



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 724 OF 1989**

**IN THE MATTER OF THE ESTATE OF EDITH WANJA MUIRURI (DECEASED)**

**MARY WAMBUI GAKURU.....1<sup>ST</sup> APPLICANT**

**ELIZABETH NGOIRI KAGOIYA.....2<sup>ND</sup> APPLICANT**

**SUSAN WANJIRU GATHOGO.....3<sup>RD</sup> APPLICANT**

**GRACE MWIHAKI MUCHIRU.....4<sup>TH</sup> APPLICANT**

**JOHN MUIRURI GACHECA.....5<sup>TH</sup> APPLICANT**

**VERSUS**

**MARY NYAMBURA MUIRURI.....ADMINISTRATRIX**

**RULING**

1. It is not in dispute that the deceased Edith Wanja Muiruri died intestate on 17<sup>th</sup> May 1985. She had one son Geoffrey Gatheca Muiruri and the following daughters: Mary Wambui Gakuru, Esther Nyokabi Muiruri, Elizabeth Ngoiri Kagoiya, Susan Wanjiru Gathogo, Grace Mwhaki Muchiru and Joyce Wakanyi Cheche. The only property she left was Kabete/Nyathuna/106.

2. When Geoffrey Gatheca Muiruri filed a petition dated 17<sup>th</sup> April 1989 seeking the grant of letters of administration intestate in respect of the estate of the deceased, he indicated that he was the only child and heir of the deceased. That was not true as the deceased had other children who were beneficiaries of the estate. He concealed this material fact from the court. This was fraudulent as the intention was to disinherit his sisters who were equally entitled to their mother's estate.

3. Under **section 51(2)(g)** of the **Law of Succession Act (Cap 160)** and **rules 7 and 26** of the **Probate and Administration Rules**, the consent of the sisters of Geoffrey Gatheca Muiruri were required as part of the petition, unless they were notified and had renounced their claim to the grant. Letters of administration ought not to have been granted without notice to his sisters. It follows that the proceedings leading to the grant were defective in substance.

4. There is no dispute that, after the grant was issued, Geoffrey Gatheca Muiruri who was then living in Congo gave a Power of Attorney to his wife Mary Nyambura Muiruri (the respondent) who on 20<sup>th</sup> October 1989 used it to apply for the confirmation of the grant. The grant was confirmed on 6<sup>th</sup> November 1989, and the entire property went to her husband.

5. On 2<sup>nd</sup> June 2017 Elizabeth Ngoiri Kagoiya and John Muiruri Gatheca (the son of Esther Nyokabi Muiruri), while unaware of the proceedings herein, went to the High Court at Kiambu and filed **Succession Cause No. 90 of 2017** to petition for the grant of letters of administration intestate in respect of the estate of the deceased. By this time Geoffrey Gatheca Muiruri had died and his wife (the respondent) had become the administratrix of his estate. She objected to the Kiambu cause on the basis that the deceased's estate had been succeeded in the present cause. The court in Kiambu said that, in those circumstances, the petition be closed. The petitioners in Kiambu had requested to be allowed to pursue their claim in the instant cause.

6. This is how the present summons were filed seeking the revocation of the grant of letters of administration issued in this cause to Geoffrey Gatheca Muiruri and confirmed at the request of his wife (the respondent). The grounds were that there was fraudulent concealment of material facts. The facts were that the deceased had other children whom Geoffrey Gatheca Muiruri had not disclosed to the court; whom he had not informed at the time of petitioning for the grant; and who had consequently been disinherited.

7. It is clear that from the list of those applying for revocation, Esther Nyokabi Muiruri and Joyce Wakanyi Cheche are no longer alive. They will be excluded as applicants.

8. In the response to the summons, the respondent filed a notice of preliminary objection. One of the grounds was that the dispute herein had already been heard and determined by Kiambu Court and decision made on 23<sup>rd</sup> March 2019 to close the file. I agree with the applicants that the court in Kiambu did not hear and determine the petition that was filed before it. The court, upon being informed of the proceedings and the instant cause, closed the Kiambu file to allow the parties to litigate herein.

**9. Section 7 of the Civil Procedure Act** deals with *res judicata* and applies to a case where the issue in dispute is similar to the issue that was previously in dispute between the same parties when they were litigating under the same title and which issue was heard and conclusively determined on merit by a court of competent jurisdiction (**Judith Gathoni Willy –v- Geoffrey Kihara Muchoki & 2 Others, Civil Appeal No. 277 of 2004**).

10. The other ground was that some of the applicants were dead, and some had no *locus standi* as they had no letters of administration. To that ground, all that was required was for one daughter of the deceased to complain. Herein, the 1<sup>st</sup> to 4<sup>th</sup> applicants are daughters of the deceased. The 5<sup>th</sup> applicant is son of the late daughter of the deceased. He is a beneficiary of the estate of the deceased in the sense that he has stepped in the shoe of his late mother. The applicants have locus, either as individuals or as a group.

11. In the written submissions by counsel for the respondent, she complained that there had been prolonged and inexcusable delay in bringing the application, and the decision in **Susan Gachambi Kamiri & Another –v- British Insurance Co. Ltd [2014]eKLR** was referred to in the support of the submissions that there was going to be substantial risk and prejudice to her if the summons were allowed. This decision, however, was not in relation to a succession dispute.

**12. Section 76 of the Law of Succession Act** 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 on its own motion .....**”

13. The question is, when did the applicants learn of the fact that, in respect of the estate left by their mother, their brother had come to this court, obtained a grant and inherited the entire estate to their exclusion" Their case is that they were unaware until they themselves went to Kiambu Court and petitioned for the grant. That fact was not challenged by the respondent. In any case, as was observed in **Re Estate of Charles Ngotho Gachunga (Deceased) [2015]eKLR, section 76 of the Act** does not impose any time limitation within which an application for revocation of grant should be brought.

14. In conclusion, I dismiss the preliminary objection by the respondent with costs and allow the application by the applicants with

costs. The grant issued on 25<sup>th</sup> September 1989 to Geoffrey Gatheca Muiruri is hereby revoked and the certificate of confirmation issued to him on 6<sup>th</sup> November 1989 is set aside and cancelled. Parcels of land Kabete/Nyathuna/105 and Kabete/Nyathuna/2775 are hereby cancelled and shall revert back to the name of the deceased Edith Wanja Muiruri.

15. So that the dispute can progress to determination, I order that a fresh grant shall jointly issue to Mary Wambui Gakuru, Elizabeth Ngoiri Kagoiya and John Muiruri Gatheca. The grantees, or any of them, shall, with notice to all beneficiaries of the estate of the deceased, within 60 days from today apply for the confirmation of the grant.

**DATED AND DELIVERED NAIROBI THIS 24<sup>TH</sup> DAY OF JANUARY, 2022**

**A.O. MUCHELULE**

**JUDGE**



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