



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 2823 OF 2013**

**IN THE MATTER OF THE ESTATE OF SAIMON MUNGAI NGUGI alias SIMON MUNGAI NGUGI**

**(DECEASED)**

**RULING**

1. The summons dated 31<sup>st</sup> October 2013 seeks revocation of a grant made on 1<sup>st</sup> January 2011 and confirmed on 19<sup>th</sup> June 2011. It is argued that the grant was obtained by fraud, misrepresentation and through concealment of facts.
2. The application is supported by the affidavit of the first applicant. The affidavit was sworn on 31<sup>st</sup> October 2013. He depones that the deceased was the brother of both the applicants and respondents. He avers that the parties had agreed to share the sole asset, Kiambaa/Kihara/1286 equally. They were to discover later that the second respondent had secretly and fraudulently obtained letters of administration intestate, had the property confirmed to her name and was in the process of transferring it to her name. She is accused of forging a letter purporting it to be from the Chief of Kihara Location. She is also accused of lying to court that she was a child of the deceased.
3. Attached to his affidavit are several annextures which support his case. The green card marked as annexture PMN 2 shows that Kiambaa/Kihara/1286 was on 8<sup>th</sup> August 2011 transferred to the name of the second respondent. This is confirmed by a Certificate of Official Search dated 18<sup>th</sup> September 2012. There is also a letter from the Chief of Kihara Location dated 23<sup>rd</sup> July 2010 which confirms that the deceased died single and was survived by his mother, the first respondent herein. The papers filed in Kiambu **CMCSC No. 306 of 2010** show that deceased was survived only by his mother.
4. There is no evidence on record that the application dated 31<sup>st</sup> October 2013 was ever served on the respondents, and I do not have on record any affidavit in reply to the application.
5. There is on record though an application dated 11<sup>th</sup> December 2013 filed at the instance of the first respondent in the application dated 31<sup>st</sup> October 2013. She seeks that the applications in the applicants dated 31<sup>st</sup> October 2013 be restrained from interfering with Kiambaa/Kihara/1286, that the application dated 31<sup>st</sup> October 2013 be struck out and that a restriction placed on the title be removed.
6. The affidavit in support of the said application is sworn by the first applicant. She is the mother of the second applicant and the respondents. She avers that Kiambu/Kihara/1286 was part of a larger piece of land known as Plot No 473 which originally belonged to her. She subdivided Plot No. 473 and distributed it amongst her children. The deceased got Kiambaa/Kihara/1286, the first respondent (Peter Munga Ngugi) got Kiambaa/Kihara/1285 while the second respondent (Harrison Njuguna) got

Kiambaa/Kihara/1287. She has attached copies of official searches in respect of the two titles. Her argument is that when the deceased died the parcel of land given to him by the deceased reverted to him automatically. She avers that she has gifted the property Kiambaa/Kihara/1286 to her daughter, Jennifer Mumbi Ngugi. She further avers that it was misleading for the respondents to allege that they had sat and agreed to share the property equally amongst themselves.

7. To this the applicants in the application dated 31<sup>st</sup> October 2013 filed a further affidavit with leave of court, through the first applicant. He avers that their mother is old and service, and does not know what happens around her. He states that the land originally belonged to their father. Kiambaa/Kihara/1296 is the deceased's inheritance from their father. He asserts that the land never passed to their mother, and therefore she could not have gifted it to the deceased. He further states that the land is valued way beyond the jurisdiction granted to the magistrate's courts. He repeats that the family had agreed to have the property shared between the two surviving brothers and sister in the propositions that are set out in paragraph 14 of the said affidavit. He argues that their sister, Jennifer Mumbi Ngugi, is a married woman who lives with her husband and children. He states that there are other sisters who are married and who are not claiming a share in the estate.

8. The applicants are annexed several documents to the first applicant's further affidavit. There is a copy of their mother's national identity card showing that she was born in 1918. There is a green card in respect of Kiambaa/Kiharu/473 showing that the propriety was originally registered in 1958 in the name of Ngugi Ikere. The property was subdivided on 30<sup>th</sup> October 1981 into four pieces. Harrison Njuguna got Kiambaa/Kihara/1284 measuring 1.6 acres, Peter Mungai got Kiambaa/Kihara/1285 measuring 1 acre, Simon Mungai got Kiambaa/Kihara/1286 measuring 1 acre while John Muthama got Kiambaa/Kihara/1287 measuring 1 acre. There are documents showing that their mother is under constant medical care.

9. The application dated 31<sup>st</sup> October 2013 came up for hearing on 26<sup>th</sup> May 2014. The respondents in the application did not attend court. There is an affidavit of service sworn on 25<sup>th</sup> April 2014, which evidences that notice of the hearing had been served on counsel for the respondents on 24<sup>th</sup> April 2014.

10. I directed that the application dated 31<sup>st</sup> October 2013 be disposed of by way of written submissions. The applicants filed their submissions on 23<sup>rd</sup> June 2014. The respondents did not file submissions. The submissions by the applicant basically rehash the averments in their affidavits.

11. The lower court file in Kiambu **CMCSC No. 306 of 2010** was availed. I have perused it. It reveals that the deceased died on 8<sup>th</sup> July 1988. There is a letter from the Chief of Kihara location dated 23<sup>rd</sup> July 2010, indicating that the deceased died unmarried and was survived by his mother, Peninah Njambi Ngugi. Representation to his estate was sought on 14<sup>th</sup> December 2010 by his mother and a grant was duly made to her on 1<sup>st</sup> February 2011. The grant was confirmed on 15<sup>th</sup> June 2011, and the asset Kiambaa/Kihara/1286 devolved upon Jennifer Mumbi Ngugi; the daughter of the administrator who is also a sister of the deceased, but who is described in the confirmation application as a child of the deceased.

12. The deceased herein died intestate in 1988. This was after the Law of Succession Act had come into force. The property in question is situated in Kiambu, which is not within the exemptions stated in **Sections 32 and 33** of the Law of Succession Act. The estate therefore falls for distribution in accordance with Part V of the Act.

13. The records show that the deceased had not married by the time of his demise. He did not have children and his stated survivor is his mother, Peninah Njambi Ngugi. He was also survived by brothers and sisters.

14. The estate of an intestate who is survived by neither spouse nor children is governed by *Section 39(1)* of the Law of Succession Act, which provides as follows:-

**“39 (1). Whenever an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the deceased in the following order of priority –**

- a. **Father; or if dead**
- b. **Mother; or if dead**
- c. **Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares, or if none...**”

15. The effect of this is that a surviving parent has priority over the surviving siblings of the deceased where the deceased died without a wife or children. In the instant case therefore the estate of the deceased ought to have devolved wholly and solely upon the surviving mother of the deceased, Peninah Njambi Ngugi. The sisters and brothers can only access the estate of their deceased sibling should there be no surviving parent.

16. I note from the record that the process of obtaining the grant was not fraudulent. The person who was entitled to a share in the estate was disclosed. She was also the person who had priority to administration by virtue of **Section 66** of the Law of Succession Act. Therefore the process under which the grant was obtained cannot be faulted.

17. The applicants appear to only have a problem with the process of confirmation of the grant. I note that their mother deceived the court that the second respondent was a child of the deceased, when in fact she was his sister. This was fraudulent. As stated above, the rightful heir to the estate of the deceased was his mother, Peninah Njambi Ngugi. The devolution of the property to Jennifer Mumbi Ngugi was therefore wrongful.

18. Since the process of obtaining the grant was properly done, I will not interfere the grant. However, as the confirmation process was flawed I will interfere with it.

19. The final orders that I shall make in this matter in the circumstances are:-

- a. That Kiambu **SRMCSC No. 306 of 2010** is hereby consolidated with **HCSC No. 2823 of 2013**, with **HCSC No. 2823 of 2013** being the lead file;
- b. That the grant made in Kiambu SRMCSC No. 306 of 2010 is hereby revoked and a fresh one shall issue out of HCSC No. 2823 of 2013 in the name of Penina Njambi Ngugi;
- c. That the confirmation orders made on 15<sup>th</sup> June 2011 in Kiambu **CMCSC No. 306 of 2010** are hereby vacated, and the certification of confirmation of grant issued based on those orders and dated 15<sup>th</sup> June 2011 is hereby cancelled;
- d. That **Kiambaa/Kihara/1286** shall devolve absolutely upon Penina Njambi Ngugi;
- e. That the land registrar for Kiambu County is hereby directed to cancel the entries made on 16<sup>th</sup> June 2011 in favour of Jennifer Mumbi Ngugi in register for **Kiambaa/Kihara/1286**, and to replace the same with an entry in favour of Penina Njambi Ngugi;
- f. That further to paragraph (d) above the land registrar shall cancel the title deed issued to Jennifer Mumbi Ngugi, and issued a fresh one to Penina Njambi Ngugi;
- g. That a fresh certificate of confirmation of grant shall issue accordingly in terms of paragraph (b) and (d) above;
- h. That costs shall be in the costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 23<sup>rd</sup> DAY OF January 2015.**

**W. MUSYOKA**

**JUDGE**