



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1771 OF 2011**

**IN THE MATTER OF THE ESTATE OF WAMWERE GICHEGE - DECEASED**

JOSEPH MUCHIRI WAMWERE.....1<sup>ST</sup> APPLICANT

RACHAEL WAMBUI GICHEGE.....2<sup>ND</sup> APPLICANT

VERSUS

GEORGE WAMWERE WARUI.....1<sup>ST</sup> RESPONDENT

MARY WANGARI.....2<sup>ND</sup> RESPONDENT

RUTH WAMBUI WAMWERE.....3<sup>RD</sup> RESPONDENT

**JUDGMENT**

1. The two Applicants in the summons dated 13.6.2014 JOSEPH MUCHIRI WAMWERE and RACHAEL WAMBUI GACHEGE are seeking for orders that the Certificate of Confirmation of grant issued on 24.3.2014 be partially revoked/rectified on the grounds that:

**(i) THAT MARY WANGARI NJENGA, GEORGE WAMWERE WARUI and RUTH WAMBUI WAMWERE the Administrators of the estate of WAMWERE GICHEGE concealed from this Honorable Court that the Applicants herein were beneficiaries of the Estate and were entitled to share with MARY WANGARI NJENGA the share she obtained for the house of NYAMBURA GICHEGE.**

**(ii) THAT the said Administrators failed to disclose to this Honourable Court that the Applicants herein had filed an Application seeking to have the Grant of Letters of Administration issued to the said Administrators confirmed in which Application the Applicant's herein had proposed the mode of distribution of the estate of the deceased.**

**(iii) THAT MARY WANGARI NJENGA intends to deny the Applicants their share in the estate of the deceased.**

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Applicant JOSEPH MUCHIRI WAMWERE in which he has deposed that Estate was to be shared between two houses namely the house of WANJIKU GICHEGE and that of NYAMBURA GICHEGE.

3. Further, that the share of the estate belonging to NYAMBURA GICHEGE has been taken by only one beneficiary namely MARY WANGARE NJENGA to the Exclusion of the two Applicants who belong to the said house.

4. The 1<sup>st</sup> Applicant also deposed that the Certificate of Confirmation should be rectified so that the share in LR No. LARI /BATH/28 is shared equally between the three of them and LR NO. LARI/BATH/T. 131 to be held by MARY WANGARI NJENGA and JOSEPH MUCHIRI WAMWERE as Tenants in common.

5. MARY WANGARI NJENGA( hereafter referred to as the 2<sup>nd</sup> Respondent) filed a Replying Affidavit dated 30.6.2017 in which she deposed as follows:

**(a) THAT in order for the court to understand the background to the distribution of this estate it is important that the history of this family is clarified which is as follows:**

(i) That JOSEPH MUCHIRI WAMWERE is the son of MARY WANJIRU WAMWERE and WAMWERE GICHECHE (deceased) who was the direct brother of her late husband JOHN NJENGA GICHECHE and RACHAEL WAMBUI GICHECHE, all from NYAMBURA GICHECHE (NYAMBURA'S HOUSE) being the second wife or house of GICHECHE WAMWERE (their father).

(ii) That the 1<sup>st</sup> respondent GEORGE WAMWERE WARUI is the son of LIVINGSTONE WARUI GICHECHE(deceased) who was a step-brother of the persons named in (i) above.

(iii) That then there was the late WAMWERE GICHECHE to whom this succession refers who together with LIVINGSTONE WARUI GICHECHE were sons to WANJIKU GICHECHE(WANJIKU's house) being the 1<sup>st</sup> wife or house of GICHECHE WAMWERE (their father).

(iv) THAT it must be noted that there were two WAMWERE GICHECHES hereafter to be referred to as WAMWERE GICHECHE( ofWANJIKU'S house) and to whom this succession refers and WAMWERE GICHECHE ( of NYAMBURA'S house).

(v) That RUTH WAMBUI WAMWERE the 3<sup>rd</sup> respondent herein is the surviving wife of WAMWERE GICHECHE (of WANJIKU's house) to whom this succession refers.

(vi) That

(1) WAMWERE GICHECHE (of WANJIKU's house) was the eldest son in the family. The other sons by order of hierarchy were;

(2) WAMWERE GICHECHE (of NYAMBURA's house)

(3) JOHN NJENGA GICHECHE (the 2nd Respondent's husband)

(4) LIVINGSTONE WARUI GICHECHE

(b) That in the 1940s and early 50s before the MauMau and the emergency, their father GICHECHE WAMWERE had two separate parcels in the Lari/Bathi section and had distributed the two parcels one in favour of WAMWERE GICHECHE (his son from WANJIKU's house) and another one to WAMWERE GICHECHE(his son from NYAMBURA'S house obviously as the trustees of the rest of the family members).

(c) THAT upon the emergence of the MauMau revolution, WAMWERE GICHECHE (of NYAMBURA's house) and the 2nd Respondent's husband JOHN NJENGA GICHECHE's direct brother joined the MauMau. As was the case was then the land he was occupying and which had been given to him as trustee was taken by the government and given to loyalists then. As a result the entire family only remained with the land occupied by WAMWERE GICHECHE (of WANJIKU's house), the subject of this succession.

(d) That WAMWERE GICHECHE (of NYAMBURA's house) died in the MauMau fight and never came back home.

(e) As a result upon attainment of independence, the independence government did compensate their family with a parcel of 5 acres in GITITHIA section of Lari Division.

(f) Initially the entire GICHECHE family used to till the GITITHIA land but after sometime WAMWERE GICHECHE (of WANJIKU's house), the surviving eldest son, the 2nd Respondent's husband and LIVINGSTONE agreed to relinquish the GITITHIA LAND TO THE Family of WAMWERE GICHECHE (of NYAMBURA's house) exclusively leaving theLARI/BATHI parcel which was only 7 acres to be shared out between the families of WAMWERE GICHECHE (of WANJIKU's house), JOHN NJENGA GICHECHE and LIVINGSTONE WARUI GICHECHE.

(g) THAT as a result JOSEPH MUCHIRI WAMWERE, his mother Mary and their other children have since independence times not lived on the LARI/BATHI land and have never used the land since they have all along lived and occupied the GITITHIA land.

(h) THAT it is as a result of the aforementioned arrangement, that when WAMWERE GICHECHE (of WANJIKU's house), the subject of this succession died the only persons entitled to inherit the land in his name are the families of himself hence his wife RUTH, JOHN NJENGA GICHECHE (and the 2nd Respondent's husband through her ) and LIVINGSTONE WARUI GICHECHE (through GEORGE WAMWEREWARUI).

(i) JOSEPH MUCHIRI WAMWERE and his siblings and mother were properly provided for when the compensated 5 acres of GITITHIA land was given tothem exclusively.

6. The parties gave viva voce evidence. The 1<sup>st</sup> Applicant in his oral evidence said the deceased herein WAMWERE GICHEGE was his big father (uncle) and RACHAEL WAMBUI GICHEGE his Auntie.

7. The 1<sup>st</sup> Applicant also stated in his witness statement that the deceased GICHEGE WAMWERE was the owner of the two parcels of land

herein and that the two were registered in the name of his eldest son WAMWERE GICHEGE (the deceased herein) to hold in trust for two houses.

8. The 2nd Respondent said the family of the Applicants was compensated and further that the property was not held in trust. The 1st Applicant confirmed that the deceased herein was his uncle. There is no evidence that he was holding the land as a trustee for the Applicants herein. I believe the testimony of the 2nd Respondent that the family of the Applicants was compensated.

9. Further, I find that the Applicants cannot prove issues of trust in the succession court. This Succession Court does not deal with issues of ownership but with distribution of estates.

10. In High Court **Succession Cause Number 864 of 1996 [2015] eKLR** Musyoka J stated as follows:

***“Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”***

13. The history of this case goes back to the mau Mau era and there is no indication that the Applicants have ever raised the issue to be solved in any forum. Equity does not assist the indolent but it only comes to the aid of the vigilant.

14. The summons for revocation dated 13<sup>th</sup> June 2014 is accordingly dismissed and the petitioners are directed to apply for confirmation of grant within 30 days of this date.

15. This being a family matter, I direct that Each party to bear its own costs.

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

**ASENATH ONGERI**

**JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.**