



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT BUNGOMA

SUCCESSION CAUSE NO. 234 OF 2012

IN THE MATTER OF THE ESTATE OF THUO MIGWE

KAMAU a.k.a. FRANCIS THUO MIGWI (DECEASED).

BETWEEN.

ANASTASIA WANGOI THUO.....PETITIONER/RESPONDENT

VERSUS

DOUGLAS CONGO THUO.....OBJECTOR/APPLICANT

AND.

SABASTIAN KAMANDE THUO.....1ST RESPONDENT

SARAH WAIRIMU THUO.....2ND RESPONDENT

JUDGMENT

Thuo Migwi Kamau alias Francis Thuo Migwi the deceased died on 16th June 2000. At time of his death he left an estate comprising of a farm Bungoma/Kiminini/207 comprising of 17.5 Hactres. He left behind a widow Anastasia Wangoi Thuo (The Administrator) and 9 children who are the beneficiaries of the estate.

The widow applied for letters of Administration to this court and on 8th day of May 2014 the grant of letters of Administration Intestate was granted to Anastasia Wangoi Thuo the widow. Then application for confirmation of grant stating in her affidavit of support sworn on 29.11.2016;

6. **THAT** all the beneficiaries to the estate of my late husband are in agreement and have even consented (**through the Consent dated 18th December, 2015 and filed in court on 26th April 2016**) in support to the summons the I should apply for the confirmation of this grant and also supported the mode of distribution stated therein.

7. **THAT** the deceased had no liabilities at the time he passed on.

8. **THAT** the deceased died intestate and left the following property which we have agreed should be held by the petitioner as Life Interest (to hold in trust for all the surviving children of the deceased).

PROPERTY	BENEFICIARIES	SHARES
BUNGOMA/ KIMININI/207 17.5 HA	ANASTASIA WANGOI THUO	LIFE INTEREST/(TO HOLD IN TRUST FOR MYSELF AND ALL THE SURVIVING CHILDREN OF THE DECEASED WHO SHALL SHARE THE SAID LAND EQUALLY.

Attached was Consent of the beneficiary;

a) SABASTIAN KAMANDE THUO	SON	54 YEAS OLD
b) DOUGLAS CONGO THUO	SON	51 YEARS OLD
c) SUSAN NJAMBI THUO	DAUGHTER	49 YEARS OLD
d) ELIZABETH WANJIRU THUO	DAUGHTER	46 YEARS OLD
e) ALICE NJOKI THUO	DAUGHTER	43 YEARS OLD
f) SARAH WAIRIMU THUO	DAUGHTER	41 YEARS OLD
g) MARION WANJIKU THUO	DAUGHTER	40 YEARS OLD
h) JOHN MBURU THUO	SON	39 YEARS OLD
PAUL MAINA THUO	SON	29 YEARS OLD

On 23.12.2016 Aroni J. confirmed the grant which in the schedule stated;

SCHEDULE:

<u>NAME:</u>	<u>DESCRIPTION OF PROPERTY _____ :</u>	<u>SHARE OF HEIRS:</u>
	BUNGOMA/KIMININI/207	17.5 HA

ANASTASIA WANGOI THUO

[Life interest and to hold in trust of the surviving children of the deceased who shall share it equally namely].

SABASTIAN KAMANDE THUO

DOUGLAS CONGO THUO

SUSAN NJAMBI THUO

ELIZABETH WANJIRU THUO

ALICE NJOKI THUO

SARAH WAIRIMU THUO

MARION WANJIKU THUO

JOHN MBURU THUO

PAUL MAINA THUO

By application dated 6.6.2017 the Objector/Applicant Douglas Congo Thuo brought under Section 76 of the Law of Succession Act and Section 44 of the Probate and Succession Rules sought orders;

a) THAT the grant of representation to the estate of the late THUO MIGWE KAMAU a.k.a. FRANCIS THUO MIGWI issue on 8th day of May 2014 and confirmed on 1st December 2016 be revoked and or annulled.

b) THAT costs of the application be rewarded to the Objector/Applicant.

WHICH APPLICATION is premised on the Grounds that;

- i. The proceedings resulting to the obtainment of the grant and confirmation thereto were defective in substance.
- ii. The grant was obtained fraudulently by making false statement and by concealment of material facts to this cause.
- iii. The petitioner initiated this cause in secrecy or without involvement of the objector.
- iv. The objector has never consented to this petition neither did he consent to the confirmation thereto and the distribution therein.
- v. The objector is entitled to a larger portion than what was awarded by the court as he had on several occasion saved the land forming the estate of the deceased from public auction.
- vi. It is in the interest of justice and fidelity to the proceedings that the orders sought be granted.

The application is supported by the supporting affidavit of the applicant where he depones; that he is a beneficiary of the estate among others; that the Administrator did not seek his consent on application for confirmation and on mode of distribution. In particular the applicant depones;

6. **THAT** I further know that whereas the certificate of confirmation of grant gave her a life interest on the property, she has proceeded to take about 11 acres for her on and distributing the remainder to the beneficiaries an act contrary to what is in the certificate of confirmation.

7. **THAT** I further know that I am not content with the distribution the way it is as I am entitled to a larger portion than other beneficiaries.

8. **THAT** the premise in 7 above is founded on the notion that I saved the land forming the estate herein several times from being auctioned over loan arrears.

9. **THAT** I further know that as a consequence of my actions in 8 above, the deceased during his lifetime had intimated and we had agreed that I was entitled to a share equivalent to the monies I had expended saving the land forming his estate.

The Administrator Anastacia Wangoi filed a Replying Affidavit Sworn on 22.9.2017 where she deponed; inter alia

3. **THAT** after this court confirming the grant survey was carried out mutation prepared and lodged in Land's Registry thus land parcel title number BUNGOMA/KIMININI/207 has been sub-divided into new number 2947-2956. Attached are official searches filed herewith and marked annexures AW-1(i-x).

4. **THAT** the Administration of the estate herein has been finished titled certificates having been issued for each heir on the estate copies filed herewith and marked annex AW-2(i-x).

5. **THAT** while this Succession Cause pending confirmation in 2007 the objector by letter asked the Petitioner to give him (3) acres on the estate but this court shared to him (4) acres. Attached is a copy of the letter filed herewith and marked annex AW-3.

In a further Affidavit Sworn on 29.5.2018 the widow gave a chronology of events all which indicate that the applicant did not sign the documents for confirmation; she further depones that after confirmation a meeting convened by the District Officer resolved that each son should be given 5 acres, and each daughter 2 acres and the Administrator be given 13.7 Acres. The plot was surveyed and Ten (10) title deeds issued.

By Consent of the parties, this court issued direction on 5.6.2018 that the application dated 6.6.2017 for revocation of Letters of Administration be canvassed by way of **viva voce** evidence. The court further directed that the beneficiaries who reside outside the country to be served by way of e-mail.

The applicant Douglas Congo Thuo testified adopted his Supporting Affidavit sworn on 2.5.2018 and Supplementary Affidavit Sworn on 26.11.2018 as his evidence in chief. Briefly he testified that the deceased was the father and the administrator is the mother. He testified that he was not aware of the filing of the cause; and only came to know of its existence on 28.4.2017 through the Assistant County Commissioner Tongaren who wanted him to attend a Meeting with the Administrator/Respondent. He went to attend the Meeting when he found surveyors on land. He learnt that each son had been given 5 Acres and daughters 2 Acres each. He later learnt that each child had been given 4.3 Acres and that John Mburu and Paul Maina were jointly given 4.3 acres extra. He testified that when his father the deceased was alive, he requested the applicant to pay 2 AFC Loans in 1986 he paid Kshs.60,000/= and in 1994 he paid Kshs.76,500/= when AFC threatened to auction the land due to adebt. He testified that he was to be compensated. He testified that in due consideration of the payments to AFC he was to get 7 acres; being the acreage for the money he paid to AFC. He tendered evidence to prove payments by himself to AFC.

Anastasia Wangoi Thuo the Administrator/Respondent filed an Affidavit sworn in 22.9.2017 while she adopted as her evidence in chief. She testified that after obtaining the confirmation of the grant she distributed to herself 4.3 Ha which is where her house is and also the family graveyard. She also gave Paul and John 4.3 Acres extra because when she became sick and they took care of her. She admits that in the grant she was to have a life interest and share the estate equally among her children. She denied that the applicant repaid any loan to AFC and saved the land from being auctioned.

Counsel for both parties filed their respective submissions. Mr. Ocharo for the applicant submitted that while the applicant objector states

that the mother never consulted him all the process from filing of Succession Cause to confirmation, the Administrator/Respondent states that it is the Objector who deliberately refused to participate despite being asked to do so. He submits that from the evidence of the Applicant he at the invitation of the deceased salvaged the land from being auctioned due to AFC loan. He was in consideration of that payment to be given 7 Acres of land extra and that the deceased had shown him the 7 Acres on the ground and had planted trees marking the boundaries. Counsel for applicant submits that the deceased having shown the Objector the 7 Acres, his wish should be respected as per the provisions of Section 42 of the law of Succession Act.

Counsel further submits that the Respondent failed to place all material facts in relation to the estate before the court which in error confirmed the grant. Finally counsel submits that the Respondent did not distribute the estate as per the schedule in the confirmation of grant but instead sub-divided the property and created new titles and secondly she gave other beneficiaries bigger share than the equal share as directed by the court. Further though it had been decreed that hers was a life interest, she gave herself a share.

Mr. Karanja for Petitioner submitted that though the applicants application is grounded on Section 76 of the Law of Succession Act, for Revocation of the confirmed grant, he dwelt in his submission in Section 42 of the Act; he submitted that the applicant nowhere in his submission has he challenged the manner in which the grant was issued and later confirmed or shown why the same should be revoked. Counsel having referred to various passages from the book The Law of Succession by William Musyoka urged this court to dismiss the application for Revocation or Annulment dated 6.6.2017.

From the application, Replying affidavit and evidence, given the main issue that crystalize for determination are as follows;

1. Whether the grant issued was obtained by fraud and/on the non-involvement of all the beneficiaries and in particular the objector/applicant.
2. Whether the Administrator administered the estate in accordance to the terms of the confirmed grant.
3. Whether the objector/applicant is entitled to receive 7 acres more than the other beneficiaries on account of his contribution to the estate.

The applicant in evidence testified that he was not consulted or involved in the filing of this Succession Cause, that he only came to know of its existence when he was shown the Certificate of confirmation of grant and the surveyors were on the ground surveying the individual plots to the beneficiaries. The Administrator/Respondent readily admits that indeed the Objector was not involved not because he was unaware but he deliberately refused to sign any of the document he was required to as a beneficiary. In the affidavits they depone what can be discerned as a frosty relationship which had defied reconciliation by family and Local Administration. It is no wonder therefore that the Objector was not involved in both the issuance of the grant and as well as the confirmation. Indeed in Consent for confirmation of the grant of Letters of Administration dated 18.12.2015 and filed in court on 26.4.2016 while all the other beneficiaries signed or wrote a letter confirming consent, the Objector/Applicant did not sign. It is therefore true that his consent was not obtained when the grant was confirmed.

The Administrator/Respondent filed Summons for confirmation of grant dated 18.12.2015 filed a Supplementary Affidavit in support of the same sworn on 20th November 2016 deponed;

6. **THAT** all the beneficiaries to the estate of my late husband are in agreement and have even consented (**through the Consent dated 18th December, 2015 and filed in court on 26th April 2016**) in support to the summons the I should apply for the confirmation of this grant and also supported the mode of distribution stated therein.

7. **THAT** the deceased had no liabilities at the time he passed on.

8. **THAT** the deceased died intestate and left the following property which we have agreed should be held by the petitioner as Life Interest (to hold in trust for all the surviving children of the deceased).

PROPERTY	BENEFICIARIES	SHARES
BUNGOMA/ KIMININI/207 17.5 HA	ANASTASIA WANGOI THUO	LIFE INTEREST/(TO HOLD IN TRUST FOR MYSELF AND ALL THE SURVIVING CHILDREN OF THE DECEASED WHO SHALL SHARE THE SAID LAND EQUALLY.

The court on 23rd December, 2016 confirmed the grant and stated;

SCHEDULE:

NAME:	DESCRIPTION OF PROPERTY	SHARE OF HEIRS:
	BUNGOMA/KIMININI/207	17.5 HA
ANASTASIA WANGOI THUO		

[Life interest and to hold in trust of the surviving children of the deceased who shall share it equally namely].

SABASTIAN KAMANDE THUO

DOUGLAS CONGO THUO

SUSAN NJAMBI THUO

ELIZABETH WANJIRU THUO

ALICE NJOKI THUO

SARAH WAIRIMU THUO

MARION WANJIKU THUO

JOHN MBURU THUO

PAUL MAINA THUO

The Respondent having been issued with the confirmed grant to sub-divided the Estate and apportioned as follows;

BUNGOMA/KIMININI/207:

Number:	Name:	Acres
BUNGOMA/KIMININI/207		
1. BUNGOMA/KIMININI/2947	PAUL MAINA THUO	1.72 HA
	JOHN MBURU	
2. BUNGOMA/KIMININI/2948	MARION WANJIKU THUO	1.72 HA
3. BUNGOMA/KIMININI/2949	SARAH WAIRIMU THUO	1.72 HA
4. BUNGOMA/KIMININI/2950	SUSAN NJAMBI THUO	1.72 HA
5. BUNGOMA/KIMININI/2951	ELIZABETH WANJIKU THUO	1.72 HA
6. BUNGOMA/KIMININI/2952	ALICE NJOKI THUO	1.72 HA
7. BUNGOMA/KIMININI/2953	SABASTIAN KAMANDE THUO	1.72 HA
8. BUNGOMA/KIMININI/2954	DOUGLAS CONGO THUO	1.72 HA
9. BUNGOMA/KIMININI/2955	JOHN MBURU THUO	1.72 HA
10. BUNGOMA/KIMININI/2956	PAUL MAINA THUO	1.72 HA
11. BUNGOMA/KIMININI/2947	ANASTASIA WANGOI	1.72 HA

The Respondent/Administrator when asked why she did not distribute the estate as per the confirmed grant stated that it is the court that gave her 4.3 HA; and that she had a right to give John and Paul the extra 1.72 HA. From the proceedings there is no evidence that the court gave her 4.3 HA or directed her to distribute the estate as she wished. The order was clear.

1) *The Respondent/Administrator was to have life interest on the estate.*

2) The land was to be sub-divided equally among the children of the deceased.

It is clear that she did not proceed with the administration of the estate as directed by this court; which actually endorsed her request to distribute the estate that way;

The Role of Administrator is to administer the estate diligently and in particular according to the grant confirmed by the court. The Administrator has no powers to revise, amend or alter the terms or shares in the confirmed grant. Any attempt to do so will be proceeding in the administration of the estate in unlawful manner.

3) The 3rd issue is whether the Objector did repay loans in respect of the land owed to Agricultural Financial Corporation. During the life time of the deceased. From the documents produced, there is no doubt from the annexures particularly from Letter from AFC that the Deceased owed them funds and Objector stepped in to pay. Annexure CT 6 – a letter from AFC dated 27.1.1994 makes Special reference to the officers visiting the farm and stated;

Hence an inspection of your father's farm was carried out on 30/12/93. Your mother who was met during the inspection was advised to inform you to make payment urgently.

However, this was in vain as no payment has been received.

It is not therefore true as the Administrator states that she was not aware of any loan with AFC. Whether the Objector was supposed to service. Indeed the objection Wanandegge Co-op Savings and Credit Society did forward a Cheque to AFC on account of the Objector for payment of money owed to AFC in respect to Tongaren/Kiminini/207 the subject of the estate. It is my finding that the objector paid funds to AFC in respect of the land.

This application for Revocation is brought under Section 76 of the Law of Success Act; The circumstances in which a grant may be revoked or annulled are set out in Section 76 of the Law of Succession Act as follows:

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

In consideration of the application I am satisfied that the Administrator Anastasia Wangoi did not proceed diligently with the administration of the estate.

In the result, after considering the application, this court issues the following orders;

1. That the confirmed grant issued on 8th May, 2014 is hereby revoked.
2. The 11 titles issued pursuant to the grant i.e.

BUNGOMA/KIMININI/207:

Number:	Name:	Acres
1. BUNGOMA/KIMININI/2947	PAUL MAINA THUO	1.72 HA

JOHN MBURU

2. BUNGOMA/KIMININI/2948	MARION WANJIKU THUO	1.72 HA
3. BUNGOMA/KIMININI/2949	SARAH WAIRIMU THUO	1.72 HA
4. BUNGOMA/KIMININI/2950	SUSAN NJAMBI THUO	1.72 HA
5. BUNGOMA/KIMININI/2951	ELIZABETH WANJIKU THUO	1.72 HA
6. BUNGOMA/KIMININI/2952	ALICE NJOKI THUO	1.72 HA
7. BUNGOMA/KIMININI/2953	SABASTIAN KAMANDE THUO	1.72 HA
8. BUNGOMA/KIMININI/2954	DOUGLAS CONGO THUO	1.72 HA
9. BUNGOMA/KIMININI/2955	JOHN MBURU THUO	1.72 HA
10. BUNGOMA/KIMININI/2956	PAUL MAINA THUO	1.72 HA
11. BUNGOMA/KIMININI/2947	ANASTASIA WANGOI	1.72 HA

are recalled and revoked.

3. The titles of Plot No. BUNGOMA/KIMININI/207 be reinstated in the name of deceased THUO MIGWE KAMAU.

4. That the Anastacia Wangoi Thuo and Douglas Congo Thuo be jointly issued with grant at letters of administration.

5. The Petitioner's to file Summons for confirmation and fresh mode of distribution of the estate among the beneficiaries.

6. That the contribution of Douglas Congo Thuo for the settling of the AFC loan be taken into account in the mode of distribution.

Dated at Bungoma this 12th day of November, 2019.

S.N. RIECHI

JUDGE