



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**SUCCESSION CAUSE NO. 338 OF 2007**

**In the matter of the Estate of MILKA WANGITHI MWARARI (Deceased)**

**PETERSON SAMSON MURIITHI..... APPLICANT**

**VERSUS**

**ELIUD NDUGUTO MWARARI.....1ST RESPONDENT**

**ROBERT NJOKA MWARARI.....2ND RESPONDENT**

**CECILIA KANINI RANGATA.....3RD RESPONDENT**

**RULING**

1. This is the application dated 6/5/2015 seeking *inter alia* that the court be pleased to revoke the grant issued on 20/12/2012 on grounds that it was obtained fraudulently. The application is supported by the affidavit of Peterson Samson Muriithi. In the affidavit, it is stated that the 1<sup>st</sup> respondent who is a brother of the applicant obtained the grant fraudulently.

2. The 1<sup>st</sup> respondent had applied for Letters of Administration *Ad Colligenda Bona* for the estate of Milka Wangithi Mwarari their late mother but the grant that was confirmed is the one for the estate of Javan Mwarari Mithamo. Before her death, Milka Wangithi had filed Kerugoya PM Succession Cause 138 of 1999 in respect of the estate of Javan Mwarari Mithamo whose property was parcel LR. Mutira/Kaguyu/211.

3. Milka Wangithi was dissatisfied with the mode of distribution and filed Embu High Court Civil Appeal No. 21 of 2001 but died before the appeal was heard. The applicant then filed an application Embu High Court Misc. Application No. 30 of 2006 for revocation of grant issued in Kerugoya PM Succession 138 of 1999 and the said application was allowed.

4. The 1<sup>st</sup> respondent also filed Kerugoya Succession Cause 9 of 2008 in relation to the estate of Javan Mwarari Mithamo and the letters of administration were issued to the applicant and the 1<sup>st</sup> respondent. However, the 1<sup>st</sup> respondent appealed against the said decision and the appeal was allowed. In the judgment the court ordered that the confirmed grant dated 21/7/2009 be canceled and that a fresh grant be issued to the applicant and the 1<sup>st</sup> respondent who would later file an application for confirmation of grant. The position is that Parcel LR. Mutira/Kaguyu/211 has already been subdivided and distributed. The applicant argues that the grant was obtained fraudulently and by concealment of material facts. The applicant states that he only learnt of the developments in the suit after he was served with a letter from the respondent's advocates.

5. In a replying affidavit, the 1<sup>st</sup> respondent stated that after grant was confirmed by the lower court Kerugoya in respect of the estate of Javan Mwarari, the late Milka Wangithi filed an appeal and died before the same was heard. The 1<sup>st</sup> respondent being the eldest son took out letters of administration for the estate of Milka Wangithi and thereafter took his mothers place in the administration of his father's estate Javan Mwarari. He also filed summons for confirmation of grant and obtained the certificate on 20/12/2012 for the estate of Javan Mwarari Mithamo.

6. The respondent states that survey on the ground was done in the presence of all beneficiaries. There is no way RL 19 and RL 7 could have been registered by the Land Registrar without all the beneficiaries entitled to share the state having signed the documents.

7. Parties agreed to dispose of this application by way of written submissions.

8. The applicant submitted that the grant issued on 20/12/12 was obtained fraudulently as the initial proceedings relate to the estate of Milka Wangithi Mwarari. It was therefore fraudulent to confirm the grant in respect of the estate of Javan Mwarari. The applicant contends that Letters of administration have never been issued in respect of the estate of Javan Mwarari Mithamo.

9. The respondent did not file relevant affidavits and petitions in respect of the estate as required by Rule 7 of the Probate and Administration Rules. The respondents did not notify the applicants advocate of the application for confirmation of grant. The applicant was not involved in the execution of the fraudulent grant.

10. The respondents advocate submitted that in the judgment delivered on 31/01/2012 the court granted a temporary grant to the applicant and the 1<sup>st</sup> respondent and therefore the applicant cannot claim that the grant of representation in respect of the estate of Javan Mwarari Mithamo was never issued. It is in view of the said letters that the 1<sup>st</sup> respondent applied to have the grant issued to the two brothers be confirmed.

11. It was further argued that the applicant cannot claim that he was not aware of the proceedings. Registration of forms RL 19 and RL 7 was done by the land registrar with all the beneficiaries signing the necessary documents. The inhibitions issued against land parcels Mutira/Kaguyu /5439, 5440, 5441 and 5442 should be lifted according to the respondent.

12. In this application arises two issues for determination as follows:-

*(i) Whether the application meets the requirements of Section 76 of the Act.*

*(ii) Whether the mix up of the ad colligenda bona proceedings with those of the Kerugoya Succession Cause No. 9 of 2008 of **JAVAN MWARARI MITHAMO** renders this succession cause void abinitio.*

13. The law governing revocation of grant is contained in Section 76 of the Law of Succession Act which provides 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) 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 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

(e) that the grant has become useless and inoperative through subsequent circumstances.

14. This was illustrated in the case of **JOYCE NGIMA NJERU & ANOTHER VS ANN WAMBETI NJUE [2012] eKLR** where the court cited the case of **MATHEKA & ANOTHER VS MATHEKA [2005] KLR 544** where it was held:-

(1) A grant may be revoked either by application by an interested party or on the courts own motion.

(2) Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance; or that the grant was obtained fraudulently by making of a false statement or by concealment of something material to the case, or the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.

(3) .....

15. The parties in this case are siblings and are children of the late Javan Mwarari Mithamo and the late Milka Wangithi Mwarari. Milka died on 3/01/2003 and was survived by her four children who are the parties in this case. Their father Javan had pre-deceased his wife Milka leaving only one known asset L.R. Mutira/Kaguyu/211.

16. An application for letters of administration ad corrigenda bona wa filed by the 1<sup>st</sup> respondent Eliud Nduguto Mwarari in this file No. 338 of 2007 listing the assets for collection as 2842 tea bushes and account No. 1301-25-1292 at Kirinyaga District Farmers Sacco. The application was allowed in favour of the 1<sup>st</sup> respondent on 12/10/2007.

17. This matter has a long history dating back to 1999 when Milka Wangithi Mwarari filed Kerugoya PM Succession Cause No. 138 of 1999 in respect of her late husband's estate Javan Mwarari Mithamo. The grant was confirmed therein and the estate distributed but Milka Wangithi was dissatisfied and lodged HCCA No. 21 of 2001. however, she died before the appeal was heard.

18. The applicant herein Peterson Samson Muriithi successfully applied for revocation of grant through HC Miscellaneous Application No. 30 of 2006 in respect of Kerugoya PM Succession Cause No. 138 of 1999.

19. The 1<sup>st</sup> respondent had filed Kerugoya Succession Cause No. 9 of 2008 whereas he was issued with letters of administration intestate and the grant subsequently confirmed. This judgment was overturned in Embu HCA No. 108 of 2008 whereas the court ordered that a fresh grant be issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondent Eliud Nduguto and Robert Njoka Mwarari in respect of the estate of Javan Mwarari Mithamo. The two administrators were directed to file an application for confirmation of grant without delay to facilitate the distribution of the estate in this hotly contested succession dispute which goes back to the

year 1999.

20. For some strange reason, the summons for confirmation of grant in the estate of Javan Mwarari Mithamo was filed in these proceedings whose nature was for grant of letters *ad colligenda bona* for the estate of Milka Wangithi Mwarari. This is where two separate causes were mixed up by error which mistake the appeal court did not notice. Neither of the parties raised the issue before the court. It appears that the parties who were represented continued with the Succession Cause of Javan in this file and had the grant confirmed following determination of several applications. This mistake has now been raised in this application and forms the basis of this application for revocation of grant.

21. The first issue raised by the applicant was that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had never been appointed administrators in this cause No. 338 of 2007. Taking this cause as it was filed, which sought for letters of administration *ad colligenda bona*, the applicant could be said to be right. However, given the prevailing situation that two causes with separate proceedings were joined together, the applicant is wrong based on the following explanation.

22. I refer to the orders of Ong'udi, J. made on 31/01/2012 in HCA No. 108 of 2008 where she canceled all the orders of the Senior Resident magistrate Kerugoya in Kerugoya PM Succession Cause No. 9 of 2008. The honorable Judge canceled the grant issued on 28/03/2008 and confirmed on 21/07/2009. She then proceeded to appoint the 1<sup>st</sup> and the 2<sup>nd</sup> respondents as co-administrators of the estate of Javani Mwariri Mithamo. This was a legal and appropriate appointment by the appeal court after setting aside the orders in the earlier cases.

23. It does not make sense therefore, for the applicant to argue that the 1<sup>st</sup> respondent has never been appointed an administrator of the estate of Javan. The order of the honourable judge issued on 31/01/2012 is still in force since on appeal was filed against the ruling by the applicant or any other party.

24. In pursuance with the orders of the judge, the 1<sup>st</sup> respondent applied for confirmation of the grant which summons was allowed without any protest and the estate was distributed as follows:-

Mutira/Kaguyu/211

Eliud Nduguto Mwarari - 1.7 acres

Robert Njogu Mwarari - 2.75 acres

Peterson Samson Muriithi - 2.75 acres

Cecilia Kanini Rang'ata - 1.7 acres

25. During confirmation of grant the court noted that the beneficiaries were present as per the list. The list referred to must have been the one contained in the supporting affidavit. The applicant was one of the beneficiaries whose name was on the list. Although he contends that that grant was obtained fraudulently, he has not attempted to show how the alleged fraud was committed.

26. The grant was made to the applicant and the 1<sup>st</sup> respondent by the court and confirmed without any objection from any of the beneficiaries. The applicant has not at all complained about the share given to him during the distribution. It was himself and his brother Robert Njogu who got bigger shares than the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

27. It is intimated by the applicant that the grant was confirmed based on the case for *ad colligenda bona*. This is not supported by the proceedings. The order made for *ad colligenda bona* on 12/10/2007 was in respect of the estate of Milka Wangithi and referred to only two things, the 2842 tea bushes and the account at Kirinyaga District Farmers Sacco. This was a totally different matter from the succession case

of Javan.

28. The confirmed grant related to the estate of Javan Mwarari Mithamo in respect of his only asset Mutira/Kaguyu/211. The mixing of proceedings for *ad colligenda bona* in respect of Milka Wangithi's estate and the successfully cause of her late husband Javan does not affect the validity of the proceedings. Neither does it amount to fraud on the part of the respondents. All the beneficiaries attended the confirmation of grant and except the applicant, the other three beneficiaries are not complaining. This aspect of dissatisfaction was noted by Ongu'di, J. in her ruling delivered on 31/01/2012.

29. I reach a conclusion that the applicant has not demonstrated any fraud on part of the 1<sup>st</sup> respondent to justify revocation of the grant.

30. It is my finding that the application has no merit and it is hereby dismissed with costs to the respondents. The orders of inhibitions issued on 6/05/2015 in respect of Mutira/Kaguyu/5439, 5440, 5441 and 5442 are hereby lifted.

31. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF SEPTEMBER, 2016.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Mr. Maina Kagio for Kariithi for the Respondent**