



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION CASE NO. 1801 OF 1995

IN THE MATTER OF THE ESTATE OF GEOFFREY KIMANDU GITAU (DECEASED)

RULING

1. The applicant David Gitau Kimandu is a son to the deceased. He seeks that grant of representation to the estate of his late father issued to his mother Margaret Wairimu Kimandu on 14th November 1995 and confirmed on 27th March 1998 be revoked or annulled on grounds that; The proceedings to obtain the grant was defective and that the same was obtained fraudulently by concealment from court of facts material to the case. The applicant also seeks that the administrator be restrained from selling, transferring, or interfering with the various properties indicated in the application as belonging to the deceased.

2. The applicant in support of the said application aver that the grant was issued to the respondent on 27th March 1995 and confirmed on 27th March 1998 to the effect that the estate be distributed equally to all beneficiaries. The said confirmed grant was later on 4th May 1999 amended where the shares that were to go to his late sisters Damaris Wanjiku Kimandu and Jane Muthoni Kimandu were to go to their children with the respondent holding the same in trust. He added that contrary to the orders of the court the respondent proceeded to transfer the property into her names and selling some. In efforts to stop this he registered a caution on the properties to safeguard his interests. Adding that the respondent in petitioning for grant of letters of administration to the deceased's estate omitted to list some of the properties forming the deceased's estate namely;

- i. Kahawa west plot DD15.
- ii. Kamuthi Housing Co-operative society Plot no. 14225/133
- iii. 4 plots at Thika Kamuthi Housing Co-operative
- iv. Shares with Mboi Kamiti irigithathi
- v. Shares with Riika

He avers that he and his other siblings are entitled to a share of their father's estate adding that the respondent cannot be trusted at all to handle the estate.

3. The respondent opposed to the application and filed her replying affidavit dated 24th June 2015. She avers that the deceased was blessed with 6 children of which 3 are deceased namely; Damaris Wanjiru, Jane Muthoni and Eunice Nyokabi but they are survived by their children. She avers that she has no selfish interest in administering the estate but her interest is towards the welfare of all beneficiaries. She avers that the registration through transmission was valid and not in breach of trust. She admits to selling **Ngenda/Kahuguini T.47** but adds that from the sale proceeds she purchased 3 plots of land which she

allocated as follows;

- i. Kamuthi-Thika Share no. 4556 to John Gitau,
- ii. Kamuthi-Thika Share no. 4557 to Francis Gakumo
- iii. Kamuthi-Thika Share no. 0137 to Paul Kamau

4. She avers that during his lifetime the deceased allocated the applicant three prime properties viz; **Kiambu/Kiamumbi Block 5/1815**, 1124 and 2320 but the applicant disposed the same for his benefit. She denied leaving out any property intentionally or plundering the deceased's estate as alleged further that there was no interest at Mwihugo Riika self Help Group. She avers that the revocation will serve no purpose and proposes the distribution of the estate to be as follows;

- i. Kamuthi-Thika Share no. 4556 to John Gitau,
- ii. Kamuthi-Thika Share no. 4557 to Francis Gakumo
- iii. Kamuthi-Thika Share no. 0137 to Paul Kamau
- iv. Kamuthi-Thika Share no. 0053 to Geoffrey Kimandu
- v. Ngenda/Kahuguini/687 to Mary Wambui and Alice Wangui
- vi. Ngenda/Kahuguini/831 to David Gitau and the children of Jane Muthoni and Eunice Nyokabi
- vii. Ngenda/Kahuguini/T.387 to Ann Wanjiku daughter of Damaris
- viii. Ngenda/Kahuguini/T. 203 to Margret Wairimu Kimandu
- ix. Kahawa west plot Margaret Wairimu Kimandu
- x. Kamuthi Housing Plot no. 14225/133 to Alice Wangui, Mary Wambui as purchasers and Margaret
- xi. Mboi Kamiti shares David Gitau
- xii. Kahuguini Irigithathi shares to Margaret Wairimu Kimandu

5. She added that the title of **L.R. No. 14225/133** was issued much later after the demise of the deceased and as such the same could not be issued in his name. Further, that she sold the same to Alice Wangui and Mary Wambui. That upon the sale of **Ngenda/Kamuthi/T.47** she bought Housing Co-operative share no. 457 and 4556 for the benefit of the two grandchild Francis Gakumo and John Gitau.

6. David Gitau in his further affidavit dated 13th July 2015 avers that it is not correct for the respondent to treat grandchildren as beneficiaries as they are only entitled to the shares meant to go to their parents and registering parcel of land in favor of her 4 grandchildren was contrary to the orders of the court. That though **Kiamumbi Block 5/1815, 1124** and **2320** do not form part of the deceased's estate adding that it was indeed the respondent who took over Kiamumbi Block 5/1815 and sold it claiming that the same belonged to her husband. Further that the respondent also sold L.R. 14225/130 and 131 and utilized the proceeds herself. He avers that he does not agree with the respondent's proposed distribution as the same has taken consideration of many people who are not beneficiaries. He proposed distribution as follows;

L.R. Ngenda/Kahuguini T. 203 to Margret Wairimu Kimandu

L.R. Ngenda/Kahuguini T. 387 to estate of Damaris Wanjiru

L.R. Ngenda/Kahuguini T.687 to

Estate of Jane Muthoni 1 acres

Estate of Eunice Nyokabi 1 acres

L.R. Ngenda/Kahuguini/831

David Gitau 2.5 acres

0.5 acres to be held by a limited liability company

Kahawa west plot number DD to Margret Wairimu Kimandu as a life interest

Kamuthi Housing Co-operative Societies plot namely 14225/133 to be transferred to a limited liability Company and shareholding to be as follows;

David Gitau Kimandu - 24%

Estate of Eunice Nyokabi- 15%

Estate of Jane Muthoni – 14%

Estate of Damaris Wanjiru -10%

Alice Wangui Gikandi – 18%

Mary Wambui Mugwimi – 18%

Kamuthi Housing Co-operative Society plot namely 4557, 4556, 0137 and 0053

Margaret Wairimu Kimandu plot no. 4557

David Gitau Kimandu plot number 4556

Alice Wangui Plot Number 0137

Mary Wambui – plot number 0053

7. Johnson Gikandi in his affidavit avers that he has cared for the petitioner for over 8 years and had even paid her hospital bill amounting to Ksh.130,000 when she was admitted at Nairobi West Hospital. He added that he paid John Gitau's school fees from secondary when he was at Kagumo High school and even paid for him CPA course from section 1 to 6. Further, that he had educated Francis Gakumo for 2 terms when he was at Muranga Technical college before he joined Utalii college where he also paid his fees. Further, that it was he who paid Ann Wanjiku from Kagubiri from form 1 to 4 and later housed her at his home in South B when she was pursuing her education at Utalii College. He avers that he has no interest in the deceased's estate but only advocated for equal distribution of the property as ordered by the court. He added that his wife Alice Wangui's turn around was because she was offered a portion of Land parcel Number 14225/133.

8. Margaret Wairimu in her further affidavit dated 15th September 2015 avers that her grandchildren are not being treated as direct beneficiaries but are taking what is entitled to their deceased's mother's shares. She avers that the applicant was allocated plot in Kiamumbi Block 5/494 by the deceased, which he sold in excess of 15 million adding that the applicant had squandered a fortune and now seeks to target the other beneficiary's shares. Further, that **Ngenda/Kahuguini T.47** was sold and **L.R. 14225/133** do not form part of the deceased's estate as the earlier was sold while the later was hers. The respondent was not

agreeable to registering a company for purposes of holding some of the deceased's assets. She denied having refused to equitably distribute the assets of the deceased. She also denies any assistance from Johnson Gikandi.

9. Margaret in her further affidavit filed on 27th January 2016 avers that Ngenda/Kahuguini T.47 does not belong to the estate as alleged. While **L.R. No. 14225/130** and **131** are hers by right. She added that it was inconceivable to register **L.R. 14225/133** in the deceased's name since the title was processed after the demise of the deceased. She denied the applicant's allegations that she attended the meeting held on 17th December 2005. She denied any relationship with Johnson Gikandi Nibuini adding that he is an intermeddler and he has no say in the matters of the estate. Alice Wangui Gikandi in her further affidavit disowns joining hands with the applicant to file a caution on **L.R. No. Ngenda/Kahuguini T. 47**.

10. The respondent in her replying affidavit she proposes the distribution of the estate. She avers that Kamuthi Housing Plot no. 14225/133 had since been sold to Alice Wangui and Mary Wangui and the money obtained used to purchase three other plots which she shared out to her grandchildren as follows;

- i. Kamuthi-Thika Share no. 4556 to John Gitau,
- ii. Kamuthi-Thika Share no. 4557 to Francis Gakumo
- iii. Kamuthi-Thika Share no. 0137 to Paul Kamau following assets.

The respondent in her affidavit lists the following properties for distribution.

Kamuthi-Thika Share no. 4556 to John Gitau,

Kamuthi-Thika Share no. 4557 to Francis Gakumo

Kamuthi-Thika Share no. 0137 to Paul Kamau

Kamuthi-Thika Share no. 0053 to Geoffrey Kimandu

Ngenda/Kahuguini/687 to Mary Wambui and Alice Wangui

Ngenda/Kahuguini/831 to David Gitau and the children of Jane Muthoni and Eunice Nyokabi

Ngenda/Kahuguini/T.387 to Ann Wanjiku daughter of Damaris

Ngenda/Kahuguini/T. 203 to Margret Wairimu Kimandu

Kahawa West plot to Margaret Wairimu Kimandu

Kamuthi Housing Plot no. 14225/133 to Alice Wangui, Mary Wambui as purchasers and Margaret.

Mboi Kamiti shares to David Gitau

Kahuguini Irigithathi shares to Margaret Wairimu Kimandu

11. Parties filed written submissions which I have read and considered. The applicant reiterated his averments in his affidavit in support of the application. He raises 3 issues for determination namely;

- i. Whether the disputed properties namely **L.R. No. 14225/133** and **Ngenda/Kahuguini T.47** form part of the deceased's estate
- ii. Whether the administrator Margaret Wairimu Kimandu distributed the estate contrary to the confirmed certificate of grant.

iii. Whether the grant issued to Margaret Wairimu Kimandu should be revoked for fraud and non-disclosure of material facts.

12. The applicant submits that the respondent contrary to the court order sold **Ngenda/Kahuguini/T.47** and purchased three plots which she distributed to her grandchildren further that her registration of transfer of the said properties via transmission in her names instead of registering the same in the names of all beneficiaries contrary to the distribution as ordered in the certificate of confirmation of grant. On this, he relied on case of **In The Matter Of The Estate Of The Estate Of Mwenda Kainyiru 445 of 2009**.

13. It was further submitted that Margaret Wairimu Kimandu distributed the estate of the deceased contrary to the confirmed grant her intentions notwithstanding the same was wrong to change mode of distribution without the consent of the other beneficiaries. He relied on the case of **Yunes Kerubo v George Kombo Oruta** Succession Cause No. 169 of 2013 where it was held, “ *therefore in as much as the 1st petitioner is right in stating that as wife of the deceased she has a priority in administering the deceased’s estates as opposed to the objectors who are children of the deceased such a right is not unfettered as the final decision on who should administer the estate of the deceased still lies in the sole discretion of this court as to whether or not the widow is capable of administering the estate of the deceased..... Therefore, in the instant case, the inclusion of Simon Ongati Kombo, Nicholas Orani Obinchu, Manuel Mandi Nyakundi and Michael Ogega Ogega was irregular, as such, children I suspect belonged to the deceased sons who are also deceased that is Andrew Obinchu and Tom Ogega. The said deceased son’s are represented by their widows who are Rose Nyanchama Aencha and Emily Nyaboke Ogega who in accordance with the law of succession represent their deceased husbands and will therefore be entitled to the share which their deceased husbands would have benefited from the deceased estate. Thus by inclusion of grand children of the deceased bearing in mind that the parents of the said grandchildren are also getting a share from the deceased’s estate meant that some of the survivors of the deceased will get a bigger share of the deceased’s estate than others without a justifiable reason therefore the grand children of the deceased in this case were not supposed to be listed as beneficiaries to the deceased’s estate.*”

14. The applicant further relied on the case of the **Estate of Moffat Mariga Ngethe Succession Cause no. 1665 of 2008** where it was held that, “*The issue for determination by this court is whether the Respondent held title in respect of the suit parcel of land as a life interest or an absolute proprietor. It is common ground that all the children of the deceased consented to the Respondent to petition the court to be issued with a grant of letters of administration intestate. That is as it should be. This is because Section 66(a) of the Law of Succession Act gives first priority to a widow or a widower to petition the court to administer the estate of his or her deceased spouse. However, it appears that the Respondent misapprehended her registration on transmission in regard to the ownership of suit parcel of land. Section 35(1)(b) of the Law of Succession Act is clear. A surviving spouse of a deceased person is entitled to a life interest in the whole of the residue of the net intestate estate of a deceased. Such spouse is entitled as of right to the absolute ownership of the personal and household effects of the deceased. In the present application, it was clear that the Respondent was only entitled to a life interest in the suit parcel of land. She lacked legal capacity to transfer the suit parcel of land either in whole or in part to third parties without the say so of the children of the deceased. On the other hand, Section 38 of the Law of Succession Act allows a property which is transferred to the children of a deceased person to be owned by the said children absolutely.*

In the premises therefore, this court holds that the Respondent lacked legal capacity to transfer any portion of the suit parcel of land to a third party without the consent of the children of the deceased. This is because the Respondent’s interest in the suit parcel of land is a life interest. She had no capacity to sell the property, which the law allows her to enjoy during her lifetime. She is in effect a trustee for the children of the deceased. It was clear that the Respondent wrongly exercised her power as the administrator of the estate of the deceased. The transfers made by the Respondent pursuant to the grant of letters of administration intestate issued by this court are hereby reversed. The subdivision done at the behest of the Respondent is cancelled. The title in respect of the suit parcel of land shall revert to the name of the Respondent with the caveat that she holds the said title as a trustee of the children of the

deceased. Since it appears that the Respondent cannot be trusted to faithfully administer the estate of the deceased, this court revokes the grants of letters of administration intestate issued to her on 31st October 2008 and confirmed on 9th March 2010.”

15. It was further submitted that the respondent had not refuted allegations that the signature purported to be fixed by the applicant in the said petition for grant of letters of administration was forged. Further the respondent has included L.R. No. 14225/133 in her proposal for distribution of the deceased’s estate but had despite knowing the existence of the same had not included it in the petition\ for grant of letters of administration but contradicts herself by claiming that the said property was issued to her as a matter of right. Further, he avers that the distribution cannot be done without first amending the confirmed grant. He added that the powers of an administrator are not absolute.

16. The respondent in her submissions avers that since the applicant has given a proposal on distribution they should pursue that avenue rather than revoke the grant as the same will set the parties further back adding that no party will be prejudiced. It was further submitted that **Ngenda/Kahuguini T.47 and L.R. No. 14225/133** are not available for distribution hence the applicant cannot claim beneficial interest over them. That there was no evidence tendered by the applicant that the respondent has wasted the estate or used the same to enrich herself but rather she has preserved the same for herself and her children.

Determination

17. The respondent appears to have left out some of the assets said to belong to the deceased contrary to Section 51(h), which provides that, *“in an application for grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.*

(2) Every application shall include information as to—

(h) a full inventory of all the assets and liabilities of the deceased;”

18. The estate of the deceased was monogamous and was survived by a widow and children as such his estate devolves under Section 35 of the Law of succession which provides, ***“Where intestate has left one surviving spouse and child or children (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—***

(a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.”

19. The deceased is survived by Margaret Wairimu Gikandi (widow) and children namely Alice Wangui, Damaris Wanjiru, David Gitau, Mary Wambui, Jane Muthoni and Eunice Nyokabi. Of these Damaris Wanjiru, Jane Muthoni and Eunice Nyokabi are deceased but are survived by their children. From the foregoing the deceased having been survived by one wife and children his estate devolves under Section 35. Under Section 35 a surviving spouse is entitled absolutely to the deceased spouse’s chattels and a life interest in the remainder with the children getting equal shares regardless of the ages, gender and financial status of the children.

20. The parties do not appear to agree on properties forming the deceased’s estate or even the mode of distribution of the deceased’s estate. The applicant in his proposal has also annexed a copy of valuation reports of the said properties said to form the deceased’s estate. The respondent in her petition for grant of letters of administration had listed the following assets;

Plot No. 203 Ngenda/Kahuguini

Ngenda Kahuguini/T. 203

Ngenda Kahuguini/T. 387

Ngenda Kahuguini/T. 47

Ngenda Kahuguini/T. 687

From this list, the applicant argues that the respondent had omitted some of the assets belonging to the deceased estate namely;

- i. Kahawa west plot DD15.
- ii. Kamuthi Housing Co-operative society Plot no. **14225/133**
- iii. 4 plots at Thika Kamuthi Housing Co-operative
- iv. Shares with Mboi Kamiti irigithathi
- v. Shares with Riika

21. The respondent claims to have sold Kamuthi Housing Co-operative society Plot no. 14225/133 to her daughter Mary Wambui but does not adduce any documentation to support the said sale or payment she received from the same. Section 79 of the Act provides that, the property of the deceased is upon grant of letters of administration as in this case vests in personal representative or administrators as the case may be and is entitled to protect the same subject to various limitations as maybe imposed by the Act. The respondent in doing so is alleged not to have consulted the other beneficiaries this I find was contrary to the duties and powers vested on the administrators as such the sale of parcel no. Plot no. 14225/133 is revoked and the title reverts to the original titleholder. Am convinced that the said parcel of land belongs to the estate of the deceased and as such should be included in the distribution of the deceased's estate.

22. The respondent in her proposed mode of distribution includes 4 plots at **Kamuthi-Thika/4556, 4557, 0137 and 00506**, Shares with Mboi Kamiti Irigithathi and Kahawa west plot DD15. From the said proposal it is clear that the respondent had omitted to list all properties forming the estate of the deceased. In regards to the shares with Riika, it is alleged that the same went under but the applicant is keen on following up on the same. The omission of listing the said properties in the petition for grant is tantamount to concealing from court something material to the case which would warrant the revocation of a grant so issued and confirmed to the respondent as per the provisions of Section 76 which provides that, *'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;"

22. I find that the said grant should stand as revoking the same will set the parties aback. I therefore find that the grant so amended on 14th May 1999 should be further re-amended to include the properties that had been omitted from the confirmed grant namely;

- i.Kahawa West plot DD15.
- ii. Kamuthi Housing Co-operative Society Plot no. 14225/133
- iii. 4 plots at Thika Kamuthi Housing Co-operative

iv. Shares with Mboi Kamiti Irigithathi

v. Shares with Riika

23. Having considered the law and the proposals made by the parties on how best to distribute estate of the deceased I find it is equitable to distribute the deceased's estate as follows;

a. Kahawa West plot DD15 to Margaret Wairimu Gikandi

b. Kamuthi Housing Co-operative society Plot no. 14225/133 - to be shared equally by all the deceased's children

i. Alice Wangui

ii. David Gitau

iii. Mary Wambui

iv. Estate of Jane Muthoni

v. Estate of Eunice Nyokabi

vi. Estate of Damaris Wangui

c. Ngenda /Kahuguini/ T.203 to Margaret Wairimu Gikandi

d. Ngenda /Kahuguini / 831 to be shared equally by

i. Estate of Jane Muthoni

ii. Estate of Eunice Nyokabi

iii. Estate of Damaris Wangui

e. Ngenda/Kahuguini/ 387 to Mary Wambui

f. Ngenda/Kahuguini/ T. 47 to David Gitau

g. 4 plots at Thika Kamuthi Housing Co-operative

i. Kamuthi-Thika Share no. 4556 to David Gitau

ii. Kamuthi-Thika Share no. 4557 to Mary Wambui

iii. Kamuthi-Thika Share no. 0137 to Alice Wangui

h. Shares with Mboi Kamiti Irigithathi and Shares with Riika to be shared equally by all beneficiaries ;

i. Margaret Wairimu Gikandi (widow) and children namely

ii. Alice Wangui,

iii. Damaris Wanjiru,

iv. David Gitau,

v. Mary Wambui,

vi. Jane Muthoni

vii. Eunice Nyokabi.

Margaret Wairimu Gikandi to hold in trust the shares given to the beneficiaries of

i. Estate of Jane Muthoni

ii. Estate of Eunice Nyokabi

iii. Estate of Damaris Wangui

I note that the applicant had sought an injunction as against the respondent to be restrained from interfering with the deceased properties as it stands from the orders issued the same will serve no purpose. No orders as to costs. It is so ordered.

Dated, Signed and delivered this 7th day of **April** 2017.

R. E. OUGO

JUDGE

In the presence of;

Miss Chepngeno holding brief for Mr. Kimani for the Applicant

Miss Nyakukira holding brief for Mr. Gitonga.....For the Respondent/Petitioner

MS. Charity Court Clerk