



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 3115 OF 2004**

**IN THE MATTER OF THE ESTATE OF DAVID NGANGA MUIRU (DECEASED)**

**RULING**

1. The deceased died on 2<sup>nd</sup> April 1989.
2. Representation to his estate was sought in a petition lodged in Kiambu SPM CSC No. 24 of 2003, by Wambari Muiru in his purported capacity as brother of the deceased. The petitioner described himself as the sole survivor of the deceased. He expressed the deceased to have died possessed of a property known as Gatamaiyu/Gachoire/770. The grant was made on 24<sup>th</sup> March 2003 to the petitioner. It was confirmed on 27<sup>th</sup> August 2003, devolving the estate wholly upon the administrator, Wambari Muiru. A certificate of confirmation of grant in those terms was duly issued on 29<sup>th</sup> August 2003.
3. The summons I am called upon to determine is that dated 21<sup>st</sup> October 2004. It seeks revocation of the grant made in Kiambu SPM CSC No. 24 of 2003, on the grounds that it was obtained in a process that was defective and tainted by fraud and misrepresentation.
4. The application is brought at the instance of John Thumbi Muiru. He claims to be a brother of the deceased and of the administrator. He states that the subject property was registered in the joint names of the deceased, but it was a subdivision of a larger family land, Gatamaiyu/Gachoire/101A. His assertion is that following the deceased's demise it had been agreed by the family that he would take the deceased's share of Gatamaiyu/Gachoire/770. He alleges that he took possession, following that agreement, and placed his son on the land, and commenced developments on it.
5. He asserts that Kiambu SPM CSC No. 24 of 2003 was initiated secretly, without his knowledge and without the consent of the family. He states that his name was omitted from the list of the deceased's survivors. His consent was never sought and he never consented to the cause and the distribution. He asserts that he came learn of the cause when the administrator began to harass him.
6. The administrator has replied to the application. There is on record an affidavit sworn by him on 14<sup>th</sup> January 2005. The gist of it is that the applicant has no claim to the subject property for his share had been utilised to pay dowry to his in laws. Whatever remained after the sale was allegedly not available for the applicant, he avers. He asserts that he was not obliged to notify the applicant of the filing of the cause.
7. The applicant swore an affidavit on 4<sup>th</sup> February 2005 to respond to the allegations made in the reply by the administrator. He asserts that he was entitled to be notified of the proceedings as a brother and dependant of the deceased. He denies all the contents of the rest of the replying affidavit.
8. The administrator swore a further affidavit on 2<sup>nd</sup> November 2009, in which he seeks to explain the

background to the lands in question, and how their deceased father had dealt with them in a will. It would appear that the said affidavit was not responded to by the applicant; although, in my view, it does not deal with the germane issues raised in the revocation application.

9. Various directions were given on the disposal; of the application. Initially the application was to be determined on the basis of *viva voce* evidence, finally it was agreed that the application be dealt with through written submissions. Both sides did file submissions. The applicant asserts that as a brother of the deceased he ought to have been notified of the initiation of the proceedings, and that his none involvement was fatal to the grant. The administrator on his part argues that the applicant was not entitled to the property in question and therefore there was no reason to involve him in the proceedings.

10. The determination of this application will hinge largely on whether the provisions of the Law of Succession Act, Cap 160, Laws of Kenya, touching on the process of applying for grant had been complied with fully. The relevant provisions are section 51 of the Act, and rule 7 of the Probate and Administration Rules. The two provisions indicate, in mandatory terms, the persons who ought to be listed in the petition as survivors. These include the surviving spouses, children, parents and brothers and sisters, of the deceased.

11. From the record before me, it is not clear whether the deceased had married and whether he had children. The record is silent on that score. However, it is clear that he had been survived by the applicant and possibly other siblings. That being the case, a petition with respect to his estate ought to have made a full disclose of the siblings who survived him. That was not done, the material presented tended to suggest that the administrator was the only sibling that the deceased had.

12. The administrator has expended some effort in demonstrating that the applicant was not entitled to the property in question. His position is that he was the sole person entitled to it. It is common ground that the property was registered on 29<sup>th</sup> April 1981 in the joint names of the administrator and the deceased. If it was a joint tenancy then it could be argued that the principle of *jus accrescendi* applied. But if that was the case then there was no need to initiate a succession cause.

13. Whatever the case, once the administrator chose to file a succession cause, he was bound to comply with section 51 and Rule 7, whether the applicant was entitled to the property or not. The fact that he did not disclose the applicant as a survivor of the deceased, and did not involve him in it meant that there was no compliance with the relevant provisions. That then would mean that the process of obtaining the grant was defective, and tainted by fraud and misrepresentation, and the grant in question liable to revocation.

14. The administrator tried his best to address the issue of who was entitled to the property. I do not think that that is an issue that I should deal with at this stage. I will leave it to be dealt with at the appropriate stage by the trial court.

15. Section 76 grants the court discretion on the matter of revocation of grants. The hands of the court are not bound once it finds that a case has been made out to revoke the grant. It may revoke the grant or make alternative orders.

16. In the end I will determine the application dated 21<sup>st</sup> October 2004 in the following terms:-

- a. **That the grant made in Kiambu SPMCSC No. 24 of 2003 on 24<sup>th</sup> March 2003 is hereby revoked;**
- b. **That as a consequence of (a) above, the orders made on 27<sup>th</sup> August 2003, confirming the grant are hereby vacated, and the certificate of confirmation of grant extracted from the said orders and dated 29<sup>th</sup> August 2003 is hereby accordingly cancelled;**
- c. **That any or all the transactions carried out on the basis of the orders of 23<sup>rd</sup> August 2003 and the certificate of confirmation of grant dated 29<sup>th</sup> August 2003 are hereby annulled;**

- d. That Wambari Muiru and John Thumbi Muiru are hereby appointed administrators of the estate of the deceased;
- e. That the court file in Kiambu SPM CSC No. 24 of 2003 shall be returned to the Kiambu Chief Magistrates Court forthwith, with directions that a grant of letters of administration intestate shall issue out of Kiambu SPM CSC No. 24 of 2003 to Wambari Muiru and John Thumbi Muiru in terms of (d) above;
- f. That the new administrators shall apply for confirmation of the grant to be made to them out of Kiambu SPM CSC No. 24 of 2003 where the issue as to who is entitled to the property in question shall be addressed; and
- g. That the applicant shall have costs of the application.

**DATED, SIGNED and DELIVERED at NAIROBI this 22<sup>ND</sup> DAY OF JULY, 2016.**

**W. MUSYOKA**

**JUDGE**