



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 3 OF 2003**

**(In the matter of the Estate of COSMAS NYAGA - Deceased)**

ANN PHIDES WAMBUI NJOKA..... 1ST APPLICANT  
KENNETH NDAMBIRI NJOKA.....2ND APPLICANT  
  
VERSUS  
  
LEAH WAGATWE NYAGA.....1ST RESPONDENT  
JOSEPH MWANGI NYAGA.....2ND RESPONDENT  
NJOGU COSMA.....3RD RESPONDENT  
PAULINE NJOKI KARIUKI.....4TH RESPONDENT

**R U L I N G**

This is a ruling on an application brought by way of Summons General Form under Rules 49 & 73 of the Probate and Administration Rules Cap 160 of the Kenya Laws. The application is dated 13/7/2012 and it seeks for the following prayers:-

- 1. That the Honourable court be pleased to rectify the register in respect of land parcels No. Brtagwe?Thumaita/2603 now registered in the names of Leah Wagatwe Nyaga and Pauline Njoki Kariuki and LR. Baragwe/Thumaita/1060 in the names of Joseph Mwangi Nyaga and Njogu Cosmas in equal shares and orders that LR. Baragwe/2603 be registered in the names of Ann Phides Wambui Njoki and Kenneth Ndambiri Njoki jointly whereas LR. Baragwe/Thumaita/ 1060 be registered in the names of Joseph Mwangi Nyaga, Alexander Murage Njoki and Dennis Mwangi Njoki jointly as per the certificat fo confirmed grant herein issued on 11/5/2006.*
- 2. That the Honourable court be pleased to authorized its Deputy Registrar to be executing all the relevant documents in respect of land parcels No. Baragwe/Thumita/2603 and Baragwe/Thumita/1060 inleu of the respondents to enable the suitlands be transferred by transmission as per the certificate of confirmed grant dated 11/5/2006.*
- 3. That the Honourable court be pleased to order the Land Registrar Kirinyaga to dispense with the production of old title deeds for Baragwe/Thumita/2603 and Baragwe/Thumita/1060, copies of PIN certificate, identity cards, passport size photos or any other relevant documents the respondents maybe required to produce to enable the*

*execution of the court orders herein.*

*4. That the costs of this application be provided for.*

The facts leading to this application are that the deceased Cosmas Nyaga Njogu died intestate on the 27/11/1986. He was survived by a widow Leah Margaret Nyaga, 4 sons namely Francis Gachoki Nyaga, Joseph Mwangi Nyaga, Peter Njogu Cosma and Patrick Muriuki Nyaga. The deceased had three daughters namely Pauline Njoki Kariuki (married), Florence Wanjiku Nyaga (unmarried) and Jacomina Njoki Cosma (deceased). Njoki Cosma was survived by 3 children who were minors, namely Ndambiri Jacomina Nyaga, Murage Jacomina Nyaga and Mwangi Jacomina Nyaga.

The widow Leah Margaret Wagatwe Nyaga applied for letters of administration intestate in Kerugoya PM Succ. No. 47 of 2002 which were issued on 2/4/2002 and confirmed on 20/12/2002. The estate was distributed to the 4 sons, the widow, and one daughter Florence Wanjiku leaving out the children of the 2nd house who included the deceased Jacomina Njoki Nyaga.

An application for annulment was filed by Alexander Murage Nyaga and Dennis Mwangi Nyaga claiming a share of Jacomina Njoki (deceased) through their advocate Kiguru Kahiga & Company. The grant was subsequently revoked on 20/5/2005. A fresh grant was issued in the joint names of Kenneth Ndambiri Njoki and Ann Phides Wambui Njoki and confirmed on 11/5/2006. The distribution of the estate was made as follows

- 1. Francis Gachoki Nyaga - Baragwe/Thumaita/1056*
- 2. Patrick Muriuki Nyaga - Baragwe/Thumaita/1057*
- 3. Peter Njogu Nyaga - Baragwe/Thumaita/1058*
- 4. Joseph Mwangi Nyaga, Alexander Murage Njoki & Dennis Mwangi Njoki to get Baragwe/Thumaita/1060 jointly.*
- 5. Ann Phides Wambui Njoki and Kenneth Njoki to get land parcel No. Baragwe/Thumaita/2603 jointly while Leah Wagatwe Nyaga should get a life interest therein.*

The grounds supporting the application are that after the revocation of the original grant, LR. Baragwe/Thumaita/2603 was bequeathed to the applicants to hold jointly while Leah Wagatwe Nyaga was to get life interest on the land. LR. Baragwe/Thumaita/1060 was bequeathed to

Joseph Mwangi, Alexander Murage and Dennis Mwangi Njoki jointly. The respondents have refused to co-operate to facilitate the implementation of the grant which is still in force. No appeal or any application for revocation of grant was filed by the respondents.

The respondents proceeded to transfer the parcels of land in their names. It is therefore necessary that the said title be revoked to facilitate the applicants receive their shares in the deceased's estate. The said titles are in the possession of the respondents who are not willing to surrender them for cancellation. The applicant's prayer is that the registrar of title be ordered to dispense with the production of the title in the process of cancellation and registration in favour of the applicants.

The 2nd respondent in his replying affidavit sworn on his own behalf and that of the 3rd respondent opposed the application.

He depones that there were 5 parcels of land in the estate of the deceased. LR. Baragwe/Thumaita/2603 was for their Late sister Jacomina Njoki and has now been inherited by her children Alexander Murage, Dennis Mwangi, Ann Phides Wambui and Kenneth Ndambiri. The respondents have no objection to the said parcel of land being registered in the names of the applicants.

The 2nd and 3rd respondents argue that the other 2 siblings should be included as owners of LR. No. Baragwe/Thumaita/ 2603. The respondents support the proposal that the name of Peter Njogu Cosmas be removed from the title LR. No. Baragwe/Thumaita/1060.

The 1st and the 2nd respondent swore a joint affidavit in which they stated that the 4th respondent and his mother Leah Wagatwe jointly owned parcel No.2603 with his mother having life interest. The respondents state that they were not aware that the earlier grant was revoked and therefore went ahead to implement it. It is contended that their mother Leah promised one Silas Makanga that would transfer a portion of parcel No. 2603 to him for he paid for her medical expenses. It is important that the applicants should compensate the said Silas Makanga for the money spent in the event that they take the whole parcel.

Parties disposed of this application through written submissions which were filed by their counsels. The applicants were represented by Kiguru Kahiga & Company. The 1st and 4th respondents were represented by Muthoni Ndeke & Company Advocates while the 2nd respondent was represented Maina Kagio & Company Advocates. The 3rd respondent

appeared in person and also filed his own submissions.

The 3rd respondent in his submissions argues that there is a problem in the mode of distribution in the grant confirmed on the 11/5/2006. He says there was an agreement in the family to distribute the estate as follows:-

- 1. Francis Gachoki - Baragwe/Thumaita/1056*
- 2. Patrick Muriuki - Baragwe/Thumaita/1057*
- 3. Peter Njogu Cosma - Baragwe/Thumaita/1058*
- 4. Leah Wagatwe Nyaga - part of Baragwe/Thumaita/2603 on behalf of herself and her 2 daughters Pauline Njoki and the late Jacomina Njoki.*

The 3rd respondent has no objection to the portion of Jacomina Njoki in LR. Baragwe/Thumaita/2603 being inherited by her children. It is necessary that the court issues another grant to reflect the agreement of the family.

It is not in dispute that the original grant was revoked on application by the applicants. The respondents have admitted that they executed the original grant for they were not aware that it had been revoked. It cannot be true that the respondents were not aware of the proceedings for revocation of the grant. There is evidence that the respondents were served with the summons and some of them attended court and cross-examined the applicants. It is dishonest for the 3rd respondent to claim that he had no knowledge of the revocation of grant. The truth is that he has his own proposal on the mode of distribution which he requests the court to adopt. The 3rd respondent has not filed any summons for revocation of grant confirmed on 11/5/2006. The confirmed grant remains in force todate.

During the confirmation of grant which came up on 6/3/2006 the court noted that the beneficiaries had been served for there was a return of service filed by the advocate for the applicant. If they wanted to objected to the summons for revocation, the respondents should have filed a protest which would have been given due consideration by the court.

It is noted that the respondents did not appeal against the judgment of the court which was delivered on 20/5/2005. Neither did they appeal against the order of confirmation of grant made on 11/5/2006. There are no pending proceedings in this case which would affect the implementation of the grant.

The claim of the 1st and 4th respondents that the applicants should compensate one Silas Makanga for medical expenses incurred in treatment of their mother Leah Wagatwe Nyaga has no legal basis. Whatever arrangement the respondents and their mother had with Silas Makanga has nothing to do with the applicants succession rights in the estate.

The copies of official search for LR. Baragwe/Thumaita/1060 show that the registered owners are Joseph Mwangi Nyaga and Peter Njogu Nyaga. LR. No. Baragwe/Thumaita/2603 is registered in the name of Pauline Njoki Kariuki and Leah Wagatwe Nyaga. The registration of the two parcels was made after the original grant was revoked. The dates of registration are shown in the copies of register as 6/7/2012 and 12/4/2012 respectively. This is evidence that the respondent defied the judgment of the court revoking the earlier grant and went ahead to register the parcels in their names. The said registrations based on the revoked grant are null and void and ought to be cancelled.

The grant confirmed on 11/5/2006 bequeathed parcel No. Baragwe/Thumaita/2603 to Ann Phides Wambui Njoki and Kenneth Ndambiri jointly while Leah Wagatwe Nyaga was to get life interest.

LR. Baragwe/Thumaita/1060 was bequeathed to Joseph Mwangi Nyaga, Alexander Murage Njoki and Dennis Mwangi Njoki jointly.

It is the considered opinion of the court that the grant confirmed on 11/5/2006 should be implemented to actualize the succession rights of all the parties in the estate as ordered by the court. The only way to comply with the judgment of the court is to nullify the illegal registrations effected by the respondents.

I find the application merited and it is hereby allowed as prayed.

**DELIVERED, SIGNED AND DATED AT EMBU THIS 18TH DAY OF JUNE, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Muriuki for Muthoni for 1st & 4th Respondents**

**3rd Respondent in person**

**Mr. Njoroge for Kahiga for Applicants**

**Mr. Okwaro for Maina Kagio for 2nd Respondent**

