



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO.255 OF 2013**

**IN THE MATTER OF THE ESTATE OF THE LATE FRANCIS KIRIMI NGARUNI  
(DECEASED)**

**STEPHEN GITONGA ..... PETITIONER/RESPONDENT**

**V E R S U S**

**PURITY MUTHEU KIRIMI ..... 1<sup>ST</sup> APPLICANT**

**JOHN MUNENE KIRIMI ..... 2<sup>ND</sup> APPLICANT**

**JANE KATHURE KIRIMI ..... 3<sup>RD</sup> APPLICANT**

**KENNETH KIMATHI KIRIMI..... 4<sup>TH</sup> APPLICANT**

**IRENE MAKENA KIRIMI..... 5<sup>TH</sup> APPLICANT**

**BENSON MWITI KIRIMI..... 6<sup>TH</sup> APPLICANT**

**JUDGMENT**

1. The Objector through summons for revocation of the grant dated 12<sup>th</sup> March 2015 seeks that the grant of letters of administration intestate issued to the petitioner/respondent on 8<sup>th</sup> July 2013 and confirmed on 14<sup>th</sup> November 2013 in respect of the estate of Francis Kirimi Ngaruni be revoked. This application is based on the following grounds.

- a) **The petitioner/respondent is a stranger to the members of family of the deceased nor is he a brother, uncle or any relationship with the deceased.**
- b) **The petitioner/respondent filed this succession cause secretly without the knowledge of any member of the deceased family.**
- c) **The proceedings to obtain the grant were defective in substance.**
- d) **The Grant was obtained fraudulently by the making of a false statement or by the concealment from the Court of something material to the cause.**

**(e) That the grant was obtained by means 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.**

2. The objectors further in their application prayed for orders of inhibition and upon granting of orders of revocation to have titles Nos. Abothuguchi/Makandune/2211,2212,2213 and 2214 to revert to the original land reference no.Abothuguchi/Makandune/690 in the name of the deceased Francis Kirimi Ngaruni; that costs of the application be borne by the petitioner/respondent.

3. The application is supported by the objectors affidavit dated 12<sup>th</sup> March 2015 in which Benson Mwiti Kirimi swore on his behalf and other objectors that the objectors are children of the deceased and heirs to his estate; that the deceased died on 9<sup>th</sup> November, 2005 at Mbagathi District Hospital Nairobi as per certificate of death No. 003880 dated 11<sup>th</sup> January, 2011,a copy whereof is attached and marked “**BM1**” and as per attached funeral programme marked “**BM2**”; that the deceased left behind parcel Abothuguchi/Makandune/690 measuring 4.2. hectares on which the objectors live and cultivate as per green card attached and marked “**BM3**”; that petitioner filed this petition secretly and that the grant was confirmed before expiry of six (6) months period; that in form P & A 5 dated 30<sup>th</sup> April 2013 petitioner claimed to be brother to the deceased as per annexure “**BM4**”; that in Chief’s letter petitioner claimed to be brother to the deceased; that petitioner is not at all brother to the deceased neither is he related to deceased family or clan but is a total stranger to deceased family; that the petitioner did not disclose the deceased had children or wives; that petitioner lied that he was the only brother to the deceased; that the proceedings to obtain grant was defective in substance; that this grant was obtained fraudulently by making of a false statement or by the concealment from court something material to the cause; that grant was obtained by means of untrue allegations of a fact essential in point of law to justify the grant notwithstanding; that the allegation was made in ignorance or inadvertently by a stranger; that the objectors discovered the registration of the petitioner on 17<sup>th</sup> February, 2015 as the owner of the deceased property which he subdivided.

4. The petitioner is opposed to this application. He filed a Replying affidavit dated 13<sup>th</sup> April 2015 in which he deponed inter alia; that the deceased was his brother and he filed the petition in that capacity with full knowledge of the objectors who did not object; that applicants application is a mere afterthought and are pushed by greedy and malice; that objectors knew of this matter and that is why they filed criminal case no. 797 of 2014 at Githongo claiming that petitioner stole their land; that petitioner had all rights to file this cause as the land actually belongs to him having redeemed the title from National Housing Corporation after deceased had secured a loan and was unable to pay and the land was being auctioned before he stepped in and paid the loan and discharged the title, referring to annexure “**S.G.1**” being a letter from N.H.C.; that the applicant did not live on the deceased estate as they have no interest in it; that petitioner has not committed any fraud in obtaining the deceased estate and that he diligently followed the due process in open and honest manner; that there is no estate to distribute as the land has exchanged hands and transferred to third parties.

5. The court has carefully considered the pleadings and parties oral submission as well as the attached annexures and all proceedings thereto. The issue for determination is whether the objectors have met and satisfied that requirements for revocation of a grant and whether orders sought can issue?

6. **Section 76 of the Law of Succession Act** states that a grant of representation, whether or not confirmed may at any time be revoked or annulled. The said section provides:-

**“76. 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 that the allegation was made in ignorance or inadvertently;*”

7. **Section 66 of the Law of Succession Act** states when preference should be given to administer the deceased estate who dies intestate. The said section provides:-

*“66. 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;

8. **Section 38 of the Law of Succession Act** provides:-

*“38. Where an intestate has left no surviving child or children but no spouse, then net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one or be equally divided among the surviving children.*

9. The **Probate and Administration Rules under Part VII** provides on how grants can be made. That under **Rule 26 (1)(2) of the Probate and Administration Rules** it is provided:-

*“26. (1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same decree as or in priority to the applicant.”*

10. In the instant petition the petitioner purports to be a brother to the deceased and has not claimed to have been a dependent of the deceased but a redeemer of the deceased property from N.H.C. That even if the petitioner was a brother to the deceased which allegation is strongly denied by the objectors and which issue this court do not want to deal with as there is a criminal case no. 797 of 2014 at Githongo to determine the issue and whether the petitioner is related to the deceased and whether his purported relationship to the deceased is fake. I am thereof, of the view that the petitioner being not a dependant to the deceased did not rank in priority over the deceased family which is comprised of the objectors.

11. The forms filed by the petitioner did not include form 38 or 39. It therefore follows the petitioner did not inform the objectors or sought their consent before the petitioner petitioned for the grant. He did not cite them either. He did not as per form P& A 5 disclose the objectors were children of the deceased but lied that he was the only surviving heir to the deceased. He even lied to the Chief that the deceased did not have any other heirs save himself. That even when the petitioner sought confirmation of the grant he once again did not inform the objectors of his action nor did he bother to comply with provisions of **Section 71 (3) of the Law of Succession Act and Rule 40 (1) (3) a) and (8) of the Probate and Administrative Rules.**

12. **Section 71 (3) of the Law of Succession Act** provides:-

*“71(3). The court may, on the application of the holder of a grant of representation, direct that the grant be confirmed before the expiration of six months from the date of the grant if it is satisfied.”*

13. Rule 40 (1) (3) (a) and (b) of the Probate and Administration Rules provides:-

*“40. (1) where the holder of a grant which has not been confirmed seeks confirmation of the grant he shall apply for such confirmation by summons in Form 108 in the cause in which the grant was issued, supported by an affidavit in Form 8 or 9 exhibiting the grant together with an estateduty compliance certificate or other satisfactory evidencethat no estateduty is payable and setting out the full names of the deceased person towwhose estate the grant relates,andhe shall satisfy the court that no application under Part III of theAct is pending.”*

*“3(a). the names, ages and addresses of the children of the deceased by whom he was survived (whether or not they were being maintained by him immediately prior to his death) and of such of his parents, step-parents, grand-parents, grand-children whom he had taken into his family as his own, brothers, sisters, half-brothers and half-sisters, as were living at his death and were being maintained by him immediately prior thereto with full details of the manner and extent and or what period they were being or had been so maintained;*

*b). In the case of a male deceased, his wife or wives or former wife or wives living at his death and, in the case of a female deceased, her surviving husband if he was being maintained by her immediately prior to her death with full details of the manner and extent and or what period he was being or hadbeen so maintained.”*

14. In the instant cause and upon perusal of all the documents and upon consideration of the parties affidavits and annextures; I am satisfied that the petitioner being well aware of the deceased beneficiaries being the objectors, herein, went out to defraud them. He planned and schemedhis plan right from the very beginning by informing the area chief that the deceased did not have any children. He omitted the objectors in Form P &A 5. He did not inform them about the consent or cite them. He claimed in his affidavit that the deceased had taken a loan and his property was about to be auctioned and that he redeemed the land from being auctioned. I have very carefully perused annexture “**BM3**” and noted that entry 1 on encumbrances section that there was a charge in favour of the National Housing Corporation for Ksh. 80,000 which was discharged as per entry no. 2 on 6.2.2014 being after the deceased was dead. The petitioner’s annexture “**SG1**” is dated 31<sup>st</sup> January, 2014 addressed to the petitioner forwarding the original title deed Abothuguchi/Makandune/690 and a discharge of charge in duplicate duly signed, executed by the corporation. The letter does not explain whythe title and discharge of charge was addressed to the petitioner. The letter is not even signed but be as it may; the paying of the loan did not give the petitioner the right to proceed to distribute the deceased estate in exclusion of the deceased heirs. The letter herein and the petitioner’s affidavit did not disclose if he paid any sum and how much it was and his claim if any is that of a creditor to extent of the amount he had paid subject to proof. His right if any is not to take the deceased property through a succession process. He should have come as a creditor upon the objectors having obtained grant of letters of administration.

15. The objectors have in my view proved on a balance of probabilities that the proceedings to obtain the grant were defective in substance, fraudulently obtained by the making of a false statement and concealing from court something material to the case; and obtaining grant by means of an untrue allegation of facts essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

16. The petitioner counsel submitted that the petitioner was entitled to transfer the deceased property by virtue of Section 82 (b) and (d) of the Law of Succession Act which provides:-

**“82. (b) to sell 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) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and**

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

**(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as may seem just and reasonable to them according to the respective rights of the persons interest in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of the estate, and to make any transfer which may be requisite for giving effect to the appropriation.”**

15. I have carefully considered the above section and I note that there is an rider under **Section 82 (b) (i) of the Law of Succession Act**; that the personal representative in my view should not be one who has fraudulently obtained the grant and secondly the purchase can be voidable at the instance of any other person interested in the asset so purchased; that legal representative should appropriate towards satisfaction of a legacy or as per interest a share in accordance with respective rights of the persons interested in the estate of the deceased. I therefore do not agree a person who has obtained a grant fraudulently has capacity to pass any good title to a purchaser. Such transaction in my view remains invalid. I do therefore agree with petitioner's counsel that under **Section 93 of the Laws of Succession Act** upon revocation of a grant the transfer of the deceased property to third parties by petitioner who obtained the grant fraudulently and sold the deceased property to defraud the deceased children cannot be declared invalid and that the beneficiaries cause of action lies with Environmental and Land Court and not in the succession cause; that position if taken will lead to fraudsters proceeding to fraud and administer deceased's estates to the detriment of the deceased heirs in collusion with others and render many families who are poor and ignorant of Succession Law process destitute. That further if that position is taken by the court it would go against the Bill of rights as enshrined in our Constitution.

16. The upshot is that the objector's application for revocation of grant is merited and is allowed. I therefore make the following orders.

**a) The grant of letters of administration intestate dated 8<sup>th</sup> July 2013 and confirmed grant issued on 14<sup>th</sup> November 2013 be and are thereby revoked.**

**b) That the title Abothuguchi/Makandune/2211, 22122, 2212 and 2214 be and are hereby cancelled and the same ordered to revert to the original land No. Abothuguchi/Makandune/690 in the name of the deceased FRANCIS KIRIMI NGARUNI.**

**c) That Benson Mwiti Kirimi, Purity Mutheu Kirimi and John Munene Kirimi are appointed joint administrators to the deceased estate and grant of letters of administration do forthwith issue to the three who are at liberty to petition for confirmation of the grant without waiting for expiry of six (6) months from the date of this judgment.**

**d) The objectors are awarded costs of the objection proceedings.**

**DATED at Meru this 17<sup>th</sup> day of September, 2015.**

**J.A. MAKAU**

**JUDGE**

**17.9.2015**

**Delivered in open court in presence of:**

Objectors in person – present

Mr. Kimathi Kiara for petitioner

Court clerk – Faith/Ibrahim

**R.V.P. WENDOH**

**JUDGE**

**17.9.2015**