

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 266 OF 2007

IN THE MATTER OF THE ESTATE OF KIURA WARI (DECEASED)

VERONICA GICUKU.....APPLICANT

VERSUS

CHARITY NGAI KIURA

FRANCIS NJAGI KIURARESPONDENTS

JOHN MURIITHI

RULING

The applicant Veronica Gichuku in her application dated 7th November 2013 seeks for the following prayers:-

1. *That the grant of administration intestate in the estate of the deceased Kiura Wari and confirmed on 2nd May 1997 be annulled or revoked.*
2. *That the court give directions that all beneficiaries herein be enjoined in the suit.*

The application was disposed of by way of written submissions which were filed by the counsels for the parties.

Beth Ndorongo & Co. represent the applicant while Muthoni Ndeke & Co. is on record for the 2nd and 3rd respondents.

The applicant avers that the grant issued to the 1st respondent Charity Ngai Kiura was obtained fraudulently and by concealment of information which was material to the case. The applicant had earlier filed succession cause No. 7 of 1995 in Embu Principal Magistrate Court. The 1st respondent joined the suit as the protester. The parties later agreed to be appointed jointly as the co-administrators of the estate on 3/3/1998. They were issued with letters of administration intestate which was confirmed on 18/11/1998. The deceased's estate comprising of parcel No. Ngandori/Kirigi/2276 was shared equally between the two administrators. The applicant Veronica Gichuku represented the first family of the deceased since her mother was deceased. The 1st respondent being the surviving widow of the deceased represented her family being the second one in the deceased's household.

Thereafter the 1st respondent filed another succession cause No. 153 of 1996 in Embu Senior principal Magistrate court where she applied for letters of administration intestate without the knowledge of the applicant.

The 1st respondent named herself and her two sons Francis Njagi Kiura and John Muriithi (the 2nd and 3rd respondents herein) as the only survivors of the deceased in exclusion of the other beneficiaries. The grant was confirmed and the land of the deceased Ngandori/Kirigi/2276 and the cash in his Kenya Commercial Bank Account distributed among themselves in equal shares.

The applicant argues that the respondents are guilty of fraud in obtaining the grant and failed to disclose that there was another succession cause No. 7 of 1995 where the 1st respondent was a party. For these reasons, the applicant urges the court to revoke the grant in succession cause No. 153 of 1996.

The 2nd and 3rd respondents deny knowing of the existence of succession cause No. 7 of 1995 and deny that the 1st respondent participated in it. Further they deny that the applicant is a daughter of the deceased and aver that she is a stranger. Neither do they know where she comes from or where she lives. The respondents aver that they have always lived on deceased's land Ngandori/Kirigi/2276 and have developed it extensively. The respondents also submitted that the beneficiaries named by the applicant in succession cause No. 7 of 1996 were not children of the deceased and are not known to them.

The succession court files numbers 7 of 1995, No. 153 of 1996 and No. 264 of 2006 were joined to this Misc. Application No. 266 of 2007. On perusal of the court record of file No. 7 of 1995, it is clear that the petitioner was the applicant in this application Veronica Gichuku. The 1st respondent joined the proceeding as the protester. The parties reached an agreement on 3/3/1998 and were appointed co-administrators.

The administrators appeared before the court six months later (18/11/98) for hearing of summons for confirmation of grant. The 3rd respondent was present together with four (4) other children of the deceased named in Form P&A.5 in Succession Cause No. 7 of 1995. There was no objection against confirmation from the 1st and 3rd respondents and the court confirmed the grant with the two administrators taking half share of Ngandori/Kirigi/2276. This grant was executed in the Lands office and the two administrators were registered as co-owners with equal shares.

The respondents claim that the people who appeared in court and named as the 1st and 3rd respondents were imposters. This cannot be true because it is the magistrate who recorded the names of the people present and also noted those absent. Assuming that the 1st respondent was not present in court and got the half share of the land, how then did the Land Registrar obtain her particulars in order to register her as a co-owner of the land with the Applicant herein.

When succession cause No. 7 of 1995 was going on in court, the 1st respondent and her sons were running a parallel succession cause without the knowledge of the applicant. In the Form P&A.5 in succession cause No. 153 of 1996, where the 1st respondent was the petitioner, she named herself and the two respondents as the only survivors of the deceased leaving out the applicant and her siblings who were children of the deceased by his first wife.

The respondents proceeded to share the same land which had been shared with their knowledge and participation in succession cause No. 7 of 1995. They also distributed proceeds of the deceased's bank account equally which account the applicant was not aware of for she did not include it in Succession Cause No. 7 of 1995. The claim that the respondents do not know the Applicant and her siblings and denial that they were children of deceased and therefore rightful heirs of the deceased's estate, cannot be true given the evidence and circumstances of this case.

If they were not aware of the existence of the first house of the deceased, then there was no need of obtaining grant in another case secretly while they were well aware that another succession cause existed. The applicant had named all the respondents in succession cause No. 7 of 1995 as beneficiaries which is a demonstration of good faith towards members of the second house of the deceased.

Section 76 of the Law of Succession Act 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.

I rely on the case of **COSIMO POLCINO VS TONY KENT [2014] eKLR** where the court in revoking a grant which had been obtained fraudulently had this to say:-

“Indeed as noted by the superior court Judge, the resealing of the Grant was made after the court was satisfied that the appellant's brother Nicholas Jack Polcino had no objection to the resealing of the Grant in favour of the appellant. As the superior court observed, had the court been made aware of the existence of the 1st respondent and Gina Kent, the court would have sought their consent or otherwise before resealing the grant. It is our view that the fact that the appellant ;failed to disclose the existence of his two siblings, is sufficient ground to annul the grant resealed in Malindi Court on 17th November, 2009. We do not therefore need to delve into the issue of whether there was forgery or not and whether the same was established to the required standard”.

Similarly, I opine that had the court in SPM Succession cause No. 153 of 1996 been aware of the existence of the earlier succession cause No. 7 of 1995 and the concealment of existence of some of the beneficiaries, it would not have confirmed the grant issued to the first respondent.

It is my considered opinion that the applicant has satisfied the court that the 1st respondent obtained the grant in succession cause No. 153 of 1996 fraudulently and concealed material information to the court.

The purpose of this fraud and concealment was intended to disinherit the applicant and her siblings. I therefore make the following orders:-

- (a) That the grant issued to Charity Ngai Kiura in Succession Cause No. 153 of 1996 and confirmed on 2nd May 1997 is hereby revoked;*
- (b) That succession causes Nos. SPM Succ. 153 of 1996, 264 of 2006 and Misc. Succession Application 266 of 2007 be are hereby consolidated with **Succession Cause No. 264 of 2006** being retained as the file number.*
- (c) That the 2nd respondent **Francis Njagi Kiura** be and is hereby appointed a co-administrator in this Cause with the Applicant to ensure that the interests of both the deceased are represented.*
- (d) That the proceeds of the deceased in Kenya Commercial Bank Account No. 100234208 and KTDA No. MU120128 do form part of the deceased's assets in this cause.*
- (e) That the Land LR. No. Ngandori/Kirigi/2276 having been lawfully distributed in Succession Cause No. 7 of 1995 will not be disturbed unless the administrators and all the beneficiaries record a consent to the contrary.*
- (f) That due to the age of these succession causes the co- administrators do take the necessary steps to finalize this cause within 60 days.*
- (f) That there will be no order as to costs.*

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF MARCH, 2015.

F. MUCHEMI

J U D G E

In the presence of:-

Ms. Ndorongo for Applicant

Applicant present

2nd and 3rd respondents present

F. MUCHEMI

J U D G E