



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**MISC. SUCCESSION CAUSE NO. 35 OF 2006**

**IN THE MATTER OF THE ESTATE OF JAVAN MWARARI GIKUNJU MUGWE (DECEASED)**

**SAMUEL MWANGI NDAMBURU.....APPLICANT**

**VERSUS**

**FRANCIS GAKONO CIUTE.....1<sup>ST</sup> RESPONDENT**

**JOSPHAT MURIUKI MBOYI.....2<sup>ND</sup> RESPONDENT**

**GABRIEL LAZARUS MUTHIKE KIRAGU.....3<sup>RD</sup> RESPONDENT**

**HEZRON MUIGAI WAIGWA.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is for the application dated 15/08/2018 seeking for orders for the cancellation of Entries No. 2, 3 and 4 in the register of LR. Mutira/Kirimunge/121 to revert to the names of the deceased herein, Gikunju Mugwe.
2. The grounds in support of the application are that the grant confirmed on 21<sup>st</sup> November 1978 was revoked in the court's ruling delivered on 29<sup>th</sup> October 1978 on grounds that it was obtained fraudulently. It is deposed that it was the said certificate that resulted in entries Nos. 2, 3 and 4 in the register initiated by the 1<sup>st</sup> and 2<sup>nd</sup> respondent pursuant to the grant obtained and confirmed in Kerugoya Succession Cause No. 4 of 1977. The land which was previously registered in the name of the deceased was transmitted to the 1<sup>st</sup> and 2<sup>nd</sup> respondent despite the fact that they were not beneficiaries of the deceased's estate.
3. The land LR. Mutira/Kirimunge/121 was sub-divided by the respondents into Nos. LR. Mutira/Kirimunge/644 registered in the name of the 3<sup>rd</sup> respondent and LR. Mutira/Kirimunge/645 to the name of the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent caused sub-division of LR. Mutira/Kirimunge/645 into two portions LR. Mutira/Kirimunge/1381 and 1382. LR. Mutira/Kirimunge/ 1381 was transferred to the 4<sup>th</sup> respondent while LR. Mutira/Kirimunge/1382 to the 2<sup>nd</sup> respondent.
4. The applicant herein moved to file succession cause No. 57 of 2013 in respect of the deceased Gikunju Mugwe which was concluded and the estate distributed to the beneficiaries pursuant to the grant confirmed on 3<sup>rd</sup> April, 2014. It is therefore necessary that the orders sought be granted to facilitate the transmission of the beneficiaries of their respective shares.
5. The respondents opposed the application in the affidavit sworn by the 1<sup>st</sup> respondent. It was deposed that the estate in issue was for one Gikunju Ndaburu who had no children and did not marry in his lifetime. The 1<sup>st</sup> respondent said he is a son to one Ciute Ndaburu a brother to the deceased Gikunju Ndaburu. The applicant according to the respondents was not a son of the deceased as he claims to be.
6. It is further stated that the applicant had no right to apply for letters of administration intestate in the estate of the deceased. The 1<sup>st</sup> respondent threatened to apply for revocation of the grant in favour of the applicant in Succession Cause No. 57 of 2013. The respondents claim that the suit was filed secretly without the 1<sup>st</sup> respondent being informed.
7. The 1<sup>st</sup> respondent says he filed an appeal against the decision revoking the grant issued in his favour in Misc. Succession Cause No. 4 of 1977. The appeal he states is No. 22 of 209 which is still pending in the Court of Appeal against the court's judgment in Misc. No. 35 of 2006 which revoked the grant.
8. I have perused the ruling of Khaminwa, J. in this Misc. Succession Cause No. 235 of 2006 in which the applicant successfully obtained

orders for revocation of grant against the respondents. The learned judge found that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had obtained the grant fraudulently and inherited the estate of the deceased Javan Mwarari Gikunju Mugwe while the rightful heir was the applicant. The ruling was delivered on 29/10/2008.

9. In its ruling, the court revoked the confirmed grant that had bequeathed the land to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Although the 1<sup>st</sup> respondent says he appealed against the decision in 2009, he has not annexed any evidence to that effect. Even assuming that the ten (10) year old appeal exists and is still pending in the Court of Appeal, the 1<sup>st</sup> respondent did not procure orders for stay of the judge's ruling. It is trite law that an appeal does not operate as stay.

10. The applicant states that after the confirmed grant in Succession Cause No. 4 of 1977 was revoked after which he filed Succession Cause No. 57 of 2013 in respect of the estate of the deceased and obtained the grant with confirmation. I believe the cause was duly gazetted as required by the law for the notice of the public which is a legal requirement. The respondents therefore did not take part in Succession Cause No. 57 of 2013.

11. The order for the deceased's estate LR. Mutira/Kirimunge/121 to revert to the name of the deceased ought to have been made on revocation of the confirmation of grant but it appears that the applicant did not ask the court to do so. This is the order that the applicant seeks before this court.

12. From the foregoing analysis derived from the evidence of the parties, I find that the applicant has satisfied the court that the orders sought are well deserved. The 1<sup>st</sup> respondent has not shown any good cause why the orders should not be issued bearing in mind that there is in existence a valid grant in favour of the beneficiaries in Succession Cause No. 57 of 2013.

13. I find the application merited and allow it as prayed.

14. Each party to meet their own costs.

15. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Abubakar for Applicant**

**Ms. Maina for A.P. Kariithi for Respondents**