



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MURANG'A**  
**SUCCESSION CAUSE NO. 564 OF 2015**  
**IN RE ESTATE OF PHINIHAS THIGA GATIBARU (DECEASED)**  
**FRANCIS MWANGI THIGA.....APPLICANT**  
**VERSUS**  
**CYRUS GITHINJI THIGA.....1<sup>ST</sup> RESPONDENT**  
**JOEL MUGO THIGA.....2<sup>ND</sup> RESPONDENT**  
**JUDGMENT**

1. The disputants are sons of the late Phinihas Thiga Gatibaru (hereafter *the deceased*). The disagreement is over the distribution of two pieces of land known as *Eusas Nyiro/Suguro/Block1/122* and *Loc.14/Kagumoini/1684* (hereafter *the suit properties*).
2. The deceased died intestate on 10<sup>th</sup> January 1997 and was survived by three sons and two daughters, Examel Wanjiru Murungaru and Phylis Nyakieni Ndoge. The two daughters are married and have *not* laid a claim to a share of their father's estate.
3. On 3<sup>rd</sup> August 2015, the 1<sup>st</sup> respondent applied for a grant of letters of administration to the estate. A grant was issued on 2<sup>nd</sup> June 2016 and confirmed on 6<sup>th</sup> March 2017. Under the grant, the two properties were to be shared equally between the two respondents.
4. The applicant was aggrieved and lodged a summons for revocation of the grant on 15<sup>th</sup> March 2019. He averred that that the grant was issued fraudulently and in secret. In particular, he claimed that his consent was not obtained and that his signature was forged. He also filed a Notice of Motion dated 27<sup>th</sup> May 2019 to restrain the respondents from evicting him from the two parcels of land.
5. In a synopsis, the applicant is pursuing a share of the two properties. The respondents on the other hand claim that he inherited another piece of land from the deceased known as *Nakuru/Rare/Bagaria* measuring 2 hectares; and, that he has always lived there. They also claimed that he was all along aware of these succession proceedings.
6. On 28<sup>th</sup> September 2021, the court directed that the *Summons* as well as the *Notice of Motion* be determined by *viva voce* evidence. The applicant and 1<sup>st</sup> respondent testified in the matter.
7. I will commence with the issue whether the grant should be annulled. A grant, whether or not confirmed, may be revoked either by the court *suo moto*; or, by an application made under section 76 of the **Law of Succession Act**.
8. It is common ground that all the heirs had *agreed* that the 1<sup>st</sup> respondent would be the administrator. This is evidenced by the letter from the Chief, Kagumoinini Location, dated 22<sup>nd</sup> June 2015. Doubt is completely removed by the applicant's own testimony who told me as follows-

When the application for letters of administration was made, I was aware and I agreed that Cyrus Githinji Thiga be the administrator. However, I did not know of the summons for confirmation of the grant. I challenge it because on 27/12/2016 [he] brought a consent through the village elder for me to sign...I raised objections. I did not sign it.

9. I thus readily find that the applicant was well aware of the matter. He cannot then be heard to say that the grant was obtained in secret or that the administrator was not agreed upon.

10. I will now turn to the allegations of fraud. The burden to prove that the applicant did not execute the consent or that his signature was forged fell upon him by dint of sections 107 and 109 of the **Evidence Act**. His two brothers insist that he executed the consent. He denies it and states that his signature takes a different style.

11. The standard of proof for fraud is *higher* than a balance of probabilities. It approaches, but is *below*, proof beyond reasonable doubt. See **Koinange v Koinange** Nairobi, High Court case 66 of 1984 [1986] eKLR, **Ratilal Patel v Lalji Makanji** [1957] EAR 314 at 317.

12. Applying those precedents here, I am *not* satisfied that the applicant proved the forgery or fraud to the required standard.

13. That leaves the question of distribution of the estate. The respondents' case is that the applicant inherited another piece of land from the deceased known as *Nakuru/Rare/Bagaria* measuring 2 hectares and where he has always lived. The 1<sup>st</sup> respondent testified that the deceased used to be a cook at the State House, Nakuru, and was allocated the land on that basis.

14. The applicant's retort is that he bought the latter property. On the first day of hearing of this suit, the applicant sought a brief adjournment to bring evidence that he purchased the land. He did not do so. Instead, he produced, among other documents, a copy of the title or allotment bearing his name (exhibit 1 (a) to (g)). No receipts, sale agreement or other explanation of the transaction were produced. I have also considered that the applicant resided on that piece of land throughout including the lifetime of his father and did not stake a claim to the suit properties until the death of the deceased.

15. It is equally telling that when he returned home following the 1992 tribal clashes in the Rift Valley, the deceased did not give him land at Kagumoini. The applicant leased some other land. He testified in cross examination that his father "*did not say I go lease...It is I who saw our land was small and I suggested to lease other land*".

16. There was also evidence that the deceased directed that the applicant's house at Kagumoini should never be demolished. However, the deceased did not allocate him any portion to farm at Kagumoini. I have reached the conclusion that the applicant was less than candid; and, that on a balance of probabilities, he did not prove that he purchased the Nakuru land. Having then inherited that land measuring 2 hectares, it would now be unjust to claim another portion at Kagumoini or Euaso Nyiro at the expense of his two brothers.

17. In the end, I *decline* to revoke the grant. The applicant's *Summons* for revocation of grant dated 15<sup>th</sup> April 2019 as well as the subsequent *Notice of Motion* dated 27<sup>th</sup> May 2019 are *dismissed*.

18. Costs normally follow the event and are at the discretion of the court. I have taken into account that this is a succession matter; or, a family dispute. In the interests of justice, each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 26<sup>TH</sup> DAY OF OCTOBER, 2021**

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of:**

Applicant (in person).

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.