



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**PROBATE AND ADMINISTRATION DIVISION**  
**SUCCESSION CAUSE NO. 2518 OF 2010**  
**IN THE MATTER OF THE ESTATE OF KAHUHU NJOKI (alias) PETER KAHUHU**  
**NG'ANG'A (DECEASED)**

**MARGARET WANJIRU NJOKI.....PETITIONER**

**VERSUS**

**NYAHANGI NGUNI**

**ALICE WAITHIRA GATHOGO**

**RACHEL WAIRIMU G. NGANGA.....APPLICANTS**

**R U L I N G**

1. Nyahangi Nguni and two others (hereinafter referred to as the Applicants), filed in court summons for revocation/or annulment of Grant of letters of Administration on 30<sup>th</sup> May, 2012. The said Application was brought under the provisions of **Section 76 (a), (b) and (c)** of the **Law of Succession Act (Cap 160)** and **Rule 44** of the **Probate and Administration Rules**.

2. The summons for the revocation is premised on the grounds that:

- a) The proceedings to obtain the grant were defective in substance
- b) That the grant was obtained fraudulently by the making of false statement or by the concealment from the court of something material to the case.
- c) The grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant.

3. Rachel Wairimu G. Ng'ang'a (hereinafter the 3<sup>rd</sup> Applicant) swore a supporting affidavit on her own behalf and on behalf of the other Applicants with their authority. It was her deposition that the proceedings to obtain the Grant were defective in substance as the Applicant failed to disclose to the Court that the Applicants were the genuine beneficiaries of land parcel No. KIAMBAA/MUCHATHA/T.300 (hereinafter the suit property).

4. The 3<sup>rd</sup> Applicant's deposition is premised on the fact that the late Sarah Wanjiku Kahuhu, the mother to the Applicants and grand-mother to the Respondent was the owner of the subject property and had

registered it in the name of the Deceased on 7<sup>th</sup> May, 1968 who is the brother to the Respondent.

5. The 3<sup>rd</sup> Applicant testified that prior to the Deceased's death in 1988, Sarah Kahuhu continually lived on the subject property until her own death on 23<sup>rd</sup> April, 2010 and that she had built 8 residential rental units thereon. She deposed that, Sarah Kahuhu left these rental units to her four daughter's including the Deceased's and Respondent's late mother, Esther Njoki Kamau (aka Njoki Kahuhu) who died five months after Sarah Kahuhu's death.

6. The 3<sup>rd</sup> Applicant assured the court that it was not their intention to dispossess the Respondent of her mother's entitlement to the subject property, but that the Applicants together with the Respondent's late mother were the rightful beneficiaries of the subject property. To this end she produced an Agreement of Sale dated 4<sup>th</sup> April, 1966 between their mother the late Sarah Kahuhu and one Kihara wa Gichinga.

7. The 3<sup>rd</sup> Applicant further averred that the Deceased was merely a trustee of the suit property, which she argues the Respondent was cognizant as evidenced by the Respondent's advocate's letter to the Chief of Karuri Location dated 3<sup>rd</sup> May, 2012. She stated that on 4<sup>th</sup> February, 2000 the late Sarah Kahuhu wrote down her intentions affirming that the suit property belonged to her and expressing her wish to have all her daughters share in it.

8. The Respondent filed her own Application by way of Chamber Summons on 28<sup>th</sup> October, 2014 brought under **Section 73 (1) of the Land Registration Act, 2012** seeking orders that:

a) The caution lodged on title No. Kiambaa/Muchatha/T.300 by the 3<sup>rd</sup> Applicant herein be removed forthwith so as to facilitate the registration of the said title in the name of Margaret Wanjiku Kahuhu

b) The District Land Registrar, Kiambu be served with a court order to ensure the removal of the said caution.

9. The grounds of the application were that the Applicant's Application for revocation or annulment of grant was dismissed with costs on 22<sup>nd</sup> July, 2014. That the Respondent was issued with a certificate of Confirmation of Grant on 14<sup>th</sup> October, 2014 which directed that the title to the suit property be transferred to the Respondent as the absolute owner thereof, and that this transfer has been hampered by the pending caution lodged on the title by the 3<sup>rd</sup> Applicant.

10. In her Supporting Affidavit, the Respondent averred that, she was issued with a Grant of Letters of Administration on 21<sup>st</sup> June, 2011. That the Applicant's advocates were served with a hearing notice on 23<sup>rd</sup> September, 2014 for the hearing of the confirmation of grant, which they accepted, stamped and signed.

11. That the Respondent's advocate having been duly served with the hearing notice, did not attend court on the said material date, causing the court to grant the Respondent's application for confirmation of grant. That the 3<sup>rd</sup> Respondent lodged a caution on the suit property illegally and without justifiable cause as the Respondent is the Deceased's next of kin and thus has a beneficial interest over the said title.

12. The Respondent stated that the said caution is causing her untold suffering and mental anguish and is hindering the process of transfer and right of use and occupation of the subject property. She urged the court to dismiss the caution in the interest of justice so as to facilitate the transfer of the suit property in her name and in compliance with the certificate of confirmation of grant.

13. In a ruling on 18<sup>th</sup> March, 2015 the court dismissed the application for removal of caution and reinstated the summons for revocation of grant. During the hearing for the Summons for Revocation of grant on 3<sup>rd</sup> October, 2016 the 2<sup>nd</sup> Applicant testified on behalf of the Applicants. She stated that she had

no knowledge of the title number of the subject property, but affirmed that the property was located in Mucatha, Kiambaa in Kiambu County and that it belonged to her mother the late Sarah Kahuhu. She stated that she did not know how old the Deceased was when the land was registered in his name, only that he had been too young to have bought the land or have been issued with an identification card.

**14.** The 2<sup>nd</sup> Applicant testified that she was already married when the land was registered in the Deceased's name. She stated that the late Sarah Kahuhu registered the land in the Deceased's name since she did not have a son, and the Deceased who was her grandson had been named after her late husband. She affirmed that the late Sarah Kahuhu had bequeathed the land to her four daughters after the death of the Deceased.

**15.** The 2<sup>nd</sup> Applicant told the court that neither the Respondent nor the Deceased's mother Esther Njoki who was alive when the bequest took place, had filed any succession proceedings following the deceased's death and while Sarah Kahuhu was alive. She further argued that they also did not petition for letters of administration after the death of Sarah Kahuhu. That the Respondent did so only after the death of her mother Esther Njoki.

**16.** The 2<sup>nd</sup> Applicant testified that the suit property contained rental rooms, two of which she had built, while the late Sarah Kahuhu had built six and the late Esther Njoki had built several others. She submitted that prior to her death, Sarah Kahuhu had instructed the 2<sup>nd</sup> Applicant to distribute the rental houses among the sisters. She stated that the late Esther Njoki was the one who had been collecting the rental income since she lived close to the suit property, and would distribute the income among the sisters.

**17.** The 2<sup>nd</sup> Applicant also testified that each of the Applicants collect rental income from the rental rooms which had been allocated to them while the Respondent collects rental income from the rooms allocated to her late mother. She asserted that the Respondent should only inherit her late mother's portion of the suit property and not the entire suit property which belongs to the Applicants' late mother.

**18.** During cross-examination by learned Counsel Mr. Kimathi who appeared for the Respondent, the 2<sup>nd</sup> Applicant stated that the Applicants did not petition for letters of administration after the death of their mother Sarah Kahuhu because they expected their sister Esther Njoki to continue living on the suit property. They had intended to petition for letters of administration after the death of Esther Njoki, but were surprised to find that the Respondent had beaten them to the punch.

**19.** The 2<sup>nd</sup> Applicant argued that there had been no sale agreement between Kihara wa Gichinga and the Deceased regarding the suit property as it was Sarah Kahuhu who bought the land from her father-in-law Mr. Kihara Gichinga. That the sale agreement was witnessed by the 1<sup>st</sup> Applicant and the 2<sup>nd</sup> Applicant's husband. She explained that although she had never counted the rooms on the suit property, she was aware of 13 rooms to her knowledge.

**20.** The 2<sup>nd</sup> Applicant stated that she had built two of the rooms and inherited one from her mother, while the 1<sup>st</sup> and 3<sup>rd</sup> Applicants also inherited two rooms each from their mother. That the late Esther Njoki inherited two rooms from their mother and four rooms from her son the deceased.

**21.** The 2<sup>nd</sup> Applicant asserted that the Applicants' husbands contributed towards the purchase of the suit property and that the late Esther Njoki had lived on the suit property until the time of her death. Prior to her death Esther Njoki was said to have been married to a Muslim man and for that reason she was buried in the Kariokor Muslim Cemetery upon her death.

**22.** The Respondent testified at the hearing for the summons for revocation of grant on 8<sup>th</sup> November, 2016. She stated that since the death of the Deceased, nobody had come forward in opposition of the Respondent inheriting the suit property. That the suit property contained 14 rental structures made of tin and timber, and that the Applicants had never lived on the suit property save for the 2<sup>nd</sup> Applicant who

briefly lived there after she had been driven away from her matrimonial home. The Respondent asserted that she had lived on the suit property with her grandmother, mother and brother (all deceased) but was driven away when disturbances erupted after the death of her mother.

**23.** The Respondent stated that she had collected rent for two months from the 14 rental rooms, before the Applicants forcefully took over the rental rooms assigning two rooms each to themselves and leaving the rest to her. It is the Respondent's prayer that the court finds that the grant was properly obtained and removes the caution on the land and returns the six rooms that the Applicants forcefully took over to her.

**24.** During cross-examination by learned Counsel Mr. Gathara, for the Applicant the Respondent stated that she did not file for petition after the death of her brother because her grandmother still lived on the suit property. She maintained that her late mother had never recognized the Applicants as co-heiresses. That if that were the case, they would have petitioned for grant and distributed after the Deceased's death.

**25.** It was the Respondent's evidence that her late mother had built all the structures on the suit property. That her brother and grandmother were buried on the 1<sup>st</sup> Applicant's land. That the suit property belonged to her brother the Deceased and that it was her late mother Esther Njoki who had bought the land from one Joseph Gathogo with money that she had saved from working for a white family. She argued that the Applicants' claim that the suit property was bought by Sarah Kahuhu is false, since it was Esther Njoki who bought the land.

**26.** During re-examination by learned counsel Mr. Kibathi, the Respondent stated that only the Deceased had built additional structures on the suit property with money he had earned as an Administrative Police Officer. She stated that the rest of the structures had been built by her mother, with proceeds paid to her following the accident that occasioned the Deceased's death.

**27.** In submissions filed by Mr. Kibathi on the Respondent's behalf, Counsel argued that the sale agreement between the Deceased and the original owner Mr. Kihara Gichinga was witnessed by the 2<sup>nd</sup> Applicant's husband one Joseph Gathogo (deceased), the 1<sup>st</sup> Applicant, the late Esther Njoki and the late Sarah Kahuhu.

**28.** Counsel argued that in her testimony, the 2<sup>nd</sup> Applicant failed to justify why the Applicants had failed to file for a succession cause more than twenty years after the Deceased's death if they were indeed the rightful beneficiaries of the property. Counsel argued that the Applicants had also failed to prove that they bought the property as no evidence was tendered in court to substantiate this claim.

**29.** Counsel contended that it was of no consequence that the Respondent's mother had married a Muslim prior to her death and that it was not the Respondent's intention to sabotage the family ties, but that she was pursuing what was her right with respect to her Deceased brother. Counsel stated that the sale agreement dated 4<sup>th</sup> April 1966 clearly stated that the suit property was sold to the Deceased by Kihara wa Gichinga and conveyed full property rights to the Deceased and makes no reference to the issue of a trust as alluded to by the Applicants.

**30.** In the Applicant's submissions filed by Mr. Gathara on their behalf Mr. Gathara argued that the Applicants' late mother Sarah Kahuhu registered the land in the name of the Deceased who was 6 years old at the time of purchase as evidenced by a search from the Kiambu Lands Office. He contended that the Deceased to whom the submissions relate pre-deceased Sarah Kahuhu and that it had always been understood that the parcel of land belonged to and was the property of the Applicants' mother.

**31.** Counsel stated that it had been Sarah Kahuhu's wish that the suit property be divided among her daughters, the Applicants and that prior to these proceedings, the family had lived peacefully. Counsel further submitted that the Chief of the area had refused to identify the Respondent as the sole beneficiary because it was common knowledge that the three Applicants and the deceased mother of the Respondent each inherited two rental units from their mother.

32. It was Counsel's contention that the title clearly shows that the land was registered in the Deceased's name who was then a minor, as a trustee. He thus submitted that the trust must be for the benefit of the four real and actual beneficiaries. He urged that the Respondent is therefore entitled to quarter of the property as was enjoyed by her mother.

33. Upon perusing the pleadings and the submissions of the parties, the issue for determination is whether the grant ought to be revoked or annulled pursuant to the provisions of **Section 76, 38 and 66** of the **Succession Act**.

34. The circumstances that can lead to the revocation of grant have been set out in **Section 76** of the **Law of Succession Act** which provides as follows:

*'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-*

*(a) that the proceedings to obtain the grant were defective in substance;*

*(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*

*(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*

*(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either*

*(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or*

*(ii) to proceed diligently with the administration of the estate; or*

*(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*

*(iv) that the grant has become useless and inoperative through subsequent circumstances.'*

35. In **Matheka and anor v Matheka [2005] 1 KLR pg 456** it was held that a grant may be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the Estate. It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.

36. I have analysed the evidence adduced in this court, to establish whether there was a constructive trust in place over the suit property. From the evidence Sarah Kahuhu (deceased) bought and registered the suit property in the Deceased's name as the only male scion of her lineage at the time. She did not have sons of her own. The court notes that the late Esther Njoki would collect the rental income from the rental rooms and distribute it among the four sisters, something she would not have done if the property belonged solely to her son.

37. According to the Applicant's submissions this had been the state of affairs since the Deceased died in 1988. By the conduct of the parties, who included the Respondent's late mother and not the Respondent herself, they related to the property as a trust. None of the four sisters opposed this arrangement. The suit property was said to have been bought in 1968 and the Deceased to have died in 1988. The Respondent confirmed that the Deceased died at 25 years of age. The Deceased could not

therefore have bought the suit property himself as he would have been too young to do so at the time.

38. The Agreement for Sale dated 4<sup>th</sup> April, 1966 attached to the further Replying Affidavit of the Respondent and translated from Kikuyu to English, states that the suit property was sold to the deceased Sarah Kahuhu and was to be put in the Deceased's name. It is therefore misleading and incorrect for the Respondent to have stated that the suit property was bought by her mother. In any case she did not furnish any evidence before the court to substantiate the claims.

39. Additionally, in a letter dated 3<sup>rd</sup> May 2012 from the Respondent's Advocate to the Chief of Karuri Location, Kiambaa County, there is acknowledgment of the fact that the Deceased was registered as a trustee of the suit property as has been argued by the Applicants. In a letter dated 2<sup>nd</sup> April, 2000 written by Sarah Kahuhu in Kikuyu language and translated into English, Sarah distributed the suit property to her four daughters inter vivos, directing that each daughter should have 2 units of the 8 rental units after the death of her grandson.

40. I therefore find from the foregoing that the Applicants were daughters to the late Sarah Kahuhu who bought the suit property. Sarah Kahuhu bequeathed the property to her daughters as evidenced by the aforementioned letter. The specific provision in Part V of the Act which apply to the Estate is **Section 38** which states as follows:-

***“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”.***

41. Having considered the rival submissions and taking into account the evidence on both sides, it is my conclusion that it would not serve the interests of justice for the Respondent to take the entire suit property for herself. Justice can only be served in the circumstances of this cause by having the estate distributed equally between all the survivors of the deceased Sarah Kahuhu, with the Respondent as the beneficiary of the share due to her late mother Esther Njoki.

42. From the evidence, it is also evident that the Respondent did not give notice or obtain consents of parties in the same degree or in priority to the Respondent for applying for the grant. The law is clear that before letters of administration are granted all persons entitled in the same degree or in priority should be notified. See the decision of Koome J as she then was, in **Succession Cause No 220 of 2002, in the Estate of Samuel Kabui Mukora (deceased)**.

43. **Section 51 (1) (g)** of the **Succession Act** as read together with **Rule 26 (1)** of the **Probate and Administration Rules** provides that:

***“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”***

44. It is therefore clear that proceedings to obtain and confirm the grant was defective in substance as no consents were obtained from the Applicants, despite their having interests and rights as lawful beneficiaries in the estate. The Applicants were entitled to the grant of letters of administration and to share in the property, on the same and equal footing as the Respondent. I therefore hold that the grant was obtained in contravention of the provisions of the foregoing laws.

45. It is my finding that indeed the Respondent obtained the grant for letters of administration by means of untrue allegation of facts essential in point of law to justify issuing of the grant. The Respondent fraudulently obtained the grant as a sole beneficiary with the full knowledge that there were other beneficiaries to the estate who were not included in the list of beneficiaries. By so doing she withheld material facts which were very important to the grant and confirmation of Letters of Administration.

46. From the foregoing it is my final determination accordingly, that the grounds of the summons for

revocation dated 28<sup>th</sup> May, 2012 have merit. The application is allowed with the following orders:

- i) The grant issued on 21<sup>st</sup> June 2011 to the Respondent Margaret Wanjiku Njoki and subsequently confirmed on 14<sup>th</sup> October, 2014 be and is hereby revoked.
- ii) A fresh grant is issued to the Respondent and the 2<sup>nd</sup> Applicant as co- Administrators of the Estate
- iii) The caution on the land parcel No. KIAMBAA/ MUCHATHA/T.300 is hereby lifted.
- iv) The estate of the deceased shall be shared equally between, the four daughters of Sarah Kahuhu.
- v) Margaret Wanjiru Njoki to receive the share due to her late mother

Esther Njoki Kamau aka Njoki Kahuhu.

It is so ordered.

**SIGNED DATED** and **DELIVERED** in open court this **14<sup>th</sup> day of February 2017.**

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**L. A. ACHODE**

**JUDGE**