



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 3771 OF 2004**  
**IN THE MATTER OF THE ESTATE OF ISAAC NGORU MUNYUA (DECEASED)**

**JUDGMENT**

1. The deceased herein died on 23<sup>rd</sup> January 1991.
2. Representation to his estate was sought in Gatundu RMCSC No. 18 of 2001 by Joseph Kamau Ikinya and Pauline Mwhaki Ngoru, in their alleged capacities as purchaser of estate property and daughter of the deceased, respectively. The affidavit sworn in support of the petition stated that the deceased had been survived by a widow, ten children and a purchaser. The widow was named as Hannah Wangui Ngoru. The children were Francis Munyua Ngoru, Peter Gacheru Ngoru, Joseph Ngwiri Ngoru, James Ngugi Ngoru, Margaret Muthithi Ngoru, Pauline Mwhaki Ngoru, Virginia Wanjiku Ngoru, Teresia Wambui Ngoru, Lucy Wanjiru Ngoru and Susan Wairimu Ngoru. The purchaser was named as Joseph Kamau Ikinya. The deceased was said to have died possessed of properties described as Ngenda/Kimunyu/774, Ngenda/Mutomo/T. 149, Plot No. 35 Mutomo and a plot with the County Council of Thika.
3. A grant of letters of administration intestate was issued to the petitioners on 16<sup>th</sup> November 2001. The said grant is yet to be confirmed, but there is a pending application for confirmation of grant dated 3<sup>rd</sup> February 2003.
4. On 16<sup>th</sup> December 2004, a summons, dated 7<sup>th</sup> December 2004, for revocation of the grant made in Gatundu RMCSC No. 18 of 2001 was filed herein by some of the survivors of the deceased, that is to say Hannah Wangui Ngoru, Francis Munyua Ngoru, Peter Gacheru Ngoru and Joseph Ngwiri Ngoru. The affidavit in support of the application was sworn by the widow, Hannah Wangui Ngoru, on 7<sup>th</sup> December 2004. She points out that Joseph Kamau Ikinya had been erroneously listed as a survivor of the deceased, yet the latter never survived the deceased as he was not related to him by consanguinity. She also avers that it was not true that the said person had bought property from the deceased as claimed. She complains that she had not consented to her daughter, Pauline Mwhaki Ngoru, being granted representation, and asserts that it was wrongful for her to be granted the same for she had a lesser right thereto. The other applicants swore an affidavit on the same date associating themselves with the averments made in their mother's affidavit.
5. The response to the application is by the purported purchaser, Joseph Kamau Ikinya. He swore an affidavit on 6<sup>th</sup> January 2006. He denies having obtained the grant fraudulently. He asserts that he bought two (2) acres out of Ngenda/Kimunyu/724 from Peter Gacheru Ngoru, a son of the deceased. He claims that he bought the portion that that son was entitled to from the estate. He has annexed to the affidavit copies of two sale agreements entered into on 7<sup>th</sup> September 2001 and 18<sup>th</sup> October 2002 between him and the said Peter Gacheru Ngoru over the sale of a property described as Ngenda/Kimunyu/724.

6. Directions were given that the application dated 7<sup>th</sup> December 2004 would be disposed of by way of oral evidence.

7. The oral hearing commenced on 9<sup>th</sup> April 2014. The first to take the stand was the second administrator, Pauline Mwiwaki Ngoru. She said the deceased was her father. She denied applying for the grant of letters of administration intestate in Gatundu RMCSC No. 18 of 2001. She alleged that she only discovered that a grant had been made in her name when the power company came over seeking a wayleave over Ngenda/Kimunya/724, and the first administrator began to lay claim to the compensation accruing therefrom. She stated that the first administrator was claiming to have bought land from the late Peter Gacheru Ngoru, yet the portion he was claiming was supposed to be inherited by Isaac Mburu. She asserted that she never applied for representation together with the first administrator, adding that she never signed any papers with respect to the matter. She said she could not possibly have applied for she had elder siblings who had priority over her. She testified further that her father had not sold any land to the first administrator, and said that the late Peter Gacheru Ngoru had no capacity to sell the land, and in any event he died between 2007 and 2008.

8. The first administrator testified on 20<sup>th</sup> July 2015. He stated that he had been approached by the late Peter Gacheru Ngoru in 2000, who offered to sell to him a piece of land. He bought two acres for Kshs. 500, 000.00. He later discovered that the land was in the name of the deceased father of the late Peter Gacheru Ngoru, whereupon he decided to apply for representation to the estate of the deceased so as to secure his interest in the land. He asserted that all the members of the family of the deceased were aware that he was applying for representation to the estate of the deceased. He stated that he followed the right process in obtaining representation to the estate. He said that Peter Gacheru Ngoru did not tell him he was not the administrator of the estate. He said too that he was not aware that a person without a grant had no capacity to transact on behalf of the estate.

9. At the conclusion of the oral hearing, the parties were directed to file written submissions, which they did. I have read through the said written submissions, and noted the arguments advanced in them by the parties.

10. The only issue for me to determine in this matter is whether the first administrator was entitled to apply for representation in the estate of the deceased herein, Isaac Ngoru Munyua.

11. The deceased herein died intestate. Section 66 of the Law of Succession Act, Cap 160, Laws of Kenya, sets out the persons who are entitled to apply for representation in intestacy. The said persons are listed in the order of priority. For avoidance of doubt, the said provision states as follows:-

*‘When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-*

*(a) surviving spouse or spouses, with or without association of other beneficiaries;*

*(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*

*(c) the Public Trustee; and*

*(d) creditors.’*

12. Going by that provision, the surviving spouse of the deceased should be given the first priority or preference with respect to appointment. The next in that order of priority are the other persons entitled on intestacy, according to their respective beneficial interests as provided in Part V of the Act. Part V of the Act carries the provisions on distribution of the estate of an intestate. The dispositive provisions are sections 35, 36, 38, 39 and 40. According to these provisions the person with the highest stake in the

estate is the surviving spouse, followed by the children of the deceased, followed by the parents of the deceased, followed by the siblings of the deceased, the half-siblings come next, followed by other relatives to the nearest degree of consanguinity and finally the state.

13. It is common ground that the first administrator, Joseph Kamau Ikinya, was not related to the deceased in any way, neither by way of consanguinity nor affinity. It is Part V of the Act which defines survivorship, that is persons who qualify to be survivors of the deceased for the purpose of intestate succession. The first administrator does not fall in any category of the survivors of the deceased. He could not possibly therefore be said to have had priority over the actual survivors of the deceased when it came to appointment as administrator of the estate of the deceased.

14. He claims to be beneficially interested in the estate of the deceased. It is in that respect that he claims that he had capacity to vie for appointment as administrator. His purported interest is that of a purchaser of part of the estate property.

15. A purchaser of estate property from the deceased prior to his death would qualify to be placed in the same category as a creditor so long as the said property had not been transferred from the deceased's name to the purchaser's name and the matter outstanding was the transfer. In the instant case, the first administrator is categorical that he did not acquire an interest in the property from the deceased himself. He asserts that he bought a portion of the estate property from a son of the deceased called Peter Gacheru Ngoru. The said transaction took place after the deceased's death at a time when the property was still in the name of the deceased. To the extent that the alleged sale was not with the deceased, the first administrator could not possibly be a creditor of the deceased, and by extension that of the estate. So he could not qualify to apply for representation to the deceased's estate as a creditor.

16. A purchase done after the deceased's death does not make the purchaser a creditor for the seller would have no authority to transact on behalf of the estate. That would particularly be the case where representation has not been obtained, for it is the appointment of administrators that grants them authority to transact on behalf of the estate. The administrators are personal representatives of the deceased and the estate of the deceased vests in them by virtue of section 79 of the Law of Succession Act. As personal representatives they represent the deceased and have authority to do such things as the deceased himself would have done were he alive.

17. The first administrator's case is that he entered into an agreement of sale with Peter Gacheru Ngoru after the death of the latter's father. He states that he was not aware that the property belonged to a dead person, and he only discovered later that that was the case. Peter Gacheru Ngoru had no authority to sell his father's property at the time that he purported to sell it. He had no land to sell for he had no proprietary rights to pass to the first administrator. Consequently, he could not enter into any binding contract with him over property that did not belong to him. The conclusion to draw is that the sale did not confer on the first administrator any rights whatsoever over the subject land. He cannot therefore purport to be a creditor of the estate of the deceased for no rights accrued to him at all.

18. Section 45 of the Law of Succession Act has criminalized transactions such as the one that the first administrator entered into with Peter Gacheru Ngoru. It amounted to what is called intermeddling. The relevant portion of that provision states as follows:-

*'(1). Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*

*(2). any person who contravenes the provisions of this section shall –*

*(a) be guilty of an offence and liable to a fine ... or to a term of imprisonment ... or to both such fine and imprisonment; and*

*(b) ...'*

19. The alleged transaction between the first administrator and Peter Gacheru Ngoru amounted to disposing of estate property without authority. It therefore fell afoul of section 45 of the Act. The two, no doubt, intermeddled with the estate of the deceased. What they did exposed them to prosecution under section 45(2) (a) of the Act.

20. The first administrator has argued that Peter Gacheru Ngoru was a son of the deceased, and was therefore entitled to a share in the estate, which share the son could dispose of before administration. That argument has no force of law in the face of the provisions of section 45 and 79 of the Act. Under section 45 of the Act, dealing with estate property without authority is prohibited. That authority emanates from legal agency or provision. One source of such authority is a grant of representation. Acting without such authority exposes one to criminal liability and sanction under section 45(2) (a) of the Act as aforesaid. The first administrator has not demonstrated that Peter Gacheru Ngoru had the relevant authority to dispose of estate property. Under section 79 the property vests only on the personal representative. It is only he who has authority to deal with it as the owner would have. Any other person has no capacity to deal with it, whether they are surviving spouses or children of the deceased.

21. It should be pointed out that the non-administrator survivors of the deceased have no legal right to estate property that they can dispose of by way of sale before the grant of representation is confirmed. It is only after confirmation of the grant that a beneficiary can have an interest vested in them, and it only after that that they would have a power of sale over the property vested in them. Peter Gacheru Ngoru's share in the estate of the deceased had not been vested in him at the time he purported to dispose of it to the first administrator, and therefore there was nothing that he could pass by way of proprietary right to the first administrator.

22. The conclusion to draw from the above is that the first administrator was not entitled to apply for representation to the estate of the deceased, for he had not acquired any interest in the same to warrant his being appointed as administrator thereof.

23. Even if he were a creditor of the estate, and therefore entitled to apply for representation, he would still have been bound to comply with the law governing applications for grants of representation.

24. The procedure for applying for grants is set out in Rule 7 of the Probate and Administration Rules. Rule 7(7) thereof states as follows –

*'(7) Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –*

*(a) renounced his right generally to apply for a grant; or*

*(b) consented in writing to the making of the grant to the applicant; or*

*(c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.'*

25. Rule 7(7) requires anyone who is petitioning for representation in intestacy, and who does not have a prior right to administration, to get the persons with prior right to renounce their entitlement to apply, or to consent in writing to the making of the grant to the person with a lesser right, or to cause citations to be issued to and served on the person with prior right to either apply or renounce their right to apply.

26. The first administrator is a person who does not have prior right to the administration of the estate of the deceased, for he was neither a surviving spouse of the deceased nor a surviving child of the deceased. This is a case where the deceased was survived by a spouse and several children. If the first administrator were a genuine creditor he would have been bound to comply with Rule 7(7). I have carefully scrutinised

the record in Gatundu RMCSC No. 18 of 2001 to satisfy myself as to compliance with the said Rule. I have not seen proof of any compliance. There is no deed of renunciation signed by the survivors with prior right, nor consents signed by them. There is no evidence of citations ever having been issued and served on them requiring them to either apply for representation or to renounce their right to so apply.

27. The application before me is for revocation of a grant of representation. The law that governs that is section 76 of the Act. The matter before me turns on appointment of administrators. A grant is liable to revocation, if it was obtained in a process that was defective, or attended by fraudulent and misrepresentation.

28. It is common ground herein that the first administrator is not a survivor of the deceased, for he was neither the deceased's spouse nor child. In his papers filed in Gatundu RMCSC No. 18 of 2001, he purported to be a survivor. He was not a creditor either. He had therefore no capacity at all to petition for representation. The proceedings to obtain the grant were defective to that extent. As an outsider to the family of the deceased, he needed to have complied with Rule 7(7). He did not. That was another defect. He also misled the court into believing that he was a survivor of the deceased. That was fraudulent conduct. The second administrator has denounced him, and stated on oath that she never applied for administration at all, and stated that the signature on the petition and the other papers was not hers. That allegation was not controverted. Her signature was not subjected to testing by a handwriting expert. Fraud reeked all through the whole process. I am clear in my mind that the process of obtaining the grant herein was not above board.

29. The orders that I am moved to make in the end are –

**(a) That the application dated 7<sup>th</sup> December 2004 is hereby allowed with the result that the grant of letters of administration intestate made on 16<sup>th</sup> November 2001 in Gatundu RMCSC No. 18 of 2001 to Joseph Kamau Ikinya and Pauline Mwhiki Ngoru is hereby revoked;**

**(b) That the court file in Gatundu RMCSC No. 18 of 2001 shall be returned to the registry at the Gatundu law courts with directions that fresh administrators of the estate of the deceased shall be appointed in an exercise that shall exclude Joseph Kamau Ikinya;**

**(c) That the matter shall thereafter be handled in Gatundu RMCSC No. 18 of 2001 and disposed of in the usual course of business;**

**(d) That the cause in respect of HCSC No. 3771 of 2004 is now exhausted, consequently the court file in respect thereof shall be closed; and**

**(e) That the applicants shall have the costs of the application, to be borne by Joseph Kamau Ikinya.**

**DATED, SIGNED and DELIVERED at NAIROBI this 9<sup>TH</sup> DAY OF DECEMBER, 2016.**

**W. MUSYOKA**

**JUDGE**