



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE 2026 OF 2000

MUMBI MWATHI.....APPLICANT

AND

STEPHEN NDUNG’U MWATHI.....RESPONDENT

NDUNG’U MUNGAI.....INTERESTED PARTY

RULING

The back ground information to the proceedings herein are that the proceedings leading to the filing of the application subject of this ruling were initially filed in the Kiambu PMS court vide succession cause No.28 of 1996. They were originated by an application by way of chamber summons dated 14th day of June, 1996 and filed on the same date. The heading indicates clearly that the application was a petition for letters of administration Ad colligenda bona presented by one Stephen Ndung’u Mwathi brought under section 67 of the probate and administration rules. Three reliefs were sought namely:-

- 1. That this Honourable court be pleased to grant letters of administration Ad Colligenda Bona as per the petition filed herein.**
- 2. That the availability of the death certificate and or burial permit be dispensed with for reasons stated in the supporting petition and affidavit.**
- 3. That the costs of this application be costs in the cause.**

The application is supported by an affidavit whose summary of the content is that the petition relates to one Kariuki Kirigo who had died on the 11th day of July, 1989 at Iringa in the Republic of Tanzania where the deceased resided as a citizen; that the deceased had previously owned land parcels number Kiambaa/Thimbigwa/T.237 Kiambaa/Muchatha/96, the deceased had named the applicant as a beneficiary as evidenced by an affidavit of Mwathi Kiringo relied upon. That the deponent applicant had been informed by one of his uncles (that uncle not named) that the deceased died leaving no family and for this reason it was difficult for the deponent to obtain the death certificate or burial permit of the deceased from Tanzania as the deponent petitioner does not know where they buried him in order to go and obtain those documents; that there are no inhibition on the said parcel of land as shown by the official serchies exhibited done on the 22/7/91; that for the reasons given in the deponement it is only fair that the oral will of the deceased be endorsed before full letters are granted.

The accompanying petition dated the same date indicates that the applicant had presented the petition in his capacity as a nephew of the deceased and by reason of the fact that owing to the special circumstances of the case, the urgency of the matter as appears from the affidavit filed here with was so great that it

would not be possible for the court to make a full grant to the person who is lawfully entitled to meet the necessity of the estate of the deceased. There is a promise that the petitioner would faithfully administer the estate of the deceased according to law all which according to law devolves upon and vests in the personal representative of the deceased and that the petitioner would render a just and true account of such estate whenever required by law. So to do and he would deliver to the court the said grant in respect of parcel number Kiambaa/Muchathat/96 and Kiambaa/Thimbigwa/T.237.

A perusal of the hand draft notes of the record reveals that the said application was taken before the court at Kiambu on the same date of 14/6/96 and the chamber summons application was allowed as prayed.

In the same file there is traced an application by way of chamber summons dated the 28th day of June, 1996 and filed the same date. It was brought under section 3A of the civil procedure Act and all enabling provisions of the law. Two prayers were sought namely:-

(1) That the Honourable court be pleased to issue confirmation of grant.

(2) That the costs of this application be in the cause.

The application had been drawn and filed by the same A.N. Mwangi & Co. Advocates for the petitioner. It is worth noting that the application for confirmation was presented 14 days after the presentation of the application for issuance of a temporary grant Ad colligenda Bona.

The application for confirmation was supported by an affidavit which had in fact been deponed by an advocate of the high court of Kenya who in fact had conduct of the matter on behalf of the applicant and was alleged to have been competent to depone to the same. Paragraphs 2,3,4,5 and 6 of the said affidavit read as follows:-

(2) That the applicant is unable to have the parcel of land transferred to him due to non confirmation of grant.

(3) That there is no dispute as to inheritance hence the prayer for confirmation of grant to enable the applicant be transferred the parcel of land.

(4) That this is a requirement from the lands office in Kiambu.

(5) That I swear this affidavit in support of the applicant's application herein.

(6) That what is deponed hereto is true to the best of my knowledge, information and belief.

A perusal of the hand draft entries of the record reveals that the application for confirmation was presented on the 28/6/96 and the file was placed before the same magistrate on the same date of 28/6/96. The order of the court reads:-

“Application for confirmation of grant issue don 14/6/96 is allowed and same ordered confirmed as prayed”

The certificate of confirmation traced on the record extracted on the 8th day of August, 1996 gave the two parcels of land namely Kiambaa/Muchatha/T.237 and Kiambaa/Thimbigwa/96 to one Stephen Ndungu Mwathi.

Meanwhile on the 17th day of June, 1996 the same advocate had presented an application under section 3A of the CPA and all enabling provisions of the probate and administration rules. The application is by way of chamber summons dated the 17th day of June, 1996 and filed on the 18th day of June, 1996. The reliefs sought were as follows:-

(1) That the court do order that the executive officer of this Honourable court to sign transfer forms in respect of land parcel No.s Kiambaa/Muchatha/T.237 and Kiambaa/Thimbigwa/96.

(2) That costs be in the cause.

The hand draft entry of the proceedings shows that the application was placed before the same magistrate on the same date; it was filed on 18/6/96 and the following entries made:-

“Mr. Murigi: It is only an officer of this court who can execute transfer documents. That is the reason for my application dated 17/6/96. I rely on the affidavit by Mr. Stephen Mwathi in support.

Order

Application dated 17/6/96 is allowed and order granted as prayed in prayer 1. No order as to costs.

The supporting affidavit for the application is indicated to have been supported by the affidavit of one Stephen Ndungu Mwathi. It comprises 6 brief paragraphs and these read:-

- 1. That I am the applicant herein hence competent to swear this affidavit.**
- 2. That I am unable to have land parcel Nos. Kiambaa/Thimbigwa/96 and Kiambaa/Muchatha/T.237 transferred in my favour as there is no one to execute the transfer document.**
- 3. That there is no one contesting inheritance in respect of the deceaseds’ estate.**
- 4. That it is only fair and just that this Honourable Court compete?. The executive officer of this court to execute transfer forms in my favour.**
- 5. That I swear this affidavit in support of my application herein.**
- 6. That what is deponed here to is true to the best of my knowledge information and belief.**

The order authorizing the executive officer to sign the transfer documents was extracted the same date of 18th day of June, 1996. The transfer documents traced on the record appear to have been signed by a person indicated to be the Executive officer whose name is not given and is purported to have been signed by a magistrate on the 20th day of June, 1996. There are two forms in respect of both parcels of land. There is also traced on the record Form R.L.7 for transfer by personal representative to persons entitled under a will or an intestacy. It indicates that the initiator is one Stephen Ndungu Mwathi as a personal representative of Kariuki Kirigo to be transferred to Stephen Ndungu Mwathi. It is indicated to have been signed by Stephen Ndungu Mwathi before the subordinate court but the dates when the execution was effected is not indicated.

Other revelation on the record reveals existence of gazette notice No.4877 of 30th day of August, 1996. For purposes of the record the same is reproduced here:-

“Gazette notice No.4877 the registered land Act cap 300 section 33.

Registration of instruments whereas Kariuki Kirigo of P.O. BOX 46124, Nairobi is registered as proprietor of those pieces of land known as Kiambaa/Muchatha/T.237 and T.306 measuring 0.22 acres and Kiambaa/Thimbigwa/96 measuring 0.76 hectares, situate in Kiambu District and where as the resident magistrate court at Nairobi in succession cause No.28 of 1996 has ordered that the said piece of land be transferred to Stephen Ndungu Mwathi of P.O. BOX 46124 Nairobi and whereas the executive officer of court has executed the transfer document of parcel No. Kiambaa/Muchatha/T.306 in favour of Mary Wambui Kamau of P.O. BOX 46124, Nairobi and

whereas all efforts made to compel the registered proprietor to surrender the land title deeds issued in respect of the said piece of land to the land registrar have failed. Notice is given that after expiration of thirty (30) days from the date hereof provided no valid objection has been received within that period, I intend to dispense with the production of the said land title deed and proceed with the registration of transfer document and upon such registration the land title deeds issued earlier to the said kariuki Kirigo shall be deemed to be cancelled and o no effect.

Dated the 30th August, 1996.

C.W. Ngechu
Land Registrar
Kiambu District”

There is traced on the record an affidavit deponed on the 16th day of July, 1991 by one Mwathi Kirigo. It had been deponed before a magistrate in the subordinate’s court at Kiambu. The affidavit was filed in court on the 14th day of June, 1996. It is reproduced herein for purposes of the record:-

“Republic of Kenya
Affidavit

I Mwathi Kirigo of ID/3489439/16 of Muchatha Village Kiambaa Division Kiambu District in the Republic of Kenya P.O. BOX 46124 Nairobi, do hereby make oath and say as follows:-

1. That I am known as above and therefore competent to swear this affidavit.
2. That I am the only brother of one Kariuki Kirigo deceased who died on 11th July, 1989 at Iringa in the Republic of Tanzania.
3. That I am not able to get his death certificate since he died out of the country.
4. That before he died he owned two pieces of land Nos.Kiambaa/Muchatha/T.237 and Kiambaa/Thimbigwa/96 which are still registered in his names upto date.
5. That the said Kariuki (deceased) had left an oral will before our clan elders such as William Gachuro Njuguna of ID./0453103/63 and Kinyua Kariuki of ID/4298928/67 to the effect hat when he dies the two parcels of land mentioned above should be inherited by his step son namely Stephen Ndungu Mwathi of ID/4860873/67.
6. That I am now making this affidavit to enable the authorities concerned to transfer the said parcels to the said Stephen Ndungu Mwathi as per the facts deponed there above.
7. That what I have stated herein are true to the best of my knowledge and belief.

Sworn by the said Mwathi Kirigo at Kiambu on this 16th day of July, 1991.

Before me
Subordinate
Court Kiambu

signed
deponent

There is also traced on the record an application presented by the same advocate A.N. Mwangi. It is by way of chamber summons brought under section 3A of the civil procedure Act and all enabling provisions of the law. It is dated 6th day of October, 1996 and filed on the 9th day of October, 1996. Two reliefs are sought namely:-

1. That the land Registrar –Kiambu land office be compelled to remove a caution lodged by one Ndung’u Mungai in land parcel number Kiambu/Thimbigwa/96.

2. That the cost of this application be cost in the cause.

The application is indicated to have been supported by the affidavit of Stephen Ndungu Mwathi. For purposes of the record the content reads:-

“Affidavit

I Stephen Ndung’u Mwathi of P.O. BOX 46124 Nairobi in the Republic of Kenya make oath and state as follows:-

- 1. That I am the applicant herein hence competent to swear this affidavit.**
- 2. That land parcel No. Kiambaa/Thimbigwa/96 has already been transferred to me by this Honourable court.**
- 3. That upon presentation of the transfer form at the lands office Kiambu I realized that one Ndungu Mungai who is my cousin had lodged a caution on the afore said parcel of land way back in 1989.**
- 4. That the said Ndung’u Mungai does not stay in the afore said parcel of land and resides in Western province and has never visited the land since the time of lodging the caution.**
- 5. That no valid objection to my being transferred the land in question has been raised as per Kenya gazette notice No.4877. Annexed and marked SNM1 is a copy of the same.**
- 6. That it’s only fair and just in the premise that the caution lodged be removed to enable me obtain title for want of no objection.**
- 7. That I swear this affidavit in support of my application herein.**
- 8. That what is deponed here to is true to the best of my knowledge information and belief.**

Sworn by the aid Stephen Ndungu Mwathi.

This 9th day of October, 1996.

**Before
C.W. Ngechu
Advocate
Commissioner of oath”**

Deponent

A perusal of the hand draft record reveals that on 8/10/96 the participating advocate one Murigi appeared before court for the applicant and there is indication that the advocates either intimated to the court or the court advised him to file an application for removal of caution as per Kenya gazette notice dated 30/8/96. On 9/10/96 there is direction that the chamber summons filed herein and fixed for hearing on 15/10/96 at 9.00 a.m. on 15/10/96 the application was placed before F.N. Muchemi and the proceedings read:-

“Mr. Murigi- This is an application dated 8-10-86 seeking for order of removal of caution by the land Registrar, Kiambu. The grounds supporting the application are contained in the applicant’s affidavit.

**F.N. Muchemi
SPM**

Court: Application not opposed. Granted as prayed.

**R.N. Muchemi
SPM”**

The order was extracted the same date of 15th day of October 1996 and it reads:-

“(1) That the land Registrar Kiambu lands office be and is hereby ordered to remove a caution lodged by Ndungu Mungai in respect of land parcel No. Kiambaa/Thimbigwa/96”

Against the afore set out background information one Ndungu Mungai moved to the high court and presented succession cause number 2026/2000. It was presented by way of summons presented under the then order XXXVI rule 1 of the CPR. Section (B) (C) succession Act rule 4 and 73 of the probate and administration. It sought three reliefs namely:-

- 1. That the grant of representation of the estate of Kariuki Kungo granted to Stephen Ndungu Mwathi herein be revoked and annulled upon the grounds that the grant was obtained fraudulently by concealing facts from court relating to the true heirs of the deceased.**
- 2. That the said grant be granted to Ndungu Mungai the bonafide purchaser of the land known as Kiambaa/Thimbigwa/96.**
- 3. That costs of this application be provided for.**

The application is anchored on the supporting affidavit and in summary the deponent asserts that the respondent Stephen Ndungu Mwathi the respondent is the deponents cousin; that the deponent had purchased the suit land in 1968 and he took possession of the said land and he has developed the same. That the succession proceedings were processed without his knowledge to the knowledge of his existence by the respondent that it was not true that the title deed was lost necessitating the gazetement of the loss. It is therefore the deponent’s assertion that the grant having been obtained fraudulently the same should not be allowed to stand.

This original application was subsequently amended on the 16th day of October, 2000, and filed on the 17th day of October, 2000. Directions were given that the Respondent be served. On 9/10/2001 directions were given by the Deputy Registrar that the said application for revocation be heard by way of viva voce evidence. On 11/12/2001 parties appeared before Aluoch J as she then was and the court gave directions that the application be presented using the statutory format hence the representation of the application dated 1st day of March,2002 and filed on the 11th day of March,2002 and directions were given that the same be disposed off by way of viva voce evidence. The matter came up for hearing severally but it never took off. On 24/5/2005 when the matter came up before Koome J as she then was, the learned Judge was informed that there are other parties not parties to the proceedings who may be affected by the outcome of the revocation proceedings who needed to be served. The learned judge then gave directions that the said affected persons be served with the application for revocation so that they too have notice of the proceedings.

On 23/11/2005 the matter went before Koome J, as she then was once more. The learned judge was informed that all the interested parties who had been brought to the attention of the court on 24/5/2005 had been served. The court was then informed that the registered proprietor of Kiambaa/Thimbigwa/96 was deceased and it was necessary to serve the application on the administrator of that deceased estate of one Kariuki Kirigo. The application for 1st day of March, 2002 was then marked stood over generally.

In the intervening period another application for revocation was presented. It was presented by one Mumbi Mwathi through counsel. It is dated 25th day of August, 2006 and filed on the 30th day of August, 2006. It is brought under section 76, (a) (b) and (c) of the law of succession Act cap 160 laws of Kenya and rule 44(1) of the probate and administration rules. The reliefs sought are three namely:-

- 1. That the grant of letters of administration ad colligenda bona granted to Stephen Ndungu**

Mwathi by the Senior Resident Magistrates COURT Kiambu on 14/6/96 be revoked and annulled.

2. That order for confirmation of grant of letters of administration issued by Senior Resident Magistrate Court Kiambu on 28/6/96 be revoked and annulled.

3. That all orders consequential upon and based on the said grant of confirmation of grant of letters of administration be declared null and void”

The application is grounded on the following grounds:-

(a) The grant of letters of administration ad colligenda bona to Stephen Ndungu Mwathi was obtained fraudulently and through material misrepresentations of facts.

(b) The order for the confirmation of grant of letters of administration issued by the Senior Resident Magistrate’s court Kiambu was illegal unlawful and irregular.

(c) All consequential orders and acts done pursuant to the above illegal orders are a nullity and of no legal effect.

The application is also anchored on a supporting affidavit by Mumbi Mwathi deponed and filed simultaneously with the application. The salient features of the same are as follows:-

(a) That she has knowledge of the matters being deponed.

(b) That the succession proceedings relate to one late Kariuki Kirigo died in 1989 at Iringa in Tanzania where he had been residing.

(c) The said deceased Kariuki Kirigo was the only brother to the applicants father Mwathi Kirigo who died in the year 2002. The said Mwathi Kirigo had two wives namely Elizabeth Njeri and Edith Nyambura. Both of these wives had children. Those of Elizabeth Njeri are enumerated as:-

(i) Samuel Kamau(ii) Mumbi Mwathi (deponent) aged 59 years. (iii) Wanjiku Mwathi aged 40 years (iv) Kaguri Mwathi adult. (v) Nyambura Mwathi- adult

Those of Edith Nyambura are enumerated as:

(i) Gathini Mwathi (ii)Nyangugi (Nyaguthi) Mwathi (iii)Wanjiru Mwathi.(iv) Stephen Ndungu Mwathi the respondent (v)Nyakuni Mwathi (vi)Kamau Mwathi.

(d) That the deceased never left a will. He left behind LR. No. Kiambaa/Muchatha/T.237 which he left for the permanent use and ownership of the deponents father and family since the deceased was permanently resident in Iringa Tanzania and as at the time of the deceaseds’ death, the deponents father and his two house holds were resident on this parcel of land.

(e) That upon the death of the deceased, the respondent filed an application for letters of administration ad colligenda bona without the knowledge and notice to the persons enumerated in paragraph 7 of the supporting affidavit.

(f) That the Respondent knew of their existence and presence on the said land since they were all living on the same land with the Respondent.

(g) Despite knowledge that the deponent and other family members were living and using the subject land, the Respondent never named them as dependants.

(h) That the Respondent made a false allegation that the deceased had left an oral will allegedly made before clan alders William Gachuru Njuguna and Kinyua Kariuki William Gachuru had deponed an

affidavit disowning the said allegation.

(i) That the application for confirmation was made on the basis of an application ad colligenda bona and for this reason the said confirmation was irregular and illegal as it is contrary to law.

(j) That by use of the said confirmed grant the Respondent went a head and changed the title of the said land in the names of Josephine Wandai Ndungu his wife (the respondent's wife) and Geoffrey Munjui Karuwa.

(k) That by reason of matters complained of herein, the deponent applicant and her siblings as well as step siblings have been disinherited.

(l) By reason of the assertions made herein, the court is urged to find that a case has been made out to entitle this court upset the grieving orders.

In the form of annexures the deponent has annexed the documentation as well as a proceeding in Kiambu principal Magistrates court succession cause number 287/96 already assessed herein. There is also an affidavit deponed by one William Gachuru Nguguna deponed on the 25th day of August, 2006 whose sum total is that he disowned being party to the making of the oral will allegedly made by the deceased subject of these proceedings.

There is an annexure for Kiambaa/Thimbigwa/96 registered in the name of George Kimani Nganga. There is also an extract of Title for Kiambaa/Muchatha/T.237 whose history of entries reveals that the deceased Kariuki Kirigo had been registered as owner on 20/2/59 and certificate was issued on 22/5/67. Title passed to the Respondent on 22/8/96. Title issued in his favour on 2/10/96 and on 24/1/2000 the parcel was subdivided into two equal parts and transferred to Josephine Wandani Ndungu and Geogrey Munyui giving rise to new Titles namely T.598.T.599.

A further perusal of the record reveals that the Respondent instructed counsel to act for him who filed notice to that effect on the 26th day of October, 2006.

On 11/12/2006 the matter went before Dulu J who gave instructions that all the beneficiaries be served with the application for revocation. On 27/6/2007 Aluoch J as she then was gave directions that both applications for revocation be heard together. There is a return of service filed on 25/7/2007 to the effect that the affected parties had been served.

Nambuye J as she then was became seized of this matter on the 24/4/2010 on which day the respondent was present and he intimated to the court that since his lawyer had not put in an affidavit in reply he wished to put in an affidavit in reply. The counsel for the applicant informed the court that both the applicant and Respondent recognize each other as siblings and for this reason they were going to discuss as siblings with regard to issue of representation and share holding where upon the court made orders giving the respondent time up to 20/5/2010 to file a reply. The applicant to respond to the said affidavit if need be within 7 days of service. The court also gave parties liberty to negotiate a settlement. And since there was counsel on record for the respondent, the respondent was advised to file a notice to act in person.

The matter came again before Nambuye J on 29/6/2010. It was noted that the Respondent who was absent had not filed any replying affidavit and the applicants counsel intimated to the court that they wished to proceed by way of submissionS where upon they were given time upto 29/9/2010 to file written submissions with notice to the other party.

On 29/9/2010 the court was informed that the respondent had not been served where upon the matter was stood over to 25/11/2010.

On 25/11/2010 when the matter came up again a Mr. Maina appeared for the Respondent and he informed the court that he had just come on record for the respondent and filed notice of appointment on the same

25/11/2010 needed and time and that he would be ready by 8/12/2010 where upon the court made an order to have the matter placed for mention on 14/12/2010 for the respondents submissions which were to be served by 7/12/2010 with an order for reply to those submissions if any being forthwith.

On 14/12/2010 the matter came up again before court. There was no representation for the respondent and the court reserved the file for a ruling on 28/1/2011 but the file was filed away either in advertently or deliberately instead of being handed to the Judge.

The applicant's submissions are dated the 13th day of July, 2010 and were filed on the same date. The salient features of the same are that:-

- (i) They rely on the relief sought, grounds in the body of the application and the content of the applicants supporting affidavit.
- (ii) The respondent who had notice filed no papers in opposition and for this reason the application is unopposed.
- (iii) They rely on the provisions of section 53,54,67,71 and 76 of the law of succession in order to solidify their application.
- (iv) On the basis of the documentation presented the court was urged to find that an illegality was committed and grant the relief sought.
- (v) A limited grant can never be confirmed.
- (vi) The cause was never gazette.
- (vii) Under section 71 of the Act, a court of law can only confirm grants of representation after the expiry of 6 months.

This court has given due consideration to the afore set out historical back ground information of the litigation, the content of the application as well as the supporting affidavit and annexures, and the high lights in the applicants' submissions and the fact that the respondent who had due notice of the proceedings never filed a replying affidavit nor submissions. All that the court is required to do is to determine whether on the basis of the afore set out background information, the applicant has satisfied the ingredients required to be established before one can earn the relief sought. These ingredients are set out in section 76 of the parent Act. It provides:-

“Section 76. A grant of representation whether or not confirmed may at any time be revoked or annulled if the court decides, either on the 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 in advertently.**
- (d) That the person to whom the grant was made has failed after due notice and without reasonable cause either :-**
 - (i) To apply for confirmation of the grant within one year from the date thereof; or such longer period as the court has ordered or allowed; or**

(ii) To proceed diligently with the administration of the estate; or

(iii) To produce to court within the time prescribed any such inventory or account of administration as is required by the provisions of a paragraph (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular.

(e) That the grant has become useless and in operative through subsequent circumstance”

This provision has been construed by the court of appeal and in the process crystallizing the law in this area in the case of **MATHEKA AND ANOTHER VERSUS MATHEKA (2005) 2KLR 455** wherein the court of appeal laid down the following guiding principles.

- 1. A grant may be revoked either by application by an interested party or on the court own motion.**
- 2. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.**
- 3. The grant may also be revoked if it can be shown to the court that the person to whom the grant has been issued has failed to produce to the court such inventory or account of administration as may be required.**
- 4. 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, without association of other beneficiaries.**
 - (b) Other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided by part V of the law of succession Act.**
 - (c) The public Trustee; and**
 - (d) Creditors”**

This court has applied the afore set out solidified guiding principles to the background information set out above and the court proceeds to make the following final orders in the disposal of this matter:-

- 1. It is evident that there is in place two applications for revocation of the same grant one filed on 1/3/2002 by Ndungu Mungai and the one subject of this ruling filed by one Mumbi Mwathi filed on 30th August, 2006.**
 - (b) It is observed that each relates to different properties which had formed the estate of the deceased Kariuki Kirigo namely Kiambaa/Thimbigwa/T.237 and Kiambaa/Muchatha/96.**
 - (c) The first application for revocation filed on 1/3/2002 is confined to land parcel number Kiambaa/Muchatha/96. Whereas the application for revocation filed on 30th August, 2006 is confined to land parcel number Kiambaa/Thimbigwa/T.237.**
- 2. It is on record that these two applications were ordered to be heard together but for unexplained**

reasons it was not possible hence this ruling is confined to the application for revocation filed on 30th day of August, 2006 by Mumbi Mwathi although its out come either way may affect the out come of the application filed by Mungai.

3. This court has applied the crystallized principles of law set out above to the facts herein and the court is satisfied that the applicant Mumbi Mwathi has brought herself within the ambit of the ingredients set by sections 76 (a) (b) and (c). The reason for saying so are as follows;-

(a) The initiator of the succession proceedings in the subordinate court namely Stephen Ndungu Mwathi is purported to have anchored his right of inheritance on to an oral will of the deceased made to clan elders. He is therefore required to have initiated his proceedings as testate proceedings and then gone through the motion of the procedures for proving his oral will in order to ensure that it complies with the requirements of section 9 of the law of succession Act. It provides:-

“Section 9(1) no oral will shall be valid unless-

(a) It is made before two or more competent witnesses and

(b) The testator dies within a period of three months from the date of making of the oral will.

Provided when applied to the initiating affidavit of the respondent who was the applicant it is observed that in paragraph 5 of the supporting affidavit deponed on 14th June, 1996 the uncle who informed the applicant of the existence of the content of the oral will is not named.

(ii) The mention of an uncle appears to be false because the deponement of Mumbi Mwathi that the deceased had only one brother who is her father and also father of the respondent has not been ousted by the respondent who never filed any response to the application.

(ii) The elders who are alleged to have been present during the making of the alleged oral will namely William Gachuru Njuguna and Kinyua Kariuki were named in an affidavit allegedly deponed by the disputants father Mwathi Kirigo in 1991. One of these William Gachuru Njuguna has deponed an affidavit annexed to the supporting affidavit of Mumbi Mwathi denying any knowledge of his presence when the alleged will was made a fact the respondent has not countered with of another affidavit.

(iv) The law makes it mandatory that in order for an oral will to be valid it has to be made three months to the death. There is no evidence to show that the will relied upon by the applicant was within the said time frame. By reason of what has been stated above, the basis of the existence of the alleged oral will stands ousted.

4. The ingredients of concealment of material facts relevant to the making of the grant has been established for the following reasons:-

(a) The Respondent failed to disclose that his own father and father of the applicant was the only brother of the deceased.

(b) The Respondent failed to disclose that in fact his father and his two house hold inclusive of the house hold of the respondents' mother were settled on land parcel number Kiambaa/Muchatha/T.237.

(c) The respondent also failed to disclose that there were other persons interested in the deceaseds' estate who may very well have moved to challenge the alleged oral will.

5. The ingredients of the illegality or the un procedurality of the process leading to the issuance of the grant have been established for the following reasons:-

(a) Without any contest from the respondent to the application subject of this ruling the existence of the alleged oral will stands ousted.

(b) The speed with which the proceedings were processed in the subordinate court and orders made tends to demonstrate existence of a prior arrangement for the issuance of the anticipated orders. This is proved by the fact that the –

(i) Application for issuance of the temporary grant ad colligenda bona was granted the same date the petition and application were presented that is 14/6/96 and yet there was no sufficient proof of existence of any danger with regard to waste or damage to the deceased's estate.

(ii) The application to seek orders for the executive officer of the court to execute the transfer documents were sought on 17/6/96 even before the application for confirmation had been made.

(iii) The transfer documents executed by the executive officer do not firstly disclose the name of the executive officer who executed them. Secondly the dates on which these documents were attested and registered in the lands registry and the name of the particular land officer who attested them has not indicated.

(iv) The application for confirmation was presented exactly 14 days after the issuance of the first grant in the absence of an application for confirmation before the expiry of six months as stipulated by law. The confirmation order was issued on the same date the application was presented which as mentioned was 14 days after the issuance of the temporary grant ad colligenda bona.

(v) The quick processing of the transaction and the fact that orders were granted by the same magistrate tends to give an impression that there were prior arrangements for the issuance of the said orders.

(vi) The said confirmation on the basis of a purported oral will did not take cognizance of the provisions of rule 13(1) of the probate and administration rules. It provides:-

“13(1) An application for proof of an oral will or of letters of administration with a written record of the terms of an oral will annexed shall be by petition in form 78 or 92 and be supported by such evidence on affidavit in form 4 or 6 as the applicant can adduce as to the matters referred to in rule 7, so far as relevant together with evidence as to-

(a) The making and date of the will.

(b) The terms of the will.

(c) The names and addresses of any executors appointed.

(d) The names and addresses of all the alleged witnesses before whom the will was made.

(e)

(f)

Applying the afore set out provision to the facts displayed herein the court is satisfied that on the said facts there was no grant of representation issued to duly appointed executors with the oral will annexed which was capable of being confirmed subsequently. In the alternative even if it were to be taken that the paper work presented did not meet the threshold for the issuance of a grant of representation with the oral will annexed, and the proceedings therefore fell into the category of a grant of representation to an intestate estate, the court still makes a finding that the correct procedure was not followed to get a grant of representation to an intestate estate which was capable of being confirmed in accordance with the provision of section 71 and 72 of the parent Act. Further the applicant who was the purported beneficiary of the alleged oral will could only be granted to the applicant if he is the one who had been named as the executor of which he did not assert that he had been named as such.

6. Another ground proving illegality is that what had been applied for was a grant ad colligenda bona which according to the applicable rules never matures into a confirmation. The relevant provision is probate and administration rule 36. It provides:-

“36(1) Where owing to special circumstances the urgency of the matter is so great that it would possible for the court to make a full grant of representation to the persons who would by law be entitled there to in sufficient time to meet the necessities of the case any person may apply to the court for the making of a grant of administration ad colligenda bona defunct of the estate of the deceased.

(2) Every such grant shall be in Form 47 and be expressly limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made.

(3) An application for such a grant shall be by petition in form 35 signed by the applicant in the presence of not less than two adult witnesses supported by an affidavit containing material facts together with the reason for the application and showing the urgency of the matter and shall be made at the principal registry or at the Mombasa, Kisumu, Nakuru, Nyeri, Kisii, Kakamega, Meru, Machakos, Eldoret and Bungoma registries.

(4) The provision of rule 7 (4) shall not apply to applications under this rule.

(5) Copies of the proceedings and of the grant when issued shall be served upon such persons (if any) and in such manner as the court shall direct”

The court has duly construed this provision and applied it to the facts herein and it makes a finding that the sole purpose of a grant of representation is to collect and getting in the estate property. It is never meant to benefit a would be beneficiary of the estate. It is incapable of being confirmed.

(ii) The application presented did not meet the thresh hold as it had not been signed by two adult witnesses.

(iii) There is no evidence that the resulting proceedings and grant was ever served on to all those who may have been interested in the estate.

7. Another illegality is found in the provisions of law used for access to the reliefs sought and granted. The court has made observation that most applications were being presented under section 3A of the civil procedure Act followed by a general provision of **“and any other enabling provision of law”**. It is undisputed that the proceedings having fallen under the law of succession Act cap 160 laws of Kenya the court could only apply any other law if the parent Act namely the law of succession Act permits the application of such law to succession proceedings section 2(1) of the L.S.A is very clear on the law applicable. It provides:-

“Section 2(1) except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestates or testamentary succession to estates of deceased person dying after commencing of this Act and to the administration of estate of those persons.

(2)...

This court is alive to the fcata that section 3A of the civil procedure Act makes provision for the inherent jurisdiction of the court to do anything for ends of justice to be made to the parties involving litigation initiated under the civil procedure Act cap 21 laws of Kenya. It provides

“Section 3A Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of

the court”

Section 101 of the L.S.A. provides:-

Except as otherwise expressly provided in this Act, nothing there in shall affect the provisions of:-

(a) The trustee Act

(b) The public Trustee Act

(c) The trusts of land Act

(d) Section 218 to 222 of the Armed Forces Act concerning estates of deceased solders”.

Lastly there is rule 63 of the probate and administration rules. It provides:-

“63 (1) Save as is in the Act or in these rules otherwise provided, and subject to any order of the court or registrar in any particular case for reasons to be recorded the following provision of the CPA Rules namely orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX together with high court practice and procedures Rules shall apply so far as relevant to proceedings under these rules.

This court has construed all the afore cited provisions of law and applied them to the facts herein and it is satisfied that section 3A is not one of the provision of law imported into the law of succession Act and for this reason it was irregular for any party to invoke it for purposes of it enabling that party to draw benefit in a succession proceeding governed by the law of succession Act. It means all orders issued herein on the basis of the proceedings respecting them having been initiated under section 3A CPA are null and void and do not pass any benefit for purposes of succession.

8. With regard to the ingredients of fraud, the court finds that this ingredient has been established because:-

- (a) The proceedings were initiated on the basis of a false allegation that the deceased died leaving an oral will on the basis of which the respondent was to benefit from the deceaseds’ estate.
- (b) The proceedings were based on a deliberate and blatant concealment of material facts namely that there were other interested parties in the deceaseds’ estate with equal right to benefit as that of the respondent.
- (c) By the fact that the proceedings were hurried to the extend that at one time even counsel acting for the applicant is the one who deponed the affidavit in support of the application for confirmation is proof that nothing was to be left to chance.
- (d) The documentation for passing title were not properly filled and yet they were used to pass title.
- (e) The gazette notice gazetting the alleged loss of title to the suit property contained deliberate misinformation as it never mentioned.
- (f) The name of the executive officer who executed documents on behalf of the deceased was not given.
- (g) There was a deliberate flouting of the law to facilitate the change of titles from the name of the deceased to the Respondent.
- (h) Despite the Respondent having been served with the application for revocation soon after its filing, he deliberately failed to respond to the proceedings despite being given ample time to do so.
- (i) By conduct of the Respondent in obtaining the issuance of the registration in his favour and then

immediately transferring it to 3rd parties.

For the reasons given in the assessment, the application for revocation dated the 25th day of August,2006 and filed on the 30th day of August,2006 be and is hereby allowed and the court proceeds to make the following orders with regard to the same:-

1. The grant of letters of administration ad colligenda bona granted to Stephen Ndung'u Mwathi by the senior Resident Magistrates court Kiambu on 14/6/96 be and is hereby revoked and annulled.
2. The order for the confirmation of grant of letters of administration issued by the senior Resident magistrates court Kiambu on 28/6/96 be and is hereby revoked and annulled.
3. All consequential orders emanating from the orders issued under (1) and (2) above are declared null and void.
4. By reason of the orders issued in number 1, 2 and 3 above all the processes whereby land parcel number Kiambaa/Muchatha/T.237 was divested from the name of Kariuki Kirigo are declared null and void.
5. By reason of the order given in number 4 above the titles resulting on subdivision namely L.R. No.Kiambaa/Muchatha/T.598 and Kiambaa/Muchatha T.599 be and are hereby ordered cancelled.
6. By reason of what has been stated in number 5 above, upon cancellation of the resulting titles mentioned in number 5, the old Title namely Kiambaa/Muchatha/T.237 shall revert and be restored in the names of the deceased namely Kariuki Kirigo.
7. The applicant who had a genuine complaint will have costs of the application paid to her by the Respondent.
8. Thereafter parties proceed according to law.
9. The delay in the drafting and delivery of the ruling which is regretted was occasioned by the clerk either in advertently or deliberately filing the file away instead of handing it over to the judge for the drafting of the ruling and the same has been drafted as soon as the file was availed to the Judge.

SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE-JA.

DATED, READ AND DELIVERED AT NAIROBI BY THE HON.MR. JUSTICE MAJANJA ON THIS 21ST DATE SEPTEMBER, OF 2012.

JUDGE