



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO 53 OF 2016**

**(FORMERLY MERU SUCCESSION CAUSE NO. 163 OF 2007)**

**IN THE MATTER OF THE ESTATE OF BUURI IRWARE (DECEASED)**

**AND**

**CECILIA KAGENDO MUGO.....1<sup>ST</sup> PETITIONER**

**AGUSTINE NJAGI IRWARE.....2<sup>ND</sup> PETITIONER**

**SEBASTIAN NYAGA BUURI.....3<sup>RD</sup> PETITIONER**

**NICHOLAS KARANI STANLEY.....4<sup>TH</sup> PETITIONER**

**RULING**

1. **JOSEPH NGAI GACHOMBA** the applicant herein has vide Summons for Revocation of Grant dated 8<sup>th</sup> February 2017 brought under **Section 76** of the **Law of Succession Act** has applied to revoke or annul the grant of Letters of Administration intestate granted to Cecilia Kagendo Mugo, Sebastian Nyaga Buuri, Augustine Njage Irware and Narchisio Njagi Bauni the Respondents herein. The applicant is further seeking inhibition orders placed on parcels L.R. Nos. **KARINGANI/MUIRU/773, 17720, 2694, 2695, 2696, 2697 and 2698.**

2. The grounds upon which this application is made are as follows namely:-

- (i) That the grant issued vide Chuka Senior Resident Magistrate Succession Cause No. 58 of 2005 was obtained fraudulently by the petitioner/Respondents who gave false and misleading information regarding the estate of BUURI IRWARE (deceased).*
- (ii) That the said grant was obtained by concealment of material facts regarding the estate of BUURI IRWARE.*
- (iii) That the grant was obtained by the Respondents without notice to the applicant who had a lawful interest by virtue of a decision in Land Disputes Tribunal No.35 of 2005.*
- (iv) That unless the orders sought are granted, the Petitioners/Respondents are likely to dispose off the estate of the deceased without distributing any part thereof to the applicant who according to him is a lawful heir to the estate.*
- (v) That the petition in the subordinate court and proceedings attendant thereto were defective in substance.*
- (vi) That the Respondents caused to be removed restrictions placed by the applicants over the estate in collusion with Land Registrar Meru South.*
- (vii) That it is just, fair and equitable to allow this application.*

3. In his Supporting Affidavit sworn on 8<sup>th</sup> February 2017, the applicant has deposed that he had a land case with the deceased vide **Land Disputes Tribunal Case No.35 of 2002** where he says he was awarded 12 acres out of the estate of the deceased. He has annexed a copy of the proceedings as evidence to support this application. At the hearing of this application viva voce, the applicant claimed that the sons of the deceased were aware of the land case and the outcome. He urged this court to nullify the grant for purposes of ensuring that he gets his 12 acres which he claims he was awarded by the Land Disputes Tribunal. He faulted the deceased's children for leaving him out in the distribution of estate. According to him the estate comprised those parcels of land known as **KARINGANI/MUIRU/775 and 776** and that parcel No.776 was later subdivided into **KARINGANI/MUIRU/1718, 1719 and 1720**. He further added that parcel **No.1720** was further subdivided according to him into parcels Nos. **KARINGANI/NDAGANI/2694, 2695, 2696, 2697 and 2698.**

4. The applicant called 9 witnesses, M'Bita M'Kana (PW2) who testified and supported the applicant on the existence of a Land Dispute Tribunal case where he stated that the applicant was awarded 12 acres out of the estate of the deceased. He further testified that the deceased did appeal in vain against the decision of the Tribunal.

5. The applicant has faulted the removal of restrictions he claims to have placed on Parcel No. **KARINGANI/MUIRU/1720**, stating that the Respondent colluded with the Land Registrar Meru South to have the same removed without notice to him and he has submitted through counsel that the removal of caution was aimed at defeating the course of justice.

6. It is further submitted that the Respondents were well aware of the applicant's interests arising from the award of the Land Disputes Tribunal but chose to conceal the same from court.

7. The Respondents have opposed this application through a Replying Affidavit sworn by Augustine Njage Irware, the 2<sup>nd</sup> Respondent. The Respondents have faulted the applicant for indolence accusing him for coming to court ten years after the grant was confirmed. They have also denied knowledge of the case filed vide Land Disputes Tribunal No. 35 of 2002.

8. The Respondents have also denied that they acted secretly and further state that they had no legal obligation to notify the applicant herein about the Succession Cause.

9. The Respondents have further denied that the removal of caution was tainted with fraud and have faulted the applicant for not pleading the particulars of fraud attributed to them and the Land Registrar. They also deny existence of land parcel No. **KARINGANI/MUIRU/775** and **1720** adding that inhibition cannot issue on a non existence parcels.

10. In their brief written submissions made through their learned counsel B.G Kariuki &Co. Advocates, the Respondents have contended that the applicant should pursue his grievances through Land Disputes Tribunal 2002 arguing that this being a Succession Cause, the court can only determine issues to do with heirs of a deceased person. They also contend that no evidence have been tendered to prove that parcel numbers **KARINGANI/MUIRU/2694, 2695, 2696, 2697** and **2698** belong to the deceased.

11. This court has considered this application and the response made by Respondents. The cause herein relates to the estate of the late **BUURI IRWARE (DECEASED)** who died on 11<sup>th</sup> November, 2004 domiciled at Karingani Location in the then Meru South District (now Tharaka Nithi County). The property comprising the estate in this cause listed in the Petition were as follows:-

**KARINGANI/MUIRU/567**

**KARINGANI/MUIRU/1719**

**KARINGANI/MUIRU/697**

**KARINGANI/MUIRU/1720**

**KARINGANI/MUIRU/775 &**

**PLOT NO. 231.**

12. In the application, the applicant has moved this court for Revocation of Grant under the provisions of **Section 76(1) of Law of Succession Act**. The grant was issued on **16<sup>th</sup> December, 2005** and conformed **6<sup>th</sup> September 2006** as per the certificate of grant herein. The grounds upon which the annulment or Revocation of Grant is sought are basically two namely:-

a. Concealment of material facts.

b. Fraud

13. On concealment, the applicant contends that there was a land dispute between him and the deceased in this cause over two parcels of land forming part of the estate namely:-

a. Karingani/Muiru/775 &

b. Karingani/Muiru/1720.

This court has noted the response made by the Respondents who have denied knowledge of Land Dispute Tribunal No.35 of 2002. I have gone through the proceedings of Land Disputes Tribunal annexed by the Applicant as exhibit "**JNG 2**". What is clear from the proceedings is that the applicant herein Joseph Ngai Gachomba had sued the deceased herein Buuri Irware over the following parcels namely;

a. KARINGANI/MUIRU/755

b. KARINGANI/MUIRU/766

This court finds that there is some disconnection between the properties comprising the estate herein and the properties which were the subject matter in the Land Disputes Tribunal. The applicant has not shown thenexus between then parcels comprising the estate and the subject matter in the Land Dispute Tribunal case. Secondly the applicant has failed to show that the Respondents herein were either involved or aware of the **Land Disputes Tribunal No. 3 of 2000 adopted in Land Dispute Tribunal No. 35 of 2002 in the Senior Resident Magistrate's Court here in Chuka.**

14. It is also true that the Law of Succession Act and indeed a probate court is limited in its scope and jurisdiction to intestate and testamentary succession and the administration of the estate of deceased persons. The applicant herein is not claiming any inheritance right over the estate. His claim is premised upon a decision of a tribunal whose jurisdiction did not extend to succession matters. It is therefore doubtful if the tribunal was seized to deal with the matter placed before it is in the first place going by the proceedings of the tribunal. The applicant's claim in my view should be canvassed at the court seized with the jurisdiction to deal with disputes related to ownership, use and occupation of land. That Court is created by the Constitution of Kenya 2010 under **Article 162 (2)** and it is Environment and Land Courts (E.L.C).

15. This court therefore finds no evidence of concealment by the Respondent and even if the issue about the applicant's claim had been brought up the finding of the court would probably not have been different. If the applicant has a court's decree in his favour over any property including any property forming the estate, he should execute the decree through the normal court process but certainly he cannot purport to execute a decree from a civil court through Probate and Administration matter. In my view that would be an abuse of court process.

16. This court has also not been shown that the Respondent acted fraudulently in the petition for letters of administration or in the administration of the estate. An allegation of fraud is a serious matter and the same must be particularized and proved beyond doubt because it amounts to a criminal conduct if proved. The applicant has accused a Land Registrar for colluding with the Respondents in that regard but the Land Registrar is not a party to this proceedings and an adverse finding against the officer cannot obviously be made without according him/her a chance to be heard. The Applicant has therefore not proved even on a balance of probabilities that the Respondents were fraudulent in the administration of the estate of the deceased.

17. Having found no merit in the grounds upon which this application has been brought, this court however has noted that the value of the estate as stated in the petition (**P&A5** and **P&A80**) for letters of administration is **Kshs.2,000,000/-** which was way above the then monetary jurisdiction of the subordinate court which was **Kshs.100,000/-** as per **Section 48** of the **Law of Succession Act** (now amended). That was an inadvertence on the part of the lower court and though the applicant never raised any issue of jurisdiction, this court has noted the same on its own motion and the same cannot be ignored because a court can only act within its jurisdiction. Anything beyond that is null and void.

In the premises though I am inclined to dismiss the application dated 8<sup>th</sup> February, 2017 which I hereby do for lacking in merit, at the same time I am minded to invoke the provisions of **Section 76(c)** suo moto and revoke/annul grant dated 17<sup>th</sup> August, 2005 and confirmed on 6<sup>th</sup> September, 2006 which I hereby do. That grant is hereby revoked/or annulled with no order as to costs. This court further pursuant to the provisions of **Section 66** of the **Law of Succession Act** hereby appoints **Augustine Njagi Irware** as the administrator of the estate of the late **Buuri Irware** (deceased). Any transaction or dealings on the properties forming the estate are hereby reversed. The administrator is given liberty to move this court for confirmation of grant before the expiry of the statutory period of six months in view of the age of this cause.

**Dated, signed and delivered at Chuka this 15<sup>th</sup> day of May, 2018.**

**R.K. LIMO**

**JUDGE**

**18/5/2018**

Ruling dated, signed and delivered in the open court in the presence of Gichuki for petitioners and the absence of Arithi but Joseph Ngai is present in person.

**R.K. LIMO**

**JUDGE**

**18/5/2018**