



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**Succession Cause 121 of 1996**

**In the matter of the estate of Nguthari Mbogori... (deceased)**

**CHRISTINE KAJUJU MWENDA .....PETITIONER**

**VERSUS**

**GERVASIO M'RUKUNGA.....OBJECTOR**

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

1. The Application dated 3.12.1996 seeks orders that the grant of letters of administration issued herein on 5.8.1996 and confirmed on 9.10.1996 be revoked and/or annulled because the said grant was issued to the Respondent fraudulently and upon concealment of material facts to the case and that untrue allegations of fact essential in law to justify a grant were placed before the court.

2. The Applicant also prays that the grant be issued to him upon revocation of the grant issued to the Respondent and that an inhibition do issue to prohibit all dealings in land parcel number Nyaki/Mulathankari/551.

3. The evidence as tendered by both the Applicant and the Respondent disclosed the following facts:

i)The deceased in this cause, Nguthari Mbogori died intestate on 25.5.1998 and he left behind a daughter, Karai Nguthari who is not interested in the estate, so far as I can see, but appeared as a witness in support of the case for the Applicant.

ii) Nguthari Mbogori was the proprietor of land Parcel Number Nyaki/Mulathankari/551.

iii) Upon Nguthari's death, the Respondent filed a petition for letters of administration interstate and in that petition she stated that the following persons survived the deceased:

(a) John Mwenda Igweta - Step son to the deceased and also deceased himself.

(b) Jacinta Karoki Mwenda - Wife of John Mwenda Igweta (deceased)

(c) Christine Kajuju Mwenda - Grand daughter

(d) David Kimathi Mwenda - Grand son (mentally unstable)

Letters of administration were subsequently issued to Christine Kajuju Mwenda and on 9.10.1996 the grant aforesaid was confirmed.

4. The Applicant entered the scene when he filed the present Application and in evidence before court,

it is his case that the Respondent is not entitled to any share in the estate and that he is the one who is entitled to it in accordance with Meru customary law. He was supported in his evidence by Cecilia Karegi who I gather is the same as Karai Nguthari daughter of the deceased and one Gitonga Igweta, uncle to the Respondent.

5. The Respondent claims the land comprised in the estate for reasons that her father had bought it from the deceased and he paid 2 goats as consideration thereof. She was supported in her evidence by Samson M'Iringo and Thomas Mutea who only said that the land now in dispute was sold to Mwenda, father of the Applicant and that Mwenda had all along used it without any interference from anyone and that the clan elders decided prior to filing of the Cause herein that the family of Mwenda should inherit it.

6. I have seen the submissions filed by Advocates appearing and to my mind, s.76 of the Law of Succession Act Cap 160 which has been invoked by the Applicant is the starting point in resolving this dispute. S.76 provides as follows:

“ A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on 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 inadvertently;
- (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 the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.

7. On the first point, I would agree with counsel for the Applicant that s.66 of the Act would be an appropriate guide as to the persons entitled to apply for letters of administration in the case of an intestate. That section provides as follows:

“When a deceased had 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-

1. surviving spouse or spouses, with or without association of other beneficiaries;
2. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
3. the Public Trustee; and

4. creditor:

Provided that, where there is partial interstate estate shall be granted to any executor or executors who prove the will”.

8. The Respondent when applying for letters of administration did not for example disclose that a daughter of the deceased, one Cecilia Karegi or Karai Nguthari or Karimi Nguthari (all these names appear on record) actually is alive and in order of priority she ought to have applied for the letters of administration in priority to the Applicant. If the said daughter of the deceased was not interested in applying for the letters of administration aforesaid, then the Respondent ought to have sought a renunciation from the said daughter of the deceased or obtained a consent to allow her to apply for the letters of administration (Rule 7(7) of the Probate and Administration Rules)

9. The Respondent did none of the above and presented her petition as if the deceased had no living direct blood relative and for that reason, the Applicant has succeed in showing that the proceedings thereafter were defective and the Respondent did conceal important material that would have helped the court reach a fair decision. For the same reasons, she is guilty of intermeddling with the estate of the deceased before her interest to it is properly determined. I say so in part because she also proceeded to sell the land and I note that there is a hand-written addition to the person surviving the deceased and one of them is Michael Ndumba Mwithibu, a purchaser of the land. She sold the land well aware that there was a dispute regarding it and before the same was given to her and that is prima facie an offence under s.45 of the Law of Succession Act.

10. I will say no more on this matter save to add this; the father of the Applicant may well have bought the land at the price of 2 goats but the land remained in the name of the deceased, Nguthari Mbogori until his death. The Applicant ought to have enforced her claim against the estate by lawful means and not by taking legal short-cuts.

11. On the other hand, the Applicant is in no better position to say that he is entitled to the estate. The law as I see it is that the daughter of the deceased is the person entitled and it is her who may choose what to do with the land. The Applicant and Respondent can only enter the Cause and claim whatever they wish once she renounces her claim or consents to one of them obtaining letters of administration. At the point of distribution, the Respondent can then raise her claim to entitlement through her deceased father and only at that stage can the court determine who truly is entitled to the land. The determination of that question is not a matter for this court now.

12. This court has looked into the manner in which the grant of letters of administration was made and it is satisfied that under s.76 of the Law of Succession Act, a good case for annulment of the grant has been made and revocation thereof must be the consequence.

13. Accordingly, I will allow prayers 1 and 3 of the Application dated 3.12.1996. for reasons I have given, prayer 2 thereof is dismissed.

14. As to costs, let the parties bear their own costs as I have found that both of them are peripherally claiming the only asset in the estate.

15. Orders accordingly.

Dated, signed and delivered in open court at Meru this 27<sup>th</sup> Day of June 2006

**ISAAC LENAOLA**

JUDGE

**In the presence of**

**Mr. Mokuia Advocate for the Petitioner**

**Mr. Muriuki holding brief for Mr. Arithi Advocate for the Objector**

**ISAAC LENAOLA**

JUDGE.