



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 1173 OF 2010**

**IN THE MATTER OF THE ESTATE OF NDIRANGU WAWERU ALIAS NDIRANGU WAWERU MANGURIA(DECEASED)**

**MERCY MUTHONI MUTHUNGI.....PETITIONER/OBJECTOR**

**VERSUS**

**WAWERU NDIRANGU WAWERU.....1<sup>ST</sup> RESPONDENT/PETITIONER**

**JOSEPH WAWERU NDIRANGU.....2<sup>ND</sup> RESPONDENT/PETITIONER**

**JUDGMENT**

NDIRANGU WAWERU alias NDIRANGU WAWERU MANGURIA (deceased) died on 31<sup>st</sup> July 1992 and was survived by three sons and two daughters all aged between the ages of 87 years and 65 years.

Waweru Ndirangu Waweru

John Mutungi Ndirangu

Nyakinyua Gitahi Kamoni

Joseph Waweru Ndirangu

Agatha Wanjiku Wanjohi.

He was the registered proprietor of LR TETU/UNJIRU/92 approximately 4.5 acres. Waweru Ndirangu Waweru and Joseph Waweru Ndirangu were granted letters of administration intestate on 13<sup>th</sup> May 2011 and sought confirmation vide summons dated 10<sup>th</sup> January 2012 indicating that the other beneficiaries had consented to the same.

A certificate was issued on 14<sup>th</sup> December 2012 with the two being the beneficiaries of the estate at 2.2 and 2.3 acres respectively.

On 24<sup>th</sup> January 2014 Mercy Muthoni Mutungi filed Summons for revocation of the grant on the ground that John Mutungi Ndirangu , who was her father and suffered mental disability had been excluded leaving essentially leaving her and her brother Charles Mbogo Mutungi destitute.

That they had not been involved in the cause and the grant was obtained by way fraud the petitioners having concealed this crucial information from the court.

Further that this same ‘mentally retarded’ John Mutungi had married her mother under Kikuyu Customary Law, and paid dowry. It is noteworthy that the document showing payment of dowry shows that John Mutungi Ndirangu went alone from his side of the family, to pay dowry to Samwel Waicigo Kahihia father to Margaret Mumbi on 8<sup>th</sup> November 2003 .The only witnesses to this were members of Margaret’s family.

She also deponed that when her mother was admitted in hospital in 2007, the 1<sup>st</sup> respondent, his son Daniel Mutungi Waweru and John Mutungi had signed a commitment and liability document for the Ksh 125,000 she had incurred. This is n record .The receipts show that the same was paid but they are in the names of Margaret Mumbi Mutungi. The respondents contended that they were tricked into making the said commitment

By the time the protest was filed the land had been partitioned into two portions Tetu/Unjiru/3062 and 3063 which she asked to be cancelled.

In his replying affidavit Waweru Ndirangu Waweru deponed that his father had two wives who pre deceased him. That John Mutungi was of unsound mind. That the deceased divided his land into two leaving a will that he be buried between the two parcels, and the land be inherited by the two petitioners while Waweru Ndirangu Waweru would take care of his brother John. That he had his own land in Shamata and it only after his parents had died that he came for John.

He stated that after the death of his parents, around 2006, one Margaret Mutungi came looking for work. She came with two children a 'boy in class 5 and a fully grown girl'. She began to pretend to be Mutungi's wife, helping him. This turned into mistreatment when she began to collect the tea money. She tried to trick him into a marriage but the family found out and cancelled the wedding. They found out that she was the wife of one David Mahinda. When she died, she was buried at her home in Kigwandi. That after her death the applicants continued to live with the John but mistreated him, refused to feed him, overworked him, denied him tea proceeds, leased out the land until the elders asked him to get his brother which he did, and took over the land, leaving the applicant and the brother occupying his mother's house and about ¼ acre of land.

In response Mercy swore an affidavit on 13<sup>th</sup> March 2014 to the effect that the 1<sup>st</sup> respondent took away her father on 6<sup>th</sup> October 2010, three years after the death of her mother. That John had paid dowry for her mother and that he attended her mother's burial.

During the hearing the respondents who had been served with hearing notice did not show up. Mercy and her brother Charles testified and called one witness. The court summonsed the Chief Kagogo-ini where the deceased hailed from.

The only issues for determination are whether there is evidence that John Mutungi is 'mentally deformed' or 'mentally retarded' as alleged by the protester. (I must state here that it is unfortunate that the protester has not found better terms with which to describe her 'father's' condition e.g mentally challenged.); whether the protesters are children of John Mutungi; whether they are beneficially entitled to a share of the deceased's estate; whether the grant should be revoked.

The protester has brought this application on behalf of John Mutungi, whom she claims is her father and who she alleges is 'mentally deformed'. From the word go she asked that the respondents to produce him in court so that he could speak for himself. The 1<sup>st</sup> respondent described him as being of unsound mind and PW2 testified that he was mentally challenged and did not understand things easily, while at the same time saying that he had his own tea bushes, tea account, dairy cattle and raised and educated the protester and her brother. The witness statements by the respondents' witnesses also indicated that John Mutungi had some mental disability. That it was on the basis of that a wedding between him and Margaret the protester's mother, scheduled at the local Catholic Church was cancelled.

The record however shows that on 14<sup>th</sup> December 2012, when the grant was confirmed, all the beneficiaries were present and there was no indication that among them there was one who was mentally challenged and who would take care of his interests. To that extent there was a degree concealment of crucial information from the court. From the evidence before this court it is a fact that John Mutungi has some kind of mental disability. However, it is the degree that has not been established to create sufficient concern to warrant the drastic act of revoking the grant. If John had the capacity to pay dowry for Margaret by himself, to have planted tea bushes 1099 in total in 1973 and to run the tea farm with cattle as well, to raise and educate the protester and her brother, to give consent to the grant, all this appears to be inconsistent with his being 'mentally deformed or retarded'. It gives the impression that he would still be capable of stating his own case through his own affidavit to refute or confirm the claims that he was in any way related to the protester and her brother.

On the other hand, no will was produced or attached to the petition to confirm the respondent's averments that the deceased left a will bequeathing the land to the respondents. But, if the protester expects the court to deal with her as the representative of John Mutungi as being 'mentally deformed' according to her description, then she ought to have taken the appropriate steps under the Mental Health Act cap 248 to be appointed his guardian. Without that power she cannot act on his behalf while describing him in such a horrendous manner.

Is the protester a daughter of John Mutungi?

That is disputed. The evidence on record is that she came to the deceased's home in the company of her mother and her brother, a fact she has not elaborated to this court. The fact that her mother was buried at her father's home in Kigwandi and not on this land creates a certain doubt as to whether the relationship between John Mutungi and her mother was that of husband and wife. Secondly, if he was indeed 'mentally deformed' 'mentally retarded', as she states in her documents, they could not have been dependent on him. In any event we are not dealing with the estate of John Mutungi, but that of his father.

Is she beneficially entitled to the estate of Ndirangu son of Waweru?

The protester is not beneficially entitled to the estate of Ndirangu Waweru. She is neither a child nor a dependant of the deceased as envisioned by s. 29 of the law of succession Act:

## 29. Meaning of dependant

For the purposes of this Part, "**dependant**" means—

*(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*

*(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased*

*immediately prior to his death; ...*

The protester is not saying that the deceased had taken them in as his children but that it is the deceased's son who had done so. The basis for laying a claim to the deceased's estate is their alleged relationship to John Mutungi which does not give them a claim to his estate as long he is still alive, or until they can establish that his case is covered under the Mental Health Act.

It is however admitted by the respondents that the protester and he brother are still living on the land. That they were there by virtue of the relationship between their mother and the deceased and even when they took away their brother John Mutungi, they left the protester occupying some of the land. Hence it is possible this was in recognition of the fact that the two depended on what John Mutungi was depending on.

Had the respondents revealed to the court the fact of John Mutungi's disability, the certificate of confirmation of grant would not have issued in the manner in which it was issued. This is because the deceased died intestate, was survived by his children his spouses having pre deceased him. His estate then fell under the provisions of s. 38 of the Law of Succession Act, whereby his estate ought to be shared equally among the five children. It appears that the other beneficiaries consented to the respondents inheriting the entire property but by their own admission after the fact John Mutungi could not have done so, rendering them guilty under s. 76 of the Law of succession Act

*(b) that the grant was obtained ...by the concealment from the court of something material to the case;*

It is on the basis of this that I make the following orders only in the interests of justice :

1. That the protest as filed fails
2. That the grant issued to the respondents on 13th November 2011 and confirmed on the 14<sup>th</sup> December 2012 is revoked.
3. That a fresh grant to issue to the respondents.
4. That the title Tetu/Unjiru/3062 and 3063 to revert to Tetu/Unjiru/92 in the name of the deceased herein. This order be served on the Land registrar to enforce.
5. That Tetu/Unjiru/ 92 be shared equally among the respondents and their brother John Mutungi Ndirangu at 1.5 acres each.
6. That John Mutungi Ndirangu's share be held in trust for him by the first respondent
7. That each party to bear its own costs.

**Dated, delivered and signed at Nyeri this 18<sup>th</sup> Day of January 2019.**

**Mumbua T Matheka**

**Judge**

In the presence of:

Mr.Kingoina coming on record for 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

Mercy- present

Court Assistant-Emmanuel

Right of Appeal in 30 days.

**Mumbua T.Matheka**

**Judge**

**18/1/19**