



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 2188 OF 2013**

**JAMES MUHU KANAI.....APPLICANT**

**VERSUS**

**CAROLINE NJERI NGOTHO..... 1<sup>ST</sup> RESPONDENT**

**GRACE NJOKI NJERI.....2<sup>ND</sup> RESPONDENT**

**STEPHEN NJONGE NJUGUNA.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

1. The summons for revocation is dated 29<sup>th</sup> August 2013. It seeks revocation of the grant made on 18<sup>th</sup> April 2014 in the **Kiambu CMCSC No. 252 of 2012**, on the grounds that the grant was obtained secretly, that there was fraud and reliance on false statements, and that the grant was confirmed to total strangers.
2. The applicant swore an affidavit on 29<sup>th</sup> August 2013 in support of the application. He avers to be a half-brother of the deceased. He states that the deceased was survived by a widow, who is mentally retarded, and six (6) children, the eldest of them being also mentally retarded. The other children are all said to be minors and currently under the care of the Nazareth Children's Home at Ngarariga in Limuru.
3. He states that Caroline Njeri Ngotho, Grace Njoki Njeri and Stephen Njonge Njuguna are strangers to the family, who have taken advantage of the mental incapacity of the widow to defraud the estate of the deceased. This they did by purporting to have had lent her some money and later bought the deceased's property. He also accuses them of misleading the local Chief to include them in the list of survivors of the deceased in the letter that the Chief wrote to court on 10<sup>th</sup> August 2012. He states that the three strangers are actually money lenders.
4. He has attached to his application some documents. There is a copy of the letter of the Chief of Ndumberi Location dated 10<sup>th</sup> August 2012 and lodged in the cause at the lower court. It indicates that apart from the widow and the six children the deceased was also survived by Caroline Njeri Ngotho, Grace Njoki Njeri and Stephen Njonge Njuguna, who are described as daughters and son in law of the deceased, respectively. There is also a copy of certificate of confirmation of grant dated 18<sup>th</sup> April 2013, devolving the estate made up only of Ndumberi/Ndumberi/2110 to Caroline Njeri Ngotho, Grace Njoki Njeri and Stephen Njonge

Njuguna. The other document is a copy of a certificate of official search dated 20<sup>th</sup> May 2013 in respect of Ndumberi/Ndumberi/2110 indicating that the applicant had lodged a caution against it. The other document is copy of a memorandum of understanding between the widow and Caroline Njeri Ngotho, Grace Njoki Njeri and Stephen Njonge Njuguna, where the widow undertakes and commits herself to sell her share of Ndumberi/Ndumberi/2110 to the said Caroline Njeri Ngotho, Grace Njoki Njeri and Stephen Njonge Njuguna for a sum of Kshs.1,300,000.00. The rest of the documents relate to correspondence between the office of the Kiambu County Commissioner, the National Land Commission and the applicant on the deceased's share of Ndumberi/Ndumberi/2110.

5. The application was served on the administrators and the persons named in the certificate of confirmation of grant as beneficiaries. The two administrators, the three beneficiaries under the certificate of confirmation of grant and other individuals have sworn and filed affidavits in reply to the application. The first batch of affidavits was sworn on 12<sup>th</sup> March 2013 by Grace Njoki Njeri, Stephen Njonge Njuguna, Hannah Wacera Kinge, Peter Wamwenja Kanai and Caroline Njeri Ngotho. They were all filed in court on 12<sup>th</sup> November 2013. The widow purportedly swore her affidavit on 15<sup>th</sup> January 2013, and the same was filed in court on 15<sup>th</sup> January, 2014.
6. The widow states that she is of sound mind, and contests the allegation that she is of unsound mind. She explains that the death of her husband left the family in dire financial constraints and without means of subsistence, whereupon she entered into an agreement with Caroline Njeri Ngotho, Grace Njoki Njeri and Stephen Njonge Njuguna for sale of Ndumberi/Ndumberi/2110. She states that she was not taken advantage of in the transaction as she was of sound mind, and in any event the transaction involved her mother, Hannah Kinge, and her brother in law, Peter Kanai Wamwenja. She was to use the money to buy alternative land at Murang'a. She was paid a sum of Kshs.700,000.00. She had agreed with the buyers that the property be confirmed directly to their names. These averments are supported by her mother, Hannah Wacera Kinge, and her brother-in-law, Peter Wamwenja Kanai, sworn on the date indicated above. They aver that she is of sound mind, that they were involved in the sale and that there was no under influence exerted on the widow.
7. The purported affidavit of the three (3) beneficiaries under the certificate of confirmation of grant was sworn by Caroline Njeri Ngotho. She confirms that she and her two co-beneficiaries did get a joint interest in the subject property under the certificate of confirmation. The averments in her affidavit mirror those of the widow, her mother and brother-in-law, in terms of confirming that the sale did take place, that there was no coercion or undue influence and that money changed hands. Grace Njoki Njeri and Stephen Njonge Njuguna swore a joint affidavit to confirm the averments in the affidavit of Caroline Njeri Ngotho.
8. Directions were given on 4<sup>th</sup> June 2014, that the application dated 29<sup>th</sup> August 2013 be disposed of by way of written submissions. I have on record written submissions filed by the applicant but not by the respondent, although it would appear that the respondent did indeed file submissions. The applicant's initial submissions are dated 18<sup>th</sup> June 2014 and were filed in court on 1<sup>st</sup> May 2014. The second version of the applicant's written submissions is a reply to the respondent's submissions. It is dated 15<sup>th</sup> September 2014 and was lodged in court on 18<sup>th</sup> September 2014. I have perused through both copies of the submissions and noted the legal and factual arguments stated therein by the applicant.
9. On 20<sup>th</sup> August 2014 the court ruled that the court file in Kiambu **CMCSC No. 252 of 2012** be made available. The said file was made available and I have had occasion to peruse it.
10. The deceased herein died on 27<sup>th</sup> February 2005. Representation to his estate was sought vide a petition for grant of letters of administration intestate lodged in court on 3<sup>rd</sup> September 2012 by Hannah Wambui Kinge and Caroline Njeri Ngotho. The petition is silent on the capacities in which the two brought the petition, but the affidavit in support of the petition describes them as

widow and daughter-in-law, respectively, of the deceased. The deceased is also expressed to have been survived by six minor children and another daughter-in-law, Grace Njoki Njeri, and a son-in-law, Stephen Njonge Njuguna. Lodged together with the petition is a letter dated 10<sup>th</sup> August 2012 from the Chief of Ndumberi Location of Kiambu County, which indicates that the deceased was survived by a widow and six minor children, and three children in law, being Caroline Njeri Ngotho, Grace Njoki Njeri and Stephen Njonge Njuguna. He is expressed to have died possessed of ½ share of Ndumberi/Ndumberi/2110, valued at Kshs.100,000.00.

11. A grant of letters of administration intestate was made on 6<sup>th</sup> November 2012 to the widow Teresiah Wambui Kinge, and the daughter-in-law, Caroline Njeri Ngotho. The grant was confirmed on 18<sup>th</sup> April 2013, with the estate, being ½ share of Ndumberi/Ndumberi/2110, devolving equally to Caroline Njeri Ngotho, Grace Njoki Njeri and Stephen Njonge Njuguna.

12. The provisions upon which the application dated 29<sup>th</sup> August 2013 is predicated are not stated on the face of the application. However, the summons seeks revocation of a grant of representation. Revocation of such grants is provided for by section 76 of the **Law of Succession Act**, which provides as follows:

**“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-**

- a. **that the proceedings to obtain the grant were defective in substance;**
- b. **that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;**

**(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding...”**

13. I will confine myself to **Section 76(a)(b)** and **(c)** of the Law of Succession Act, for the applicant appears to have grounded his application on these three grounds. He complains that the process of obtaining the grant was defective and the grant was obtained on the basis of fraud and concealment of important matter from court.

14. The central plank of the applicant’s case is that the beneficiaries named in the certificate of confirmation of grant are not survivors of the deceased nor members of the family of the deceased, yet in the process of the obtaining of the grant of representation they posed as daughters and son-in-law of the deceased and the grant was made in that background. That made the process defective and the fact that they misrepresented themselves as family members fraudulent.

15. I have noted from the record that the three were described in the Chief’s letter of 10<sup>th</sup> August 2012 as daughters and son-in-law. They are similarly described in the affidavit in support of the petition sworn on 3<sup>rd</sup> September 2012. In the affidavit sworn in support of the application dated 22<sup>nd</sup> March 2013, it is averred that the three are among the children who survived the deceased.

16. The applicant avers that the three are not children of the deceased nor daughters and son-in-law of the deceased. He describes them as strangers to the estate. He states that the only connection between them and the estate is the transaction that the three entered into with the widow of the deceased regarding the estate property, Ndumberi/Ndumberi/2110.

17. Although the three are described in the initial pleadings as daughters and son-in-law, is not disclosed which sons and daughters of the deceased had married the three individuals, granted that the six children of the deceased are described as minors in the petition and in the Chief’s letter. It is also not defined what became of the sons and daughters who had married these three

individuals.

18. Curiously, the widow and the three individuals, in their affidavits in reply to the application dated 29<sup>th</sup> August 2013, do not say a word about the alleged marital relationship between them. The widow does not refer to them as her in-laws or talk about them having married her children. Instead she dwells on how these three loaned her some money on the understanding that that she would sell her share in Ndumberi/Ndumberi/2110. Similarly, the three do not talk at all about being children in law of the deceased or to the widow, nor of having married the deceased's or the widow's children. They dwell only on the issue of having lent money to the widow against Ndumberi/Ndumberi/2110.
19. From the material before me, I am inclined to conclude that the three were indeed not children of the deceased, nor married to the children of the deceased. They are not relatives of the deceased, and their only connection with the estate is the transaction supported by the memorandum of understanding dated 1<sup>st</sup> August 2012. To that extent the allegation that they were daughters and son-in-law of the deceased was false.
20. The fact that a false allegation was placed before the court can fully be construed to mean that the same was intended to mislead the court to influence it to make a grant in the name, among others, of Caroline Njoki Ngotho, in her purported capacity as a daughter in-law of the deceased. The grant was therefore made fraudulently by the using of a false statement and misrepresentation, which made the process of obtaining the grant defective.
21. It is common ground that the widow and the three individuals entered into a transaction for the sale of Ndumberi/Ndumberi/2110. The applicant has attached a copy of the agreement for the sale of the said property. Although the document is headed "**Memorandum of Understanding**" instead of agreement of sale, the terms of the so-called Memorandum of Understanding points to a sale of the property.
22. The relevant portion of the Memorandum of Understanding states as follows:

**"IT IS HEREBY MUTUALLY AGREED AS FOLLOWS:—**

**WHEREAS the Borrower is a beneficiary of ½ share of L.R. No. Ndumberi/Ndumberi/2110 by virtue of being the widow of John Kinoro (deceased) and is willing to sell the same to the Lenders after successful petitioning of letters of administration.**

**IT IS HEREBY MUTUALLY AGREED AS FOLLOWS:**

1. **The Lenders agree to lend to the Borrower and the Borrower agrees to borrow from the Lenders, the sum of Kshs.300,000/= the payment of which is acknowledged through execution of this Memorandum of Understanding.**
2. **In consideration of the said loan, the Borrower undertakes to sell to the Lenders her ½ share in L.R. No. Ndumberi/Ndumberi/2110 on completion of the administration process of the deceased's estate at the price of Kenya shillings One Million Three Hundred Thousand only (Kshs.1.3 M/-).**
3. ...
4. **The said loan amount comprises part of the purchase price.**
5. **The Lenders will make a further instalment on or before 1<sup>st</sup> November 2012 of Kshs.400,000/=.**
6. **The final instalment shall be released to the Borrower after confirmation of the Grant.**

7. **The Lenders will take possession of the aforesaid parcel of land after confirmation of grant in respect of the Deceased's estate.**
8. **The Borrower undertakes to cooperate with her brother-in-law towards partitioning and other related process for easier transmission to the Lenders...**

23. A careful reading of the Memorandum of Understanding will no doubt lead to the conclusion that it is an agreement for sale of land disguised as an agreement for borrowing money. Of the ten terms of the agreement only one dwells on the borrowing, the rest are on the sale of the land.

24. The transaction of 1<sup>st</sup> August 2012 must be viewed against the provisions of **Sections 45 and 82 of the Law of Succession Act.**

25. Section 45 reads as follows:

**45. (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 not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment...**

26. The relevant provision of Section 82 provides as follows:—

**“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers —**

**(a) ....**

**(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:**

**Provided that—**

i. ...

**(ii) no immovable property shall be sold before confirmation of the grant.”**

27. Section 82 of the Law of Succession Act should be read together with Section 79 thereof, which provides as follows:

**“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”**

28. Section 45 of the Law of Succession Act deals with what is called intermeddling with the estate of a dead person. This provision is designed to protect and preserve the estate. It bars persons who have no authority in law from handling estate property. Persons without such authority cannot take possession or dispose of any free property of a dead person. Authority derives from a grant of representation or from some other written law.

29. The sale transaction comprised in the Memorandum of Understanding was entered into on 1<sup>st</sup> August 2012. The deceased had died on 17<sup>th</sup> February 2005 and grant of letters of administration intestate in respect of his estate was made on 6<sup>th</sup> November 2012. This means that as at 1<sup>st</sup> August 2012 the property belonged to a dead person, and the transaction was being carried out at a time when representation had not yet been obtained. The person purporting to dispose of the property did not have authority in law to dispose of what belonged to a dead person. Consequently, the transaction to dispose of property belonging to a dead person amounted to intermeddling and both the seller, Teresiah Wambui Kinge, and the buyers, Caroline Njeri Ngotho, Grace Njoki Njeri and Stephen Njonge Njuguna were engaging in a transaction which fell afoul of section 45 of the Law of Succession Act. The said transaction was not only an act of intermeddling, it was also a nullity. The individuals involved were engaging in criminal activity by virtue of Section 45 (1)(a) of the Law of Succession Act, and are liable to prosecution.
30. By virtue of **Section 79** of the Law of Succession Act, the said property had not vested in the widow as administrator and therefore she was not at the material time a personal representative of the deceased and had no capacity whatsoever to exercise any of the powers set out in Section 82 of the Act, in particular the power to sell estate property. In any event, the property in question was immovable property, which, by virtue of proviso (ii) to Section 82(b), could not be sold before the grant had been confirmed.
31. The provisions of Sections 45 and 82 of the Law of Succession Act are in mandatory terms. The effect of this then is that the acts of intermeddling cannot be sanitized by acts meant to regularize the unauthorized dealings. These unlawful acts cannot be cured.
32. It is clear to me that the Memorandum of Understanding dated 1<sup>st</sup> August 2012 was designed to circumvent the provisions of Section 82, in particular proviso (ii) to section 82(b) thereof. The transaction was meant to defeat the law. It was meant to set the stage for the filing of the petition of 3<sup>rd</sup> September 2012. As the transaction was contrary to the law, the grant making process that meant to sanitise it was thereby defective and a nullity.
33. The deceased person was survived by six minor children. By virtue of Section 41 of the Law of Succession Act, the interests of such minors should be secured by the property being held in trust for them until they attain the age of eighteen (18) years. The interests of the minors in this case have not been secured at all.
34. Ideally, the estate of the deceased ought to have devolved upon his widow and her co-administrator to hold in trust for the children during their minority. The property was not liable for sale during the children's minority. If for whatever reason it became absolutely necessary to sell the property during minority, then such sale could not be done without the leave of the court.
35. The provisions relating to life interest are to similar vein. The deceased herein died intestate and therefore the provisions of Part V of the estate are therefore relevant. Under Section 35(1), the surviving spouse, such as the widow in this case, is entitled to the personal and household goods of the deceased absolutely, and a life interest in the whole residue of the net interest of the estate. Section 37 gives powers on disposal of estate property during life interest. The proviso to the provision is clear that in the case of immovable property, leave of court must be obtained before such property can be disposed of.
36. Issues were raised concerning the mental capacity of the widow. No medical evidence was provided or furnished on the alleged mental state of the widow. However, the way the property was dealt with lends credence to the allegations. The applicant alleged that the minor children of the deceased are in children's home for there was no parent to care for them. The respondents have not responded to this allegation.
37. Having taken into account everything that I have stated above, I am disposed to make the

following orders:-

- a. **That the grant of letters of administration intestate made in Kiambu CM CSC No. 252 of 2012 on 6<sup>th</sup> November 2012 is hereby revoked;**
- b. **That the orders made in Kiambu CM CSC No. 252 of 2012 on 5<sup>th</sup> April 2013 confirming the said grant are hereby discharged and the certificate of confirmation of grant dated 18<sup>th</sup> April 2013 cancelled;**
- c. **That the cause in Kiambu CM CSC No. 252 of 2012 is recalled and is hereby consolidated with this cause HCSC No. 2188 of 2013;**
- d. **That HCSC No. 2188 of 2013 shall be the lead case file;**
- e. **That a fresh grant shall issue out of HCSC No. 2188 of 2013 to persons to be agreed upon by the parties;**
- f. **That before a grant is issued in terms (e) above —**
  - i. **The County Commissioner for Kiambu County shall file, or cause to be filed, a report on the general status and circumstances of the widow of the deceased, Teresiah Wambui Kinge; and**
  - ii. **The Nazareth Children Home at Ngarariga, Limuru, to provide a report on the children of the deceased who are or were under their care, that is to say: Hannah Wacera Kinoro, Michael Kinge, Peter Kanai, Mary Wanjiku, Jane Wariara and Mary Wangeci.**
- g. **That the reports in (f) above shall be filed within thirty (30) days of the delivery of this ruling and the Deputy Registrar shall cause this court order to be served on the County Commissioner for Kiambu County and on the administrator of the Nazareth Children's Home, Ngarariga, Limuru;**
- h. **That the matter shall be mentioned after forty-five (45) days for receipt of the reports in (f) above and for further orders and;**
- i. **That the applicant shall have costs of the application.**

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>ST</sup> DAY OF JULY, 2015.**

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**W. MUSYOKA**

**JUDGE**