



**REPUBLIC OF KENYA**

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

**SUCCESSION NO. 194 of 1999**

**IN THE MATTER OF THE ESTATE OF JAMES MWAURA KIBETI**

**DANIEL NJUGUNA KIBETI.....APPLICANT**

**VERSUS**

**JANE WAITHERERO MWAURA**

**WILSON NGUGI.....RESPONDENTS**

**RULING**

1. The deceased to whose Estate the proceedings herein relate is James Maura Kibeti (“the Deceased”), who the record shows died intestate on 12.10.99 at Shimo la Tewa, Mtwapa. On 2.12.99, the 1<sup>st</sup> Respondent, the widow of the deceased filed a petition for grant of letters of administration. She stated in her affidavit in support of the petition for grant that she was the sole survivor of the deceased. On 21.6.00, a caveat dated 15.5.00 was filed under Rule 15(2) of the Probate and Administration Rules by Samuel Kibeti Ngugi (Samuel), the father of the deceased. He also filed an Objection as well as a Petition by way of Cross Application. Samuel listed the following as survivors of the deceased:

Samuel Kibeti Ngugi	Father
Jane Waitherero Mwaura	Wife
Emily Wambui	Mother
Wilson Ngugi Kibeti	Brother
Benson Mungai Kibeti	Brother
Jane Mugure Kibeti	Sister
Wanjiru Kibeti	Sister
Daniel Njuguna Kibeti	Brother

2. On 1.10.03, a Grant of Letters of Administration was issued to both the 1<sup>st</sup> Respondent and Samuel. However, prior to the confirmation of the Grant, Samuel died in a road accident on 28.4.05. His wife Emily Wambui, the mother of the deceased died on 6.1.06. On 26.6.06, owing to the death of Samuel, the 2<sup>nd</sup> Respondent, the elder brother of the deceased filed summons for Revocation of Grant under

Section 76(e) of the Law of Succession Act and issuance of a fresh Grant to both Respondents. The fresh Grant was issued on 10.8.06 and confirmed on 9.3.07. In the schedule to the Certificate of Confirmation, the estate of the deceased was distributed as follows:

1<sup>st</sup> Respondent      House on Plot No. 742/III/MN, Mtwapa Subdivision No. 166(Orig. No. 539/III/MN

2<sup>nd</sup> Respondent      Plot No. 1573 and house thereon, Mikindani Plot Nos. Kiine/Gacharo/731, 1643 & 1645

3. On 20.11.08, the Applicant while unrepresented filed Summons for Revocation of Grant of even date on grounds that the Grant was obtained fraudulently by making false statements material facts to the cause. That the 2<sup>nd</sup> Respondent disposed of the deceased's Plot No. 1573, Mikindani and was in the process of disposing of other assets of the estate of the deceased without the consent or knowledge of the other beneficiaries. The Applicant further claimed that he had been left out of the administration of the estate by the 2<sup>nd</sup> Respondent. The Applicant further states that neither he nor other brother consented to the issuance of the grant to the 2<sup>nd</sup> Respondent contrary to what the 2<sup>nd</sup> Respondent stated in his affidavit.

4. By a Notice of Appointment of Advocates dated 4.6.09, the Applicant appointed counsel to represent him who filed another Summons for revocation of Grant on 26.5.14. The grounds were similar to the previous application. On 30.11.15, the Applicant filed a Notice to Act in person and prosecuted the Application without Representation.

5. The Application is opposed by the Respondents. The 1<sup>st</sup> Respondent filed grounds of Opposition dated 16.1.14. In her Replying Affidavit sworn on 7.7.14, the 1<sup>st</sup> Respondent averred that Samuel, his wife and children were not entitled to the estate of the deceased. However to avoid unnecessary litigation, she agreed to Samuel being a Co-Administrator with her. She contended that she had not done anything to the detriment of the Applicant and therefore orders sought should not be made against her. The 1<sup>st</sup> Respondent died on 22.6.16, before she testified in Court.

6. The 2<sup>nd</sup> Respondent testified that upon the demise of their father Samuel and their mother, all 3 brothers agreed that he should take their father's place as administrator herein. He stated that prior to Samuel's demise they had agreed that Samuel would take the house in Mikindani and Plots Nos. Kiine/Gacharo/731, 1643 & 1645. That after the 2<sup>nd</sup> Respondent became Administrator he took all the properties on behalf of the 3 brothers. He claims that he followed due process and did not obtain grant fraudulently.

7. On the properties, the 2<sup>nd</sup> Respondent stated that he sold the Mikindani property in 2007 for Kshs. 1,400,000/= . The proceeds were divided between the 3 brothers and children of their deceased sister Joyce Wanjiru. All were to get Kshs. 300,000/= each. The 2<sup>nd</sup> Respondent also got Kshs. 200,000/= as commission for identifying a buyer. That everybody except Daniel got their share. The Chief who oversaw the distribution of the above amount directed that Daniel's share be withheld till he accounts for items he had taken from their father Samuel's home in Muruka, Kandara. He stated that he was still holding Daniel's share.

8. The 2<sup>nd</sup> Respondent further stated that the family is yet to obtain a grant of representation for the estate of their father Samuel. Their father did not want his children to stay together. Benson Mungai took over plot 90, Muruka, Daniel was to take the land in Mpeketoni and the 2<sup>nd</sup> Respondent was to take Plot Numbers Kiine/Gacharo/731, 1643 & 1645. That this was their father's arrangement.

9. Monica Wambui Munyi, the mother of the 1<sup>st</sup> Respondent testified that her daughter and the deceased were married and had no children. That her daughter Samuel tussled over distribution of the estate. That they did not complete the administration before Samuel died. That after the death of Samuel, the 2<sup>nd</sup>

Respondent and the 1<sup>st</sup> Respondent divided the property amongst themselves.

10. In her testimony, the Interested Party stated that she expressed interest in purchasing a piece of land that was on sale in Kiine Sagana area. That is when she met the 2<sup>nd</sup> Respondent who was the registered owner of the 3 plots Kiine/Gacharo/731, 1643 & 1645. She purchased the properties together with Peter Bundi Gichangi, her husband and they paid Kshs. 5,500,000/= as the purchase price. The Interested Party stated that prior to the purchase she did a search of the title of the property at the Landa Registry, spoke to the area chief and confirmed that the land belonged to the 2<sup>nd</sup> Respondent. She dealt with the 2<sup>nd</sup> Respondent who had all the documents. She became aware of the family dispute with regard to the properties only after the purchase.

11. I have carefully considered the matter herein as well as the testimony of the witnesses. The law relating to revocation of grants is found in Section 76 of the Law of Succession Act which provides:

12. The Applicant's case is that the Grant was fraudulently obtained by the making of a false statement by the 2<sup>nd</sup> Respondent that all his brothers had given their consent to the making of the grant to him while in actual fact none of his brothers had done so. Indeed none of his sisters gave their consent either. There is also no evidence that they had notice or were otherwise aware that the 2<sup>nd</sup> Respondent had applied for revocation of the Grant in favour of their father and had further been appointed co-administrator of the estate herein together with the 1<sup>st</sup> Respondent. Rule 26 of the Probate and Administration Rules provides:

***“26. Grants of letters of administration***

***1. Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.***

***2. An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”***

13. I have carefully looked at the consent produced by the 2<sup>nd</sup> Respondent that was annexed to his affidavit as “WN1”. It is signed by the Applicant and Benson Mungai. However, the consent relates to the estate of Samuel Kibeti Ngugi, their father and not the estate herein. No evidence of consent by the Applicant or any sibling of the deceased has been produced. Further, no consent of the beneficiaries accompanied the summons for confirmation of grant. To this extent therefore, I do find that the Grant was not only obtained fraudulently by concealment of facts material to the cause and by making a false statement, it was also obtained through proceedings that were defective in substance.

14. Having so found, what will be the fate of the Interested Party. She testified that prior to purchasing plots Nos. Kiine/Gacharo/731, 1643 & 1645, she carried out due diligence and found that the property was indeed registered in the name of the 2<sup>nd</sup> Respondent who was the Vendor. She was not aware of the family dispute relating to the properties. Being an innocent buyer for value without notice, she is protected by Section 93 of the Act which provides:

***93. Validity of transfer not affected by revocation of representation***

***1. All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.***

15. The testimony of Monica Wambui Munyi is that the Respondents divided the estate amongst themselves. This is borne out by the Certificate of Confirmation of grant issued on 23.3.07 as shown above. The deceased was survived by his wife, the 1<sup>st</sup> Respondent but no children. The 1<sup>st</sup> Respondent

agreed to share the estate with Samuel, the deceased's father who however died before confirmation of the Grant, as did the deceased's mother. The 2<sup>nd</sup> Respondent who replaced Samuel took for himself 4 properties of the estate to the exclusion of all other beneficiaries of the estate of the deceased. The Act at section 39 (c) provides that brothers and sister of an intestate share in equal shares as follows:

**39. (i) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—**

***father; or if dead***

***mother; or if dead***

***brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none***

...

16. The 2<sup>nd</sup> Respondent testified that Samuel, their father had arranged who was to get what property. That their brother Benson Mungai was to get the property in Muruka, the Applicant was to get the land in Mpeketoni while he was to get the 3 properties herein Kiine/Gacharo/731, 1653 & 1645. No will by Samuel containing this alleged arrangement was produced in Court. Further the 3 properties Kiine/Gacharo/731, 1653 & 1645 did not belong to Samuel for him to distribute to the 2<sup>nd</sup> Respondent. Yet further, the entitlement of the children of Samuel to his estate has no bearing whatsoever in the distribution of the estate herein.

17. The Respondents proceeded to have the Grant confirmed and divided the property amongst themselves as though there were no other beneficiaries. Although he testified that he took all the properties on behalf of the 3 brothers, the 2<sup>nd</sup> Respondent sold all the properties that he got. He sold Plot No. 1573 Mikindani, for Kshs. 1,400,000/= which he shared with his 2 brothers and his deceased sister Joyce Wanjiru's children at Kshs. 300,000/= each. He paid himself a commission of Kshs. 200,000/= . The share of the Applicant was withheld until he returned some items he took from their father's home in Muruka, Kandara. This was ostensibly at the direction of the chief who oversaw the sharing of the moneys. A list of items was annexed to his affidavit. The Applicant did not counter this claim. However the cause herein relates to the estate of the parties' late brother and not of their late father. Consequently, the Applicant can only be asked to account for intermeddling with his father's estate in the succession cause relating to that estate and not in the cause herein. The withholding of the Applicants share in the proceeds of sale of Plot 1573, Mikindani therefore has no basis.

18. The 2<sup>nd</sup> Respondent sold the Plots Nos. Kiine/Gacharo/731, 1643 & 1645 to the Interested Party at Kshs. 5,500,000/=. It is noteworthy that this time round, the 2<sup>nd</sup> Respondent did not call the chief to oversee the sharing of the sale proceeds amongst the brothers. He kept it all for himself.

19. The 2<sup>nd</sup> Respondent as Co-Administrator was under a legal obligation to ensure that all his siblings benefitted equally from their late brother's estate. This he failed to do and chose instead to enrich himself by disinheriting them. The Court frowns upon the fraudulent conduct of the 2<sup>nd</sup> Respondent.

20. In the premises therefore, having evaluated the evidence and the law relevant in this matter, I find that no useful purpose will be served by revoking the Grant herein. A lot of water has gone under the bridge. Properties have been sold and the 1<sup>st</sup> Respondent has died. Then there is the innocent Interested Party who must be protected by this Court. I will therefore not disturb the Grant and the transactions done there under. However, in order to remedy the fraudulent acts by the 2<sup>nd</sup> Respondent and in exercise of the powers conferred upon this Court by Section 47 of the Law of Succession Act and Rule 73 of the Rules made thereunder I do make the following orders which are necessary for the ends of justice:

i. The 2<sup>nd</sup> Respondent, Wilson Ngugi shall pay to the Applicant, Daniel Njuguna Kibeti the sum of Kshs. 300,000/= being his share of the sale proceeds of Plot No. 1573 Mikindani within the next 30 days.

ii. The 2<sup>nd</sup> Respondent, Wilson Ngugi shall within 6 months pay to his siblings their respective shares of the sale proceeds of Plots Nos. Kiine/Gacharo/731, 1643 & 1645 as follows:

Benson Mungai Kibeti	Kshs. 1,100,000/=
Jane Mugure Kibeti	Kshs. 1,100,000/=
Estate of of Wanjiru Kibeti	Kshs. 1,100,000/=
Daniel Njuguna Kibeti	Kshs. 1,100,000/=

iii. Each party to bear own costs.

**DATED, SIGNED and DELIVERED in MOMBASA this 24<sup>th</sup> day of March 2017**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the Respondents**

..... **for the Interested Party**

..... **Court Assistant**