



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 2270 OF 2001**

**IN THE MATTER OF THE ESTATE OF NJOROGE GITAU (DECEASED)**

**JUDGMENT**

1. According to a letter dated 5<sup>th</sup> April 1984 from the Chief of Ithiru Location, Kandara Division, the deceased herein died in the 1950s. The Chief named the possible beneficiaries as his widow, Ruguru Njoroge, and his children Wanjiru Njoroge, Waithera Ngugi, Wanjiku Kigotho, Wangari Kibunyi and Wambui Ndirangu. Other relatives are said to be Gitau Kiuna and Kigotho Gaithuma. Representation to his estate was sought in a petition for grant of letters of administration intestate lodged in Murang'a RMCSC No. 82 of 1984 on 13<sup>th</sup> April 1984 by Peris Wanjiru Njoroge, in her capacity as a daughter of the deceased. A grant was accordingly made to her on 20<sup>th</sup> August 1997. The grant was confirmed on 19<sup>th</sup> March 1999, with the estate, comprising of Loc 4/Gakui/828. 1085 and 1091, devolving wholly upon William Maina Gitau.

2. On 19<sup>th</sup> September 2001, a summons, of even date, was lodged herein for revocation of the grant made in Murang'a RMCSC No. 82 of 1984 on the grounds that the same had been obtained by fraudulent concealment of material facts and reliance on untrue allegations of facts. It was at the instance of Raphael Maina Gitau. He alleged to be a son of the deceased who was not disclosed in the petition and during confirmation. He said that he stood to suffer loss.

3. Another summons, undated, was filed in the same cause on 28<sup>th</sup> May 2002, by Peris Wanjiru Njoroge and William Maina Gitau, the affidavit sworn in support of the application gives no reasons at all for the revocation of the grant. It would appear that the said application was meant to be a response to that dated 19<sup>th</sup> September 2001.

4. There is an affidavit on record, sworn on 14<sup>th</sup> June 2002, by William Maina, apparently in reply to the application of 19<sup>th</sup> September 2002. He states that the deceased was survived by daughters only, and had no sons. He avers that the applicant was not a son of the deceased, and was therefore not entitled to a share in the estate of the deceased.

5. A third summons for revocation of grant was filed in the cause on 2<sup>nd</sup> October 2007, by Esther Wambui Ndirangu. She complained that the petition filed in the cause in Murang'a RMCSC No. 82 of 1984 did not disclose all the survivors of the deceased. The petitioner was said to have left out Ausilia Waithera Ngugi, Regina Wangari, Wanjiku, wa Njuguna, Boniface Ndirangu Gitau, Peter Ngechu Gitau and the applicant.

6. There is a reply to that application by the administrator in Murang'a RMCSC No. 82 of 1984. She urges that the applicant in the application dated 2<sup>nd</sup> October 2007 was at all times aware of the cause. She states that the applicant and her other sisters in fact executed a deed of renunciation of their rights to

apply for grant. She asserts that the applicant was not a beneficiary of the estate as she had married, and lived on her husband's land. She states that Boniface Ndirangu Gitau and Peter Ngechu Gitau were not sons of the deceased.

7. There is on record an affidavit sworn and filed on 12<sup>th</sup> May 2008 by Ausilia Waithera Ngugi and Wanjiku Kigotho. They allege that the deceased died in 1980, and complain that the administrator had obtained the grant without involving them, charging that they did not sign the consents that are purported to have been signed by them. They assert that as children of the deceased they were also entitled to a share in the estate. They claim that all the daughters of the deceased had all married. The administrator was also said to have had married a person called Mugo, and she came back to her parents' home with a son called William Maina. They also allege that two of the parcels of land, Loc 4/Gakui/1085 and 1091, were held in trust by their father for their uncle, information they allegedly got from their mother before she died. They complain that despite holding a family meeting, the administrator did not disclose to them that she had filed a succession cause.

8. There is another affidavit sworn and filed in court on even date by the applicant, Esther Wambui Ndirangu. She names the daughters and the brothers of the deceased. She mentions that all her sisters got married at one stage or other. The administrator had married a Mugo and the begat a child called William Maina. The deceased was said to have bought property from a Munyuku in 1964, which became Loc 4/Gakui/828. His brother, Gitau Ndirangu bought parcels of land from Kabogo and Dominic, these became Loc 4/Gakui/1085 and 1091. He later moved to Molo and during land registration and consolidation, all these parcels of land were registered in the name of the deceased. She asserts that Loc 4/Gakui/1085 and 1091 were so registered in trust. She reiterates that the succession cause in Murang'a RMCSC No. 82 of 1984 was lodged without their consent.

9. There is a further affidavit sworn on 18<sup>th</sup> December 2008, filed herein on 6<sup>th</sup> July 2010, by Regina Wangari Kibunyi. She asserts that all the children of the deceased were aware of the proceedings filed in Murang'a RMCSC No. 82 of 1984 by the administrator, emphasizing that they all signed the deed of renunciation, where they renounced their right to administration, as well as that to a share in the estate, and agreed to the distribution to William Gitau. She states that the claim by Raphael Maina Ndirangu does not hold as he did not raise it all during the deceased's lifetime.

10. Directions on the disposal of the matter were initially given on 28<sup>th</sup> January 2003 that the application would be disposed of by way of *viva voce* evidence.

11. The hearing commenced on 27<sup>th</sup> January 2004. The first to take the stand was Raphael Maina Gitau. He is a nephew of the deceased, being a child of the deceased's brother. He said that his father had bought the property that was eventually registered in the name of the deceased. He claimed that he was present when his father bought the property. He claimed that his father's family moved to Molo, leaving the property under the care of the deceased. During the time of land consolidation the land was registered in the name of the deceased. He said that his father was entitled to Loc 4/Gakui/1085 and 1091. He complained that when the administrator moved for succession of the deceased's estate she did not disclose that the property was held by the deceased in trust for his father. He testified that he had siblings, claiming that he had brought the claim on their behalf. He said that he had no applied for representation to the estate of his father who died in 1982, neither had his father sought representation to the deceased's estate. He stated that his father died at Molo and was buried there. Towards the end he appeared to claim all three parcels, saying that Loc 4/Gakui/828 is what their grandfather had left to his father and the deceased, the ancestral land; while Loc 4/Gakui/1085 and 1091 is what his father had bought. This would mean that Loc 4/Gakui/828 ought to be shared equally between his family and that of the deceased. He testified that he brought land dispute proceedings in Murang'a, Case No. 245 of 2000, against the administrator and her son, William Gitau. He wanted them to move to Loc 4/Gakui/828, so that he could retain Loc 4/Gakui/1085 and 1091. The tribunal ruled in his favour, but on appeal the whole land was awarded to William Gitau.

12. The second witness for the applicants was Esther Wambui Ndirangu. She testified that she was a child of the deceased and a cousin of Immanuel Maina Gitau. She stated that her uncle had bought two parcels

of land from Njoroge Kiruma and Kabogo Gitau. She said that the family of the deceased and that of his cousin lived in the same compound until his uncle moved his family to Molo. Land consolidation was done thereafter. The property was registered in the name of the deceased. She alleged that she participated in the fencing of the land of her father and that of her uncle. The parcels were three, and her father was registered as proprietor on condition that he would transfer her uncle's parcels to him. She said that the administrator was at the time not at home. She stated that the two parcels of land were not at the same place. Her father's land, which she described as the ancestral land, was at a place called Ithenji, while her uncle's land was situated at Mwirungi and Kamae. The land at Ithenji was Loc 4/Gakui/828, while that at Mwirungi was Loc 4/Gakui/1085 and Kamae was Loc 4/Gakui/1091. She stated that her mother kept saying that the two parcels of land belonged to her uncle. She explained that Loc 4/Gakui/828 comprised of ancestral land and some two acres that the deceased had bought from a Munyuku. She said she did not sign any papers allowing her sister, the administrator, to petition for representation and also consenting to devolution of the property to her son absolutely. She never visited the Murang'a court at confirmation of grant.

13. Further directions were given on 21<sup>st</sup> November 2007 to the effect that all the revocation applications be consolidated and heard together. Although there were no directions that the matter ought to start *de novo*, the matter commenced afresh on 1<sup>st</sup> November 2011. Raphael Maina Gitau testified afresh, and gave evidence substantially along the same lines as that that he had given on 27<sup>th</sup> January 2004.

14. The next witness was Wanjiku Njuguna. She said that she was a child of the deceased. She claimed that the deceased did not have any land, but held the same for his younger brother. Indeed, she said he was in possession of his father's property. She averred that she was not aware of the cause in RMCSC No. 82 of 1984. She stated that although the family met at the chief's office there was no agreement on the way forward, there was no agreement that administrator would proceed to apply for representation. She further said that she did not consent to the proposed mode of distribution. She also stated that she was not party to the tribunal cause in Case No. 245 of 2000. She said that all the daughters of the deceased were married. She said she wanted a share of the deceased's property. She said although she recalled visiting the chambers of Gichigi Burugu & Company, Advocates, she could not recall signing any documents there. She stated that he was aware that her cousins had been claiming their father's share of the property.

15. Ausilia Waithera Ngugi testified next. She said she was a daughter of the deceased. She stated that all her sisters were married, but the administrator left her husband and went back to her home. She stated that the deceased had his own land, but he also held another piece of land for his uncle. She said that her uncle was away when the land was registered in the name of the deceased. She asserted that she never signed any documents relinquishing her right to a share of the estate of the deceased. She stated that the administrator lived on the land as an unmarried daughter after she left her matrimonial home. She allegedly stays of the deceased's part of the land, which measures four acres, and farms the portion held in trust for their uncle, which measures three acres. She mentioned that there are no developments or structures on her uncle's land. She stated that she participated in the tribunal case, Case No. 245 of 2000, where she gave evidence. She recalled telling the tribunal that part of the deceased's land was held in trust by him for his uncle. The tribunal then ruled that administrator ought to surrender their uncle's land to the claimant. She said that she was not party to the Murang'a succession cause, asserting that she never attended court there with regard to the case. She stated that she was entitled to a share in her father's estate.

16. The petitioner's case opened on 5<sup>th</sup> May 2015. The administrator was the first on the stand. She said that she was previously married. She stated that her sisters were all married. She also stated that they were all aware of the succession cause, where they had signed a renunciation, waiving their right to administration. She alleged that the renunciation was signed at the Chief's office. She said that none of them were literate and the documents were not interpreted to them. She testified that the grant was confirmed, and the state devolved upon her son, William Gitau. She said she was unable to till the land, so she decided to give it to her son. She alleged that no one objected to the confirmation at the proceedings in Murang'a RMCSC No. 82 of 1984. She stated that none of the parcels of land were registered in trust for his uncle. She claimed that the deceased had called her uncle and informed him that

he did not hold the property in trust for him. She said she was not ready to share the land with her sisters as the land had been given to her by their mother during their mother's lifetime. She stated that she bore her son during the time she was married. It was after her husband died that she moved back to her parents' home as she had no one to live with. She said that some of her sisters were present at the confirmation of the grant. She also alleged that during her father's final illness there a ceremony where she produced a goat and her father directed that she would be the one to inherit his property. Her siblings were allegedly not present but the deceased allegedly called them to tell them about it. She said that her mother had told her that she would be the only heir to the property.

17. William Maina Ngugi followed on 8<sup>th</sup> June 2016. He stated that he was grandchild of the deceased and a son of the administrator. He said that his mother never married. He alleged that the deceased died in 1982, his mother applied for representation to the estate and no one opposed the application. He claimed that he did not know how he was related to Raphael Maina Gitau. He said the deceased did not hold the property in trust for anybody. He asserted that the estate was properly devolved to him. He claimed that all his aunts had renounced their rights to inherit from the deceased's estate. In any event, he said, they were all married and ought not therefore to be allowed to inherit any share from the estate.

18. At the conclusion of the oral hearing it was directed that the parties file written submissions. There has been compliance with the directions for the parties did file their respective written submissions. I have had occasion to read through them and noted the arguments advanced therein.

19. The application before me is premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. Under that provision, the court is given discretion to revoke a grant of representation on any of the three general grounds set out in that provision. The first ground is where the grant was obtained through a process which was defective or attended by fraud and misrepresentation. The second ground relates to the administration of the estate; a grant will be revoked where the administrator fails to seek confirmation of the grant within the time allowed in law, where the administrator has not been diligent in the administration of the estate, or where the administrator fails to render an account as and when required to. The last ground is where the grant has become useless and inoperative following certain events, such as the death of a sole administrator.

20. The applicants in this case appear to found their case on the first general ground, that the proceedings to obtain the grant were defective, or were founded on fraud, misrepresentation and concealment of facts. There are claims by one applicant that it was not disclosed that the deceased held the property in trust for his father, and therefore his father's side of the family ought to have been disclosed. The other side claims that although they were children of the deceased, they were not consulted nor involved in the process of obtaining representation to the estate nor in its distribution. They also say that the documents alleged to bear their signatures were not genuine for the signatures on the documents were not theirs.

21. From the record, it would appear that the deceased died before the Law of Succession Act came into force. The administrator claims that he died in the 1950s, while the applicants claim he died in 1980. The material before me points to the death of the deceased occurring in 1980. His first generation national identity card was placed on record, indicating date of issue as 1<sup>st</sup> March 1979. Surely, the same could not have been issued in respect of a dead person. Two issues arise from this. One is that by virtue of section 2(1)(2) of the Law of Succession Act, the estate of the deceased fell for distribution in terms of the law of intestacy that applied to estates of persons who died before the 1<sup>st</sup> of July 1981. The second is that the administrator appears to have had deliberately misled the court to believe that the deceased had died a long time ago when certificates of death were not being issued. The administration of the estate was then to be as per Part VII of the Law of Succession Act.

22. As administration of the estate was to comply with Part VII of the Act, it is imperative to consider whether the process of obtaining the grant was above board. The process of seeking representation is governed by section 51 of the Act. Section 51(2) details what ought to be contained in the application. The deceased herein died intestate, and for our purposes the relevant provisions should be section 51(2) (g) which says as follows:-

*'An application shall include information as to – (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 the his or hers then deceased ...'*

23. I have scrupulously perused through the cause file in Murang'a RMCSC No. 82 of 1984. Although it does have a copy of the petition lodged therein, there is no affidavit in support of the petition where the survivors of the deceased would have been listed. However, the letter from the Chief of Ithiru Location identifies the survivors of the deceased as the widow and five daughters. I believe that these would be the same persons that the petitioner listed in her petition as survivors of the deceased.

24. It emerged from the evidence placed before me that the deceased, apart from the spouse and children, was also survived by a brother and the brother's children. Going by the provisions of section 51(g), these individuals ought to have been disclosed. The reason that the law requires that the list of survivors includes members of the extended family is so that claims such as that herein by the nephew of the deceased can be tackled within the cause. Where that information is suppressed and such relatives are not involved in the process then applications such as the one that I am now determining would no doubt arise.

25. The nephew of the deceased has presented a case to the effect that the property being shared out included a portion that actually belonged to his father, and which the deceased, his uncle, held in trust for his father. All the children of the deceased, save for the administrator, appear to support that claim. I was also referred to proceedings before the land disputes tribunal where that precise question was the subject matter. The tribunal found in favour of the nephew, but on appeal the Appeals Committee found that the property should devolve upon the grandson of the deceased. The decision by the appeals committee appears to have had been influenced by the orders made in Murang'a RMCSC No. 82 of 1984 on confirmation, devolving the property to the grandson of the deceased. It would appear that the Appeals Committee did not make its own independent finding, but simply followed what the lower court had held. In any event, the Land Disputes Tribunal, in my view, exceeded the powers conferred upon it by the Land Disputes Tribunal Act, 1990, which had brought it into being. Its jurisdiction was limited to determining a claimant's right to occupy and work on land, but not ownership. The property was registered and the Tribunals and the Appeals Committee had no power to decide on ownership of such property. Whatever, the case it would appear that the nephew of the deceased had made out a case that a portion of the estate property had been in fact been held in trust for his father by the deceased.

26. The other issue is that the daughters of the deceased claim that they were not involved in the process. The administrator counters that they were, and that they infact signed a deed of renunciation, renouncing their right to administration. Her sisters have countered that by saying that they never signed such a document, and dismissing the signatures in the document purported to be theirs to be forgeries. However, the document was not presented to document examiners to assess whether or not the signatures on the document purported to be those of the daughters of the deceased were theirs. I cannot therefore tell one way of the other who is telling the truth.

27. The daughters complain that the estate of the deceased was improperly devolved to their nephew, a child of their sister, the administrator. The administrator appears to hang on her claim that she was unmarried and that under customary law she was the only person entitled to inherit. She also alleged that there was a ceremony where her father had blessed her as the sole inheritor. The material before me indicates that the administrator had been married. She was never divorced nor separated from her husband, and therefore for all practical purposes the said marriage was never dissolved. In her words, she went back to her parents' home after her husband died, and when she noted that there was no one to live with at his home. Clearly, she does not have any superior claim compared to that of her sisters. They had all been married. They were all equally entitled to a portion of the estate of their father.

28. The administrator also hangs on a deed of renunciation allegedly signed by her sisters. The sisters have denounced that document. I am convinced that the sisters did indeed sign that document. However, the administrator conceded that the sisters were illiterate; the document was not read over and explained to them before they signed it. They probably did not understand its purport.

29. The alleged renunciation is in the following terms –

‘WHEREAS the above named NJOROGE GITAU alias MWENJEKA GITAU of Gakui Village, Murang’a, died in the year 1952 leaving him surviving ourselves RUGURU NJOROGE, WAITHERA NGUGI, WANJIRU KIGOYHO, WANGARI KIBUNYI and WAMBUI NDIRANGU together with other relatives namely: -

PERIS WANJIRU NJOROGE – Daughter

NOW, we RUGURU NJOROGE, WAITHERA NGUGI, WANJIRU KIGOYHO, WANGARI KIBUNYI and WAMBUI NDIRANGU of Gakui Village P O Box 15 Kandara do hereby renounce all our right and title to the letters of administration to the estate of the deceased.

Dated the 12<sup>th</sup> day of April 1984.

Signed by the above named

In the presence of ...’

30. In very plain language, the deed of renunciation has nothing to do with renunciation of a right to a share in the estate of the deceased, it amounts to nothing more than a renunciation or waiver of the signatories’ right to apply for representation to the estate. The sisters of the administrator did not therefore waive their rights to a share in the deceased’s estate. Their rights as such are alive and intact.

31. Then there is the issue of the son of the administrator of the estate taking everything, while the deceased had been survived by children, who should have had a superior claim to the estate compared to that of the grandchild of the deceased. That can only happen in case where the primary survivors have consented to devolution to secondary survivors. Clearly, from the record, there was no consent by the primary survivors to such devolution.

32. I am cognizant of the fact that the deceased died before the Act came into force, and the law to govern devolution to his estate ought to be the law that governed the intestate estate of an African at the time. The deceased and his family are Kikuyu by ethnicity. The law that ought to govern the estate ought to be Kikuyu customary law. That law envisages a patrilineal system of inheritance, where the estate devolves upon the male side of the family, to the sons basically. Where there are no sons then to the next male relatives: uncles, male cousins, nephews and so on. The female side of the family is not entitled, save where the surviving daughter of the deceased is unmarried.

33. That held sway then. We are in a new legal dispensation. The Constitution enjoins us to treat all equally before the law, and frowns upon discrimination based on gender or marital status. These principles would no doubt override the customary law position stated above, so that daughters of the deceased, whether married or not, would be entitled to inherit from their father’s estate in equal measure with their male relatives. The Kikuyu customs on the matter should therefore not matter in this case. The estate of the deceased herein ought to be shared out equally between all the five daughters of the deceased.

34. In the end, I shall resolve the applications before me for revocation of grant in the following terms: -

**(a) That the said applications are allowed so that the grant made in Murang’a RMCSC No. 82 of 1984 to Peris Wanjiru Njoroje on 20<sup>th</sup> August 1997 is hereby revoked;**

**(b) That the orders made in Murang’a RMCSC No. 82 of 1984 confirming the grant of 20<sup>th</sup> August 1997 are hereby set aside and the certificate of confirmation of grant extracted from the said orders on 19<sup>th</sup> March 1999 is hereby cancelled;**

**(c) That I hereby direct the Land Registrar responsible for Murang'a County to cancel all transfers in respect of Loc 4/Gakui/828, 1085 and 1091 and revert the said properties to the name of the original proprietor, Njoroge Gitau pending fresh distribution of the estate;**

**(d) That I hereby appoint Peris Wanjiru Njoroge, Raphael Maina Gitau and Esther Wambui Ndirangu administrators of the estate of the deceased;**

**(e) That I hereby declare that the person entitles to a share in the estate of the deceased are Wanjiru Njoroge, Waithera Ngugi, Wanjiku Kigotho, Wangari Kibunyi, Wambui Ndirangu and Raphael Maina Gitau;**

**(f) That I hereby declare that Loc 4/Gakui/828 shall be shared equally between Wanjiru Njoroge, Waithera Ngugi, Wanjiku Kigotho, Wangari Kibunyi, Wambui Ndirangu, while Loc 4/Gakui/1085 and 1091 shall devolve upon Raphael Maina Gitau to hold on his own behalf and that of his brothers;**

**(g) That the matter herein originated from the Murang'a Chief Magistrate's Court, consequently I shall direct that the court file in Murang'a RMCSC No. 82 of 1984 be returned to the said registry with directions that the said court issue a fresh grant of letters of administration intestate in terms of order (d) above;**

**(h) That the administrators appointed under order (d) shall move the court in Murang'a RMCSC No. 82 of 1984 for confirmation of the grant made to them under order (g) above proposing to distribute the estate in terms of order (f) above;**

**(i) That the instant matter has been exhausted as it was limited to the disposal of the revocation applications, it shall accordingly be closed; and**

**(j) That as this is a family matter, there shall be no orders as to costs.**

**DATED and SIGNED at NAIROBI this 3<sup>RD</sup> DAY OF MAY, 2017.**

**W. MUSYOKA**

**JUDGE**

**DELIVERED and SIGNED this 5<sup>TH</sup> DAY OF MAY, 2017.**

**M. MUIGAI**

**JUDGE**