

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
SUCC. CAUSE NO.1136 OF 2005

IN THE MATTER OF THE ESTATE OF MUTHIORA GICHANE - DECEASED

PAULINE WANJIRU NGUGI.....APPLICANT

VERSUS

SAMUEL KAMONYE GICHANE.....1ST RESPONDENT

ELIUD MWAE MUTHIORA.....2ND RESPONDENT

JUDGMENT

Muthiora Gichane, the deceased to whose estate these proceedings related died on 29th September 1974. On 18th March 1986, Samuel Kamonye Gichane and Stephen Gichane Muthiora, petitioned the Kiambu Subordinate Court in **Succession Cause No.41 of 1986** to be issued with a grant of letters of administration intestate in respect of the estate of the deceased. In the petition, the petitioners listed the dependants of the deceased. Those dependants excluded the Applicant. The properties comprising the estate of the deceased were listed as LR. Nos. Ndumberi/Ting'ang'a/T.507 and Ndumberi/Ting'ang'a/869. The grant was issued to the petitioners on 7th October 1987. It was confirmed on 5th December 1988. The two properties were distributed in the manner proposed by the petitioners. Stephen Gichane Muthiora died on 13th June 1997. He was substituted by the 2nd Respondent, Eliud Mwae Muthiora. The substitution was done on 10th December 2003.

On 6th May 2005, the Applicant moved this court by summons seeking to have the grant of letters of administration intestate that was issued to the Respondents revoked pursuant to **Section 76** of the **Law of Succession Act** and **Rule 44(1)** of the **Probate and Administration Rules**. The Applicant claimed that the Respondents had obtained the said grant by fraudulently making false statements and concealing from the court facts that are material to the case. In particular, the Applicant stated that the Respondents failed to disclose that she was a beneficiary of the estate of the deceased. She further took issue with the fact that the Respondent failed to notify her when they petitioned the Kiambu Subordinate Court to be issued with a grant of letters of administration intestate. The application is supported by the annexed affidavit of the Applicant. She swore a further affidavit on 27th October 2008 in further support of her application. The application was opposed. Jane Njeri Muthiora and Eliud Mwae Muthiora swore witness affidavits in opposition to the application. In essence, they deponed that the Applicant was not a dependant of the deceased, and therefore cannot be a beneficiary of his estate.

Directions were taken to the effect that the matters in dispute would be disposed of by the court hearing *viva voce* evidence from the disputing parties. During the hearing, Pauline Wanjiru Ngugi (the Applicant) testified on her own behalf while Jane Njeri Muthiora (DW1) and Eliud Mwae Muthiora (2nd Respondent) testified as DW2. From the said evidence, the following facts emerged: the properties that comprised the estate of the deceased were previously owned by Gathaara Muthiora. Gathaara Muthiora had three (3) children, namely Gichane Muthiora, Kamonye Gichane and Gathare Muthiora. Gichane Muthiora was the father of Muthiora Gichane, the deceased to whose estate these proceedings relate. Muthiora Gichane (the deceased) was married to two wives, namely Veronica Njeri Muthiora (now deceased) and Jane Njeri Muthiora (DW1). Veronica was blessed with four (4) children including the 2nd Respondent, while Jane was blessed with six (6) children.

From the evidence adduced, it was apparent that during his lifetime, the deceased allowed his paternal

aunt, Gathare Muthiora to reside on the parcel of land registered as LR. No. Ndumberi/Ting'ang'a/T.507 (suit parcel of land). The deceased allowed his aunt to live on the land because she was not married. The aunt however had a son by the name Ngugi Gichane. Ngugi Gichane married the Applicant in 1955. According to the Applicant, from the time of her marriage to the said Ngugi Gichane (now deceased), she has resided on the suit parcel of land. Initially she lived on the suit parcel of land with Gathare Muthiora, her mother in-law. Subsequently thereafter, upon the demise of her mother in-law, she lived on the land with her husband and children.

The Respondents' concede that the Applicant has lived on the suit parcel of land for period that she states. However, it was their case that the deceased allowed his aunt to reside on the suit parcel of land as a licensee. They testified that upon the death of the aunt, the Applicant and the members of her family were requested to give vacant possession of the suit parcel of land. The Applicant had refused to vacate even though she had another parcel of land in place called Ngemwa where her husband (Ngugi Gichane) was buried. It was the Respondents' case that the Applicant had no claim whatsoever over the suit parcel of land because the licence upon which she occupied the land had been terminated. On her part, the Applicant insists that since she is the wife of Ngugi Gichane who was the son of Gathare Muthiora, the aunt of the deceased, and who had been allowed to reside on the suit parcel of land by her father, it was only just and fair that she be recognized as a beneficiary of the suit parcel of land.

This court has carefully evaluated the facts of this case. The deceased in this case died before the **Law of Succession Act** came into force on 1st July 1981. **Section 2(2)** of the **Law of Succession Act** provides thus:

“The estate of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estate shall commence or proceed so far as possible in accordance with this Act.”

In the present case therefore, the applicable law is the customs of the Kikuyu community, to which the deceased belonged. It is the Applicant's case that she is entitled to inherit the suit parcel of land by virtue of the fact that the father of the deceased, who was the previous owner of the suit parcel of land, had allowed her sister, the mother in-law of the Applicant to occupy the suit parcel of land. From the evidence adduced by both parties, it was common ground that the aunt of the deceased was not married. Under Kikuyu Customary Law, an unmarried daughter or a daughter who was married but was divorced by the husband, was entitled to be given a piece of land where she would occupy and sustain herself. This was the case with Gathare Gichane, the mother in-law of the Applicant. She was given this suit parcel of land by her father by virtue of the fact that she did not have a husband at the time.

Although the suit parcel of land was registered in the name of the deceased, the deceased acknowledged this fact. This is because, during his lifetime, he did not interfere with the said Gathare Gichane's occupation of the suit parcel of land. He knew he was registered as the owner of the suit parcel of land in trust for the said Gathare Gichane and her successors. Likewise, when she died, no one interfered with the occupation of the same by Gathare Gachane's son Ngugi Gichane or by the Applicant. It was apparent from the evidence adduced that it was when the Respondents petitioned the court to be issued with a grant of letters of administration intestate in respect of the estate of the deceased that they developed designs on the suit parcel of land. The interesting fact is that, even with this design having been put in motion, the Respondents have not interfered with the Applicant's occupation of the suit parcel of land. In the premises therefore, the court holds that the Applicant has a case when she states that she is entitled to suit parcel of land because she has been residing on the same by virtue of being the wife of the son of Gathare Gichane, who was entitled to the said parcel of land by virtue of the fact that she was bequeathed the same by her father, the grandfather of the deceased.

In the circumstances therefore, this court will revoke the certification of confirmation of grant that was issued to the Respondents on 10th December 2003. A new certificate of confirmation of grant shall be issued by this court distributing the properties that comprised the estate of the deceased as proposed by the Respondents in the application before the Kiambu Subordinate Court save that the suit parcel of land i.e. Ndumberi/Ting'ang'a/T.507 shall be inherited by the Applicant. There shall be no orders as to costs

as this dispute involves family members. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2014.

L. KIMARU

JUDGE