



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 130 OF 2005

IN THE MATTER OF THE ESTATE OF GEOFREY MWAURA NGOIMA (DECEASED)

VIRGINIA WANJIKU KAMUYU.....APPLICANT

VERSUS

JOSEPH KAREGA KAMAU....ADMINISTRATOR/ RESPONDENT

JUDGMENT

The deceased died on 21st October, 1984. He was survived by the following family members;

- a) **Phylis Wangui Mwaura Ngoima –widow (now deceased)**
- b) **Hilda Gathoni- daughter**
- c) **Mary Nyambura –daughter**
- d) **Virginia Woki –daughter**
- e) **Jean Wanjiku –Hutchinson –daughter (now deceased)**
- f) **Phoebbe Wambeti-daughter**
- g) **Mwaura Ngoima –son**
- h) **Phyllis Wambui Wagacha-daughter**
- i) **Njenga Mwaura Ngoima-son**
- j) **Edith Waithera Ngoima-daughter**
- k) **Geoffrey Kangethe Ngoima-son**
- l) **Fredrick Njoroge Mwaura Ngoima-Son**
- m) **Mercy Njeri Ngoima-daughter**

The deceased had the following assets that comprise of his estate;

- i. **L.R. No. Githunguri/Githiga/1073**
- ii. **L.R. No. Githunguri/Githiga/1074**
- iii. **L.R. No. Githunguri/Githiga/1075(currently subdivided into L.R. No. 3079 and L.R. No. 3080 respectively**

iv. L.R. No. Githunguri/Githiga/1076 (currently subdivided into L.R. 3081 , L.R. 3082 and L.R. 3083)

v. Plot No. 30/74 on Kahuhu Market in Githiga

On 3rd November 1998 the deceased's sons; Njenga Mwaura Ngoima and Geoffrey Kangethe Ngoima petitioned for grant of letters of administration intestate which were issued on 6th January, 1999 and consequently confirmed on 8th December, 2000.

Pheobe Wambeti filed application of Summons for revocation of grant on 21st January 2005 and Edith Waithera Ngoima filed similar application for revocation of grant dated 21st January 2015 respectively. The Applicants sought for the following orders;

- i) The revocation of the grant of letters of administration and confirmed grant so issued*
- ii) That the court be pleased to order that the said administrators not to evict, trespass or in any way interfere with the land occupied by the applicant as alienated by the deceased.*
- iii) There was need to preserve the estate of the deceased pending hearing and determination of the application.*
- iv) That in the alternative, the Court to redistribute the estate of the deceased's estate comprising of the assets listed above.*
- v) Cost of the application.*

The application is premised on grounds;

- i) The confirmation of grant was obtained fraudulently by making false statement**
- ii) There was concealment of material facts by the said Njenga Mwaura Ngoima**
- iii) That some of the beneficiaries were fraudulently excluded from the succession process.**
- iv) That some of the beneficiaries did not get any inheritance from the deceased's estate**
- v) Part of the distribution was done as per the confirmation of grant of 11th December 2000 but some beneficiaries have not received their inheritance on ground**
- vi) Some beneficiaries were left out and did not get any inheritance from the deceased's estate.**
- vii) Some of the beneficiaries/administrators sought to own the larger chunk of the estate to the disadvantage and exclusion of the other beneficiaries.**

The Applicants sought the following orders;

- i) That the grant of letters of administration granted to Njenga Mwaura Ngoima and Geoffrey Kangethe Ngoima on 6th January 1999 and confirmed on 8th December 2000 be revoked or annulled.**
- ii) That in the alternative this honorable court be pleased to re-distribute the following estate properties equally amongst all the beneficiaries.**
 - a) L.R. No. Githunguri/Githiga/1073**
 - b) L.R. No. Githunguri/Githiga/1074**
 - c) L.R. No. Githunguri/Githiga/1075(currently subdivided into L.R. No. 3079 and L.R. No. 3080 respectively**
 - d) L.R.No. Githunguri/Githiga/1076 (currently subdivided into L.R. 3081, L.R. 3082 and L.R. 3083)**
 - e) Plot No. 30/74 on Kahuhu Market in Githiga**
- iii) That this court be pleased to grant any other or further order it may deem fit and expedient in the circumstances.**

HEARING

APPLICANTS' CASE:

On 27th July 2015, the Court directed that both applications for revocation of grant by the Applicants be heard together as the germane issue

in both applications were similar.

Phoebbe Wambeti Ngoima (PW1) filed Summons for revocation on 21st January 2005, a similar application on 7th August, 2009. On 6th June 2013 she filed application for revocation of title and similar application on 15th April, 2015. She relied on the contents of these applications in her testimony.

In a nutshell, she testified that her late father showed where on the said property to build her house and she built a stone permanent 7 bedroom house worth Ksh 4-5m built for her by her children. She resided on the said property on the said portion since 1975 up to date. She engages in farming and keeping livestock; chicken, cows and goats. She has 6 children and 15 grandchildren and she lives with 6 of those grandchildren and has no land to give them.

She confirmed that on 8th December 2000, she attended Court for confirmation of grant but she was not aware of and was not informed what was going on. She was told to sign the documents for succession but she did not know nor was she informed that these proceedings were for distribution of their late father's estate. She was not asked if she agreed with the distribution. The land comprises of 40-50 acres yet from the grant she was allocated 2 acres and to date she has never received the title documents.

The application is based on grounds that; The grant of letters of administration of the estate of Geoffrey Mwaura Ngoima was obtained by making of a false statement and concealment from court of material information to the case; that the administrators failed to include some of the beneficiaries to the deceased; that it is imperative that the court issues necessary orders to preserve the estate. There was money in bank accounts and a shop that is rented and proceeds paid. The administrators have not carried out their duties diligently. She is apprehensive that she will be evicted from her present portion of deceased's estate that she has also developed.

Their late father did not leave an oral Will; he did not distribute his estate but he told each one where to build their house on the land.

She has been in Court since filing the application for over 10 years and her request is equal distribution of the estate of the deceased and not the 2 acres allocated to her.

Edith Waithera Ngoima (PW3) testified and relied on the application for revocation of grant filed on 17th March 2015. The application is supported by the sworn affidavits of Edith Waithira Ngoima, Phyllis Wambui Wagacha and Virginia Woki. She avers that the respondents applied for grant of letters of administration on 3rd November 1998 and in their affidavit in support of the same listed their mother and 7 children leaving out 5 daughters of the deceased namely Hilda Gathoni, Mary Nyambura, Virginia Njoki, Phyllis Wambui Wagacha and Mercy Njeri Ngoima. Further, that only 5 out of 13 beneficiaries consented to the confirmation of the said grant while some like herself were misled to sign the consent. Her brother, Njenga told her to sign documents to obtain a loan for taking care of the tea plantation. She later attended Court for confirmation of grant and they were told to take care of the widow of the deceased. She did not understand what was going on. That the properties were not shared equitably among the beneficiaries hence the 5 daughters were not granted any property. That some of the properties were left out i.e. Plot 3074, others were subdivided and Githunguri/Githiga/3079 and Githunguri/ Githiga/3080 have been sold off.

After that they agreed on distribution of 2 acres each for her and PW1 but the same was never availed to date.

The deceased gave Plot No. Githunguri/Githiga/1073 to Jean Hutchinson Wanjiku (now deceased) as a wedding present and even though there was no dispute, after allocating her 2 acres of land as per the said grant the same were never transferred to her or her family. PW3 was cultivating on the said parcel of land but had to stop when the Respondents started asking her to pay rent. That she had earlier sought revocation of the said grant in her application dated 24th February 2014 but her advocate on record did not find the Court file.

PW3 stated her brothers neglected their mother, from 1985 she lived with her in Buruburu estate. Later, they moved to Githiga and lived in Kangethe's house until her death in 2008. They built a house for their mother and after her death she continued to live there until Njenga chased her out of the house and rented it. He felled trees and sold. Ngoima and Kangethe also rented out land. Kangethe and Phoebe built their houses where the deceased showed them to build during his lifetime, but Fred Njoroge began to build after the Court issued orders to preserve the estate of the deceased.

The daughters worked together and took their elderly mother to clinic and cared for her during admission in hospital. She attached medical bills, the bundle produced in Court dated 4th November, 2015 which their mother incurred medical bills and the daughters' paid. Their brothers did not contribute and it is unfair that they now seek to own all land to the daughters' exclusion.

PW3 attended the meeting where it was alleged that the deceased made the oral Will, it was a normal family gathering and he did not distribute his properties. Although the deceased's brothers Ephantus Kamunge and David Ngoima attended the meeting they did not witness the oral will. The allegation that the Applicants pursued the case now that their mother and brothers to deceased are now deceased is not borne out by facts, PW 1 filed the application in 2005 and PW 3 in 2015 and some of the witnesses were alive.

Phyllis Wangui Ngoima (PW4) stated that the administrators of the estate did not list her as one of the beneficiaries of the deceased's estate, she was not informed and she did not participate in the proceedings for grant and confirmed grant.

RESPONDENTS' CASE:

Ngoima Mwaura (DW1) testified and relied on his affidavit filed on 15th July 2015 that in October 1984, their father, the deceased called a family meeting at home; at the meeting, their late mother, the Applicants, the Respondents, the deceased and his 2 brothers were present. Mary Koinange, Phyllis Wambui, Jean Hutchinson and Virginia Woki were absent. He said the deceased said the land belonged to the widow, their mother as long as she was alive, the daughters were educated and had done well therefore the land would revert to the sons.

Any of the daughters who would come back home would get 2 acres.

During his lifetime, the deceased showed Kangethe where to build his house on the land, he gave Jean Hutchinson a 3 acre gift. The proceedings to obtain grant were commenced in 1998 more than 10 years after deceased's death. In 1999, he left for US and left his house and 10 acres of land until he came back in 2013 and wanted both back for his use.

The 2 Applicants got 2 acres each, which they refused to take to date. DW1 stated that it is not possible PW3 who was present during the Court proceedings to have been misled, she worked as Executive Secretary, Ministry of Foreign Affairs, so who misled her and how was she misled? DW1 attributed the instant case to recent changes in law by Constitution of Kenya 2010 and the Applicants have taken advantage of these changes and not that the administrators concealed any facts of the process of obtaining grant was defective and it is not true the grant is inoperative. He reiterated that he inherited his parents' house Parcel 1074, Kangethe built on Parcel 1075, and Parcel 1076 is tea plantation 8 acres, Wambeti (PW1) was on Parcel 1074 and Edith (PW3) on Parcel 1076. He acknowledged Edith looked after their late mother with her sisters. He allowed Edith to live in his house and cultivate land for 10 years when he came back, he took over and is rearing grade cattle.

Mercy Njeri was married and upon her husband's death, she inherited from his estate. Hildah Gathoni and Mary Mbiyu Koinange discussed these proceedings and declined to go against their late father's wishes.

Njenga Mwaura Ngoima (DW2) stated he relied on affidavits filed on 19th May 2015, 6th June 2015, 18th May 2015 and 15th July 2015.

He confirmed that their late father called a family meeting as DW1 stated that their father formalized his wishes in terms of inheritance and their mother was present and aware and agreed. So after deceased's death, he and DW4 filed Succession proceedings in Court on the advice of a friend and filed petition for grant of letters administration intestate. He did not include, 5 sisters as they were not beneficiaries of deceased's estate. The petition was gazetted and there was no objection. So they proceeded to distribute the estate and informed the Applicants of their portion of 2 acres each and they did not object/refuse.

He distributed all land as per the confirmed grant; the deceased subdivided the land into 4 portions, 1 portion for Jean Hutchinson (deceased) and the other 3 portions as agreed in the confirmed grant. The titles are out and have been ready for collection. Ngoima (DW1) obtained title deed fraudulently as he took it upon himself and allocated himself land not as in confirmed grant but 1 acre that belongs to PW1 Phoebbe Wambeti Ngoima. Despite him taking the Surveyor to verify the proper allocation, DW1 sent them away.

He told the Court that Parcel 1076 was subdivided between 3 people, Njoroge, Edith and him, he sold his portion.

He stated that the Applicants filed the instant applications to take advantage of new law COK 2010. Out of 11 children, only 3 have a problem, Mary Koinange and Hilda Gathoni signed affidavits of renunciation. It is not possible to annul the grant 30 years later as people have developed their portions and he requested maintenance of *status quo*.

Fredrick Njoroge Mwaura (DW3) testified and relied on his affidavit filed on 19th May 2015 and he confirmed that the deceased made an oral will with those present as confirmed by DW1 and DW2 and that is what they relied on in filing Succession proceedings in Kiambu Law Courts. The land in question is 43-44 acres or thereabouts and they distributed it as such. There was no objection at the time. The family members settled on the land according to their late father's wishes. The 4 portions of land were surveyed, consolidated and distributed as follows; Land Parcel L.R.1076 (DW3) resides there; L. R.1074 Ngoima(DW1)resides there; L. R. 1075 Kangethe resides there and owes (PW1) 1 acre; L.R 1075 was subdivided into L.R. 3081 to Edith(PW2); L.R.3082 to Njenga (DW2) ; and L.R.3083 to him (DW3). It is not true that the Applicants have not been allocated any land, they have each 2 acres and have built and reside on the land.

DW3 alluded to the fact that PW1 had insulted the deceased and told him he was foolish and stupid and he was present and heard her abuse him.

DW1 reiterated that Edith PW2 is entitled to 2 acres only as their late father as Kikuyu elder said if they went against his wishes they would be cursed.

Therefore the grant should not be revoked because it is as their father said there is no fraud or concealment of facts.

SUBMISSIONS

APPLICANTS' SUBMISSIONS

Edith Ngoima (PW2), Phyllis Wambui Ngoima(PW3) and Virginia Woki filed submissions on 4th May 2017 and raised the following issues challenging the process of obtaining grant and distribution of the deceased's estate;

- a) The deceased's wife /widow though included in the Petition, she was excluded in Summons for confirmation of grant and was not allocated any property.
- b) The written consents were by only 5 of the 13 beneficiaries contrary to legal requirements.
- c) Plot L.R. Githunguri/Githiga/1073 a gift to Jean Hutchinson (now deceased) by the deceased during his lifetime; and there being no dispute, has not been transferred to the estate of Jean Hutchinson.

The Applicants stated that they are entitled to an equal share of the estate by virtue of **Section 29 (a) Law of Succession Act** as dependents

of deceased's estate.

They also relied on **Article 27 & Article 159 (e) of Constitution of Kenya 2010** and the Case of **IN THE MATTER OF ESTATE OF ELIZABETH WANJIKU MUNGE (DECEASED) [2015] EKLK** at Pg 4 that promotes equality and defies discrimination of children of deceased. They also alluded to the fact that from the pleadings and evidence; there are sufficient grounds to warrant revocation of grant.

Phoebe Wambeti (PW1) filed submissions on 17th October, 2017; in her application sought revocation of grant issued to Njenga Mwaura Ngoima and Geoffrey Kangethe Ngoima.

In her submissions she raised 3 issues for determination namely;

Whether the grant of letters of administration issued to Njenga Mwaura Ngoima and Geoffrey Kangethe Ngoima on 6th January, 1999 and consequently confirmed on 8th December 2000 should be revoked/annulled. It was submitted that the grant so obtained and confirmed qualifies for revocation on grounds listed under **Section 76 of the Law of Succession Act**. That the proceedings to obtain the grant were defective in substance in that the respondents have not adduced any evidence in support of the alleged oral will relied on in the distribution of the deceased's estate the exact, date when the same was allegedly made and all the terms or aspects addressed by the said oral will. The applicant contends that there was no such will as the deceased could not have disinherited their mother. Further that despite insistence of the existence of an oral will the administrators applied for grant of letters of administration intestate hence the proceedings initiated were defective *ab initio*. That the administrators did not involve all the beneficiaries in the petition for grant but they handpicked a few beneficiaries and left out others which rendered the whole process flawed.

Further that the grant was obtained fraudulently for failing to disclose all the children of the deceased by omitting to list the 5 daughters of the deceased namely; Hilda Gathoni, Mary Nyambura, Virginia Woki, Phylis Wambui Wagacha and Mercy Njeri Ngoima.

She relied on the case of **THE ESTATE OF FREDRICK KAMAU KIGURU, SUCCESSION CAUSE NO. 41 OF 2001**, L. Justice Koome held that the applicant who was the wife of the deceased ought to have been notified together with her children, of the petition for grant of letters of administration. That the said grant having been obtained fraudulently and through the concealment of material facts, specifically the existence of the applicant and the children of the deceased should be revoked.

It was submitted in the instant case; that the deceased's widow was never allocated any part of the deceased's assets. With the respondent taking advantage of the 2nd applicant's advanced age and limited education tricked her to sign the petition documents on the claim that the same was meant to report / register their father's death. In her evidence in court she testified that she did not hear any mention or anything to do with confirmation of grant and she was not asked and she did not agree to the mode of distribution proposed by the administrators. That although she attended court on the day of confirmation she did not understand what was going on.

It was submitted that the respondents did not include all the deceased's property Plot No. 30/74 on Kahuhu Market and funds in the deceased's bank accounts in their petition document and also in their confirmation of grant application. That the applicant was to get a parcel of land from the 40-50 acres and was gifted L.R. Githunguri/Githiga/1074 where she was granted permission to construct her house by the deceased. However, upon search of the same it is registered in the names of Ngoima Wa Mwaura adding that she is yet to receive any portion of the deceased's parcel of land.

Further, that the 2nd applicant has constructed on the deceased's land and upon conducting a search her name did not appear stating that the administrators did not administer the estate as per the confirmation of grant. It was submitted that the administrators have never produced in court any inventory or account of administration as required by **Section 83(e) and (g) of the Law of Succession Act**. That the grant has become useless and inoperative in that some beneficiaries have titles in their names but do not have the said parcel of land on ground.

It was submitted that the distribution of the deceased's assets was contrary to **Article 27 and 60 of the Constitution** and purporting to distribute to some children omitting others went contrary to the said provisions. The said distribution was unjust and hence the said estate should be re-distributed amongst all the beneficiaries of the deceased regardless of their gender.

The applicant has sought the court to issue a mandatory injunction against the eviction from the parcel of land where she has constructed her parcel of land. She relied on the case of **KENYA BREWERIES LIMITED & ANOTHER VS W. OKEYO CA NO. 332 OF 2000**,

The applicant claims that special circumstances exist as she was gifted the said parcel of land by the deceased and has constructed a 3-bedroom permanent house and wishes to retain the same should the court reconsider to remedy the wrongs done during administration of the deceased's estate. It was the applicant's submission that the respondents fraudulently obtained the grant for letters of administration and as such the same should be revoked as provided for under **section 76 of the Law of succession Act**.

RESPONDENTS' SUBMISSIONS

The respondents in their submissions take issue with the applicant's delay in filing for revocation of the said grant of letters of administration, having filed the application 15 years after the said grant was issued and the applicant having participated in the proceedings. It was submitted that the deceased's widow was not disinherited but retained her life interest until her demise. That the applicant conveniently filed the application after the 2nd notice of motion was filed and after the demise of the two sureties who attested to the oral will of the deceased. That the Respondents allege double standards on the part of Applicants who conveniently take no issue with the gifting of Jean Hutchison Wanjiku by the deceased but challenge their father's oral will which has been adhered to for over 33 years. That other than the title unlawfully held by Ngoima wa Mwaura, the administrators had the land surveyed for distribution as per the confirmation of grant with each beneficiary occupying the parcels allocated. That Plot No.30/74 Kahuhu Market was not a free property at the time of petitioning for grant of letters of administration and will be added after the conclusion of civil proceedings.

The respondents pointed out 3 issues for determination.

i) validity of oral will made on 14th October 1984

ii) whether the applicants are entitled to the prayers sought in their application

iii) whether independent legal advice is necessary in succession matters

It was submitted that the deceased's utterance's and last wish in respect of his property meets the ingredients of an oral will as provided under **Section 9 of the Law of Succession Act** which defines a will to be,

“ an oral will is valid if it is made in the presence of two or more competent witnesses and the testator dies within a period of three months from the date of making the will”

Further **Section 3 of Law of Succession Act** defines a will to be;

“the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death , duly made and executed according to the provisions of part II..”

With regard to prayer for the stay of execution, the respondents submit that as per the certified proceedings of 30th May 2008 all beneficiaries were present and there was no objection on confirmation of the grant was raised. They sought to estop the applicant from claiming to be dissatisfied with the confirmation. Further, it was submitted that the administrators have faithfully administered the estate of the deceased and have never charged the applicants rent on the parcel of land on which she lives on. It was submitted that all beneficiaries consented to the confirmation of the grant of letters of administration and as such they should be estopped from challenging the confirmation of grant.

On this they relied on the case of **PENINA NJUHI MBARUKU & ANOTHER V REUBEN KARONGO WAINAINA [2015] EKLK**,

It was submitted that the orders sought for revocation were baseless and that the applicants have not raised any sufficient grounds as set out under **Section 76 of Law of Succession Act** to warrant the same. They relied on the case of **MATHEKA AND ANOTHER VERSUS MATHEKA (2005) 2KLR 455**.

It was submitted that the applicants did not lay any basis for their proposition in respect of the above guidelines and did not cite any provisions nor case law to support the same.

On the issue of orders sought to bar eviction they relied on the case of **GIELLA VS CASSMAN BROWN (1973) EA 358**, which lays down the principles guiding the court in granting an injunction the applicant must demonstrate that; He has a prima facie case with a probability of success; He stands to suffer irreparable loss and damage if the orders sought is not granted. In the event of doubt the court to decide the matter on a balance of convenience.

They relied on the case of **MRAO V FIRST AMERICAN BANK OF KENYA LTD. & ANOR [2003]** which defines a prima facie case as follows;

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

It was submitted that the rights of the two applicants have not been infringed upon as each of them have been allocated 2 acres from the deceased estate and no proprietary rights have been infringed.

ANALYSIS AND DETERMINATION

I have considered the parties pleadings, testimony, and submissions. In my view the issues for determination are;

1) Did the deceased leave/have a valid oral will?

2) Have the parties satisfied the grounds for revocation of grant as set out in Section 76 of the Law of Succession Act to warrant revocation of grant or not?

3) Should distribution of estate of deceased be as per confirmed grant or equally/equitably amongst beneficiaries of estate?

4) Has the applicant met the requirements for grant of an injunction?

The deceased died on 24th October 1984, this was after the coming into force of the Law of Succession Act whose commencement date

was 1st July, 1981 as such the estate of the deceased is governed by the provisions of the said Act.

The respondents argue that the deceased left an oral will allegedly made during a meeting held sometime in 1984 after which the deceased is said to have died shortly thereafter. There is no evidence of the exact date when the said oral will was made. This is crucial to determine whether the alleged oral will met the requirements of **Sections 9 and 10 of the Law of Succession Act**,

1) No oral will shall be valid unless-

a) it is made before two or more competent witnesses; and

b) the testator dies within a period of three months from the date of making the will.

2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of the oral will, and which has not been revoked as provided by Sections 18 and 19.

10) If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.

The Respondents called no independent witness to testify on the said oral will since the Respondents claimed there was an oral will by the deceased and the Applicants claimed there was no will. In the absence of competent independent witness (not beneficiaries) who testified, this Court cannot confirm the existence of such Will and its validity.

Further, it is confirmed by the documents filed by Njenga Mwaura Ngoima and Geoffrey Kangethe Ngoima in **SUCCESSION CAUSE 249 OF 1998 Kiambu Law Courts**; who petitioned for grant of letters of administration, they did not disclose the oral will but filed Petition for grant intestate and not based on oral will or will annexed.

Having found that there was no proof of existence of an oral will the estate of the deceased, administration of the estate devolves under the intestacy rules. By the time the confirmation of grant was taking place, the widow of the deceased though alive was of ill health and was under constant care by her children and later died in 2008. The applicable law after 2008 would be **Section 38 of the Law of Succession Act** which provides,

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among surviving children”.

From the foregoing, the estate of the deceased should be equally distributed amongst the deceased's children.

I have carefully considered the distribution as done by the respondents. From the said distribution as adopted in the confirmation of grant of 11th December, 2000, the administrators left out the 5 daughters of the deceased namely; Phyllis, Mercy, Mary, Hilda and Virginia. The respondents admit to having left out the sisters from the list of beneficiaries and also in the confirmation of grant. They argued that the sisters were not entitled as they were married and well off hence not entitled to inherit from the deceased. Although the Respondents alleged they relied on the deceased's wishes; it was not proved through evidence that the deceased made his wishes on distribution of his estate save for the gifts *inter vivos* that are not contested and if he did it was not proved that it amounted to a valid oral will. Therefore, the estate is to be administered and distributed under intestacy laws. The Respondent ought to have complied with the following mandatory provisions as follows;

Section 51 of Law of Succession Act prescribes;

1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner,

2) An application shall include information as to-

a) the full names of the deceased;

b) the date and place of his death

c) his last known place of residence;

d) the relationship (if any) of the applicant to the deceased;

e) whether or not the deceased left a valid will;

f) the present addresses of any executors appointed by any such valid will;

g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

Rule 26 of Probate and administration Rules prescribes;

1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the name degree as or in priority to the applicant.

2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

From the above provisions, the disclosure of all surviving children of the deceased and of the child/children of deceased child of the deceased in the Petition was not complied with. There were no written consents from all beneficiaries of deceased's estate or renunciation filed then (they were filed in 2015) on the appointment of administrators and contents of the petition. The Consents to making of grant filed were from Jean Hutchinson Wanjiku, Edith Waithira (PW2), Fredrick Njoroge Mwaura (DW3), Phoebe Wambeti (PW1) Phyllis Wangui Ngoima (widow). PW1 & PW2 stated that they were not informed or aware of what was going on in Court and what they consented to. Hilda, Mary, Phyllis, Virginia, Mercy and Ngoima Mwaura were left out. The renunciation by Hilda, Mary & Mercy were filed long after the petition was filed and grant was issued.

The Applicants in this instance allege that the Respondents herein concealed from court that there were other beneficiaries to the deceased's estate listing only the sons and 3 daughters of the deceased herein whilst leaving out 5 daughters of the deceased hence disinheriting them.

With regard to the confirmed grant issued on 11th December 2000, the wife /widow of the deceased was named in the Petition, and whom DW3 alleged that the deceased said the land belongs to his wife during her lifetime, yet she was not named or allocated any property nor her consent sought and obtained to the distribution of deceased's estate. She also did not exercise her life interest on the suit property.

The Summons for confirmation of grant did not contain list of beneficiaries, list of all assets that comprised of deceased's estate; the Plot 30/74 Kahuhu Market and proceeds of deceased's bank accounts were omitted, what was included was Githunguri/Githiga 1073,1074, 1075 & 1076 and the proposed mode of distribution was as follows;

- i. Ngoima Mwaura – 8.7 acres
- ii. Njenga Mwaura Ngoima – 8.8625 acres
- iii. Geoffrey Kangethe Ngoima- 10.4 acres
- iv. Fredrick Njoroge Mwaura Ngoima – 8.8625 acres
- v. Jean Wanjiku 3.075 acres
- vi. Phoebe Wambeti 2 acres
- vii. Edith Waithira – 2 acres

There were no written consents by the beneficiaries approving the distribution of the estate. They did not execute any documents as consent on the mode of distribution as was stated in the case of **MARY WANGARE KIHKA vs JOHN GICHUHI KINUTHIA & 2 OTHERS [2015] eKLR**. The Court record does not indicate in name (s) of who was present during the confirmation of grant process .It cannot be confirmed in the absence of written consents or confirmation of each beneficiary present; that the beneficiaries were informed, knew of the proposed mode of distribution, consented/approved it and participated in the process. The Court record in **Kiambu Law Courts Succession Cause No. 249 of 1998** shows that on 8th December 2000, the Applicant addressed the Court as follows; asked the Court to confirm the grant and distribute the estate as per schedule to affidavit. He said that; '**all the beneficiaries are here and have no objection.**' The Court allowed the application. There is no indication who all beneficiaries were; their names and consents.

The above anomalies pointed out confirm that the Administrators/Respondents did not conform to the legal requirements of obtaining a grant and thereby the process was defective in substance and they concealed material facts as provided by **Section 76 of Law of Succession Act** as some of the grounds for revoking a grant.

If the beneficiaries did not consent to the mode of distribution of deceased's estate how was it equal, equitable or fair as shown in confirmation of grant? See **SUCCESSION CAUSE 399 OF 2007 IN RE ESTATE OF JOHN MSAMBAYI KATUMANGA (DECEASED) [2014] eKLR**.

The Respondents stressed the fact that the Applicants' pursued the claim to the estate after 30 years so as to take advantage of COK 2010 and now that the witnesses to the oral will are deceased namely , the deceased's widow and brothers to the deceased. PW1 filed Summons for revocation of grant in 2005; Constitution of Kenya 2010 came into force thereafter. The Court record confirms the matter was not delayed by the Applicant but various circumstances including the court itself. So the delay was not deliberate and cannot be attributed to the Applicant. The witnesses were alive and well at the time the 1st Applicant filed the summons for revocation of grant.

The Law of Succession Act does not put a time line within which a person can file an application for revocation of grant. Section 76 particularly provides that,

“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”

Secondly, leaving out the daughters of the deceased whether married or not amounts to discrimination and is contrary to **Article 27 & 60 of COK 2010**. In the case of **PETER KARUMBI KEINGATI & 4 OTHERS VS. DR. ANN NYOKABI NGUTHI & 3 OTHERS C.A. 235 of 2014 (2014) eKLR Mwilu, Kiage & M’Inoti JJA stated as follows:**

‘As regards to the argument by the Applicants that married daughters ought not to inherit their parent’s property because to do so would amount to discrimination to the sons on account of the fact that the married daughters would also inherit property from their parent’s in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that courts would grapple with during distribution are the issues anticipated by Section 28 of the Law of Succession Act. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. The ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for those discriminative cultural practices against women be buried in history.’

It is not in dispute that Jean Hutchinson had been gifted a portion of land from the deceased’s lands and issued with a title deed in 1988. The land having been so gifted accordingly in law under **Section 42 of Law of Succession Act** ceased to belong to the deceased and as such would not be part of the deceased’s estate.

Two of the daughters; Hilda Gathoni Wambura and Mary Nyambura Mbiyu are said to have renounced their right to the said inheritance. This is supported by the affidavits dated 19th May 2015. It is not clear from the Court record Mercy Njeri Ngoima’s position.

The administrators are adamant that the distribution is fair as the same was done according their father’s wish. Phyllis, Edith and Virginia are seeking equal distribution of the deceased’s estate to all beneficiaries having been omitted as beneficiaries in the grant and confirmed grant. The respondents have admitted to omitting the daughters in the list of beneficiaries in the petition and confirmation of grant. This I find is tantamount to making of a false statement or by the concealment from the court of something material to the case. Hilda Gathoni Wambura and Mary Nyambura Mbiyu in their affidavits dated 19th May 2015 have expressed their lack of interest in pursuing this matter. There is no representative from the estate of the late Jean Hutchinson challenging the said confirmed grant. I therefore find that the grant issued on 8th January 1999 and confirmed on 11th December 2000 was obtained fraudulently as such the same should be revoked. The respondents should therefore include Phyllis, Edith and Virginia in the list of beneficiaries. Parties have indicated that the beneficiaries have undertaken development on the various parcels of land so allocated. As such this should be put into consideration during the distribution of the deceased’s estate. A grant should issue jointly to the two respondents and 2 applicants and parties to proceed to confirmation of grant. The applicant’s application is allowed.

The applicant has sought an injunction restraining the respondents from evicting, trespassing or in any way interfere with the land occupied by the applicant as alienated by the deceased. I find that since the suit properties were in the name of the deceased and were transferred to beneficiaries and buyers through the defective grant; the suit properties despite titles remain the original property of the deceased and hence ought to be preserved and status quo maintained until the irregularity, illegality and invalidity are regularized. To that end, the estate of the deceased (as it was the deceased’s before survey, sale, transfer) shall be preserved under **Section 45 of Law of Succession Act** until the new grant is issued and confirmed.

DISPOSITION

1. The grant issued on 8th January 1999 and confirmed on 11th December 2000 is revoked under Section 76 of Law of Succession Act.

2. A new /fresh grant is to be issued forthwith in the names of the following beneficiaries;

a) Njenga Mwaura Ngoima

b) Geoffrey Mwaura Ngoima (for continuity and convenience of Purchasers; innocent 3rd Parties who are bonafide purchasers for value and without notice of defective title)

c) Phoebe Wambeti Ngoima

d) Edith Waithera Ngoima

As joint administrators of the deceased’s estate who will inform, consult and engage all beneficiaries (except those who renounced their interest) with a view to equitable redistribution of the deceased’s estate; (not equal distribution because 30 years later; there are irreversible changes on use of land; gift *intervivos*, permanent developments, sale of land etc) and obtain consents when filing summons for confirmation of grant. If any party is aggrieved to file protest (s) to be determined by Court.

3. The redistribution shall include following portions of original Githunguri/Githiga 1073,1074, 1075 &1076 where undeveloped, cultivated and unsold portions and Plot No 30/74 Kahuhu Market Githiga and exclude;

- a) Jean Wanjiku Hutchinson's gift from deceased 3or so acres
- b) Permanent structures built by Kangethe and Phoebe as had been shown by deceased
- c) Permanent structures by Edith (house built after she vacated Kangethe's house)
- d) Their parents' home
- e) Fredrick Njoroge's house
- f) Njenga Mwaura's house
- g) Ngoima Mwaura's house
- h) All portions of land in the suit property validly sold to 3rd Parties.

4. The redistribution shall take into account of each beneficiary's gift, part of land one has sold, part of the land one has developed, cultivated or settled in the equitable distribution.

5. Upon agreement or settlement; the subject title documents shall be surrendered to Land Registrar Kiambu and each beneficiary's cost after confirmation of grant process at own cost the issuance of new title.

6. The status quo shall be maintained; there shall be no eviction, change or movement of boundaries, demolitions or any form of scuffle or damage to property until grant is confirmed.

7. OCPD Kiambu Police Station to supervise compliance of the above orders.

8. Any aggrieved party may apply to Court or lodge appeal.

9. Each party to bear own costs.

DATED, SIGNED AND DELIVERED THIS 17TH DAY OF SEPTEMBER 2018.

M. W. MUIGAI

JUDGE- FAMILY DIVISION HIGH COURT

IN THE PRESENCE OF;

MS LEAH NGANGA FOR APPLICANT

MS LYNN NGANGA & MRS. AKEDI FOR APPLICANTS

MWENDA HOLDING BRIEF FOR MR. NJERU FOR RESPONDENT

PATRICK KINUTHIA COURT CLERK.