



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 336 OF 2011**

**IN THE MATTER OF THE ESTATE OF KAGIRI MUKUA (DECEASED)**

**NELSON NDUNGU KAGIRI ..... 1<sup>ST</sup> APPLICANT**

**JUSTUS NDUNGU KAGIRI .....2<sup>ND</sup> APPLICANT**

**STEPHEN NGARUIYA KAGIRI ..... 3<sup>RD</sup> APPLICANT**

**V E R S U S**

**LEAH WAITHERA KAGIRI ..... 1<sup>ST</sup> RESPONDENT**

**MARGARET NJAMBI KAGIRI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This matter relates to the estate of Kagiri Mukua, who died on 2<sup>nd</sup> September 2001.
2. The cause was prompted by a request by Leah Waithera Kagiri and Margaret Njambi Kagiri, widow and daughter, respectively of the deceased for citations to issue upon Wanjiku Kagiri, Njeri Kagiri, Ndirangu Kagiri, Ndungu Kagiri, Stephen Ngaruiya Kagiri, Wanjiru Kagiri, Wambui Kagiri, Lucy Nyaguthii Kagiri, Wanjiku Kagiri, Wangui Kagiri, Kagiri Njambi, Waithira Kamau, Wanjiru Kagiri, Njeri Kagiri, Nelson Ndungu Kagiri, Wangari Kagiri, Boniface Ngaruiya Kagiri, Muthoni Kagiri, Teresiah Wanjiku, Mwihaki Kagiri, Kaniki Kagiri and Wanjiku Kagiri.
3. The two citors lodged an affidavit for verification of the proposed citation to accept or refuse letters of administration in court on 21<sup>st</sup> February 2011. The said affidavit was sworn on 7<sup>th</sup> February 2011.
4. The record does not indicate whether any directions were given on the proposed citation. However, there is on record an entry of appearance entered by the firm of Messrs. J. W. Wanjohi & Co. Advocates on behalf of the citees.
5. It would appear that the proposed citors lodged on the same day, that is to say 21<sup>st</sup> February 2011, a petition for grant of letters of administration intestate in their capacity as widow and daughter of the deceased. According to the petition the deceased was polygamist who had married three times – to Leah Waithira Kagiri, Ngendo Kagiri and Wambui Kagiri. Leah Waithira Kagiri the first petitioner, Ngendo Kagiri was said to have remarried, while Wambui Kagiri was dead. Between them they had twenty-three (23) children, whose names were listed in the petition. The deceased

- was expressed to have died possessed of three properties, being Githunguri/Kiairia/2132, 2134 and 2136. A grant of letters of administration intestate was made to the two on 26<sup>th</sup> October 2011.
6. The grant made on 26<sup>th</sup> October 2011 has not been confirmed. There is however pending a summons for confirmation of the grant, dated 27<sup>th</sup> November 2012.
  7. On 16<sup>th</sup> May 2012 a summons for revocation of the grant made on 26<sup>th</sup> October 2011 was lodged at the registry by three sons of the deceased, that is to say Nelson Ndungu Kagiri, Justus Ndungu Kagiri and Stephen Ngaruiya Kagiri. The grounds upon which revocation of the grant are sought are set out on the face of the application, as well as in the affidavit in support sworn on 16<sup>th</sup> May 2012 by Nelson Ndungu Kagiri.
  8. In summary, the applicants argue that the administrators were all from one home, yet the deceased had married thrice and had twenty-three children who have all been left out. It is stated that the mandatory consents of the dependants had not been obtained nor filed. It is also averred that not all the assets that make up the estate had been listed. The applicants aver that the twenty-three children of the deceased risk being disinherited. They pray that the grant be revoked and fresh administrators be appointed upon agreement, representing all three houses.
  9. The reply to the application takes the form of an affidavit sworn by Margaret Njambi Kagiri on 12<sup>th</sup> June 2012. She argues that some assets were left out of the list of assets in the schedule for the same had been distributed *inter vivos* by the deceased to Nelson Ndungu Kagiri, Justus Ndungu Kagiri and Stephen Ngaruiya Kagiri. It is argued that these three, who also are the applicants in the application for revocation of grant, are not entitled to a share in the remaining estate of the deceased. The three are accused of intermeddling with the estate by selling twelve (12) plots at Githurai and by destroying records. It is stated that although the deceased died in 2001, the applicants took no steps at all towards obtaining representation to the estate. They had to wait until they were prompted by the administrators when they moved to court in 2011.
  10. The deponent of the affidavit sworn on 12<sup>th</sup> June 2012 has attached documents to the said affidavit. There is a certificate of official search dated 30<sup>th</sup> March 2010 regarding the property described as Githunguri/Kiairia/2137 showing that the same was registered in the name of Nelson Ndungu Kagiri in 2000. Copy of the certificate of official search dated 30<sup>th</sup> June 2010 in respect of Githunguri/Kiairia/2131 shows that the same was registered in 2000 in favour of Justus Kagiri Ndungu. There is also copy of a certificate of official search dated 30<sup>th</sup> March 2010 in respect of Githunguri/Kiairia/2133 showing that the same was registered in the name of Stephen Ngaruiya Kagiri in 2000. There is also a letter from Mwicigi Kinuthia & Co. Advocates dated 3<sup>rd</sup> May 2012 which suggests that there are other assets not featured in the schedule of assets.
  11. It was directed on 28<sup>th</sup> May 2013 that the application dated 16<sup>th</sup> May 2012 be disposed of first. The said application was to be disposed of by way of *viva voce* evidence. These directions were revised on 14<sup>th</sup> July 2014, when it was directed that the said application be disposed of by way of written submissions. Both sides have filed written submissions. The applicants' submissions are dated 6<sup>th</sup> October 2014 and were lodged in court on the same date. The respondents' submissions are dated 11<sup>th</sup> August 2014 and were filed in court on 12<sup>th</sup> August 2014. The authenticity of the written submissions by the respondents is doubtful for the document is not signed by counsel for the administrators.
  12. Revocation of grants is provided for under Section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The court will revoke the grant on application or on its own motion where the proceedings to obtain the grant were defective, the grant was obtained on the basis of fraud and misrepresentation, the administrators upon obtaining representation have failed to proceed diligently with administration, and the grant has since become inoperative or otherwise useless.
  13. The charge against the administrators in this cause is that they failed to disclose or omitted some

dependants from the petition and left out half of the assets. It is also pleaded that the administrators did not obtain certain mandatory consents.

14. The information that should be carried in an application for a grant of representation are set out in Section 51(2) of the Law of Succession Act. The said provision states as follows:-

**“An application shall include information as to-**

- a. **the full names of the deceased;**
- b. **the date and place of death;**
- c. **his last known place of residence;**
- d. **the relationship (if any) of the applicant to the deceased;**
- e. **whether or not the deceased left a valid will;**
- f. **the present addresses of any executors appointed by any such valid will;**
- 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 his or hers then deceased;**
- h. **a full inventory of all the assets and liabilities of the deceased; and**
- i. **such other matters as may be prescribed.”**

15. Section 51(2) of the Act is complemented by rule 7 of the Probate and Administration Rules, which provides for applications for grants of representation. Rule 7 has a similar list of the sort of information that ought to go into an application for a grant of representation.

16. These two provisions are in mandatory terms. It is required that the names and addresses of all the surviving children, spouses, parents, etc, must be disclosed. There should also be a full inventory of all the assets and liabilities of the deceased.

17. Regarding disclosure of the survivors it is alleged that the administrators failed to disclose or omitted to list some of the beneficiaries or survivors. It is curious that the applicants have not pointed out the individuals whose names were not disclosed in the petition. They state that the deceased had three wives, two of whom are since dead, and twenty-three children. The record before me indicates that the administrators disclosed one surviving spouse and twenty-three children. Evidently, both sides were clearly reading from the same page. No information was concealed from the court with respect to the survivors of the deceased. There is therefore no basis for the accusation that the administrators concealed information regarding some survivors.

18. On the assets, the charge is that the administrators disclosed only half of the assets. Curiously the applicants have not themselves disclosed to the court the assets that they allege were not disclosed by the administrators. The second administrator in her affidavit of 12<sup>th</sup> June 2012 states that the estate comprised of other assets that were not disclosed in the petition. If that is the case, then there was therefore lack of disclosure of certain assets.

19. Is the non-disclosure fatal to the petition? Section 51(2) of the Act and rule 7 of the Rules are in mandatory terms. The courts have previously held that the non-completeness of the schedule of survivors and assets is not fatal to the petition. The defect is curable. It can be cured by the administrator updating the list of survivors with the names of those left out and similarly by updating the schedule of assets by introducing into the list details of the assets omitted. Such non-disclosure therefore is not sufficient ground for revocation of a grant.

20. The other charge is on the non-inclusion of a mandatory consent in the bundle of documents filed with the petition. The applicants allege that the persons with equal or prior right to administration did not consent in writing to the two administrators petitioning for representation.

21. The relevant law on this is rule 7 sub-rules 6 and 7 of the Probate and Administration Rules. The deceased person herein died intestate and therefore the relevant provision is rule 7(7), which 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 of administration intestate he shall before making 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 grant.”**

22. Section 66 of the Act, that rule 7(7) refers to, states as follows-

**“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, 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 priority according to their respective beneficial interests as provided by Part V;**
- c. **the Public Trustee; and**
- d. **creditors.”**

23. Section 66 sets out a guide on entitlement to a grant of representation. The provision gives an order of preference. Priority is given to surviving spouses, followed by children and so on – generally following the provisions in Part V Sections 35 to 39 of the Act.

24. According to rule 7(7), a person who has a lesser right or priority or entitlement to administration of an intestate estate must provide proof that the persons with a superior right or entitlement to administration and those having equal entitlement have either renounced their right or consented in writing to the making of the grant or have been issued with a citation to renounce their right to administration. This requirement applies too to an applicant or petitioner whose right ranks equal to that of other persons who are not themselves applicants or petitioners. It does not however apply to applicants or petitioners whose rights to administration outrank those of the persons who are not seeking representation.

25. The petitioners in the petition lodged in court on 21<sup>st</sup> February 2011 are described as widow and daughter, respectively, of the deceased. The widow is a surviving spouse of the deceased, and by virtue of Section 66 of the Act, she had a prior right to administration over the children of the deceased. As a petitioner she was not bound to comply with rule 7(7) of the Rules for that provision only applies to petitioners of equal or lesser right. Section 66(a) of the Act appears to encompass petitioners of equal or lesser right who apply in association with person of prior right. There would be no need for them to comply with rule 7(7) of the Rules. There was therefore no obligation on the part of the administrators to comply with rule 7(7) of the Rules.

26. I have perused the papers filed herein carefully and for the record, I wish to note that there is nothing to indicate that renunciations and consents envisaged in rule 7(7)(a)(b) of the Rules were obtained and filed with the petition. However, in view of what I have stated in paragraph 25 above, the failure to obtain the consents or renunciations was of no consequence.

27. I have noted though that there was an attempt by the administrators to comply with rule 7(7)(c) of the Rules, by having citations issued. I note however that the provision set out in rules 21 and 22 of the Probate and Administration Rules governing citations to accept or refuse a grant was not

followed. No citations were issued. No directions were given. The petition filed in court on 28<sup>th</sup> February 2011 was not lodged in court on the strength of directions given by the court. Quite clearly rule 7(7)(c) of the Rules was not complied with. But again, in view of what I have stated in paragraph 25 above, the non-compliance was of no consequence.

28. The deceased was no doubt a polygamist. He had married three times, and got children in each of his three houses. That meant that his family consisted of three households. It is noteworthy that the petition of 21<sup>st</sup> February 2011 was by two individuals from the first house. The other houses were not represented in the proposed administration, although they had been properly disclosed as survivors of the deceased.

29. The applicants in the application dated 2<sup>nd</sup> September 2001 are the sons of the deceased. They come from each of the three houses of the deceased. Although the same is not recorded on paper, the three sons appear to say that they were the persons entitled under customary law to take charge of the administration of the estate.

30. That may be well, but the deceased died in 2001, long after the Law of Succession Act came into operation. Under the Act, the fact of being a son of the deceased does not give one a superior right or entitlement to administration over a surviving widow or daughter of the deceased. All the survivors of a deceased person regardless of their gender and marital status are treated equally under the provisions of the Act.

31. I am cognisant of the fact that the deceased died in 2001. The instant cause did not commence until ten (10) years later, in 2011. It was the administrators who took the initiative. The applicants had ten years to seek representation, they did not avail themselves of the opportunity. They waited until the administrators had gone to court ten years later for them to react. They are clearly not proactive sons. They appear to be reacting to the prompting of the widow and the daughter of the deceased.

32. I am not persuaded that a proper case has been made out for grant of the application dated 16<sup>th</sup> May 2012. I shall not allow it. Neither shall I dismiss it. Instead I shall make the following orders:-

- a. **That the grant made on 26<sup>th</sup> October 2011 shall be amended to accommodate or include a representative each from the second and third houses of the deceased;**
- b. **That the administrators named in the grant, as amended in (a) above, are hereby directed to work on a comprehensive schedule of the assets making up the estate of the deceased;**
- c. **That the matter to be mentioned after thirty (30) days for the court to receive the names of the representatives referred to in paragraph (a) above and for further directions; and**
- d. **That there shall be no orders as to costs.**

**DATED, SIGNED and DELIVERED at NAIROBI this 10<sup>TH</sup> DAY OF JULY, 2015.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Mr. Goa for Mr. Wanjohi advocate for the Applicant.**

**In the presence of Mr. Kamata for Mr. Kinuthia advocate for the Respondent.**