



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2157 OF 2013

JUDGMENT

BACKGROUND

1. The deceased to whom these proceedings relate **John Kangethe Waithaka** died intestate on 23rd September 1989. On 20th February 1992 **Edith Wanjiru Kangethe (widow)** and **David Koine Kangethe (son)** petitioned for grant of letters of administration in Githunguri SRM's Court Succession Cause no. 6 of 1992. The same was gazetted in Kenya Gazette No. 1133 on 27th March 1992. The properties listed as per the petition are; **Githunguri/ Nyaga/15, Githunguri/Nyaga/739, Njiru Farmers 3 Shares, Kimuchu Farmers 3 Shares, Rioki Farmers 2 Shares and Breweries Shares**1.

2. On 18th November 1992 **Jane Wanjiku Wathigo** alias **Jane Wanjiku Kangethe (widow now deceased)** and **Patrick Githinji Wathigo** alias **Patrick Githinji Kangethe (son)** raised an objection to the making of the grant on grounds that they feared that their interests were not represented. They further filed a cross-petition on the same date seeking to be appointed as the administrators. Via his affidavit of protest dated 10th December 1993 **Thendu Mbugua** avers that he purchased 1 acre from the deceased John Kangethe Waithaka from parcel no. **Githunguri/Nyaga/15**. That later he purchased another ½ acre from Peter Mbugua Kangethe and another ½ acre from Josephat Ndichu Kangethe in their respective beneficial shares. That at the time of confirmation of grant the administrators failed to include his name or indicate his interest as purchaser of the 2 acres from **Githunguri/Nyaga/15**. The grant of letters of administration was issued to **Edith Wanjiru Kangethe, Jane Wanjiku Kangethe, Patrick Githinji Wathigo** and **David Koine Wathigo** on the **13th January 1993**. Various applications were made by the beneficiaries to confirm the grant. There was the application made on the 17.10.93 by Ndichu Wathigo, another on the 4.5.95. The trial court gave the parties a month from the 20.6.1996 to deliberate on the appropriate schedule. The parties failed to agree and the case was heard. On the 5.12.1996 the interested parties Thendu Mbugua and James Ndichu Mungai were joined as beneficiaries to the estate.

3. The case was heard. The following persons testified **Edith Wanjiru**, she sought to have the deceased's estate divided into 3 equal portions and opposed the proposal that Patrick gets the share of Jane Wanjiku (deceased). **David Koine Wathigo** supported the proposal of Edith and admitted that Ndichu his brother sold a portion of the land and denied knowing the interested parties. Edith and David testified as applicants. The protestors were **Miriam Wangui Kangethe** and **Patrick Githinji Wathigo**. Miriam testified that Patrick is her son and that the deceased had shown his wives where to utilize. That Jane's wishes before she died was that Patrick utilizes the house he built her and that the estate benefits Patrick. She denied selling land to John Njenga but admitted John was her late son's friend (Peter Mbugua) and that Peter brought John Njenga into the land of the deceased. She did not witness any transaction of Josephat Ndichu Wathigo selling any land of the deceased. During cross-examination she admitted that Patrick Githinji should step into her shoes as she was illiterate. Patrick testified that he represented the house of Jane, that he took care of her and constructed her house. That on the 25.7.96 Jane testified that he should inherit her share, though Jane had no title. He admitted seeing John Njenga till their land. His late brother Peter did not inform him of any sale of the land. During cross-examination he admitted that his brother's had no right to sell the deceased's property. The interested party John Njenga testified that he bought ¼ acre from Miriam Wangui Kangethe at Kshs. 50,000/- and Mbugua Wathigo son of Miriam sold an acre to him. He also bought an acre from Josephat Wathigo. He sought to give what he bought from estate. He produced the agreements he had with vendors. The trial court in its judgment held that Jane Wanjiku was deceased and since she died childless Patrick could not inherit what he called her portion. That at the time Jane made her alleged wish she did not have the legal ownership of a title to gift Patrick any land. The court found that Patrick and Miriam's proposal lack any legal backing and that Patrick cannot benefit twice from the estate. On the interested party's claim the court held that the interested party had demonstrated that he was in occupation of some land which forms the deceased's estate. That though he bought the land those who sold to him had no legal capacity to do so. The court held that he was not a dependent of the estate nor was he protected by the Act. It was further held that the deceased was polygamous, his estate would be subject to the provisions of section 40 of Cap 160, and it was held that the estate be divided equally into 3 equal shares with the administrators holding the 1/3 share on behalf of their houses. The grant was confirmed as per the judgment dated the 12.7.2007. What followed thereafter was an application to have the names of the beneficiaries rectified and to have Patrick Githinji Wathigo sign the transfer documents to facilitate the sub-division and transmission of the deceased's estate. The application was granted on the 24.7.2008.

APPLICATION

4. The application for consideration before this court is the summons dated 27th August 2013. The application is brought under Section 76 of the Law of Succession Act (the Act) and Rule 44(2) of the Probate and Administration Rules (Rules). The applicant seeks for orders that;

- i. That the grant of letters of administration made by the Senior Resident Magistrate's court at Githunguri in SRM Succession

Cause No. 6 of 1992 to **Edith Wanjiru Kangethe, Jane Wanjiku Kangethe, Patrick Githinji Wathigo and David Koine Kangethe** on 13th January 1993 be annulled and or revoked.

ii. That costs of the application be provided for.

5. The application is based on grounds that; the grant was obtained by making false statements and by concealment from court of relevant material to the case. That the said grant was obtained without any citation being served upon the applicant herein. That the respondents took advantage of her illiteracy and old age to obtain the grant to her disadvantage. That the respondents did not seek her advice on the distribution of the property being one of the deceased's surviving widows. That the respondents are planning to evict her from her husband's property. Further, that they have falsely stated that she has agreed to hold the property for her children who are already adults and proceeded to hurriedly process fresh title deeds in the wrong names Miriam Wangui Kangethe instead of Maria Wangui Kangethe. That the respondents are in the process of transferring all the property she purportedly holds in trust for the children some of which they have since sold to third parties. She urges the court to intervene and protect her interest.

6. In her affidavit in support of the application, the objector Maria Wangui Kangethe avers that the deceased had 4 wives namely **Jane Wanjiku Kangethe, Maria Wangui Kangethe, Muthoni Kangethe and Edith Wanjiku Kangethe**. That all but herself are since deceased. She avers that the deceased was survived by the following assets;

- i. Githunguri/Nyaga/15
- ii. Githunguri/Nyaga/739
- iii. Shares in Njiru Farmers Co-op Society
- iv. Shares in Kimuchu Farmers' Co-op Society
- v. Shares in Rioki Farmers Co-op Society
- vi. Shares in Kenya breweries Limited

7. Edith Wanjiku Kangethe, Jane Wanjiru Kangethe and Patrick Githinji Wathigo and David Koine Kangethe petitioned for a grant and on 31st July 2008 they were granted a grant of letters of administration in regards to the deceased's estate. She avers that the said grant was obtained by concealment of material facts. The grant was subsequently confirmed dividing the deceased's estate into 3 equal portions to be held in trust for the beneficiaries by the said administrators and herself. She avers that the administrators took advantage of her old age and proceeded with the distribution without her approval. Further, that the administrators have failed in the administration of the deceased's estate and have failed to render a true account on their dealings with the deceased's estate. That they have resorted to disposing of the deceased's estate by way of sale without regard to the interests of other beneficiaries and have threatened to evict her. That it would be in the interest of justice to annul the grant so that her interest as a widow is addressed.

8. Patrick Githinji son to the deceased in his replying affidavit dated 23/2/2015 avers that David Koine son to Edith Wanjiru Kangethe petitioned for grant of letters of administration without informing the other wives. That he only learnt of the same from the gazette notice. That during the same year he and Edith were summoned before the said court and were enjoined as administrators in the succession cause and were issued with a grant of letters of administration on 13th January 1993. He avers that before his demise the deceased had subdivided parcel no. **Githunguri/Nyaga/15** amongst his 4 wives. That after subdivision his father had asked all to settle on their portions and the portion belonging to Muthoni Wathigo was occupied by her children since she had died in 1972 and parcel **No. Githunguri/Nyaga 739** remained as it was since the family of the late father was residing there. That in 1979 his father showed him, where to plant some 1000 coffee bushes which he did. His father showed him the portion belonging to Jane Wanjiku. He cultivates the parcel of land till now. That before Jane died she told the magistrate at Githunguri that if she died before the completion of the succession cause, Patrick should get her portion of the land as he had taken care of her and that Patrick should represent her in court. Jane died on the 26/10/1996 whilst under the care of Patrick. That in 1981 he moved from Githunguri/Nyaga 739 and settled at Githunguri/Nyaga 15 the portion measuring 0.55 acres from the parcel given to Maria Wangui Kangethe as per the court order in its judgment dated 27th October 1981. That David Koine and Edith Wanjiru Kangethe (deceased) brought a private surveyor on 21/11/2008 to subdivide parcel no. Githunguri/Nyaga 15 and in the process interfered with his compound his pit latrine and a permanent zero grazing shed. He stated that the new boundaries as put cut through his permanent house and water well. Further, that they destroyed the boundary that divides Maria Wangui's portion and late Muthoni's children and claimed that they sold the portion belonging to him to Samuel Kangere Gatoto who built on the same. That when they distributed the parcels Githunguri/Nyaga 5 and Githunguri/Nyaga 739 they did so against the will of the district land surveyor's office in Kiambu. That despite the two parcels of land David Koine in collaboration with Edith Wanjiru Kangethe and her daughter Elizabeth Wangui Kangethe have not considered any other property belonging to the deceased namely;

- i. Posho mill**
- ii. Money held at the bank**
- iii. 3 plots in Njiru**
- iv. Kimuchu Thika Parcels of land and 2 plots**

4. That it was their intention to sell their father's property for their gain instead of the rightful heirs. That they had collected money from foreign people who occupy more than $\frac{3}{4}$ acre of the parcel of land Githunguri/Nyaga 15 and Githunguri/Nyaga 739 and have sold a plot in

Thika 1449 measuring 0.0800 Ha which was sold by David Koine Wathigo and Elizabeth Wangui Kangethe to St Peter Archillies Kiwanuka Church of the Archdiocese of Nairobi. He urged the court to stop them from selling any more of the deceased's property.

5. David Koine Wathigo in his replying affidavit 27/9/2013 denied the allegations made adding that the applicant's son had been served with a similar application for revocation filed by Hannah Muthoni Muruwa but they never filed a respond and she withdrew the same. He averred that the application was an afterthought as the applicant was fully involved in the succession proceedings in Githunguri law Court. He added that he and Edith Wanjiku Kangethe carried out subdivision in accordance with the confirmed grant sometime back.

6. After directions the parties gave evidence as follows;

7. Maria Wangui Kangethe a widow to the deceased adopted he affidavit and testified that the deceased had 4 wives namely Muthoni Kangethe, Jane Wanjiku and Edith Wanjiku. That prior to his demise the deceased subdivided the parcel of land into four portion of land. That Muthoni Kangethe mother to David Kangethe moved to court and obtained letters of administration without informing them and she only got to know of the same when people came to subdivide the land. Jane went to court and said that her portion be given to Patrick. Jane and their husband are buried in the said portion of land and Patrick farms there. She stated that she did not agree with the subdivision of the said parcel of land as she was given a small portion of the said land and that the same did not follow how the deceased had sub-divided the land. She wants her portion as given to her by her husband. The beacons are still there to date.

8. During cross-examination she stated that she did not agree on the mode of distribution adding that she was being chased from the said parcel of land. She denied being in possession of a title of some 5 acres, she also denied selling land.

Dominic Nyage Karanja reiterated PW1 evidence adding that the objector should be left with the portion she currently occupies and the grant be cancelled. During cross-examination he indicated that the land parcel no. 15 is 20 acres.

9. Stephen Karanja reiterated PW1 evidence adding that by the time the deceased died he left the objector in her shamba and at the time there were beacons. However, the same have since been destroyed and new ones put in place. That they did not call Maria when they were dividing the said parcel of land into the three 3 portions. He stated that the objector being a widow to the deceased should be left in her portion of the land which she was occupying before the demise of the deceased.

10. David Koine adopted his affidavit dated 27/9/2013. He urged the court to return the file to Githunguri once the matter was concluded to facilitate distribution of the deceased's estate. During cross examination he stated that they had filed Succession Cause in Githunguri Law court and the matter had been concluded and a judgment given, surveyors were called adding if the deceased had divided the land they would have divided it properly. Further, that there were some grammatical errors that should be rectified. He stated that they could not agree on the mode of distribution and the father had not signed the papers. That they had distributed the estate and that Patrick had even sold off ½ acre with his mother.

11. On further cross examination he stated that at Githunguri Court Patrick was representing his mother and did not need to cite the objector with a citation adding that in the lower Court the objector was well represented. That in this cause she has not proved her allegations of intention to revoke the grant. He added that he did not consult the objector and did not require her consent. He is the son of Miriam Wangui Kangethe. That their estate portion was 1/3 and she was to hold the same in trust of her children.

12. Patrick Githunguri Waithigo sought to rely on his affidavit dated 23/2/2015. He is the objector's son. He testified that David who is his step brother main interest was to sell the said property. That Githunguri/Nyaga 15 & 739 has been sold and people who bought the same have started constructing adding that their title deeds can be cancelled. He added that the deceased did not wish them to sell. He urged the court to order the government surveyor to subdivide the parcel of land as per the court's directions. He added that he had settled in plot 15 and had built in his mother's plot. That the persons who allegedly bought the parcel of land came with the police and was told to build near his house adding that when putting up the boundaries they split his house right in the middle. He urged the court to assist him as he had built there that he is getting old and feared being evicted.

13. During cross examination he stated that the respondent did not invite him to inform him that he intended to subdivide the land and only heard of the same at the D.O's office when the boundaries were put he left and settled in plot no.15 nor was he asked to sign anywhere. He denied that his mother has five acres out of parcel no. 15.

14. On further cross-examination he stated that his father had 4 wives and the portion of land had been subdivided into 4 portion. That his mother no longer lives in the said portion as she was made to move adding that the objector has not been given any land. He stated that he was not in the Githunguri cause and was not included in the process at all even on mode of distribution. He added that the posho mill is there to-date, the bank account and 3 acres of land at Njiru is also not included. Kimalo Thika & 2 Plots Kione and Elizabeth were selling secretly. That where he has built on plot no. 15 the same was sold and the person built next to him.

15. The objector filed written submissions. the respondents relied on their affidavits and evidence .The objector in her submissions raised 4 issues for determination namely;

- i. Whether the objector is entitled to a share of the estate
- ii. Whether the administrators have diligently managed and distributed the estate
- iii. Whether the objector should be made an administrator
- iv. Whether the grant should be revoked

i. Whether the objector is entitled to a share of the estate

ii. It was submitted that the objector is the only surviving spouse of the deceased who was polygamous and hence she is a beneficiary and is entitled to a share of the deceased's estate. Further that prior to his demise the deceased had subdivided parcel no. **Githunguri/Nyaga/15** amongst his four wives and settled each in their allocated portions. That the objector settled in her portion but the respondents have interfered with and distributed the deceased's estate leaving the objector with no share. That Section 40(1) provides that, "(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children." It was submitted that being the deceased's surviving wife she is entitled to a share of the estate as she had even been allocated her portion.

ii. Whether the administrators have diligently managed and distributed the estate

It was submitted that Respondents have subdivided the deceased's estate into 3 equal portions and held in trust of the beneficiaries without consent of the beneficiaries. That the respondents have subdivided parcel no. Githunguri/Nyaga 15 interfering with Patrick's compound and well claiming it was sold to Samuel Kangere Gatoto. That David Koine and Edith Wanjiru have sold part of the land in Githunguri/ Nyaga 15 and 739 and a plot in Thika for their own selfish gain. It was submitted that the administrators have failed to diligently distribute the estate. She relied on the case of **John Njuguna Kimunya v Teresiah Wacuka Kimunya [2017] eKLR**, "*The respondent after the said confirmation has not shared out the said parcel of land to the other beneficiaries as she is supposed to but instead has sought to subdivide and transfer a portion of the said parcel of land to a third party who is not a beneficiary of the deceased. In my view, the respondent as administrator of the deceased estate has failed to carry her duties diligently in distribution of the said estate upon confirmation of the said grant.*"

iii. Whether the objector should be made an administrator.

It was submitted that the objector is the only surviving spouse of the deceased she comes first in order of persons who should take out a grant on the deceased's estate and the respondent erred in failing to serve a citation to the objector and denying her a chance to take out and grant. That section 66 of the Law of Succession act provides the order of preference to the person to whom grant of letters of administration shall in the best interest of all concerned be made with priority to surviving spouse followed by other beneficiaries of the deceased's estate. That the objector under rule 7(7) of the probate and administration Rules provides that, anyone who is petitioning for grant of letters of administration and who does not have prior right to administration to get the persons with prior right to renounce their entitlement to apply or consent in writing to the making of the grant to the person with a lesser right or to cause citation to be issued and served on the person with prior right to either apply or renounce their right. It was submitted that it was only prudent to have the objector as an administrator to safeguard the interests of the other beneficiaries and cause and ensure that the estate is properly administered and distributed.

iv. On whether the grant should be revoked.

It was submitted that for a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance or that the grant was obtained fraudulently by making false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegations of fact essential in point of law or that the person named in the grant has failed to proceed diligently with the administration of the estate.

It was submitted that the respondents obtained the grant fraudulently by concealing material facts by leaving out some of the deceased's property namely; Posho mill at Ngewa, money at the bank accounts, 3 acres land and plots in Njiru area, Kimuchu Thika parcel of land and 2 other plots. Further, that the respondents had failed to properly manage and diligently distribute the estate to the beneficiaries of the estate leaving some without a share. She relied on the case of **James Wanyama Masolo v Fredrick Wakhungu Wanyama & Another [2012] eKLR**, "*if distribution is undertaken in a manner which was not agreed by a majority of the beneficiaries or in a manner contrary to the interests of any of the beneficiaries, then, mismanagement may easily be construed. Any action by an administrator must be undertaken in the interest of all the beneficiaries so as to avoid a situation where the administrator deems the estate to be his personal property for him to deal with in the manner that he solely wishes.*"

v. It was further submitted that the respondents have caused a lot of loss damage and wastage of the estate by disposing part of the land by way of sale to strangers without regard to the interest of beneficiaries. Further, the respondents have embarked on disposing part of the estate without consulting the beneficiaries. Therefore any detrimental action by the administrators would amount to negligence and hence mismanagement. In **James Wanyama Masolo v Fredrick Wakhungu Wanyama & Another [2012] eKLR**, "*Mismanagement of the estate of a deceased person by an administrator or administrators is a serious matter which would swiftly attract drastic orders against the administrator including revocation and/or annulment of grant to pave way for a new grant with new or additional administrator.*"

DETERMINATION

16. In her application, the objector faults the petitioners for petitioning for a grant without giving her an opportunity to petition since she ranks in priority. The objector is the only surviving wife of the deceased. According to Section 66 of the Law of Succession Act it provides that, "*when a deceased has died intestate, the court shall, save as otherwise expressly provided, have a 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 reference-*

(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;"

It is not in dispute that the objector was a widow to the deceased and hence ranks in priority of the other beneficiaries in applying for grant of letters of administration. In instances where a person who ranks lower than the spouse intends to take out a grant of letters of administration the law provides that the petitioner should cite the said person for him to take out the grant of letters of administration or refuse to do so which would necessitate him to proceed and petition. The petitioners are sons of the deceased hence his beneficiaries. However, though entitled to a share of the deceased's estate they rank lower in priority than the objector. I find that the petitioners were representing their mothers who were widows of the deceased. The widows who did not petition in their own capacity ought to have cited the objector. However having carefully gone through the evidence adduced before the SRM's court the Objector informed the court that Patrick her son was representing her interests as she is illiterate. I find that she fully participated in the proceedings in the SRM's court and was fully aware of the proceedings relating to the deceased's estate.

Further, it is not in dispute that the deceased had four wives and hence he was polygamous as such his estate devolves under Section 40 of the Law of Succession Act which provides that, "(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38." The objector does not agree with the mode of distribution used by the petitioners claiming that she was left out of the distribution with the portion she was supposed to get being transferred to a third party who is not a beneficiary of the deceased. From the evidence adduced in the SRM's court the objector was heard and the court made a finding that the estate of the deceased be divided into 3 equal parts. At the time of the said Ruling Jane a wife of the deceased had died and the court declined to give what was called her share to Patrick. I am constrained to agree with the findings of the trial court, that Jane had no land in her name nor children, and therefore the estate was to be divided equally amongst the 3 houses. In my view, the applicants have failed to demonstrate how the administrators have failed to carry their duties diligently in distribution of the said estate upon confirmation of the said grant.

Section 76 of the Law of Succession Act provides, "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—

(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;"

Jane Wanjiku Wathigo alias Jane Wanjiku Kangethe and Patrick Githinji Wathigo alias Patrick Githinji Kangethe raised an objection to the making of the grant on grounds that their interests were not represented in the confirmation and distribution of assets. There no documents to support the sale of the alleged parcel of land. The applicants also argues that some of the deceased's assets were left out in the distribution namely Posho mill at Ngewa, money at the bank accounts, 3 acres land and plots in Njiru area, Kimuchu Thika parcel of land and 2 other plots. This matter has been in court since 1992, there is no evidence that the deceased left the said assets. No evidence was adduced in the lower court either that the deceased left the said properties or bank account. Now that one of the administrators Jane Wanjiku Kangethe is deceased, the grant shall be amended to include **Maria Wangui Kangethe** as an administrator. I find no reason to revoke the grant, as the applicants have failed to prove their allegations. A fresh grant be issued in the names **Maria Wangui Kangethe, Edith Wanjiru Kangethe, Patrick Githinji** and **David Koine Kangethe** as administrators. The administrators to ensure that the deceased's estate is divided in 3 equal parts taking into account the areas they have built and live in. Succession Cause No. 6 of 1992 shall be returned to Githunguri Law Courts forthwith to enable the parties finalize distribution of the deceased's estate. Since this is a family matter I make no orders as to costs.

Dated, signed and delivered at Nairobi this 16th day of May 2019

R.E OUGO

JUDGE

In the presence of;

Mr. Gekonge h/b Mr. Mitiambo For the Objector

Patrick Githinji Wathigo In person

Respondents Absent

Mercy Court clerk