



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 287 OF 1998**

**IN THE MATTER OF THE ESTATE OF THE LATE HARRISON GITHUKU KABETHI (DECEASED)**

**SARABINA WAMBUI MUCHINA.....APPLICANT**

**VERSUS**

**DAVID MACHARIA NDEGWA.....1<sup>ST</sup> RESPONDENT**

**NJUKI KARIUKI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The estate relates to the late **Harrison Githuku Kabethi (DECEASED)** who died on the 29<sup>th</sup> August, 1994;
2. The Grant in dispute was issued on the 4/11/2008 to the applicant herein one Sarabina Wambui Ndegwa (**'Sarabina'**) as the administrator; and the same was confirmed on the 2<sup>nd</sup> March, 2012;
3. The applicant filed the application on the 2/04/2014 under the provisions of Section 76 of the Law of Succession Act and Rule 44(1) of the Law of Succession Rules; stating that she was a child of the deceased and that the children of the deceased were not all disclosed and included by the respondent in the succession proceedings;
4. The application was based on the grounds on the face of the application and was supported by the affidavit made by the applicant on the 8/08/2012; in which she sought orders to revoke or annul the Grant;
5. Directions were given on the 10/05/2013 that the matter be heard by way of oral evidence; the matter proceeded for hearing and upon conclusion the parties were directed to file and exchange written submissions; hereunder is a summary of the parties claims;

**APPLICANT'S CASE**

6. The applicant's evidence was that the deceased was her husband and that they had sixteen (16) children together; property known as Nyeri/Ndathi Settlement/650 belonged and was registered in the name of her deceased husband's name; she got to know the respondents when her husband passed on; they took her to an advocate, Jane Wangari, in Karatina; this is how she learned of the petition for letters of administration; she emphasized that the respondents have no relationship with the deceased;
7. One of the respondents tills a portion of the said 21/2 acres shamba; she realized that they had set aside one acre of the property for her and the other 11/2 was taken by the 2<sup>nd</sup> respondent, Njuki Kariuki; she did not know the 2<sup>nd</sup> respondent's interest in the said property; she thought he acquired it under a lease; she did not know of a sale agreement of 1993; there was no such agreement between her husband and the respondents; a sale agreement of 1996 cannot be legal because her husband had died two years earlier in 1994;
8. In cross-examination however she admitted having seen the respondents before being taken to the lawyer; she stated that she had returned to her deceased husband in 1994 and found the 2<sup>nd</sup> respondent cultivating on the land; according to the chief's letter the 1<sup>st</sup> respondent's interest on the land was that of a purchaser; she was not aware that she was made an administrator in a grant dated 4<sup>th</sup> November 2008;
9. The applicant's prayer was that the Grant be revoked so that she may be included on behalf of her late husband;

**PETITIONERS/RESPONDENTS CASE**

10. The 1<sup>st</sup> respondent, David Macharia Ndegwa, stated that the deceased sold him about 11/4 of Nyeri/Ndathi Settlement/650 at Kshs. 56,500 and the parties signed an agreement dated 13<sup>th</sup> February 1993 to that effect; parties had agreed on the mode of payment and the 1<sup>st</sup> respondent did full payment in two instalments before an advocate; part of the payment was through a set-off where the deceased collected some materials from the 1<sup>st</sup> respondent's shop;

11. The deceased showed him the measurements of his bought property and he put beacons; by the time the deceased passed on the 2<sup>nd</sup> respondent was already in possession of the shamba; he cultivated the shamba for a short while then allowed the 2<sup>nd</sup> respondent to continue with it since it was far; the deceased's parents were also on the property; they also sold ¼ of the property to the 1<sup>st</sup> respondent; the portion had been given to them by the deceased; the 2<sup>nd</sup> respondent nevertheless allowed them to continued living on that parcel;

12. The 1<sup>st</sup> respondent then decided to claim his entire 1 ½ of his property; he entered into an agreement with the parents of the deceased in 1996, two years after the deceased passed away; by this time the 2<sup>nd</sup> respondent was in possession of the property; on 3<sup>rd</sup> June 1999 he sold the whole property to the 2<sup>nd</sup> respondent; the said agreement was endorsed by the applicant before the area chief; the applicant was not living on the property when it was sold by her deceased husband to the 1<sup>st</sup> respondent; she had separated with her deceased husband; her in-laws informed her about the sale;

13. The 1<sup>st</sup> respondent retrieved the original title deed of the property from the police station where it had been held at the instance of the deceased's creditors; he paid up the debt and took the title deed to the advocate;

14. The 2<sup>nd</sup> respondent, Njuki Kariuki, stated that he used to look after the subject property but later decided to buy it from the 1<sup>st</sup> respondent; there was no one occupying the property then except the deceased's parents; when the applicant came she found he had installed water for irrigation; they agreed with her to go to the advocate together with the 1<sup>st</sup> respondent; he had been in an interrupted occupation of the property since 1999; he urged the court to have him acquire his title because he had paid for the property;

### **ISSUES FOR DETERMINATION**

15. After hearing the evidence of the parties and upon reading their respective written submissions this court has only framed one issue for determination;

(i) Whether to revoke the Grant and the Confirmed Grant;

### **ANALYSIS**

#### **Whether to revoke the Grant and the Confirmed Grant:**

16. The only issue for determination is whether there was a valid agreement entered into by the deceased and the 1<sup>st</sup> respondent for the sale of a portion of the subject property; the evidence of the 1<sup>st</sup> respondent was that he had entered into an agreement for sale with the deceased on the 13/02/1993 for the purchase of 1¼ acres of land out of the subject property; that the purchase price was agreed upon and had been fully paid;

17. It is said that all this took place during the lifetime of the deceased and also whilst the applicant was away; these facts were not controverted by the applicant who confirmed that she knew there was an agreement entered into during the deceased's lifetime and at that point in time she was not at home;

18. The applicant in her evidence had stated that she had never seen the agreement made as between the deceased and the 1<sup>st</sup> applicant; but this court notes that she impliedly acknowledged its existence by entering into a formal written contract with the 1<sup>st</sup> respondent; who in his affidavit annexed this printed form of a Sale Agreement dated the 9/03/1996 which makes reference to the deceased's dealings with him prior to his demise;

19. This Sale Agreement was made as between the applicant and a beneficiary by the name KabethiGithuku of the one part and the 1<sup>st</sup> respondent of the other part; the portion of the parcel of land is identifiable as 1.5 (One Decimal Five) acres out of Ndathi/Settlement/Scheme/650 and the consideration is indicated therein as having been fully paid; all the parties executed the Sale Agreement and it is not denied that the 1<sup>st</sup> respondent put the 2<sup>nd</sup> respondent in possession; and that he has been in possession for 24 years and no attempt has ever been made to evict him there from;

20. This court has had occasion to peruse the entire file and to take into consideration all the evidence adduced and what comes out clearly from the foregoing evidence is that there was no formal first agreement; in that this agreement made between the deceased and the 1<sup>st</sup> respondent was not contained in any document as is required by law; but the applicant nevertheless acknowledged its existence and subsequently reduced the agreement into writing and concluded the deal;

21. As such the complete acceptance by the applicant of the first agreement may be found in the subsequent agreement;

22. The applicant stated in her evidence she was also aware that the deceased's parents also had a portion in the subject property; this portion is said to have been bequeathed to the parents by the deceased;

23. It is not clear from the evidence what became of the parents but what is clear is that upon further perusal by this court of the Sale

Agreement dated 9/03/1996 it shows that the applicant and the beneficiary named hereinbefore included this portion in the agreement and were the beneficiaries of the proceeds of the sale of the ¼ acre; making the total acreage sold to the 1<sup>st</sup> respondent as being 1.5 acres;

24. The reducing of the original intention of the deceased and the inclusion of the terms relating to the subject property and consideration into the Sale Agreement dated the 9/03/1996 gives rise to the implication that the applicant had accepted the 1<sup>st</sup> respondent's interest in the deceased's estate; this was followed by the Letter from the Chief dated the 24/09/1998 which this court notes incorporates the 1<sup>st</sup> respondent's interest;

25. Lastly it is noted that on the P&A 5 Form dated the 17/06/1998 which is the fundamental document that commences succession proceedings, at the Liabilities Section, the interest of the 1<sup>st</sup> respondent as that of a purchaser is clearly indicated; all these documents go to corroborate the evidence of the 1<sup>st</sup> respondent on the interest he had in the deceased's estate and his interest is thus safeguarded;

26. The record reflects that the absence of the applicant and the reservations noted by the Honorable Judge relate to the application for confirmation and the application for the Deputy Registrar to execute the transmission documents and the applicant's absence at the hearing thereof and refusal to sign can only be attributed to be a deliberate and calculated act with a view to frustrating the final process;

27. This court finds that the instant application for revocation of the grant to be misplaced; the applicant cannot shift any blame to the respondents as she was the one who petitioned for the letters of administration and therefore cannot feign ignorance on her own behalf and/or allege fraud and concealment in the process; this court finds that there is sufficient evidence on record to demonstrate that proper steps were taken to determine the persons entitled to the subject property from inception of the process to the very end;

28. This court is satisfied that the applicant's entire application does not disclose any element of fraud, or the making of a false statement or of concealment of material facts;

### **FINDINGS & DETERMINATION**

29. In the light of the forgoing this court makes the following findings;

(i) This court finds that the Grant dated 04/11/2008 and the Certificate of Confirmation of Grant dated 02/03/2012 were obtained in a procedural and correct manner;

(ii) The application for the Revocation of the Grant is found to be lacking in merit and it is hereby dismissed.

(iii) The applicant shall bear the costs of this application.

It is so ordered accordingly.

**Dated, Signed and Delivered at Nyeri this 6<sup>th</sup> day of February, 2020.**

**HON. A. MSHILA**

**JUDGE**