



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2937 of 2012**

**IN THE MATTER OF THE ESTATE OF NJUGUNA WAMUGI ALIAS NJUGUNA WAMUGI "B" (DECEASED)**

1. The Application before the Court seeks revocation of the Certificate of Confirmed grant and/or revocation of the Letters of Administration granted to John Iraki Njuguna. The Applicants are Peter Gitau Kimani The Letters of Administration were issued on 13th January 2012 and were confirmed on 28th November 2012. The Application was filed on 5th December 2012. It is brought under Section 76(a), (b) and (c) of the Law of Succession Act Cap 160 Laws of Kenya and Rules 44(1) and (2) and 47 of the Probate and Administration Rules.

2. The Application seeks the following Orders:

(a) That grant of letters of administration made to JOHN IRAKI NJUGUNA on 13th January 2012 and confirmed on 28th November 2012 in the Thika Chief Magistrate's Court Succession Cause Number 18 of 2012 in the matter of the Estate of NJUGUNA WAMUGI ALIAS NJUGUNA WAMUGI "B" ALIAS NJUGUNA WAMUGU (DECEASED) be revoked and/or annulled.

(b) THAT there be a stay of execution of the orders of the confirmed grant pending the hearing of this application inter-parties.

(c) That the costs of this application be provided for.

3. The Application is supported by the Affidavits of Peter Gitau Kimani and Eudias Margaret Nyambura Mwangi. The Grounds relied upon are:

(i) That the proceedings to obtain the grant were defective in substance.

(ii) That the grant was obtained by means of untrue allegations of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

(iii) That the grant was made fraudulently by the making of a false statement or by the concealment from the court of something material to the case.

(iv) That the administrators/Respondent did not inform the Applicants of the date of the confirmation of grant.

(v) That the administrators excluded the Applicants in the list of distribution of the deceased estate.

4. The Application is disputed by the Administrator. He has filed his Replying Affidavit on 10th May 2013. In his affidavit he states that the deceased was survived by Francis Nuguna Mruru, Joseph Kiruri Njuguna himself and Peter Kahiro Njuguna. the Petition states that the first three are the sons of the Deceased and the last is a grandson.

5. The file was called up from the C.M's Court in Thika. Letters of Administration and the Certificate of Confirmed grant were issued on the Petition of a sole administrator, JOHN IRAKI NJUGUNA. The Matter was heard in the Chief Magistrate's Court at Thika in Succession Cause No 18 of 2012. The Petition and Affidavit in Support Exhibit the Chief's Letter from the Office of the Chief in Gituamba Location. He says he has "identified" the following "beneficiaries" of the estate of the Deceased:

"1. Joseph Kiruri Njuguna ID/ 6376187 - son, 2 Peter Kahiro Njuguna ID/ 16105167 - son, 3 John Iraki Njuguna ID/1243842 - son , 4 Frances Njuguna Wamugi ID/ 25365310 - grandson and on behalf of the late wamugi Njuguna family, (5 Peter Gitau Kimani ID/67141 , 6 Eudias Margaret Nyambura Mwangi ID/7010721, 7 John Ng'ang'a Kamau ID/6714618, 8 Josephat Kamau Gitau ID/8485196) the four are purchasers

6. Therefore the only evidence before the CM's Court of the involvement of "Four Purchasers" came from the Chief's letter. The "Four Purchasers" also are indicating as having signed the Consent to the making of a grant of administration in the presence of Muringi Waitihaka

Advocate. The Petition also exhibited the Certificates of Official Search for the two Chania Properties that were owned by the Deceased. They are CHANIA/NGORONGO/351 and CHANIA/KIRIKO/T.36. Those properties are then shared between the Beneficiaries in the Certificate of Confirmed Grant in equal shares..

7. Section 76 of the Law of Succession Act Cap 160 Laws of Kenya relied upon by the applicant provides as follows:

"A grant of representation whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by interested party or its own motion:-

- a. That the proceedings to obtain the grant were defective in substance;
- b. That the grant was obtained by the making of a false statement or by concealment from the Court of something material to the case.
- c. The grant was made by an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
- d. The person to whom the grant was made has failed, after due notice and without reasonable cause ...."

The burden of proof rests with the Applicant to prove that the grounds set out in section 76 of the Law of Succession Act before the grant can be revoked.

8. Of the Grounds relied on in the Application, the first is that the proceedings to obtain the grant were defective in substance. Neither the Grounds nor the Supporting Affidavit gives any further detail of how the proceedings were defective. From the Court file it is apparent that there was a petition, the petition was advertised by Gazette Notice and the Applicants had signified their consent. Ground (ii) relies on the making of untrue allegations. Again they are not set out in sufficient detail to be understood. In any event the Applicants appear to have been party to the process. Ground (iii) states that the grant was made fraudulently. Again, the particulars of fraud are neither pleaded nor set out in the Supporting Affidavit. In any event the Applicants were party to that procedure.

9. Grounds (iv) and (v) deal with the process relating to the confirmation of the Grant. The two main complaints are that the Applicants are not included in the distribution. This complaint is answered by the Replying Affidavit where the Administrator/Deponent says at paragraph 6 "That the applicants herein are strangers to the estate of the deceased as they are not beneficiaries..." and at paragraph 7 where it is said "That the applicants claims to be purchasers of land but are not stating from whom they purchased the land parcel from and what portion they allegedly bought.". He goes on to say "That the applicants have also not annexed any agreement for sale of the land they allege to have purchased.". It is trite law that it is the function of administrators to identify and call in the assets of the Estate for distribution. If the Administrator is saying that the Applicants have not demonstrated that they are either beneficiaries and/or dependents of the Deceased, not that they purchased any part of his property before his death. If they had done so, it would not be difficult for them to provide the documentary proof. They have exhibited none.

10. Both Counsel for the Parties informed the Court that they would like to proceed by way of Written Submissions and that direction was given on 5th April 2017. The Applicants filed theirs on 13th July 2017 and the Respondent had already filed theirs on 27th April 2017. On 13th November 2017 the Parties were given an opportunity to highlight their Written Submission, The Court has taken both the Written and Oral Submissions into account. By way of example, the Applicants allege that because none of the Applicants are left out of paragraph 5 (of the Affidavit in Support of the Summons) that is a deliberate concealment. It is argued that what is left out is the fact that they have an interest to inherit through the person who sold it to them and the fact of that interest. What is noteworthy about that Submission is that there is no evidence to support that such an interest (a) ever came into existence and (b) was made known to the Administrator of the Estate. The only source of information is the Chief's Letter. The Chief was neither called, nor was there an Affidavit from him. The Applicants have not filed anything that could resemble a memorandum denoting a sale of land. Therefore they have failed to establish their locus as purchasers against the Estate.

11. In relation to whether or not they are Beneficiaries/Dependants, again they have not stated how that state of affairs comes into existence. **Section 66 of the Succession Act Cap 160** provides; *"When the deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the following order of preference:*

*(a) Surviving spouse or spouses, with, or without, association of other beneficiaries;*

*(b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V.."*

12. It is clear from that Section that a purchaser who is neither beneficiary nor dependant does not rank highly in the discretion to be used. That does not mean that in the appropriate cases, a purchaser does not have any recourse. A purchaser of any part of an Estate would have recourse against the Administrators. In any event, they must prove their claim with sufficient appropriate evidence. In this case they have not done so. The Respondent relies on the Authority of ***Kennedy Opiche Olela v William Ogida Ochuodho & another [2014] eKLR***. In that case it was held that a purchaser is not a person who is entitled to petition for letters of administration. The Respondent extrapolates from that argument that such a person should not be able to revoke a grant either.

13. In further Submission, Counsel for the Applicants sought to criticise the lower Court for confirming a grant without the consent of the Applicants. However, there is no blame that can lie with the Lower Court. The Applicants were named purchasers, not beneficiaries. In view of the fact there was no evidence of their purchase before the Court, they failed to establish locus and in that case the Lower Court was right not to call for their consent. In any event, even if they had in *Ileri Nyaga v Karani Ngari & Another Embu HC Succ. No. 68 of 2007 [2010]*

eKLR it was held that ". a buyer or purchaser cannot cause an otherwise valid grant to be revoked for the only reason that he was not recognized in the proceedings. As stated earlier in my ruling, his recourse lies in suing whoever sold the property to him and if such person be dead, then he can only sue the administrator of the deceased's estate."

14. The question must be, have the Applicant's discharged the burden of proving their case. In fact, they have provided absolutely no evidence of any sale. Even if they had, would it be sufficient? The authorities suggest, not. For those reasons, the Application is dismissed with costs.

Order accordingly,

Farah S. M. Amin

JUDGE

**Delivered, Dated and Signed at Nairobi this 22<sup>nd</sup> day of January 2018**

In the presence of:

Court Assistance: Patrick

Applicants: Mrs Kiguatha HB Mr Ngigi

Respondents: No Appearance