



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 1442 OF 2011**  
**IN THE MATTER OF THE ESTATE OF WAMBURI GATITI ALIAS WABURI GATITI (DECEASED)**

PATRICK NDUNGU.....1<sup>ST</sup> APPLICANT

WANJIRA NDUTA.....2<sup>ND</sup> APPLICANT

VERSUS

FRANCIS MUNGAI WAMBURI.....1<sup>ST</sup> RESPONDENT

**RULING**

1. The deceased Wamburi Gatiti alias Waburi Gatiti died intestate on 7<sup>th</sup> February 2003. He was survived by two wives and 11 children. He left two parcels of land:

- a. Kinale/Escarpment Block 1/520 and
- b. Gatamaiyu/Kagwe/601.

On 22<sup>nd</sup> October 2009 the respondent (being one of his sons) petitioned this court for the grant of letters of administration intestate. The grant was issued to him on 22<sup>nd</sup> December 2009 and has confirmed on 15<sup>th</sup> June 2000. The respondent got Gatamaiyu/Kagwe/601. Kinale/Escarpment Block 1/520 was shared among the respondent and his siblings John Irungu Waburi and Hannah Wamuhu Ndungu.

2. The applicants Patrick Ndungu and Wanjiru Nduta are nephew and niece, respectively, of the deceased. They are children of Nduta Kihoti who was a sister to deceased. Nduta Kihoti and the deceased had a brother called Migwi Kihoti who died a bachelor. The applicants filed the present summons dated 15<sup>th</sup> July 2011 seeking to have the grant and certificate issued to the respondent revoked and/or annulled on the grounds that:-

- a. the grant was obtained fraudulently by concealment from the court of material facts;
- b. land parcel Gatamaiyu/Kagwe/601 was ancestral land in which they had 1/3 share but which had been mysteriously registered in the name of the deceased;
- c. their 1/3 entitlement to the parcel arose from the fact that they were the grandchildren of one Kihoti Mbuthia in whose name the land was registered in 1958 during land demarcation and adaptation; and
- d. they were born on this land in the early 1960 as the mother Nduta Kihoti, a daughter of Kihoti Mbuthia, never got married.

3. The application was opposed by the respondent.

4. There is no dispute that the deceased's brother Migwi Kihoti died on 28<sup>th</sup> February 1996. He was the registered proprietor of Gatamaiyu/Kagwe/601. Upon his death, two succession petitions were filed at Githunguri Magistrate's Court in respect of his estate. One was No. 54 of 1996 filed by his sisters Nduta Kihoti and Njeri Mwai. The other was No. 58 of 1996 which was filed by the respondent. The two petitions were consolidated. The court heard the matter and determined that under Kikuyu customary law Nduta Kihoti and Njeri Mwai

were sisters to Migwi Kihoti and could not inherit his estate. The court also found that the respondent could not also benefit. The only beneficiary was the brother of Migwi Kihoti who was Waburi Gatiti (the deceased herein). The deceased was subsequently registered in respect of the land. When he died on 7<sup>th</sup> February 2003 the respondent went to Limuru Court in Succession Cause No. 137 of 2009 and obtained a grant in respect of the estate of the deceased. The grant was confirmed as a result of which he became registered in respect of the parcel of land which he has since sold.

5. The applicants' case is that the respondent, who knew they were on the land, did not let them know he was filing the petition. Their consent was not sought, and they did not participate in the proceedings leading to the grant. The respondent's response was that he was not required to inform the applicants. This was because the court in Githunguri had determined that the right person to inherit the parcel was the deceased; and that the proceedings leading to that determination had involved the mother of the applicants and she had lost to the deceased. It is not in dispute that the applicants were aware of the Githunguri matter and decision. They acknowledge that there was no appeal filed against the decision because of "lack of knowledge and resources."

6. It is true that under **section 51(2)(g)** of the **Law of Succession Act (Cap 160)** and **rule 7(1)** of the **Probate and Administration rules**, the respondent was obligated to inform all the persons with the claim to the estate that he was filing the petition. In this case, however, the mother of the applicants had been found by a competent court not to have any claim to the parcel of land. That decision had not been reviewed, or set aside on appeal. Under **section 7** of the **Civil Procedure Act** the matter was *res judicata*. The issue whether the applicants' mother had a claim to the parcel of land was substantially in issue and determined by Githunguri court. The applicants' claim was on the basis that they were children of the mother who was laying a claim to the land.

7. In conclusion, I find no merit in the application for revocation and/or annulment and hereby dismiss it with costs.

**DATED and SIGNED at NAIROBI this 12<sup>TH</sup> day of JULY 2018**

**A.O. MUCHELULE**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 16<sup>TH</sup> day of JULY 2018**

**J. N. ONYIEGO**

**JUDGE**