



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CASE NO. 23 OF 2017

IN THE MATTER OF THE ESTATE OF RUTH WAMUCHI

ALIAS RUTH WAMUCHIE GICHARU (DECEASED)

ALICE WANGARI KAMAU.....APPLICANT

VERSUS

MARGARET WANJIKU WARUI.....1ST RESPONDENT

JOSEPHINE NJERI NDUNGU.....2ND RESPONDENT

LUCY WANGUI KIMANI.....3RD RESPONDENT

BRIGITTE NYACIUMA.....4TH RESPONDENT

AND

ESTHER WANIGU MUIRURI.....APPLICANT

VERSUS

MARGARET WANJIKU WARUI.....1ST RESPONDENT

JOSEPHINE NJERI NDUNGU.....2ND RESPONDENT

LUCY WANGUI KIMANI.....3RD RESPONDENT

BRIGITTE NYACIUMA.....4TH RESPONDENT

ALICE WANGARI KAMAU.....5TH RESPONDENT

R U L I N G

1. Before me are two Summons for Revocation or Annulment of Grant. These were filed on 15th September, 2014 and 13th November, 2014 respectively. In the first application, the Applicant sought for orders that the grant dated 22/1/2014 be revoked or annulled she, ALICE WANGARI KAMAU (the 1st Applicant) be included as one of the beneficiaries of the estate herein.

2. The Application is based on the grounds that there was concealment by administrators of the estate of material facts in respect of the deceased's properties and beneficiaries resulting in John Kamau Gicharu, her late husband being disinherited; that further, an estate asset, namely, and **LR. NGENDA/GATUKUYU/223** had been omitted in the latest confirmed grant. The summons is supported by the affidavit of the Applicant. She deposed that she is the widow of the late JOHN KAMAU GICHARU one of the deceased's sons; that the administrators of the estate failed to include all the beneficiaries in their petition for the confirmation of grant and also failed to include the asset stated in the application herein and that if the said grant is upheld the beneficiaries who have been left out will suffer irreparable loss.

3. On 14th October, **MICHAEL NDICHU MBURU** 2014 filed his replying affidavit to the summons. He deposed what is required in this case is the rectification of the Certificate of Confirmation of Grant dated 22/1/2014 as it did not include all the deceased's properties. He contended that the Applicant's deceased husband was provided for in bequests in the will of the deceased. He urged the court to dismiss the application.
4. Subsequently, **JOSEPHINE NJERI NDUNGU** and **BRIGITTE NYACIUMA GICHARU** filed their joint replying affidavit on 24th October, 2014 as the administratrix of the deceased's estate. They deposed that in accordance with the deceased's will the Applicant's husband was to receive a share in the parcel No. **Ngenda/Mangu/223**, erroneously described in the application as Ngenda/Gatukuyu/223, and not in parcel No. **Ngenda/Mangu/111**. They outlined in the affidavit, their proposed rectifications to the Certificate of Confirmation dated 22/1/2014.
5. **LUCY WANGUI KIMANI** and **MARGARET WANJIKU WARUI** also filed their replying affidavits on 11th November, 2014 and 18th November, 2014 respectively. They opposed the application. They asserted that the Applicant's husband benefitted from the will in the following portions of land; Ngenda/Gatukuyu/223-6 acres, LR. Chania Makua/ 792 (6 acres), Ngenda/ Gatukuyu T.257 and shares in Mangu investments.
6. In the second application, the Applicant sought for orders that the grant dated 22/1/2014 be revoked or annulled and that the late **ESTHER MARY WANIGU** having been the legal wife of the late **GREGORY GICHARU**, the deceased husband of the deceased herein, be included as beneficiaries and her interest be represented by **ESTHER WANIGU MUIRURI** as the direct issues of Esther Mary Wanigu are now deceased.
7. The application is based on the grounds that there was concealment of material facts as to the beneficiaries of the estate of **GREGORY GICHARU** and that Esther Mary Wanigu his legal wife and their two issues were left out in the will of Gregory Gicharu. The application is supported by the affidavit of **ESTHER WANIGU MUIRURI**, (the 2nd Applicant). She deposed that the property forming the estate of the deceased's herein is essentially the estate of the late GREGORY GICHARU who through a will bequeathed all his property to the deceased's herein, leaving out his lawfully wedded wife, Esther Mary Wanigu. She contended that she has the consent from the beneficiaries of the estate of ESTHER MARY WANIGU to be their representative.
8. **AUGUSTINE NJOROGE KAMAU** filed an affidavit in support of the summons for revocation by Esther Wanigu Muiruri. He deposed that he is Gregory Gicharu's brother. He contended that his late brother married the late Esther Mary Wanigu in 1938 and later cohabited with Ruth Wamucii Gicharu, the deceased herein from 1943. He contended that his brother willed all his property to **Ruth Wamucii Gicharu** thereby disinheriting Esther Mary Wanigu and her two children. He urged the court to invalidate the said will in this case as it does not provide for all the beneficiaries to the estate of Gregory Gicharu, and consequently, to revoke the certificate of confirmation of grant issued on 22/1/2014.
9. **JANE NJOKI WARUI** filed her replying affidavit on 30th August, 2017 in opposition to the two summons for revocation of grant. She deposed that her grandfather Gregory Gicharu was not married to any other wife apart from **Ruth Wamucie**. She contended that the 1st Applicant's family benefitted from the following portions of land; Ngenda/Gatukuyu/223 (6 acres), LR. Chania/Makua/792 (6 acres), Ngenda/ Gatukuyu T.257 and shares in Mangu investments. She denied that Esther Mary Wanigu was ever married to her grandfather. She also supplied a draft schedule for the distribution of the estate.
10. **LUCY WANGUI KIMANI** equally filed her replying affidavit on 30th August, 2017 and deposed that she was married to the deceased's son and that she had never seen the supposed wife to Gregory Gicharu by the name Esther Mary Wanigu.
11. **BRIGITTE NYACIUMA GICHARU** in her replying affidavit filed on 30th August, 2017, opposed both applications for revocation and contended that the estate being administered is that of Ruth Wamucie and not that of Gregory Gicharu and that the 1st Applicant is currently in occupation of the parcel No. Ngenda/Mangu/223.
12. When the two Summons for Revocation of Grant came up for hearing, a consent was recorded that the two issues to be determined are whether **Esther Mary Wanigu** was a wife to the deceased and whether **John Kamau Gicharu** is a beneficiary to the estate herein. At the hearing, parties adopted their witness statements and thereafter were cross examined.
13. **ALICE WANGARI KAMAU (PW1)** adopted her witness statement as her evidence. She contended that her husband was the eldest son of the deceased but that he was not involved in the succession process. In cross-examination by Mrs. Ngethu, she contended that her husband did participate in this matter when he was alive and that he objected to an alleged will of the deceased. She stated that she lives on the Mangu property where she carries out farming activities. She denied being knowledge that her husband had sub-divided and sold some portions of land belonging to the estate herein and that the land she occupies had been apportioned to Njoki, Brigitte and herself. When cross-examined by Mrs. Muigai, she stated that she is pursuing her husband's share of the estate and that she is not aware that there was another wife other than her mother-in-law Wamucii. In re-examination, she contended that she is not aware of a consent adopted by the court and to which her husband was a party. She asserted that her husband was not included as a beneficiary in the estate herein.
14. **ESTHER WANIGU MUIRURI (PW2)** testified that her grandmother was married to Gregory in 1938 and they had two sons and that Wamucii, the deceased herein was Gregory's second wife. She stated that she was pursuing this matter as her grandmother's side was sidelined in the distribution of the estate. In cross examination by Mrs. Ngethu she admitted that the document she relied on to prove the grandmother's marriage to Gregory Gicharu was only a record of the certificate of marriage. She contended that all the properties of Gregory Gicharu devolved upon Wamucii on his death. When cross examined by Mr. Kamonjo, she stated that the chief's letter left out her grandmother, Gregory's first wife.
15. **AUGUSTINE NJOROGE KAMAU (PW3)** testified that Esther Wanigu was Gregory's first wife. When cross examined by Mrs. Ngethu,

he contended that Gregory is his blood brother and was married to Wanigu until 1945 when she moved to Karuri. He stated that Gregory left his entire estate to Wamicii through a will. He asserted that Raphael Kamau an issue of the marriage between Gregory Gicharu and Esther Mary Wanigu was raised by Wamucii.

16. MICHAEL NDICHU MBURU (RW1) adopted his witness statement and was cross-examined by Mrs. Muigai. He stated that he knew Gregory Gicharu and he had never heard of the alleged first wife or child named Raphael Kamau.

17. BRIGITTE NYACIUMA GICHARU (RW2) testified that Ruth Wamucii was her mother and that she left a will. She denied that she secretly applied for the administration of her mother's estate. She contended that she objected to the will because together with other sisters, she had been excluded in the will. That later a consent was recorded before the local chief for issuance of a new grant that provided for all children of the deceased. When cross examined by Mrs. Muigai, she reiterated that her mother left a will which the daughters opposed as they were not provided for. She contended that her father passed on when she was ten years old, but as she grew up she became aware that the family properties were in her mother's name. She averred that she does not know someone named Raphael Kamau. In cross exam by Mr. Kamonjo, she agreed that she and some of her brothers recorded a consent with the local chief in relation to the parcel No. Ngenda/Mangu/111 and that John Kamau was not in attendance as his parcel is No. Ngenda /Mangu/ 223 according to her mother's will. She asserted that the 1st Applicant has no share in the former parcel, stating during cross examination by Mrs. Ngethu, that the 1st Applicant's deceased husband refused to attend the meeting with the local chief in regard to that parcel.

18. Subsequently, parties filed their written submissions. The 1st Applicant, submitted that she has satisfied the conditions provided in law to warrant the annulment of grant having demonstrated that there was concealment of material information as did she did not consent to the grant being confirmed. Counsel placed reliance on the decision **In the matter of the Estate of Mwaura Mutungi alias Mwaura Gichigo Mbura alias Mwaura Mbura (deceased) Nairobi HCSC No. 935 of 2003** where a grant was revoked for failure to notify the applicant/beneficiary of and to obtain his consent to succession proceedings. The court was urged to revoke the grant herein as the Petitioners failed to act in good faith by excluding the 1st Applicant as a beneficiary. It was submitted that the grant of letters of administration issued was for an intestate estate and as such the allegations of the existence of a will are illegal and unfounded. Counsel submitted that, the Applicant is entitled to the share of the estate due to her late husband **John Kamau Gicharu** as the surviving spouse.

19. ESTHER WANIGU MUIRURI, filed her submissions on 21st January, 2019. It was submitted that Gregory Gicharu and Esther Mary Wanigu married in the year 1938 and were blessed with two issues. Counsel submitted that through his will the late Gregory disinherited his first wife and willed all his properties to his second wife Ruth Wamucii. Counsel submitted that the deceased's estate ought to be equally divided among the beneficiaries including the two sons of Esther Mary Wanigu as the law provides for the wives and former wives of a deceased person.

20. Lastly, Michael Peter Mburu filed submissions on 13th March, 2019. It was submitted that the application by the 1st Applicant is misconceived and an abuse of the court process and that she should have instead applied for rectification of the confirmed grant to reflect what her husband had inherited from the estate. He further submitted that the pastor named James Kinuthia who wrote the letter purporting a wedding between Gregory Gicharu and Esther Mary Wanigu was not called to give evidence. It was submitted that Esther Mary Wanigu and her children through the 2nd Applicant should have pursued the estate of Gregory Gicharu and not that of Ruth Wamucii. He urged the court to distribute the estate according to the affidavit of Josephine Njeri, Brigitte Nyaciuma and Jane Njoki which affidavits take into consideration the interests of the 1st Applicant.

21. The court has considered the record of this cause which was first instituted in 1992, as a probate cause, based on the will of the deceased herein, dated 13.9.88 by which the deceased distributed her assets comprising of five immovable assets as follows:-

- a. LR No. Ngenda/Gatukuyu (Mangu)/111 to Simon Gakungu Gicharu, Stephen Kimani Gicharu and Francis Warui Gicharu but two portions of the asset measuring 1 acre each were reserved for any daughter who might fall "in desperate need of shelter" and to a grandson Gicharu wa Njoki, respectively.
- b. LR No. Ngenda/Gatukuyu (Mangu)/223 to sons John Kamau Gicharu, James Kiuru Gicharu and Daniel Gicharu. These sons were required to vacate asset 1 above pursuant to this grant.
- c. Coffee bushes on item 1 and 2 bequeathed to all male children, namely Simon Gakungu Gicharu, tephem Kimani Gicharu, Francis Warui Gicharu, John Kamau Gicharu, James Kiuru Gicharu and Daniel Nguri. Simon Gakungu however was to act as a trustee, on behalf of his brothers for a period of ten years after the demise of the deceased, managing the bushes and sharing profits among the brothers equally. Thereafter the respective tea bushes would devolve upon the beneficiaries to whom the land parcels in No.1 and 2 above had been bequeathed.
- d. Shares in Mang'u Investments Company were bequeathed to John Kamau Gicharu and Simon Gakungu Gicharu.
- e. A portion of a plot at Gatukuyu Market was bequeathed as follows;

Developed portion to Simon Gakungu Gicharu and the undeveloped portion to others "capable" of developing the said portion.

22. Monies in bank was bequeathed to the sons and were to be utilized in farming activities on the land parcels herein. Although a grant was issued in accordance with the will, it appears from the respective affidavits and evidence of the parties as well as the record, that some of the children of the deceased were aggrieved with the terms of the will, principally, the daughters and John Kamau Gicharu (deceased husband of Alice Wangari Kamau the 1st Applicant). The challenge raised by **John Kamau Gicharu** (hereafter John) culminated in the consent recorded confirming grant on 19.6.02 before **Rawal J** and the subsequent certificate of confirmation of grant.

23. The challenge on the part of the daughters resulted in the consent before **Kimaru J** recorded on 15.6.10 which principally re-distributed the asset LR No. Ngenda/Mang'u (Gatukuyu)/ 111 in order to accommodate the deceased's daughters who were aggrieved that they had been excluded from their mother's will. Pausing here, there can be no dispute that **John Kamau Gicharu** was a son of the deceased herein and a beneficiary under her will. The matter did not rest with the consents and several other applications, resting with one dated 6.11.12 were filed by parties. When the matter was next placed before **Kimaru J**, a further consent was adopted appointing **Michael Ndichu Mburu** and **Mary Njoki** as trustees of the children of **Lucy Gakungu Gicharu** (deceased) a daughter to the deceased. The other terms of the consent were that a new grant would issue in the names of Margret Wanjiku Warui, Josphine Njeri Ndungu, Lucy Wangui Kimani and Brigitte Nyaciama Gicharu who would be responsible for giving effect to the consent recorded on 15.6.10 in respect of LR No. Ngenda/Mangu/111.

24. A grant issued as ordered and an application to confirm it, dated 31.10.13 was filed on 8.11.13. Unfortunately, and that is partly why the 1st Applicant is aggrieved, the application was confined to one asset and persons who were by the previous consent to share in the asset LR No. Ngenda/ Mangu/ 111. So that the grant confirmed by **Majanja J** pursuant to the application was equally limited to the above asset and beneficiaries thereto, who did not include John, the 1st Applicant's wife, or the said Applicant. It has been explained in the affidavits in reply to the application of the 1st Applicant that the parties believed the 2002 grant together with the subsequent confirmed grant were adequate to cover the re-arrangements made subsequent to the former. That is an erroneous belief, but reasonable in the circumstances of this case.

25. Equally, there is no merit in the complaint by the 1st Applicant that the land parcel LR Ngenda/Mangu/111 is more valuable than the parcel (No. 223) that she undeniably now holds by virtue of the will of the deceased. Her husband having entered into the consent before **Rawal J** concerning the said will, she cannot now purport to revise the terms of the said consent regarding the bequests due to her husband, and which never included Ngenda/Mangu/111. The re-arrangements to accommodate the female beneficiaries were agreed upon by those sons (excluding John) to whom the said parcel had been given under the will, and their sisters. That re-arrangement does not give the 1st Applicant a new right to claim part of the said parcel as she appears to be doing by her depositions and submissions. After all, by the terms of the will and subsequent consents her husband received more than one asset of the estate. Moreover, the agreements made by the beneficiaries before **Kimaru J** on 15.6.10 and 13.5.13 and the resultant grant did not in any way interfere with bequests specific to her husband at all.

26. It has also been stated that one beneficiary, namely Benedette Wairimu Njoki was erroneously left out of the allocations in LR Ngenda/Mangu/111. Thus is so far as the grant issued on 22nd January 2014 is only confined to the one asset of the estate, and only some of the beneficiaries benefitting therefrom, the 1st Applicant's complaint is valid as the grant excludes her husband and bequest to him under the will.

27. Section 76 of the Law of Succession Act provides that:

“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) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently; (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either— (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or (ii) to proceed diligently with the administration of the estate; or (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or (e) that the grant has become useless and inoperative through subsequent circumstances.”

28. It does not appear to me that the administrators in filing the application dated 31st October 2013 to confirm grant were motivated by malice or fraud as the 1st Applicant purports. Rather, that the application was erroneous and led to an erroneous grant. However, because the key defect in the certificate is that it is partial, the court will not revoke the said certificate of confirmation of grant. Instead, bearing in mind the age of this litigation, and so as to expedite its conclusion, I will in the interest of justice order a follows:

a) the administrators herein to file an application for the rectification of the certificate of confirmation of grant within 45 days of today's date, taking care to include all the assets of the deceased and to include the mode of distribution captured in the consent before **Rawal J** on 19.6.2002, and before **Kimaru J** on 15.6.10 and 13.5.13 as these consents modify the terms of the deceased's will dated 13th September 1988.

29. As regards the application filed on 13th November 2014, the court having reviewed the respective affidavits, evidence and submissions of the parties is of the view that based on the material presented by the 2nd Applicant, the application does not lie in this cause. The estate herein relates to Ruth Wamuchie Gicharu. And even though she was the wife of the late Gregory Gicharu Kamau, and may have received the assets herein through Thika Succession Cause No.49 of 1973 in respect of the said husband, this is the wrong forum in which to seek revocation of any grant to her in the said cause. The court therefore declines to determine the question whether **Esther Mary Wanigu** was the wife of **Gregory Gicharu Kamau**. The application filed on 13th November 2013 is therefore dismissed. In light of the nature of this cause, parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 5TH DAY OF FEBRUARY 2020.

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C. MEOLI

JUDGE

In the presence of:

Mr. Bichanga holding brief for Mr. Kamungo for Applicant

Mr. Makumi holding brief for Mr. Ngige for Respondent

Court Assistant – Ndege/Nancy