



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
Miscellaneous Application No. 84 of 2007**

ALICE WANJIRU THIKA)
GAKUYA THIKA).....APPLICANTS
DAVID MUCHERU THIKA)
CRACE WANGUI THIKA)

VERSUS

JOSEPH GICHOMO MWANGI)
GICHANGI GAKUYA).....RESPONDENTS
FRANCIS HEZRON K. MWANGI)
PETER MUNENE MURUGA)

R U L I N G

This is the summons for revocation or annulment of grant under Section 76 and Rule 44 Laws of Succession Act dated 3th September 1998. The applicants seek orders revoking/annulling the grant issued on 8/3/1996 and confirmed on 7/6/1996 in Embu Senior Resident Magistrate's Cause No. 213/1995 on the following grounds:

- (a) *the grant was obtained by making false statement and concealments from court of something material to the cause.*
- (b) *The grant was obtained by means of untrue allegations of a fact essential in points of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.*

There is also a supporting affidavit by all the Applicants. They have explained the circumstances under which the grant was issued and confirmed. They complained that they have been disinherited by a grandson of the deceased and yet they are his real children and first wife respectively.

The 1st Respondent filed a replying affidavit dated 8/5/2003 in which he says he is a purchaser for value from the registered proprietor of the land who is the 2nd Respondent. He denied that the Applicants had no other land to live on. The 3rd and 4th Respondents filed similar replying affidavits. They all deny that Applicants reside on that land Parcel No. MUTIRA/KANYEI/449.

The matter proceeded by way of *viva voce* evidence. In her evidence the 1th Applicant stated that she

was the wife of THIKA WA KIBONGE. The said Thika wa Kibonge had 3 wives i.e. 1st Applicant Winoe and Wakathale. The 2nd Respondent is the grandson of the deceased.

The land left behind by the deceased was land No. MUTIRA/KANYEI/449 in the name of Thika Kabonge. It was to be shared between his 3 widows. That was done. Later her house on her land was demolished. The 2nd Respondent sold the land left by her husband. In cross examination she said she had the original title in her custody which she produced as (PEXB.1).

The father to the 2nd Respondent testified herein as PW2. He said his father had 3 wives and 5 children. He was not aware that the 2nd Respondent had filed succession over their deceased father's estate. He stated that none of the Respondents were his brothers. They learnt later what the 2nd Respondent did and he was charged with forgery and convicted and sentenced to 5 years imprisonment (PEXB.2). He said the Respondents do not live on the suit land.

His sister Wambui stays on the suit land. He denied that the 2nd Respondent lives on land No. 449, though he used to live there in 1995. He lived there to take care of the land and not to dispose of it.

PW3 is a brother to PW2. He gave similar evidence to that of PW2. The 1st Respondent said his registration was not fraudulent. He paid for the land and had never used it. In cross examination he admitted that the 2nd Respondent had told him that all his relatives had died. The witness learnt later the 2th Respondent had cheated them.

The 3rd Respondent explained how he facilitated the 2nd Respondent to file a succession cause after buying 2 acres from his land. He bought 2 acres. On the ground there was opposition and the 2nd Respondent was arrested and charged.

The 4th Respondent explained in detail how he had bought 2 acres of land from the 2nd Respondent. He paid the whole of the purchase price. The land was registered in his name and that of his wife yet she was not a party to this suit. He has not used the land. He had no reason to doubt the 2nd Respondent.

The 2nd Respondent did not tender any evidence. M/s Kibicho for the Applicants gave a summary of the evidence adduced by the witnesses. He cited the case of **WAITIKI NDEGWA, DANIEL MATHENGE NDEGWA VS DUNCAN NDEGWA 7 ANOTHER in Criminal Appeal No. 197/2002 (NYERI)** to support their case, that the 2nd Respondent knew that there were beneficiaries to the deceased's estate yet he hid this from the court.

The 1st, 2nd and 3rd Respondents did not file any submissions. Mr. Maina Kagio for the 4th Respondent filed submissions saying under Section 93 Law of Succession Act, the transfer of land to 1st, 3rd and 4th Respondents is valid and registration cannot be canceled. He distinguished this case from the Nyeri one saying in the latter case the administrator had not sold the land to any 3rd party.

From the evidence adduced and submissions filed herein the following have clearly come out:-

1. ***The late Thika Kebonge was the registered owner of land parcel No. MUTIRA /KANYEI/449.***
2. ***The said Thika Kengonge died in 1976. he had 3 wives with children. Two of the wives have died and the 1st Applicant is the only surviving widow.***
3. ***2nd- 4th Applicants are children of the deceased Thika Kebonge.***
4. ***The 2nd Respondent is a grandson of the deceased and a son to the 2nd Applicant.***

5. *The 2nd Respondent by passed his grandmother (1st Applicant), his own father (2nd Applicant) his uncle (3rd Applicant) and his aunt (4th Applicant) and filed a Succession Cause No. 213/95 in respect of the estate of Thika Kebonge.*
6. *In presenting his papers in the succession cause he told the court that the deceased was survived by a son known as Peter Munene Muruga. He even swore an affidavit dated 31/8/95 saying his father and all relatives were deceased and there was no one except him to succeed his grandfather.*
7. *Upon such false statement and averments being presented to the court the court in Embu issued and confirmed a grant in the name of the 2nd Respondent. The land was then transferred to him.*
8. *In the meantime the 2nd Respondent sold several acres out of this estate to the 1st, 3rd and 4th Respondents and pocketed the money.*
9. *When surveyors came to the land there was resistance on the ground and that is when the family members realized there was a problem.*
10. *A report was made to the DCIO and after investigations the 2nd Respondent was arrested and charged before Kerugoya Court for the following offences vide Criminal case No. 2921/96.*
 - *false swearing contrary to Section 14 of the Penal Code.*
 - *obtaining and registration by false pretenses contrary to Section 320 of the Penal Code.*
 - *three counts of obtaining money by false pretenses contrary to Section 313 of the Penal Code.*
 - *All the Respondents herein testified they realized they had been cheated by 2nd Respondent.*
11. *The 2nd Respondent was found guilty on all the 5 counts and convicted and sentenced to a maximum of 3 years imprisonment. He never appealed against this finding by Court.*
12. *Meanwhile the Respondents got registered as proprietors but have not utilized the land.*

This is the scenario prevailing. The Respondents claim that they acquired valid and good titles. First of all the obtaining of the grant was clouded with a lot of falsehoods. The deceased Thika Kebonge was survived by a widow and children. The 2nd Respondent could only inherit from him through his father or if any of the closest relatives were dead. With the judgment in Kerugoya Criminal Case No. 2921/1996 still intact, there is no way the grant obtained can stand.

The same was obtained through a false statement that the 2nd Respondent was the only beneficiary of the deceased. He also lied to the court that his own father had died. Had the court known that there was a WIDOW and several CHILDREN who had survived the deceased, the Grant herein would not have been issued.

I am guided by the case of **JOSEKPH WAITIKI NDEGWA & ANOTHER VS DUNCAN NDERITU NDEGWA** Nyeri Court of Appeal No. 179/2002.

The confirming of the grant herein had the legal effect of disinheriting all the beneficiaries. The Respondents plead that they are covered by Section 93 of the Laws of Succession Act as innocent purchasers. Yes they are purchasers but one can benefit from a good title.

The title that the 2nd Respondent had was not a good title. He therefore had no capacity to pass that title to any one. He was even found guilty and convicted of obtaining land registration by false pretences. This clearly confirms he had no good title to pass to the respondents as he lacked capacity to

do so.

In the circumstances, I find that the titles obtained by the Respondents cannot be good titles. The process leading to the obtaining of the original title by the 2nd Respondent was fraudulent. The fact that the Applicants could be having land elsewhere does not dis-entitle them from their inheritance.

I therefore annul the Grant issued to the 2nd Respondent. It shall be of no consequence. Any orders emanating therefrom are set aside.

The titles issued to the 1st, 3rd and 4th Respondents are hereby cancelled and the land should revert to its original owner.

I hereby issue a fresh grant to the 1st Applicant jointly with 2nd Applicant. They are allowed to file for confirmation in less than the required 6 months owing to age of the 1st Applicant.

The District Land Registrar Kirinyaga to act on the orders above.

DELIVERED, SIGNED AND DATED AT EMBU THIS 25TH DAY OF SEPTEMBER 2012.

**H.I. ONG'UDI
JUDGE**

In the presence of:-

Mr. Nganga for Maina Kagio for 4th Respondent

Mr. Mungai for Kibicho for Applicant

1st – 3rd Respondents in person

Njue CC