



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 2868 OF 2012**

**IN THE MATTER OF THE ESTATE OF FRANCIS NGURE KAMAU (DECEASED)**

**PENINAH WANJIKU .....APPLICANT**

**-VERSUS-**

**WELLINGTON KURIA NGURE**

**SIMON GATHONGO.....RESPONDENT**

**JUDGMENT**

**BACKGROUND**

The deceased Francis Ngure Kamau died intestate on 13<sup>th</sup> April 2005. He was survived by the following beneficiaries;

**1<sup>st</sup> house**

1. Peninah Wanjiku Ngure - widow
2. Rose Wanjiru - daughter
3. Susan Waithera -daughter
4. Agnes Nduta -daughter
5. Cathrine Wangare - daughter
6. Peninah Wanjiku -daughter
7. Mary Wachuka - daughter

**2<sup>nd</sup> house**

1. Loise Wambui - widow ( deceased)
2. Anne Wanjiku - daughter
3. Agnes Nyakarura -daughter
4. Washington Kamau - son
5. John Maina - Son
6. Jane Wanjiru - Daughter
7. Shanel Wambui - daughter
8. Simon Gathungu -Son
9. Wellington Kuria -Son

The deceased left the following assets;

1. **Dagoretti/Riruta/T.160**



<b>Washington Ngure</b>	<b>Kamau</b>	<b>Kasarani Mwihiike Plot No. 472</b>	
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By an Application filed on 10<sup>th</sup> July 2018, the Applicants; **Wellington Kuria** and **Simon Gathungu** sought revocation or annulment of the grant on the grounds;

- a) That the persons to who the grant was issued have failed after due notice and without reasonable cause to proceed fairly and diligently with the administration of the estate;**
- b) That the Respondents have divided the estate property and acquired Title of the estate property; L. R. No. Dagoretti/Riruta/T. 160;**
- c) That the Honourable Court do grant an order of revocation of grant and title issued to the Respondents;**
- d) That the Respondents obtained grant fraudulently by making false statements to the Court that the sharing of the properties would be equal between the two families as the property was never distributed as per the grant.**

**HEARING;**

PW1 Timothy Kamau Ndungu informed Court that he was instructed by the administrators to subdivide **Dagoretti/Riruta/T/160** into 2 equal portions. He filed in Court the Affidavit of 24<sup>th</sup> September 2018, bundle of photographs of the suit property and mutation form. He considered the shape of the land, existing structures, how economical the land would be to parties and the broad network access.

He claimed that the 1<sup>st</sup> House processed and paid for the title while the 2<sup>nd</sup> house refused the shown subdivision.

**PW2 Peninah Wanjiku Ngure** testified that the suit property was divided equally by Surveyor. The Objector refused her access to the water place. She called the **D.O.** who granted access in 2016. The Surveyor came and divided the suit property into 2 parts. She obtained title and gave her children their portions. The 1<sup>st</sup> Administrator claimed she demolished her house and grandchildren's place and she was not compensated.

She did not know why she was in Court.

**PW3 Washington Kamu Ngure Co administrator**, confirmed that he was present during the confirmation of grant. Later he called all siblings and step mom and they agreed on distribution as per Court order.

The subdivision was conducted as per the developments that were done by each of the **2 houses/wives** of deceased.

He confirmed that the **Chief and D.O.** were called to resolve disputes. He asked his step mother not to dig a well so as to allow access to other children to access their homes.

If subdivision was/is done any other way Kuria would lose some houses for rent and Peninah would lose some of her houses too. He did his best as administrator and did not know why he was in Court.

**DW1 Wellington Kuria Ngure** informed the Court that they did not agree as beneficiaries on the distribution of the deceased's estate and more particularly they did not agree on the subdivision. He demanded that the Court orders demolition of part of Part A of the suit property where the deceased's 1<sup>st</sup> widow resides and then have access as the other road was/is closed. He wants the said **Plot 160** subdivided vertically and not horizontally as was done.

**APPLICANTS SUBMISSIONS**

**Issue**

- a) Whether the Applicants are entitled to the orders sought

**Legal Analysis**

Whether the Respondents failed to proceed diligently with the administration of the estate of **Francis Ngure Kamau** (deceased)

The Applicants submitted that the threshold for revocation of grant is as per section 76 of the Law of succession Act which provides that;

***“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court 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 persons 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.”*

In *G. A.A M & Another –vs- M.OA.O [2016]eKLR* it was held that;

*“any of the circumstances enumerated in section 76, if proven may lead to revocation or annulment of a grant of representation whether that grant has been confirmed or not.”*

The Applicant submitted that in the instance case, the Applicants were sons of the deceased and the Respondents were the Administrators of the estate of Francis Ngure Kamau(deceased).

In *Re Estate of Njau Kanyora (deceased) [2016] eKLR;*

*“The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all the grounds stated under the said section. A close look at section 76 shows that the grounds can be divided into two categories;*

- a) The first three deal mainly with the property of the grant making process;*
- b) The other grounds deal with mal-administration i.e personal representatives have not been effective in administration. In the present case the administrator is alleged to have failed to act.*

*A grant can also be revoked for lack of diligence in administering the estate or for becoming in operative or useless.”*

They submitted that in this matter, it was not in dispute that grant was issued to the Respondents who are the Administrators of the deceased’s estate. The Respondents were to equally distribute property **Dagoretti/Riruta T.160** between the Applicants and the 1<sup>st</sup> Respondent.

Further they submitted that the surveyor testified that he received instruction from the administrators to subdivide the plot. He also testified that when he got to the plot the 1<sup>st</sup> Respondent was staying on one side of the plot and the Applicants were staying on the other side. Not once did the surveyor meet with the Applicants, he only received instructions from the Respondents.

Due to failure by the administrators of the deceased’s estate to divide the property **Dagoretti/Riruta T. 160** fairly as per certificate for confirmation of grant, has caused the Applicants to suffer cannot have their share of the said property as the proprietors of the **Dagoretti/Riruta T. 160**.

Black’s Law Dictionary defines fraud as ;

*“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other, fraud, in the sense of a Court of equity, properly includes all acts, commissions, and concealments which involves a breach of legal or equitable duty, or confidence justly reposed, and are injurious to another, or by which an undue and un-conscientious advantage is taken of another.”*

The Respondents being Administrators of the deceased estate subdivided property **Dagoretti/Riruta T. 160** without the knowledge and consent of the Applicants, into two portions and the 1<sup>st</sup> Administrator, registered the plot that is developed and where she resides into her name and children. As a result on 9<sup>th</sup> April 2018, the Applicants were served with a notice to vacate and bring down all the structures they had built.

This Court has also considered the process of obtaining confirmed grant, the Summons for confirmation specifically the Supporting Affidavit outlined the Proposed mode of distribution of the deceased's estate. Curiously, save for different beneficiaries attending Court on alternative days, there were no written consents by ALL beneficiaries as to their consent on the proposed mode of distribution except when they attended Court and verbally confirmed consent. The other beneficiaries sent emails, letters and affidavits to waive their right to inherit from their late father's estate.

This court has considered the facts of the case and applied the law and finds that the confirmation of grant was contrary to Section **76(b) & (d) (ii) of Law of Succession Act** which means that all beneficiaries did not agree and/or consent to the proposed mode of distribution and even after the grant of confirmed grant the subdivision of suit property **Dagorretti/Riruta/T 160** was not as per the confirmed grant.

#### **DISPOSITION**

- 1. Therefore, the confirmed grant is revoked and annulled and the beneficiaries are granted an opportunity to consult agree and/or consent to the mode of distribution of the deceased's estate and subdivision thereof without demolition of permanent structures unless the owner is compensated for the resulting loss.**
- 2. The administrators to file fresh/new summons of confirmation with the beneficiaries' written consents; in form of each beneficiary's name ID number and signature and to attend Court and confirm consent.**
- 3. If any party is aggrieved, the party may apply to any Court in Family Division for hearing and determination of the dispute.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 22<sup>ND</sup> JULY 2019**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**MR KIPIYO HOLDING BRIEF KINYANJUI FOR ADMINISTRATOR PENINAH NGURE**

**OJIENDA ADVOCATE FOR APPLICANTS**

**COURT ASSISTANT- ISAIAH OTIENO**