



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO.2397 OF 2009**

**IN THE MATTER OF THE ESTATE OF WAMBUI GIKANGA (DECEASED)**

**GIKONYO MBURU .....APPLICANT VERSUS**

**DAVID GIKONYO GIKANGA .....RESPONDENT**

**MARY WAMBUI GITAU .....INTERESTED PARTY**

**JUDGMENT**

1. The succession cause proceedings relates to the estate of the late Wambui Gikanga who died on 11<sup>th</sup> May 2001. There was a grant of letters of administration intestate issued to David Gikonyo Mburu on 23<sup>rd</sup> March 2005 and confirmed on 15<sup>th</sup> December 2005.

2. Via summons dated 23<sup>rd</sup> September Mburu Gikonyo sought revocation of the said grant on grounds that the proceedings to obtain the same was defective in substance; that the petitioner obtained the said grant fraudulently by making a false statement by concealment of something material to the case; that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the grant was made in ignorance or inadvertently and that the person who obtained the said grant has failed after due notice to proceed diligently in administration of the said estate.

3. The affidavit in support of the said application the objector avers that the deceased was her grandmother who passed away. That at the time of her death she was the registered owner of **L.R. Githunguri/Githiga/T.835**. That the money used to purchase the said parcel of land was part of compensation by insurance for wrongful death of his father who died in a road accident on December 1966. That at the time he was only 5 years old. Once he became of age, he married and his wife and 5 children have been living in the said portion of land where he has constructed 3 semi-permanent residential houses. That there was a case regarding the said parcel of land at the Land Dispute Tribunal and after hearing all the evidence the elders confirmed his interest on the land and a decree was issued in SRMCC No. 59 of 1999 at Githunguri. That once his grandmother died he was entitled to his father's share of the land. However, his uncle David Gikonyo Gikanga petitioned for grant of letters of administration in regards to his grandmother's estate in Succession Cause no. 58 of 2001 at Githunguri. In the same cause he filled an application on 27<sup>th</sup> November 2002 laying claim as a beneficiary. That the petitioner applied for the confirmation of the same secretly and Mary Wambui Gitau was named as sole beneficiary of **plot no. Githunguri/Githiga/T.835** and later transferred the said parcel of land as an alleged purchaser.

4. David Gikonyo in opposition to the said application filed his replying affidavit dated 28<sup>th</sup> October 2011. He stated that he was the one who processed his brother's award which amounted to Kshs. 20,000 when he died in the said road accident in 1966 and that the said sum was paid to his wife and children. He

avers that the deceased was never paid any money and the allegations that the deceased as given money is unfounded, dishonest and misleading. That once the objector heard that the land had been sold he encroached to prevent the interested party from gaining possession. That the objector's matrimonial home is in Githiga where his mother stays having been allocated the said land by the deceased before her demise. That the decree was passed after the land had been sold and the sale was not revoked therefore the decree had been overtaken by events. That he obtained the grant of letters of administration with the consent of all the children and that the same was gazette in the Kenya gazette and the objector had an opportunity to object the same. Further that if the said land belonged to his father the applicant should have applied for grant of letters of administration for his estate and listed the same as such. That the interested party was registered as sole owner having purchased the same lawfully. He urged the court to disallow the applicant's application.

5. Mary Wambui Gitau filed her replying affidavit dated 28<sup>th</sup> October 2011 in opposition to the said application. She avers that she is an interested party by virtue of having entered into a sale agreement and purchased the said parcel of land from the deceased before her demise. That after her death the administrator to the deceased's estate transferred the same into her names and she holds the same as absolute owner.

6. Gikonyo filled a further affidavit dated 8<sup>th</sup> February 2012 in response to David Gikonyo's replying affidavit. He acknowledged that Kshs. 20,000 was paid by the insurance following his father's death's in a road accident in 1966. That the said money 5,000 was given to his mother and 12,500 was held in trust for the children who were minor. That 1,000 was given to the deceased to purchase a plot which cost 800 and she kept the balance of 200 which she used to purchase building materials with. That the plot that was purchased was registered in her grandmother's name as it was feared that his mother would remarry leaving the children with her grandmother. That he later on constructed a timber house for his grandmother on **L.R. Githunguri/Githiga/T.835** but the house was later moved to **L.R. Githunguri/Githiga/298** belonging to her son David Gikonyo. That the interested party was illegally listed as a beneficiary in the succession cause as there is no provision for a purchaser to be included in the list of beneficiaries.

7. Gikanga Mburu filed the application dated 10/11/2009. He testified that his late father purchased the land **Githunguri/Githaiga/T.835.8** when he was 5 ½ years following an insurance compensation and the same was registered in his grandmother's name. That after his grandmother's demise there were proceedings at Githunguri in which he participated on. He stated that the case no.59/1999 was a case between him and his grandmother and it was agreed that he continues staying in the said parcel of land as her grandmother was being harassed. That the succession cause regarding his grandmother's estate was done; that during the said proceedings he raised an objection on 28/11/2001. That he was never called to do the application but only learnt that the shamba had been sold and he was to move. He stated that it was held that the beneficiary was Mary Wambui Gitau who he claims was not a member of the family. He stated that he put a caution on the said parcel of land when his grandmother was alive and the same had been divided. But learnt that the said caution had been removed and the land sold. That he had not be called to attend any land board meeting to state the same be transferred to her. He refutes allegations that the grandmother received Kshs. 30,000/- as sale price for the said parcel of land. That when the grandmother was ill she was taken to Githunguri law court and that the money was to be refunded. He urged the court to assist him get back the said plot of land and have it reverted in her grandmother's name.

8. On cross examination he stated that their father had 3 boys and 4 girls. He stated that the money was given when he was about 9½ years. He stated that his grandmother told him to stay in the parcel of land adding that there was no sale of the said parcel of land nor any agreement between her and Wambui. That at the time the grandmother died his mother was alive and they tried to follow up on the succession cause but the same had passed.

9. On cross-examination by the court he stated that he and his family stayed in the said parcel of land which measures approximately 50\*100 and that he had lived there since 1976.

10. Joseph Ngare Gikanga stated that he was the older uncle to Joseph Mburu. That Mburu's father died in a road accident at Mlango Kubwa in Eastleigh in 1966 at the time he was working at Kenya Science. After his burial they got an advocate who filed their case and they were paid Kshs. 20,000/-. From the said money the children were to be bought for a plot of land. That it was agreed that the said parcel of land be registered in her grandmother's name as the mother could disappear. That the oldest child of his brother Gikonyo went to live with his grandmother. He stated that their father had his own land. That his father had 2 wives Njeri and Wambui. He stated that the said parcel of land was subdivided into two portions with titles in the names of Mburu Gikanga and Wambui Gikanga. One portion was bought by another person. That they agreed with the person who bought the land to exchange with another portion elsewhere. He sought to confirm that his late brother had 7 children and his wife was also deceased hence could not testify. That Mburu being the first born had the right to claim the property and later subdivide the same amongst his family members. That the case proceeded before the tribunal. That after the death of Wambui Gikanga David Gikanga went and filed the case of the estate of Wambui without notifying the others. That his father had other lands and each of them was given their share. He stated that the said property was not Wambui's but was for Ngari's children.

11. On cross examination he stated that Wambui Gikanga was his stepmother who had 4 sons one who is deceased but 3 are still alive. He reiterated his evidence in chief and explained how they are related. He testified further that that the land was bought from a mukorino though he was not involved in the transaction. That Wambui could not have sold the property as she had been told not to sell it by their father. That her children who went behind her back and changed the names of their mother without informing the others and proceeded to file the succession cause. He stated that he did not know who Wambui was and that there was no sale agreement in regards to the sale of the said parcel of land. That Mburu died when Gikanga was about 19 years. That before the death of his father both families had a good relationship but fell out after his demise.

12. David Gikonyo testified that Wambui Gikanga was his mother and she had 6 children 4 sons and 2 daughters. 2 sons the 2 daughters are still alive. He testified that Gikonyo Mburu was his brother's son who had died following a road accident in 1966. That he is the one who took the case to the advocate and they were paid Kshs. 20,000/-. That the advocate paid himself 3,000, the wife got 5,000, Mukule got 2,500 and Wanjiku got 3,000 but that he was not given anything. That after Wambui passed he took out letters of administration after they agreed that he was to be the administrator. He stated that the plot **Githunguri/Githiga/T835** was bought by Wambui in 1964 for Kshs. 800 but could not recall the land his mother bought but they exchanged the same and **Githunguri/Githiga/T835** was given to his mother after an exchange with Mwangi but sold the land when Gikonyo wanted to take the land by force. He stated that the land was sold to Wambui and the land was transferred after his mother died. He added that it was his late mother's wish that Gikonyo does not get the land but the same to go to Mary Wambui Gitau. He stated that the said parcel of land was sold at Kshs. 150,000/- and that Gikonyo cannot claim the said parcel of land now as Wangari Gikonyo's mother was given money in 1985 for the same. He stated that all of them were given 4 acres of his late father's 16 acres of land. That Wambui Gikonyo was alive when he took out the grant of letters of administration. That they have their land 4 ½ acres of land where his mother is buried. He stated that Mburu Gikonyo had no right to inherit as the owner had sold it to another party. That Mburu was not a beneficiary of the property of Wambui Giana and as such has no right to anything to do with her property. That they did not tell Gikonyo Mburu about the case as his mother was still alive. That his mother had a right to do anything with the land.

13. On cross-examination he stated that he was present during the sale and when they wrote the sale agreement and even acted as a signatory to the same and that at the time there was no case. He denied receiving any money on behalf of his mother since the land was his mother's. That there was an issue with the said land he testified regarding the same. The matter was initiated at the headmen who made no decision on the same and then to the chief who told them to continue building. But later the mother went to the tribunal seeking to have Gikonyo evicted and they were given a decision in 2 months and the same was given to the court. The said decision held that the land belonged to the owner of the title, but he recalls Gikonyo was not evicted. He stated that he took out the grant of representation in regards to plot. He stated that Gikonyo filed a protest in court in Githunguri and that Gikonyo was not there when the grant was confirmed. That he named Gikonyo's father as a son and that the court did not ask if he had a

family.

14. DW1 testified further that he started to buy the land in 1997 and Wambui started to plough the land in 1997. That in 1964 the transfer did not take place and the money was refunded. The land exchanged was given to her in October 1996 and this was after Gikonyo threatened to sell the same. That the case ended in 1968 and she was paid the same year and she was paid 5000. He denied allegations that he misled his mother in the sale. That Gikonyo would have gotten a piece of the land had his mother not sold the same. He added that he did not go to the land board to transfer the said parcel of land and that the advocate dealt with it. He stated that the sale agreement was done on 17/7/98 and Gikonyo did not object to the sale. That Gikonyo's mother was buried at the land she was given his mother. That he did not tell Wambui that there was a case. That it was his mother wish that the land be given to Wambui that his mother was annoyed as she had been abused and she even left a curse saying the land was Wambui's. He admitted that the applicant's mother would have been given the land if it had not been sold.

15. Dw2 Mary Wambui Gitau the interested party testified that she bought part of the deceased's property No. 835 at Githiga in 1998. The sale agreement was dated the 17<sup>th</sup> of July 1998. Wambui was paid the money before a lawyer and the property is her name and that at the time Wambui died the property had not been transferred into her name. That the property has been transferred to her name. On being cross-examined she admitted that there was a caution in the green card by Gikonyo, but stated it was removed after the case was finalized. That there was no case when she was buying the land. That she bought the land in 1998 but made the last payment in 2002 on the 14<sup>th</sup> of February that Wambui was sick and could not sign. That she paid Wambui only. That David did not tell her that the case was proceeding in the Chief's office nor was she told of the decree of 24<sup>th</sup> October 2002. That she was the sole beneficiary in the Succession Cause of Wambui, she was not aware of the Objection proceedings. That she does not recall signing any papers in the petition nor attending the land control board. She denied collaborating with David Gikanga to defraud Gikonyo of the land.

16. I have read and considered the parties affidavits, applicant and interested party's written submissions and applicant and respondent's oral submissions. The applicant has based his application on Section 76 of the Law of Succession Act, 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;***

***(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;"***

17. It is not in dispute that the objector's father died in 1966 from a road accident and was compensated Kshs. 20,000/- by the insurance company. The respondent claims that from the said amount the advocate paid himself 3,000, the objector's mother got 5,000, Mukule got 2,500 and Wanjiku got 3,000. It was agreed that some of the money would be used to purchase a plot to be held in trust for the deceased's children. The respondent claim that the plot ***Githunguri/Githiga/T835*** was bought by the deceased in 1964 for Kshs. 800.

18. The objector herein claims to have an interest on the basis that the said land was bought with proceeds from the insurance award following his father's death. In his testimony, he stated that he has stayed with his grandmother since 1976. That he has been in continuous possession of it, and had made developments on the same. In essence the applicant/objector claims that the deceased was holding the land in trust and as such could not purport to sell the same without involving him. Further the objector/applicant is a grandson to the deceased and had been taken in by the grandmother I find that he qualifies as a dependant under section 29 of the Law of Succession Act which defines a dependant to include, ***"(b) .....***

***grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;***

19. From the foregoing I find that the applicant being a dependant is entitled to protection of this court under Section 26 of the Act which provides that, ***“where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”***

20. I find further that the petitioner in obtaining the grant of administration to the deceased estate failed to disclose that the applicant was a dependant in the deceased’s estate was tantamount to concealment from the court of something material to the court and as such find that the grant so obtained and confirmed was done fraudulently. I therefore revoke the grant obtained by the petitioner on **23<sup>rd</sup> March 2005** and confirmed on **15<sup>th</sup> December 2005**.

21. There is a sale agreement dated 17<sup>th</sup> July 1998 between Wambui Gikanga and Mary Wambui Gitau for half of the parcel of land ***Githunguri/Githiga/T835*** for Kshs. 150,000. The deceased appended her thumbprint on the same. At the said time of signing the said sale agreement the deceased acknowledged being in receipt of Kshs. 30,000/- paid by the purchaser Mary Wambui Gitau. There is a further 3 acknowledgments executed by the deceased evidencing that she received the balance of Kshs. 40,000 on 23<sup>rd</sup> October 1998, 11<sup>th</sup> August 1998 and 14<sup>th</sup> February 2002 respectively this brings a total of the purchase price to Kshs. 150,000. However, Wambui Gikanga died before the transfer of the said parcel of land to the purchaser Mary Wambui Gitau. The deceased’s son David Gikonyo applied for Grant of letters of administration which were issued to him on 5<sup>th</sup> December 2005 and later on confirmed on 15<sup>th</sup> December 2005. It was then that David as administrator of the deceased’s estate transferred the said plot to Mary Wambui Gitau and the same was registered in her name on 13<sup>th</sup> February 2006 as evidenced by the copy of title deed attached. The interested party claims that she is entitled to the said parcel of land as a purchaser for value without notice. She relies on Section 93 of the Law of succession Act which seeks to protect the rights of purchasers, it provides that ***“A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.***

***(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.”***

22. In considering the evidence adduced I note the following the Respondent all along knew of the dispute over the parcel land that was being sold to the interested party. It’s evident that the applicant’s objection was overlooked and the grant confirmed despite his objection. It was the interested party evidence that she did not sign any papers in the petition nor did she attend the land control board this makes me doubt whether she was a bona fide purchaser as claimed and therefore in my view she cannot seek protection from section 93 of the Succession Act. Cap. 160. From the foregoing I find that the interested party can claim as against the deceased’s estate. Each party to bear its own costs. It is so ordered.

Dated, signed and delivered this **7<sup>th</sup>** day of **September** 2016.

**R. E. OUGO**

**JUDGE**

**In the presence of;**

.....**For the Applicant**

.....**For the Respondent**

.....**For the Interested Party**

**MS. Charity Court Clerk**