



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)**

**CIVIL APPEAL NO. 183 OF 2015**

**BETWEEN**

**CATHERINE WAIRIMU GICHIRA ..... APPELLANT**

**VERSUS**

**MARGARET NYOKABI MUCHOKI ..... 1<sup>ST</sup> RESPONDENT**

**ANTHONY MUCHOKI ..... 2<sup>ND</sup> RESPONDENT**

**SHARON MUCHIRI ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal from the Judgment and Order of the High Court of Kenya at Nairobi (Kimaru, J.) delivered on 29<sup>th</sup> April, 2014*

**in**

**Succession Cause No. 1684 of 1995)**

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**JUDGMENT OF THE COURT**

**INTRODUCTION**

1. This is an appeal from the judgment of Kimaru, J. where the learned judge granted orders for revocation of the grant of the letters of administration intestate issued to **Catherine Wairimu Gichira** (the appellant) and **Stanley Mukolwe** on 15<sup>th</sup> November, 2006 and confirmed on 21<sup>st</sup> September, 2010. The appellant was aggrieved by the High Court judgment and preferred an appeal to this Court.

**BACKGROUND**

2. **James Muchiri Kabii**, hereinafter referred to as “the deceased”, died on 10<sup>th</sup> January, 1995. The deceased was survived by five children, a son and four daughters namely, **Thomas Irungu Kabii** (now deceased), **Josephine Kabii**, **Catherine Gichira**, **Mary Wangongo** and **Lucy Wangechi Kabii**. The mother of the said children had pre-deceased the deceased.

3. Subsequent to the death of the deceased, Thomas Irungu Kabii (hereinafter referred to as Tom) applied

for grant of letters of administration of their late father's estate vide Succession Cause No. 1684 of 1995. In the petition he indicated that the deceased left the following as his survivors:

***“(a) Thomas Kabii age 35 years - son***

***(b) Margaret Nyokabi Muchoki age: 40 years – friend***

***(c) Lucy Wangechi Kabii age: 29 years – daughter Dependants***

***a) Sharon Gathoni age: 20 years***

***b) Anthony Muchoki age: 20 years.”***

4. The 1<sup>st</sup> respondent gave her consent to Tom to petition for the grant and on 15<sup>th</sup> December, 1995 the grant was issued to Tom as the sole administrator of the deceased's estate.

5. On 18<sup>th</sup> June, 1996 Tom filed an application for confirmation of the grant. The 1<sup>st</sup> respondent and Lucy Wangechi Kabii swore an affidavit in support of the application for the confirmation of the grant. The short

affidavit stated as follows:

***“We, Margaret Nyokabi Muchoki and Lucy Wangechi Kabii of Post Office Box 59213 Nairobi, jointly and severally make oath and say as follows:***

***1. That we are beneficiaries of James Muchiri Kabii (deceased).***

***2. That on 27<sup>th</sup> January 1995 we consented to the grant of administration be issued to Thomas Kabii.***

***3. That we hereby consent to the confirmation of the said grant of administration in the matter and mode of distribution stated in the application for confirmation.”***

6. The schedule of the deceased's estate contained several properties but two of them, L.R. No. 209/6989/34 and Bahati/Block 1/522, were proposed to be distributed to the 1<sup>st</sup> respondent while the rest were to be distributed to Tom. The grant was confirmed on 28<sup>th</sup> June, 1996. It was further rectified on 28<sup>th</sup> October, 1996. The two properties aforesaid were apportioned to the 1<sup>st</sup> respondent.

7. On 29<sup>th</sup> November, 2004 Tom died in a car accident. On 25<sup>th</sup> February 2005 his wife, Caroline Anne Kabii, and her brother, Hugh Norman Wrigley, applied for grant of letters of administration of Tom's estate in High Court Succession No. 433 of 2005. The property that was listed as forming his estate was Tom's inheritance from the estate of the deceased in terms of the aforesaid confirmation of grant.

8. On 25<sup>th</sup> April, 2005 Josephine Kabii, Mary Wangong'u and Catherine Gichira, (Tom's sisters) filed an objection to the issuance of the grant on the basis that they were entitled to part of the estate of their deceased's father.

On 17<sup>th</sup> May, 2005 they also filed summons for revocation of the grant that had been issued to Tom.

9. On 25<sup>th</sup> October, 2005 the High Court gave directions for the notice of filing of the summons for revocation of the grant to be published in one local daily newspaper. That was done on 31<sup>st</sup> October, 2005 when such notice was placed in “The Standard” newspaper.

10. In a statement of agreed facts filed in court on 12<sup>th</sup> May, 2006 the advocates for Caroline Anne Kabii

and Hugh Norman Wrigley and the advocate for Josephine Kabii, Catherine Gichira and Mary Wangong'u agreed that the estate of Tom and that of the deceased were intertwined only to the extent of the property of the deceased that devolved upon Thomas Kabii through the succession proceedings before it. The parties also agreed that the issue in dispute was the distribution of the estate of the deceased in Succession Cause No. 433 of 2005.

11. On 14<sup>th</sup> May, 2007 Catherine Wairimu Gichira and Stanley Mukolwe were by consent appointed administrators of the estate of the deceased. Subsequently, the grant was confirmed in terms of a consent entered into by the parties and a certificate of confirmation of the grant was issued on 21<sup>st</sup> September, 2010. Thereafter the estate was distributed as agreed.

### **APPLICATION FOR REVOCATION OF GRANT**

12. On 18<sup>th</sup> April, 2011 the respondents filed summons for revocation of the grant of the letters of administration issued to Catherine Wairimu Gichira and Stanley Mukolwe. The application was made on the grounds that the grant was obtained by fraudulent concealment of a material fact, to wit, that Margaret Nyokabi Muchoki is the surviving widow of the deceased; that the grant was obtained by untrue allegations of facts; that the only beneficiaries of the estate of the deceased were the ones set out in the schedule to the confirmation of grant made on 21<sup>st</sup> September 2010, which excluded Margaret Nyokabi Muchoki, Sharon Gathoni and Anthony Muchoki.

13. In the affidavit in support of the application, Margaret (the 1<sup>st</sup> respondent) deponed that she was married to the deceased under Kikuyu customary law and had been cohabiting with him from 1988 to the time of his demise on 10<sup>th</sup> January, 1995. She further averred that their union was blessed with one child, Sharon Gathoni Kabii, who was born on 24<sup>th</sup> January 1989; that the deceased took care of them including her first born child, Anthony Gichuki.

14. In support of her claim that she was married to the deceased, Margaret annexed to her affidavit an affidavit that had been jointly sworn by her and the deceased on 28<sup>th</sup> October, 1991. In the said affidavit the deceased acknowledged that he had married the 1<sup>st</sup> respondent under Kikuyu customary law in 1991. The 1<sup>st</sup> respondent also annexed a death and funeral announcement of the deceased in the "Daily Nation" newspaper of 17<sup>th</sup> January, 1995 where she was identified as a widow of the deceased. Margaret also annexed a copy of a birth certificate of Sharon Gathoni that was issued on 31<sup>st</sup> March, 2005. The birth certificate indicated that the deceased was the father of Sharon Gathoni.

15. The respondents' application was also supported by an affidavit sworn by John Wanduara, who deponed that he knew both the 1<sup>st</sup> respondent and the deceased during the deceased's lifetime; that in October 1991 he accompanied the deceased to the 1<sup>st</sup> respondent's rural home at Karatina in Nyeri District for the purpose of paying bride price.

16. In a replying affidavit, the appellant denied that the 1<sup>st</sup> respondent was married to the deceased. She contended that if indeed the 1<sup>st</sup> respondent had been married to the deceased, she would have so identified herself when Tom first petitioned the court for grant of letters of administration of the deceased's estate. Instead, she identified herself as a friend of the deceased.

17. The appellant further deponed that there was no sufficient evidence to prove that a Kikuyu customary marriage between the deceased and the 1<sup>st</sup> respondent was ever conducted; that the 1<sup>st</sup> respondent was aware of and consented to the grant of the letters of administration to Tom, and further consented to the confirmation of the grant; that she was given two properties from the deceased's estate and she consented to the mode of distribution of the rest; that since the letters of administration of the deceased's estate were issued to Tom, then subsequently revoked, a new grant issued and confirmed and the property distributed, the applicant had not made any attempt to apply for review of the distribution, having all along been aware of the same.

18. Stanley Mukolwe also raised similar arguments as those made by the appellant. He pointed out that the 1<sup>st</sup> respondent had taken over 15 years to raise a complaint, yet she was aware of the proceedings in court. In his view, the 1<sup>st</sup> respondent's application was an afterthought.

19. As regards the two children named as the deceased's children in the 1<sup>st</sup> respondent's application, Stanley Mukolwe stated that they had already been catered for when the two properties were transferred to the 1<sup>st</sup> respondent.

### **THE HIGH COURT'S DETERMINATION**

20. In his determination, the learned judge held that the property known as **L.R. No.1209/6989/34** was purchased in the joint names of the deceased and the 1<sup>st</sup> respondent on 9<sup>th</sup> September 1994 as stated in the 1<sup>st</sup> respondent's affidavit. He also held that the 1<sup>st</sup> respondent had established to the required standard of proof that she was a wife of the deceased. In so finding, the learned judge cited the affidavit sworn by the 1<sup>st</sup> respondent and the deceased on 28<sup>th</sup> October, 1991 as well as the affidavit of John Wanduara to the effect that he witnessed the payment of dowry.

21. The learned judge further held that the deceased and the 1<sup>st</sup> respondent had a child together, Sharon Gathoni, and the deceased was maintaining Anthony Muchoki prior to his death. The two children therefore qualify to be considered as dependants pursuant to **section 29(b)** of the **Law of Succession Act**.

22. In view of the above findings, the learned judge concluded the grant of letters of administration to Catherine Wairimu Gichira and Stanley Mukolwe **"cannot stand because it failed to take into consideration Margaret and her children who were dependants of the deceased."** The court ordered that another application for confirmation of grant be presented to court, taking into consideration the interest of Margaret and her children as dependants of the deceased.

### **APPEAL TO THIS COURT**

23. Being aggrieved by the said decision, the appellant preferred an appeal to this Court. In the memorandum of appeal, the appellant faulted the learned judge for ordering fresh distribution of the deceased's estate while at the same time acknowledging that the 1<sup>st</sup> respondent was provided for in the first distribution of the estate made on 28<sup>th</sup> June, 1996; for failing to appreciate that the respondents had participated in the confirmation of grant made on 28<sup>th</sup> June, 1996 and consented to the mode of distribution of the estate and could not therefore be heard to seek revocation of the grant; that the learned judge failed to appreciate that the respondents were seeking a review of the mode of distribution, having consented to the same and therefore they had not discharged the burden set by law on review; that the learned judge erred in law by failing to appreciate that Succession Cause Nos. 1684 of 1995 and Succession Cause No. 433 of 2005 had been consolidated and the appellant's claim in the former was only in respect of the property that devolved to her deceased's brother, Thomas Muchiri Kabii.

24. The appellant further contended that the learned judge failed to appreciate that there was inordinate and inexcusable delay in filing the application; that the learned judge erred in law and fact in granting orders that had not been pleaded; and lastly, by failing to take into consideration the matters raised by herself and Stanley Mukolwe in their affidavits and submissions.

25. When this appeal came up for the pre-trial directions on 4<sup>th</sup> October, 2016 in presence of counsel for the parties, the Court directed that the appeal be canvassed by way of written submissions to be filed within 21 days and the submissions be highlighted on 2<sup>nd</sup> February 2017, which date was set by consent.

26. Come the hearing date, only one advocate, **Judy Thongori**, learned counsel for the appellant, had filed submissions and attended court to highlight the same. **Messrs Muchoki Kangata** and company advocates and Messrs Tongoi and company advocates for the respondents neither filed submissions nor attended court, despite the fact that the hearing date had been fixed by consent, and they had also been

served with hearing notices way back on 21<sup>st</sup> October, 2016.

27. Mrs. Thongori relied on her written submissions and highlighted the same briefly.

28. have carefully perused the appellant's submissions and the authorities cited by the appellant. The points for determination as set out in the appellant's submissions are as follows:

- (i) Whether the learned judge erred in law and fact by ordering fresh distribution of the estate;
- (ii) Whether the learned judge erred in law and in fact by failing to appreciate that the appellant and her sisters' claim was only in respect of the property that devolved by consent of the respondents, to her deceased brother, Tom;
- (iii) Whether the learned judge failed to appreciate that there was inordinate and inexcusable delay in filing the application dated 18<sup>th</sup> April 2011;
- (iv) Whether the learned Judge erred in law and fact in granting orders that had not been pleaded.

29. We shall determine the above issues in a composite manner. On the first issue for determination, it is important to point out that in Succession Cause No. 1684 of 1995 the 1<sup>st</sup> respondent was described as a friend of the deceased. The 1<sup>st</sup> respondent consented to the presentation of the petition bearing her description as such. She willingly allowed Tom to apply for letters of administration of the estate of the deceased. The 1<sup>st</sup> respondent also participated in the confirmation of the grant made on 28<sup>th</sup> June, 1996 and agreed to as well as the mode of distribution of the deceased's estate.

30. In her supplementary affidavit in support of summons for revocation of grant sworn on 13<sup>th</sup> July, 2011, the 1<sup>st</sup> respondent stated at paragraph 4 that **"...it is not true that I consented to the mode of distribution of the estate as proposed by the said Thomas Irungu Kabii but only to his application to apply for letters of administration intestate"**.

31. That averment was far from the truth. Earlier in this judgment we set out the affidavit of consent by the 1<sup>st</sup> respondent and Lucy Wangechi Kabii that was signed before E. Rugaita Advocate and Commissioner of Oaths.

32. In the summons for revocation of grant the 1<sup>st</sup> respondent stated that the grant was obtained by concealment of the fact that she was the surviving widow of the deceased and that Sharon Gathoni and Anthony Muchoki had deliberately been excluded as beneficiaries of the deceased's estate. That is not entirely correct. The 1<sup>st</sup> respondent was aware that she had been described as a friend of the deceased. The record of appeal shows that one of the annexures to the affidavit sworn by the appellant in response to the summons for revocation of grant is the eulogy of James Muchiri Kabii (the deceased) that was read during his burial. The same showed that the deceased married the late Esther Njuguni Kabii in February 1958 and together they had five children. There was no mention of the 1<sup>st</sup> respondent in the eulogy. We think that affirms the appellant's contention that the deceased never got married to the 1<sup>st</sup> respondent; that the deceased only cohabited with the 1<sup>st</sup> respondent shortly after the death of his wife, Esther Njuguni Kabii. That may explain why the 1<sup>st</sup> respondent consented to her reference as a friend of the deceased in the petition that was filed by Tom.

33. The 1<sup>st</sup> respondent not only consented to the filing of the 1<sup>st</sup> petition but also to the confirmation of the grant and distribution of the deceased's estate; consequent to which two properties, L.R No. 209/6989/34 and L.R. Bahati/Block 1/522 were apportioned to her absolutely.

34. Other than the affidavit that was sworn by the 1<sup>st</sup> respondent and the deceased to the effect that they were married under Kikuyu customary laws and the affidavit of his friend, John Wanduara, that he was

present when the deceased paid dowry to the 1<sup>st</sup> respondent's parents, there is no other evidence that there was a valid customary marriage between the deceased and the 1<sup>st</sup> respondent.

35. The essentials of a Kikuyu customary marriage include performance of a ceremony known as “**ngurario**”. The importance of “ngurario” to a valid customary Kikuyu marriage has been emphasized in several decisions, including **Case v Ruguru [1970] E.A. 55**, In The Matter of The Estate Of Geoffrey Githu Kaboro (deceased) Hcsc No. 2163 of 2011 and **Eliud Maina Mwangi v Margaret Wanjiru Gachangi, CA No. 281(A) of 2003**. There was no indication that such a function ever took place.

36. In **Joseph Gitau Githongo v Victoria Mwihaki Munya [2014] eKLR** this Court held that a party who wishes to rely on customary law bears the burden to prove not only the custom in question but also the particular elements sought to be relied upon.

37. Secondly, the 1<sup>st</sup> respondent stated that the affidavit that was sworn by her and the deceased was to assist her get a transfer from Nakuru where she was working as a teacher to Nairobi. The affidavit was sworn on 28<sup>th</sup> October, 1991 and the 1<sup>st</sup> respondent was transferred by the Teachers Service Commission from Nakuru to Pangani Primary School on 5<sup>th</sup> December, 1991. It cannot therefore be ruled out that the real purpose of that affidavit was to enable the 1<sup>st</sup> respondent secure the transfer and not to authenticate existence of a customary marriage.

38. Regarding provision of a share of the deceased's estate to Sharon Gathoni and Anthony Muchoki, there was no dispute that the 1<sup>st</sup> respondent had been allocated two properties, L.R No. 209/6989/34 and L.R. Bahati/Block 1/522, which she did not tell the court how they were dealt with. It was not shown that the two children did not benefit from the share of the deceased's estate that was given to their mother. In any event, no evidence was adduced to demonstrate that Antony Muchoki was being maintained by the deceased prior to his demise.

39. The 1<sup>st</sup> respondent did not offer any explanation to the court why she had not taken any action to challenge the grant in question for a period of nearly 15 years if indeed she was a widow of the deceased. The delay was simply inordinate and inexcusable. In **Allen v Sir Alfred McAlpine, [1968] 1 ALL ER 543 Salmon L.J.** commenting about delay in instituting proceedings stated that, when inordinate delay is established, until a credible excuse is made out, the natural inference would be that it is inexcusable.

40. The respondents having been aware of Succession Cause No. 1684 of 1995 for a period of nearly 15 years, did not advance any reasonable excuse for the delay in filing their application cannot be excused for their indolence, if at all the application for revocation of the grant was not an afterthought.

41. But even if there was a case for making provision for Sharon Gathoni and Anthony Muchoki out of the deceased's estate, we think the right procedure would have been to apply for review of the grant rather than revocation of the same.

**42. Section 76 of the Law of Succession Act** outlines the circumstances under which a court may revoke a grant. Some of those circumstances are:

*a) Where the proceedings to obtain the grant were defective in substance;*

*b) Where the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case;*

*c) Where the grant was obtained by means of untrue allegations of facts;*

*d) Where the person to whom the grant was issued has failed to properly administer the estate;*  
*and*

*e) Where the grant has become useless and inoperative through subsequent circumstances.*

These principles notwithstanding, we do not think that any of the above circumstances were sufficiently demonstrated by the 1<sup>st</sup> respondent.

43. For all these reasons, we are satisfied that this appeal has merit and consequently allow the same. The judgment and order of the High Court made on 29<sup>th</sup> April, 2014 are hereby set aside; and the certificate of confirmation of grant dated 21<sup>st</sup> September, 2010 is hereby reinstated. The respondents shall bear the costs of this appeal.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of June, 2017.**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIrb**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**