



**REPUBLIC OF KENYA**

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

**MISC. SUCC APPLICATION NO. 73 OF 2012**

**IN THE ESTATE OF THE ESTATE OF THE LATE GICHERE MWANGI - DECEASED**

**FRANCIS NDEGE MWANGI.....APPLICANT**

**V E R S U S**

**MARTIN MUTHIKE MICHERE.....PETITIONER**

**RULING**

1. This matter relates to the estate of the deceased Gichere Mwangi Ruiru, deceased who died intestate on 24/4/2007. A grant of Letters of Administration was issued to Martin Muthike Micere and confirmed on 21/11/2008.

2. The applicant, Francis Ndege Mwangi in application under **Section 76 of the Law of Succession Act Cap 160 Laws of Kenya** dated 30/9/2009 seeks an order that the grant of letters of administration in Kerugoya Succession cause No. 217/2007 be revoked and or annulled on the grounds that the proceedings to obtain the same were defective in substance and that the grant was obtained fraudulently by making a false statement or by concealment from court of something material to the case by the respondent. The application is supported by the affidavit of Francis Ndege Mwangi sworn on 30/9/09. His contention is that the succession was filed secretly without his knowledge. He only came to know about the succession when he found the respondent with his brothers attending Land Control Board for portion of LR. No. Mutira/Kathare/205 the estate of the deceased. He then proceeded to Kerugoya court and obtained a copy of the grant.

3. He further depones that before the deceased died, he had a case with him at the Land Disputes Tribunal which the respondent was aware. The tribunal ordered that the LR Mutira/Kathare/205 be shared equally between him and the deceased. The award of the Tribunal was adopted as the Judgment on 28/12/2005. Thereafter he applied for an order for the Executive Officer to sign on behalf of the deceased. Later he attended the Land Control Board and consent to sub-divide the land was granted. The survey was done and the land was sub-divided. The applicant stays on one of the parcels measuring 0.935. The respondent took advantage as the registration of title deeds had not been done. That the respondent fraudulently concealed from him when he filed the cause in order to disinherit him.

4. The respondent Martin Muthike Machere opposed the application and filed a replying affidavit. He depones that the applicant is a brother to his deceased father. The applicant was given land at Mwea Scheme approximately Ten Acres by the clan. That they appealed the decision of Tribunal at the Provincial Tribunal and the applicant was told to go to his land at Mwea Scheme/1904 and leave his late father's land Mutira/Kathare/2005. That the applicant has no claim over the deceased's estate.

5. The respondent Martin Muthike Machere passed away on 13/10/2014 and was substituted by Cicily Njoki Machere, his sister who obtained a limited Grant of Letters of Administration ad Litem in his estate

6. The parties agreed to rely on the affidavits and to file submissions. For the applicant it was submitted that the deceased was the registered owner of Land Parcel No. Mutira/Kathare/205. In the lifetime of deceased a matter was filed in the Central Division Land Disputes Tribunal which gave Judgement on 28/12/2005 and ruled that the land be shared equally between the applicant and the deceased. The decision of the tribunal was adopted as the judgment of the court and a decree annexure FNM-2 was issued. There has been no appeal. That the succession cause was filed and prosecuted discretely without the knowledge of the applicant. That under **Section 76 of the Law of Succession Act** the grant should be revoked for having been obtained in proceedings which were defective, was obtained fraudulently by concealment from court of something material to the case. That the grant was obtained by means of untrue allegations of facts. He further submits that the respondent was aware of the existence of the court orders and were bound by the court orders. He submits that a fresh grant should be issued to the applicant and the respondent.

7. For the respondent, it is submitted that the tribunal had no jurisdiction to deal with issues of title to land. That the allegations by the applicant are not true as Martin Muthike Machere appealed to the Provincial Land Appeals Committee as confirmed by the letter dated 12/6/2006 annexed to his affidavit. That the applicant has not pleaded that he was a beneficiary dependant and/or creditor to the estate of the deceased. The **Section 76 of the Law of Succession Act** can only aid a beneficiary, dependant or creditor. The applicant does not fall under any of the three categories. It is finally submitted that the petition was properly filed, all the persons were cited, it was gazette and there was no objection or protest. They urge the court to dismiss the application.

8. I have considered the application and the submissions. It is not in dispute that the applicant and the deceased had a dispute over land parcel No. Mutira/Kathare/205 which forms the estate of the deceased. The Land Disputes Tribunal ordered that the land parcel No. Mutira/Kathare/2005 be sub-divided equally between Francis Ndege Mwangi and Gichere Mwangi Ruiru alias Jason Machere Mwangi, (the deceased). This decision of the Land Disputes Tribunal was in the Senior Resident Magistrate's court at Kerugoya LDT 81/2005 adopted as the Court's Judgment on 28/12/2005 in the presence of both parties, annexure FNM-2-. A decree was issued on 26/1/2006.

9. The respondent submits that he appealed to the Provincial Appeal Tribunal. He annexed a letter dated 12/6/2006. The letter acknowledges that an appeal was filed and would be heard in due course. It further stated that the status quo be maintained until the said appeal is heard and determined. The respondent did not annex any decision of Provincial Land Appeals Committee. The respondent has not proved that the appeal was determined or if it was, what was the outcome.

10. I find that the decree in the Senior Resident Magistrate's Court Kerugoya LDT 81/2005 has never been set aside. A decree is defined under **Section -2- of the Civil Procedure Act** as "*means the formal expression of an adjudication which so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and maybe either preliminary or final, it includes the striking out of a plaint and the determination of any question within Section 34 & 91* -----"

11. There is no prove that the decree was set aside on appeal. The decree binds the parties as the conclusive determination of the dispute. The respondent is therefore bound by the decree.

12. The decree is clear that when the award was adopted the parties were before the court. The respondent has also deponed that when the award was read in Kerugoya court, they appealed. What this means is that the respondent was aware of the award giving the applicant half a share of the Land Parcel Mutira/Kathare/205. Despite that the respondent went ahead and filed succession, obtained a grant and distributed the estate without giving the applicant his share. The respondent did not also inform the applicant when he filed the succession. The applicant only came to know about the succession when he happened to go to the D.O's office and found the respondent seeking to obtain a consent of the Land Control Board to execute the grant.

13. The respondent failed to disclose the claim by the applicant and also concealed from court something material to the case.

**Section 76 of the Law of Succession Act** provides:-

*"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."*

The sections lays down the grounds upon which the court will revoke a grant. The applicant has established that the proceedings were defective in substance as the estate of the deceased was at the point of filing the succession cause limited to half share of the land. The grant was obtained fraudulently by concealment from the court something material to the case. These are sufficient grounds to warrant the court to order the revocation of the grant. The grant should therefore be revoked.

14. The respondent has submitted that the Central Division Land Disputes Tribunal had no jurisdiction to deal with issues of title to land as **Section 3 of the Repealed Land Disputes Act** provided for disputes that could be handed by the Tribunal which excluded from the Tribunal Disputes touching on title to land.

15. This submission much as it may be correct is misplaced. This court is not sitting on appeal against the decision of the Land Disputes Tribunal. Secondly **Article 165(5) of the Constitution** provides that the High Court shall not have jurisdiction in respect matters falling within the of courts under **Article 162** which establishes courts with the status of the High court to deal with Employment and Labour Relation Disputes and Environment, the use and occupation of and title to land. This court has no jurisdiction to determine whether the

Tribunal had jurisdiction to handle the dispute. Thirdly the jurisdiction of this court is under the **Law of Succession Act Cap 160** which in its preamble states:-

***“An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto.”***

16. The matter before this court is a succession cause. The applicant has shown that he has a decree giving him a share of the estate of the deceased. His claim stands determined. He was in the process of executing the decree after obtaining an order for the Executive Officer to sign the necessary documents to facilitate sub-division, annexure FNM3, Consent of the Land Control Board to sub-divide, annexure FNM 4 and Mutation Forms, annexure FNM-5-.

17. The applicant has satisfied the requirements set under **Section 76 of the Law of Succession Act** to warrant the court to order the revocation of grant. I find that the application has merits. I order that the grant confirmed on 21/11/2008 by the Senior Resident Magistrate's Court in Succession cause No. 217/07 shall be revoked. The applicant shall be at liberty to file objections or protest to the making of the grant. Costs to the applicant.

**Dated at Kerugoya this 15<sup>th</sup> Day of July 2019.**

**L. W. GITARI**

**JUDGE**