



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCC CAUSE NO H.C 189 OF 2004

IN THE MATTER OF THE ESTATE OF WANGOI MUCHIRI (DECEASED)

JAMES GITEMI KIMANI.....PETITIONER

VERSUS

WAMBUI NDAU.....OBJECTOR

JUDGMENT

1. Petition of letters of administration was filed by the Petitioner **James Gitemi Kimani** on the 6th of April 2004, as the son of the deceased. In his affidavit, he deponed that the deceased was survived by himself and 6 other beneficiaries who are the deceased children namely: **James Ndungu Kimani, Francis Karanja Kimani, Joseph Ngugi Kimani, David Mburu Kimani, Joseph Mburu Kimani, and Margaret Wanjiku Kimani.**
2. A grant of letters of administration was issued to **James Gitemi** on 1st December 2004.
3. Summons for enlargement of time within which to file an objection was filed on 4th February 2015 by **Wambui Ndaui**. The applicant sought to enlarge the time within which to file an objection and also sought to have the Petitioner arrested and prosecuted for intermeddling in the estate of the deceased. In her application, the Applicant argued that she is the rightful beneficiary of the deceased estate by virtue of being a daughter to the deceased while the Respondent was a grandson of the Deceased. The Petitioner had submitted the letters of administration intestate through falsehood as he had listed his siblings as the beneficiaries of the estate of the deceased yet they were only entitled to the share of the Estate of the deceased through their deceased father **Kimani Muchiri** who was a brother to **Wambui Ndaui**.
4. Further on 19th May 2015, **Wambui Ndaui** applied for revocation of the grant under **Section (b) (c) of the Law of Succession Act** seeking to revoke the grant issued to **James Gatemi Kimani** on 1st December 2004, be revoked and that she be appointed as the administrator and beneficiary of the estate. As she was left out as a beneficiary of the estate of the deceased.
5. She filed a supplementary affidavit on 12th June 2015. Adducing evidence that **Kimani Muchiri** the late father to the Petitioner had sold part of the deceased estate being Plot No. 765 Kiambogo. In support of her affidavit she filed a supplementary affidavit by **Joseph Ngugi Kimani** a son of the deceased **Kimani Muchiri** and an elder brother of the Petitioner **James Kimani Gitemi**, he averred that he was a grandson to the deceased **Wangoi Muchiri**, and the only beneficiaries of the estate of the deceased **Wangoi Muchiri** were his Late father **Kimani Muchiri** and the applicant **Wambui Ndaui**.
6. In response to the petition for revocation, a replying affidavit was filed by **James Gitemi Kimani** on 10th September 2015, where he averred that he petitioned for the full grant of the estate of the deceased with the full knowledge and consent of the whole family and **Wambui Ndaui**. The deceased who is his grandmother had 2 children his late father **Kimani Muchiri** and **Wambui Ndaui**. He averred that the deceased had only one property remaining in her name and that **Wambui Ndaui** chose not to participate in the proceedings as she was married. He was appointed by his late father and **Wambui Ndaui** to petition for letters of administration of the deceased. There is no need of revoking the grant as the Petitioner was yet to apply for confirmation of the grant.
7. An application for confirmation of grant was filed on 25th April 2016, by **James Gatemi Kimani**. In his supporting affidavit, he averred that the deceased was survived by 2 beneficiaries namely his late father **Kimani Muchiri** and **Wambui Ndaui** and that he is the son of the late **Kimani Muchiri** and the only property left by the deceased which is subject to distribution is Kiambogo Settlement Scheme No. 692 measuring 5 acres.
8. His proposal is to have the said property be distributed between **Wambui Ndaui** who will hold 1 ½ acres and **James Gatemi Kimani** 3 ½ acres to hold in trust of himself and his other siblings. He stated that the account in Post Bank was left with no monies.
9. In response, **Wambui Ndaui** filed affidavit of protest on 6th May 2016. She averred that the deceased had 3 assets being Plot No.692

Mununda, where she lived with the deceased and still lives with her children and grandchildren, plot Kiambogo/ Kiambogo Block 1/765, which plot was sold by his late brother **Kimani Muchiri** and the post bank account. The allegations that she had forfeited her interest in administering the estate of the deceased are not true, and she had not at any point appointed the Petitioner to petition for the estate of her deceased mother. The estate of her late brother has benefited from the proceeds of parcel 765 and the money in the post bank account. It is an injustice to allow the Petitioner to have the lion's share of the deceased estate. She prays to be wholly allocated parcel no. 692.

OBJECTOR'S EVIDENCE

10. The objector availed 2 witnesses including herself. The first witness testified that she lives in Plot No.692 Mununda, registered in the name of **Wambui Muchiri** her late mother. She produced a death certificate to confirm that her mother is deceased and stated that her mother was buried in plot No.692 and that **James Gitemi Kimani** is her nephew, her brother's son who is now deceased; she said plot no 692 which is 5 acres to her and that's where she lives with her children but her nephew wants to take it away from her.

11. She confirmed that **James Ndungu Kimani** is the brother of James and the beneficiaries listed in the petition are the children of her brother. The brother was alive when their mother died. She said the deceased left behind another plot Kiamogo/Kiamogo Block 1/765 which was 2 ½ acres which were given to Kimani, and he later sold it and a post office bank account.

12. She stated that she filed protest because the Petitioner had brought a surveyor. She was not mentioned in the petition as a child of the deceased. On Cross Examination, the protestor confirmed that the Petitioner is her nephew, and she can't recall the number of children of his brother. She said she has 6 children and she can't recall when her brother died. She denied knowledge of a meeting held on 28th November, 2014 as the land had already been divided. She said she does not agree to Petitioner being granted letters of administration. She said that she opposed to surveyor hiving away three and half acre from plot 692 and that it should be divided by her and her children while his brother's family will share the Miti Mingi plot.

13. On cross examination, by the court, the objector confirmed that the Eburu Land belonged to her brother, who had purchased it.

14. The objector's witness PW2 **Joseph Ngugi Kimani**, said that he knows **Wambui Ndau** as she is the Aunt while the Petitioner is his younger brother, him being the firstborn of the Late **Kimani Muchiri** who died in 2006 and was buried in Eburu.

15. He testified that the protestor is the daughter of **Wambui Muchiri** and that Plot No. 692 which comprises of 5 acres belongs to **Wambui Ndau**. He confirms that assets left by his grandmother are Kiambogo Plot No. 692 and plot 765 measuring 2 acres which his father sold.

16. He confirmed that they are 7 children and that the objector Wambui was to share Plot No. 692 with Gitemi who is now deceased but left behind 2 children; while his father was allocated plot no. 765. He said that it is not proper for their family to have a share of the plot no.692.

17. On Cross Examination by counsel for the Petitioner, he said he has no proof to show that his grandmother had allocated the two parcels to her children. He further said he was not sure if the Post Bank account had any money.

18. On reexamination PW2 confirmed that his father sold plot no.765 and produced a sale agreement as proof.

PETITIONER'S EVIDENCE

19. The Petitioner **James Gitemi Kimani** states that he filed the Petition as a child of **Kimani Muchiri** who is the son of **Wangoi Muchiri**. He said when he filed the Petition his father was still alive. He said he encountered challenges which resulted in delay in confirming the grant. He confirmed that his father and aunt had agreed that the succession be filed. He said the 2 were in a verbal agreement that they share plot no. 692 where Kimani would take 3 ½ acres while Wambui 1 ½ acres but later his Aunt Wambui changed her mind and filed a protest. He said he is not aware of plot no. 765 as he was not informed of the said plot by the father.

20. He confirms that they never filed a succession in respect to their father's death and prayed that the grant be confirmed as proposed. On cross – Exam by **Mr. Omwenyo**, he confirmed that **Joseph Ngugi** is his elder brother. He said he never talked to his Aunt before filing the succession but he sat with his father and other siblings. He said there is no proof of document to show that his Aunt and his father had an agreement on the share of Plot No.692.

21. He confirmed that he did not include his aunt as a beneficiary but would ensure she benefited from the estate. He said filed the Petition in 2004 and surveyed the land in 2014. He took the surveyor before the grant was confirmed. He lives in Eburu in his father's land and at no time has he ever lived in plot number 692.

22. He confirms that Exhibit 2 had his father's identity number which shows the buyer had cleared paying for plot 765. And the chief's letter dated 14th February, 2004 stated that his father was the only sibling yet he had the objector **Wambui Ndau** and 2 brothers now deceased.

23. He further stated that he did not intend to sell the land but wanted the same for his family to plough but he indicated in the affidavit for summons for confirmation of grant that he is the beneficiary of 5acres.

24. On re-examination, he confirmed that he never informed his aunt Wambui on the issue of succession and that the only asset was Plot 692 and that he is following up on the plot on behalf of his family and siblings.

OBJECTOR'S SUBMISSIONS

25. Protestor filed her submission on 6th October 2020 and submitted that the Deceased **Wangoi Muchiri** was her mother and also mother to **Kimani Muchiri** who is the father of **James Gitemi**. On 1st December, 2004 James was issued with a Grant of Letters of Administration intestate in respect to the Deceased estate. She later in the year 2015 filed a protest challenging the same.

26. She submitted that the Petitioner instituted the petition with ill motives as she was not consulted about the matter; that the petitioner never sought the consent of the only surviving beneficiaries of the estate of Wangoi Muchiri before him filing the suit.

27. She relied **Section 76(b) of the Succession Act** and urged this court to revoke as the same was obtained fraudulently by making a false statement and concealment of material facts. She cited several grounds that should warrant the revocation of the grant which include failing to include her as a beneficiary of the estate of the deceased, failing to include a chief's letter from the where the deceased hailed from, and also failing to obtain consent from all adult beneficiaries and as per the law, she is the one who has a preference over the Petitioner to petition for letters of administration in respect to the deceased estate.

28. She further submitted that Petitioner failed to disclose to the court all the beneficiaries entitled to the deceased either surviving or deceased. She submitted that the deceased had 3 assets which include Plot No 692, Plot 765, and the account in Post bank and submitted that the mere assertion by the Petitioner that the account has no funds has not been backed up by any proof.

29. She urged the court as per **section 38 of the law of succession Act**, to find that **Kimani Muchiri** has already benefited in the sale of Plot No.765 and monies in the Post Bank Account and find that plot No.692 be distributed to **Wambui Ndau** for her benefit and that of the heirs of the deceased sons of **Wangoi Muchiri**.

30. She submitted that the Petitioner is not properly before the court and urged the court to revoke the grant issued to the Petitioner, and further order that Parcel no. 692 be distributed to the protestor to hold in trust of her benefit and that of any other beneficiaries.

PETITIONER'S SUBMISSIONS

31. The Petitioner filed submissions on 11th November 2020. He submitted that he is a grandson to the deceased **Wangoi Muchiri** who was survived by 2 beneficiaries **Kimani Muchiri** and **Wambui Ndau** and that before the death of his father, the protestor and **Kimani Muchiri** had agreed on the mode of distribution of the estate of the deceased. He submitted that a grandchild is a direct heir of the estate of a grandparent where the parent predeceased the grandparent. He relied on the case of **Nyeri Succession Cause no.580 of 2014 in the matter of the estate of Florence Mukami Kinyua (deceased)**. He relied on **rule 7(1) (e) (iii) and rule 4 of the second schedule to the probate and administration Rules**.

32. He submitted that he involved the protestor in applying for letters of administration and sought to have the grant issued to him upheld and the protestor's case be dismissed.

ANALYSIS AND DETERMINATION

33. There is no dispute that the protestor is the daughter of the deceased **Wangoi Muchiri** and the petitioner is the grandson of the deceased being the son of the deceased's son **Kimani Muchiri**. It is not also disputed that the petitioner is not the only son of the late **Kimani Muchiri**.

34. I consider the following as Issues for determination: -

1. Whether grant issued to the petitioner should be revoked
2. What comprises the estate of the deceased?
3. Who should be issued grant of letters of administrations.

(i) Whether Grant issued to the petitioner should be revoked

35. The Protestor averred that the Respondent had no right to apply for a grant of letters of administration of her deceased mother in his capacity as a grandson of the deceased since he failed to obtain the necessary consent before applying for letters of administration intestate as per the requirement in **Section 26 of the law of Succession Act**.

36. **Section 66 of the Law of Succession Act**, provides preference to be given to certain persons to administer deceased's estate where the deceased died intestate and provided that the court shall, save as otherwise expressly provided, have final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the order of preference as set out in the aforesaid section. **Section 66(a)-(d)** provides: -

“66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without the association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors”

37. Whereas the court has final discretion on who should be granted letters of administration., the Act as provided above, it has gone ahead to give a general guide following the order of reference in respect to persons who should be granted letter of administration in the absence of spouse, other beneficiaries are entitled to intestacy with priority to their respective beneficial interest. The petitioner herein is the son of the deceased's son. In my view, he cannot be disqualified from being granted letters of administration being representative of his family subject to consent from his siblings.

38. I however note from evidence adduced by his brother that he did not get the blessings of his siblings to represent his father's house and that he also did not consult the protestor who is the only surviving child of the deceased before filing this petition. Part VII, dealing with the making of grants under **Rule 26(1) and (2) of the Probate and Administration Rules** provides: -

“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled inequality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

39. There is no doubt that the Objector held a higher priority than the Petitioner. Further, the Petitioner also failed to disclose the interests of his other siblings and that of the protestor and her children. **Section 76 of the succession Act Cap 160 Laws of Kenya** provide 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)...

40. From the foregoing I find that the petitioner failed to disclose material facts and see merit in prayer for revocation of grant issued to him.

(ii) What comprises the estate of the Deceased?

41. The protestor **Wambui Ndau** in her affidavit avers that the deceased had 3 assets namely:

a. Plot No.692 Mununda, where she lived with the deceased and still lives with her children and grandchildren,

b. Plot Kiambogo/ Kiambogo Block 1/765, which plot was sold by his late brother Kimani Muchiri and,

c. The post bank account.

42. It is not in dispute that plot no. 692 Mununda where the Protestor lives with her children and money post bank account are among the assets forming part of the estate of the deceased. It has not been confirmed that post bank account had any monies no; evidence has been adduced to support the petitioner's assertion that the account has no money. The position can only be ascertained from a statement issued by the bank.

43. For the Kiambogo/ Kiambogo Block 1/765 Plot, the Protestor obtained a letter from the chief in an attempt to sell the said plot and averred that he was the only beneficiary of the deceased. **Section 45 of the Law of Succession Act** provides for the intermeddling of the estate of the deceased:

“45. No intermeddling with a property of the deceased person (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. (2) Any person who contravenes the provisions of this section shall— (a) be guilty of an offense and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

44. Sale of Kiambogo Block 1/765 amount to intermeddle with the estate of the deceased as grant had not been confirmed. All assets that the

deceased left behind should be listed and divided at the ratio of 50:50 as between the protestors family and the petitioner and his siblings

45. **FINAL ORDERS**

a. The Grant of Letters of Administration issued to James Gatemi Kimani is hereby revoked.

b. Grant of Letters of Administration be issued jointly to protestor Wambu Ndaou and a representative from family of the deceased's son late Kimani Muchiri.

c. A statement of account in respects to the Post Bank Account for the period in question to be filed to ascertain if the account had any monies.

d. The assets of the deceased's to be shared at the ratio of 50:50 between the protestor family and family of deceased's son late Kimani Muchiri

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 10TH DAY OF JUNE, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

Lepikas - Court Assistant

Omwenyo for Protestor

Mr. Karanua Mbugua for Petitioner Absent