



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 725 OF 2012**

**IN THE MATTER OF THE ESTATE OF PAUL MWONGERA M'IMPWI alias PAUL MWONGERA(DECEASED)**

**STELLA MUKIRI**

**GLADYS KANINI.....APPLICANTS/OBJECTORS**

**-VS-**

**JEREMIAH NGARUNI**

**HARUN KINOTI MBIJIWE**

**IBRAHIM MWIRIGI KIRIKA**

**JOSEPH KAIJI KIRIGIA**

**DOUGLAS MWITI MUTUMA.....RESPONDENTS**

**J U D G M E N T**

1. **PAUL MWONGERA (“the deceased”)** died on 10<sup>th</sup> June, 1988. On 4<sup>th</sup> June 2012, the Chief of Nkuene Location wrote a letter introducing the 1<sup>st</sup> respondent as the brother and joint tenant with the land deceased on parcel No. Abothuguchi/Ruiga/1706.

2. On 13<sup>th</sup> November, 2012, the 1<sup>st</sup> respondent petitioned for letters of administration of the estate intestate and disclosed himself as being the sole survivor of the deceased. The grant was issued to the him on 9<sup>th</sup> January, 2014 and confirmed on 8<sup>th</sup> December, 2014 with the estate being distributed as follows:-

**a. ABOTHUGUCHI/RUIGA/1705- 0.20 HA**

Douglas Mwiti Mutuma- 20Ft by 80Ft

Jeremiah Ngaruni- Balance

**b. ABOTHUGUCHI/RUIGA/1706- 0.20 HA**

Douglas Mwiti Mutuma – 25Ft by 80Ft

Joseph Kaiji Kirigia - 25Ft by 80Ft

Harun Kinoti Mbijwe - 20Ft by 80Ft

Ibrahim Mwirigi Kirika - 20Ft by 80Ft

Jeremiah Ngaruni 29Ft by 80Ft

3. On 26<sup>th</sup> March, 2018, **Gladys Kanini Mputhia** and **Stella Mukiri (“the Applicants”)** lodged a Summons for the revocation of the grant. They contended that the deceased had other siblings who were not included as beneficiaries of the estate, that the 2<sup>nd</sup> to 5<sup>th</sup> respondent were

strangers to the estate. That the grant was obtained secretly and fraudulently and thus, the grant should be revoked and the estate be distributed equally between the 1<sup>st</sup> respondent and the applicants.

4. All the respondents opposed the application vide replying affidavits filed on 2<sup>nd</sup> July, 2018. In his replying affidavit the 1<sup>st</sup> respondent stated that the land in question was not subject to inheritance as he was a joint owner with the deceased. The other respondents averred that they had rightfully bought portions of land from the 1<sup>st</sup> respondent. The respondents filed copies of green Cards for **L.R. Nos. ABOTHUGUCHI/RUIGA/1705 and 1706** to show the ownership of the subject properties.

5. The parties filed their respective submissions which I have carefully considered. The issues for determination in this matter are:-

- a) *Whether joint tenancy exists in the ownership of the estate of the deceased and its effect on succession;*
- b) *Whether the grant should be revoked;*
- c) *Whether the 2<sup>nd</sup> to the 5<sup>th</sup> respondent are entitled to a share in the estate.*
- d) *How the estate of the deceased should be distributed.*

6. On the first and second issue, revocation of grant is provided for under **Section 76 of the Law of Succession Act** which provides inter alia that: -

***“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) .....

(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) .....

(d) .....

(e) .....

7. The applicants contended that the deceased had other siblings who were not included as beneficiaries of the estate. That the 2<sup>nd</sup> to 5<sup>th</sup> respondents were strangers to the estate and that the grant was obtained secretly and fraudulently. In his response, the 1<sup>st</sup> respondent did not deny that the applicants were his siblings or that he had not notified them of these proceedings. He only deponed that he held the deceased's property under a joint tenancy.

8. In order to determine whether or not revocation should issue, suffice it to state that the issue of survivorship must be determined first. ***In Re Estate of Josphine Mumbua Mehlafl (2015) e-KLR***, the court, quoting **Gray & Gray in Elements of Land Law, 5<sup>th</sup> Edition**, at paragraphs 915 and 916 held:-

***“It has been said that the right of survivorship (or jus accrescendi) is the “grand and distinguishing” incident of joint tenancy. On the death of one joint tenant the entire co-owned estate “survives to” the remaining joint tenant or tenants. Ultimately, in the manner of the medieval taunting, the last surviving tenant becomes the sole owner – the winner takes it all.”***

9. This doctrine was legislated in **Section 102 (1) of the Registered Land Act**, now repealed, where it was provided as follows:-

***“102(1). Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land and consequently,***

(a) *dispositions may be made only by all the joint proprietors; and*

(b) *on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly.”*

10. In view of the foregoing, it is clear that property held under joint tenancy is subject to the rule of survivorship. Under the said rule, the deceased ceases to be entitled to the property on his death where he or she is survived by one or more joint tenants. The surviving joint tenant takes the deceased's entire share by virtue of his surviving the deceased. In other words, the interest of a joint tenant expires upon his demise as his share merges with that of the survivor. In this regard, in a joint tenancy or ownership, property will only form part of the deceased's estate where the deceased is the only surviving joint tenant. (See the case of ***Benson Mutuma Muriungi v C.E.O Kenya Police Sacco & another (2016) eKLR***). This is unlike ownership in common where the share of the deceased survives him.

11. In the present case, the copy of the green card filed in court shows that the properties in question were held in equal share between the deceased and the 1<sup>st</sup> respondent. The property was therefore held in common. Where property is held in common, the interest of an owner in common survives him on his demise and passes on to his beneficiaries/survivors. This is unlike in a joint tenancy.

12. Before the coming into force of the current Land Acts, 2012, where property was registered jointly without specifying the shares of the owners, such property was presumed to be held under joint tenancy. However, where the respective shares of the owners were specified; the ownership was in common. In the present case, the 1<sup>st</sup> respondent held the property equally with the deceased. Their respective shares were well defined. In this regard, he was an owner in common with the deceased whose interest passed on to his estate and was subject to the rules of intestate succession. That being the case, it was incumbent upon the 1<sup>st</sup> respondent to disclose to court the existence of his other siblings. This he failed to do. He never sought their consent in terms of Rule 26 of the Probate and Administration Rules. In the premises the grant cannot stand. It is hereby revoked.

13. The next issue is whether the 2<sup>nd</sup> to 5<sup>th</sup> respondent are entitled to a share in the estate. They contended that they had purchased their various portions from the 1<sup>st</sup> respondents. Firstly, there was no evidence of any such purchase. No sale agreement or transfer was produced in support of those allegations. The court was not told when and for how much the respondents purportedly purchased the subject portions. In any event, they participated in misleading the court when the matter came up for confirmation by pretending to be beneficiaries. They cannot be allowed to benefit from their own misrepresentation at the expense of the real beneficiaries of the deceased. Accordingly, I hold that the 2<sup>nd</sup> and 5<sup>th</sup> respondent are not entitled to any share of the estate.

14. From the material on record, the beneficiaries of the deceased are known. These are the 1<sup>st</sup> respondent and the applicants as their interests run in *pari passu*. Their rights and interest are equal.

15. In this regard, I make the following orders:-

- a) The sale of the land Parcel Number Abothuguchi Ruiga/1706 is hereby declared void.
- b) The same reverts back to the name of the deceased and 1<sup>st</sup> respondent.
- c) Consequently, the estate is to be distributed as follows:-

**ABOTHUGUCHI/RUIGA/1705.0.20 HA**

Sarah Mukiri

Gladys Kanini                      jointly in equal shares

Julius Mukiri

**ABOTHUGUCHI/RUIGA/1706 – 0.20 HA**

Sarah Mukiri

Gladys Kanini                      jointly in equal shares.

Julius Mukiri

16. This being a family matter, I will make no orders as to costs.

It is so decreed.

**SIGNED at Meru**

**A. MABEYA**

**JUDGE**

**DATED and DELIVERED at Meru this 11<sup>th</sup> day of October, 2018.**

**A. ONG'INJO**

**JUDGE**

**In the presence of:**

Mr. Abubakar Adv H/B for Kaimenyi for Applicants

Mr. Wamache for Respondent N/A

Applicants present in person

Respondents 1st present, 2<sup>nd</sup> present, 3<sup>rd</sup> present and 4<sup>th</sup> N/A.

**COURT:** Copies of Judgment to be supplied to counsel and parties at their own costs.

**A. ONG'INJO**

**JUDGE**