REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO. 152 OF 2017

IN THE MATTER OF THE ESTATE OF JARED KIMITHI

GATHIAKA alias GERALD KIMITHI GATHIAKA (DECEASED)

ELIZABETH NJERI GATHIAKA.....APPLICANT

VERSUS

KESIAH WANJIKU KIMITHI.....1ST RESPONDENT

EDWARD KAMORE KARIUNGI.....2ND RESPONDENT

JUDGMENT

1. For determination by the court is the summons filed on 23rd April, 2014 seeking that the Grant of Letters of Administration to KESIAH WANJIKU KIMITHI and EDWARD KAMORE KARIUNGImade on 20th September, 2011 be revoked.

2. The Application is based on the grounds that the proceedings to obtain the said grant were defective in substance and that the grant was obtained fraudulently by the concealment from the court of material facts. The application is supported by the affidavit of ELIZABETH NJERI GATHIAKA (the Applicant) who deposed that she was a widow to **Geoffrey Gathiaka**, the deceased son of the intestate herein but her consent was not sought prior to the petition for grant and that her existence as a beneficiary was concealed from the court. Hence the grant was fraudulently obtained.

3. In opposition to the summons several affidavits were filed, and principally by the Respondents **Kesiah Wanjiku Kimithi** and **Edward Kamore Kariungi**(the 1st and 2nd Respondent respectively). The 2nd Respondent deposed that he is the deceased's grandchild and was appointed as a co-administrator with the 1st Respondent by consent of all the beneficiaries including the Applicant who was well aware of the succession cause. He also contended that in the course of the proceedings the Applicant was substituted to represent her deceased husband and was allocated a portion of the land parcel **LR No.MUGUGA/MUGUGA/78** where she currently resides. He denied allegations that the Applicant was unaware of this succession cause and asserted that the Applicant wilfully boycotted family meetings called to discuss the succession cause. The 1st Respondent for her part stated that she and the Applicant resided on the same compound and reiterated that the Applicant was kept updated with the proceedings in the succession cause.

4. In her further affidavit on 21st July 2014 the Applicant asserted that prior to his demise, the deceased herein had made known to the family his wishes concerning the devolution of his estate. She took issue with the appointment of and the 2nd Respondent as an administrator on grounds of priority and repeated that she had not consented to his appointment.

5. Subsequently, the 2nd Respondent filed a supplementary affidavit. He denied allegations that the deceased made his wishes on succession known prior to his demise. He asserted that the Applicant was always updated on the progress of the succession cause. He deposed that all beneficiaries were involved in the distribution of the estate and that the 1st Respondent was in full control of the same. It was contended that land parcel **LR No. MUGUGA/MUGUGA/78** has already been subdivided and the Applicant allocated MUGUGA/MUGUGA/3428.

6. The court directed that the summons be heard by way of viva voce evidence with deponents to affidavits being cross-examined on their affidavits.

7. The Applicant testified as **PW1** and relied on her supporting and further affidavits. In cross-examination she denied attending any family meetings to discuss the succession proceedings herein. She contended that she had sought help from the local administration officials at a

time when the Respondents sought to evict her after her husband's death and that she learnt about the succession proceedings when a surveyor came to carry out survey work on the parcel of land on which she resides. She disagreed with the mode of distribution as adopted claiming that she got a small portion and that the new mode of distribution required her to move to a new site. She also contended that there was introduced at the distribution stage, a sixth beneficiary who is a stranger, one **Jane Mukuhi**.

8. The 2nd Respondent was next, testifying as **RW1.** Under cross-examination he stated that the Applicant did not sign the consent form relating to distribution but explained that the Respondents had included the Applicant's deceased husband's name **Geoffrey Gathiaka** in the summons to confirm the grant and the share due to him. He contended that the Respondents had engaged a surveyor to survey the suit property for parcellation; that the inclusion of Jane Mukuhi did not affect the acreage of the land due to the respective beneficiaries as she was a purchaser who transacted with the 1st Respondent by purchasing a plot assigned to the said Respondent.

9. The 2nd Respondent (**RW2**) also adopted her affidavits. During cross-examination, she stated that the Applicant did not participate in the succession cause herein but she was aware of the cause. She confirmed that the Applicant ought to get the share of land which had been allocated to her in the cause.

10. The parties subsequently filed their submissions. The Applicant submitted that the consent of all dependants is a mandatory requirement and that the Applicant became aware of the succession cause when surveyors visited the site to parcel out the land parcel. It was submitted that the Respondents were under a duty to notify all the beneficiaries and/or issue them with citations prior to filing the Petition for grant. And that it is not a good answer for the Respondents to claim that the Applicant was aware of the cause. Relying on the case **In Re Estate of Wahome Mwenje Ngonoro (deceased) (2016) eKLR,** it was argued that the Respondents were under a legal duty to disclose to the court the Applicant's interest in the deceased's estate. The court was urged to not uphold the resultant sub-division of the suit land as it is adverse to the Applicant's interest and in any case, the grant ought to be revoked as it was fraudulently obtained by the making of a false statement.

11. The Respondents submitted that all the beneficiaries to the deceased's estate save for the Applicant's husband who is deceased gave their consent to the appointment of the Respondents as Administrators and to the mode of distribution and that the Applicant was subsequently substituted in his place. It was contended that the Applicant chose to sleep on her rights despite being updated on the progress of the succession cause. A party cannot seek to benefit from her own misdeeds. The Respondents called to their aid the case of **Gabriel Mbui vs Mukindia Maranya (1993) eKLR** where it was held that a person cannot derive an advantage from his own wrongdoing. They further relied on the maxim that equity does not aid the indolent as emphasized in the case of **Ibrahim Mungara Kamau vs Francis Ndegwa Mwangi (2014) eKLR.**

12. The Respondents took the position that the summons for revocation was not made in good faith and that in any case revocation of the grant herein would be in vain as the estate has already been distributed among all the beneficiaries. It was further submitted that the Applicant has not adduced evidence to support the ground that the grant was obtained fraudulently. The Respondents similarly attacked the Applicant's allegation of material non-disclosure as unfounded. Citing the case of **Agnes Mutitu Mwaura & 2 others vs Jane Njoki Gachoki (2015) eKLR** as to requisite proof, the Respondents argued that the Applicant has failed to prove material non-disclosure by the Respondents and therefore the summons should be dismissed.

13. The court has considered the evidence of the parties and submissions made in respect of the summons for revocation of grant. The undisputed facts of this matter are that Jared Kimithi Gathiaksa, the deceased herein, died intestate on 25th August 2004. He was survived by a widow **Kesiah Wanjiru Kimithi** who is the 1st Respondent. The deceased and the 1st Respondent had five children, namely, **Geoffrey Gathiaka Kimithi**, **Lilian Mwihaki Njoroge**, **Mary Njeri Kairu, Mary Wangui Njogu**, and **Grace Wanjiru Mwaniki.** Geoffrey Gathiaka Kimithi (hereinafter **Geoffrey**) and Mary Njeri Kairu predeceased the deceased herein. **Geoffrey** was survived by his widow Elizabeth Njeri Gathiaka (the Applicant) while Mary Njeri Kairu was survived by Edward Kamore Kariungi (the 2nd Respondent).

14. On 7th March 2011, the 1st and 2nd Respondents petitioned for letters of administration intestate listing all the children of the deceased, both living and deceased. The consent to the making of the grant was signed by the surviving children of the deceased, namely, Lilian Mwihaki Njoroge, Mary Wangui Njogu and Grace Wanjiru Mwaniki.The assets comprising the deceased's estate were listed as the following land parcels:

a) LR. No.Muguga/Muguga/734

b) LR. No.Muguga/Muguga/78

c) LR. No. Gilgil/Karunga 9/13

d) LR. No.Gilgil/Karunga 9/5

15. On 20th September 2011 a grant issued to the Respondents and on 16th July 2012 the Respondents filed a summons to confirm the grant, which again listed all the living and deceased children of the deceased, and the widow and child of the two deceased children, namely **Geoffrey** and **Mary Njeri Kairu**. The living children executed consents in Form 37. The affidavit in support of summons for confirmation of grant of administration intestate (Form 9) also listed the surviving and deceased children of the deceased, and further stated:

"3 The deceased was survived by the following other dependents;

a) EDWARD KAMORE KARIUNGI Son of MARY NJERI KAIRU (DECEASED)

b) NJERI GATHIAKA wife of GEOFFREY GATHIAKA KIMITHI (DECEASED)"

16. The mode of distribution in the application indicated shares due to the widow, the living and deceased children of the deceased. When the summons came up for hearing on 29.10.12 before **Mugo J** counsel for the Administrators stated inter alia that:

> **"My clients are in court but 2 beneficiaries have since died and the family has agreed that their children inherit their shares."**

Whereupon the court directed as follows:

> **"The court notes that the deceased beneficiaries are named as heirs and shares attributed to them for distribution. A [Further affidavit] and consent to be filed as appropriate and afresh date be taken in the registry."**

17. Thus, on 4th December 2012 a further affidavit and a consent executed by four beneficiaries were filed in compliance with the order of the court. The affidavit referred to the application to confirm the grant and stated that all the beneficiaries had given their consent to the mode of distribution but that two beneficiaries namely Geoffrey Gathiaka Kimithi and Mary Njeri Kairu were deceased. At paragraph 7 the deponent stated that:

> **"THAT consequently we have all agreed that GEOFFREY GATHIAKA KIMITHI and MARY NJERI KAIRU be substituted with NJERI GATHIAKA and EDWARD KARIUNGI KAMORE respectively to represent their families as per the annexed duly executed consent."**

18. The beneficiaries who signed the consent are Keziah Wanjiku Kimithi, Lillian Mwihaki Njoroge, Mary Wangui Njogu and Grace Wanjiru Mwaniki. On 4th February 2013 **Kimaru, J** confirmed the grant in the presence of four of the beneficiaries, in accordance with the mode of distribution contained in the affidavit in support of the summons. According to the certificate of confirmation of grant subsequently issued the deceased's assets were distributed as follows:

a) Muguga/Muguga/734 -Portion of 0.1 ha each to Keziah Wanjiku Kimithi and Mary Wangui Njogu;

b) Muguga/Muguga/78-

(i) Keziah Wanjiku Kimithi - 0.2 ha;

(ii) Lillian Mwihaki Njoroge - 0.1 ha;

(iii) Mary Njeri Kairu - 0.1 ha;

(iv) Geoffrey Gathiaka Kimithi - 0.1 ha;

(v) Grace Wanjiru Mwaniki - 0.1 ha;

c) Gilgil/Karunga 9/13-

(i) Keziah Wanjiku Kimithi - 0.2 ha;

d) Gilgil Karunga 9/5-

Mary Njeri Kairu - 0.2 ha.

19. More than a year later the Applicant filed the present summons for revocation. **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)…."**

20. According to the Applicant the proceedings to obtain the grant were defective in substance as her consent as the widow of **Geoffrey** was not sought both at the initial stage and during confirmation of the grant and that the administrators concealed that she was a beneficiary to the estate. First of all, on the latter ground, a perusal of the proceedings and filings herein indicates that there was no attempt to conceal the existence of the Applicant. The chief's letter filed with the Petition for grant includes the Applicant as a widow representing the deceased son of the intestate known as Geoffrey and Geoffrey is listed among the children of the deceased. Moreover, the affidavit to support the summons to confirm the grant (Form 9) also reflected all the living and deceased children of the deceased and further listed the Applicant and the 2nd Administrator as those surviving the deceased children of the deceased herein. Their portions were set out in the mode of distribution.

21. It is true however that among the persons who executed the consent to the making of a grant, the Applicant was not included. The Applicant's counsel has anchored her submission on the provisions of Rule 26 of the Probate and Administration Rules (P & A Rules) to argue that the consent of all dependents or other persons beneficially entitled was mandatory to the making of the grant. It is important to clarify that the Applicant was not a biological child of the deceased. Secondly, that this cause relates to the estate of **Jared Kimithi Gathiaka** and not **Geoffrey Gathiaka** and thirdly, that Rule 26 (1) and Rule 7 (7) of the P & A Rules must be read in their entirety and together with Section 66 of the Law of Succession Act. The latter section provides that:

> **"When a deceased has died intestate, the court shall, save as otherwise expressly provided, have final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—**
>
> **(a) surviving spouse or spouses, with or without association of other beneficiaries;**
>
> **(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V; [Rev. 2017] Law of Succession CAP. 160 27**
>
> **(c) the Public Trustee; and**
>
> **(d) creditors:**
>
> **Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will."**

22. The requirement for notice to other persons in Rule 26(1) of the P & A Rules applies only where the applicant is entitled *in the same degree or in priority* with such other persons. Rule 7(7) of the P & A Rules provide that:

> **"Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has—**
>
> > **(a) renounced his right generally to apply for a grant; or**
> >
> > **(b) consented in writing to the making of the grant to the applicant; or (c) been issued with a citation calling upon him either to renounce such right or to apply for a grant."**

23. It is clear from section 66 of the Law of Succession Act that a surviving spouse ranks highest among persons to be given preference in the appointment of administrators to the estate of an intestate. Such spouse may apply and be appointed with or without association of other beneficiaries. Second in priority are other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided in Part V of the Act. Under Part V, the spouse surviving the intestate takes priority even where the intestate is also survived by children. Section 35 of the Law of Succession Act which is applicable to the instant case provides that the surviving spouse is entitled to:

> (a) the personal and household effects of the deceased absolutely; and
>
> (b) a life interest in the whole residue of the net estate.

24. While the life interest determines on re-marriage if the surviving spouse is a widow, if the surviving spouses remains unmarried, she has power by virtue of subsection (2) of appointment of all or any part of the capital of the net estate by way of gift taking immediate effect among the surviving child or children of the deceased. However, there is liberty to apply where a child considers that the power has been unreasonably executed or withheld. As regards the powers of a spouse during life interest, Section 37 of the Law of Succession Act provides that:

> **"A surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:**
>
> **Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court".**

25. Similarly, the wife and children of a deceased person are his automatic dependents by virtue of Section 29 of the Law of Succession Act. Reading the foregoing provisions alongside Rules 7(7) and Rule 26(1) of the P & A Rules, it is evident that the Applicant was not entitled in the same degree of priority to the 1st Respondent, as far as appointment as administrator is concerned. With regard to the 2nd Respondent, he is beneficially entitled under the principle of representation found in Section 41 of the Law of Succession Act, to stand in the place of his parent who predeceased the intestate herein i.e Mary Njeri Kairu. It appeared from some of the Applicant's depositions that she believed that the male child of the deceased (her husband) and by extension herself, occupied a higher status than the female children. There is no legal basis for such a view as all children of a deceased person rank equally before the law.

26. In view of the foregoing there was no legal requirement for the 1st Respondent to give notice under Rule 7(7) of the P & A Rules to the Applicant or to comply with the requirements of Rule 7(7) prior to obtaining the grant in respect of her deceased husband's estate. The person applying for a grant is required by Section 51 and Rule 7 of the P&A Rules to disclose certain key facts in relation to the deceased such as the deceased's full names, date and place of death, last known place of residence, the Applicant's relationship to the deceased and whether or not he left a valid will. Sections 51(2)(g) provides that ***"in cases of total or partial intestacy the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased"*** be provided in the application for a grant. As the court already observed, in relation to the Applicant herein, the necessary disclosures had been made in the Petition. It is apparent that the Applicant herein was particularly irked by the inclusion of the 2nd Respondent as a beneficiary and his appointment as an administrator, arguing that he ranked lower in priority and was not entitled to an inheritance. These arguments do not hold water, given the provisions of the law considered above. And for a further reason, which the Applicant admitted in her own affidavit evidence.

27. It was the Respondents' case that all along, the Applicant was aware of this succession cause, contrary to her assertions. The beneficiaries Kesiah Wanjiku Kimithi, Grace Wanjiru Mwaniki (and her husband Patrisio Mwaniki), and Lilian Mwihaki Njoroge all swore affidavits in response to the summons to revoke grant, confirming that the Applicant was aware of the succession cause and was kept informed up until the grant was confirmed and further that, in a meeting of the members of the family of the deceased it had been resolved to have the 2nd Respondent appointed as a joint administrator with the 1st Respondent. It would seem from the annexure **EKK1 a**ttached to the replying affidavit of the 2nd Respondent filed on12/5/2014 and admitted by the Applicant, the issues relating to the succession of the deceased herein had been simmering since 2008. **EKK1** is a copy of a summons dated 14th July, 2008 issued by the Assistant Chief Muguga Sub- location to the 1st and 2nd Respondents and the living children of the deceased and stated in part:

> **"You're all hereby required to report at Kiambaa post before the undersigned, on Friday the 18th of July 2008 at 9.00 a.m. without fail. This is in connection with a dispute lodged in this office relating the succession of the late Gerald Kimithi. With you be accompanied by other members of the family and 2 elders of your choice. Failure to comply, further legal actions can be taken against you"** (sic).

28. This cause was not filed until March 2011. According to the affidavit of the 2nd Respondent this filing was preceded by family meetings whose secretary was the Applicant's son **Dancun Ndegwa Gathiaka** and who was the second guarantor (with **Patrisio Njeru**) to the petition filed herein. At paragraph 8 of the 2nd Respondent's affidavit, the deponent asserted that he was proposed in a family meeting to be a co-administrator to the 1st Respondent with the consent of family members and that the Applicant had willfully boycotted family meetings. This resolution is supported in the affidavit evidence of the other beneficiaries.

29. In her affidavit filed on 21st July, 2014, the Applicant asserted that the 2nd Respondent was a stranger to the estate and further stated that:

> **"…I did not consent to the appointment of the 2nd Respondent as an administrator of the estate of the deceased as (I) had left the meeting and it is evident. … I boycotted the alleged meeting after I realized that the Respondents had hatched a plot to defraud me after they asked that the beneficiaries raise an amount of Kshs.120,000/= as costs for the petition herein and I was required to contribute an amount of (Shs.) 60,000/= thereof."**

30. Concerning the involvement of his son in the family meetings and acting as surety in respect of the petition for grant, the Applicant dismissed her son as depressed and a drunkard who eventually committed suicide. Under cross examination, she was hard pressed to explain how she was unaware of the filing of the Petition when a member of her household was involved. She however admitted that way back in 2007, she had already placed a caution against the land parcel **LR No. Muguga/Muguga/78** which was intended to **"ensure dialogue… before any transfer of the property".**

31. Under cross examination during her testimony, the Applicant attempted to deny her own depositions to the effect that she had attended a family meeting called to discuss succession proceedings and had left the meeting and boycotted such other meetings. She also claimed that her son had died in 2009, which cannot be true as the affidavit of justification of proposed sureties was dated 3rd January, 2011. Having decided not to participate in the family meetings where the family resolved to have the 2nd Respondent apply for the grant alongside the 1st Respondent, the Applicant cannot be heard to contradict those who participated in the deliberations she had boycotted. By her own admissions, she was aware that the family was preparing to file the succession cause but seemingly did not attempt to get involved. As one who had taken steps to file a caution in respect of an asset of the estate and to involve the local administration, it is surprising that the Applicant evidently sat back and waited until the family completed the succession process before taking any step in the succession cause. One would be forgiven for thinking that her the intention was to scuttle the entire process.

32. The Respondents assert that they kept the Applicant informed on the progress of the case. Although it seems that such communication may have been verbal, it unlikely that the Applicant's son **Dancun Ndegwa** who acted as surety in the cause could have failed to update her on the process which she had already become aware of prior to boycotting family meetings.

33. Despite the foregoing and the Applicant's affidavit evidence, the Applicant was to assert before this court during cross examination that:

"I only learned above the succession proceedings when surveyors came to the land".

34. This would be in 2014, on the available material. In light of the facts and admissions by the Applicant, it cannot be true that she learned about the succession cause in 2014. During her testimony, the Applicant appeared evasive when confronted with facts she considered inconvenient at the time, the most telling being her denial of averments contained in her affidavit. Weighing the Applicant's testimony, it was difficult to conclude that it was believable. The onus of proof under sections 107 and 108 of the Evidence Act lay with the Applicant but has not been discharged. The court has no reason to disbelieve the evidence of the 1st Respondent especially, who lives on the same compound as the Applicant, to the effect that while the Applicant refused to participate in the proceedings she had briefed her about the same and ensured that she was assigned a share of the land. It seems probable that the Applicant while resting her confidence in the caution she had secretly filed, had deliberately resolved to stay away from the proceedings in the mistaken belief that her interests were secured. The Applicant cannot benefit from her own default and/or indolence.

35. As succinctly stated by **Kuloba, J** (as he then was) in **Gabriel Mbui v Mukindia Maranya [1993] e KLR:**

> **"No one can improve his condition by his own wrong. The latin of it is *Nemo ex suo delicto meliorem suam conditionem facere potest*…it is an ancient dictum of our law, that a person alleging his own infamy is not to be heard. People whose wisdom I cannot profane by making modern comparisons to them abbreviated their wisdom in the saying, *Allegans suam turpitudinem non est audiendus*…. By which they meant that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a right or claim. No one shall be allowed to set up a claim based on his own wrongdoing. A person cannot take advantage of his own wrong and in equity, the maxim holds good that he who comes into equity must come with clean hands… *Null prendra advantage de son tort demesne*… meaning no man shall profit by the wrong that he does, and *Nullus commodum capere potest de injuria sua propria*… which means, no one can gain an advantage by his own wrong."**

36. The foregoing appears to describe the conduct admitted by the Applicant in her further affidavit filed on 21st July 2014. As a result of her own chosen inaction, the Applicant did not take advantage of the provisions of the Law of Succession enabling her to object to the making of a grant, file a caveat or protest. And while it is true that the Applicant's consent as a person beneficially entitled in terms of Rule 40(8) of the P&A Rules ought to have been obtained and filed, the court was on 4.2.13 satisfied that the requirements of the orders of 29.10.12 had been met, and proceeded to confirm the grant.

37. The Applicant by her own conduct of failing to follow up with the succession cause, denied herself the opportunity to raise a protest to the confirmation of the grant and the issues she is now raising concerning the fairness of the mode of distribution of the estate come too late in the day and are based on a misapprehension of the law. In any event, all the living children of the deceased got equal shares of the estate as the Applicant's deceased husband Geoffrey while the deceased's widow was allocated a larger portion of the estate, and she subsequently sold one of her plots being a subdivision of **LR No. Muguga/Muguga/78** to one **Jane Mukuhi** . The widow was within her rights to do so as the property had vested upon her absolutely under the confirmed grant. She also benefitted, with the 2nd Respondent from shares in land parcels in Gilgil which the Applicant does not recognize as forming part of the estate of the deceased and therefore not in contention. On all accounts, the distribution of the estate was in compliance with the law and on the face of it equitable.

38. The Applicant appears to labour under the erroneous view that her deceased husband being the only son of the deceased was entitled to a larger share of the estate and that the 2nd Respondent was not entitled to inherit his deceased mother's share. The 2nd Respondent's affidavit filed on 30th July 2014 indicates that the land parcel **LR**. **No. Muguga/Muguga/78** has already been sub-divided reducing slightly the allocations of **all** the beneficiaries due to the creation of an access road. A portion measuring 0.093ha which is also the size of the portions to other beneficiaries has been reserved for the Applicant despite the fact that she did not contribute to the subdivision costs and admittedly refused to contribute any funds to the succession process.

39. Courts do not act in vain and one who comes to equity must do equity. Revoking the confirmed grant in this case would not only put the parties to unnecessary expenses, but it would also result in further delay to the conclusion of the administration of the estate herein. It is quite unlikely that the outcome of the distribution of the estate would change given position of the parties, the applicable law and principles governing intestate succession. In my considered view, the justice of the case lies in disallowing the summons for revocation so that the administration of the estate of the deceased who died almost 17 years ago can be completed.

40. The only intervention that the court considers necessary to facilitate that process is the rectification of the certificate of confirmation of grant issued on 4th February, 2013, in order to substitute the deceased beneficiary **Geoffrey Gathiaka Kimithi** with **Elizabeth Njeri Gathiaka** the Applicant herein, and the deceased beneficiary **Mary Njeri Kairu** with **Edward Kamore Kariungi** the 2nd Respondent herein, as had been proposed in the administrators' affidavit filed on 4th December, 2012. A rectified certificate of confirmation of grant in these terms will issue accordingly. Parties will bear own costs.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 16TH DAY OF JULY, 2020.

C. MEOLI

JUDGE