



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 202 OF 2014**

**IN THE MATTER OF THE ESTATE OF KAMAU GATHUNGU MBIRIRI (DECEASED)**

**JUDGMENT**

1. The deceased to whom this succession cause relates died testate on 5<sup>th</sup> November 2012. He was survived by one wife and 8 children. The testator did not name an executor of his will. Lucy Njeri Kamau widow to the deceased and Zaituni Wanjiru Kamau applied for the grant of letters of administration on 4<sup>th</sup> February 2014 and the same was granted on 16<sup>th</sup> September 2014.

2. On 30<sup>th</sup> October 2014 one Esther Muthoni Gathungu the applicant hereinafter referred as the applicant filed a summons to revoke the grant. The applicant seeks the orders that the court revokes the grant issued to the Administrators on 16<sup>th</sup> September 2014 and preservation orders preserving **L.R. NGONG/NGONG/55464**. She also seeks that the Court consolidates this cause with **HCSC No. 239 of 2014** the estate of the **Kamau Gathungu Mbiriri** which is pending for hearing and determination before this court. The said application was premised on grounds that the grant was obtained by concealment of material facts as not all beneficiaries were involved in the process hence the grant so obtained was defective in substance. That the administrators have issued the tenants of **L.R. NGONG/NGONG/55464** with a notice to terminate their tenancy with effect from 31<sup>st</sup> October 2014 an act they claim amounts to intermeddling. That the deceased and the applicant are children of Humphrey Gathungu Mbiriri who in his lifetime subdivided his land **L.R. NGONG/7745** to his 3 homes and **L.R. NGONG/NGONG/55464** was registered in the name of the deceased to hold in trust for Esther Muthoni Gathungu, Mary Kabura and Hiram Machua. Therefore the said **L.R. NGONG/NGONG/55464** was not acquired by the deceased but by their late father and the same was held in trust and as such the applicant her two other siblings are entitled to inherit their late father's property adding that the deceased died intestate and allege that the said will was forged.

3. On the 23/3/2015 this court consolidated Succession Cause no. 239 of 2014 and 202 of 2014. On the 18<sup>th</sup> of June 2015 this court gave preservatory orders preserving L.R. Ngong/Ngong/55464 restraining the administrator from evicting the tenants and occupants of the said premises or in any other way interfering with their quiet possession. Parties agreed to proceed by way of viva voce evidence. 2 witnesses **Anne Njeri Kihara, Esther** and **Muthoni Mutheru** testified during the hearing of the objectors case. The administrator objector called 3 witnesses, **Lucy Njeri Kamau, Edward Karori Waweru** and **Julius Irungu Tamka**.

4. The Objector's case from the witness statements and evidence in court is as follows; Esther Muthoni Gathungu the objector is a sister of the deceased Kamau Gathungu Mbiriri who died on the 5/11/2012. The deceased was survived by family members who in one way or the other derive their livelihood or reside on L. R. Ngong/ Ngong/55464. The said family members are Esther Muthoni Gathungu, Mary Kabura and Hiram Machua who are his sibling. The others are his widow the respondent and their 8 children. That their late father the late Humprey Gathungu Mbiriri was the initial owner of L.R. Ngong/

Ngong/ 1674 from which L.R. Ngong/Ngong/ 55464 was excised. The whole land was about 7 acres. Their late father had 3 wives, their mother was Margaret Ngendo. Their father distributed L.R.Ngong/ Ngong/ 1674. Their father gave  $\frac{1}{4}$  acre to each of his wives from one acre initially and later subdivided the rest of the six acres later into 2 acres and gave each wife 2 acres, these were written in the wives names. He sold one plot  $\frac{1}{4}$  out of the one acre to his daughter Anne Njeri plot no. 7744. The  $\frac{1}{4}$  that their father gave out first was written in the name of their bother Samuel Mbiriri who held it in trust for them, they use it todate. The 2 acres their mother was given was later on subdivided amongst her children. Esther stays in the  $\frac{1}{4}$  plot that was given to their mother. Their mother was given L.R. Ngong/Ngong/7745 but the land was registered in their late brother's name Kamau Gathungu Mbiriri. Their brother subdivided the said plot to Ngong/ Ngong/ 55464 of 0.067Ha which they are not litigating on and L.R. Ngong/Ngong/ 55465 of 0.033 Ha. which he sold in 2011. That he benefited from the sale to their exclusion. This is the subject of the objector's case. That their late father after subdividing L.R. Ngong/ Ngong/ 7742 gave his children various plots. That L.R. Ngong/ Ngong/ 55464 was registered in their late brothers name who was the first born son to hold in trust for his sibilings Esther, Mary and Hiram. That the administrators of the deceased are treating the said property as the property of the deceased yet their late brother was to hold it in trust for them. That they have a right to inherit from Humphrey Gathungu Mbiriri. That the deceased left no written will. That the grant of probate of written will was obtained by deceit and concealment of material facts as the deceased and the applicant are all children of the deceased. That they were not involved in obtaining the grant nor were they issued with any citations.

5. The respondent's case as stated in their statements and evidence adduced in court is as follows; Lucy Njeri Kamua is the administrator of the deceased's estate. The objector is the sister of the deceased. She lives in L.R.Ngong/ Ngong/ 55464. She moved into the said plot as a care giver to her late mother in law and it is then that the objector assumed responsibility of some rooms that her late husband had constructed for his late mother to enable her derive a livelihood for herself. That the objector, Mary and Hiram never directly depended upon the deceased at any given time prior to his demise neither did they derive their livelihood from the said plot. That the objectors and her sibilings are not legally entitled to inherit in priority to herself as the lawful wife of the deceased and the children. That there was no deceit or concealment of material facts as alleged. That their father in law subdivided his estate during his life time. That L.R. Ngong/ Ngong/ 55464 formed and still is the rightful inheritance of the deceased from his late father Humphrey Gathungu Mbiriri and at no point was the land ever held in trust by deceased husband on behalf of the objector and her sibling. That her sibilings are not supporting her in this matter and that the objector coerced Anne Njeri and Samuel Mbiriri who are her step sister and brother to be her witnesses. That her husband left behind a valid expression of how he wished his estate to be distributed. That her husband before his death was within his legal right, capacity and competency to dispose of his estate having been the sole registered owner of the said plot. That the letters terminating the tenancy have been issued by the administrator within her legal mandate. That copies of the green card and the title deed in respect of the suit parcel show that the said parcel was registered in the names of the deceased and they do not show that he held the land in trust for the benefit of the applicant and her sibilings.

6. Edward Karori Waweru stated that on the 12<sup>th</sup> of October 2012 he witnessed the deceased execute a written Will wherein he expressed himself on how he wanted his estate to be distributed out amongst his dependents upon his demise. The said Will was attested by one Julius Irungu Tamka in the presence of the deceased at the offices of M/s Rumba Kinuthia & Co. Advocates, Ngong Office Branch. In the Will the deceased listed his dependent's and the properties which included Ngong/Ngong/55464 measuring approximately 0.067 Ha. This property was to be divided into two portions and the portion adjacent to Irungu's shop to go to his wife Lucy Njeri Kamau and her children and the other remaining portion next to Kihara's shop to go to his deceased wife Regina Wairimu's eight Children. The Will is not forged. The deceased gave them documents to show that the properties were in his names. The deceased never held the subject property in trust for anyone else. Julius Irungu Tamka recalled that he witnessed the deceased will dated 12<sup>th</sup> October 2012 which was attested by Edward Karori Waweru. His evidence on the Will was similar to that of Edward Karori Waweru.

7. Parties filed written submissions which I have considered. The applicants apart from analyzing the evidence states that the disputed facts are;

i. Whether the property L.R. Ngong/Ngong/7745 is held by the deceased in trust for the objector Esther Muthoni Gathungu and her two siblings Mary Kabura and Hiram Muchua.

ii. Whether the administrator should have involved Esther Muthoni Gathungu and her two siblings Mary Kabura and Hiram Muchua in the proceedings leading to her being issued with a grant.

iii. Whether the deceased left behind a will and if so if the same is valid?

iv. Whether the deceased would validly bequeath off L.R. Ngong/Ngong/7745 having held the same in trust for Esther Muthoni Gathungu and her two siblings Mary Kabura and Hiram Muchua.

8. It is submitted by the applicant that the deceased did not acquired L.R/Ngong/Ngong/7745 but secretly subdivided it to L.R/Ngong/Ngong/55464 and L.R/Ngong/Ngong/55465 and secretly sold L.R/ngong/Ngong/55465 to Julius Irungu Tamka. Julius Irungu Tamka is not an independent witness to the disputed will. By the deceased subdividing L.R/Ngong/Ngong/7745 and selling L.R/Ngong/Ngong/55465 he did in effect sell his  $\frac{1}{4}$  interest in L.R/Ngong/Ngong/7745. The late Humprey Gathungu Mibiriri subdivided L.R Ngong/Ngong/7742 into LR. Ngong/Ngong/17134, LR. Ngong/Ngong/17135, LR. Ngong/Ngong/17136, LR. Ngong/Ngong/17137, LR. Ngong/Ngong/17138 and LR. Ngong/Ngong/17139 which he gave directly to the deceased, the objector, Mary Kabura and Hiram Muchua hence no case of preferential treatment of double transmission. The registration of L.R. Ngong/Ngong/7745 to the deceased was in trust for the objector, Mary Kabura and Hiram Muchua. The deceased can only be a  $\frac{1}{4}$  owner of L.R. Ngong/Ngong/7745 and such cannot purport to have an interest in L.R. Ngong/Ngong/55464 having sold off L.R. Ngong/Ngong/55465. That this court has severally held that it cannot declare a trust hence **E.L.C No. 955 of 2012 Esther Muthoni Gathungu Vs. Lucy Njeri** where the plaintiff/ (current objector ) has sought to protect the interests.

9. It was further submitted that the administrator has not proved that there was a Will left behind by the deceased as it was not produced. For this argument the objector relied on the case of **Nairobi HCSC No. 1965 of 2009 (as consolidated with succession cause no. 1788 of 2009) in the matter of the estate of Anthony John Thompson – Deceased Solomon Njoroje Kiore Vs. Beatrice Wairimu Kariuki**, where Justice Kimaru relied on Hailisbury’s Laws of England 4<sup>th</sup> Edition Vol. 17 para 903, where the author states “..... **it is the duty of the executors or any other person setting up a will to show that it is the act of a competent testator.... His testamentary capacity must be established and proved affirmatively**”. That the court cannot at this stage make any finding on the existence of the will, its validity and the competence of the deceased to make the challenged will. On whether the property could be disposed of by a written Will, the applicant relied on section 3(1) Law of Succession Act and also HCSC No. 2299 of 2012 in the matter of the **estate of Salome Mukami Kariuki (Deceased)** where Justice Musyoka held that “**property held in trust does not belong absolutely to the trustee; although in law he is the legal owner thereof. He deals with such property subject to the trust. He holds the same for the benefit of others, and he cannot legally deal with it in a manner adverse to the interest of the beneficiaries. The property does not belong to him, so he cannot sell it or gift it in any manner to anybody. He can only deal with it in ways that advance the interests of the beneficiaries**”.

10. The objector further submitted that since the respondent did not obtain the consent of the objector who is in the same degree or in priority to the applicant, the respondent acted contrary to Rule 26(1), (2) of the Probate and Administration Rules provides:- “**26(1) letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. (2) an application for 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**”. The applicant also relied on Rule 40 (8).

11. The respondent reiterated the facts as adduced in her evidence and affidavit and submitted that the objector conceded that she never raised the issue of the suit land during the lifetime of both her parents

and that of her late brother. That the applicant acknowledged that she had acquired her portion which was shared among the beneficiaries of her later mother estate. Those issues arose only after the deceased sold a certain portion of the land during his lifetime which he did not share with his siblings yet the applicant and their siblings did not take any steps towards holding the deceased to account in respect of the alleged plot. That the applicant having alleged that the suit parcel was being held by the deceased brother in trust she was legally duty bound to establish the question of trust, bearing in mind that she admitted that the deceased had the suit parcel registered in his names whilst all of them were of majority age. That the applicant's mother was alive at the said time and no mention was made as to whether she was suffering any known legal deficiency to warrant the suit parcel being registered in the late brother's name. That the issue of the alleged trust cannot stand as the title in respect of the suit land is in the name of the deceased and it is not indicated that he was holding it in trust. That although the objector claims she was pursuing the suit plot for her own interest and that of her siblings the court should note that neither her sister or brother signed any affidavit statement or any documents authorizing her to do so. That instead the objector relied on statements of her step sister and brother.

12. On the administrator's case it was submitted that it the respondent's position the deceased left a valid Will expressing on how he intended to have the estate administered. That the administrator has no obligation neither the requisite capacity to undo that which her husband stated in the Will. That the objector has not proved the issue of forgery of the Will neither has the same been investigated by anybody or agency. That the allegation of forgery therefore remains a mere allegations which cannot be the basis of revoking a grant of probate lawfully obtained. That he who alleges must prove that the application has no merits and should be dismissed with costs. That even assuming the deceased died intestate, the respondent is protected by the provisions of section 35 through to 41 which clearly spells out the degree of inheritance in situations where one dies and leaves behind a spouse and children or where ones does not leave behind a spouse and children as the case might be.

13. The applicant seeks to have the grant issued on 16<sup>th</sup> September 2014 revoked. The court consolidated this cause with HCSC NO 239 of 2014 on the 23<sup>rd</sup> March 2015. The court also restrained the administrators from evicting tenants and occupants of Ngong/Ngong/55464 on the 18<sup>th</sup> June 2015. The court also granted preservative orders preserving the said property on the 18<sup>th</sup> of June 2015. From the pleadings the respondent petitioned for a Grant of Probate of written Will. This is attached to the petition. The application for revocation was filed by the objector after she became aware that the administrator issued tenants/occupants with a termination of tenancy notice. From the facts deponed it is not in dispute that the deceased's father Humprey Gathungu Mbiriri in his lifetime distributed L.R. Ngong/Ngong/1674 to 5 plots, namely; Plot No. 7742,7743, 7744 and 7745 which was given to the deceased's mother and registered in the name of Kamau Gathungu Mbiriri. It is the applicant's evidence that their late brother was to hold this land in trust for himself, his mother and their two siblings and that later the deceased subdivided the land and sold part of it to Julius Irungu. It is not in dispute that the applicant lives in the portion where their mother lived. It is not clear from the respondent's evidence how the deceased acquired the said land as it is evident that their late father gave their mother 2 acres which was subdivided amongst her children. My understanding of the evidence is that the first quarter that was subdivided from the one acre by the deceased's belonged to their late mother. Evidence of trust is crucial but from the evidence adduced am persuaded that the deceased held the said property on his behalf and his sibling. The respondent's does not deny that the objector stays within the said plot, therefore it was necessary at the time of applying for the grant to let her know that a petition for grant was filed and that the said portion was included as part of the deceased estate. The Objector has a right of beneficial interest in the said portion of land. The said property should not form part of the deceased's estate. Although this information was not disclosed to the court I will not revoke the grant as requested but order that the property in dispute **L.R Ngong/Ngong/55464** shall be taken out of the deceased list of properties until such time that the parties can agree on whose name it shall be registered. Section 76 of the Succession Act does not make it mandatory that every grant must be revoked. The words used are a grant may be revoked or annulled. The injunction and preservative orders shall remain in force until the issue is sorted out. The administrator is at liberty to apply for confirmation of grant on the properties that are not in dispute. Since this is a family matter each party to bear their own costs. It is so ordered.

Dated, signed and delivered this 2<sup>nd</sup> day of **February 2017**

**R. E. OUGO**

**JUDGE**

In the presence of:

.....For the Applicant

.....For the Respondents

Ms. Charity

Court Clerk