



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO.1723 OF 2009**

**IN THE MATTER OF THE ESTATE OF WARUGA KAMONDU (DECEASED)**

DAVID MAINA MWANGI.....1<sup>ST</sup> APPLICANT  
JOHN KARANJA MWANGI.....2<sup>ND</sup> APPLICANT  
NANCY NJERI NDUNGU.....3<sup>RD</sup> APPLICANT

**VERSUS**

PERIS WANJIKU KAMARA.....RESPONDENT

**J U D G M E N T**

The respondent, Peris Wanjiku Kamara was issued with grant of letters of administration intestate to administer the estate of Waruga Kamundu (deceased). The deceased died in 1967. The grant was issued by the Thika Resident Magistrate on 27<sup>th</sup> February 1986 in **Thika Resident Magistrate's Court Succession Cause No.305 of 1983**. The said letters of administration was confirmed to the respondent on 8<sup>th</sup> November 1990. Two properties i.e. Loc.3/Kariua/T.69 and Loc.3/Kariua/145 (the suit property) appear in the schedule of the said certificate of confirmation of grant. The said properties comprised the estate of the deceased. The court directed that the said properties be inherited by the respondent. After the grant was confirmed, the suit property was on transmission, transferred to the respondent.

On 31<sup>st</sup> July 2009, the applicants filed summons pursuant to **Section 76** of the **Law of Succession Act** seeking to have the said grant issued to the respondent revoked or annulled. The applicants claimed that the respondent had obtained the said letters of administration by fraudulently making false statements and concealing from the court facts which were material to the case. In particular, the applicants' stated that the respondent failed to disclose to the court that the applicants were the grandchildren of the deceased and therefore entitled to inherit the estate of the deceased. They claimed that the respondent was a total stranger to the said estate of the deceased and therefore not entitled to claim any share in the estate of the deceased. The application is supported by the annexed affidavit of David Maina Mwangi. In the said affidavit, he deponed that the applicants were the children of one Beth Nyabena Mwangi who was the daughter of the deceased. The said Beth Nyabena Mwangi was married to one Mwangi Karugo. Mwangi Karugo, also deceased, is the father of the applicants. The said Mwangi Karugo had filed summons for revocation of grant vide **Nairobi HC Misc.Application No.764 of 1994** seeking the revocation of the grant issued to the respondent. The said application was however dismissed on 5<sup>th</sup> July 2001 for want of

prosecution. It is the applicants' case that they have been in occupation of the suit property since the lifetime of their deceased, who was their maternal grandfather. The applicants state that the respondent obtained the said letters of administration by fraudulently concealing material facts from the court, being the fact that the deceased had other dependants who were entitled to inherit the property that comprised his estate.

The respondent swore a replying affidavit in opposition to the summons for revocation of grant. She stated that she was married to one David Kamara who the son of Ndugo Kamundu, the brother of the deceased, Waruga Kamundu. She swore that the deceased was registered as the owner of the suit property in trust for his then late brother Ndugo Kamundu. Ndugo Kamundu was survived by two (2) sons namely David Kamara, the husband of the respondent and Wilson Kamau who is still alive. She explained that the deceased had a daughter by the name Beth Mwangi. The daughter was married to one Mwangi Karugo, the father of the applicants. It was her case that Mwangi Karugo had prior to his death, filed several cases seeking to assert proprietary right over the suit property. The said cases include **Thika Resident Magistrate's Court Civil Case No.424 of 1990**. The pleadings and proceedings of the said suit were annexed to the said replying affidavit. The suit was dismissed by the subordinate court. It was apparent that the said Mwangi Karugo did not appeal against the said decision. The respondent explained that she later obtained an order from the said court for the eviction of the said Mwangi Karugo from the suits property. The respondent annexed an affidavit which was sworn on 14<sup>th</sup> September 1992 by the said Mwangi Karugo in the proceedings before the subordinate court in which he stated that he was not opposed to giving vacant possession of the suit property but required time to be allowed to remove all his properties including the trees that he had planted on the suit property. It was the respondent's argument that the applicants did not have a case against her since the matter in dispute had already been resolved by courts of competent jurisdiction. She urged the court to dismiss the summons for the revocation of grant with costs.

At the hearing of the summons, this court heard oral submissions made by Mr. Ngugi on behalf of the applicants and by the respondent who was acting in person. This court has carefully considered the facts of this case. The issue for determination by this court is whether the applicants made a case for this court to revoke the grant that was issued to the respondent on the grounds that the respondent had concealed facts that were material to the determination of the succession cause. Certain facts are not in dispute in this cause. It is not disputed that the deceased died in 1967 prior to the universal application of the **Law of Succession Act**. The **Law of Succession Act** is applied to estates of deceased's persons who died after the 1<sup>st</sup> July 1981. The **Succession Law** applicable to the present case is therefore Kikuyu customary law. According to the applicants, they are the children of the daughter of the deceased. Their mother, Beth Mwangi was married to one Mwangi Karugo. The said Mwangi Karugo filed several suits seeking to challenge the respondent's claim to ownership of the suit property. He even challenged the grant of letters of administration that was issued to the respondent in respect of the estate of the deceased in the High Court. He however failed to prosecute the same. The summons for revocation of grant was dismissed for want of prosecution. The said Mwangi Karugo has since died. The applicants, his children, have picked up the cudgel. The applicants claim to the deceased estate is on the basis that they are maternal grandchildren of the deceased. The respondent explained the circumstances in which she claims right of inheritance of the suit property. She stated that she was the widow of David Kamara, the son of Ndugo Kamundu who was entitled to inherit the suit property under Kikuyu customary law.

Having evaluated the facts of this case, it was clear to the court that the applicants have no claim over the suit property. The reason for this decision is twofold: firstly, the issue in dispute regarding the ownership of the suit property has been litigated upon between the father of the applicants and the respondent in courts of competent jurisdiction. The subordinate court at Thika found in favour of the respondent. The applicants' father did not appeal against this decision. The applicants' father sought to challenge the grant that was issued to the respondent in respect of the estate of the deceased. He did not prosecute the summons for revocation of grant before the High Court. The same was dismissed for want of prosecution. At some point during the protracted litigation between the applicants' father and the respondent, the applicants' father swore an affidavit pleading to be given time to vacate from the suit property. It was therefore clear to the court that the applicants cannot have a superior claim to the suit property to that of their father who was unsuccessful before several courts of competent

jurisdiction. Secondly, under Kikuyu customary law, it is the respondent who is entitled to inherit the suit property. As the widow of the son of Ndugo Kamundu (i.e. David Kamara) who was entitled to the suit property, she has a superior claim to the suit property than the applicants' father who was the son in law of the deceased. Finally, it was clear from the facts of this case that the applicants are not prepared to accept the decision rendered by the court. Litigation must come to an end. By seeking to revive a suit which has been long finalized under the guise that the applicants are beneficiaries or dependants of the estate of the deceased, the applicants are in fact flogging a dead horse.

For the above reasons, this court holds that the applicants' summons seeking to revoke the grant that was issued to the respondent by the Thika subordinate court has no merit and is hereby dismissed with costs to the respondent.

**DATED AT NAIROBI THIS 8<sup>TH</sup> DAY OF APRIL, 2011**

**L. KIMARU**

**JUDGE**