



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

**SUCCESSION CAUSE NO. 169 OF 2006**

**IN THE MATTER OF THE ESTATE OF KAHURI KUBAI (DECEASED)**

**RULING**

1. This application is brought by way of Summons for revocation of Grant dated 25<sup>th</sup> January, 2006 and taken out under *Section 76 (a), (b) and (c)* Laws of Succession Act, Rules 44 and 73 of the Probate and Administration Rules, form 107 and 14 thereto and all enabling legal provisions. It is supported by the annexed joint affidavit of Samuel Rigii Kubai and William Mburu Kubai sworn on 26<sup>th</sup> January, 2006.
2. The Applicants seek for an order that the grant of letters of administration and the confirmed grant issued to John Chege Kubai be revoked or annulled on the grounds that:-
  - (1) The proceedings to obtain the grant were defective in substance.
  - (2) The grant was obtained fraudulently by the making of false statements and representations and concealment from the court of facts material to the cause.
  - (3) The grant was obtained by means of untrue allegation of facts essential in points of law to justify the grant.
  - (4) Some of the rightful beneficiaries of the deceased were not involved and or informed of the succession cause.
3. The application is opposed, and in his replying affidavit dated 27<sup>th</sup> February, 2006, John Chege Kubai, the Respondent, deposes among other things that the succession cause instituted in the Kiambu Chief Magistrate's Court, being succession cause No. 106 of 2004 was openly instituted and the same was duly advertised as by law required, and that the Applicants had all the time and opportunity to object to the making of the grant. It is his testimony that during the time the deceased was still alive he had bought 3/34 of the piece of land the subject of these proceedings. Further, he avers that since he took care of the deceased during his last days, the deceased decreed to him that he was also entitled to the remaining 4/34 of the piece of land (commonly in Kikuyu referred to as *uramati*). It is his averment that although a report was made to the Criminal Investigation Department offices in Kiambu, the said report turned out to be unfounded since after investigations he was not charged with any criminal offence in Court, and that the entire application by the Applicant is an after-thought and is only meant to seek to be entitled to what does not belong to him.
4. It was directed on 18<sup>th</sup> June 2013 that the application be disposed of by way of affidavits and written submissions. The parties herein have filed their written submissions. The Applicants

written submissions were filed on 26<sup>th</sup> June, 2013, while the Respondent's written submissions were filed on 4<sup>th</sup> July, 2013.

5. The Applicants averred and submitted that the said grant in this matter was obtained by the making of false statements and misrepresentation and more so by way of concealment of material facts from the court. It was further submitted that the deceased was their uncle and that at the time of his demise he was unmarried and therefore he had no immediate dependants. It was their submission that the grant of letters of administration to the deceased estate should not have been made to the Respondent herein alone. Finally, the Applicants submitted that the Respondent deliberately failed to disclose to the lower court that there were other dependants who rank in equality or priority to the respondent and whom the deceased's estate should devolve to.
6. On his part, the Respondent submitted that the Applicants have not disclosed their exact relationship with the deceased for the court to be able to determine if indeed they were dependants of the deceased or not. Further, he contended that the applicants have not disclosed the estate of the deceased to the court and how they propose to have the same distributed. It was his contention that the Respondent's averments contained in his replying affidavit have not been controverted. He submitted that on a balance of probability, the applicants have notoriously slept on their rights if any, that the deceased died on 1<sup>st</sup> July, 1973 and no claim has ever been lodged by the Applicants until 2006, that the Respondent has been utilizing the an eighth of an acre of the estate of the deceased since 1957 and the Applicants have never raised any claim to the same prior to 2006. He submitted that it is manifestly obvious that the Applicants are simply busy bodies and/or have inordinately slept on their rights, if any, and they do not deserve this court's mercy as their indolence should not be rewarded by grant of the prayers being sought, and further that their claim is too remote to be countenanced under the Succession Act, as this court is being urged to order.
7. It was the Respondent's submission that contrary to the allegations made by the Applicants, the Respondent's case falls under Section 42 of the Law of Succession Act, and that the deceased had during his life time given his property, namely 4/34 share of Limuru /Ngecha/110 to the Respondent as his grandchild, and further that the position is the sum total of all the averments made in the affidavits of the Respondent which have not been denied by the Applicants. He urged court to dismiss the application for revocation.
8. Having carefully considered the application, the affidavits on record and the written submissions by counsel for respective parties, I form the view that the main issue for consideration is that whether the application for revocation of the said grant is merited.
9. This takes me straight to the provisions of Section 76 of the Law of Succession Act which sets the grounds for revocation of grant. Thus, a grant of representation, whether or not confirmed, may be revoked or annulled if the court is satisfied that the proceedings to obtain the same were defective in substance. I have not detected any such defect in the circumstances of this case nor have the applicants stated so in their application. The grant too can be annulled or revoked if it was obtained fraudulently or by making of a false statement or by concealment from court of something material to the case. There is nothing in the application, the supporting affidavit as well as the applicants' written submissions, that would remotely suggest any of the foregoing. The grant may also be nullified if it is proved that there was untrue allegation of a fact essential in point of law. This is not the case here. The allegations made in support of the petition were factual and truthful. It is my considered view, that the instant application does not disclose any defect in substance in the said grant.
10. I note too that the Applicants herein have not been able to demonstrate acts of fraud committed by the Respondent. They have also not shown that the said grant was issued to the Respondent through concealment of material information. Thus, I find that this is not a suitable case under which a grant can be revoked.
11. The Applicants have failed to prove their allegations. In the case of *Re Estate of Waitheru Kihoro*

(*Deceased*) (2009) eKLR, it was held that ‘...in any event it is a cardinal principle of our justice system that whoever alleges must prove the allegation.’ In *Julius Machabe Marombo vs. Augustine Wanjala Marombo* (2011) eKLR it was observed that ‘in the absence of fraud, mistake or misrepresentation, the Objector cannot sustain an application for revocation of grant.’

12. Accordingly, I am of the considered view that there would be no basis whatsoever for revoking the grant in this instant since when the Respondent applied for letters of administration, it was disclosed vide a letter dated 7<sup>th</sup> July, 2004 by Chief Ngecha Location Mr. J.P.K. Kamunyu to the Senior Resident Magistrate Court, Kiambu, that the deceased had a joint title deed with Mr. John Chege Ayub Kubai. Therefore, there was no concealment of matter from the court nor was fraud practiced to obtain the grant. As a result I form the opinion that the grant made to the Respondent herein was properly obtained.
13. The Applicants did not provide any proof that the Respondent herein has failed to seek its confirmation. If anything, the evidence on record reveals that the Respondent proceeded meticulously with the administration of the estate of the deceased and had the grant confirmed as required. Finally, the Applicants did not adduce evidence that the grant issued herein as aforesaid had become useless and inoperative through subsequent circumstances.
14. It is also important to observe that Section 66 of the Law of Succession Act is to the effect that when a deceased dies intestate, the court shall have the final discretion as to the person(s) to whom a grant of letters of administration shall be made. Even though, as alleged here that the Applicants and the Respondent herein bear the same relationship with the said deceased, the Respondent was closer to the deceased by virtue of having been taken in by the deceased as his child and has been utilizing the said 4/34 share of the said deceased’s sole estate since 1957, a fact the Applicants have not denied nor responded to. The Respondent under the circumstance was therefore emotionally closer to the deceased.
15. Accordingly, I have come to the inescapable decision that the application dated 25<sup>th</sup> June, 2006, lacks merit. Accordingly it is dismissed with costs to the Respondent. The Kiambu file, that is to say Kiambu Chief Magistrate’s Court Succession Cause Number 106 of 2009 shall be returned to the Kiambu court for further handling of the matter by that court.
16. It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>st</sup> DAY OF January, 2014.**

**W. MUSYOKA**

**JUDGE**