968 of 2002

NAOMI WATIRI GITHUKU APPLICANT

VERSUS

NAPHTALI KAMAU GITHUKU 1ST RESPONDENT

JOEL MBUGUA GITHUKU 2ND RESPONDENT

RULING

Joel Mbugua Githuku (*hereinafter referred to as the Petitioner*) while describing himself as the step son of the deceased petitioned for the grant of Letters of Administration Intestate over the Estate of **Dorcas Njeri Githuku** - *deceased* who died intestate on 24th March 1991.

According to the affidavit in support of the petition the Petitioner stated that the deceased was survived by the following;

Naomi Watiri Githuku (*married daughter*)

Joel Mbugua Githuku (*adult step son*)

Naphtali Kamau Githuku (*adult step son*)

The deceased left a piece of land parcel **No.Loc.16/Ndunyu Chege/1080**. Letters of Administration Intestate were given to Joel Mbugua Githuku on 8th July 2002. The Applicant Naomi Watiri Githuku filed the summons for revocation dated 2nd August 2002 and cited the principle grounds for revocation: -

Ø *That the proceedings to obtain the grant were defective in substance.*

Ø *That the grant was obtained fraudulently by the making of a false statement or by concealment from court of material facts.*

Ø *That the grant was obtained by means of untrue allegation of a fact essential to a point of law to justify the grant.*

This matter was heard by way of *viva voce* evidence in addition to affidavits on record. The Applicant gave her own evidence and relied on the evidence of her stepmother Regina Watiri Githuku. The gist of the Applicant's case can be summarized as follows;

The deceased herein Dorcas Njeri Githuku was one of the three wives of the late Daniel Githuku Itume. She is the mother of the Applicant who is her only child. The late Daniel Githuku Itume who died in January 2001 almost ten (10) years after the death of the deceased, had distributed his land during the Land Demarcation amongst his three (3) wives in 1964 and gave each wife an absolute title.

This title No. **Loc 16/Ndunyu Chege 1018** belonged to the deceased who had at one point subdivided her land and is said to have given her daughter Naomi Watiri the Applicant some money to buy for herself land where to settle with her family in Rift Valley.

The Applicant is the deceased only daughter and married, the Petitioner and Naphtali Kamau Githuku are the stepchildren of the deceased. According to the Applicant whose evidence was supported in every material aspect by that of her step mother and the 3rd wife of Daniel Githuku Itume was that even after the deceased passed away, her husband lived for almost ten (10) years and never applied for letters of Administration because it was his intention that the deceased property being Title **No.Loc.16/Ndunyu Chege/1018** should revert to the Applicant. It was their evidence that Mzee Itume kept the original title and he called the Applicant and gave her the original title and said it was her right to inherit her mother's property. They contended that the Petitioner or even Naphtali Githuku, the stepsons have never been in occupation of the said parcel of land as it is Regina who used to take care of the deceased and has been in cultivating this parcel of land with the permission of the Applicant.

The Applicant denied that she was consulted by the members when the Petitioner applied for letters of Administration.

On the part of the Petitioner, he called four (4) witnesses in addition to his own evidence.

The gist of the matters stated in their evidence can be summarized as follows;

The Petitioner and DW2 are the sons of the late Mzee Itume by his other wives. They stated that sometimes in 1989, there was a family gathering where at, the deceased, their late father, the Applicant and their stepmother gathered to discuss the deceased's land parcel. It was at that meeting that the deceased said the land should belong to both her stepsons in equal shares.

In 1993, there was a further meeting whereby the Petitioner, his step brother convened a meeting of elders to discuss the transfer of the suit premises but they contended that there were no resolutions as the deceased last wife, Regina objected to the transfer as she wanted her son to be included as a beneficiary.

The Petitioner and Naphtali testified that they were the ones who used to look after the deceased and the Applicant who is married is not entitled to a share of this land as she already took possession of the proceeds of three (3) acres of same land that was sold.

The Petitioner also relied on the evidence of John Mbugua a member of their clan who confirmed that he participated in the family meetings and the resolution of their clan was that the land should belong to the Petitioner and his step brother as according to their clan and Kikuyu Customary Law married daughters do not inherit property.

Stanley Munengere a former Chief of the area testified and the gist of his evidence was that he was the chairman of a meeting on 2.2.93 to discuss the inheritance of the deceased land and they resolved that the Applicant should jointly apply for the letters of Administration with the two step-brothers.

I have carefully considered all the evidence, the pleadings and the submissions put forward by the parties. I think the issues for determination is whether the petition for Grant of letters of representation and the grant was issued to the Petitioner fraudulently.

Secondly, who among the Petitioner and Applicant has priority in law to be issued with the Grant of letters of representation? Is the Applicant precluded by the Kikuyu Customary Law from inheriting from her mother's estate. Considering that the Applicant got a gift *inter vivos* is she entitled to the deceased

estate.

The issue in controversy is basically who should inherit parcel No. *Loc 16/Ndunyu Chege/1080* although other issues arose as a matter of law. It is not in dispute that the deceased was survived by her only child the Applicant. The Petitioner with Naphtali Kamau Githuku are step children.

The deceased died in 1991 and her estate should in this case be administered according to the provisions of the **Law of Succession Act Cap 160** which provides;

“Section 2(1) except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those person.”

Having restated the above position of the law, the same Act provides how an estate of an intestate person should be distributed.

Section 38 therefore provides;

“Where an intestate has left a surviving child or children but no spouse, the next intestate estate shall, subject to the provisions of Section 41 and 42, devolve upon the surviving child if there be only one, or be equally divided among the surviving children.”

In this provision there is no inclusion of stepchildren to as heirs of a deceased. Parliament in its own wisdom left out stepchildren of a deceased as heirs. I believe that was a deliberate move because if the deceased is survived by stepchildren, they fall within the category of dependants under **Section 29** of the Act.

I should also hasten to add that the definition of child is without reference to the child's gender or marital status and thus I find the argument by the Petitioner and his witnesses that married daughters do not inherit properties without merit and against the spirit of the law.

In view of the above clear provisions of the law, I come to the inescapable conclusion that the letters of Administration that were obtained without the consent and involvement of the Applicant were irregularly obtained. If the Petitioner's father intended to give this land to the Petitioner, nothing could have stopped him from applying for the letters of Administration and transferring the land to them for the period of about ten (10) years when he survived his wife the deceased herein.

Accordingly I hereby revoke the grant issued on 8.7.02 to Joel Mbugua Githuku. In the interest of justice and to prevent the abuse of the process, and having established the Applicant was the sole surviving child of the deceased, I hereby direct that a grant be issued to her as the sole Administrator of the deceased estate. If the Petitioner and his stepbrother so wish, they can apply for dependency under part III of the Law of Succession.

It is so ordered.

Ruling read and signed on 10th March 2006.

MARTHA KOOME

JUDGE