



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1763 OF 1993**

**IN THE MATTER OF THE ESTATE OF DANIEL KIRUI GATHUNA (DECEASED)**

**CONSOLIDATED WITH**

**SUCCESSION CAUSE NO. 488 OF 2011**

**IN THE MATTER OF THE ESTATE OF REBECCA NDINDA KIRUI (DECEASED)**

**EDWARD NJOROGE KIRUI.....APPLICANT**

**VERSES**

**JOHN MUTHIORA KIRUI.....RESPONDENT**

**RULING**

1. The deceased Daniel Kirui Gathuna died intestate on 8<sup>th</sup> February 1978. He was survived by his widow Rebecca Ndinda Kirui and five sons Joel Mbugua Kirui, Joseph Kamunyu Kirui, Edward Njoroge Kirui, John Muthiora Kirui and James Waweru Kirui. The only property he left was Dagoretti/Riruta/167 measuring 8.940 Hectares which he had subdivided into six parcels:- Dagoretti/Riruta/1426, 1427, 1428, 1429, 1430 and 1431. Joel Mbugua Kirui petitioned the court for the grant of letters of administration intestate. A grant was issued on 17<sup>th</sup> August 1994. On 20<sup>th</sup> December 1994 he applied for the confirmation of the grant. He proposed that parcel 1426 goes to Rebecca Ndinda Kirui, 1427 goes to Edward Njoroge Kirui, 1428 goes to Joseph Kamunyu Kirui, 1429 goes to John Muthiora Kirui, 1430 goes to James Waweru Kirui and 1431 goes to him. The grant was confirmed on 30<sup>th</sup> June 1995. He passed on and was substituted by John Muthiora Kirui on 2<sup>nd</sup> December 2008. He had transferred the respective parcels to the beneficiaries. These proceeding were in **Cause No. 1763 of 1993**.

2. The widow Rebecca Ndinda Kirui died intestate on 21<sup>st</sup> April 2010. Dagoretti/Riruta/1426 had been registered in her name. It measures 0.35 Hactares. In **Succession Cause No. 488 of 2011** Edward Njoroge Kirui petitioned for the grant of letters of administration 10<sup>th</sup> March 2011. The listed beneficiaries were himself, Joseph Kamunyu Kirui, John Muthiora Kirui, Joel Mbugua Kirui, and James Waweru Kirui. On 15<sup>th</sup> July 2011 John Muthiora Kirui cross-petitioned for the grant. On 9<sup>th</sup> March 2012 a joint grant was issued to Edward Njoroge Kirui and John Muthiora Kirui. On 11<sup>th</sup> October 2012 John Muthiora Kirui applied to confirm the grant. Edward Njoroge Kirui filed a protest to the application. The dispute is pending.

3. Back to **Cause No. 1763 of 1993**. In an application dated 19<sup>th</sup> December 2012 the applicant Edward Njoroge Kirui applied to have the grant issued and confirmed to Joel Mbugua Kirui and later to John Muthiora Kirui revoked. He swore that, although the supporting affidavit sworn by Joel Mbugua Kirui had stated that all the beneficiaries were in support of the application for the confirmation and the proposed distribution, he had not been consulted, was not aware of the application and had not consented to the distribution. He stated that he had not attended the hearing of the application for confirmation. He further stated that, the deceased had, before he died, subdivided parcel 167 into five portions, each portion to each son; that their mother Rebecca Ndinda Kirui was not given a portion, but was to have a life interest in the portions. Had he been aware of the confirmation he would have protested the distribution as it had gone against what the deceased had provided. The deceased had subdivided parcel 167, and had obtained the Land Control Board Consent to transfer the portions ("EK 3") but the transfer had not been effected when he died. He complained that Joel Mbugua Kirui was guilty of concealment and non-disclosure of these material facts.

4. Joseph Kamunyu Kirui died on 13<sup>th</sup> October 2015. His widow Joyce Njoki Kamunyu filed a replying affidavit opposing the application. Her case was that it would be prejudicial to revoke the grant which was issued on 14<sup>th</sup> August 1994 and confirmed on 30<sup>th</sup> June 1995. She

stated that the beneficiaries, including the applicant, had each taken possession of their respective parcels which they were using; that the applicant had since 1998 had the title to his portion and had not moved with speed to challenge the distribution, if he felt aggrieved. She denied that the applicant was not aware of the confirmation and distribution. He had instead, she stated, waited until the death of their mother to complain about the distribution.

5. Owing to the fact that **Cause No. 1763 of 1993** and **Cause No. 488 of 2011** relate to the late father and mother, respectively, of the beneficiaries, I consider that the resolution of the applications in either cause will be efficiently, effectively and fairly done if the two causes are consolidated. I order the consolidation of the two causes. **Cause 1673 of 1993** will be the cause file number.

6. Another replying affidavit to oppose the application was sworn by James Ngumba Nduati the executor of the Will of Kinuthia Asaph Mbigi (deceased). He stated that Kinuthia Asaph Mbigi had brought a portion (Dagoretti/Riruta/5722) from Dagoretti/ Riruta/1430 which in the distribution was allocated to James Waweru Kirui who subsequently died and the portion taken over by the administrators of his estate Esther Wambui Waweru and Daniel Kirui Gathuna. The two were the ones who had sold Dagoretti/Riruta/5722 to Kinuthia Asaph Mbigi. The buyer claimed to be a *bona fide* purchaser for value without notice.

7. The file shows that in **Cause No. 3014 of 2003**, following the death of James Waweru Kirui, parcel Dagoretti/Riruta/1430 was distributed to his family members.

8. There is no dispute that the applicant was party to the petition for grant. The grant was issued to Joel Mbugua Kirui on 17<sup>th</sup> August 1994. The grant was confirmed on 30<sup>th</sup> June 1995. The applicant claims that in 1998 Joel Mbugua gave him the title to Dagoretti/Riruta/1427 measuring 1.22 Hectares. The application for revocation was filed on 23<sup>rd</sup> November 2012. He did not explain why it took him 14 years to file the application if indeed he was aggrieved by the distribution that had been done without his consent and participation. Loyce Njoki Kamunyu stated that the application for revocation was an afterthought; that the applicant had waited until the death of his mother in 2010 before bringing the application. It is material that the person the applicant did not want to benefit from the estate of his father was his mother. Even assuming that the applicant had a genuine complaint, he was guilty of inordinate delay.

9. The applicant claimed that he was not party to the confirmation of grant in which the deceased's estate was distributed. He stated that any signature attributed to him would be a forgery. The affidavit by Joel Mbugua Kirui to support the application for confirmation stated that –

**“all the beneficiaries have agreed with the foregoing distribution.”**

However, no consent was annexed. However, the record shows that on 5<sup>th</sup> August 2008 there was a consent signed by the beneficiaries to support the application to substitute Joel Mbugua Kirui with John Muthiora Kirui in the grant and certificate of confirmation. The applicant signed that consent. I find that, he could not have signed if he did not agree with the contents of the certificate of confirmation.

10. I consider that the applicant has not complained to police that his signature in these proceedings has been forged. This would have allowed for investigations, with possible vindication. I find that the claim that his signature was forged was not true. I further find that he was party to the application for the confirmation of the grant, and the distribution of the estate of his deceased father.

11. Consequently, I find that the application dated 19<sup>th</sup> November 2012 by the applicant has no merits and dismiss it with costs.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF FEBRUARY 2020**

**A.O. MUCHELULE**

**JUDGE**