



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 30 OF 1979**

**IN THE MATTER OF THE ESTATE OF DAVID GATHUKU WANYEE - (DECEASED)**

TERESIA NYAMBURA.....1<sup>ST</sup> APPLICANT

STEPHEN WANYEE GATHUKU.....2<sup>ND</sup> APPLICANT

FRANCIS KIRAGU GATHUKU.....3<sup>RD</sup> APPLICANT

VINCENT MUIGAI GATHUKU.....4<sup>TH</sup> APPLICANT

VERSUS

VIRGINIA WAITHERA GATHUKU.....1<sup>ST</sup> RESPONDENT

SUSAN MUTHONI GATHUKU.....2<sup>ND</sup> RESPONDENT

KIBATHI GATHUKU.....3<sup>RD</sup> RESPONDENT

ROSEMARY WANJIKU.....4<sup>TH</sup> RESPONDENT

TERESIA NYAMBURA.....5<sup>TH</sup> RESPONDENT

DORCAS WACHEKE WANYEE.....6<sup>TH</sup> RESPONDENT

**RULING**

1. From what has been deponed by the applicants Teresia Nyambura, Stephen Wanyee Gathuku, Francis Kiragu Gathuku and Vincent Muigai Gathuku, the deceased David Gathuku Wanyee was their father by his first wife the late Hellen Wanjiku Gathuku. He died intestate on 4<sup>th</sup> July 1975. He was the registered proprietor of Dagoretti/Riruta/61 measuring 7.8104 Hectares. His second wife was the late Virginia Waithira Gathuku and the respondents are her children. Following the death of the deceased, Virginia went to the Nairobi District Land Registry armed with a certificate of succession that had been purportedly issued by the District Magistrate's Court at Sheria House in Nairobi in **Succession Cause No. 30 of 1979** in which the parcel had been determined to be shared among her and her children (the respondents) in respective proportions. The lands registry registered her and her children as proprietors of the respective parcels.

2. The applicants state that Virginia did not file the said cause at Sheria House as alleged, or at all. This is because **Cause No. 30 of 1979** did not relate to the deceased but the estate of Kilonzo Makau. Their case is that Virginia did not file any succession cause following the death of the deceased, and therefore the certificate of succession that was used to transmit the deceased's parcel of land to her and her children was a forgery. A report has accordingly been filed with the police.

3. The deceased's parcel of land has been subdivided, and/or some parcels sold. What is left are parcels Dagoretti/Riruta/5972, 4763, 2391, 5048, 5041, 6712, 5011, 5050, 5049, 4760, 4761, 5974, 5975, 4753, 4762, 4759, 4743, 4756, 5976 and 5977.

4. The applicants filed the present summons on 31<sup>st</sup> July 2019 seeking to annul the certificate in succession dated 10<sup>th</sup> January 1980 under

Virginia; an order to the Chief Land Registrar to revoke the redistribution of titles to the parcels above; and to have the respondents vacate the respective titles.

5. The respondents filed a notice of preliminary objection whose grounds were that:-

(a) Cause No. 30 of 1979 did not relate to the estate of the deceased; and

(b) this court does not have jurisdiction to revoke a certificate of succession issued under **section 12** of the **Registered Land Act (Cap 300) (now repealed)**.

6. Ms. Wangui Kimani and Mr. Mureithi for the respondents filed written submissions on the preliminary objection. I have considered what each had to say.

7. In the word of the applicants, no succession proceedings have been filed in respect of the estate of their late father who died intestate on 4<sup>th</sup> July 1975. No grant of letters of administration has been issued in respect of the estate of the deceased. No certificate of confirmation has been issued. This court cannot be called upon to revoke or annul a certificate of succession that does not exist. To that extent, the summons was misconceived and has to be struck out.

8. It follows that the determination of the issue whether the court has jurisdiction to revoke a certificate of succession issued under **section 120** of the repealed **Registered Land Act** would be an academic exercise, and an exercise in futility in which the court would not like to engage. This is because no certificate of confirmation has ever been issued in respect of the estate of the deceased David Gathuku Wanyee. Once again, no succession proceedings have been shown to have been filed following the death of David Gathuku Wanyee.

9. What is open to the applicants is to sue to recover the deceased's estate from whoever has acquired it without due process. A suit to recover land can only be in a court created under **section 13** of the **Environment and Land Act** and **Article 162(2)(b)** of the Constitution. But that would have to be after the acquisition of capacity to sue under **section 82 (a)** of the **Law of Succession Act**.

10. In short, and for the reasons outlined, the preliminary objection raised by the respondents succeeds.

11. However, given the peculiar facts of this case as shown above, I make no order as to costs.

**DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 8<sup>TH</sup> day of APRIL 2020.**

**A.O. MUCHELULE**

**JUDGE**