



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 304 OF 2011**

**IN THE MATTER OF THE ESTATE OF STANLEY MUTUA GITUMA (DECEASED)**

**CHRISTINE WAUSI MWAMBI**

**MOSES MWONGERA MWOGA.....PETITIONERS**

**-VS-**

**GRACE GATWIRI MUNYUA**

**MARTIN MURITHI MUTUA.....APPLICANTS/OBJECTORS**

**R U L I N G**

1. **STANLEY MUTUA GITUMA (“the deceased”)**, died on 5<sup>th</sup> January, 2009. On 9<sup>th</sup> June, 2011, **Christine Wausi Mwambi and Moses Mwangera (“the petitioners”)** petitioned for letters of administration intestate. In the Petition, they stated that the deceased was survived by:-

- a) **Christine Wausi Mwambi - widow**
- b) **Martin Murithi - son**
- c) **B G - son (minor)**
- d) **S M - daughter (minor)**

2. The deceased’s assets were listed as follows:-

- a) **death gratuity held by the public trustee – Embu**
- b) **money held at D. C’s office, Imenti North District**
- c) **Land parcel No. Ntima/Igoki/6321**
- d) **Land parcel No. Gatuanyaga/Ngoliba/265**

3. The grant of letters of administration were issued on 12<sup>th</sup> October, 2011 to the petitioners. The same was confirmed on 13<sup>th</sup> February, 2013 and all the assets were distributed to **Christine Wausi Mwambi** except **Land Parcel No. Ngoliba Gatuanyaga Block 2/265** in which she held jointly with her two children, B G and S M (minors).

4. On 30<sup>th</sup> October 2013, the Objectors lodged an application seeking the revocation of the grant among other orders under **Section 76(b) and (c) of the Law of Succession Act, Rules 44(1) and (2) and 73 of the Probate and Administration Rules and Section 68 of the Land Registration Act 2012.**

5. The objectors contended that they were beneficiaries of the estate as wife and son of the deceased, respectively yet they were not provided for; that the Cause was filed secretly and without their knowledge or consent; that the grant was obtained fraudulently by making false statement or by concealment from the court of material facts and that the signature appearing on the consent to the making of the grant was not that of the 2<sup>nd</sup> objector.

6. The application was opposed through a replying affidavit of by **Christine Wausi Mwambi** sworn on 3<sup>rd</sup> February, 2014. She deponed the applicants were strangers to her. She denied all the allegations made by the objectors in the application and affidavit in support.

7. On 7<sup>th</sup> March, 2017, the court directed that the objection be determined through affidavit evidence on which the parties and their witnesses were to be cross-examined. The objectors testified and called two witnesses to support their claim while the petitioners testified and called one witness.

8. **O1W1 Martin Murithi Mutua**, relied on his affidavits dated 30<sup>th</sup> October, 2013 and 8<sup>th</sup> April, 2017 respectively. He told the court that he is a son of the deceased and that he used to live in Giaki in the land belonging to the father of the deceased which had not been subdivided. He was in occupation thereof with amongst others Alexander Mugira and Japheth Mwikathi who are brothers to his father.

9. After he found out about the succession cause he lodged the objection and the two petitioners threatened him and he moved away from where he used to stay. Since then, the petitioners had married each other and are now living on that property. That his grandfather knows him well but is also involved in the fraud with the petitioners. He had taken photographs with his father during his lifetime but the 2<sup>nd</sup> petitioner took all these things from his grandfather and his wife burnt the house and everything inside.

10. He stated that the deceased had Ngoliba/Gatuanyaga/Block 2/265 wherein he had constructed premises which were unfinished by the time of his demise. That what was left was roofing. He did not know if it was the 1<sup>st</sup> petitioner who completed them. He denied ever signing any consents in these proceedings. He denied being involved in the procurement of the chief's letter that led to the commencement of these proceedings or being related to the writer thereof. He stated that the 1<sup>st</sup> objector was his mother.

11. **O2W1 Grace Gatwiri Munyua** filed an affidavit sworn on 8<sup>th</sup> April, 2017 which she adopted as her evidence. She stated that she got married to the deceased under Kimeru Customary law in 1975. That the 2<sup>nd</sup> objector was her son with the deceased. That the 1<sup>st</sup> petitioner is her co-wife whose identity she only came to know during the burial of the deceased. Her husband used to live in Meru until he got a job with the National Youth Service and worked at Garisen and later Yatta. She used to visit him at his working place. After his death, the petitioners filed this succession cause secretly of which she got to know about when her son was prevented from splitting his timber. She has other children Faith Kajuju and Peter Mwititi from other relations than the deceased.

12. **OW3 David Mugambi Ruuti** has been the chief of Kirima Itune location for 23 years. He told the court that he knew both the deceased and his father for he grew up within the same locality and they used to go to the same church. He is the one who usually writes the letters of introduction for succession matters. He denied having written the letter dated 7<sup>th</sup> June, 2011 which commenced these proceedings. He recalled writing a letter to the deceased's employer at the instance of the petitioners in which he disclosed the heirs as those in the letter of 7<sup>th</sup> June, 2011 that was on record.

13. He confirmed that the 2<sup>nd</sup> objector was a son of the deceased born out of wedlock and that he attended at the funeral where he was identified as such. The 2<sup>nd</sup> objector had in 2014 planted tobacco on the land belonging to the deceased's father and he is the one who wrote him a letter of introduction to BAT to show that he had lawfully cultivated the tobacco. That the father of the deceased would be lying if he insisted that the 2<sup>nd</sup> objector was not a son of the deceased.

14. He came to know Christine on the date of the funeral when she was introduced as the only wife of the deceased. She had now remarried the 2<sup>nd</sup> petitioner with whom they now live as man and wife. He denied that **O2W1** was recognized as a wife at the burial. He knew her as a girlfriend of the deceased in the 1970s. According to him, those who survived the deceased were the 1<sup>st</sup> petitioner, the 2<sup>nd</sup> objector, Brian and Sharon.

15. **OW4 Christine Sanita**, the Assistant Public Trustee produced the public trustee file No. 190 of 2011 in respect of this estate as **OExh.1**. She confirmed that her office received Kshs.824,434/70 from treasury as death gratuity. On receipt of the money, they sought to establish who the beneficiaries were. They were confirmed to be Christine Wausi (widow), Martin Murithi Mutua (son), B M (son) and S M M (daughter). The money was then released to the petitioners upon all the necessary documents being presented to her office. According to her, if her office was to undertake distribution of the estate in accordance with the **Law of Succession Act, Cap 160 Laws of Kenya**, the 2<sup>nd</sup> objector would have been entitled to a quarter of the sum since he formed a separate unit.

16. **P1W1 Christine Wausi Mwambi** reiterated the contents of her affidavit sworn on 9<sup>th</sup> May, 2017. She stated that the chief of Kirima Itune Location, one Mr. Mugambi whose letter dated 7<sup>th</sup> June, 2011 commenced these proceedings was a relative to the objectors. That the said Mugambi included the name of the 2<sup>nd</sup> objector as a son of the deceased in the said letter. She could not remove that name from the letter and neither did she know that the chief had a superior to whom she could have complained.

17. She told the court that she had spent the death gratuity on building the rental houses on land parcel No. Ngoliba/Gatuanyaga Block 2/265 and produced photographs to that effect. That had spent Kshs.1.2M to construct the said houses and has receipts to prove that fact. She was collecting a monthly rent of Kshs. 10,000/=.

18. She admitted that the 2<sup>nd</sup> objector did not sign any of the consents on record. That they were signed by one Nicasio Githinji Murage who helped her and the 1<sup>st</sup> petitioner to get money from the public trustee.

19. **P2W1 Moses Mwangera Mwoga**, a brother to the deceased, relied on his affidavit sworn on 9<sup>th</sup> May, 2017 as his evidence. He stated that the 1<sup>st</sup> petitioner was the wife of the deceased with whom they were blessed with two children. He denied that the objectors are beneficiaries of the estate. None of the objectors had been introduced to the deceased's family.

20. He stated that it is he and the 1<sup>st</sup> petitioner who procured the introductory letter which commenced these proceedings. That it was the chief who added the name of the 2<sup>nd</sup> objector to the said letter. He denied ever knowing the 2<sup>nd</sup> objector. His friend showed him the office of one Murage who helped the 1<sup>st</sup> petitioner in the succession cause. He does not know who signed the consent for the 2<sup>nd</sup> objector and who chose Murage as the surety.

21. On his part, **PW3 Mwoga M'Ajara** alias **Mwoga M'Gituma**, father to the deceased, adopted his affidavit sworn on 9<sup>th</sup> May, 2017 as his evidence. He reiterated what **P2W1** had told the court. He denied that any dowry was paid for the 1<sup>st</sup> objector. He paid dowry for the 1<sup>st</sup> petitioner after the demise of the deceased so that she could be allowed to bury him.

22. Although the parties were directed to file written submissions, only the objectors filed theirs which I have carefully considered. The issues that arise for determination are; ***whether the applicants are beneficiaries of the estate of the deceased; whether they were entitled to be notified of these proceedings and their consent required; whether the grant should be revoked and finally how the estate should be distributed.***

23. The applicants' contention is that they are heirs to the deceased by virtue of being wife and son of the deceased, respectively. The petitioners and their witness assert otherwise. I will deal with the contention of each applicant separately.

24. The 1<sup>st</sup> applicant stated that she was married to the deceased in 1975 when she was 17 years. She was then in secondary school while the deceased was in Polytechnic at Gitoro. That dowry of a goat was paid on her behalf in accordance with the Meru customs. That the deceased later moved her to Meru town where he established a business for her when he was employed by the National Youth Service. That she used to visit him at his place of work at Garsen and Yatta. She admitted that apart from the 2<sup>nd</sup> Applicant, whom she bore with the deceased, she had two other grown-up children from other relationships.

25. **OW3** the area chief told the court that he knew the family of the deceased very well. He knew the 1<sup>st</sup> objector as a girlfriend with whom the deceased was moving around with in 1970s. That the 2<sup>nd</sup> objector was a child of the deceased with the applicant born out of wedlock. That the 1<sup>st</sup> applicant was not recognised as a wife of the deceased during his burial.

26. **OW3** was an independent witness. He had nothing to gain from his testimony apart from telling the court what he knew about the dispute. This court recalls that the 1<sup>st</sup> objector testified that she did not know that the 1<sup>st</sup> petitioner was married to the deceased until the day of burial. If that be the case, how comes that when she was allegedly visiting the deceased in Yatta, she did not see her yet the evidence on record clearly shows that the 1<sup>st</sup> petitioner cohabited with the deceased thereat? The 1<sup>st</sup> objector, in the courts' view, did not produce satisfactory evidence to prove any existence of a marriage between her and the deceased.

27. This court's finding is that, the 1<sup>st</sup> objector was not a wife of the deceased. She is not beneficiary and was not entitled to any notice of these proceedings.

28. As regards the 2<sup>nd</sup> objector, he contended that he was a son of the deceased. **OW3** also stated that the 2<sup>nd</sup> objector was a child of the deceased born out of wedlock. I saw the 2<sup>nd</sup> applicant testify. He stated that he had lived in his grandfather's land during the lifetime of the deceased. He was well aware of all the surroundings of his late father's home where he stated he grew up. That testimony remained firm even in the face of intense cross-examination.

29. On the other hand, **PW2 and PW3** told the court that they did not know the 2<sup>nd</sup> objector. The contention of the petitioners was that his name was inserted in the introductory letter dated 7<sup>th</sup> June, 2011 by **OW3**. When **OW3** appeared and testified, he was not challenged on that fact. He denied ever writing that letter or being related to the objectors. Investigations ordered by the court revealed that, the letter was written by one **Joseph Nkubi Mururu** the Assistant Chief of Kanjagi Sub-location who gave a statement to the police on the circumstances under which he wrote that letter.

30. The evidence on record is clear. The petitioners gave the name of the 2<sup>nd</sup> objector as a son of the deceased to the Assistant Chief (then acting as the chief of the area) who indicated as such in the letter of introduction. I reject the allegation that the name of the 2<sup>nd</sup> objector was inserted by the chief as contended by the petitioners. If that was the case, they would have protested. They included his name in both the petition and the documents they lodged with the Public Trustee, Embu. I saw **PW1, PW2 and PW3** testify. They came across as untruthful witnesses who will only give testimony that is self-serving, the age of **PW3** notwithstanding!

31. In the circumstances, I am satisfied and hold that the 2<sup>nd</sup> objector was a son of the deceased. He lived with the deceased's father in his early years when the deceased was away working. He was a son begotten out of wedlock. The deceased catered for his educational needs. The deceased's family only rejected him after the demise of the deceased. Accordingly, he is a beneficiary of the deceased and was entitled to be notified of these proceedings and his consent sought. This disposes the first two issues.

32. The next issue is whether the grant should be revoked. Addressing the meaning and tenor of **section 76 of the Law of Succession Act** in **Nyaga Cottolengo Francis v. Pius Mwaniki Karani CA No. 5 of 2016 (Nyeri)**, the Court of Appeal held:-

***“That provision has been construed by this Court in Matheka Case (supra) which laid out the guiding principles as follows:-***

***‘1. A grant may be revoked either by application by an interested party or on the court's own motion.***

***2. Even when revocation is by the court's own motion, there must be evidence that the proceedings to obtain the grant were***

defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law ....

3. ...

**4. When a deceased has died intestate, the court shall save as otherwise expressly provided have a final discretion as to the person or persons to whom a grant of letters of administration shall in the best interests of all concerned be made but shall without prejudice to that discretion accept as a general rule the following order of preference.**

**a) Surviving spouse or spouses, without association of other beneficiaries.**

**b) Other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided by part V of the Law of Succession Act.**

**c) The Public Trustee; and**

**d) Creditors”.**

33. I will be guided by the foregoing in dealing with the third issue. The petitioners admitted that the name of the 2<sup>nd</sup> objector was included in the petition as a beneficiary. The court has found out that he was a beneficiary and should have been notified of these proceedings and his consent sought. Form 38 is shown to have been signed purporting that the 2<sup>nd</sup> objector gave his consent. The petitioners told the court that it is only one Murage who knew whose signature that was. Surely, the court had been duped to act on fraudulent documents into issuing the grant. That grant cannot stand by dint of **Section 76 of the Law of Succession Act Cap 160 of the Laws of Kenya.**

34. The final issue is how the estate should be distributed. The evidence on record is that the estate consisted of two immovable properties and monies amounting to KShs.967,334/70 (**KS.824,334.70 from the Public Trustee, Embu and Ks.143,000/- from the D.C’s Office Imenti North**).

35. The beneficiaries are four, the 1<sup>st</sup> petitioner and her two children and the 2<sup>nd</sup> objector. The 1<sup>st</sup> petitioner stated that she is prepared to give the 2<sup>nd</sup> objector a portion in **Ngoliba/Gatuanyaga Block 2/265** because that is where she had given her other children only he agrees to accept her as step mother. What she need to know is that it is not what the parties consider to be convenient and desirable to them that matters in succession, but what the law dictates to be equitable and just.

36. For all purposes and intents, the deceased had children from two different women. My view is that the provisions of **section 40 of the Act** should apply whereby each of the deceased’s child and the surviving spouse should form a separate unit. In this regards there will be 4 independent units.

37. I have considered the entire testimony of the witnesses. There is no evidence that the entire monies received by the 1<sup>st</sup> petitioner was invested in the estate. Even if it were, all the beneficiaries will be entitled thereto equally. Although the parties did not file any valuations of the two available properties, I have considered that **Gatwanyaga/Ngoliba Block 2/265** is bigger in size (0.35Ha) and is fully developed with a monthly income of KShs..10,000/- or thereabout, while **Ntima/Igoki/6321** is not developed and measures approximately 0.10Ha. This will be taken into consideration on distribution.

38. Accordingly, the monies will have to be distributed into 4 equal shares of KShs.241,833/60. The 1<sup>st</sup> petitioner and her children will take the **Gatwanyaga/Ngoliba Block 2/265** property while the 2<sup>nd</sup> petitioner should take **Ntima/Igoki/6321**.

39. Accordingly, taking into consideration all the circumstances of this case, I allow the application and make the following orders:-

**a) the grant issued and confirmed to Christine Wausi Mwambi is hereby revoked;**

**b) a fresh grant be issued to Christine Wausi Mwambi and Martin Murithi Mutua as co-administrators of the estate of the deceased;**

**c) the title deeds to NTIMA/IGOKI/6321 and NGOLIBA GATUANYAGA BLOCK 2/265 be reverted to back to the names of the deceased;**

**d) the estate is distributed as follows:-**

**i) NGOLIBA /GATUANYAGA BLOCK 2/265**

Christine Wausi Mwambi on her own behalf and on behalf of B G and S M in equal shares.

**ii) NTIMA/IGOKI/6321**

Martin Muriithi Mutua - wholly

**iii) Gratuity and Monies deposited with the Imenti North DC totaling KShs.967,334/70**

Christine Wausi Mwambi

Christine Wausi Mwambi

S M

Martin Muriithi Mutua - Equally

40. Since, in terms of the testimony of the 1<sup>st</sup> petitioner, the entire sum received as gratuity and from the DC Imenti North was sunk in developing the property now taken by her and her children, the 1<sup>st</sup> petitioner is to pay over to the 2<sup>nd</sup> objector his share thereof in the sum of KShs.241,833/60.

41. This being a family dispute, I make no order as to costs.

**Signed at Meru by me**

**A. MABEYA**

**JUDGE**

**DATED and DELIVERED AT MERU THIS 4TH DAY OF OCTOBER, 2018**

**F. K. GIKONYO**

**JUDGE**