



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT CHUKA**

**SUCCESSION CAUSE NO. 19 OF 2015**

**(FORMERLY MERU HIGH COURT SUCCESSION CAUSE NO.446 OF 2011)**

**IN THE MATTER OF THE ESTATE OF THE LATE**

**JOHANA MWERERIA THUGURA (DECEASED)**

FREDRICK MUTUA.....1<sup>ST</sup> PETITIONER/APPLICANT

JOHN KINOTI.....2<sup>ND</sup> APPLICANT

ELIUD NJERU JOHANA.....3<sup>RD</sup> APPLICANT

JULIUS MURIUKI.....4<sup>TH</sup> APPLICANT

JUSTIN KIAMBI MARETE.....5<sup>TH</sup> APPLICANT

EUSTACE MUGENDI NJERU.....6<sup>TH</sup> APPLICANT

TARSILLA MUKWANJIRU KIBAARA.....7<sup>TH</sup> APPLICANT

JANE WANJA MURIANKI.....8<sup>TH</sup> APPLICANT

**VERSUS**

ALPHAXARD NDEGE.....1<sup>ST</sup> PETITIONER/APPLICANT

JULIUS NYERERE ERASTUS.....2<sup>ND</sup> PETITIONER/APPLICANT

**R U L I N G**

1. This cause relates to the estate of the late **JOHANA MWERERIA** (deceased) who died on 25<sup>th</sup> December 1997 at Chogoria Hospital domiciled at Igoji. He died intestate leaving behind the following dependants, (as per the letter from Area Chief dated 26<sup>th</sup> March 2009 filed together with the petition of letters of administration of his estate) namely:-

- (i) Mutua Mwereria
- (ii) Julius Muriuki
- (iii) Lydia Kajuju Henry (daughter in law and wife to Henry)
- (iv) Alphaxard Ndege
- (v) Eliud Njeru Johana

(vi) Micheni Johana

(vii) Joyce Kainda

2. The properties comprising the estate listed were as follows:-

(i) L.R. Igoji/Kiangua/367

(ii) L.R. Igoji/Kiangua/980

(iii) L.R. Igoji/Kiangua/19

(iv) L.R. Igoji/Kiangua/976

3. This court appointed the following as administrators of the estate of the deceased herein on 17<sup>th</sup> August, 2016.

(i) Alphaxard Ndege

(ii) Julius Nyerere Erastus and

(iii) Fredrick Mutua

4. Aphaxard Ndege and Julius Nyerere Erastus on 4<sup>th</sup> April, 2017 applied for confirmation of grant and gave a proposal on how the estate should be distributed. The proposal met resistance from Fredrick Mutua who filed a protest through an affidavit sworn on 10<sup>th</sup> May, 2017.

5. The main basis of protest was that the proposed mode of distribution was not fair and equitable. He further stated that the initial distribution which was annulled as a result of nullification of grant was fair and reasonable.

6. This court on 11<sup>th</sup> May 2017 fixed the protest for hearing after giving direction to the effect that the protest was to be heard by way of oral evidence. The hearing protest was filed for hearing on 4<sup>th</sup> July 2017 in presence the protestor's counsel and the petitioners. On 4<sup>th</sup> July, 2017 this court was not sitting and the protestor's counsel in presence of petitioner's counsel took another hearing date by consent which was on 11<sup>th</sup> October, 2017. On 11<sup>th</sup> October, 2017 the protestor's counsel Mr. Murithi applied for adjournment telling the court that the protestor was absent. The protest was then fixed for hearing on priority on 11<sup>th</sup> December, 2017 but on 11<sup>th</sup> December 2017 the protestor and his counsel were both absent leaving this court with no option but to confirm the grant as proposed by the 1<sup>st</sup> and 2<sup>nd</sup> administrator.

7. The protestor (Fredrick Mutua) has now moved this court together with 7 other applicants vide Summons for Revocation of Grant dated 4<sup>th</sup> January, 2018 for revocation of the grant as confirmed on 11<sup>th</sup> December, 2017 under **Section 76 of Law of Succession Act** citing the following grounds namely:-

*a) That the proceedings to obtain the grant were defective in substance*

*b) That the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the cause.*

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

8. In the Supporting Affidavit sworn on 4<sup>th</sup> January 2018, Fredrick Mutua depones that he is a grandson of the deceased being a son to Mutua Mweriria who is a deceased's son to deceased in this cause. He further depones that the estate of the deceased herein had been administered and distributed vide ***Chuka Principal Magistrate Civil Case No/112 of 2010*** where the estate of the deceased was distributed as follows:-

**(A) L.R. Igoji/Kiangua/367**

(i) Mutua Mwereira - 3.50 acres

(ii) Eliud Njeru Johana - 3.50 acres

(iii) Micheni Johana - 1 acre

**(B) L.R. Igoji/Kiangua/980**

(i) Lydia Kajuju - 3 acres

(ii) Julius Muriuki - 3 acres

(C) **L.R. Igoji/Kiangua/976**

(i) Aphaxard Ndege - 3.50 acres

(ii) Lydia Kajuju - 0.50 acres

(D) **PLOT NO. 19 Kiangua Market**

(i) John Kinoti

(ii) Julius Muriuki Jointly

9. According to the applicant the beneficiaries had settled on their respective shares before the grant was nullified and a fresh grant issued which was the subject of confirmation on 11<sup>th</sup> December, 2017. He has faulted the mode of distribution that was adopted by this court stating that the same was done in his absence and that of his counsel. He has also claimed that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants did not consent to the proposed mode of distribution prior to the confirmation of grant. He also complains that he was not given a share on behalf of his late father Mutua Mwereria and that the daughters of the deceased were not catered for. He also claims that those who made contribution financially towards the succession cause were not rewarded as initially agreed and has given examples of John Kinoti (2<sup>nd</sup> applicant) 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> applicants respectively.

10. The first applicant is supported by John Kinoti, the 2<sup>nd</sup> applicant who also says that he is a grandson to the deceased on account of being a son to one Julius Muriuki who he claims was a deceased's biological son. He has faulted his erstwhile counsel Ms Basilio Gitonga and Murithi Advocate for not keeping him and other beneficiaries abreast of what was going in this cause. He claims that the 1<sup>st</sup> applicant (Fredrick Mutua) was not informed about the hearing of the protest on 11<sup>th</sup> December 2017. He further states that they were not notified when the initial grant was revoked in court and claims that their advocate kept them in the dark. He further states that he would have opposed the revocation of the initial grant and the confirmation of grant on 11<sup>th</sup> December, 2017 because the same did not cater for his interest over plot No.19 at Kiangua Market where he claims to have spent Kshs.428,744/- in development. He claims that the amount he has spent should be refunded with interest of 25% if he cannot be given a share of the plot. He claims that in total he has spent Kshs.828,744/- in developing the plot where he is running business.

11. Justin Kiambi Marete, the 5<sup>th</sup> applicant claims purchasers interest in L.R. Igoji/Kiangua/2651 having purchased it from the late Mutua Mwereria. He has exhibited a copy of title and a copy of the official search to back up his claim. He has further deposed that he was aware that the initial grant which had been used to pass the interest in L.R. Igoji/Kiangua/2651 had been revoked but that the new administrators did cater for his interest in the proposed mode adopted by this court. He has further averred that his interest having been purchased from an appointed administrator after confirmation is protected under **Section 93 of the Law of Succession Act**. He has further pointed out his parcel No.Igoji/Kiangua/2651 resulted from subdivision of L.R Igoji/Kiangua/367. He claims that upon purchase, he developed the plot extensively.

12. The 6<sup>th</sup> applicant, Eustace Mugendi Njeru, the 7<sup>th</sup> applicant Tarasira Mukwanjeru Kibara and Jane Wanja Muriangi the 8<sup>th</sup> applicant have made similar claims that they are also purchasers of some of the properties that were subdivided from Igoji/Kiangua/367. Eustace Mugendi Njeru has on his part averred that he purchased parcel No.2987 from Eliud Njeru, parcel No.2765 from Cosmos Njiru who had bought it from John Kinoti and Mutua Mwereria and 2653 from Gibson Muthomi Phineas who had purchased it from Eliud Njeru. He has annexed registration documents to prove that he is now a registered owner of the above parcels.

13. Tarsilla Mukwanjiru Kibaara on her part states that she purchased Igoji/Kiangua/2766 from John Kinoti who in turn had purchased it from Mutua Mwereria. She has also exhibited title deed to show that she is now the registered owner of that parcel.

14. Jane Wanja Muriangi states on her part that she purchased Igoji/Kiangua/2652 from Eliud Njeru and has also exhibited a copy of title deed.

15. The respondents herein Alphaxard Ndege and Julius Nyerere have opposed his application. They have pointed out that the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> applicants cannot raise any issue in this Summons for Revocation of Grant because the application in respect to them is *res-judicata*. They have faulted the 5<sup>th</sup> to 8<sup>th</sup> applicants stating that they have no *locus* to bring this application.

16. The respondents have faulted the applicants for seeking to set aside a consent order through this application instead of exploring other avenues. They contend that the applicants cannot seek to revoke a grant obtained after revocation of the initial grant as it would amount to abuse of court process.

17. Julius Nyerere in his Replying Affidavit sworn on 30<sup>th</sup> July 2018 has deposed that the applicants have issues with their former counsels which in his view should not be an issue in this application.

18. The 2<sup>nd</sup> respondent has faulted the applicants for failing to attend court when the cause was scheduled for confirmation yet their advocate was aware as the date was taken by consent. He has further contended that the purchasers of parts of the estate should follow up their claims to whoever sold it to them since they are not claiming that they purchased the interests from the deceased in this cause. He has further contended that this application is brought merely to delay the finalization of this cause.

19. In their written submissions done through Ms Mutwiri Arimi & Co. Advocates the respondents have contended that the 1<sup>st</sup> to 4<sup>th</sup> applicants have been parties in this cause throughout and that the issues in the application have been raised, adjudicated upon a decision

made rendering the application in respect to them *res judicata*. They further contend that the 1<sup>st</sup> applicant being a co-administrator in the estate cannot be the one applying for revocation of grant. It further contended that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants are litigating through the 1<sup>st</sup> applicant and that on that account they should equally suffer the same fate.

20. The respondents have also submitted that the 5<sup>th</sup> to 8<sup>th</sup> applicants purchased their respective interests from 1<sup>st</sup> to 4<sup>th</sup> applicants and since they did not purchase the interests from the deceased himself the estate in this cause cannot be taken to have a liability which ought to have been disclosed. In so far as the respondents are concerned there is no privity of contract between the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> applicants and the deceased and cannot claim any privity with the respondents either. In that regard, the respondents contend that the 5<sup>th</sup> to 8<sup>th</sup> applicants' remedy lies in a civil claim against whoever sold them the assets comprising the estate. They have faulted the applicants particularly 1<sup>st</sup> to 4<sup>th</sup> applicants for bringing on board other applicants through the back door to reverse a consent order that revoked the earlier grant.

21. This court has considered this application and the grounds upon which it is made. I have also considered the response made and the points of law raised. This application has been brought on three grounds which mainly hinges on allegation of fraud, defective proceedings and concealment of material facts. While this court agrees that the cited grounds are among those listed under **Section 76 of Law of Succession Act** is warranting revocation of grant, the applicants have neither pointed out the existence of any ground in the manner in which the respondents moved and obtained the grant and its confirmation.

22. I have noted from the applicants' affidavits that they are all avoiding the reasons why they did not attend court on 11<sup>th</sup> December, 2017 when this cause came up for hearing of the protest filed by Fredrick Mutua the 1<sup>st</sup> applicant. The first applicant in that protest had opportunity and chance to air his grievances regarding the confirmation of grant as proposed by the respondents. He did however chose to stay away together with his erstwhile advocate and instead of explaining why they failed to turn up for hearing, he has roped in other parties who have instead challenged the confirmation of grant pointing that the initial grant in **Chuka Principal Magistrate's Succession Cause No. 112 of 2010** should not have been revoked by consent without their knowledge. The question posed however is why didn't they question or challenge the revocation of grant vide a consent order adopted in court on 17<sup>th</sup> August, 2016? It is true that the applicants were well aware of the revocation since they have sworn affidavits to that effect so for them to acquiesce to the revocation only to turn up after the confirmation of the confirmation of the fresh grant that was issued as a result of the revocation of the initial grant is to some degree a belated attempt to address the revocation of the initial grant issued on 20<sup>th</sup> December, 2010 and confirmed on 9<sup>th</sup> December, 2011 vide **Chuka Principal Magistrates Court Succession Cause No.112 of 2010**. It is true therefore to conclude that the 1<sup>st</sup> to 4<sup>th</sup> applicants by bringing this application are attempting to have a 2<sup>nd</sup> bite on the cherry of justice which is improper but the 1<sup>st</sup> to 4<sup>th</sup> applicants in this Summons for Revocation of Grant are sailing on the same boat with 5<sup>th</sup> to 8<sup>th</sup> applicants which means technically, throwing out the 1<sup>st</sup> to 4<sup>th</sup> applicants' cause in this application would amount to throwing the baby out with the bath water. This is because all the applicants are joined on the hip of this matter.

23. This court has brooded over the claims made by 5<sup>th</sup> to 8<sup>th</sup> applicants replete with copies of titles and the provisions of **Section 93 of Law of Succession Act**. So while the legal issues raised by the respondents are well founded like for example basis for setting aside a consent order, this court has taken time to weigh the scales of justice particularly in the spirit of **Article 159** of the constitution and noted that while the grounds raised by the applicants in this Summons for Revocation of Grant are wanting, the provisions of **Section 76** states that this court can move as its own motion to meet the ends of justice as provided under **Section 47 of Law of Succession Act** and **Rule 73** of the Probate and Administration Rules. This is because dismissing the application certainly would not bring the disputes between the parties herein to an end. Asking the parties to explore an appeal to the confirmation of grant made on 11<sup>th</sup> December, 2017 would only prolong and protract the disputes in this cause. When a party turns up in probate court claiming to have purchased or acquired interests in any part of the estate of the deceased person from an administrator exercising his powers under **Section 82 of Law of Succession Act**, and in addition exhibits title deeds or prove of attendant registration as the 5<sup>th</sup> to 8<sup>th</sup> applicants herein have done, it is hard and unlikely for a court to disregard their claims without substantive hearing and determination of the interests. That in my view is what underpins the letter and spirit of **Article 159** of the Constitution. The claims put forward by 5<sup>th</sup> to 8<sup>th</sup> applicants though technically wanting have substance which merits full hearing and determination.

There is no denying that the 5<sup>th</sup> to 8<sup>th</sup> applicants certainly were not in court on 11<sup>th</sup> December, 2017 and were unrepresented. They were also persons with interests in the estate. There is no evidence that they were made aware of the date of the confirmation or hearing of the protest which had raised their claims on the estate. To some extent therefore there was some inadvertence in confirmation of the grant before the question of liabilities or sales were determined. Inadvertence is one of the grounds upon which a grant can be revoked under **Section 76 of the Law of Succession Act**.

24. The long and short of this is that this court finds that substantial justice will be served if the grant issued and confirmed on 11<sup>th</sup> December, 2017 is revoked. I for the aforesaid reasons hereby revoke the grant. At the same time I appoint the respondents herein Alphaxard Ndege and Julius Nyerere Erastus as the administrators of the estate of the late Johana Mwereria Thugura (deceased). They are granted liberty to apply for confirmation before expiry of statutory period in view of the age of this cause. They are directed to notify all the applicants herein when taking any step in this cause. The 1<sup>st</sup> to 4<sup>th</sup> applicants are condemned to pay costs to the respondents as they are responsible for the delay and the hurdles in the finalization of this cause.

**Dated, signed and delivered at Chuka this 19<sup>th</sup> day of December, 2018.**

**R.K. LIMO**

**JUDGE**

**19/12/2018**

Ruling signed, dated and delivered in presence of Kimathi holding brief for Mutwiri Arimi for Respondent and Ithiga holding brief for Mugo for applicant.

**R.K. LIMO**

**JUDGE**

**19/12/2018**