



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 562 OF 1993**

**IN THE MATTER OF THE ESTATE OF GERALD KARUGU WARUTA- (DECEASED)**

**JOHN NGATIA.....APPLICANT**

**VERSUS**

**ANETA KAGURE.....1<sup>ST</sup> RESPONDENT**

**PETER MWANIKI.....2<sup>ND</sup> RESPONDENT**

**CHARLES MATHENGE.....3<sup>RD</sup> RESPONDENT**

**JOHN RUGUMI.....4<sup>TH</sup> RESPONDENT**

**SIMON WACHIRA.....5<sup>TH</sup> RESPONDENT**

**LUCY WAIHUINI.....6<sup>TH</sup> RESPONDENT**

**LYDIA WANJUGU.....7<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The deceased Gerald Karugu Waruta died on 23<sup>rd</sup> September 1991. He hailed from Karaini/Chorongi sub-location in Nyeri County. He was survived by three widows: Aneta Kagure (1<sup>st</sup> respondent), Chivila Kirigo and Hellen Wangui. In all he had 16 children. The children of the 1<sup>st</sup> respondent were Peter Mwaniki (2<sup>nd</sup> respondent), Charles Mathenge (3<sup>rd</sup> respondent), John Rugumi (4<sup>th</sup> respondent), Simon Wachira (5<sup>th</sup> respondent), Lucy Waihuini (6<sup>th</sup> respondent) and Lydia Wanjugu (7<sup>th</sup> respondent). His estate comprised the following property:-

- (a) Thegenge/Karia/1347;
- (b) Thegenge/Karia/1345;
- (c) Thegenge/Karia/1346;
- (d) Plot No. 538 Muhotetu;
- (e) Plot No. 3 Giakanja;
- (f) Account at Barclays Bank, Nyeri Branch; and
- (g) Shares in Kedong Farm.

There is no dispute that the estate was substantially located in Nyeri County.

2. In 1993 the applicant John Ngatia together with Salome Muthoni, Titus Ndungu and Paul Mathenge (all being some of the children of the deceased) petitioned this court for the grant of letters of administration intestate. The grant was issued on 30<sup>th</sup> June 1993, and confirmed on 3<sup>rd</sup> June 2002.

3. In the certificate of confirmation the widows were given Thegenge/Karia 1347, Thegenge/Karia/1345 and Thegenge/Karia/ 1346, respectively, and each was to have life interest therein and to hold in trust for her children. The widows were asked to jointly have a life interest in plot No. 3 Giakanja and to hold the same in trust for their children. They (the widows) were to equally share the proceeds in the Barclays Bank account, and to have life interest in shares in Kedong Farm and eventually to hold the same in trust for their children. Lastly, plot No. 538 Muhotetu was to be equally shared among Simon Wachira, Peter Mwaniki, Samwel Mugo, Paul Githui, John Rugumi, Charles Mathenge, Paul Mathenge, John Ngatia, Joseph Wachira, Patrick Mugo, Titus Ndungu and Andrew Rugumi.

4. This decision is in respect of two applications. The first application was dated 17<sup>th</sup> April 2014 and filed on 6<sup>th</sup> May 2014 by the applicant seeking preservative orders over Gituamba/Muhotetu/Block 2/875, 766, 767 and 364 which came from plot No. 538 Muhotetu. The other prayer was that the parcels be redistributed in accordance with the certificate of confirmation of grant. Lastly, the distribution of the shares in Kedong Farm or any proceeds thereof be stopped to await redistribution in accordance with the confirmation. The applicant's case was that, despite the certificate of confirmation, he had discovered that parcels 875, 766, 767 and 364, each measuring 10 acres, had been transferred to the 1<sup>st</sup> respondent, Paul Githui, 3<sup>rd</sup> respondent and 2<sup>nd</sup> respondent, respectively. Then, that the proceeds of Kedong Farm were going to the 1<sup>st</sup> house (1<sup>st</sup> respondent's house) alone.

5. The respondents on 16<sup>th</sup> June 2014 filed a replying affidavit sworn on 11<sup>th</sup> June 2014 to oppose the application. They deposed that they were unaware of the petition and the proceedings therein until they were served with this application on 17<sup>th</sup> April 2014. That was when, upon perusal of the court file, they discovered that there was a petition, grant and certificate of confirmation. They found that their signatures had been forged in the affidavit supporting the petition and in the consent supporting the application for confirmation. They reported the alleged forgeries at Nyeri Police Station vide OB No. 33/06/06/2014. Further, they stated that the deceased had left a Will, and therefore the applicant had misrepresented to the court that the deceased had died intestate. Thirdly, following the deceased's death the respondents obtained a death certificate No. 239502 after surrendering the deceased's identification card, but then they discovered that the applicant had, to enable the filing of the petition, obtained a subsequent death certificate No. 239571. Fourth, in 2006 the applicant had filed a claim against the 1<sup>st</sup> and 3<sup>rd</sup> respondents at Laikipia Land Disputes Tribunal regarding the four parcels. The Tribunal had in a ruling (annexure AK 7) found against him, but, significantly, agreed with the respondents that the deceased had left a valid Will on basis of which the disputed parcels had been transferred. The applicant had been given 30 days to appeal to the Provincial Land Disputes Appeals Committee but had not appealed. Lastly, that the deceased had before his death transferred his shares in Muhotetu Farmers Co. Ltd to the 1<sup>st</sup> respondent, and that the company was a shareholder in Kedong Farm Ltd.

6. The second application was by the respondents against the applicant. It was dated 11<sup>th</sup> June 2014. It was filed under **section 76(a), (b), (c) and (e) of the Law of Succession Act (Cap. 160)** seeking to have the confirmed grant herein revoked, and to have the applicant and/or third parties restrained from interfering with the estate of the deceased. The grounds were that, the applicant had obtained the intestate grant with the knowledge that the deceased had died testate and that the grant had been obtained fraudulently. The supporting affidavit contained the averments in the replying affidavit mentioned in the foregoing.

7. The applicant opposed the application by filing grounds of opposition and a replying affidavit. In the grounds of opposition it was stated that the application was misconceived as the applicant was only one of the administrators to whom the grant was issued; the application was an afterthought having been prompted by the applicant's application; and there were no reasonable grounds why it had taken the respondents 23 years to raise the issue of the Will. In the replying affidavit it was alleged that the respondents had intermeddled with the estate as they had no basis to distribute what was plot 538 Muhotetu; they had not shown in what capacity they were receiving proceeds from Kedong Farm to the exclusion of the other members of the family; and there was no explanation why the 5<sup>th</sup> respondent was receiving the proceeds of Plot No. 3 Giakanja. The applicant stated that, despite the above, he would be willing to have the grant revoked if the titles in question were cancelled and the parcel be redistributed to all houses; the proceeds of Kedong Farm are accounted for, refunded and shared to all beneficiaries; and the proceeds of Plot No. 3 Giakanja accounted for and refunded and redistributed to all the beneficiaries.

8. The applicant was represented by Mr. Njenga and the respondents by Mr. Wachira. Counsel agreed that the two applications be heard together on the basis of the written submissions which they filed. I have considered the rival applications, the affidavits and annexures, and the written submissions.

9. There is the question whether the deceased died testate or intestate. The respondents annexed a copy of a Will that was allegedly made by the deceased on 26<sup>th</sup> May 1991. The applicant wondered why, if indeed it was true that the deceased left a Will, the matter was being raised for the first time after 23 years. The answer by the respondents was that the applicant all along knew about the Will; that infact in the proceedings in 2006 at the Laikipia Lands Disputes Tribunal the Will was an issue and that the Tribunal had found that it was the valid Will of the deceased; that the applicant had not appealed against that finding. In the instant proceedings, the applicant was silent about the Laikipia Land Disputes Tribunal proceedings. I find that the issue of the Will was not new. The applicant has always known that the respondents were claiming that there was a Will left by the deceased. With that knowledge, what was open to the parties was to either petition for the grant of probate or for the applicant to call upon the respondents to prove the Will. It follows that the proceedings leading to the grant were defective in substance. **Section 51(2)(e) of the Act and rule 7(1)(c) of the Rules** require the petitioner to disclose whether the deceased died testate or not.

10. The respondents' case was that when the applicant and others petitioned for intestate grant, which they obtained and had it confirmed, this was without their knowledge; that their signatures had been forged to show that they had participated. It is material that when the applicant filed a response to the application to revoke the grant, he did not deny the averment that he had forged the signatures of the respondents in the alleged consents. On the material on record, I find that the applicant and others had unilaterally petitioned the court for the grant, and eventually got confirmation, without reference to the respondents who were beneficiaries to the estate of the deceased. Under **rule 26(1) of the Probate and Administration Rules**, letters of administration ought not to be granted to any applicant without notice to

every other person entitled in the same degree as, or in priority, to the applicant. The respondents stated that they were not informed or involved in the process of obtaining the grant. There was no renunciation or duly written consents by the respondents in Forms 38 and 39 as provided in **rule 26(2)**. The proceedings to obtain the grant were defective in substance in that regard, and therefore the grant ought to be revoked (**In the Matter of the Estate of Eutychus Wanyoike Njau (Deceased), Nairobi HC (Milimani) Succession Cause No. 1633 of 2009**).

11. It would appear from the title deeds of parcels 875, 766, 767 and 364 that transfers were made to the present proprietors on 13<sup>th</sup> March 1995, long before the grant was confirmed. There will be the question whether these parcels constituted the free property of the deceased that can form the basis of the applicant's claim.

12. In conclusion, I revoke the grant that was issued to the applicant and others on 30<sup>th</sup> June 1993, and confirmed on 3<sup>rd</sup> June 2002.

13. In order to protect the estate from possible waste as the parties consider their next action, I direct that none of the properties in the matter should be sold and/or transferred, or further transferred.

14. I ask that the costs of the two applications be paid by the applicant.

**DATED and DELIVERED at NAIROBI this 7<sup>TH</sup> day of MAY 2018.**

**A.O. MUCHELULE**

**JUDGE**