



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**SUCCESSION CAUSE NO. 50 OF 2003**

***In the matter of the Estate of KIURA KATHERI Alias KIURA NJAMIU (DECEASED)***

**NJIRU NJAMIU.....1ST APPLICANT**

**ISAIAH MWANIKI.....2ND APPLICANT**

**NJAGI NJAMIU.....3RD APPLICANT**

**VERSUS**

**NJERU NJAMIU..... 1ST RESPONDENT/ADMINISTRATOR**

**NJUE NJAMIU..... 2ND RESPONDENT/ADMINISTRATOR**

**JOTHAM KARUKA..... 3RD RESPONDENT**

**R U L I N G**

1. The applicants in their summons for revocation/ annulment of grant dated 8/12/2011 seeks for revocation of the grant issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondents on 12/05/2005. The grant was confirmed on 31/03/2011 and amended on 13/10/2011.
2. The applicants relies on grounds that the grant was obtained fraudulently by making false statement and concealment from court facts material to the case. In the supporting affidavit sworn by the 3<sup>rd</sup> applicant Njagi Njamiu, it is stated that the deceased had two wives. The first wife had four children while the 2<sup>nd</sup> wife had three sons and three daughters. Two children of the second wife were given each 7 acres of land by the clan which the deceased was to hold in trust for his 2<sup>nd</sup> house.
3. The children of the 2<sup>nd</sup> wife Susana Wachuka are the three applicants herein. It is deponed that the children of the 2<sup>nd</sup> house have always lived on the 7 acres registered in the name of the deceased while those of the first house lived on their respective parcels of land. The land in question is LR. Ngandori/Kirigi/67.
4. The applicants also allege that they were not heard by the court before it distributed the land to be shared equally among the ten (10) beneficiaries.
5. The applicant state that after the court confirmed (and amended) the grant, the 1<sup>st</sup> and 2<sup>nd</sup> respondents went ahead and registered the land LR. Ngandokri/Kirigi/67 in their names thereby disinheriting the applicants.

6. It is further stated that the applicants have lived on the land for over 60 years and that the family has multiplied to about 46 units with several houses built on the land. It would therefore be unjust to have that land shared equally among the ten (10) beneficiaries.
7. The applicants contend that the gifts *intervivos* to the first family were not taken into consideration by the court during the distribution.
8. The respondents opposed the summons for revocation relying on the replying affidavit sworn by the 2<sup>nd</sup> applicant Njue Njamiu. He states that the application is designed to delay the distribution of the estate. Since no evidence of fraud or concealment of facts has been tendered by the applicants. It is denied that the deceased gave any land to the respondents.
9. According to the respondents, the deceased had only one asset L.R. Ngandori/Kirigi/67 to which all the ten beneficiaries of the estate are entitled to including the respondents. The applicants explained that they registered the land in their names awaiting to distribute it to all the 10 beneficiaries and that they have no intention to defraud any beneficiary of their share. The hostility of the applicants led to this action for they blocked the respondents from carrying out the sub-division.
10. The parties disposed of the application by way of written submissions which were accordingly filed. Mr. P.N. Mugo represented the applicants while Mr. Joe Kathungu & Co. is on record for the respondents.
11. The facts leading to this application are that the 1<sup>st</sup> and 2<sup>nd</sup> respondents applied for grant of letters of administration intestate in the estate of the deceased. The letters of administration were issued on 12/05/2005 and confirmed on 31/03/2011. The deceased had two houses with ten children who were all identified as beneficiaries. At the time of the distribution, the two widows were deceased and were survived by their children as the eligible beneficiaries.
12. Before she died, the 2<sup>nd</sup> widow Susan Wachuka had filed an objection which was later withdrawn. This was after some evidence had been taken. The court distributed the only asset of the deceased Ngandori/Kirigi/67 measuring 7 acres equally among the ten beneficiaries including the parties in this case.
13. The administrators later expressed their predicament in their efforts to execute the grant. They filed an application seeking for orders that the officer commanding police station (OCS) Mayatta provides security for sub-division since the applicants were hostile and had vowed to disrupt the sub-division exercise. Before this application was heard, this summons for revocation was filed by the applicants who had been accused of frustrating distribution.
14. The applicants allege that the 1<sup>st</sup> and 2<sup>nd</sup> respondents concealed facts material to the case and thus obtained the grant irregularly. The concealment is described in paragraph 23 of the supporting affidavit as:-
- Para 23 THAT there was serious non disclosure as the Judge was not informed that the respondents had shared 14 acres of the deceased family land given intervivos and applicants were to share our 7 acres which has been grabbed and we were left landless.*
15. Section 107 provides that the party who alleges the existence of a certain fact has a duty to prove. The applicants produced copies of register for L.R. Ngandori/Kirigi/69 and 70 registered in the names of Njue Njamiu and Njeru Njamiu respectively.
16. The parcels were registered in the names of the respondents on 23/09/1960 as first registration. The allegation was that the two parcels of land were the entitlement of the deceased during land adjudication and should therefore be treated as gifts *intervivos* to the respondents.

17. It was therefore argued that the respondents should not inherit the only asset of the deceased and should leave it for the children of the 2<sup>nd</sup> house. It is admitted that the first house had four sons and that two Kiriamburi Njeru and Jotham Kanga were not given any land by the deceased or by the clan.

18. The applicants are required to prove that the land parcels of the 1<sup>st</sup> and 2<sup>nd</sup> respondent were an entitlement of their father and that it was given to the respondents by the clan for that purpose. No evidence was tendered to prove that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were given the land which belonged to the deceased. They were also required to prove that the respondents were appointed administrators and during the hearing, they failed to disclose material facts to the court resulting to a flawed or defective grant.

19. This application is brought under Section 76 of the Law of Succession Act.

It 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.*

20. The issue raised by the applicants featured in the proceedings of their mother's protest which was later abandoned. The applicants had the opportunity of filing their own protests which they failed to do despite the court reminding them to do so. The applicants cannot turn the failure on their part and allege non-disclosure of facts material to the case on the part of the respondents.

21. The proceedings show that the applicants were present during the proceedings when the orders for confirmation were made and many other times when the case was on-going. Non-disclosure of facts may occur when the case is being heard *ex parte* or where one person or family unit is unrepresented. In this cause, all the family members in both houses were present in court and participated in the proceedings.

22. The 2<sup>nd</sup> family was part and parcel of this cause and were never kept aside of the process. It is not correct for them to say that they were not heard by the court contrary to the rules of natural justice. The court normally hears any party who moves it and who establishes that he has an interest in the case before it.

23. In this case, the court called upon any party opposed to the mode of distribution to file a protest. This happened several times as borne by the proceedings. None of the applicants moved the court. The chief's letter and Form P&A.5 discloses all the beneficiaries of the estate. All the named beneficiaries were catered for during the confirmation of the grant. Section 40 of the Succession Act was therefore applied by the court in distributing the estate whereas the beneficiaries were given equal shares.

24. If the applicants were dissatisfied with the mode of distribution, the right thing to do would have been to appeal against the decision of the court but not to apply for revocation of the grant. In this application, the applicants are required to prove one or more of the grounds for revocation or annulment of grant stipulated under Section 76 of the Act.

25. I reach a conclusion that the applicants have not proved non-disclosure of facts material to the case. The alleged fraud has also not been proved on the part of the respondents.

26. The summons for revocation is hereby dismissed. Each party to meet their own costs of this summons.

27. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF FEBRUARY, 2017.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**1<sup>st</sup> & 2<sup>nd</sup> applicants present**

**1<sup>st</sup> & 2<sup>nd</sup> respondents present**

**Ms. Ndorongo for P.N. Mugo for Applicants**