



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 892 OF 2009**

**IN THE MATTER OF THE ESTATE OF WAIHAKA GITHII (DECEASED)**

**JUDGMENT**

1. The deceased herein died on 16<sup>th</sup> November 1991. Representation to his estate was sought in a petition lodged in this cause on 20<sup>th</sup> April 2009 by Mary Wairima Waithaka, in her alleged capacity as widow of the deceased. The deceased was said to have had been survived by the widow and nine (9) children, being Mary Wairima Waithaka, Philip Munyua Waithaka, Agnes Wangechi Waithaka, Janeffer Wanjiru Waithaka, Esther Nduta Waithaka, Eunice Muthoni Waithaka, Ruth Wanjiku Waithaka, Peris Nyambura Waithaka, Alice Warwinu Waithaka and Jane Wambui Waithaka. He allegedly died possessed of Loc 19/Rwathia/2041, Loc 19/Rwathia/Kayu/T. 168, Share Certificate No. 5601 for 4 shares in Samuru Gituto Farmers Coop. Society Limited and Stall No. 64 Jericho Site & Service Market Nairobi.
2. A grant of letters of administration intestate was duly made and issued to the petitioner on 3<sup>rd</sup> August 2009. The grant was confirmed on 15<sup>th</sup> June 2010, and a certificate of confirmation of grant of even date duly issued. The estate devolved absolutely on the administrator widow of the deceased, Mary Wairima Waithaka.
3. What I am called upon to determine is a summons for revocation of grant dated 20<sup>th</sup> September 2011. The application is brought at the instance of Jacob Muthee Kamau. The grounds and facts upon which it is premised are deposed in the applicant's affidavit, which was sworn on 20<sup>th</sup> September 2011.
4. The applicant claims to be a nephew of the deceased, by dint of being a son of the deceased's brother, Julius Kiarahu Githii, who is also deceased. He avers that his grandfather, Gibson Githii, the father of the applicant's father and his uncle, the deceased herein, left a parcel of land known as Loc 19/Rwathia/902, which was to be shared between four survivors. Representation to the grandfather's estate was obtained by the deceased herein in SC No. 277 of 1987. The property in question was to be shared equally between the two houses of the applicant's dead grandfather. The portion going to the house from which the deceased herein and the applicant's father came was Loc 19/Rwathia/2041, after the subdivision. It was registered in the name of the deceased on the understanding that he would hold it in trust for himself and the family of his dead brother. It transpired that the deceased died before Loc 19/Rwathia/2041 could be subdivided and the portion due to the family of the applicant hived off and transferred to them. Upon the deceased's death his widow moved the court in proceedings where the family of the applicant was not consulted, informed or included.
5. The applicant has attached a number of documents to his affidavit. There is a letter from the Chief of Kiriti Location, dated 12<sup>th</sup> October 1989, confirming that the applicant's grandfather had been survived by four individuals, who included the deceased herein and the applicant's father. It was

- also confirmed that he owned Loc 19/Rwathia/902. There is copy of a grant of letters of administration intestate in Murang'a SRMCSC No. 277 of 1989 in respect of the estate of Gibson Githii, which was made on 10<sup>th</sup> May 1990 to the deceased herein, Waithaka Githii. Copy of a certificate of confirmation of grant dated 28<sup>th</sup> March 1991 shows that Loc 19/Rwathia/902 was to be shared equally between the deceased and Esther Nduta Githii.
6. The administrator responded to the application through her affidavit sworn on 30<sup>th</sup> November 2011 and filed herein on 23<sup>rd</sup> January 2012. She concedes that the applicant's grandfather had two wives, but alleges that she was unaware that Loc 19/Rwathia/902 was to be shared equally among the two houses and that there was a trust created between the deceased and the applicant's father. She avers that Loc 19/Rwathia/902 was subdivided into two portions, Loc 19/Rwathia/2041 and 2042, which were then registered in the names of the persons named in the certificate of confirmation of grant issued in Murang'a SRMCSC No. 277 of 1989 on 28<sup>th</sup> March 1991.
  7. Attached to the affidavit of the respondent administrator are copies of several documents. There is the certificate of confirmation of grant issued in Murang'a SRMCSC No. 277 of 1989 on 28<sup>th</sup> March 1991. There is also copy of a green card in respect of Loc 19/Rwathia/2041 which shows that the deceased was registered as proprietor thereof in 1992 and the respondent administrator was registered as proprietor in 2010 after his demise. There is also copy of the proceedings in Murang'a SRMCSC No. 277 of 1989 when the grant was confirmed on 10<sup>th</sup> May 1990, to support her assertion that no trust was intended as the applicant's father attended court when it was ordered by consent of all present that Loc 19/Rwathia/902 be divided equally between the deceased and Esther Nduta Githii. He is not recorded as raising a protest, and there is no order that the property was to be held in trust. Then there is a document in the Kikuyu vernacular, which has not been translated.
  8. The applicant replied to the respondent's averments in his affidavit sworn on 5<sup>th</sup> March 2012. He asserts that the two beneficiaries named in the certificate of confirmation of grant issued in Murang'a SRMCSC No. 277 of 1989 on 28<sup>th</sup> March 1991 were the first borns in the two houses of the deceased and they were to take the property on behalf their siblings. He avers that was in keeping with the customs of his tribe. He asserts that their deceased grandfather did not own any other property.
  9. Directions were given on 30<sup>th</sup> September 2014 on the disposal of the application, where it was directed that the same be disposed of orally. The oral hearing took place on 10<sup>th</sup> February 2015. The applicant testified and called one witness. The respondent did not attend court, and therefore no evidence was adduced in support of her case. The applicant's oral evidence largely followed what he had stated in his affidavits. He however added that his father and his mother were buried on the land in dispute, that is to say Loc 19/Rwathia/2041. The deceased's family was said to have initially objected to the said burials, but later relented. He asserted that his family did not have any other land anywhere.
  10. The applicant's witness was his aunt, Hellen Wanjiku Githii. She stated that she was a sister of the deceased, and their father had two wives. Each house had two children; the deceased's mother had two sons, the deceased and the applicant's father; while her mother had two daughters, herself and Esther Nduta. After their father died, a succession cause was brought where it was agreed the property would be shared equally between the two houses, on the understanding that the property would be held by the elder children in each house – Waithaka Githii and Esther Nduta. As between the deceased and the applicant's father their share was not subdivided and shared between them. When the deceased died his widow took the position that the applicant's father's family was not entitled to a share in the property. She added that the two sides were in occupation of the land and knew the marks that indicate the boundary.
  11. At the conclusion of the oral proceedings, the parties were directed to file their respective

submissions. There has been compliance with those directions, for both sides did file their respective written submissions. The applicant's submissions are dated 10<sup>th</sup> April 2015 and were filed in court on 10<sup>th</sup> April 2015; while the respondent filed hers, dated 3<sup>rd</sup> June 2015, on 5<sup>th</sup> June 2015. I have carefully gone through the said submissions and the authorities cited.

12. From the material before me, I am satisfied that when Gibson Githii, the father of the deceased and the applicant's father, died his estate was to devolve equally amongst his children. The property was to be split into two, and the eldest child from each house was to hold the portion allotted to them in trust for their younger siblings. There is an arguable case that the property, Loc 19/Rwathia/2041, was family property held in trust by the deceased. It was incumbent on the administrator to prove that it was not. She was given the chance, filed papers in response, but chose to stay away from the oral hearing of the matter. I am convinced on the basis of the material before me that Loc 19/Rwathia/2041 was trust property.

13. Having so found, I need to consider whether I should proceed to revoke the grant made herein.

14. The jurisdiction to revoke a grant of representation is given by section 76 of the Law of Succession Act. The said provision states 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. *...'*

15. What ought to be contained in the application for grant of letters of administration intestate is set out in Section 51(2)(g) of the Law of Succession Act and Rule 7(1)(e) of the Probate and Administration Rules. Section 51(2)(g) states as follows: -

*'An application shall include information as to – in cases of total or partial intestacy, the names and addresses of all surviving spouse, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.'*

Rule 7(1) (e) states as follows: -

*'...the application shall be by petition...supported by an affidavit...containing...the following particulars – in cases of total or partial intestacy (i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no spouse or child, like particulars of such person or persons who would succeed in accordance with section 39(1) of the Act.'*

16. Rule 7(7) of the Probate and Administration Rules, is also relevant, it states as follows:-

*'Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant representation intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –*

- a. *renounced his right generally to apply for a grant; or*
- b. *consented in writing to the making of the grant to the applicant, or*

c. *been issued with a citation calling upon him either to renounce such right or to apply for a fight.*'

17. These provisions are in mandatory terms. There must be a full disclosure of all the survivors of the deceased as set out in the two provisions, whether or not they were to take a share in the assets that he or she died possessed of. All the categories of survivors set out in Section 51(2) (g) of the Law of Succession Act and Rule 7(1) (e) of the Probate and Administration Rules must be disclosed. Failure to disclose would be fatal to the grant.

18. The complete disclosure of all the survivors, as envisaged in section 51 and Rule 7, is meant to cater for such situations as the one alleged in this case, that the deceased held property in trust, for his brother. All the survivors should all be brought out, so that at distribution they can state whether or not they claim a share in the estate.

19. Section 66 sets out the preference to be given to certain persons to administer where the deceased died intestate. The provision states as follows –

*'When the deceased has died intestate, the court shall...have a final discretion as to the person or persons to whom a grant of letters of administration shall...be made, but shall...accept as a general guide the following order of preference –*

- a. *Surviving spouse or spouses, with or without association of other beneficiaries;*
- b. *Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*
- c. *...*

20. If the property in question was trust property, as I have found it to be in this judgment, it follows naturally that all the other members of the extended family of the deceased ought to have been involved in the process as required by the relevant law. Failure to involve them made the process of obtaining the grant defective. The non-disclosure of the other family members would also mean that there was concealment of material information from the court. Ideally, therefore, the grant herein is fertile for revocation.

21. I am satisfied that the applicant has established as case for revocation of the grant made herein for it was obtained in proceedings that were defective and there was non-disclosure of all the survivors of the deceased as required by Section 51(2) (g) of the Law of Succession Act and Rule 7(1) (e) of the Probate and Administration Rules.

22. However, I do take cognizance of the fact that the deceased herein died in 1991. The cause herein was initiated in 2009 and a grant of representation made that year and confirmed in 2010. The summons for revocation has been pending since 2011. This background moves me not to consider the revocation of the grant, but to make the following orders instead:-

- a. **that I do hereby appoint the applicant herein, Jacob Muthece Kamau, an-administrator herein, with Mary Wairima Waithaka, of the estate of the deceased herein;**
- b. **that the grant of letters of administration intestate herein dated 3<sup>rd</sup> August 2009 to be amended to accomodate the appointment of Jacob Muthece Kamau as administrator;**
- c. **that the orders made on 15<sup>th</sup> June 2010, confirming the grant made on 3<sup>rd</sup> August 2009, are hereby set aside, to the extent of Loc 19/Rwathia/2041;**
- d. **that the certificate of confirmation of grant dated 15<sup>th</sup> June 2010 shall be rectified to remove Loc 19/Rwathia/2041 from the schedule of the assets distributed as per the said certificate;**
- e. **that all transactions carried out on the strength of the said certificate, as it related to Loc 19/Rwathia/2041, are hereby nullified, and the Land Registrar responsible for Murang'a**

**County is hereby directed to revert the registration of Loc 19/Rwathia/2041 to the name of the deceased;**

- f. that confirmation proceedings shall be taken out by the administrators appointed in (a) above for the fresh distribution of Loc 19/Rwathia/2041 as between the family of the deceased and the applicant herein, Jacob Muthece Kamau; and**
- g. that there shall be no order as to costs.**

**DATED, SIGNED and DELIVERED at NAIROBI this 8<sup>TH</sup> DAY OF JULY, 2016.**

**W. MUSYOKA**

**JUDGE**