



**In re Estate of Daniel Kamau Gitau (Deceased) (Succession Cause
1644 of 2013) [2024] KEHC 4808 (KLR) (Family) (3 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4808 (KLR)

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

SUCCESSION CAUSE 1644 OF 2013

PM NYAUNDI, J

MAY 3, 2024

BETWEEN

GEORGE GITAU KAMAU 1ST APPLICANT

HANNAH MUMBI GITAU 2ND APPLICANT

AND

JOSEPH GITHUKA KAMAU 1ST RESPONDENT

PATRICK RURIGI KAMAU 2ND RESPONDENT

FRANCIS GATHIRU KAMAU 3RD RESPONDENT

HANNAH NJERI KAMAU 4TH RESPONDENT

JANE JAMBI KAMAU 5TH RESPONDENT

JUDGMENT

1. By Summons dated 30th October 2020, the Applicants herein seek to revoke the grant issued to the 1st and 3rd respondents on the 16th December 2013. The Summons is presented under Sections 76 of the *Law of Succession Act* and Rule 44 (1) of the Probate and Administration Rules. The Summons is supported by the Affidavit of 1st Applicant sworn on the same day and is premised on the following grounds-
 1. The Applicant and five (5) others are the biological children of the late Daniel Kamau Gitau
 2. The Grant of Letters of Administration was obtained fraudulently
 3. The Respondents herein obtained the said Grant & confirmation thereof fraudulently with a view to illegally deny the Applicants their right to the deceased (sic) property.



4. That the Grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant
 5. The proceedings to obtain the Grant were defective in substance.
 6. That the Respondent applied for Grant of Letters of Administration through the concealment of material facts and maliciously misled this Honorable Court.
 7. The Applicants were never included as beneficiaries of the estate of the deceased.
 8. It is in the interests of justice that the grant of letters of administration issued on the 16th December 2013 and the certificate of confirmation of grant dated 15TH November 2017 be revoked.
2. The Respondents have opposed the Summons and the 1st Respondent has sworn the Replying affidavit on 16th December 2021 refuting the allegations in the Summons.
 3. The matter proceeded via viva voce evidence with the Applicants calling 4 witnesses and the Respondents 2 witnesses. At the conclusion of the hearing the parties filed written submissions

Summary Of The Applicants' Case

4. PW1- Serah Wangari. She contends that she has an interest in the subject parcel of land (Kiambu/Waguthu798) as it belongs to the deceased, Daniel Kamau, who was her husband. She stated that they did not formalize the marriage. She states that she and her husband lived on the subject land.
5. She attended the funeral of her late husband. She could not remember the number of years she lived on the land but recalls that when they moved to the farm it was a bush and they had to clear it. By the time they moved to the farm she had given birth to her children, Gitau, Hannah, Wambui, Njambi, Wairimu and Kangethe.
6. Veronica Gachagi is her co wife, she moved onto the farm after Sarah had cleared the bushes. She stayed on the farm for about 20 years. She had a quarrel with her deceased husband and left. Her children took care of her husband when he was ailing. She has been denied access to the farm by the 3rd respondent. Her house has been in a state of disrepair but she has not been able to re-enter the farm and restore it. Currently she is staying at a home that her daughter Hannah has set up for her.
7. In Cross examination she stated that she got married under Kikuyu Customary law, she cannot remember the year she got married. Her co wife moved onto the farm after she had cleared the bushes. She stated she was born in 1947 and met the deceased in 1955. She gave birth to Hannah in 1959.
8. She stated that the deceased and her were confirmed on the same day. She was unable to visit the deceased when he was unwell. The deceased had mental illness. The other family has built on the parcel of land and has not made provision for her. She registered a caution on the parcel of land as a licensee.
9. In re-examination she confirmed that she was 76 years Old. When she got married to the Deceased they 1st lived at Gikambura, she cannot remember the year they moved to the farm the child born before Hannah had died.
10. When the 1st family turned hostile and she was unable to go to the home, her husband would go visit her where she was staying. She cannot remember the year that the houses were built. At the time she left the home there was only one house in the compound. The deceased was buried at the land in Kiambaa



11. PW2- Bernard Njuguna Ithagi. He is a Senior Assistant Chief of Waguthu Location. He confirmed letter dated 14th November 2017 originated from the Chief's Office and that it correctly lists the family of the deceased. That he had 2 wives and the children listed there.
12. The deceased was personally known to him as he is a resident of the area. He knows Serah Wangare as the wife of the deceased and that her children were the children of the deceased. His evidence is that the Children of Sarah attended the schools in the neighborhood and so he knew them.
13. In cross examination, he stated that he was approached as the Assistant Chief of the area as the other family was trying to disinherit the House of Sarah. He did not approach the Elders to arbitrate over the issue. He spoke to the 1st and 2nd Respondent. He stated that the letter dated 27th July 2011 authored and signed by David K. Thuo Assistant Chief Ngegu Sub Location did not enumerate the family of the deceased correctly. He discounts the letter of the Chief who is his predecessor as he does not hail from the area.
14. He confirmed that in his statement he did not enumerate the children of the deceased but was adamant that the Applicants and their siblings are children of the deceased.
15. He stated that he is not the one who provided the information on the heirs to the Chief who authored the letter. He was approached by Jane Njambi to come and testify on behalf of Serah Wangare and her children.
16. In re-examination, he stated he did not consult the Elders as the family was well known to him.
17. PW3- Margaret Wairimu Kamau- She testified that she is a daughter of the deceased. She produced her Birth Certificate as evidence that the deceased was her father. She was born on 19th June 1973. She recognizes the respondents as Children of the deceased by the 1st wife.
18. In cross-examination she confessed that she did not know her step mum well and neither could she remember the year she died. She obtained her Identity card in 1998. At the time they left the home she was between 10 to 12 years. They left the farm as their house had collapsed.
19. It was the deceased who would come to their home. They did not go to his home. At the time her dowry was paid her in laws went to her mother's home. She did not inform her step brother, Francis Gathiru, when she was getting married. Her dowry was received by her Uncle (Brother to deceased). She attended the same primary school with some children from the 1st House. She was registered in her father's name at the school.
20. She attended the funeral of the deceased in her capacity as his daughter. She has not cultivated on the farm
21. In reexamination, she confirmed that she can identify the spot where her father was buried. She has not been able to go to the farm on account of the hostility of the respondents. She did not invite the children from 1st house to her wedding because they are not close.
22. PW4- Hannah Mumbi Kariuki- She testified that the deceased is her father. She recalls meeting the deceased in 1963. Prior to coming to Gathangu, they lived with their maternal grandmother. The deceased was a tailor. After some time, they moved with the deceased to Ruthigiti. Later the deceased brought them to the home at Kiambaa/ Wambuthi/ 798.
23. She came to know of the other family when she was an adult and getting married. She met her step mum and the deceased introduced them to the other family. That they had to leave the farm after their house collapsed. Her parents had a falling out and the deceased moved to stay at the shops.



24. When they attempted to build a house for her mum with the support of her husband and sister in law the deceased stopped them and later built a house for her step mother.
25. She reiterated that since the land belonged to the deceased, she, her mum and her siblings were entitled to a share. She has 6 sisters.
26. In cross examination she stated she was born in 1959. She confirmed that her mother was born in 1947. She got married in 1977. The deceased attended her wedding. Her father did not allow them to build on the land.
27. Her step siblings took care of the deceased while he was ailing. She visited her father when his mind was sober, when he fell critically ill, the 1st House did not allow them access.
28. In reexamination, she stated that she was unable to nurse the deceased owing to the hostility by the 1st Family. Initially the families were close but when the deceased fell ill, there was a rift between them.
29. In Submissions dated 18th December 2013, the Applicants identify the following as the issues for determination
 1. Whether the Objector/ Applicants are the Children of the deceased?
 2. Whether the instant grant as issued to the Respondents should be revoked as prayed by the Objector/ Applicants?
 3. Whether this Court has jurisdiction to entertain the cause?
 4. Who should bear the costs of the Application?
30. On the 1st issue it is contended that the Applicants have discharged their burden of proof as set out by the Court of Appeal decision in *Gatirau Peter Munya vs Dickson Mwend Kithinji & 3 Others* [2014] eKLR. It is submitted that it has been established that the Serah Wangare was the wife of the deceased and have established that by production of the certificate of confirmation that bears the name of the deceased.
31. It is further submitted that the paternity of Hannah Mumbi has been established by the production of her marriage certificate that shows that the deceased was her father.
32. Finally, it is submitted that the paternity of Margaret Wairimu Kamau has been established by the Birth certificate she has produced. These in addition to the letter from the Area Chief setting out the family members of the deceased.
33. On the 2nd Issue it is submitted that the Grant should be revoked as it was obtained fraudulently and through fraud, misrepresentation and concealment of material facts by the Respondent. The Applicants rely on the decision in *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] eKLR and *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause No. 158 OF 2000. It is submitted that the instant case has similar circumstances as those obtaining in *Re Estate of Lesinko Sokorte Kiraiyo (Deceased)* [2017] eKLR and on that basis the Grant herein should similarly be revoked.
34. It is submitted that this Court lacks the territorial jurisdiction as the subject parcel of land is situated in Kiambu County and that the Court being devoid of jurisdiction should transfer the matter to Kiambu Court.
35. Finally, it is submitted that the Petitioner/ Respondents should meet the costs herein.



Summary of Respondent's Case

36. DW1- Joseph Githuka Kamau, he is a co Administrator and son of the deceased. He lives on the subject parcel of land, which has been home since birth with his parents. When Petitioning for the Grant, his Application was supported by the letter of the Area Chief dated 27th July 2011. This letter has the list of the legitimate beneficiaries of the deceased.
37. He does not recognize the Applicants, their mother and other siblings as being family of he deceased. They sought to be recognized as family of the deceased after he was buried.
38. At the time of lodging their Application, the area Chief instructed a village elder to investigate and determine who were the rightful family members of the deceased. It is the elders who confirmed that the Applicants were not family members of the deceased.
39. The letter of 24th November 2017 is a misrepresentation. He denies that Hannah was his sister but indicates when she goes to the home, she is visiting his sister in law.
40. At the time of his death his father was a member of ACK Christ the King Church at Wanjori. He was in the same school with Margaret Wanjiru. When he got married Serah did not attend his wedding. None of the Applicants, sibling or their mother cared for the deceased when he was critically ill. Prior to his death the deceased had pointed out the respective shares of the land to all his children, this should not be disturbed.
41. In cross examination, he confirms that he attended the same church as the mother to the Applicants, Serah Wangare. His father inherited the land from his father and it was registered in his name in 1982. He does not have a birth certificate.
42. He does not have any interaction with the Applicants. The Chief who authored the letter was appointed a few months before his father's death. The members of the family were ascertained by the Elders.
43. He confirmed that he does not have a marriage certificate as proof of his parents' wedding. Both his mother and Serah lodged their caution as licensee. That of Serah was lodged almost two weeks after the death of the deceased. They are awaiting the conclusion of this matter before they transmit the estate to the beneficiaries.
44. They were under no obligation to notify the objectors' family as they are not beneficiaries of the estate of the deceased. He reiterated that it is the daughters- in- law who took care of the deceased when he was critically ill.
45. In re-examination he stated that the deceased never introduced Serah and her children as his siblings. The Applicants had filed a succession cause in Kiambu. He reiterated that he is the son of the deceased. He affirmed that the authenticity of the Chief's letter in support of his Petition has not been challenged.
46. DW2- Esther Njoki She is a resident of Gathangu and was born and raised there. She knows the family of the deceased. Her husband is related to the family of the deceased.
47. She is a member of the ACK Christ the King Church. Serah Wangari and the deceased were members of the Church too. The Church is not aware of the relationship between Serah and the deceased. To her knowledge the deceased was a widower at the time of his death. Serah and her children did not participate at his burial.
48. She was asked by the Chief to consult with the elders and report on who were family members of the deceased. The elders concluded that Serah and her children were not family members of the deceased.



49. In Cross examination, she reiterated that she is related to the deceased and that she does not recognize Serah as the wife of the deceased. She stated that when one of Serah’s children died he was buried at a public cemetery. The 1st Wife of the deceased is buried on the subject parcel of land. The marriage of Veronica and deceased was recognized by the Church.
50. She attended the wedding of Hannah at St. Joseph’s Church, the deceased did not attend the wedding. No minutes were taken of the meeting by the Elders
51. In reexamination she stated that the deceased marked out portions of the farm for his children.
52. In Submissions dated 7th March 2024, the Respondents rehashed their evidence and urged that the Applicants had not proved their case to the required standard and that therefore the Petition should be dismissed.

Analysis And Determination

53. Having considered the pleadings herein, evidence tendered, submissions filed, authorities cited and the relevant law, I consider the following to be the issues for determination
 1. Whether the Court has jurisdiction to hear this matter?
 2. Whether the Applicants, their mother and other siblings are beneficiaries of the Estate
 3. Whether the grant should be revoked
 4. Who should pay costs

54. On the 1st issue Whether the Court has jurisdiction?

The High Court is established under Article 165 of *the Constitution* of Kenya, 2010 and vested with unlimited original jurisdiction in criminal and civil matters. The Applicants challenge the territorial jurisdiction of the matter. This must fail as the Court’s constitutional mandate is explicit and not limited in the manner that the Applicant seeks to.

55. On the 2nd Issue Whether the Applicants, their mother and other siblings are beneficiaries.

For the Applicants to succeed they must situate themselves within the ambit of Section 29 and Section 3(2) of the *Law of Succession Act* which provide

For the purposes of this Part, "dependant" means—

(a)	the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
(b)	such of the deceased’s parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and



(c)	where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.
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Section 3(2) of the Act provides that

References in this Act to ‘child’ or ‘ children’ shall include a child conceived but not yet born (as long as that child is subsequently born alive) and in relation to a female person, any child born to her out of wedlock, and , in relation to a male person, any child whom he has expressly recognised or in fact accepted as a child of his own or for whom he has voluntarily assumed parental responsibility”

56. The launching pad for the analysis and determination by this Court is Sections 107, 108 and 109 of the [Evidence Act](#) which provide-



107.	<p>Burden of proof.</p> <table border="1" data-bbox="858 271 1386 909"> <tr> <td data-bbox="858 271 1123 645">(1)</td> <td data-bbox="1123 271 1386 645">Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.</td> </tr> <tr> <td data-bbox="858 645 1123 909">(2)</td> <td data-bbox="1123 645 1386 909">When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.</td> </tr> </table>	(1)	Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.	(2)	When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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(2)	When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.				
108.	<p>Incidence of burden.</p> <p>The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.</p>				

109.	<p>Proof of particular fact.</p> <p>The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.</p>
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57. The issue is, have the Applicants discharged the burden of proof as required; is it established that Serah Wangare is a wife (widow) to the deceased? And are the Applicants and their other siblings children of the deceased?
58. The Applicants submit that the proof of the marriage of Serah Wangare to the deceased, is in addition to her evidence, the letter from the Chief and the confirmation certificate. Our laws in Kenya recognize marriage under various systems. These include Customary, Civil and Christian. In appropriate cases the Court will also presume a marriage.
59. In this instance, Serah Wangare stated that they did not formalize their union under either Civil or Christian Marriage. In evidence she stated that they had formalized their marriage under customary law, but adduced no evidence as to the rites that crystallize a marriage under Kikuyu Customary law and whether she and the Deceased complied with these.
60. Therefore, as was held in *Gituanja v Gituanja* [1983] KLR 575 I find that the Applicants have not proved that there was a customary marriage between her and the Deceased.
61. As to whether the Court can presume a marriage, the Supreme Court in *MNK V POM; Initiative for Strategic Litigation in Africa Petition No. 9 of 2021* laid out what it referred to as the ‘strict parameters’ within which a presumption of marriage can be made and these include [64].....
1. The parties must have lived together for a long period of time
 2. The parties must have the legal right or capacity to marry.
 3. The parties must have intended to marry.
 4. There must be consent by both the parties
 5. The parties must have held themselves out to the outside world as being a married couple
 7. The onus of proving the presumption is on the party who alleges it.
 7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive
 8. The standard of proof is on a balance of probabilities
62. The Applicants have not placed evidence before this Court that would support a finding of presumption of marriage. There are vague statements of the deceased and Serah residing at ‘the shops.’ Some evidence on the Deceased coming over to ‘the shops’. The reference to shops as to a place of residence does not in my view have the necessary level of specificity for this court to find that the deceased and the Applicants shared a residence that can be considered as a family home. It is not possible to deduce from the evidence tendered that the Deceased and Serah had a clear intention to marry. It was her evidence that she left the home after a disagreement and went to reside at ‘the shops’. I find it telling that she did not find it worth her effort to salvage her marriage if there was one when the deceased was alive and has chosen to do so after his death.
63. On their own, the Chief’s letter and the confirmation card are fickle ground upon which to seek to base the existence of a marriage, they require scaffolding which in this instance is absent. The conclusion that must be drawn is that the relationship if any that existed between the deceased and Serah did not amount to a marriage.



64. It is contended that deceased was survived by 6 children born by Serah Wangare. The Six are as set out in the letter from the Chief dated 14th November 2017 as-
1. Hannah Mumbi Kariuki- Daughter
 2. Lucy Wambui Kimuyu-daughter
 3. George Gitau Kamau- Son
 4. Jecinta Njambi Omondi- Daughter
 5. Margaret Wairimu Kamau-daughter
 6. Caroline Wanjiru Kamau- Daughter
65. Where paternity is contested, the Chief's letter on its own cannot be evidence of paternity. It is alleged that the children are the biological children of the deceased. Two of the Children listed above testified in Court.
66. Hannah Mumbi Kariuki has made available her marriage certificate as evidence of paternity as the name of the deceased is included as parent. The marriage certificate is proof of marriage and not of birth. I find therefore that Hannah Wambui has not proved that she is the child of the deceased.
67. Margaret Wairimu Kamau has availed her birth certificate that shows the deceased as her father. Although the Respondents tried to challenge the validity of the Birth certificate, in my view, the authenticity of the birth certificate was not shaken. In the circumstances I hold that she is a child of the deceased. In Joachim Ndaire Macharia v Mary Wangare & Another[2008] eKLR the Court found that a birth certificate was prima facie evidence of paternity. The only way the Petitioner/ Respondent could dislodge this evidence was through a DNA Test which they did not call for or a credible challenge to the validity of the birth certificate.
68. No evidence was tendered to establish the paternity of Lucy Wambui Kimuyu; George Gitau Kamau; Jecinta Njambi Omondi and Caroline Wanjiru Kamau. Neither did the Applicants demonstrate that the alleged children were dependent upon the deceased. I therefore find that it has not been proved that they are children of the deceased within the meaning of Section 3(2) of the [Law of Succession Act](#).
69. On the 2nd issue I find therefore, that only Margaret Wairimu Kamau is a beneficiary to the estate of the deceased.
70. On the 3rd Issue, Whether the Grant should be revoked?
- Section 76 of the [Law of Succession Act](#) provides the grounds and circumstances under which a grant may be revoked. The relevant grounds to this matter are set out in Section 76 (a), (b) and (c) which read as follows
- “ A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-
- (a) That the proceedings to obtain the grant were defective in substance;
 - (b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;



- (c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to just the grant notwithstanding that the allegation was made in ignorance or inadvertently ...”

71. It is the Applicants’ case that, the Administrator in applying for the Grant did not disclose to the Court that the deceased had other children. For this reason, it is submitted the grant is defective as it was presented with incomplete information.

72. Section 51 of the Law of Succession Act which is couched in mandatory terms enumerates the information that must be included in an Application for grant of representation and specifically Section 51(2) (g) requires that-

- (g) In cases of total or partial intestacy, the names and addresses of the all the surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased... (Emphasis Supplied)

73. Rule 7(1) (e) of the Probate and Administration Rules provides-

“... where an applicant seeks a grant of representation to the estate of a deceased person ... the application shall be by a petition ... supported by an affidavit ... containing ... the following particulars-

(a) ...

(b) ...

(c) ...

(d) ...

(e) In cases of total or partial intestacy-

(i) the names, addresses, marital status and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, the particulars of such person or persons as would succeed in accordance with Section 39(1) of the Act ...(Emphasis Supplied)

(ii) ...

(iii) ...”

74. It follows that the failure to provide the information as required by Section 51 of the Law of Succession Act and Rule 7(1) of the Probate and Administration Rules would render such a Grant defective or if deliberate fraudulent and therefore revocable.

75. From the above it is evident that a basis has been laid for revocation of the Grant. The power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the persuasive decision in *Albert Imbuga Kisigwa v Recho Kawai Kisigwa Succession Cause No. 158 of 2000* where Mwita J stated:-

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke



or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.”

76. In re Estate of the Late Mwaura Makuro (Deceased) [2021] eKLR, Ogola J, reiterated that the overarching duty of the Court is to uphold substantive justice and invoked rule 73 of the Probate and Administration Rules in declining to revoke a grant where and Administrator had failed to administer the estate.
77. The grant herein was issued on 16th December 2013. The Applicants in their summons for revocation were principally challenging their omission from the list of beneficiaries. Their concern can be addressed by including the legitimate beneficiaries to the schedule and requiring a redistribution of the assets to make provision for the additional beneficiary.
78. Based on the foregoing, I decline to revoke the grant and I make the following orders
- i. Margaret Wairimu Kamau be added onto the list of the surviving Children of the deceased
 - ii. The orders of 15th November 2017 confirming the grant are hereby set aside and/ or vacated
 - iii. The Administrators to apply afresh within 45 days for the distribution of the Estate of the deceased considering Sections 38 and 41 of the [Law of Succession Act](#)
 - iv. Each party will bear their own costs
 - v. Mention on 17th July 2024 before the Deputy Registrar Family Division to confirm Summons for Confirmation filed and take directions on its hearing

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
3RD DAY OF MAY, 2024.**

P. NYAUNDI

JUDGE

In the presence of:

Court Assistant Fardosa

