



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2279 OF 2011

**IN THE MATTER OF THE ESTATE OF THURA NGONGU alias THURA NGONDU
(DECEASED)**

TABITHA MWIHAKI NJOROGEAPPLICANT

VERSUS

JOSEPH KAMAU NJOROGE.....1ST RESPONDENT

JOHN NADUNGU MACHARIA.....2ND RESPONDENT

JUDGMENT

1. The deceased THURA NGONGU alias THURA NGONDU died intestate on 12th August 1981 and left land parcel LARI/MAGINA/217 measuring 0.81 Hectares. On 31st December 2009 the respondent petitioned the Senior Resident Magistrate's Court at Limuru for the grant of letters of administration intestate. The 1st respondent JOSEPH KAMAU NJOROGE was the son of the deceased whereas the 2nd respondent JOHN NDUNGU MACHARIA had bought 1.16 acres of the land from the applicant TABITHA MWIHAKI NJOROGE who was the widow of the deceased. A grant was issued to the respondents on 28th June 2010. On 6th July 2010 the same was confirmed. The 1st respondent got 2 acres and the 2nd respondent got 1.16 acres.
2. On 17th October 2011 the applicant brought this application under **section 76(a), (b) and (c)** of the **Law of Succession Act (Cap. 160)** and **rules 44 and 73** of the **Probate and Administration Rules** seeking to have the grant revoked and/or annulled. The reasons were that:-
 - a. the certificate of confirmation was obtained fraudulently by making of a false statement or concealment of something material to the case;
 - b. the petition was filed secretly and the applicant and other beneficiaries had not given consent, and the alleged consents filed were forgeries; and
 - c. the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
3. The applicant swore and affidavit to support the application. She stated that she was born in 1918 and was therefore 93 years; that the deceased had left her with children (including the 1st respondent), 3 of whom had died but had left their children. Her children were:-

- a. 1st respondent;
- b. WACU NJOROGI (married);
- c. NGONYO NJOROGI (married with 3 children)
- d. WANJIKU NJOROGI (Married);
- e. NYOKABI NJOROGI (deceased – unmarried with 4 children and grandchildren);
- f. GITAU (deceased with no children); and
- g. MBUGUA (deceased with wife and 4 children).

Her case was that the respondent had filed the petition, obtained grant and had it confirmed without involving her and the family. The result was that she and the other beneficiaries had been disinherited. The record shows that both at the filing of the petition and at the application for confirmation she had offered her consent by thumb- printing and that WACU and NGONYO had consented by signing. The applicant states that none of them consented and that the said thumbprint and signatures were forgeries. She further stated that she had, following the death of the deceased, agreed to sell 1 ½ acres to the 2nd respondent but that she had now allowed him to participate in the administration of the estate, and, in any case, he had not completed the payment of the purchase price.

4. The replying affidavit was sworn by the 1st respondent whose case was that all the beneficiaries had been involved in the filing of the petition, and that none of them had been disinherited. He stated that the 2nd respondent had been involved in the petition because he had bought 1.16 acres of the suit land from the applicant and paid for it. He annexed the agreement ('JKN-1'). She had used the proceeds to buy a piece of land from one STEPHEN THAURI MUIRURI, he said.
5. MRS. MUHUUHU for the applicant and MR. MBUGUA for the respondent addressed me on the application. I have considered what they said.
6. Under **section 71(c) and (3) of the Act**, a grant can only be confirmed after the expiry of six months. It can be confirmed after a shorter period only on the application of the holder of the grant of representation. When such an application is made, the Court has to be satisfied that:-
 - a. there is no dependant, as defined by section 29, of the deceased; and
 - b. that it would be expedient in all the circumstances of the case.

In this case, the grant was issued on 28th June 2010 and five days later an application for confirmation within six months was made. In the affidavit sworn to support the application it was clear that the respondents did not indicate why they were seeking an early confirmation in a Cause that had dependants. MRS. MUHUUHU submitted that the fact that there was a rushed confirmation was evidence of fraud.

7. Secondly, the applicant had no capacity to sell any part of the land to the respondent before the grant was confirmed. Under **Section 82(b)(ii)**

“no immovable property shall be sold before confirmation of the grant.”

It follows that the purchase of the land by the 2nd respondent from the applicant was illegal. The purchase did not therefore give the 2nd respondent any right to participate in the administration of the estate of the deceased. The 2nd respondent was neither a beneficiary nor a dependant of the deceased. He was not owed anything by the deceased.

8. Thirdly, the 1st respondent offers no explanation why he did not share the balance of estate with his brothers and sisters. The applicant denies the consents that are exhibited to them and says they were forged. What is important is that on the day of confirmation the beneficiaries had to be served. The record does not show that they were served, or that they were present. The 1st

respondent does not say that the deceased had provided for the rest of his children before he met his death.

9. In conclusion, I agree with the applicant that the grant was illegally and fraudulently obtained. It is therefore revoked with costs. Any transfers of 1.16 acres to the 2nd respondent or 2 acres to the 1st respondent is cancelled. The entire title shall revert to the deceased.

DATED and DELIVERED at NAIROBI this 29th January 2015.

A.O. MUCHELULE

JUDGE