



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO. 5 OF 2020**

**(FORMERLY SUCCESSION CAUSE NO. 386 OF 2004 (MOMBASA))**

**IN THE MATTER OF THE ESTATE OF M'KIUNGA M'RINYIRU Alias M'KIUNGA M'WARINGIRI (DECEASED)**

**GEORGE N. KIUNGA.....1<sup>ST</sup> APPLICANT/OBJECTOR**

**ANDREW KIREMA.....2<sup>ND</sup> APPLICANT/OBJECTOR**

**ISAIAH MUNYUA.....3<sup>RD</sup> APPLICANT/OBJECTOR**

**VERSUS**

**STELLA KOORU.....1<sup>ST</sup> RESPONDENT/PETITIONER**

**JOSEPH MUTHAURA.....2<sup>ND</sup> RESPONDENT/PETITIONER**

**RULING**

1. Before the Court is an application dated 13<sup>th</sup> December 2019 seeking revocation of grant which was issued on 23<sup>rd</sup> November 2007 with respect to the Estate of the late M'Kiunga M'rinyiru.

2. In the confirmed grant, the property to be distributed is Plot No. NYAKI/GAKI/xxx to be distributed among a total of 14 beneficiaries. 9 of them were to get 2 Ha each and 4 of them were to get 1 Ha each while one Stella Kooru was to get 2.9 Ha.

***Applicant's Case***

3. The Applicant's application is supported by the grounds on the face of it and the supporting affidavit sworn on 9<sup>th</sup> July 2020 by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants. The Applicants also filed submissions dated 9<sup>th</sup> July 2020 whose contents are the same as those of the affidavit. They submit that the 1<sup>st</sup> Respondent is a second wife to the deceased and the 2<sup>nd</sup> Respondent is her son, who is also a child of the deceased from the 2<sup>nd</sup> house; That the deceased was at the time of his death domiciled in Meru and that all of the deceased's assets are in Meru and that save for the 2<sup>nd</sup> Respondent, all the beneficiaries are in Meru. That the Respondent, with a view of disinherit some of the deceased family members, clandestinely filed a succession cause in Mombasa (completely out of jurisdiction) and left out many beneficiaries on the Estate from the proposed mode of distribution. That 17 children (10 from first house and 7 from second house) and 1 widow (the 1<sup>st</sup> Respondent) survived the deceased. That the Respondent in their proposed mode of distribution left out 5 daughters of the deceased when none had given consent to the effect that they were not interested in their father's estate. That the letter from the Chief used in Mombasa was a forgery since the area chief denied issuing such a letter and thus caused an inhibition to be placed on the land parcels that had been illegally subdivided because of the unfair succession proceedings conducted in Mombasa. That the deceased's estate comprised land parcel number NYAKI/GAKI/xxx and 50% of land parcel number NYAKI/MULATHANKARI/xx jointly owned in common with their late uncle M'Nchebere M'Ringiru. That in proposing the unfair mode of distribution, the Respondents are relying on the fact that the first house has benefitted from land parcel number NTIMA/IGOKI/xxxx. That this parcel of land belonged to one Ngiriki M'Kiunga (their mother and first wife) and that their late mother had been gifted this land by her parents and hence it cannot form part of their father's estate and that even assuming that the land had been gifted *inter vivo* to their mother by her husband, it is their humble submission that the same would still not be available for distribution as part of their father's estate.

4. They therefore urge that the grant issued and confirmed in Mombasa be revoked for it was not only issued through fraudulent actions of the Respondents but also by concealment of material facts to the Court. They submit that both parcels of land should be shared equally amongst the deceased children as was the wish of their late father that each of his child gets a commercial plot at land parcel number

NYAKI/MULANTHAKARI/xx and also an agricultural land at land parcel number NYAKI/GAKI/xxx.

### **3<sup>rd</sup> Applicant's Case**

5. The 3<sup>rd</sup> Applicant filed an affidavit sworn on 30<sup>th</sup> March 2020. He also filed submissions dated 24<sup>th</sup> July 2020. He opposes the application made by the 1<sup>st</sup> and 2<sup>nd</sup> Applicant and states that he is opposed to being an applicant and his signature was forged, which matter he has reported to the police. He states that the application for grant was made with the knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants and that all the beneficiaries appeared before the Court in 2007 and no objection was raised. He states that the 1<sup>st</sup> and 2<sup>nd</sup> Applicant have no authority on behalf of their late father's estate to make any application regarding their father's property as they are acting under their own cursed personal interests, and that their application is not based on land parcel number NYAKI/GIAKI/xxx. He states that each has a share but on two other properties while the parcel their father had given to each of his wives to avoid conflicts. He states that NYAKI/MULATHANKARI/xx is jointly by their father and his brother and that the names on the greencard presented to court bears the names. That the other asset NTIMA/IGOKI/xxxx as claimed by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants was never a gift but a clear separation of each of his wife, children and land to avoid these current issues. He states that the 1<sup>st</sup> and 2<sup>nd</sup> Applicant have separated the family into houses, a thing that their dad never wanted all the children to do. That the application for grant was made with their knowledge and only waited when their mother proposed to include other existing estates as was their father's wish that each to acquire their shares. That the estates NYAKI/MULATHANKARI/xx and NTIMA/IGOKI/xxxx are not commercial plots as they claim but homesteads into which the 1<sup>st</sup> and 2<sup>nd</sup> houses rest on and that only NYAKI/GIAKI/xxx is agricultural and each has a share. That the 1<sup>st</sup> and 2<sup>nd</sup> Applicants have colluded with the Chief of Giaki location to spark wars with the chief of Mulathankari location on issue which is not in his area of jurisdiction a ground which is contrary to law and punishable under this Court. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are expressing their greed outwardly by hiding the estate NTIMA/IGOKI/xxxx which they have procured a buyer who is funding this cause as the lands are cut in the middle by a busy highway which they wish to sell. That the beneficiaries of the estate are all children and extends to siblings of the children of the late M'Kiunga whom they wish to remove out of the land to give their shares to deceased ones siblings and later drive them out forcefully. That he wishes that the Chief be put on oath. That he seeks that the Court dismisses the application and allows the distribution of the said NYAKI/MULANTHAKARI/xx and NTIMA/IGOKI/xxxx to proceed or if so, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants make an application of distributing NTIMA/IGOKI/xxxx.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' Case**

6. The 1<sup>st</sup> Respondent opposed the application by way of a replying affidavit sworn on 31<sup>st</sup> March 2020. She also filed submissions dated 24<sup>th</sup> July 2020. The contents of the replying affidavit are similar to those of her submissions. She submits that the deceased had two houses, the first house having 9 children and the second house having 6 children. She submits that the mother of the first house passed away and she thus became mother to all of the deceased's children including those of the first house. She submits that she chose one of her children (the 2<sup>nd</sup> Respondent) who could co-operate with her and who was able to assist her financially to file the succession case and this explains why she first filed the matter at Mombasa since her said child had a business in Mombasa.

7. She submits that before his demise, the deceased had planned very well on how his family should live in that his first house to occupy land parcel number NTIMA/IGOKI/xxxx and the second house to occupy land parcel number NYAKI/MULATHANKARI/xx and that up to now, each of the houses is occupying the land as per the wishes of the deceased. She submits further that the deceased went ahead and confirmed that land parcel number NTIMA/IGOKI/xxxx is registered under the names of the Applicant's mother NGIRIKI M'KIUNGA who is now deceased, to avoid conflict with the children and that from land parcel number NYAKI/GIAKI/xxx, each of the deceased's children is to be given 2 acres as per the confirmation of grant.

8. She finally submits that the Applicants were all through aware of the succession cause since 2004 and at no time have they ever raised any objection and that she is very old and has struggled so much to take care of the children and that some of the said children are over 60 years and they shall start fighting immediately since some have already developed their homes and built permanent houses. She urges the Court to dismiss the application and the status quo be maintained to avoid shedding of blood as their father wishes them to live in peace.

### **Determination**

9. The question arising in this application is on whether or not to revoke the confirmed grant issued on 23<sup>rd</sup> November 2007. The burden is on the 1<sup>st</sup> and 2<sup>nd</sup> Applicants to prove that there is reason good enough to revoke the grant.

10. The law providing for revocation grants is Section 76 of the Law of Succession Act, Cap 160 of the Laws of Kenya. It provides as follows: -

#### **76. Revocation or annulment of grant**

***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 order or allow: 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.***

11. The primary reason for seeking revocation as per their affidavit and submissions is that 5 daughters of the deceased were left out, and that a parcel namely NYAKI/MULATHANKARI/xx was also not included in the succession case. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants have also disclosed the existence of another property namely NTIMA/IGOKI/xxxx which according to them was a gift *inter vivos* to their late mother, (mother of the 1<sup>st</sup> house) and is therefore not up for distribution. They claim that this other parcel is the main reason why the Respondent purportedly concealed material facts from the Court in securing the confirmed grant. They further claim that the letter from the Chief used to file the Petition in the High Court in Mombasa was a forgery.

12. It appears that though his is named as one of the 3 Applicant's, the 3<sup>rd</sup> Applicant has taken a tangent position and is in fact, arguing in the same lines as the Respondents. According to the 3<sup>rd</sup> Applicant, the parcel namely NYAKI/MULATHANKARI/xx is jointly owned by their father and his brother and that the names on the greencard presented to court bears the names. As for the property namely NTIMA/IGOKI/xxxx he states that this is registered in the 1<sup>st</sup> and 2<sup>nd</sup> Applicant's mother's name and the 1<sup>st</sup> and 2<sup>nd</sup> Applicants live thereon. He appears to have no issue with this property.

13. According to the Respondents, all parties have been aware of the proceedings and that no objection was ever raised. She states that the matter was only filed in Mombasa due to the convenience as her son who was able to finance the matter lived in Mombasa where she followed him for this purpose. She states that the deceased had planned very well on how his family should live in that his first house to occupy land parcel number NTIMA/IGOKI/xxxx and the second house to occupy land parcel number NYAKI/MULATHANKARI/xx and that up to now, each of the houses is occupying the land as per the wishes of the deceased.

#### ***Forgery Claims***

14. With respect to the claims of forgery made by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants, this Court is alive to the serious nature of this allegation. However, what is baffling is that even while they claim that the letter from the Chief used to file the Petition in Mombasa was a forgery, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants fully participated and even attended Court in the initial proceedings, which culminated in the year 2007. It is now over 14 years later. It is not clear on why it took the 1<sup>st</sup> and 2<sup>nd</sup> Applicants over a decade to realize that there were forgeries. Furthermore, this claim could only be proven by way of cross-examining the deponents of the respective letters. This Court is not convinced that the 1<sup>st</sup> and 2<sup>nd</sup> Applicants have proven their claim of forgery.

#### ***Omission of Certain Beneficiaries***

15. With respect to the allegation that 5 of the daughters of the deceased were left out, this Court indeed acknowledges that all children irrespective of their gender are entitled to inherit property. This is indeed the spirit of Article 27 of the Constitution on equality and freedom from discrimination. This Court however observes that the said 5 daughters do not feature in the application. The Application has been made by the 1<sup>st</sup> and 2<sup>nd</sup> Applicants, both of whom were beneficiaries as per the schedule of distribution. It is indeed questionable as to why the said daughters were not the ones who made the instant application or swore the affidavits in support of the same.

16. Furthermore, this Court observes that the family of the 1<sup>st</sup> wife whom the 1<sup>st</sup> and 2<sup>nd</sup> Applicants alongside their sisters are associated with benefited from the parcel namely NTIMA/IGOKI/xxxx. Although as admitted by parties, this property is already registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Applicants' late mother, and is therefore not part of the estate of the deceased, this Court takes into consideration that the said family of the first wife already has benefited from this property over and above what they obtained from the distribution of the deceased's estate. This is so for the case of the Respondents who are said to have benefitted from the other parcel namely NYAKI/MULATHANKARI/xx much as it now belongs to the deceased's brother as shall be discussed hereunder. Section 42 of the Law of Succession Act requires the Court to make such considerations as it settles such inheritance matters. The said Section provides as follows: -

#### **42. Previous benefits to be brought into account**

***Where-***

***a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or***

***b) property has been appointed or awarded to any child or grandchild under the provisions of Sections 26 or Section 35 of this Act that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.***

17. In the circumstances, while affirming the rights of a female heir to benefit from the estate of the deceased, no evidence has been tendered to support the claim for the children's share in the estate and further, the families of both wives admittedly received provisions and/or gift *inter vivos* from the deceased and thus the said children, if any have not entirely been disenfranchised of their shares.

### **Omission of Certain Properties**

18. On the allegation that property namely NYAKI/MULTHANKARI/xx was left out in the distribution, this Court finds in the negative. From the evidence adduced, it is apparent that the said property is registered in the joint names of the deceased and his brother, M'Ncebere M'Ringiru. This was evidently a joint tenancy. The position in law is clear that in such joint tenancies, when one of the tenants passes on, the remaining tenant automatically becomes the new sole owner under the doctrine of survivorship. This implies that the property is not up for distribution as the surviving tenant is now the new owner. The property will only be up for distribution upon the demise of the new sole owner, and even then, this property would only be the subject of the Estate of this new owner. This is the hallmark of the principle of *jus accrescendi* which provides for the right of survivorship.

19. This finding was affirmed by the Court in the case of *In re Estate of Johnson Njogu Gichohi (Deceased) Succession Cause No. 112 of 2016 [2018] eKLR* where L.W. Gitari J held as follows: -

#### **13. Section 60 of the Land Registration Act provides:**

***“If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of death delete the name of the deceased tenant from the register by registering the death certificate.”***

***This means that where property is in the names of joint owners, upon the death of one of them, the surviving owner automatically becomes the owner upon presenting the evidence of death of the joint tenant i.e death certificate to the registrar. The property automatically passes to the surviving joint tenant. This principle of survivorship over jointly owned property operates to exclude the property from the Law of Succession Act upon the death of one of the joint tenants. I am in agreement with the holding by Achode J. – Mwangi Gakuri –v- Bernard Kigotho Maina & Another, H. C NBI. Succ. Cause No. 2335/2011 where she stated:***

***“Property is capable of passing upon death other than by will. It may pass by survivorship..... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship..... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants....”***

***18. My view is that as the objector and the deceased were joint owners, the objector as the surviving joint owner was entitled to acquire ownership without being subjected to the process of intestacy. In the case of Isabel Chelangat –v- Samuel Tiro(2012) eKLR, the principle of survivorship also known as ‘jus accrescendi was expounded where it was stated:***

***“A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities.” The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant as long as there is a surviving joint tenant as the right of survivorship takes precedence.”***

***By the principle of survivorship land owned jointly passes automatically to the surviving owner when one dies without the need to file a Succession Cause. W. M. Musyoka in his book Laws of Succession at page 3 states as follows:-***

***“Property is capable of passing upon death other than by will. It may pass by survivorship..... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship..... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants.”***

20. Going by the foregoing, the property NYAKI/MULTHANKARI/xx, having being jointly owned by the deceased and his brother, may not be the subject of this succession cause as it automatically passed on to the deceased's brother upon his death.

21. The other property TIMA/IGOKI/xxxx does not belong to the deceased and is therefore not the subject of the instant application.

### **Conclusion**

22. In conclusion, this Court is alive to the serious ramification of revoking a grant more so after it has gone through the due process, which included public notification through the Kenya Gazette. In this Court's view, revocation should be done only where there is good reason to do so. In the present case, the Applicants have failed to satisfactorily prove the allegations of fraud. There is also no question of defectiveness of the proceedings leading to confirmation of the grant. The beneficiaries who have purportedly been left out do not feature in the application and neither is there evidence to support this allegation. Nonetheless, the deceased had during his life time gifted both families with properties. Finally, the property claimed to have been omitted from the deceased's estate automatically passed to the deceased's brother under the doctrine of survivorship and cannot therefore be up for distribution.

23. Additionally, no proper explanation has been given as to why it has taken the Applicants over a decade to bring the instant application, from the time the confirmed grant was made, even then when the said grant was confirmed with their full knowledge, participation and consent. This Court does not therefore find any reason to revoke the grant.

**ORDERS**

24. In the end, this Court makes the following orders: -

*i) The 1<sup>st</sup> and 2<sup>nd</sup> Applicant's application for revocation of grant dated 13<sup>th</sup> December 2019 is hereby dismissed.*

*ii) Each party shall bear its own costs.*

*Order accordingly.*

**DATED AND DELIVERED ON THIS 10<sup>TH</sup> DAY OF JUNE, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

**M/S George M. Kiunga & Andrew Kirema, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants in person**

**Stella Kooru, the 1<sup>st</sup> Respondent in person**