REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 75 OF 2019

IN THE MATTER OF THE ESTATE OF GAITHO KIMANI (DECEASED)

MARGARET WANJIRU.....1ST APPLICANT

JANE NJOKI.....2ND APPLICANT

VERSUS

MBUGUA GAITHO.....1ST RESPONDENT

AGNES NJERI GAITHO.....2ND RESPONDENT(Deceased)

RULING

1. For determination is the summons dated 22nd March, 2017 seeking that the grant of letters of administration issued on 11 November, 1988 to **Mbugua Gaitho** jointly with **Agnes Njeri Gaitho** (the 1st and 2nd Respondents, respectively) and thereafter confirmed on 31st May, 1989 be revoked. The application is brought by two daughters of the deceased, namely, **Margaret Wanjiru** and **Jane Njoki** (the 1st and 2nd Applicants, respectively) and is expressed to be brought under section 76 of Law of Succession Act *inter alia*. On grounds that the proceedings to obtain he grant were defective in substance and that the grant was obtained fraudulently by the making of false statements and non-disclosure of facts material to the case.

2. In support of the summons the Applicants filed a supporting affidavit sworn by 1st Applicant on behalf of the 2nd Applicant. To the effect that they are both children of the deceased herein, **Gaitho Kimani** who had two wives in his lifetime, namely, namely **Esther Wanjiku** and **Agnes Njeri**. That the deceased was survived by the following children: Wambuku Gaitho (deceased), Moses Ngigi Gaitho (deceased), Susan Wanjiru, Mbugua Gaitho, Wambui Gaitho, Gachibi Gaitho (deceased), Margaret Wanjiru, Jane Njoki, Ann Wariara (deceased) and Bernard Kimani (Deceased), and his second wife Agnes Njeri Gaitho, now deceased. It is further deposed that the estate of the deceased herein comprised of a land parcel known as **LIMURU/KAMIRITHU/77** measuring approximately 4.6 acres; that the petition for letters of administration with respect to the deceased's' estate was filed by the Respondents without involving some of the children and/or beneficiaries to the deceased Estate. The Applicants took issue with the manner in which the grant of letter of administration was obtained.

3. The Respondents opposed the summons through a replying affidavit sworn by the 1st Respondent. The said Respondent points out that it was ridiculous and unfair that the summons for revocation was filed 28 years since confirmation of the grant. Further, the Applicants were aware that the deceased had distributed the suit property amongst his four (4) sons who had since taken up possession of the portions in accordance with the confirmed grant and developed the said portions. They assert that the subdivision of the suit property was done during the deceased's' lifetime in accordance with Kikuyu Customary Law. Consequently, it is their position that it would be unjust to revive issues concluded long ago. An affidavit by one **Monica Wanjiku Ngigi** wife to Moses Ngigi Gaitho (deceased), a son of the deceased also supported revocation.

4. Pursuant to directions by the court, parties equally filed further witness statements and the matter heard *via viva voce* evidence on 24th July, 2019. During the hearing, the Applicants called three (3) witnesses and the Respondent two (2) witnesses and at the close of each party's case submissions were filed by both parties. It appears that the original file wherein the impugned grant was issued, namely **Kiambu Succession Cause No. 180 of 1988** subsequently went missing and only a reconstructed file created later was forwarded to this court.

5. Testifying as **PW1**, **Monica Wanjiku Ngigi** adopted the contents of her affidavits and asserted that she was the widow of one of the deceased's sons**, Moses Ngigi Gaitho** (deceased) . She confirmed that the deceased died in the year 1985. It was her evidence that the subdivision/distribution of the suit property was done after the demise of the deceased. She categorically stated that she did not witness any meeting involving close relative and elders called by the deceased in his lifetime to discuss the sharing of the property among his sons. **PW1** further confirmed she lived on the suit property with other dependants, and she had lived on the suit property since 1983. She also stated that she was not aware of the succession cause being published and that sub-division of the suit property happened in secrecy. Finally, she concluded that proper subdivision ought to be done to include all beneficiaries of the estate of the deceased as the Applicants did not get any portions.

6. **PW2** was Jane Njoki (2nd Applicant). Like **PW1** the witness similarly denied that the deceased ever called any meeting in the presence of elders to discuss distribution of the suit property. That as a daughter to the deceased she got married in 1969 and moved to live at her husbands' homestead; that no proper distribution of the property was done and she only learnt of the succession cause in 2017, prompting her and the co-Applicant to place a caution on the suit property, and later filing the instant summons for revocation. She emphasized that the 1st Respondent did not involve the daughters in the succession proceedings and that she received nothing from the deceased's' estate.

7. The final witness on the Applicants' side was Margaret Wanjiru (**PW3**). She stated the deceased was her father and that she only found out about the succession cause sometime in 2017. She told the court that she got married in 1963 and that her claim related to the portion held by Agnes Njeri because she was a daughter to the said 2nd wife of the deceased. She too stated that the succession cause in respect of the deceased was done hastily and in secret.

8. To open the Respondents' case was **Peter Kepha Kimani** who testified as **RW1.** It was his evidence that he was a stepbrother to the deceased; that in the year 1984 before his demise the deceased convened a meeting involving him, village elders and the deceased's family members to discuss the distribution of the deceased's' estate in accordance to his wishes and Kikuyu Customary Law. He testified the deceased suit property was thereafter divided into four portions in favour of his sons: Mbugua Gaitho, Gichibi Gaitho (deceased), Kimani Gaitho (deceased) & Ngigi Gaitho (deceased). **RW1** further confirmed that the Applicants did not receive any portion of land because they were already married, and they did not attend the meeting in 1984. However, to the best of his knowledge he asserted that they were notified of the meeting.

9. It was also his further evidence that at the time of the deceased's death in 1985 all his daughters were married and that according to Kikuyu tradition, married daughters were not entitled to inherit as it was assumed that they would receive inheritance in the family where they were married. In conclusion he stated since the Applicants were still married it would be an injustice to grant the orders sought, especially as the Applicants had waited too long to raise the current objection.

10. **RW2** was Mbugua Gaitho, the 1st Respondent. In his testimony he confirmed that he and his deceased stepmother, the 2nd Respondent were the petitioners in the **Kiambu Succession Cause 180 of 1988** and that they did not involve the Applicants. He explained that the main reasons for not involving the Applicants was that they were already married, and the fact that the deceased had prior to his death distributed his estate amongst his four sons. He also admitted that the alleged meeting in which the deceased declared his wishes on the devolution of his estate was not attended by the Applicants, that neither the 1st nor the 2nd wives to the deceased were allocated specific portions in the suit property. It is his position that it was not the deceased's wish that his property be apportioned equally between his children. In conclusion he emphasized that the Applicants had waited 32 years to lay claim to the suit property despite being aware of the deceased wishes on distribution of his estate.

11. In their submissions, the Applicants reiterated their evidence. They identified two primary issues for the court's determination; (a) whether all the beneficiaries of the deceased benefited from his estate in accordance with the law of succession; and (b) whether the the deceased made an oral will or died intestate. On the first issue the Applicants relied on Section 76 of the Law of Succession Act and the case of **MATHEKA & ANOR V MATHEKA (2005) 2KLR 445** regarding the guiding principles on revocation of a grant. Further citing the case of **MILKA ANYANGO OTIENO & ANOR VS KENNEDY OTIENO ODENY [2014] eKLR** they argued that failure by a petitioner to list all beneficiaries and their interest to the estate amounts to concealment of material facts that renders the grant made to such petitioner liable for revocation. On the second issue the Applicants submitted the Respondents' assertion of the making of an oral by the deceased had not been made out, and in addition, the alleged will did not satisfy the statutory requirements. And besides, it was pointed out that the Respondents had petitioned not for grant of probate but letters of administration under intestacy. Therefore, the Applicants urged the court to allow their application.

12. On their part, the Respondents submitted that the deceased distributed his estate amongst his sons in accordance with Kikuyu Customary Law during his lifetime. Their submissions were anchored on **Eugene Contran's Restatement of African Law, Law of succession** and **Casebook on the Law of Succession by W.M Musyoka.** In the Respondents' view two key issues required determination, namely, (a) whether the Applicants are entitled to a share of the deceased's estate (b) whether the application before the court is merited. On the first issue the Respondents submitted that the deceased herein was a Kikuyu man, and his estate could be distributed among his children during his lifetime. Further, under Kikuyu Customary Law the property of a deceased passed to the sons only as was the case in the instant matter. The only exception to the practice being where unmarried daughters were assigned some inheritance. It was the Respondents' case that the Applicants herein did not qualify having been already married prior to the demise of the deceased. Reliance was placed **RE ESTATE OF NGAMINI KIRIRA [2016] eKLR.**

13. On the second issue, the Respondents submitted the Applicants were always aware of the deceased's wishes on the devolution of his estate but took no steps for over 45 years after the deceased made his wishes known. The Respondents emphasized that the lives of the deceased's sons will be disrupted if the application is allowed, because they long settled on their portions of the suit property with their children and have invested heavily on the land. In their view, revoking the grant would lead to gross injustice upon the deceased's sons. They therefore urged that the summons dated 23rd March 2017 be dismissed with costs.

14. There is no dispute that in his lifetime the deceased had two wives and ten children including four sons and the Applicants herein, among others. The deceased died on 7th April 1985 and was survived by his wives and nine children, one son having predeceased him. According to the Respondents, he expressed his wishes concerning the devolution of his estate during a meeting convened prior to his death. While **RW1** had asserted in his affidavit that this was in 1984, **RW2** could only say during cross-examination that the meeting happened prior to the death of the deceased's 1st wife in 1988. Whether the alleged meeting did happen or not, the alleged utterances as asserted by the Respondents do not amount to an oral will, there being no evidence that the deceased died three months thereafter as required under section 9(1)(b) of the Law of Succession Act. The deceased therefore died intestate within the meaning in section 34 of the Law of Succession Act as attested by the filing of intestate proceedings by the Respondents in 1988. The further implied question is whether, in the alternative, the deceased had gifted the sole asset of his estate as guided by Kikuyu Customary Law, to his four sons and therefore was unavailable for distribution as his free property. The pertinent question therefore being whether the alleged gifts had been made *inter vivos* to the four sons.

15. Before delving into that question, it is necessary to determine whether the Applicants were entitled to be involved in the succession cause in respect of their father and to be included as beneficiaries. As earlier noted, this court did not have the benefit of perusing the original file in **Kiambu Succession Cause 180 of 1988** wherein the impugned grant was issued. However, on the material before the Court the proceedings leading to the grant related to an intestate deceased. The summons before the Court is premised on the provisions of Section 76 Law of Succession Act which provides inter alia that:

> **"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 justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;**
>
> **(d)…. "**

16. The key complaint raised by the Applicants is that they were neither involved or included as beneficiaries in the lower court succession cause in respect of their father, nor received any benefit from the distribution of his estate. Section 26 of the Law of Succession Act defines a dependant as follows:-

> **"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, grand-parents, 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**.

17. The Applicants qualify as dependents under Section 29 of the Law of Successions Act. It matters not whether they were married or not. The definition of children in section 3 of the Act does not distinguish between male and female children. See also Article 27 of the Constitution. Moreover, under Section 51(g) of the Law of Succession Act, in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased. This is reiterated in Rule 7(e) of the Probate and Administration Rules, which provides that in cases of total or partial intestacy, a petitioner applying for a grant is required to include the names, addresses, marital status and description of *"all surviving spouses and children of the deceased …"*. Further, pursuant to the provisions of section 66 of the Law of Succession Act, as read with Rule 26 of the Probate and Administration Rules, the applicant seeking a grant in respect of the estate of a deceased intestate is required to obtain the consent of or give notice to every person entitled in the same degree as himself.

18. The excuse by the 1st Respondent that the Applicants being married daughters were excluded from the succession proceedings holds no water. The deceased herein having died after the commencement of the Law of Succession Act, his estate could only be administered under the Law of Succession Act as prescribed by section 2 (1), and (2) and section 4 thereof, and not Kikuyu Customary Law. The Applicants' complaint on this score is therefore justified.

19. The Respondents have variously emphasized that the deceased being a Kikuyu man was entitled in his lifetime to share out or distribute his estate in accordance with Kikuyu customary law. No doubt, the deceased was within his rights during his lifetime to settle any property for the benefit of any child or children as he desired. Whether such settlement would have been influenced by customary law or personal preferences is neither here nor there. The subject matter of the alleged gifting is land. Land transactions whether founded on a consideration or not must be in writing to be valid. The Land Registration Act and the Registered Land Act before it, prescribes that a disposition in land be made by execution of an instrument in the prescribed form. The deceased was the registered proprietor of the suit property. To make an effective gift to his sons in his lifetime, he ought to have executed an appropriate instrument such as a transfer of land. This never happened even if he indeed had expressed the intention to settle the property for the benefit of his sons.

20. I fully agree with the sentiments of **Nyamweya, J**. in **Re Estate of the Late Gedion Manthi Nzioka (Deceased) (2015) eKLR** to the effect, *inter alia*, that:

> **"For gifts inter vivos, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts or … Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts inter vivos must be completed for the same to be valid. In this regard it is not necessary for the donee to give express acceptance, and acceptance of a gift is presumed until or unless dissent or disclaimer is signified by the donee. See in this regard Halsbury's Laws of England 4th Edition Volume 20(1) at paragraph 32 to 51".**

21. Concerning failure to complete or perfect gifts, **Halsbury Laws of England 4th Edition Volume 20(1)** at paragraph 67 states that:

> **"Where a gift rests merely in promise, whether written or oral, or in unfulfilled intention, it is incomplete and imperfect, and the court will not compel the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donor's subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid, the donor must have done everything which according to the nature of the property comprises in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do**." (emphasis added)

22. In **Odunga's Digest on Civil Case Law and Procedure Vol (III)** Page 2417 at paragraph 5484 (d) and(e) it is stated that:

> **"Generally speaking, the moment in time when the gift takes effect is dependent on the nature of the gift; the statutory provisions governing the steps taken by the donor to effectuate the gift. (See in Re Fry Deceased {1946} CH 312 Rose: and Trustee Company Ltd v Rose {1949} CL 78 Re: Rose v Inland Revenue Commissioners {1952} CH 499 Pennington v Walve {2002} 1WLR 2075 Maledo v Beatrice Stround {1922} AC 330. Equity will not come to the aid of a volunteer and therefore, if a donee needs to get an order from a Court of equity in order to complete his title, he will not get it. If, on the other hand, the donee has under his control everything necessary to constitute his title completely without any further assistance from the donor, the donee need no assistance from equity and the gift is complete. It is on that principle that in equity it held that a gift is complete as soon as the donor has done everything that the donor has to do that is to say as soon as the done has within his control all those things necessary to enable him, complete his title. Where the donor has done all in his power according to the nature of the property given , to vest the legal interest in the property in the donee, the gift will not fail even if something remains to be done by the donee or some third person. Likewise, a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor. (See Snell's Equity 29ED Page 122 paragraph 3)"** (emphasis added).

23. In this instance, the Respondents have not offered any material to establish claims that the deceased gifted his land parcel to his four sons during his lifetime. The suit property was still registered in the name of the deceased at his death and no instrument in the sons' favour had been executed. The alleged gift was therefore never perfected and must fail. And the deceased had not made any disposition by way of a will. The suit property remained the free property of the deceased within the definition found in section 3 of the Law of Succession Act. Therefore, the deceased's estate fell to be distributed in accordance with the provisions of the Law of Succession Act governing intestacy, and in particular section 38 of the Law of Succession Act which provides for equal distribution of an estate where the intestate deceased was survived only by children. Now that the 2nd Respondent is deceased, this means that the surviving male and female children of the deceased are potentially entitled to benefit equally from the intestate's estate. The 1st Respondent cannot therefore be heard to say that the Applicants had no share to the deceased's estate because they were married females and to claim that the deceased had already gifted away the suit assets at the time of his death.

24. The Applicants are persons beneficially entitled and whose consent ought to have been sought, and their respective shares to the suit property identified at the time of confirmation of the grant. See the proviso to Section 71 of the Law of Succession Act and Rule 40 sub-rules 4 and 8 of the Probate and Administration Rules. The 1st Respondent and his deceased co-Respondent were, in excluding the Applicants, clearly labouring under false assumptions that are unsupported by the law. The exclusion of the Applicants from the succession cause in the lower court was erroneous and vitiates the said proceedings. The proceedings were defective in substance. In addition, the grant was obtained through the non-disclosure of facts material to the cause, namely the existence of the Applicants as children of the deceased who also survived him.

25. In the circumstances, the court is satisfied that the grant issued to the Respondents cannot stand. The grant, as subsequently confirmed is hereby revoked. A fresh grant will henceforth issue in the joint names of the 1st Respondent and Margaret Wanjiru, the 1st Applicant. They are at liberty to file an application to confirm the grant before the expiry of six months identifying all the all the children of the deceased, and where deceased, their surviving spouse/child and their respective shares. These persons should execute the necessary consents or appropriate protest as they deem fit, to the confirmation application. For this purpose, the application when filed, will be served on all such persons.

26. The restriction on dealings placed against the suit property by the Land Registrar on 30th December 2016 will remain in force until the grant is confirmed in accordance with paragraph 25 above. In view of the nature of the dispute and relations between the parties, I direct that each of them bears their own costs.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 13TH DAY OF MAY 2021.

C. MEOLI

JUDGE

In the presence of:

Ms. Kimani h/b for Mr Wambua for the Respondent

Applicant: N/A

C/A :Kevin Ndege