



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2354 OF 2015

IN THE MATTER OF THE ESTATE OF THUO KAMUIRU (DECEASED)

JAMES NDUNGU THUO.....OBJECTOR/APPLICANT

VERSUS

THUO JOSEPH MBURU.....ADMINISTRATOR/RESPONDENT

RULING

1. The Applicant herein **JAMES NDUNGU THUO** filed in the High Court the summons for Revocation of annulment or Grant dated **21st August 2015** seeking revocation of the Grant issued to the Administrator on the grounds that: -

1. **“The proceedings to obtain the Grant and subsequent confirmation were defective in substance *ab initio*.**

2. **Obtainance of the Grant of Letters of Administration intestate thereof and the subsequent confirmation was obtained fraudulently by the making of a fraudulent and false statement, use of forged documents and by the concealment of facts material to the case.**

3. **The Grant was obtained by means of an untrue allegation of a fact essential in point of Law to justify the Grant”.**

2. The summon was supported by the Affidavit dated **21st August 2013** as well as the Further Affidavit dated **3rd February 2015**.

3. The Administrator/Respondent **Thuo Joseph Mburu** opposed the application through the Replying Affidavit dated **4th December 2015**. The summon was canvassed by way of written submissions. The Objector/Applicant filed written submissions dated **16th July 2021** whilst the Administrator/Respondent relied on his written submissions dated **11th June 2021**.

BACKGROUND

4. The Succession Cause relates to the Estate of **Thuo Kamuiru** (herein after ‘the Deceased) who passed away on **20th March 1989**. The Deceased who was polygamous and had **two (2)** wives was survived by the following persons –

1ST HOUSE

A. MARY NJOKI THUO (First widow, also Deceased)

1. Njeri Njoroge - married daughter (deceased)

2. Wanjiru Gitau - married daughter

3. Peter Kamuiru Thuo - son

4. Hannah Wanjiku - married daughter (deceased)
5. Joseph Gitau Thuo - son
6. Koigi Thuo - deceased son
7. John Thuo - deceased son
8. Monicah Muthoni - unmarried daughter

2ND HOUSE

B. RUTH NJERI THUO (Second wife, also Deceased)

1. James Ndungu Thuo - Son
2. Mariam Wanjeri Njiru - married daughter
3. Tabitha Wanjiku - married daughter
4. Paul Munoru Thuo - son (declared a missing person)
5. Francis Koigi Thuo - son
6. Hannah Wanjiku - married daughter
7. Joseph Mburu Thuo - son
8. Peter Mungai Thuo - son (mentally handicapped and a Dependant person)

5. Following the demise of the Deceased **Mary Njoki Thuo** (the 1st wife) and **Thuo Joseph Mburu** (a son from the 2nd house) filed at the **Limuru Law Courts** a Petition for grant of letters of Administration intestate dated **18th August 2010** vide **Succession Cause No. 116 of 2010**. The two were issued with the grant dated **18th October 2010** which grant was subsequently confirmed on **14th June 2011**. The two widows of the Deceased are also now deceased. The 2nd widow **Ruth Njeri Thuo** died on **28th November 2009**, whilst the 1st widow **Mary Njoki Thuo** died on **8th April 2015**. Upon the demise of his Co-administrator, the Respondent, **Thuo Joseph Mburu** remained as the sole administrator of the estate of the Deceased.

6. The Objector averred that sometime in **March 2015** he was informed that strangers had been spotted viewing the parcel of land known as **ESCARPMENT (JET) SCHEME/370** (hereinafter the suit land) accompanied by a known local land broker. Upon further investigation, the Objector discovered that the said parcel of land had been subdivided way back in the year **2012** into two parcels namely **1611** and **1612**. That said subdivision was done on the basis of the confirmed grant issued by the **Limuru Courts** on **14th June 2011**.

7. Upon further enquiry the Objector discovered that Parcel No. **1612** had been registered to one of his brothers **Francis Koigi Thuo** on **23rd October 2012** and that parcel No. **1411** was registered in the name of another of his brothers **Joseph Gitau Thuo**.

8. The Objector's position is that he was not informed neither was he involved in the filing of the petition for letters of Administration interstate. That the said petition was in any event defective as the Objector asserts that the Deceased did **not** die intestate. He asserts that the Deceased died testate having left a valid written Will dated **15th November 1988**, which Will detailed how the Deceased wished his estate to be distributed.

9. Finally, the Objector avers that he **did not** sign the consent to grant of letters of administration. He insists that signature purported to be his on the consent is in fact a forgery.

10. The Objector insists that he has occupied and tilled the suit land since the year **1980**. That he has constructed his matrimonial home on said parcel of land and that his late son **Harun Thuo Ndungu** was buried on the suit land in **January 1989**.

11. Being aggrieved by the issuance of the grant to the Administrator and the dealings with the suit land, the Objector placed a caution against any further dealings in the suit plot No. **1612**. The Objector asserts that there is a clear move to disinherit him from his rightful entitlement in the estate of the Deceased. That on **14th July 2015**, he was served with a demand letter from one **BENJAMIN KIGORU MURIMI** who claims to have purchased Plot No. **1612** from **Francis Koigi Thuo**.

12. For the above reasons the Objector asserts that the Grant was obtained through misrepresentation and concealment of material facts. He urges this court to revoke said grant to pave the way for issuance of Grant with written Will.

13. The remaining Administrator of the estate **Thuo Joseph Mburu** strenuously opposed the summons for revocation of Grant. The Administrator categorically denies the allegation by the objector that he was sidelined the objector during the succession process. He avers that the objector fully participated in the process and insists that the Objector's signature on the consent form is authentic.

14. The Administrator states that the Objector was provided for having been bequeathed three parcels of land as follows: -

- (i) 5 acres of land at Subukia – Solai
- (ii) $\frac{3}{4}$ acres of LR No. Lari/Kirenga 1819.
- (iii) $\frac{1}{2}$ share of Escarpment shopping centre.

15. The Administrator denies that the suit land had been allocated to the Objector by the Deceased during his lifetime. That this summons is motivated by bad faith and by the desire of the objector to get more than his fair share of the estate. The Administrator urges the court to dismiss this summons in its entirety.

Analysis and Determination

16. I have carefully considered this summons for revocation of Grant, the Replying Affidavit in response as well as the written submissions filed by both parties.

17. It is common ground that **Thuo Kamuiru** the Deceased herein passed away in **Lari Location** on **20th March 1989**. A copy of the Death Certificate Serial Number **250868** is annexed to the petition for Grant of Letters of Administration Intestate dated **18th August 2010**. It is not disputed that the Objector was a son to the Deceased and as such has requisite *locus standi* in this matter.

18. Further, it is common ground that following the demise of the Deceased the Administrator and the Deceased's 1st wife **Mary Njoki Thuo** (now Deceased) sought and obtained Grant of letters intestate issued by the **Limuru Court** on **18th October 2010**. That said grant was duly confirmed on **14th June 2011**. A copy of the confirmed grant is in the court file. It is common ground that one of the Administrators **Mary Njoki Thuo** passed away on **8th April 2015** leaving **Thuo Joseph Mburu** as the sole Administrator of the Estate.

Section 76 of the Law of Succession Act 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 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 of 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 as any such inventory or account which is false in any material particular; or

iv. that the grant has become useless and inoperative through subsequent circumstances.”

19. The matters which arise for determination in this matter as follows:-

- (i) Whether the objector's signature on the consent form was forged?
- (ii) Whether the Deceased left a valid written Will?

(i) **FORGERY**

The Objector has asserted that he was not included or involved in the petition for letters of administration. He insists that he was sidelined

during the entire process. The Administrator retorts that the objector was included and indeed was fully involved in the succession cause filed at the **Limuru Law Courts**. The Administrator cites the fact that the objector signed the consent to making of grant of administration as evidence of the objector's involvement and participation in the entire process. The said consent which was filed in court on **18th August 2010** is annexed to the original petition for grant. The consent is signed by all the children of the Deceased including the Objector **James Ndungu Thuo**.

20. The Objector denies having signed said consent. He insists that his signature was forged. Forgery is a serious allegation. If as the Objector claims the signature on that consent was forged, the question which immediately comes to mind is what action did the objector take. There is no evidence that the objector reported this alleged forgery to the police or to any other authority.

21. It is trite law that he who alleges must prove. Issues of fraud and/or misrepresentation are matters which require tangible proof. Forgery is a serious offence. A mere allegation of forgery will not suffice. The onus is upon the Objector to adduce sufficient evidence to prove that his signature was indeed forged.

22. The Objector did not call evidence from a document examined to prove that his signature on said document was forged as he claims. The Objector has failed to satisfy the court that his signature on the consent dated **18th August 2010** was forged.

23. In the absence of credible proof of forgery I find that the Objector did in fact sign the consent to making of grant of administration intestate. Additionally, I find that the Objector signed the consent to confirmation of Grant dated **8th June 2011** which consent was filed in court on **6th June 2011**. Both consents signified that the objector was involved in and participated in the succession cause No. **116 of 2010** filed at the **Limuru Law Courts**. The objector therefore fully consented to the Grant being issued to the two Administrators. He cannot now run away from the said consents.

(ii) **Existence of a Will**

The Objector's position is that the Deceased did not die intestate. The objector asserts that the Deceased left a valid written will dated **15th November 1988**. That said Will was written in **Kikuyu** language and was translated into English. The Objector has annexed a copy of the said Will to its supporting affidavit dated **21st August 2015** (Annexure JNT '3')

“Validity of written Will is provided for under section II of the Law of Succession Act which provides thus –

“No written Will shall be valid unless

(a) The Testator has signed or affixed his mark to the Will, or it has been signed by some other person in the presence and by the direction of the testator.

(b) The signature or mark of the testator or the signature of the person signing for him is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c)”

24. I have carefully perused the annexed copy of the alleged Will. The copy availed to court is blurred and is virtually unreadable. I note that the Will does not bear the signature of the Deceased. At the right side of the document are two smudged marks, which possibly represent thumbprints. However, it is not indicated who those thumb prints belonged to - whether to the Deceased or to some other person. The said markings do not appear at the bottom of the document so as to give effect to the **entire** document as provided by **section II (b)** – rather the smudged marks are situated at the top right side of the documents. There is no signature or marks to authenticate the entire documents. This document cannot be said to be a valid written Will.

25. A close inspection of the alleged Will shows that although the document is dated **15th November 1988** the same bears an amendment/insertion dated **5th February 1989**. For a written Will to be valid it cannot have any amendments and/or insertions. If the Deceased wished to amend his Will then he would have authorized a new document (a codicil) to include any amendments he wished to make. The amendments/insertions in the alleged Will render the document suspect. It cannot in the circumstances be described as a valid written Will. Due to the fact that the document is unsigned and bears amendments I do not accept this as a valid Will.

26. I note that the Deceased died way back in **1989**. This court has found that the Objector was involved and participated in the succession cause before the **Limuru Law Courts**. The application was filed in **2015**. If the objector was aware of a written Will why has he waited almost **seventeen (17)** years to produce the same, and only produce it **after** the distribution of the estate of the Deceased. Litigation must come to an end. The objector if he is to be believed must have been aware of the existence of the Will from the onset. Why did the objector not raise the issue of the Will in the year **2010** when the matter was before the court in **Limuru**.

27. The Objector cannot now **seventeen (17) years** after the fact, claim that the Petition ought to have been one for letters of administration with Will attached to justify the summons for revocation of Grant. He cannot seek to benefit from his own mischief by filing this summons which is clearly an afterthought.

28. I find that the objector participated in the succession proceedings before the **Limuru Court** despite his alleged knowledge of the existence of a written Will. Moreover, the Objector signed the requisite consent forms signaling his acceptance of the mode of distribution of the estate. He cannot now turn around and claim that the succession was faulty. The Objector could have filed an affidavit of protest if he believed that the estate was not being distributed in accordance with the wishes of the Deceased. He did not do so. He kept silent and

acquiesced to the succession process.

29. I find the present summon to be mischievous and find that the same were only filed because the Objector became dissatisfied with the portion of the estate allocated to himself. It has been proved the objector was included and was provided for in the distribution of the estate.

30. Finally, I find no merit in the summons. The same is hereby dismissed in its entirety. This being a family matter each party shall meet its own costs.

DATED IN NAIROBI THIS 8TH DAY OF OCTOBER 2021.

.....

MAUREEN A. ODERO

JUDGE