



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 705 OF 1996**

**IN THE MATTER OF THE ESTATE OF GICHUNJI KIMANI (DECEASED)**

**KAMAU GICHUNJI A.....APPLICANT**

**VERSUS**

**WAWERU MURIGI.....RESPONDENT**

**RULING**

1. The amended summons dated 30<sup>th</sup> November, 2018 is taken out by the Applicant, Kamau Gichunji A pursuant to Section 83(h) and (i) of the Law of Succession Act, Rule 49 of the Probate & Administration Rules, and any other enabling provisions of the law for orders of review and/or variance of the consent order dated 25<sup>th</sup> May, 2006.

2. The application is supported by the affidavit of Kamau Gichunji A one of the administrators and is premised on the grounds that the sharing of 2 acres in L.R. No. Komothai/Gathugu/811 between the families of Jane Wangui (0.25 acres) and Kimani 'A' family (1.75 acres), both from Murugi household has caused a dispute. Further, the merging of Komothai/Gathugu/816 and L.R Komothai/Gathugu/562 as directed by the consent order failed since some title holders refused to surrender some of their titles. In addition, one of the Administrators Thuo Gichunji died five years ago and another Ng'ang'a Njenga, disappeared four years ago and has not been heard from since then.

3. Geoffrey Mwangi Kimani an administrator of the estate of Jane Wangui Kimani swore a replying affidavit dated 4<sup>th</sup> February, 2019. He stated that the consent order dated 25<sup>th</sup> May 2006, was entered into without the full involvement/representation of the family of Jane Wangui and as such the late Jane Wangui was discriminated against based on her gender and was given a small portion of the land. He urged the court to review and/or set aside the Consent Order entered on 25<sup>th</sup> May 2006 and make a provision for the late Jane Wangui Kimani by allocating 2 acres in L.R. Komothai/Gathugu/811.

4. In opposition to the amended Summons Waweru Murigi from Kimani 'A' family filed a replying affidavit dated 3<sup>rd</sup> January, 2019 on his own behalf and on behalf of Regina Gathoni Murigi, Grace Wairimu Kibe, Gladys Muthoni Kinyanjui and Nancy Nyawira Kinyanjui. He admitted that it had been difficult to enforce the consent order since the family of Jane Wangui was in possession of 1.75 acres allocated to Kimani A. He prayed that the children of the late Jane Wangui be ordered to vacate 1.75 acres given to the family of Kimani A and occupy 0.25 acres as directed by the order of consent. In addition, he deposed that the deceased transferred one acre to the family of Murigi Kimani Gichunji. He stated that the L.R Kimothai /Gathugu/562 which measures approximately 9.90 acres was divided by the deceased into 5 equal portions for his five wives. Murugi's house was entitled to 1.98 acres which was to be shared equally among the three sons.

5. The matter proceeded by way of viva voce evidence. Pw1 Kamau Gichunji A testified that the dispute arose during distribution of L.R Komothai/Gathugu/811 measuring 2 acres was being utilized by the family of Jane Wangui. He asserted that Kimani 'A' family had already been allocated 1 ½ acres of land from other parcels of the deceased's land and proposed that the whole 2 acres of L.R Komothai/Gathugu/811 in dispute be allocated to the estate of Jane Wangui. On the allegation by the Respondent that the deceased transferred 1 acre of land to Murigi Kimani Gichunji, he stated that the said Murigi Kimani Gichunji C did not buy the land from the deceased, but was holding it in trust for the other beneficiaries.

6. Regarding the distribution of Komothai/Gathugu/816 and L.R Komothai/Gathugu/562, it was Pw1's testimony that the parties failed to abide by the court's direction to surrender the title deed already issued for cancellation. He averred that they therefore proceeded to share L.R Komothai/Gathugu/562 taking into account the allocation of L.R Komothai/Gathugu/816. He accused Kimani 'A' of delaying the matter since he had already received a title deed to his 1 ½ acre parcel.

7. Pw2 Geoffrey Mwangi Kimani a grandchild to the deceased and a son of Jane Wangui stated that his mother had been in possession of the 2 acres of land for 46 years. He averred that his family came to learn of the Consent Order issued in 2008 and filed an application to set it aside but were unsuccessful. He contested the allocation of 0.25 acres from the entire deceased's estate as being inequitable. He referred to the 1 ½ acres of plot no 816 and 5 acres of parcel no. 321 allocated to Kimani A in comparison to the 0.25 acres allocated to his mother. He prayed for the allocation of the 2 acres which his family was in possession of and averred that if the two acres were allocated to the estate of

Jane Wangui, they would have no other claim to the rest of the estate of the deceased.

8. In his testimony the Respondent Waweru Murigi alleged that the estate of Jane Wangui should not be allocated the 2 acres sought since the distribution of the property was done by the deceased himself. He also claimed that L.R Komothai/Gathugu/562 was distributed among the deceased's 5 wives and that Kimani A was not allocated any portion therein. He asked the court to distribute the property among the 5 wives of the deceased and was in agreement with the proposal to remove parcel no. 816 from the consolidation as ordered in the consent since it was already distributed. He stated that Kimani A was given 2 acres by the deceased and allocated 5 acres during distribution where he had built while the late Jane Wangui was not allocated any other property other than the 0.25 acres in parcel no. 811.

9. The parties filed written submissions in support of their respective positions in this matter which I have considered. The consent at the centre of this dispute was entered into on 2<sup>nd</sup> May, 2006. The orders adopted directed the parties on how the property was to be distributed among the beneficiaries of the estate of the deceased as follows:

A. Kamothai/Gathugu/811: Family of Jane Wangui 0.25 acres

Kimani A 1.75 acres

Miringu Gichunji 0.60 acres

Kiarie Gichunji 2 acres

B. Gatamaiyu/Nyanduma/142 Kimani B 1 acre

Njuguna 1 acre

Kamau A 2 acres

Kimani E 1.35 acres

C. Kamothai/Gathugu/816 and Kamothai/Gathugu/562 be merged and subdivide afresh among the 14 sons of the deceased equally.

10. It is trite law that a consent order can be varied where it is proved that it has been obtained by fraud or collusion or by an agreement contrary to public policy of the court, or the consent was given without material facts, or in misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement.

In the Court of Appeal decision of Samuel Wambugu Mwangi Vs Othaya Boys High School Civil Appeal No. 7 of 2014 [2014] eKLR, the court observed that:

**“...Circumstances under which a consent judgment may be interfered with were considered in the case of Brooke Bond Liebig (T) Limited Vs Maliya (1975) E.A. 266. It was stated that prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in general for a reason which would enable the court to set aside an agreement.”**

In the case of Kenya Commercial Bank Limited Vs Benjoh Amalgamated Limited & Another Civil Appeal No. 276 of 1997 [1998] eKLR, states that:

**“....It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out....”**

In Flora W. Wasike Vs Destimo Wamboko (1982-88) 1 KAR 625, the learned Judge observed that:

**“...Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court... or if the consent was given without sufficient material facts, or in misapprehension or ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement....”**

11. I think it is important to point out at this juncture that for as long as parties are not in agreement it is left to the court to apply the laid down law and principles to arrive at what the court would consider to be fair and just in the circumstances of the case. It was not disputed that the deceased had five wives all of whom are deceased. Each of the five wives left surviving children being 14 sons and one daughter in total.

12. The meeting held before the mode of distribution was agreed upon was attended by all the beneficiaries except the family or a

representative from the family of Jane Wangui. Further, there was no justification why the daughter was left out, or allocated only 0.25 acres from their father's estate, or why some properties were to be shared only among the sons of the deceased. On the allegation that it was the deceased who had distributed the property, nothing has been placed before the Court to show that the deceased bequeathed any of his children property before his demise.

13. In addition, the consent in issue was entered into in the presence of Mrs. Kimani and Mrs. Waweru advocates for the Co. administrator and Co-petitioner respectively at a time the estate of Jane Wangui was not represented in court. In his testimony, the 3<sup>rd</sup> Administrator Kamau Gichunji on cross examination confirmed that during the family meeting where an agreement was reached on how the deceased's property was to be distributed, Jane Wangui had already passed on and her house was not represented. PW2 Geoffrey Mwangi Kimani a son of Jane Wangui insisted that his family was not involved in the consent or the agreement on distribution of the property of the deceased. These assertions were not disputed by the Respondent.

14. The court is not bound to accept the mode of distribution based on open discrimination of the sister without any justification. To do so would be to allow the perpetuation of discrimination against women for simply being women or girls or daughters. It would be an abdication to protect and defend a very key constitutional principle of non-discrimination.

15. Even before the promulgation of the Constitution in 2010, Makhandia J (as he then was) **In Re Estate Of Solomon Ngatia Kariuki (Deceased) (2008) EKLK**, while speaking about the existing provisions of the Law of Succession Act, made a very strong statement on the issue of discrimination against daughters generally in succession matters and he said;

**“The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.”**

16. It is evident from the foregoing that this court would be failing in its constitutional mandate to uphold a disputed consent based on non-disclosure of a material fact being that some of the beneficiaries were not involved in the agreement. I find that the the estate of Jane Wangui was denied a chance to be heard making the consent fatally defective from the onset.

17. Having taken all factors into account and in exercise of the discretion granted to this Court by Section 66 of the Law of Succession Act, I find that the application dated 30<sup>th</sup> November, 2018 has merit and I therefore make the following orders which are necessary for the ends of justice to be met:

- i. The Consent order recorded on 2<sup>nd</sup> May, 2006 is hereby set aside in its entirety.
- ii. Beneficiaries of the estate of the deceased are directed to agree on an equitable mode of distribution of the estate within 30 days from the date hereof and present the proposal to Court for adoption.
- iii. Parties have 15 days to agree on the person or persons to be appointed as administrators of the estate to replace the deceased administrators.

**SIGNED DATED AND DELIVERED IN OPEN COURT THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of ..... Advocate for the Applicant**

**In the presence of ..... Advocate for the Respondent**