



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 253 OF 2007**

**IN THE MATTER OF THE ESTATE OF NGARI GACAMBA alias NGARI GACHARUBA  
(DECEASED)**

**KUNDU MANYARA.....APPLICANT**

**PIUS MWANIKI MUGO.....SUBSTITUTED APPLICANT**

**VERSUS**

**NJERI NGARI.....PETITIONER/RESPONDENT**

**RULING**

1. Pius Mwaniki Mugo, the applicant has applied to have the confirmed grant in favour of Njeri Ngari, the respondent, to be revoked on the ground that the suit land reference No. Ngandori/Kathangariri/T. 203 currently plot No. 9 was and is unlawfully registered in the name of the respondent.
2. According to the applicant (PW 1) the applicant's late father bought the suit land from the husband of the respondent. A sale agreement written in Kiambu was executed to that effect and was produced as exhibit P. ex 3 (a) and (b). It is his further evidence that his father bought this suit land from Ngari Gacamba, who is the husband of the respondent for Kshs. 600. His father then developed the land between 1969 and 1972. PW 1 also stated that the respondent filed succession proceedings and obtained a confirmed grant without informing the applicant's father that she had done so. The confirmed grant was put in as exhibit PEX B1. When his father realized that the respondent wanted to sell the suit land, he went to the land's office and was advised to file a suit. However, the land remained registered in the name of Ngari Gacamba, until it was transferred into the name of the respondent on the strength of the confirmed grant. A green card was produced as exhibit PEX B5, in which there is a note that reads: "*There was a previous transfer to Kundu Manyara on 5/2/1968 see P/FILE IN L/R OFFICE*".
3. Furthermore there is the evidence of the Land Registrar (PW 4), Joseph Mulinge Munguti. According to PW 4 this land was adjudicated and the respondent's husband was ascertained to be the owner. Subsequently, the applicant's father cautioned the land claiming a purchaser's interest. PW 4 was unable to explain why the land was not registered in the name of the applicant's father.
4. Subsequently, the applicant's father filed a case before the before the Embu District Lands Disputes Tribunal, which found in his favour and the award was adopted as a decree in Embu Chief Magistrate's Court, Award Suit number 28/11 with Kundu Manyara being the plaintiff and Njeri Ngari being the defendant. According to the decree, Kundu Manyara was the person entitled to the suit land. The tribunal also advised Kundu Manyara to file a case in the High Court to give effect to his award. That

remained the position until the respondent petitioned and obtained a certificate of confirmation in his favour in respect of the suit land.

5. There is ample evidence that the applicant's father went into occupation of the suit land and developed it by building permanent buildings which were rented out to tenants. One such tenant is Michael Mbogo Kivuti (PW 3) who is still on the suit property. This tenant also stated that the land belonged to Kundu Manyara.

6. Tabitha Njeri Ngari, the respondent (DW 1) gave evidence that the suit land belonged to her husband who was also known as Ngari Gacharuba. She adopted her sworn affidavit of 30th July 2012 as her evidence. She stated that she does not know Kundu Manyara. She went further to state that Kundu Manyara did not buy land from her husband. She confirmed that a person cannot sell land without the consent of his wife. She went further to state that she filed a succession cause, in which she included the suit property as part of the estate of her late husband. Following that succession, she obtained a confirmed grant. No one objected to the suit land being given to her by the court. Subsequently, she learnt that there was someone claiming to own the suit property. She termed the purchase of the suit land by Kundu Manyara as lies.

7. Furthermore, she stated that there is a permanent shop on the suit land and whoever built on that suit land stole the said suit land. Interestingly, she denied any knowledge as to who stole the suit land from her husband. According to her the "theft" of the suit land was reported to police by her late husband. She confirmed in her evidence that she never informed the person who was in occupation of the suit land that she had filed in court a succession cause concerning this suit land. This witness contradicted herself by stating that she knew Kundu Manyara as the one who had built the permanent shop on the suit land in 1971.

8. When asked about the sale agreement between her husband and Kundu Manyara, she expressed surprise that her husband had a sale agreement in respect of the suit land. She also admitted in her evidence that Kundu Manyara is the person who planted sugarcane on the suit land and is the person who has been paying rates to the government.

9. I have considered the evidence of the petitioner and his witnesses. I have also considered the evidence of the respondent. I believe the evidence of the petitioner and his witnesses. I find from the entire evidence that the suit land was sold to Kundu Manyara by the respondent's husband.

10. I also find from the totality of the evidence that during the adjudication process Kundu Manyara was found to be the owner of the land. This explains why the land is indicated to have been transferred to him. This is clear from exhibit PEX B5). In exhibit Pex B5, it in part stated that "there was a previous transfer to Kundu Manyara on 05.02.1968 see p/file in L/R office". Kundu Manyara went ahead and filed a case in the tribunal which found in his favour and from that arbitral award the magisterial court issued a decree, A. EX 6. This decree has never been challenged to-date. And the decree and was to be enforced as an order of a civil court. I do not believe the evidence of the respondent (DW 1). She did not impress me as a truthful witness. She gave contradictory evidence as to whether she knew the late Kundu Manyara or not. Additionally she denied knowing the existence of a land sale agreement between her late husband and Kundu Manyara.

11. The issues for determination in the light of the foregoing evidence are as follows:

1. Whether or not the confirmed grant should be revoked.
2. Whether or not the applicant was informed of the succession proceedings filed by the respondent.
3. Whether or not the decree of the magisterial court in favour of the applicant's father is null and void.
4. Who should bear the costs of this suit.

12. I find from the evidence that the succession proceedings which ended up with the confirmed grant in favour of the respondent were filed without the applicants or his late father being informed by the respondent. The respondent in this regard admits that she did not inform the applicant or his father of the succession proceedings in court. In the circumstances, I find that this is a ground which entitles this court to revoke the grant in terms of section 76 of the Law of Succession (Cap 160) Laws of Kenya.

13. The effect of the decree in favour of Kundu Manyara clearly indicates that he was the owner of the suit land. This decree has never been challenged to-date. It is submitted by the respondent's counsel that the tribunal did not have jurisdiction to give the award in favour of the applicant's father. I do not accept this submission because the decree has never been challenged and therefore it only remained to be enforced. It is too late in the day to challenge its legal validity either by way of review or by way of an appeal.

14. In the light of the foregoing, I find that the applicant has succeeded in his application and the confirmed grant is hereby revoked. Furthermore, there is ample evidence that he is entitled to be registered as the owner of the suit land and I so order.

15. As regards to costs, the applicant will have the costs of this application.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **13<sup>th</sup>** day of **APRIL 2016**

In the presence of Mr Kisinga holding brief for Mr Mugambi Njeru for the applicant and Mr Mwaniki holding brief for Mr Mogusu for the respondent

Court clerk Njue

**J.M. BWONWONGA**

**JUDGE**

**13.04.16**