



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION

SUCCESSION CAUSE NO. 886 OF 1990
IN THE MATTER OF THE ESTATE OF KAMAINDO GATHUKU - (DECEASED)

MAKARIOUS TURITU.....APPLICANT

VERSUS

JOHN NJUGUNA GATHUNGU.....1ST RESPONDENT
PETER GITHEHU GATHUNGU.....2ND RESPONDENT

DANIEL NJENGA MUIBAU.....3RD RESPONDENT

RULING

1. The deceased Kamaindo Gathuku died intestate on 31st August 1976. It is not in dispute that he left two daughters: Wambui Gathungu and Monicah Wanjiru Turitu. His estate comprised Thika/Ngoliba “A”/35.
2. On 11th August 1990 Wambui Gathungu petitioned for the grant of letters of administration. She did not disclose that the deceased left any other heir. A grant was issued to her on 27th March 1991. She died on 14th November 1991. The grant had not been confirmed.
3. It is not in dispute that John Njuguna Gathungu and Daniel Njenga Muibau are the son and grandson, respectively, of Wambui Gathungu. On 5th March 2001 they took over the grant of letters of administration. On 3rd October 2002 they applied to have the grant confirmed. In the application they asked that the estate be shared equally among three beneficiaries, themselves, and Peter Githehu Gathungu. Each was to get 1.6 acres. The grant was confirmed in these terms, and each has had his entitlement transferred to him.
4. The application dated 19th December 2019 basically seeks the revocation of the grant as confirmed and that the distribution of the estate to the three (the respondents) be cancelled. The applicant is Makarios Githuku Turitu. There is no dispute that he is the son of Monicah Wanjiru Turitu, a daughter of the deceased. She was the sister of Wambui Gathungu. She died on 22nd May 2015. The complaint by the applicant was that Wambui Gathungu had petitioned the court on her own behalf and on behalf of her sister. When she died, the respondents took over the matter and, without reference to him or his consent, got the grant and had it confirmed. The result was that he was disinherited.
5. The replying affidavit by the 2nd and 3rd respondents acknowledged that the deceased left four children who have since died. They included Wambui Gathungu and Monicah Wanjiru Turitu. They stated that the deceased had before his death given the suit land to Wambui Gathungu, a fact that was known to Monica Wanjiru Turitu and her children. It was on this basis that they took over the case and had the grant confirmed.
6. Now that Monica Wanjiru Turitu was a daughter of the deceased, and a beneficiary, and since she had not renounced her claim to the estate and grant, she was under **section 51(2)(g)** of the **Laws of Succession Act (Cap. 160)** and **rule 7(i)(e)** of the **Probate and Administration Rules** entitled to be mentioned in the petition, and her consent was mandatorily required to allow Wambui Gathungu to petition for the grant. The same was required at the point when the 1st and 3rd respondents took over the administration of the estate, and eventually had it confirmed. In the application, there was no reference to the applicant’s mother or indication that she had been provided for by the deceased. She got nothing from the estate, and therefore, upon her death, her son (the applicant) was legitimately entitled to complain. He was in the process disinherited. It does not matter that his siblings may not be interested in the estate.
7. The claim that the application was supported by the affidavit by the advocate is, given the facts of the case, without merit. First, the advocate was deponing to what he had read from the case file. Secondly, and more important, the applicant swore a separate affidavit to support the application.
8. The respondents then placed reliance on **section 30** of the **Act** that provides as follows:-

“No application under this Part shall be brought after a grant of representation in respect of the estate to which the

application refers has been confirmed as provided by section 71.”

The section relates to **Part III** which deals with provisions for dependants. However, the application was brought under **section 76 of Part VII** of the **Act** that deals with revocation or annulment of grant, whether or not confirmed, when it is shown that –

- (a) the proceedings to obtain the grant were defective, or
- (b) the grant was obtained fraudulently; or
- (c) the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant;
- (d) where the person given the grant has failed to apply for its confirmation, or has failed to diligently administer the estate; or to produce to the court such inventory or account of administration as may be required.

9. In conclusion, I find that the grant issued to Wambui Gathungu, and later to the 1st and 3rd respondents, and subsequently confirmed were obtained by means of non-disclosure of the fact that Monicah Wanjiru Turitu was a daughter of the deceased who was entitled to the grant and to inherit the deceased. The intention of not disclosing her was to disinherit her, and eventually disinherit the applicant. The proceedings leading to the grant and certificate of confirmation were substantially defective.

10. These are the reasons why I dismiss with costs the preliminary objection raised by the respondents, and allow with costs the application by the applicant. The grant issued to Wambui Gathungu and subsequently to the 1st and 3rd respondents, and confirmed to the two, are hereby all revoked, set aside and recalled. The consequence is that the deceased's parcel Plot No. 35 Ngoliba "A" Scheme Thika and the resultant titles issued to John Njuguna Gathungu, Peter Githuku Githehu Gathugu and Daniel Njenga Muiba are cancelled and they will revert into the name of the deceased.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 8TH NOVEMBER 2021.

A.O. MUCHELULE

JUDGE