



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1126 OF 2016

IN THE MATTER OF THE ESTATE OF MARY WAMBUI MUTHAMI (DECEASED)

JOHN GITAU MUTHAMI.....1ST APPLICANT

PETER KIMANI MUTHAMI.....2ND APPLICANT

JAMES THANDI MUTHAMI.....3RD APPLICANT

PAUL KARIUKI MUTHAMI.....4TH APPLICANT

-VERSUS-

ELIZABETH NJOKI MUTHAMI.....1ST RESPONDENT

RUTH NYAMBURA NGANGA.....2ND RESPONDENT

RULING

1. The deceased Mary Wambui Muthami died intestate on the 4th June 1998. She was the registered proprietor of LR No. Dagoretti/Thogoto/813 and LR No. Dagoretti/Thogoto/T.532. She left her husband (widower) Muthami Matiru with whom she had the following children: -

- (a) Jane Njambi Kinyanjui;
- (b) Margaret Gichiku Muthami;
- (c) Elizabeth Njoki Muthami (1st respondent);
- (d) Ruth Nyambura Nganga (2nd respondent);
- (e) George Njoroge;
- (f) John Gitau Muthami (1st applicant);
- (g) Peter Kimani Muthami (2nd applicant);
- (h) James Thandi Muthami (3rd applicant); and
- (i) Paul Kariuki Muthami (4th applicant).

2. With the consent of the applicants and the rest of the family, the respondents on 11th July 2016 petitioned the court for the grant of letters

of administration intestate. The grant was issued on 22nd September 2016, and confirmed on 19th June 2018. This followed a consent to the distribution of the estate that was filed on 12th October 2017 that had been signed by all the children of the deceased. It was filed along with the summons for the confirmation of the grant. In the proposed distribution contained in the affidavit sworn by the respondents to support the summons, each of the two parcels of the deceased was to be shared equally by the daughters in the family. These were (a), (b), (c) and (d) above. The distribution was eventually done, and each of them has obtained title.

3. By application dated 25th November 2020, the applicants, who are the sons in the family, sought the revocation of the grant as confirmed. Their case was that they had been disinherited by the fraud and collusion perpetrated by the respondents. They claimed that the grant had been obtained by the making of false statement and concealment from the court of material evidence.

4. The respondents denied these claims and asked for the dismissal of the application. They swore that, throughout the succession proceedings, the applicants were involved and consented to the daughters inheriting their mother's estate. They produced minutes ("ER 3") of the family meeting held on 15th September 2015 at the Chief's Office where their father Muthami Matiru indicated that all the land in his name would be given to the sons, and all the land the land in the name of deceased would go to the daughters. The chief, the elders, and the children agreed with this. It was on this basis that the succession cause was filed, heard and determined.

5. It is evident that the applicants signed Form 38 (under **rule 26(2)** of the **Probate and Administration Rules**) and gave consent to the respondents to petition for, and obtain, the grant in respect to the estate of the deceased. Following the grant, and upon application for confirmation by the respondents, the applicants, again, consented to the two parcels of land to each go to the daughters equally.

6. These consents created a contractual obligation and a solemn arrangement in the family from which the applicants cannot be allowed to resile. The confirmation of the grant was based on the consent that all the beneficiaries signed. It is trite that the only remedy available to a party who wants to get out of a consent order or judgment is to set it aside by way of review, and the grounds of setting aside are where the consent order or judgment was obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if the consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement (**East African Portland Cement Company Limited –v- superior Homes Ltd [2017]eKLR**).

7. The applicants did not make reference to the consent that they gave at the filing of the petition, and at the application to confirm the grant. They were bound by the consents.

8. In conclusion, I dismiss the application for revocation with costs.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2021.

A.O. MUCHELULE

JUDGE