



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 979 OF 2000**

**IN THE MATTER OF THE ESTATE OF JACOB KAMAU KIRAGU (DECEASED)**

**KAMAU GITAU.....ADMINISTRATOR/1<sup>ST</sup> APPLICANT**

**JAMES KARIUKI MWAURA.....ADMINISTRATOR/2<sup>ND</sup> APPLICANT**

**VERSUS**

**FRANCIS KAHORA KAMAU.....ADMINISTRATOR/RESPONDENT**

**RULING**

1. The deceased Jacob Kamau Kiragu died intestate on 30<sup>th</sup> March 1971. He had married Wanjiku Kamau, Wangui Kamau and Nyambura Kamau. They have since died. He left parcel Ndeiya/Ndeiya/434 as his estate.

2. In the judgment dated 1<sup>st</sup> February 2005 by Justice Koome (as she then was) a joint grant was issued to Francis Kahora Kamau (representing the house of Nyambura Kamau, Hannah Gathoni Mwaura (representing the house of Wanjiku Kamau) and Joseph Gitau Kamau (representing the house of Wangui Kamau). The grant was confirmed on 20<sup>th</sup> July 2005 following a consent on the distribution of the estate. The terms were that:-

(a) the house of Wanjiku Kamau to get 4 acres to be registered in the joint names of Hannah Gathoni Mwaura and her eldest son James Kariuki Mwaura in trust for themselves and for the other sons of Mwaura;

(b) the house of Wangui Kamau to get 4 acres to be registered in the joint names of Joseph Gitau Kamau and his brother Stanley Muturi Kamau absolutely in common in equal shares; and

(c) the house of Nyambura Kamau to get 5 acres to be registered in the names of Joram Gitau Kamau and Francis Kahora Kamau jointly in equal shares.

3. Hannah Gathoni Mwaura died on 4<sup>th</sup> September 2017 and Joseph Gitau Kamau died on 11<sup>th</sup> May 2011. That left Francis Kahora Kamau as the only administrator. A chamber application was successfully filed on 31<sup>st</sup> October 2018 to replace Hannah Gathoni Mwaura by James Kariuki Mwaura and Joseph Gitau Kamau to be replaced by Kamau Gitau.

4. The present application was filed by the two co-administrators Kamau Gitau and James Kariuki Mwaura to review the certificate of confirmation to amend the distribution in the certificate as follows:-

(a) in the house of Wangui Kamau, the 4 acres that were to be registered in the joint names of Joseph Gitau Kamau and Stanley Muturi Kamau absolutely in common equal shares be amended for the same to be registered in the joint names of Kamau Gitau and John Njuguna Muturi and to be held in trust for themselves and for Joseph Gitau and Stanley Muturi; and

(b) in the house of Wanjiku Kamau, the 4 acres that were registered in the joint names of Hannah Gathoni Mwaura and James Kariuki Mwaura be amended so that the same be registered in the name of James Kariuki Mwaura to hold in trust for himself and the other sons of Mwaura.

The grounds for the application were that Hannah Gathoni Mwaura, Joseph Gitau Kamau and Stanley Muturi Kamau had died; that when the application to substitute the deceased administrators was made, the applicants inadvertently forgot to have the distribution and the certificate of confirmation amended accordingly; the intended amendment affects only the house of Wangui Kamau and Wanjiku Kamau, and that the members of those two houses had consented to the same; and that no prejudice would be occasioned to any party.

5. The application was opposed by the third administrator Francis Wahora Kamau on the grounds that:-

a) Hannah Gathoni Mwaura, Joseph Gitau Kamau and Stanley Muturi Kamau having died, each can only be substituted by a person who is her/her legal representative; and

b) that the original court file in Kiambu Resident Magistrate's Court **Succession Cause No. 129 of 1999 (In the Matter of the Estate of James Kamau Kiragu)** was not available, and therefore the application was premature and unmeritorious.

6. Mr. Kivindu for the applicants and Mr. Njenga for the respondent filed written submissions. I have considered them.

7. It is common ground that the respondent is an administrator representing the house of Nyambura Kamau which got 5 acres. The application does not affect this house, and does not touch the 5 acres allocated to the house.

8. It is also true that, following the death of Hannah Gathoni Mwaura, Joseph Gitau Kamau, and Stanley Muturi Kamau, the beneficiaries of the houses of Wangui Kamau and Wanjiku Kamau cannot access their 4 acres (each house). The beneficiaries have agreed in whose names the parcels should be registered, and the nature of that registration.

9. Strictly speaking, under **Order 45 rule 1** of the **Civil Procedure Rules**, there is no discovery of new and important matter or evidence (because the fact of the deaths was known when the administrators were being substituted); there was no mistake or error apparent on the face of the court; and neither is there sufficient reason (**Muyodi –v- Industrial and Commercial Development Corporation & Another [2006] IEA 243**).

10. Yes, strictly, following the death of Hannah Gathoni Mwaura, Joseph Gitau Kamau and Stanley Muturi Kamau, those to replace them should be their legal representatives, in the sense that they should have a grant. However, under **section 47** of the **Law of Succession Act (Cap 160)**:-

**“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:**

**Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”**

Secondly, **Rule 73** of the **Probate and Administration Rules** provides that:-

**“73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”**

It is my considered opinion that the justice of this case requires that the certificate of confirmation should be amended to give effective remedy to the beneficiaries in the houses of Wangui Kamau and Wanjiku Kamau. The Court of Appeal in **Floris Piezzio and Another –v- Giancarlo Falasconi [2014] eKLR** dealt with the powers of the court under **section 47** of the **Act** and **rule 73** of the **Rules**, and noted that the provisions give the court wide jurisdiction in dealing with testamentary and administration issues of an estate. The provisions are intended to secure and safeguard estates, among other things. I dare add that, where a certificate of confirmation has been issued, the court, using these provisions, has to ensure that the named beneficiaries do access the benefits in the certificate. That access should not be hampered by technicalities.

11. As for Kiambu **Succession Cause No. 129 of 1990**, it is enough to observe that the matter was dealt with when the grant in the cause was revoked by the judgment of Justice Koome on 11<sup>th</sup> February 2005. There was no appeal against the revocation. The respondent cannot raise the same issue in the instant application.

12. In conclusion, the application dated 31<sup>st</sup> January 2019 is allowed with 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**