



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 706 OF 2011

**IN THE MATTER OF THE ESTATE OF WATHIARI KAMATU ALIAS WATHIARI KAMAU
(DECEASED)**

JUDGMENT

1. This succession cause relates to the estate of **Wathiari Kamatu alias Wathiari Kamau** who died on the **4th of November 1985**. **Njoroge Kirumba Waithiari** the son of the deceased with the consent of his mother petitioned for grant at the Chief Magistrate's Court at Kiambu. The grant was confirmed on the **21st of June 1995**. The deceased's estate was determined as follows; Njoroge Kirumba Wathiari to inherit 2.68 Ha from Githunguri /Ikinu 684 and George Giteru Njihia was to inherit 0.06 Ha. This was the sole property mentioned. In his affidavit in support of the application to confirm the grant the petitioner/ administrator did not mention any other beneficiary.
2. On the 4th of April 2011 the applicant / objector filed a summons to revoke or annul the grant. The application is brought under sections 46,47 and 76 of the Law of Succession Act and Rule 73 of the said Act. The applicant claims that the grant was fraudulently obtained by making false allegations, documents and concealment from court material facts, that the grant was obtained by means of untrue allegations of facts essential in point of law to justify the grant.
3. On the 18/04/2012 Esther Nyambura Wathiari was appointed as the administrator of the deceased's estate in place of Njoroge Kirumba who passed on the 11/06/2009.
4. The applicant/objector Julian Wanjiku filed affidavits in support of the application dated the 4/4/2011 and a further affidavit dated the 27/6/2011, she also testified in court. This is her evidence. She is the daughter of the deceased, the deceased had five children Njoroge, herself, Esther Nyambura Wathiari, Rahab Njeri (deceased) and Teresia Njambi. Their mother died. When their father died he left one property Githunguri/Ikinu/684. She stays in the said property together with the children of Njoroge. Before their father died he sold the part of the land to one Njihia. That they did not know that Njoroge had petitioned the court for a grant after their father's death. They were not involved in the process. They got to know about it 3 years later. They the daughters of the deceased used to cultivate the said land. She later heard that Njoroge had subdivided the land. Her father had sold the land to Njihia. She has no title neither her sisters. That they had no agreement that they get their mother's shares at Gatata Farmers Cooperative Society and that Njoroge gets the land, nor were they given money for the portion that was sold the 0.6 acres. That after their father sold the land he subdivided it he gave one portion to their brother and the other was for the daughters. She asked this court to give the portion they are entitled to from their father's estate including the children of their deceased's sister Rahab.
5. During cross-examination the applicant testified as follows that they also had a brother called Joseph who is deceased that she did not include his name. That by the time her father died she was the only one living in the said land, her other sisters were married. That Njoroge subdivided the land and that he got a

title without their father's knowledge. That at the time of their father's death the title to the land had been changed. She denied that she cultivates ½ the land, but admitted that Njproge's children live in the said land.

6. John Kahoro Njoroge the son of the first administrator Njoroge Kirumba filed a replying affidavit dated the 3rd of December 2014. He also testified in court. This is his evidence. Their father died in 2009, their grandmother in 2007. They are 12 children. The objector is their father's sister. She is claiming a portion of their shamba. That his father and his grandmother Naomi petitioned for the grant in 1994. By the time his grandfather died all his daughters were married. He admitted that before his grandfather's death he had sold part of his land and divided the money amongst the girls. The girls were aware nothing was hidden from them. George Njihia bought the part that had been subdivided. Njoroge his father got the other portion Julian returned to her father's home and stays there. She uses about half the shamba the part that used to be the grandmother's. They have not threatened to evict her. That their grandmother before her told them that the land was to be divided into six portions each boy his and one portion for the girls. That after their father and grandmother died the objector started giving them problems. The shamba belongs to them as they were given money for their portion. That he does not know how they transferred the shares their grandmother had in Gatata to their names. That Esther and Patricia got their shares when their father was alive and they are married.

7. During cross-examination he testified that Rahab who is deceased was buried in her home in Ruiru, and her children do not stay at the said shamba. That his father's portion is now Githuguri/ Ikinu/2296 which was from 684. That he did not know what happened in the Kiambu case. He admitted that the girls had a right to inherit. He stated that he had no evidence of the sale that was done and how the money was divided amongst his father's sisters. That his father told them that there was a portion for Julian at the said shamba.

8. Parties filed written submissions. I have considered them. The objector's submission reiterated the evidence. It was submitted that grant should be revoked as the grant was obtained fraudulently and concealing from the court material facts by failing to include the sisters. The objector relied on sections 35 and 38 of the law of Succession on how the estate of the deceased should devolve. It was further submitted that there was no evidence adduced that the objectors had benefitted from the proceeds of the sale of land by their father. The objector urged this court to revoke the grant and to redistribute to all the deceased's children equally land title No. Githunguri/ Ikinu 2296 which was a resultant subdivision of the deceased's estate land title No. Githunguri/Ikinu/684.

9. The respondent submitted as follows: the deceased had the right to sub-divide the land the way he did during his life time, in support of this the respondent relied on the case of the Estate of Ngamini- Kiriai (deceased) Succession Cause No. 100 of 2003. That the applicant was aware of the confirmed grant since 1995 and raised no objection or complaint until after the death of their mother Naomi Wanjiru Wathiari and their only brother Njoroge Kirumba. That there has been inordinate delay in bringing the application for revocation, that the applicants choose to pursue the case after the death of Njoroge and serve his children yet there are no proceedings for grant for Njoroge's estate and that the title of the land is not in the name of the respondents. That the applicants have only come to court because of the new Constitution 2010 which they perceived as having strengthened their position as married daughters to claim inheritance from their deceased father. For their submission of inordinate delay the respondent relied on the case of **Estate of Kanyila Gitau (deceased) Nairobi HCC SUCC 746 of 1994**. The respondent urged the court to dismiss the objection and to note that they have no objection if one of the daughters Julia Wanjiku continues to remain and till the land with the other beneficiaries and that she should take one portion similar to the children of the registered proprietor 1/6 as she does not have any children of her own. That the proposal is to subdivide into six equal portions.

10. I have considered the evidence adduced, the submissions and the law. The deceased in this cause died in 1984 therefore his estate are governed by the provisions of the Law of Succession Act Cap 160. It is not in dispute that the son of the deceased one Njoroge obtained the grant to administer the estate of the deceased. From the proceedings filed in the court at neither Kiambu neither the objector's name nor that of her sisters were included in the petition. Njoroge as the administrator had a duty to disclose the other

names of his siblings in the petition it for the court to decide whether they were entitled to any of the deceased's assets. By failing to do so Njoroge failed to disclose material facts to the court as is required in law. Njoroge as the administrator concealed from the court facts that were material to the case, the existence of his sisters. Even if they had been given money by their deceased father which is in dispute and has not been proved, Njoroge had a duty to disclose to the court all the beneficiaries of the deceased's estate. On this fact alone this court revokes the grant that was issued to Njoroge on the 26th of September 1994. On the issue of delay and the rights of daughters inheriting my view is that the Law of Succession Act has no limitation period on when a grant can be challenged, each case however is considered on its own evidences, as did Judge Visram in the case cited by the respondents.

11. Having revoked the grant what next? There is a grant that was issued to Esther Nyambura Waithiari on the 18th of April 2012 after she sought to be appointed as an administrator of the estate of the late Waithiari alias Waithari Kamau. Section 38 of the Law of Succession provides that “ **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 be equally divided among the surviving children**”.

At time the objection was filed the wife of the deceased had also passed on therefore in deciding the mode of distribution this court is guided by the provisions of section 38. Guided by the said provision this court orders that the portion of land, Land Title No. Githunguri/Ikinu/2296 which is the resultant subdivision of the deceased's estate, Land Title No. Githunguri/ Ikinu/684 shall be redistributed to all the deceased's children equally. This being a family matter each party to bear its own costs. It is so ordered.

Dated signed and delivered this 2nd day of February 2017

R.E.OUGO

JUDGE

In the presence of:

..... **For the Applicant**

.....**For the Respondent**

M/s Charity

Court/ Clerk