



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**SUCCESSION CAUSE NO. 107 OF 1991**  
**IN THE MATTER OF THE ESTATE OF JAMES MBAI GATHURI (DECEASED)**

**R U L I N G**

1. The application for determination is dated 10<sup>th</sup> March 2014. It takes the form a summons for rectification of grant and seeks rectification of the grant confirmed on 13<sup>th</sup> December 2011, removal of an administrator who has died and rectification of the mode of distribution.
2. It is brought at the instance of Lois Wanjiku Mbai, who swore an affidavit on 3<sup>rd</sup> October 2013 in its support. She is one of the administrators of the estate. She states that one of the administrators, Rachel Wanjiru Mbai, died on 17<sup>th</sup> April 2013, as evidenced by a copy of a certificate of death attached to her affidavit. She is said to have died after the confirmation of the grant. The children of the deceased are said to have consented to the proposal to have the dead administrator's name removed. It is proposed that the two assets that make up the estate be distributed so that Dagoretti/Uthiru/88 is registered in the joint names of Lois Wanjiku Mbai and Jane Wambui Mbai to hold in trust for themselves and the other beneficiaries and Dagoretti/Uthiru/83 be registered in the name of Lois Wanjiku Mbai with the property being held as per the shares on the ground.
3. There is an affidavit on record sworn on 15<sup>th</sup> March 2014 by one Paul Kihara Mbai. It is not indicated whether the same is in support of the application dated 10<sup>th</sup> March 2014, but from its tenor it does appear that it is intended to do so. The deponent is a son of the deceased. He resides abroad. He indicates that the family agreement was that following the death of the previous administrators, the new administrators should be Jane Wambui Mbai and Lois Wanjiku Mbai. He explains that prior to their deaths, the previous administrators had facilitated the subdivision of Dagoretti/Uthiru/88 and drawing plans had been adopted for that purpose. He also states that prior to his death, the deceased had given Dagoretti/Uthiru/83 to Lois Wanjiku Mbai and himself. He pronounces himself to be in support of the distribution proposed in the rectification application. James Muchene Mbai swore an affidavit in similar terms on 14<sup>th</sup> March 2014.
4. There is an earlier application dated 3<sup>rd</sup> February 2014 brought at the instance of Monicah Wairimu Kamau, seeking the setting aside of orders made earlier rectifying the certificate of confirmation of grant on 13<sup>th</sup> December 2011, cancellation of all orders made thereafter and setting aside all transactions relating to Dagoretti/Uthiru/83 and Dagoretti/Uthiru/88.
5. The applicant in the said application swore an affidavit on 3<sup>rd</sup> February 2014. She brought the application in her capacity as a daughter-in-law of the deceased and the surviving widow of a dead son of the deceased called Samuel Kamau Mbai. She avers that after the deceased died, her

mother-in-law, Rachel Wanjiru Mbai and her dead husband, Samuel Kamau Mbai, were appointed administrators of the estate. They had their grant confirmed, whereupon it was directed that the two assets comprising the estate, that is to say Dagoretti/Uthiru/83 and Dagoretti/Uthiru/88, were to be held by the administrators for themselves and the other survivors of the deceased. It transpired that the two administrators died in 2007 and 2013 respectively. Thereafter, the two were substituted in proceedings where some of the survivors were not consulted, and the certificate of confirmation of grant rectified in a manner that resulted in a distribution of the assets in a way that excluded and disinherited some of the beneficiaries. It is against that background that the applicant came to court in her application dated 3<sup>rd</sup> February 2014.

6. The application of 3<sup>rd</sup> February 2014 was responded to by Jane Wambui Mbai vide an affidavit sworn on 13<sup>th</sup> March 2014. She avers that the applicant was privy to the family agreements and consultations that culminated in the rectification that she was complaining about, and that the said rectification did in fact cater for everyone.
7. The applicant reacted to that affidavit vide hers of 24<sup>th</sup> March 2014. She denies having ever consented to the rectification, stating that she only signed a consent relating to the replacement of administrators. She reiterated that the ultimate result of the rectification of the certificate of confirmation was the exclusion of some of the survivors of the deceased from benefit.
8. Lois Wanjiku Mbai swore a further replying affidavit on 14<sup>th</sup> August 2014 where she avers that the applicant had been factored in the distribution which resulted from the rectification of the grant. She cites meetings where the applicant was alleged to be in attendance where the said distribution was agreed upon. She alleges that Dagoretti/Uthiru/83 had been bequeathed to her and her brother Paul Kihara by the deceased, whereas Dagoretti/Uthiru/88 had been carved out into seven portions which were allotted to the following persons: -
  - a. Children of John Gitau Mbai, a dead son of the deceased;
  - b. Monicah Kamau, widow of Samuel Kamau Mbai, a dead son of the deceased;
  - c. Noah Njau Mbai;
  - d. Burial site;
  - e. Late Racheal Wanjiru Mbai and her daughters;
  - f. Late Racheal Wanjiru Mbai and her daughters;
  - g. Four equal portions to Monicah Kamau, Noah Njau, James Muchene and Racheal Wanjiru.
9. She mentions that two other individuals, Susan Wahu and Hannah Wangui Nganga, were to get a share each on a parcel of land at Kinangop being Nyandarua/Kahuru/1187. It is not indicated who these individuals were in relation to the estate of the deceased.
10. The applicant reacted to the affidavit of Lois Wanjiku Mbai of 14<sup>th</sup> August 2014 by swearing her supplementary affidavit on 27<sup>th</sup> October 2014. She complains that the certificate of confirmation of grant dated 13<sup>th</sup> December 2011 disposed the estate to only two individuals, Lois Wanjiku Mbai and Jane Wambui Mbai, and there is nothing in it to show that the other survivors were factored in as alleged. She asserts that the rectification was only meant to defraud the other survivors of the deceased. She states that Dagoretti/Uthiru/83 was never ever bequeathed to Lois Wanjiku Mbai and Paul Kihara Mbai as alleged as the deceased had died intestate and therefore all his estate was available for distribution intestate. She adds that the proposal referred to in paragraph 8 here above was not in the parent certificate of confirmation of grant.
11. Directions were given on 6<sup>th</sup> October 2014 on the disposal of the application dated 10<sup>th</sup> March 2014 to the effect that the same be by way of written submissions. The said directions were sought by counsel for the one of the parties, it was not disclosed that there was an earlier application that needed to be determined simultaneously with that of 10<sup>th</sup> March 2014. Anyhow, the only written submissions on record are dated 20<sup>th</sup> May 2015 and were filed in court on 18<sup>th</sup> June 2015 on

behalf of the applicant in the application dated 3<sup>rd</sup> February 2014 in respect of that application, yet directions had not been taken on its disposal.

12. The deceased herein died on 17<sup>th</sup> February 1990. Representation to his intestate estate was sought by Rachel Wanjiru and James Kamau, in their respective capacities as widow and son of the deceased, vide a petition lodged in this cause on 4<sup>th</sup> June 1991. He was expressed to have been survived by the widow and nine children, being John Gathuri, James Albert Muchene, Samuel Kamau Mbai, Jane Wambui, Paul Kihara, Lois Wanjiku, Susan Wahu, Noah Njau and Robert Kungu. He was said to have died possessed of Ruiru East/Juja East Block 2/752 and Dagoretti/Uthiru/83. A grant of letters of administration intestate was duly made to the petitioners on 23<sup>rd</sup> August 1991.
13. On 2<sup>nd</sup> October 1991, the administrators lodged an application at the registry in the cause seeking confirmation of the said grant, proposing that all the assets of the deceased be registered in the joint names of the administrators, Rachel Wanjiru and Samuel Kamau in trust for themselves and other beneficiaries, namely John Gitau, James Muchene, Paul Kihara, Lois Wanjiku, Noah Njau and Edward Kungu. The handwritten record relating to the disposal of the said application is not in the file, but a copy of the original certificate of confirmation of grant issued on 23<sup>rd</sup> December 1991 indicates that the grant was confirmed on that said date, and the estate comprising of Ruiru East/Juja East Block 2/752, Dagoretti/Uthiru/83, Dagoretti/Uthiru/88 and Plot No. T. 154 – Kiambu devolved upon the administrators, Rachel Wanjiru and James Kamau, for themselves and all the other beneficiaries.
14. The record reflects that on 23<sup>rd</sup> March 2009 an application dated 18<sup>th</sup> March 2009 was lodged at the registry by Rachael Wanjiru, seeking rectification of the grant made on 3<sup>rd</sup> December 1991. The rectification was sought in two respects. By that time her son and co-administrator, Samuel Kamau Mbai had died and she wanted to have him replaced as administrator by her daughters, Loise Wanjiku Mbai and Jane Wambui Mbai. She also wanted the court to cause the name Mbai added after her name, Rachael Wanjiru, to read Rachael Wanjiru Mbai. In the affidavit in support of the application, she had also informed the court that two other sons of the deceased, John Gathuri and Robert Kungu, had also died. She sought that the certificate of confirmation of grant be amended after the rectification of the grant so that the assets - that is to say Ruiru East/Juja East Block 2/752, Dagoretti/Uthiru/83, Dagoretti/Uthiru/88 and Plot No. T. 154 – Kiambu – devolve upon the new set of administrators - Rachael Wanjiru Mbai, Loise Wanjiku Mbai and Jane Wambui Mbai – to hold the same in trust for themselves and all the other beneficiaries.
15. The handwritten record before me is incomplete for it commences from 4<sup>th</sup> November 2011. I cannot therefore tell from it whether the application dated 18<sup>th</sup> March 2009 was ever heard and determined. I have perused through the documents in the rest of the file and I have not come across any that suggests that the application was ever disposed of.
16. I suspect that the said application was never heard for an application dated 14<sup>th</sup> March 2011 seeking similar orders was lodged at the registry. It sought rectification of the confirmed grant issued on 3<sup>rd</sup> December 1991, the substitution of Samuel Kamau Mbai with Loise Wanjiku Mbai and Jane Wambui Mbai, and the addition of the name Mbai to the name of Rachael Wanjiru. The only new prayer was that seeking rectification of the mode of distribution.
17. The wording of the affidavit is different from that in the affidavit sworn in support of the earlier application dated 18<sup>th</sup> March 2009, but the contents are similar save that the mode of distribution is to be altered so that Dagoretti/Uthiru/88 was to devolve wholly upon Lois Wanjiku Mbai and Jane Wambui Mbai and Dagoretti/Uthiru/83 wholly upon Lois Wanjiku Mbai. The application was silent on what was to become of the other assets, Ruiru East/Juja East Block 2/752 and Plot No. T. 154 – Kiambu.

18. The application dated 14<sup>th</sup> March 2011 came up for hearing on 13<sup>th</sup> December 2011 and was allowed. A certificate of confirmation of grant was duly issued dated 23<sup>rd</sup> December 2011 reflecting that Dagoretti/Uthiru/88 was to be shared equally between Lois Wanjiku Mbai and Jane Wambui Mbai, while Dagoretti/Uthiru/83 passed wholly to Lois Wanjiku Mbai.
19. The developments in this cause raises a number of issues. It is questionable why the estate of the deceased intestate was shared between only two of his children whereas there were other survivors, and particularly after the court had earlier devolved the estate upon the administrators to hold in trust for the survivors mentioned in the application dated 2<sup>nd</sup> October 1991.
20. There are questions too regarding the fate of Ruiru East/Juja East Block 2/752 and Plot No. T. 154 – Kiambu, which had been listed in the petition and the application for confirmation of grant as assets making up the estate of the deceased and therefore available for distribution. They were included in the certificate of confirmation of grant dated 23<sup>rd</sup> December 1991, but were removed from the schedule in the certificate of confirmation of grant dated 13<sup>th</sup> December 2011. No explanation has been given in any the affidavits filed herein for that development.
21. Then there is the curious reference to the property described as Nyandarua/Kahuru/1187. It is said that there was agreement within the family that the same should devolve upon Susan Wahu and Hannah Wangui Nganga. It is not indicated whether this property forms part of the estate of the deceased. It was not listed in the petition, nor was it brought up at the confirmation of the grant. It therefore does not feature in the certificates of confirmation of grant on record. It would seem it forms part of the estate for it is suggested that it should devolve upon a daughter of the deceased, Susan Wahu. But who is this other person, Hannah Wangui Nganga who is proposed to get a share thereof for she was not listed in the petition as a daughter nor in the confirmation application.
22. Regarding Dagoretti/Uthiru/83, it is said by Lois Wanjiku Mbai and Paul Kihara that the same had been bequeathed to them by the deceased. The deceased is said to have died intestate, there is nothing on record to suggest that he had died testate with regard to part or whole of his estate, for the making of a bequest can only be way of a will. The two claimants have not provided any proof of any such bequest by the deceased. In any event, the said property had been confirmed in 1991 to the administrators to be held in trust by them for themselves and the other beneficiaries. I feel persuaded by the argument by Monicah Wanjiku Mbai that Dagoretti/Uthiru/83 was never bequeathed to the two and is available for distribution in accordance with section 35 of the Law of Succession Act, Cap 160, Laws of Kenya.
23. Loise Wanjiku Mbai and Jane Wambui Mbai and their mother no doubt misled the court on 13<sup>th</sup> December 2011 into interfering with the distribution allowed on 23<sup>rd</sup> December 1991 so that the estate of the deceased was devolved wholly to them. Indeed, the legality of the certificate of confirmation of grant dated 13<sup>th</sup> December 2011 is doubtful, for it cannot stand alongside that dated 23<sup>rd</sup> December 1991. The two certificates are on record for the orders of 13<sup>th</sup> December 2011 did not yield a certificate of confirmation of grant which rectified the earlier one of 23<sup>rd</sup> December 1991. It is fresh certificate of confirmation. The effect of it is that there are two certificates of confirmation of grant in force for the orders made on 13<sup>th</sup> December 2011 did not cancel or revoke the certificate of 23<sup>rd</sup> December 1991.
24. There cannot be two certificates of confirmation of grant in force at the same time. There can only be one certification of confirmation in force at any one given time. That one can be rectified or amended, and if a fresh one must be made, then the earlier certificate must be cancelled. Consequently, the certificate purported to have been issued on 13<sup>th</sup> December 2011 is a nullity for it cannot be in force at the same time with the certificate issued on 23<sup>rd</sup> December 1991.
25. In view of what I have said so far, it will be seen that there are valid arguments in the application dated 3<sup>rd</sup> February 2014. To straighten out the matter to facilitate is eventual conclusion I do

hereby make the following orders:-

- a. That the orders made herein on 13<sup>th</sup> December 2011 are hereby reviewed so that
  - h. I appoint Lois Wanjiku Mbai, Jane Wambui Mbai and Wairimu Kamau administrators of the estate of the deceased;
    - (ii) A grant of letters of administration intestate shall issue to the three administrators accordingly; and
    - (iii) The certificate of confirmation of grant dated 13<sup>th</sup> December 2011 is hereby cancelled, and in its place shall be issued a rectification of the certificate dated 23<sup>rd</sup> December 1991 removing the names of Rachel Wanjiru and Samuel Kamau and substituting them with the names of Lois Wanjiku Mbai, Jane Wambui Mbai and Wairimu Kamau;
- b. That the new administrators shall prepare and place before the court in the next thirty (30) days:-
  - i. A full list of all the sons (whether now dead or alive) who survived the deceased;
  - (ii) A full list of all the daughters (whether now dead or alive, and whether married or unmarried) who survived the deceased;
  - (iii) a statement as to whether John Gitau, Samuel Kamau and Robert Edward Kung'u ever married, and if they ever did, whether they were survived by spouse and child or children, giving details of their surviving spouses and children; and
  - (iv) A statement on the past and current ownership status of Nyandarua/Kahuru/1187, Ruiru East/Juja East Block 2/752 and Plot No. T. 154 – Kiambu; and
- c. That this matter shall be mentioned thirty (30) days after the date of the delivery of this ruling on a date to be obtained by the parties at the registry and to be given by the registry on priority for compliance and further directions.

26.It is so ordered

**DATED, SIGNED and DELIVERED at NAIROBI this 5<sup>TH</sup> DAY OF FEBRUARY, 2016.**

**W MUSYOKA**

**JUDGE**

**In the presence of .....advocate for the applicant.**