



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE 746 OF 2004**  
**IN THE MATTER OF THE ESTATE OF NJOROGE NJUGUNA (DECEASED)**  
**JOHN NJUGUNA MAINA.....APPLICANT**  
**VERSUS**  
**FREDRICK NJUGUNA WAMUGUNDA.....RESPONDENT**  
**JUDGMENT**

**PLEADINGS**

The deceased died on 21st May 1988.

The Respondent applied for grant of letters of administration intestate and was issued with grant on 15th June 1989 which was later confirmed on 16th March 1990 in **Succession Cause 317 of 1988 Senior Magistrates' Court - Muranga**.

In 2000, the Respondent filed suit in Resident Magistrates' Court -Kangema **Civil Case 3 of 2002** against the Applicant and sought declaration by the court that the defendant was/is not entitled to ownership of Land Parcel no Loc 12/Subloc/1/218. The Court proceedings and judgment of the Court attached to the pleadings filed by the Applicant and marked **JNM-7** depict evidence of the Applicant and Respondent herein in detail culminating with the dismissal of the declaration and the Trial Court's decision that "it is apparent that the defendant has an interest in the suit land since it belonged to his father".

The Applicant filed Summons for revocation of grant on 18th March 2004 and sought revocation of the grant issued to the Respondent in the estate of the deceased herein. He urged this Court to revoke the grant under **Section 76 of Law of Succession Act** because;

- a) **The grant was obtained fraudulently by making false statement;**
- b) **The grant was obtained by concealing from Court facts material to the case;**
- c) **The grant was obtained by deliberately making untrue allegations of facts essential in point of law;**
- d) **The grant was issued without knowledge and consent of the Applicant and other interested parties and/or rightful heirs of the deceased's family;**

**e) The Respondent is not a member of the deceased's family but a distant relative;**

His mother, Eunice Wangui Maina (now deceased) filed a Supplementary affidavit on 17th June 2004 and deposed that she was married under customary law to the deceased and they settled on the contested suit property Loc 12/Subloc/1/218 in Marimara, Kangema Division.

They had 4 children namely;

**a) John Njuguna Maina- Applicant**

**b) Wanjeri Maina-deceased**

**c) Irungu Maina**

**d) Wanjiru Maina -deceased**

She further deposed that after the deceased died, the Respondent demolished her house and sent her and her children including the Applicant who was 10 years old away. She lived with her parents and brought up her children there and they were left destitute. The Respondent later obtained title deed over the land.

Maina Kariuki maternal grandfather to the Applicant filed affidavit on 16th June 2009 and he deposed that the Applicant's mother, his daughter was married to the deceased under customary law in 1974. In 1975, the deceased came to his home and found him with elders and brought 5 goats, 1 ram and Ksh 8,000/- They lived together on the suit property Loc 12/Subloc/1/218 and they had 4 children. In 1988, he learnt of the deceased's death, he was part of the family that organized his funeral. After the deceased was buried, the Respondent demolished their home and sent them away. The Applicant, his siblings and mother came home to his grandfather and mother and lived there. Before the deceased's death, he called him and gave him the title deed for the suit property Loc 12/Subloc/1/218 to keep in safe custody as his wife and his daughter was not mentally stable and his children were young. he kept the title document and later gave it to the Applicant.

The Respondent filed Replying Affidavit on 15th June 2004 and he deposed that the Applicant was not the deceased's son. The deceased did not marry and he had no children at all. The deceased died on 21st May 1988 and not 1987 as the Applicant alleged as he did not attend or participate in the funeral of the deceased. That he was nephew to the deceased and he was his paternal Uncle. When he advanced in age the clan met and appointed him to take care of the deceased which he did from 1985 -1988 when he died. The clan met and agreed that the Respondent was to take over the deceased's land as shown by minutes of the meeting held by the Clan on 2nd June 1985 annexed and marked as **FMG**. The Applicant was/is a total stranger to the matter and family and has no claim to the deceased's estate.

There are identical affidavits filed on 12th January 2010 by John Njuguna Mukuha and Gerald Mukuha to the effect that the deceased was advanced in age and did not marry anyone under customary law let alone the Objector's mother. They attended the clan meeting in 1985 that sanctioned the Respondent to take care of the deceased. Therefore, the deceased did not marry anyone, he had no child or children, he did not live with the Objector and he did not attend his funeral.

**HEARING**

On 9th October 2017, the Applicant PW1 testified that the deceased Maina Njuguna alias Njoroge Njuguna is his father and his mother Eunice Wangui Maina (deceased) and they are 4 children of the marriage. They lived together with the deceased on the suit property Loc 12/Subloc/1/218 until the deceased died.

After the deceased's funeral, the Respondent sent them away and demolished their home. After that his mother, who suffered mental illness roamed all over markets and they depended on relatives and good Samaritans to survive. He produced the burial permit of his late mother awaiting burial after the

determination of this case.

The Respondent filed **Succession Cause 317 of 1988** and filed petition for grant of letters of administration and indicated he was the deceased's son a fact that is not true and he knows it. He attached letter from the Chief annexed and marked **JNM- 6** that indicated that the deceased married woman who then left but did not leave any child or children at home and that the land should be inherited by the Respondent Fredrick Njuguna son of the deceased's brother in law. The letter refers to clan/elders meeting of 1988 that agreed that the deceased's land should be inherited by the Respondent. He obtained the grant copy marked **JNM-3** and confirmed grant copy marked **JNM-4**. In the affidavit in Support of confirmation of grant annexed and marked **JNM- 5** the Respondent claimed to be the sole survivor and dependent of the deceased. The Respondent cultivates on the said land but lives on his own land inherited from his father. The Respondent filed a declaratory suit against him annexed as proceedings and judgment of **Civil Suit 3 of 2002** Kangema Magistrates' Court produced as **Exhibit 3** which was dismissed and the Court confirmed he had an interest in the deceased's estate hence the filing of the present application.

The Green card annexed as **Exhibit 2** confirmed that the Respondent took ownership of the suit property as owner through transmission and was issued with title deed on 7th May 1990 after he obtained the grant and certificate of confirmed grant.

As of now the Applicant's mother died and her body is in the mortuary awaiting burial. The Applicant sought the expeditious hearing and determination of these proceedings to have the Court allow him and grant orders for his late mother to be buried on the suit property.

PW2 Arthunus Ngima Kamamo, a neighbour testified that he knew the deceased, the Applicant's mother and the Respondent and his father.

He confirmed that he was present when the deceased went to the Applicant's mother's home and paid dowry. He witnessed the deceased marry the Applicant's mother, they lived on the suit property Loc 12/Subloc/1/218 and had 4 children; the Applicant, his brother who was taken to the Children home, the daughters died and one was buried on the suit property and the other died in hospital and was buried at the hospital grave. When the deceased died he was there and participated in his burial on the suit property. Thereafter, the Respondent sent the Applicant, his mother and siblings away and demolished their home.

When the Applicant was 18 years old, he came to claim from the Respondent their land and he chased him away and he filed a case in Kangema Court. PW2 went and testified in the said Court. When they attended Chief's meetings and D.Os meetings it was confirmed that the suit property belonged to the Applicant and his family.

DW1 Fredrick Njuguna Wamugunda deposed he knew the deceased Njoroge Njuguna who died on 21st May, 1988 and he was buried on his land 12/Subloc/1/218. The deceased was his paternal Uncle as he and the Respondent's father were step brothers.

On 2nd June 1985, the deceased's brothers called a meeting and were concerned of the deceased's advanced age, ill health and he lacked care. The family clan agreed that the Respondent was to take care of the deceased and he did take care of the deceased until his death in 1988. The minutes of the meeting were produced as **Defense Exhibit -1**. The deceased died and they buried him on the land. Thereafter, the Respondent was accompanied by family members to the Chief's office and they consented and approved that the deceased's land was to be inherited by the Respondent. The Chief wrote the letter produced as **Defense Exhibit-2** and he filed **Succession Cause 317 of 1988** and obtained grant of letters of administration **Defense Exhibit -4** and confirmed grant **Defense Exhibit-5**. The Respondent did not have the original title to the deceased's land and he reported to Kangema Police Station that it was lost and the same was gazetted in Kenya Gazette produced as **Defense Exhibit-7** and thereafter it was processed and he obtained a new title. All this time no-one claimed any part of the deceased's estate until 2001 that he was summoned to the Assistant Chief by a letter and found the Applicant PW1 and neighbor PW2 and

they claimed the deceased's land and produced the original title.

The matter was escalated to the D.O and he then filed Civil Suit 3 of 2002 in Kangema Court and later the present matter in the High Court and the Applicant filed the present application for revocation of grant of letters of administration over the deceased's estate.

The Respondent stated that the deceased was born in 1900 in 1974 he was 74 years old and at the time of his death he was 88 years old. The deceased did not marry the Applicant's mother and the Applicant is not is child and he was responsible in taking care of the deceased upto his death and the clan allowed him to inherit the land in question.

DW2 James Thuo Maina, former Assistant Chief of Watuha Sub location near Gakira Sub location in 1988 and he wrote the Chief's letter dated 9th November 1988 **Exhibit -2**. He did not know the deceased nor the parties but he received information from Senior Chief that some elders from Gakira Sub location were coming to see him and he was to investigate the matter of the deceased. He met 6 elders and wrote their names in the said letter. They produced the deceased's death certificate

and they agreed that the land in question would be inherited by the Respondent. They told him that the deceased married many wives and he ran away, he did not meet any of the wives. He recorded what they said and he had no objection.

DW3 Vincent Mwangi Kibuga and DW4 Peter Njuguna Kibuga brothers of the Respondent testified that the deceased their Uncle worked in settlers homes as cook and in 1972 he retired and came to live on his land suit property 12/Subloc/1/218. While there, DW3 was allowed to put up a cowshed from 1975-1980 and therefore he visited the deceased quite often and his wife brought him food. During that period he did not see any wife of the deceased or child. When the deceased grew old, he called his brothers and held a meeting where the Respondent was appointed to take care of the deceased. He did so from 1985-1988 when the deceased died and thereafter the land was transferred to him.

Eunice Wangui the Applicant's mother was not married to the deceased and they did not have a child. The Applicant is not child to the deceased, he was old and could not have children at the time and no-one stayed at the home.

## **DETERMINATION**

After considering pleadings, oral evidence and written submissions of both parties; the issues for analysis and determination are as follows;

- a) **Is the Applicant John Njuguna Maina child of the deceased?**
- b) **Was his mother Eunice Wangui married to the deceased and/or did they have the Applicant as their child?**
- c) **Was the Respondent Fredrick Njuguna Wamugunda bequeathed the deceased's land suit property 12/Subloc/1/218 legally, regularly and validly?**
- d) **Should the grant issued on 15th June 1989 and confirmed on 16th March 1999 be revoked or upheld?**

The Law of Succession Act provides under Section 39 that where the deceased has left no spouse(s) or children the estate is bequeathed to parents, siblings and relatives who are nearest degree of consanguinity.

In the instant case the evidence on record is as follows;

On the one hand, the Applicant's testimony is that he is son to the deceased as was told by his late mother

Eunice Wangui and had other siblings. He stated they lived with the deceased on the suit property until his death. They were evicted and lived with maternal grandparents. This version is confirmed by the affidavit of his grandfather filed in Court, the evidence of their neighbour PW2 who confirmed customary marriage of the Applicant's mother to the deceased. There is also significantly the production of the original title to the suit property annexed as Plaintiff Exhibit -1 issued on 4th October 1973 in the name of Njoroge Njuguna (deceased) and copy of the Greencard annexed that shows that the suit property was transferred to the Respondent in 1990 pursuant to certificate of confirmation of grant.

On the other hand the Respondent with the evidence of Chief and brothers contended that the deceased had no family and the Respondent took care of the deceased right up to his death and the clan /elders decided to give him the suit property.

The issues of Applicant's mother being married to the deceased as per PW2's evidence and the applicant's grandfather's affidavit that the deceased came to his home in 1975 and brought dowry in form of the ram goats and cash have not been controverted. The fact that the Applicant produced the original title document to the suit property is sufficient evidence that the deceased gave the title deed to the Applicant's grandfather for safe keeping as his late mother suffered mental illness.

The fact of denial without any other evidence is not sufficient. The deceased retired and relocated back home in 1972 and married the Applicant's mother. It is alleged that the deceased could not sire a child due to old age. This was not scientifically proven to be true. Secondly, the definition of child under **Section 3(5) of the Law of Succession Act** is wide enough to include the Applicant as this Court finds no other plausible explanation why the deceased left the original title deed of the suit property to the Applicant's grandfather.

In the absence of any other cogent evidence to controvert the evidence of the Applicant, PW2 and what the Applicant's grandfather deposed in his affidavit, this Court finds the Applicant's mother Eunice Wangui was married to the deceased under Kikuyu customary law and the Applicant is son of the deceased.

With regard to transmission and transfer of the suit property to the Respondent; the evidence on record is as follows;

a) On 2nd June 1985 the clan and family of the deceased namely;

- a) **Njoroge Njuguna**
- b) **Kahiu Njuguna**
- c) **Macharia Njuguna**
- d) **Samson Kibuga Githongo**
- e) **James Mwangi Mukuha**
- f) **Njuguna Wamugunda**
- g) **Kibuga Njuguna**
- h) **John Njuguna Mukuha**

They agreed that Njuguna Wamugunda (Respondent) would take care of the deceased and thereafter, he would inherit the suit property that belonged to him. This is as per Agreement **Defense Exhibit-1**

On the other hand on 9th November 1988, the Sub Chief Gakira Location wrote a letter and confirmed from the Respondent and 6 elders/family members/clan namely;

- a) **Macaria Njuguna**
- b) **Kahiu Njuguna**
- c) **Mwangi Mukuha**
- d) **Gerald Mukuha**
- e) **Kibuga Njuguna**
- f) **Kibuga Gathongo**

That they agreed that the Respondent Frederick Njuguna to be the heir of the mentioned piece of land 12/Subloc/1/218 from the deceased's estate.

This Court finds that there are glaring anomalies to this process; if the elders in 1985 agreed that the Respondent was to take care of the deceased and thereafter take possession of his land, why would there be another group of elders attending a meeting after the deceased's death to again confer beneficial interest to the Respondent? The 1st and 2nd lists of elders are not identical; the elders who met in 1985 except for 3 of them the rest are different persons. This Court finds it strange that elders agreed in 1985 on how to distribute the deceased's land when he was alive and well and the deceased did not pronounce himself on this matter or sign anywhere, the deceased did not write a Will to this effect so how would elders bequeath the deceased's land in his presence without his authority or approval? How come in the said Agreement produced in Court the elders did not sign anywhere what they agreed? Why was the author of the Agreement not called to testify on the document? All these questions vitiate the validity of this Agreement as it is contrary to legal process to transmit beneficial interest in a deceased's estate; that is by Will (oral or written) or by intestacy process. This agreement does not fit either of these legal processes. The elders, clan or family members had no land to bequeath anyone so they could only suggest and the deceased who was alive could and should have stated what he wanted to do with his land. Strangely, the deceased had released the title deed to the suit property to the Applicant's grandfather, in the absence of his consent to transfer to the Respondent his land, he could not have done so and at the same time give the title to someone else.

This court found the following evidence contradictory; the Chief's letter of 9th November 1988 states that the deceased married women who left him and they left without any child, yet in his testimony, the Respondent was categorical that the deceased never married and did not have children . The Court finds this contradiction in terms.

The Respondent in the documents lodged with the petition in **Succession Cause 317 of 1988** stated that he was son to the deceased a fact he knew not to be true and that he was sole survivor of the deceased another fact he knew was not true. He is nephew to the deceased and it is not disputed that he looked after the deceased during his lifetime. That is sufficient to warrant the Respondent to claim and pursue a share of the demand of his estate.

From the above analysis, this Court is satisfied coupled with the declaratory suit **Civil Suit 3 of 2002** of Kangema Court that the applicant is son of the deceased who has relentlessly pursued his claim against all odds for 13 years and now shall bury his late mother on the said land.

### **DISPOSITION**

- 1. The grant issued on 15th June 1989 and confirmed on 16th March 1999 to the Respondent Fredrick Njuguna Wamugunda is revoked under Section 76 of Law of Succession Act as the process was defective and there was concealment of material facts to the Trial Court.**
- 2. A new /fresh grant shall be issued to the Applicant John Njuguna Maina son of the deceased and Frederick Njuguna Wamugunda nephew of the deceased jointly.**

**3. The suit property 12/Subloc/1/218 shall be divided equally into 2 portions each for the son and nephew of the deceased.**

**4. The Applicant shall bury his late mother on the suit property 12/Subloc/1/218 on his proposed share and the process shall be supervised by Area Chief Gakiha Division and OCS Kangema.**

**5. The Registrar of Lands Muranga Registry shall revoke title of the suit property 12/Subloc/1/218 and revert it back to the deceased's name pending confirmation of grant.**

**6. The Administrators shall file the summons for confirmation within 120 days from today.**

**7. If all or both are not in agreement each shall file and/or file protest for the Court to determine.**

**8. Each party to bear own costs.**

**DELIVERED SIGNED & DATED IN OPEN COURT IN NAIROBI ON 27<sup>TH</sup> NOVEMBER, 2017.**

**M.W.MUIGAI**

**JUDGE**