



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 3 OF 2003**

**IN THE MATTER OF THE ESTATE OF MUSA RENGU NABISWA (DECEASED)**

**BETWEEN**

**JOSEPH K. RENGU.....1<sup>ST</sup> RESPONDENT**

**THE BOARD OF MANAGEMENT LUGARI**

**TOWNSHIP PRIMARY SCHOOL.....2<sup>ND</sup> RESPONDENT**

**AND**

**TOM WANJALA .....OBJECTOR**

**R U L I N G**

1. The Court has before it an application for revocation of a grant confirmed in 2005. The Application is brought by Tom Wanjala, one of the sons of the Musa Rengo Nabiswa. The Application was filed on 11<sup>th</sup> November 2016 in other words eleven years after the grant.

2. The Application is brought under **Rules 44 and 73 of the P&A Rules, Section 3A and 63 (e) of the Civil Procedure Act, Section 28, 119 and 143 of the RLA Act and all enabling Provisions of the Law**

The Applicant seeks the following orders:

“(i) Spent

(ii) That the 2<sup>nd</sup> Respondent, their agents, employees and any other person working under their instructions be restrained jointly and severally from entering or interfering with the Objector’s/Applicant’s peaceful use and occupation of land parcel LR. KAKAMEGA/LUGARI/1721 in any manner whatsoever pending the hearing and determination of this application.

(iii) That the 2<sup>nd</sup> Respondent, their agents, employees and any other person working under their instructions be restrained jointly and severally from entering or interfering with the Objector’s/Applicants peaceful use and occupation of land parcel LR. KAKAMEGA/LUGARI/1721 in any manner whatsoever pending the hearing and determination of this cause.

(iv) That an inhibition/restriction be placed on LR. KAKAMEGA/LUGARI/1721 and or any other resultant numbers until this application/and objection proceedings are heard and determined.

(v) Spent

(vi) That the certificate of confirmation/orders of 14.12.2005 or any other date herein be revoked/annulled/set aside forthwith.

(vii) That the registration pursuant to the certificate of confirmation aforesaid in respect to land parcel LR.No. KAKAMEGA/LUGARI/1721 be cancelled and the registration of the deceased herein be restored.

(viii) That costs be provided for.”

3. The Application is based on the grounds that appear on its face namely:

- (a) That the grant was obtained fraudulently by making a false statement or by concealment from the court something material.*
- (b) The objector was never involved in the proceedings, his consent and or authority was never sought or obtained.*
- (c) That the Objector has established part of his home on a portion of LR. KAKAMEGA/LUGARI/1721.*
- (d) That the Objector is entitled to a portion of land parcel LR. KAKAMEGA/LUGARI/1721.*
- (e) That the said parcel of land has since been sold and transferred to Lugari Township Primary School without the Objectors knowledge by the Petitioner.*
- (f) That the said Lugari Township Primary School have begun fencing the said parcel of land and have fenced off one of the Objector's houses including the access road.*
- (g) That the Objector shall suffer irreparable loss if the orders sought are not granted.*
- (h) That the orders sought shall meet the ends of justice."*

4. The Application is Supported by the Affidavit of Tom Wanjala where he states inter alia:

- "1. That the deceased herein was my father who died in 1999.*
- 2. That the grant herein was confirmed on 14.12.2005.*
- 3. That the deceased was the registered owner of LR. KAKAMEGA/LUGARI/52 measuring 16 acres, KAKAMEGA/LUGARI/1723, 1724, 1725, 1722 and 1721. He also had LR. KAKAMEGA/CHEKALINI/66, 68 and 54.*
- 4. That the deceased had the following sons:-*

- (a) Edward Kimungui*
- (b) Musumba*
- (c) Daniel Khaoya*
- (d) Tom Wanjala*
- (e) Musa Rengo (deceased)*
- (f) Joseph Rengo*
- (g) Lawrence K. Rengo*
- (h) Peter Kitunyi*

*5. That before his demise the deceased demarcated the aforesaid parcel of land amongst his sons in the following manner;*

- |                                  |              |                             |
|----------------------------------|--------------|-----------------------------|
| <i>(a) Edward Kimungui</i>       | <i>.....</i> | <i>Kakamega/Lugari/1723</i> |
| <i>(b) Musumba</i>               | <i>.....</i> | <i>Kakamega/Lugari/1724</i> |
| <i>(c) Daniel Khaoya</i>         | <i>.....</i> | <i>Kakamega/Lugari/1725</i> |
| <i>(d) Tom Wanjala</i>           | <i>.....</i> | <i>Kakamega/Lugari/1722</i> |
| <i>(e) Musa Rengo (deceased)</i> | <i>.....</i> | <i>Kakamega/Lugari/1721</i> |

*6. That my other brother Joseph Rengo, Lawrence Kabuchanga & Peter Kitunyi were allocated LR. Kakamega/Chekalini/66, 68 and 54 respectively.*

*7. That land parcels Kakamega/Lugari/1721 and 1722 remained in the deceased names.*

*8. That the deceased had allocated me Kakamega/Lugari/1722 where I have established my matrimonial home even though he passed on before transferring the same to me.*

9. *That I have established part of my home on a portion of LR. Kakamega/Lugari/1721.*
10. *That I am also entitled to inherit part of Kakamega/Lugari/1721.*
11. *That my brother Joseph Rengo filed this cause and allocated LR. Kakamega/Lugari/1721 amongst himself and Patrick Rengo, Lawrence Rengo, Peter Sanda who are my brothers without my knowledge.*
12. *That it was only after I saw strangers who claimed to be acting on behalf of Lugari Township Primary School fencing the land parcel No. Kakamega/Lugari/1721 that I learned of this cause.*
13. *That the said Lugari Township Primary School have begun fencing the said parcel of land and fenced off part of my home and the access road.*
14. *That the land parcel LR. Kakamega/Lugari/1721 has since been sold and transferred to Lugari Township Primary School by Joseph Rengo, Patrick Rengo, Lawrence Rengo and Peter Sanda who were the joint owners.*
15. *That I have been advised by my Advocates on record which advise I verily believe to be true that any order against the intended 2<sup>nd</sup> Respondent cannot be issued unless they are made party to the proceedings.*
16. *That I will suffer irreparable loss if the orders sought are not granted.*
17. *That it is in the interest of justice that the orders sought are granted...”*

5. The Grounds of the Application are, in a nutshell, that the Applicant/Objector was excluded from the proceedings for grant, and the letters of administration were issued and confirmed by the Court with the aid of fraudulent conduct and material non-disclosure. The Applicant Objector states that he is entitled to certain land which the Second Respondent (Lugari Township Primary School) has fenced off with the effect of preventing access to one of the Objector’s houses/homes.

6. The Respondents have filed their respective Replying Affidavits setting out their version of events. The Application is opposed and is said to be made in bad faith.

7. Several years ago the Court differently comprised directed that the Application would be heard by viva voce evidence. Nearly, six years have elapsed since that direction and nothing was done. This Court considers that the issues before the Court are not susceptible to oral evidence and cross examination because there is very little of the facts that are disputed. What is disputed is whether the distribution under the certificate of confirmation was appropriate and properly done. In the circumstances, that decision is hereby reviewed. The Parties have filed Affidavits as well as Witness Statements. The process of converting evidence into pleadings although favoured in some circles, does not lend itself to the prompt and clear administration of justice, in this case. It is in the interests of justice that the elderly parties have their dispute resolved.

8. Under Section 73 of the Law of Succession Act, before can revoke a grant the Court it must decide the following:

- “(a) That the proceedings to obtain the grant were defective in substance.*
- (b) That the grant was obtained fraudulently by the making of something material to the case*
- (c) That the grant was obtained by means of untrue allegations of 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 failed, after due notice and without reasonable cause either-*
  - (1) To Apply for confirmation of the grant within one year from the date thereof or such longer period as the court ... or allows*
  - (2) To proceed diligently with the administration of the estate*
  - (3) To produce to court , within the time prescribed any such inventory... or*
- (e) That the grant has become useless and inoperative through subsequent circumstances.”*

9. This Court must first of all satisfy itself that there is good reason for revocation. It is correct that the process has not been perfect. The Deceased passed away on 15<sup>th</sup> February 1999. The First Respondent filed his petition for the letters of administration intestate on 6<sup>th</sup> January 2003. In it he lists the heirs dependents of the Deceased as:

- (a) Joseph K. Rengo – son
- (b) Peter Sante – grandson

- (c) Patrick Nalinyanya Rengo – son
- (d) Lawrence Kapchanga Rengo – son
- (e) Tom Wanjala Rengo – son
- (f) Daniel Khaoya Rengo – son
- (g) Edward Rengo – son.

The Chief's Letter state's that Peter Kitui Rengo predeceased the Deceased but was survived by Sande Kituye. What is noteworthy about that list is that although there are several sons, there are no women whether as a wife, mother or daughter. However the Applicant makes no complaint in relation to that. The heirs listed in the Application are the same save for an additional person described as "Musa Rengo (deceased). It is not clear whether that is a reference to the deceased or anyone else.

10. The Petition lists the Estate as comprising the following:

Kakamega/Lugari/1721 – 1.5 ha and Kakamega/Lugari/1722 only. The Certificate of Official Search provides the following information. Firstly in relation to Kakamega Lugari/1722 it arose from a sub-division of Plot No 52. It comprises 1.6 hectares. It was owned by Musa Rengo Nabiswa in 1998 and the title deed was issued in 2000. According to the Chief's Letter the Deceased Musa Rengo owned Kakamega/Lugari/52 which was about 16 acres. Before his death he shared out the land as follows: Tom Wanjala was to receive 4 acres, Daniel Wanjala was to received 5 acres and Edward Ali also 4 acres. The remaining 3.9 acres or so was to be shared between the son of Peter Kitui, Joseph Kirongesi, Patrick Nalianya and Lawrence Kapchanga. The First Respondent was therefore asserting that Plot No. 52 gave rise only to two titles 1721 and 1722. The Certificate of Confirmation of Grant dated 14<sup>th</sup> December 2005 deals with the distribution of 1721 and 1722 only. It does not deal with the share intended for Daniel Wanjala comprising 5 acres. How was that land divided and how did the title vest in Daniel? That is a significant omission.

11. The Applicant disputes that. According to the Supporting Affidavit, the Land known as LR No Kakamega/Lugari/52 measuring 16 acres was divided and gave rise to Kakamega/Lugari 1721, 1722, 1723, 1724 and 1725. In addition, it is said that the Deceased Musa also owned Kakamega/Chekalini/54, 66 and 68. The First Respondent, has responded but through a witness statement instead of a replying Affidavit. He says "THAT the deceased bought plot No. Kakamega/Lugari/52 from the settlement scheme in 1964 which was 16 acres.". It is then said "That before his demise, the deceased sub divided his land into 1721, 1722, 1723, 1724 and gave to his sons as follows:

Edward Rengo – 4 acres

Daniel Khaoya – 5 acres (because he paid settlement loan)

Tom Wanjala (complainant) 4 acres. THAT our father, Musa Rengo retained 3 acres (This was to be utilized by Joseph Rengo and the brothers who are most vocal within the Succession Cause.

12. Both Respondents have asserted that the Applicant was present before the Court when the grant was confirmed. Even State Counsel has asserted so in his Written Submissions. The Record of Proceedings tells a different story. On 1<sup>st</sup> December 2004, only the Petitioner was present. The Court directed: "*Beneficiaries will file affidavit on how they propose the land should be distributed. Thereafter they may relist the matter. If the affidavit reveal disagreements on distribution the court shall adjudicate on the matter.*".

13. On 8<sup>th</sup> June 2004, ALL the Beneficiaries were to attend. Only the Petitioner attended. The Court held ; Land title No. 1722 is only four acres. The Petitioner has shown in the application that the three sons herein mentioned will take 4 acres, 5 acres and 4 acres. There is an error and the Court cannot issue an order for distribution of land that does not exist.". Eventually, on 14<sup>th</sup> December 2005, the Summons for confirmation came before the Court for Confirmation. The record shows that the only person who attended was Mrs Muleshe for the petitioner. Ms Muleshe told the Court, "*The parties have all agreed on the mode of distribution. There is a joint affidavit and consents filed in terms regard. I seek confirmation.*". The Court decided; "*I have perused the application the affidavits and consents and I am satisfied that the grant may be confirmed. I accordingly confirm the grant made on 22/3/04 to the petitioner.*".

14. The Summons for Confirmation was dated and filed on 21<sup>st</sup> September 2004. It puts forward a list of the Children including one grandchild as well as Daniel and Edward Rengo. It also states the totality of the Estate comprises Kakamega/Lugari/1721 and Kakamega/Lugari/1722. That is only 7 acres out of the 16 acres that the Deceased owned. There is no mention of the shares that were to vest in Daniel and Edward. There is also absolutely no evidence to show that the land has in fact been transferred into their names whether before the death of the Deceased or otherwise.

15. The Affidavit relied on by Ms Muleshe and the Respondent, did supposedly signifying the beneficiaries' consent is said to be sworn by Tom Wanjala (the Applicant/Objector), Daniel Khoya and Edward Rengo. At paragraph 5 the property in the Estate is described as Lugari/1711, Lugari/1712 and not 1721 and 1722. What might be a explained away as a typographical error in any other document is sworn testimony in an affidavit. Paragraph 8 of the Affidavit is also telling. It states on behalf of Tom, Daniel and Edward, "***That we are engaged in some duties in Nairobi and cannot attend court on 1.12.04 for confirmation***". It is strange therefore, that State Counsel in the Attorney General's Chambers and an officer of the Court, can assert repeatedly that the Beneficiaries or any of them were present when the grant was confirmed. Applicant states he was not.

16. The Affidavit was said to be sworn on 25<sup>th</sup> October 2004. Although the matter was adjourned In addition, the Court was told the consent contained in the Affidavit related to the distribution. Perusal of the document shows that nothing said in the affidavit about how the

Estate will be distributed. Nor is there any consent to such distribution.

17. As appears above in 2003-05 the Petitioner/Respondent was asserting – on oath that the only land in the Estate were two parcels, 1721 and 1722. The Court raised concerns about the shares of Daniel and Edward. The Petitioner then produced an affidavit supposedly signifying their consent to the distribution. That is not what was said. However, the Petitioner now tells the Court that in fact the land was sub-divided into 4 pieces: 1721, 1722, 1723 and 1724. However there are no land searches exhibited in relation to the 9 acres.

18. The Applicant appears to have continued living in the homes they had before the death of their Father. It seems that even for the 11 years after confirmation, there was no cause for complaint. However, the Petitioner/Respondent admits that in that time he did not complete his duties as an administrator because he neglected to transfer the Applicant's share to him. What the Applicant is alleging is that Joseph Rengo instead transferred his share to another

19. This Application was triggered by the current occupier of Lugari/1721 encroaching onto the houses and land of Lugari/1722.

20. There is nothing on the file which shows when and how the parcels were demarcated and/or delineated – if that was ever formally done. Where there any walls and/or fences in 2003. Did the meeting of elders decide where the demarcation would be? That evidence is not before the Court, but it is very relevant to the dispute now before the Court and the solution.

21. The Second Respondent filed a Replying Affidavit, through a Thaddeous Akhwesa who describes himself as a head teacher. Sadly, he did not give sufficient attention to the objection. The Objector/Applicant is saying that the School is encroaching on his land and in any event he did not give his consent to any distribution that could have led to the school lawfully occupying any part of the Estate of the Deceased. The Headteacher has no independent first hand knowledge of that. He does say they relied upon the confirmation of grant. He says the school then “acquired Kakamega/Lugari/1721. The Headteacher exhibits a “Land Sale Agreement between Mr Joseph Kironngosi Rengo and Lugari t/ship Primary School. That is the document on which the School's right of ownership rests.

22. Unfortunately for the school, that sale agreement is defective in a number of respects. Firstly, Joseph Regno was not the owner of the Property. He was at best a joint owner with his brothers as signified in the Certificate of Confirmation. Secondly the original agreement and early payments were made three years before October 2015, in other words October 2012. At that time the Estate had not vested in any of the beneficiaries. Therefore Joseph did not own anything or any part of Lugari/1721 of which he could pass good title to the school. The land search is dated .....

23. In these proceedings the School is represented by the Attorney General's Department. In the circumstances and against the factual context set out above, this Court would expect State Counsel to bring sober consideration to the dispute before the Court. Instead, the Written Submissions of the Second Respondent seek to vilify and insult the Objector. They say;

#### **Issues for Determination**

1. The issues for determination in the standpoint of the 2<sup>nd</sup> Respondent are as follows:-

***“(a) Whether the objector has met the requirements for revocation of grant.***

*2. That Section 73 of the Law of Succession Act provides for the circumstances under which a grant can be revoked and which provides as follows;*

*“a grant of representation, whether or not confirmed, may any time be revoked or annulled if the courts decides either on an 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 something material to the case.*

*(c) That the grant was obtained by means of untrue allegations of 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 –*

*1. to apply for confirmation of the grant within one year from the date thereof or such longer period as the court or allows,*

*2. to proceed diligently with the administration of the estate,*

*3. to produce to court, within the time prescribed, any such inventory or account of administration as 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*

*4. that the grant has become useless and inoperative through subsequent circumstances.*

*That it is the Respondent submissions that the applicant's application has failed to meet the threshold for revocation of grant as set out in Section 73 of the Law of Succession Act.*

5. That the applicant has failed to prove through evidence that the grant was obtained through fraud or concealment of material facts and that even the objector himself participated in the succession proceedings and was even given his share of property being LR. NO. KAKAMEGA/LUGARI/1722 and his brothers were to share LRL. NO. KAKAMEGA/LUGARI/1722 and which they sold to the 2<sup>nd</sup> Respondent.

6. That the objector did not object to the sharing of the properties of their deceased father at the time when the same was being shared but seems to have starting having issues when the same was sold to the 2<sup>nd</sup> Respondent.

7. That it is ironical and malicious for the objector to want a share of land parcel KAKAMEGA/LUGARI/1721 and yet he was given alone without sharing with his brothers land parcel No. KAKAMEGA/LUGARI/1722.

8. That the land was transferred to the 2<sup>nd</sup> Respondent after the grant was confirmed and which process was legal.

9. That the objector has not given any evidence that land parcel No. KAKAMEGA/LUGARI/1722 was given to him by the deceased father and therefore was not subject to the succession proceedings.

**Conclusion:**

10. It is the 2<sup>nd</sup> Respondents submissions that the objector has failed to fulfil the requirements for revocation of grant as set out under Section 73 of the Law of Succession Act and that this Honourable Court should uphold that the grant was obtained legally and procedurally and we urge the Honourable Court to dismiss the application with costs.”

24. First Respondent’s submissions, which also introduce new evidence state:-

“1. The 1<sup>st</sup> respondent filed a replying affidavit dated 5.11.2018. He opposed the summons for revocation and in the affidavit, he stated that the deceased late Musa Rengo Nabiswa distributed all his properties during his lifetime and the only properties left undistributed were L.P Kakamega/Lugari/1721 and 1722. He prayed that the summons be dismissed with costs.

2. The factors to be considered in revoking and annulment of a grant are provided for under rule 44 and 73 of the probate and administration rules in the law of succession act. The applicant is replying on fraud and concealment of a material fact from the court. And that the applicant/objector was never involved in the proceedings, his consent and his authority was never sought nor obtained.

3. The 1<sup>st</sup> respondent wishes to draw the courts attention on the proceedings of 14.12.2005 before Justice G.B.M Kariuki. The petitioner was represented by Mrs. Muleshe and it was clear that all the parties agreed on the mode of distribution and signed consents and joint affidavit. A quick perusal of the consents and joint affidavit reveals that the applicant/objector was present personally before the court and participated fully in the confirmation of the grant which he now seeks to revoke.

4. It is the petitioner/respondent’s submissions that no single ground of revocation has been proved by the applicant. It is clear from the court record as pointed out by the petitioner that the applicant participated in the proceedings leading to the confirmation of the grant. Secondly, his consent and authority was sought and the applicant/objector voluntarily granted them by signing both the consent forms and the joint affidavits and also attending court on the confirmation date to confirm the contents of both the affidavits and the consent filed. The objector/applicant did not raise any objection to the confirmation at the time of confirmation of the grant.

5. The applicant has not alluded any fraud to the petitioner. If at all there was any fraud, the petitioner ought to have been charged with fraud. To compound the desperate attempts by the objector/applicant to have the grant revoked, the objector has not annexed any certificates of official search or copy of records of the alleged parcels of land and to whom they belong to as the court can infer the dates the transactions took place. The applicants failure to lay bare before the court of any evidence of fraud, concealment of material facts or no consents authority will only point to the failure of the objector’s application dated 7.11.2016. The petitioner/respondent prays that the court do return a finding that the applicant has not established a reason for the court to revoke the certificate of confirmed grant hence dismiss the summons for revocation or annulment of grant with costs.”

25. First Respondent admits he did not transfer the Objector’s share to him. Therefore it is possible that he transferred it to someone else, giving rise to the possibility of encroachment.

26. **Issues:**

1. Are there sufficient grounds for setting aside the Grant.

2. What should happen thereafter.

No order leaves parties in limbo.

There are third party rights to consider relating to the school and its students.

27. Therefore the Court orders and directs that:-

1. 3 brothers – Tom, Edward and Daniel to file affidavits explaining which land was given by father. Exhibiting Land Searches, Titles and any other documentation leading to distribution.

2. The first Respondent shall file an Affidavit explaining when and how the subdivision was done plus exhibit.

3. The Registrar of Lands shall:-

(a) Appoint a Surveyor to attend the parcel formerly Kakamega/Lugari/52 and prepare a map of the divisions as they existed in 1999 and a second map of the delineation that now exists as at today's date within 21 days.

(b) Cause to be filed with the court copies of the official search certificate for all the properties owned by the deceased including but not limited to:-

(1) Kakamega/Lugari/1721

(2) Kakamega/Lugari/1722

(3) Kakamega/Lugari/1723

(4) Kakamega/Lugari/1724

(5) Kakamega/Lugari/1725

(6) Kakamega/Chekalini/54

(7) Kakamega/Chekalini/66

(8) Kakamega/Chekalini/68

Within 28 days.

Penal Notice attached to paragraph 3.

4. Interim orders for status quo to be maintained granted on 10<sup>th</sup> July, 2017 to continue until the next hearing.

5. List for further directions on 8<sup>th</sup> June, 2021.

Orders accordingly.

**Farah Amin**

**JUDGE**

**DELIVERED, SIGNED AND DATED IN KAKAMEGA ON THIS THE 18TH DAY OF MARCH 2021.**

**In the presence of:**

Court Assistant: Abuye

Mr. Ondieki

Abinayo Wawire – Son of Thomas Wanjala