



## SUCCESSION

- *Definition of “estate” and free property.*
- *Succession cause can only be filed in respect of property which deceased could in his lifetime dispose.*

## REPUBLIC OF KENYA

### IN THE HIGH COURT OF KENYA

### AT MERU

### SUCCESSION CAUSE NO. 42 OF 2004

### IN THE MATTER OF THE ESTATE OF SILAS KABURU M’MAGIRI (DECEASED)

**CHARLES MUTHOMI KABURU ..... PETITIONER**

**VERSUS**

**PETER NTEERE MAGIRI ..... OBJECTOR**

### JUDGMENT

The deceased in this estate is Silas Kaburu M’Magiri deceased. He died intestate. His son Charles Muthomi petitioned for grant of letters of administration intestate. In so doing, he listed those that survived the deceased as his wife, one other son and three daughters. He also listed the properties that the deceased left as:-

1. ***Sagera Block 2/48 Kabiongai***
2. ***Plot No. 6 Katheri Market***
3. ***Abothuguchi/Katheri 577***

A grant was issued to Charles. On his application for confirmation was confirmed the court distributed the three properties to the beneficiaries named in this cause. The court is now considering an application by way of summons dated 30<sup>th</sup> September 2010. The same is filed by Peter Nteere Magiri. He seeks the revocation of the grant issued to Charles. He seeks revocation on the basis that Charles in petitioning for grant in this cause included parcels of land that did not belong to the deceased Silas Kaburu M’Magiri. The properties, that is, *Abothuguchi/Katheri/577* and *Plot No. Katheri/6* are according to Peter Nteere registered in the name of his father who is not the deceased in this cause. Although in the affidavit of Peter Nteere it is indicated that official search of the two parcels were included, on my perusal of this file I could not find those annexures. However, in the replying affidavit sworn by Charles Muthomi dated 24<sup>th</sup> June 2011, it is clear that Charles does not deny that those two parcels of land are not registered in the name of Silas Kaburu M’Magiri deceased. He however petitioned for grant in respect of those two parcels on the basis that those parcels ought to have been given to his father Silas Kaburu M’Magiri deceased. Having not denied that the said parcels of land are not registered in the name of Silas Kaburu M’Magiri, it goes without saying that, there was no basis for Charles to seek grant in respect of those two parcels of land. He was wrong to have included those two parcels of land in this estate. The word estate in the Law of Succession Act Cap 160 in section 3 is defined as follows:-

***“Means the free property of a deceased person.”***

That means that parcels *Abothuguchi/Katheri/577* and *Plot No. Katheri/6* are not part of the estate of Silas Kaburu M’Magiri deceased. That being so, the application for the revocation of grant by Peter Nteere is merited. Further under section 3 of the Law of Succession Act free property is defined as follows:-

***“In relation to a deceased person, means the property of which that person was legally competent, freely to dispose during***

*his lifetime, and in respect of which his interest has not been terminated by his death.”*

The two parcels of land by that definition cannot be regarded to be free property belonging to the estate of Silas Kaburu M'Magiri deceased. I therefore grant the following orders:-

- 1. The confirmed grant issued and dated 31<sup>st</sup> January 2008 is hereby revoked.*
- 2. The costs of the summons dated 30<sup>th</sup> September 2010 are awarded to Peter Nteere Magiri to be paid by Charles Muthomi Kaburu.*

Dated, signed and delivered at Meru this 10<sup>th</sup> day of August 2011.

MARY KASANGO  
JUDGE