



REPUBLIC OF KENYA



In re Estate of Joseph Githae Ngatia (Deceased) (Succession Cause 240 of 1990) [2024] KEHC 903 (KLR) (26 January 2024) (Ruling)

Neutral citation: [2024] KEHC 903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 240 OF 1990
SM MOHOCHI, J
JANUARY 26, 2024**

IN THE MATTER OF THE ESTATE OF JOSEPH GITHAE NGATIA (DECEASED)

BETWEEN

CHARLES WAMBUGU GICHURU APPLICANT

AND

MARTHA WANJIRA GITHAE EXECUTOR

RULING

1. This Succession Cause relates to estate of Joseph Githae Ngatia (the deceased). The deceased died on the 22nd November 1986 (aged 72) and was survived by two widows Cecilia Wanjiku Githae and Wanjira Githae and Five (5) sons David Gichuru Githae (Deceased), John Gichuru Githae (Deceased), Wandete Githae, Charles Wambugu Githae and Evans Kabui Githae all adults.
2. The Deceased left an uncontested written will dated 7th August 1986 and the Grant of Probate of letters of Administration with a written will was initially confirmed on the 27th July 2016 and was ultimately being further rectified on the 22nd October 2022.
3. The Applicant Charles Wambugu Githae the Applicant is the Son of a daughter of the deceased from the 1st house in this instance suing his step-grandmother the Respondent from the 2nd House.
4. Charles Wambugu Githae in a summons (2nd Application) dated 23rd March 2023 filed sought the following reliefs:
 1. Spent
 2. That this Honourable Court be pleased to stay the transfer and registration of LR No. 204/511 Sabugo Scheme in the names of the Martha Wanjira Githae the administrator pursuant to The Further Rectified confirmation of grant Issued by this Honourable Court of the 21st October 2022 and further grant orders of injunction restraining any form of interference with the Estate



property namely LR No. 204/511 Sabugo Scheme for reasons that the applications for Such further rectification of confirmation was done contrary to Section 76 of the Succession Act.

3. That, the Honourable Court be pleased to withdraw trust granted to the Administrator for the heirs of the 1st Family and further direct for the distribution and registration of 6.5 Acres equally among the children of Davd Gichuru Githae who are all adults.
4. Costs of this application be provided for.
5. Charles Wambugu Githae anchors his Application on the following grounds that;
 - a. That, the Administrator herein namely Martha Wanjira Githae was issued the further rectified confirmation of grant on the 21st October, 2022 without the knowledge of all the beneficiaries to the estate.
 - b. That, the administrator was granted rights of trust in regard to the heirs of the late David Gichuru Githae a direct beneficiary to the estate and who shared 6.5 Acres after his demise instead of the said share be transferred to his immediate beneficiaries and children and all of whom are adults,
 - c. That, the application for rectification of the confirmation of grant was done secretly, illegally and without the knowledge or consent of all the beneficiaries and more particularly contrary to section 76 of the Succession Act.
 - d. That, the administrator has overshadowed the interests of all the beneficiaries are House and there is likelihood that she will cause registration in her names and further possess all ownership rights without the consideration of that trust.
 - e. That, since the heirs from the 1st family are all adults, there is need that their share be distributed and transferred individually to all of them equally.
 - f. That, it is just and expedient that the administrator and her children be allowed access and residence in the estate property especially as at now.
6. The Application is opposed by Martha Wanjira Githae in her replying affidavit dated 19th April 2023 and the filed grounds of opposition dated 19th April 2022 that;
 - i. The Applicant lacks the capacity to bring the application.
 - ii. The supporting affidavit is fatally defective offending the provisions of Section 5 of the Oaths and Statutory deductions Act.
 - iii. The application is not founded on any law.
 - iv. The prayers sought in the application are untenable in law.

The Applicant's Case

7. Charles Wambugu Gichuru submits he is beneficiary to the estate of Joseph Githae Ngatia (deceased) by virtue of being his grandson previously represented by his late father namely David Gicuru Githae representing the 1st family comprising of;



1. Joseph Mwangi,	(being the children of Catherine Wambui Gichuru)
2. Patterson Mahua,	
3. Cecilian Wanjiku,	
4. Tabitha Wanjiru Mary Muthoni	
5. Martha Wangechi	
6. Paul Mwangi,	(being the children of Mary Wangari Gichuru)
7. Simon Gichigo,	
8. Joseph Wambugu,	
9. Joseph Wambugu,	
10. Charles Wambugu,	
11. Charles Wang'ombe,	
12. Eunice Wanjiku,	
13. Juliah Muthoni,	
14. Cecilia Wangui,	
15. Grace Wambui,	
16. Milkah Muthoni,	
17. Eunice Wanjiku	
18. Lucy Wambui	

8. That, the facts the application is that, Martha Wanjira Githae, applied by way of an summons application for the further rectified confirmation of grant, without the consent of all the beneficiaries to the estate and proceeded to be issued with the same on the 21st October, 2022 thereby causing her to solely, secretly and without the information of the beneficiaries from the 1st family execute transfer by transmission of the estate property namely LR No. 204/511 Sabugo Scheme into her own names. The Application for the further rectified confirmation of grant was done contrary to section 76 of the Succession Act.
9. That, the Application is opposed by Martha Wanjira Githae, citing her own version of the reasons why she filed for such, though she has lied on oath especially in her replying affidavit sworn on 19th April, 2023 especially in clauses 4,6,7,9 &, 11.



10. That the Applicant is legally entitled to the estate of the deceased together with his siblings as members of the 1st family comprising of Joseph Mwangi, Peterson Mahua, Cecilian Wanjiku, Tabitha Wanjiru Mary Muthoni & Martha Wangechi (being the children of Catherine Wambui Gichuru) and Paul Mwangi, Simon Gichigo, Joseph Wambugu, Charles Wang'ombe, Eunice Wanjiku, Juliah Muthoni, Cecilian Wangui, Grace Wambui, Milkah Muthoni, Eunice Wanjiku And Lucy Wambui (being the children of Mary Wangari Gichuru) thus the allegations that he is not an Executor/legal representative of the Estate of the Late David Gichuru Githae are irrelevant.
11. That, the Law of Succession clearly defines who, how and when an application for revocation of Grant either confirmed or not can be applied for.
12. That, the Deceased was polygamous and as outlined in Section 40 of the Act.
 - “ 40. Where an intestate has married more than once under any Where system of Law permitting polygamy, his personal and household effects intestate was and the residue of the net intestate estate shall in the first instance, be divided among the houses according to the number of children in each also, adding any wife surviving him as an-additional unit to-the number of- children.
 - (2) The distribution of the personal and household effects the rest of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”
13. That, as grandchildren of the deceased they are without any representative, they have unfettered- rights to challenge the Executor to involve them in the estate as a-way to channel our beneficial interest in the Estate.
14. That, if the Executor Martha Wanjira Githae was genuine enough, she would have convened for an all-inclusive family to seek for consent to rectification and further demand to be given a person within the 1st Family who would be registered as a trustee for all of them but not cause registration in her own-names.
15. That, this has overshadowed the interests of all the beneficiaries of the 1st House and there is likelihood that Martha Wanjira Githae, will cause registration in her names and further possess all ownership rights without the consideration of that trust and since the heirs from the 1st family are all adults, there is need that their share be distributed and transferred individually to all of them equally.
16. That, the transfer and registration of LR No. 204/511 Sabugo Scheme in the names of the Martha Wanjira Githae the Executor. pursuant to the further rectified confirmation of grant issued by Court of the 21st October, 2022, has clearly prayed that the intentions of the Respondent is to possess all the estate property to herself and her house.
17. That, at the age of 86 years, Martha Wanjira Githae is less active to-be-the-trustee-of the 1st Family and this may-lead to a vacuum of administration in the near future and lead to an even more strife in the Estate.
18. It is worth noting that, there is need for revocation of the further rectified confirmation of grant or a rectification to include a representative from the 1st Family to equate the balance of fair representation and execution in Administration of the estate.



19. That, it is not disputed that Martha Wanjira Githae, caused for the further rectified confirmation of grant without the Consent of all beneficiaries and further, registered the Estate Property LR No, 204/511 Sabugo Scheme under her own names.
20. The Applicant, together with his siblings as children of a direct beneficiary namely David Gichuru Githae (deceased) are an interested party to be catered for under section 76 and thus it is not in any dispute that the application for revocation is properly before Court.
21. The Applicant urges for an immediate action by this Court to stand in and protect the unprotected in the estate-of the deceased. Remedy for such is provided for under Section 76 (a), (b), (c)(ii) 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 to point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
 - d. Failure to proceed diligently with the administration of the estate;
22. The Applicant submits that, the deceased property was transferred to the Respondent Executor in a very opaque manner that confirms her intentions are to dislodge the 1st Family off their share having registered herself as a trustee holding in trust for the heirs and which she never did to the 2nd family verdict.
23. That, the issue which this Court ought to primarily ask itself before making its decision is:-
 - a. Is the administration of the Deceased's estate fair, noting that only one person and who is the administrator becomes the trustee of the 1st family and which comprises of adult persons?
 - b. Was the Application for rectification consented?
 - c. Is the Respondent catered for in section 76-(a) ;(b) (c) (ii) to warrant trusteeship for the 1st Family?
 - d. Where does the balance of fair administration of the deceased's estate lie?
 - e. Are the final beneficiaries in the estate of the Deceased especially the 1st family content with the Respondents actions that lead to registration of their share in her name?
24. The Applicant submit that, he is properly before Court championing for fair administration of the deceased's estate as an interested party and beneficiary and it is only just that this Court do revoke the further rectified confirmation of grant issued on the 21st October, 2022.
25. The Executor/Respondent, has gotten into problems with the exercise of the administration, especially by causing herself to be registered in all the estate properties and as such she fails to apply for confirmation of grant within the time allowed, she fails to proceed diligently with administration, or fails to render accounts as and when required.

“Where any person interferes with the free-property of the deceased or with deals with estate of a deceased-person Contrary to the provisions of section 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the Court. The transaction is subject



to be nullified and set-aside at the instance of innocent beneficiaries who may have been affected by the act but were not involved in the same,"

26. The Applicant submit that, his case has fulfilled the required threshold and pray that this Court allows the Application in his favour by:-
- a. Revocation of the further rectified confirmation of grant issued on the 21st October, 2022.
 - b. Cancellation and revocation of the title arising from subdivision of LR No. 204/511 Sabugo Scheme in the names of the Martha Wanjira Githae and reverts back to the name of the deceased awaiting the parties to agree on the final heirs of the 1st Family/House the Estate.
 - c. In alternative, this Court be pleased to Order for an all consented rectification of Grant by withdrawing the trusteeship of the Respondent in the 1st family and by appointment of one of the beneficiaries as a co-administrator representing the 1st Family.

Respondent's Case

27. Martha Wanjira Githae the surviving widow/administratrix did not file written submissions but deponed that, the deceased had two wives namely Cecelia Wanjiku (1st house) and herself (the 2nd house).
28. That, previously a certificate of confirmation of grant in this matter had been issued to the late David Gichuru Githae who passed on before completing the administration of the estate and the late John Gicuru Githae and her were appointed administrators with the consent of the beneficiaries.
29. That, after the demise of John Gicuru Githae, a further rectified certificate of grant was issued on 21st October,2022 removing his name as an Executor.
30. That, all beneficiaries have always consented to all applications made before this Court save for the dead whose consent is beyond reach and the Court record speaks for itself.
31. That, therefore the Applicant's allegations that rectification was done ex-parte and in secret are untrue and made in bad faith.
32. That, further it's important to note that the beneficiaries of the late David Gichuru Githae are not the sole beneficiaries of the 1st house as he had sisters whose beneficiaries are also entitled to a share.
33. That, at the time of rectification, the 1st house failed to identify a representative thus as Legal representative of the estate, she took it upon herself to safeguard the interests of all its heirs' beneficiaries house by indicating that she shall hold their share in trust for them
34. That, since being issued with the grant in October,2022 she has made steps towards completion of administration of the estate and has obtained a consent from the Land Control Board to subdivide the land as per the further rectified certificate of confirmation of grant.
35. That, she is well aware that as a trustee of the 1st house's share, she has a duty to act in the best interests of its heirs and cannot deal with their share without their consent and leave of Court.
36. That further, she is 86 years old and has no intention to in any way deal with the 1st house's interest in the estate save for completing the administration of the estate as per the directions of the Court.
37. That, the 1st house is not only comprised of the Applicant as the beneficiary of the late David Gichuru Githae but his Sisters too and that the Applicant is neither an Executor/legal representative of the estate



of the late David Gichuru Githae nor his late grandmother Cecelia Wanjiku thus has no capacity to speak or file anything on behalf for the 1st house.

38. That, further the Applicant has not presented any written authority to bring this application on behalf of the beneficiaries he purports to speak for thus the application is brought on his own personal and selfish reasons.
39. That this Succession cause was instituted in 1990 and litigation has to come to an end as administration of an estate is not meant to last forever.
40. That, once a Title deed is issued and all the beneficiaries of the 1st house come to agreement on who their share shall devolve to then I shall have no issue/objection to transfer the land to them.
41. That, as such it is only fair that the application be dismissed to pave way for completion of distribution and thus prays for the dismissal of the Application.

Analysis & Determination

42. I have considered evidence adduced, pleadings and submissions filed. There is no dispute that the deceased left behind 2 houses, a widow (the Executor) and seven (7) children two (2) of which were from the 1st House.
43. No evidence has been laid to demonstrate that Martha Wanjira Githae was issued the further rectified confirmation of grant on the 21st October, 2022 without the knowledge of all the beneficiaries to the estate.
44. In a case such as of this nature where the deceased died intestate and was a polygamous survived by one widow and children, the anchor on distribution of his estate is Section 40 of the [Law of Succession Act](#) which primarily provides as follows;
 - “(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate, shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
 - (2) The distribution of the personal and household effects and the residue of the net interest within each house shall then be in accordance with the rules set out in sections 35 to 38”
45. The basic scheme is in line with the principles expounded in the following cases [Rono -v-Rono](#) Civil Appeal No. 66 of 2002, where Waki JA stated *inter alia* that;-
 - “More importantly, section 40 of the [Act](#) which applies to the estate makes provision for distribution of the net estate to the “houses according to the number of children in each house, but also adding any wife surviving the deceased as an additional unit to the number of children.” A “house” in a polygamous setting is defined in section 3 of the Act as a “family unit comprising a wife and children of that wife.”



46. In addition, *In The Matter of Re Estate of Benson Ndirangu Mathenge(deceased)* Nakuru HCSC No. 231 of 1998 (Ondeyo J),

“the deceased was survived by his two widows and their children. The first widow had four children, while the second widow had six children. The Court stated that the first house was comprised of five units while second had seven units. The two houses of the deceased combined and looked at in terms of units made up twelve units. The Court distributed the estate to the children and the widows treating each as a unit. The land available for distribution was forty acres, which was divided by the Court into twelve units. Out of the twelve units, five were given to the first widow and her four children, while the remaining seven units went to the second widow and her six children”.

47. Further, *In the Matter of the Estate of Nelson Kimotho Mbiti (deceased)* HCSC No.169 of 2000, Koome J directed that, the estate of a polygamist be divided in accordance with the provisions of Section 40 of the *Act*. The estate was divided into units according to the number of children in each house with the widows being added as additional units. The same reasoning was also applied by Judge Ali Roni in the Estate of Ainea Masinde Walubengo(deceased) (2017) eKLR stating that

“I am of the view that Section 40 of the *Law of Succession Act* will apply to the circumstances of this Case. Meaning that the Court will distribute the estate of the deceased according to each house considering the number of children in each unit including the surviving widow.”

48. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the *Law of Succession Act* as follows:

“76 Revocation or annulment of grant 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. that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the Court order or allow; or
 - ii. To proceed diligently with the administration of the estate; or
 - iii. to produce to the Court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or



- e. that the grant has become useless and inoperative through subsequent circumstances.
49. Section 76 of the [Law of Succession Act](#), provides for revocation or annulment of grant which may be *suo moto* by a Court or on the application of any interested party. It is, however, worth noting that it is not every situation where transgressions or failings by the Executor, will lead to revocation of grant. The Court still retains the power to make orders as are fit to meet the ends of justice.
50. Section 81 of the [Law of Succession Act](#) provides for Powers and duties of personal representatives to vest in survivor on death of one of them
- “Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:
- Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the Court has made a further grant to one or more persons jointly with him”.
51. Section 83(i) provides the duties of Executors to include:
- “to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the Court, either of its own motion or on the application of any interested party in the estate, to produce to the Court a full and accurate account of the completed administration”.
52. This Court has the inherent power under Rule 73 of the [Probate and Administration Rules](#), to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.
53. The Executor indicates that the 1st family did not agree on a nominee, hence the exclusion, is insufficient for revocation of the confirmed grant, however this Court shall craft appropriate reliefs under the circumstances.
54. The Applicant provided an entire list of eighteen (18) names as beneficiaries without evidencing the said relationship.
55. This Court disagrees with the Executor in her contends that the deceased had daughters from the 1st house that are equally entitled to a share of the deceased. The deceased will dated 7th August 1986 was explicit on the deceased’s last wishes and that if he had desire to further bequeath the share of David Gichuru then he would have done so in his will.
56. The Deceased Bequeathed in his will, the share to the 1st house to the executor David Gichuru Githae (deceased) and the widow was to have a life-interest and thereafter the property was to be registered in the name of the executor David Gichuru Githae(deceased). I would on the same thread then posit that, the one best placed to stake a claim on this share of the estate of the deceased to the 1st house would be a personal representative to the estate of the executor David Gichuru Githae (deceased).
57. It thus follows that share of 6 ½ acre land bequeathed to David Gichuru Githae(deceased) shall be registered as such upon the extinction of the life-interest of the Executor.



58. Consent of grand children in a testate probate and administration is unnecessary, it appears the Applicant is forgetting that the Administration of the estate is per the will.
59. A beneficiary in a testate probate and administration process are those specifically bequeathed in the written will and while the heirs children might naturally anticipate inheriting from their parents the same cannot be said in this case. The Applicant does not have locus to make this Application as he purports to represent the 1st house without evidencing any consent.
60. I disagree with the Applicant's assertion that, grand children automatically become heirs upon demise of their parents and before conclusion of the testate succession of the estate of their grandfather. In a testate probate and administration process the distribution and execution of the will is as per the last wishes of the deceased.
61. I am of the conviction that Martha Wanjira githae shall hold in trust the 6 ½ acres on behalf of the beneficiaries and should they so desire for inclusion of a nominee trustee in the confirmed grant, they may all consent and move the Court by appropriate application.

Accordingly, in furtherance:

- i. This Court upholds the Grounds Objection dated 19th April 2023 and finds the same to be meritorious and that, the Applicant lacks capacity to bring this motion.
- ii. This Court finds that, the undated Summons filed on 28th March 2023 to be unmerited and is dismissed.
- iii. That the Executor shall retain her life interest and upon demise, the said share to the 1st house shall be shared amongst the successors to the estate David Gichuru Githae (deceased) as per the last wish and testament of the deceased.
- iv. Parties shall bear their own costs, this being a family matter.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 26RD DAY OF JANUARY, 2024.

S. MOHOCHI
JUDGE

