



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 729 OF 2014

**IN THE MATTER OF THE ESTATE OF THIGA MUNGAI ALIAS JASAN WAITITU–
DECEASED**

NANCY NJOKI NGUGI.....1ST APPLICANT

HANNAH NDUTA MWANGI.....2ND APPLICANT

VERSUS

GEORGE MUNGAI THIGA.....1ST RESPONDENT

ARTHUR THIGA WAITITU.....2ND RESPONDENT

THIGA MUNGAI.....3RD RESPONDENT

AND

JOHNSTONE MURIRA NGUYAI.....INTERESTED PARTY

JUDGMENT

1. The deceased herein died on 6th February 1976. Grant of letters of administration intestate were issued to the respondents on 19th June 2012 by the Chief Magistrate's Court at Kiambu in Succession Cause No. 98 of 2012. The grant was confirmed on 19th September 2013.
2. The applicants are step-sisters of the deceased and are sisters of the 1st respondent. The 1st respondent is the step brother of the deceased. The 2nd respondent is the son of the deceased, and the 3rd respondent is the nephew of the deceased. The estate subject of the dispute comprised land parcels Karai/Gikambura/419 and Karai/Gikambura/T.292. Upon confirmation, the former was subdivided into land parcels Karai/Gikambura/4599, 4600, 4601, 4638, and 4639. In the schedule to the Certificate of Confirmation, the respondents and Joshua Mungai Thiga (another nephew of the deceased) shared 419 and the 3rd respondent alone got T.292.
3. The applicants filed this summons on 24th March 2014 seeking the revocation and/or the

annulment of the grant on the grounds that the same was obtained fraudulently by the making of false statements and the concealment of facts material to the case; the grant was obtained by means of untrue allegation of fact essential in point of law; the proceedings leading to the grant were defective in substance having been undertaken before Kiambu Court which lacked the pecuniary jurisdiction to deal with the dispute; and that, subsequent to the confirmation, the estate had been distributed to only four beneficiaries and thus had excluded them and other beneficiaries. The application was supported by the affidavit of the 1st applicant. It was their case, and this was not disputed by the respondents, that their late father Thiga Mungai who died in the 1930's had three wives, being Nyambutu Thiga (1st house), Wanjiku Thiga (2nd house) and Kibui Thiga (3rd house). The applicants belonged to the 3rd house which also had Margaret Njeri Ngugi, Winnie Wanjiku and the 1st respondent. The deceased subject of the dispute and Damaris Waithira were from the 2nd house whereas the children in the 1st house were Mungai Thiga, Wanjiku Nyagacere, Njeri Thiga and Wanjiku Thuiya. It would appear that Mungai Thiga died leaving the 3rd respondent and Joshua Mungai Thiga. During the process of land adjudication, consolidation and demarcation it was agreed that the two parcels be registered in the name of the deceased to hold in trust of the three houses of the late Thiga Mungai. The complaint of the applicants is that the respondents did not involve all the beneficiaries in the distribution of the estate, and neither had the consent of these beneficiaries been sought or obtained. The respondents swore a replying affidavit through the 2nd respondent who stated that there were family deliberations involving all the beneficiaries through which each house nominated a representative who got a portion during confirmation. Such representative was to hold the portion in trust for the members of his family. I note that the persons who benefited got absolute registration each as there was no indication that they were to be registered to hold in trust.

4. But more important, I have perused the lower court file and noted that in the affidavit in support of the petition of the grant of letters of administration intestate it was deponed that the deceased was survived by only the respondents. Further, in the affidavit sworn to support the application for the confirmation of the grant the only persons indicated to be beneficially entitled to the estate were the respondents and Joshua Mungai Thiga. The estate was then distributed to these four. It is therefore evident that the mandatory provisions of **section 51** of the **Law of Succession Act (Cap. 160)** were not followed. It was required of the petitioners to disclose all the beneficiaries of the deceased's estate. It did not matter that the four were representing the respective houses. In any case, such representative, if one existed, needed to be disclosed and noted in the certificate of confirmation. Under **section 76(b)** of the **Act**, failure to disclose a beneficiary is a material matter that should lead to the revocation of the grant (**In the Matter of the Estate of DAVID KAMETHU ALIAS DAVID MAINA KINYANJUI (Deceased) Nairobi H.C P & A No. 1301 of 2002**).
5. Form 38 that was filed shows that consent was only obtained from and executed by the respondents themselves. That left out the rest of the beneficiaries. Under **rule 26(2)** of the **Probate and Administration Rules** the respondents were required to file Form 38 which mandated them to obtain consent to the making of the grant of letters of administration intestate to person of equal or lesser priority (**In the Matter of the Estate of MARIOKO NJERU MIGWI (Deceased) [2014]eKLR**). The applicants were persons of equal priority and did not execute any consent in favour of the respondents nor did they renounce their right to petition for the grant and as such the proceedings to obtain the grant were defective in substance. For this second reason the grant should be revoked.
6. There is the issue of land parcel Karai/Gikambura/4638 which the interested party Johnstone Murira Nguyai bought from the 1st respondent. The contention of the interested party is that he was an innocent purchaser for value without notice, and sought to benefit from the provisions of **section 93** of the **Act** which deals with the validity of transfer not affected by revocation of grant. It provides as follows:-

“93(1) A transfer of any interest in immovable or movable property made to a

purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been disclosed nor provided for.”

7. The agreement of sale between the interested party and the 1st respondent was entered into on 1st September 2013. A grant had been issued to the 1st respondent on 19th June 2012. Confirmation was done on 19th September 2013, after the sale agreement had been signed. **Sections 55 and 82** of the **Act** prohibited the 1st respondent from selling the deceased’s property before the grant was confirmed. When the 1st respondent entered into the agreement he had no capacity to sell the land as it belonged to the deceased. I have looked at the agreement (“JN1”). It shows the 1st respondent was an administrator in an on-going Succession Cause No. 98 of 2012 at Kiambu to succeed the deceased. The 1st respondent hoped to benefit from the estate of the deceased to be able to transfer the interest to the interested party. Any basic due diligence should have told the interested party that the 1st respondent had no title to pass. I do not think it matters that by the time of the transfer the grant to the 1st respondent had not been confirmed. Secondly, the agreement was not entered into with the knowledge or concurrence of the other beneficiaries. In the affidavit sworn on 7th July 2014 by the 1st applicant, she deponed as follows:-

“11. THAT I reiterate my deposition that Johnstone Murira Nguyai knew or ought to have known that the property he was buying was family land which was subject to a succession cause. He was an active participant in the fraud committed against the estate and the beneficiaries and knowingly engaged in the fraud in cohorts with the administrator, the said Joshua Mungai Thiga, one Muthoni Macharia and one Charles Ndungi Kibugi.”

Further, in the affidavit sworn by the interested party and filed on 16th February 2015 he admits that he knew that the land he was buying was part of the property of the deceased and that it was subject of a succession cause, and that the family had other members. The totality of the evidence, I find, shows that the interested party, who throughout the land transaction had the benefit of legal counsel, was aware of the full facts about the land. He knew the 1st respondent was not the owner of the land. The land was part of the estate of the deceased, and the family of the deceased was interested in the same. In fact, he knew or ought to have known that the applicants had a stake in the land and yet their participation and consent were not sought. I find that he was not an innocent purchaser without notice of the full facts.

8. In reaching this decision, I have considered the decisions in **In The Matter of the Estate of VERONICA NJOKI WAKAGOTO (Deceased) {2013}eKLR, GITAU & 2 OTHERS V. WANDAI & 5 OTHERS [1989] KLR 231, In The Estate of CEASER RIUNGU (Deceased) [2010]eKLR, In the Matter of the Estate of MWAURA MUTUNGI ALIAS MWAURA GICHIGO (Deceased) HC Succession Cause No. 935 of 2003 at Nairobi and In the Matter of the Estate of MIRIAM GATHONI MWATHI (Deceased) HC (Nairobi) Succession Cause No. 387 of 2010**, among others. I hold that the interested party was not a bonafide purchaser without notice and cannot, therefore, take cover in the provisions of **section 93** of the **Act**.
9. In conclusion, I revoke the grant of letters of administration that was issued to the respondents on 19th June 2012 and confirmed on 19th September 2013. Land parcels Nos Karai/Gikambura/419 (Karai/Gikambura/4599, Karai/Gikambura/4600, Karai/Gikambura/4601, Karai/Gikambura/4638, Karai/Gikambura/4639) and Karai/Gikambura/T.292 shall revert into

the names of the deceased Thiga Mungai alias Jasan Waititu. The registration of land parcel No. Karai/Gikambura/4638 in the name of the interested party Johnstone Murira Nguyai is hereby cancelled to enable the parcel revert to the estate of the deceased. The respondents and the interested party shall jointly and/or severally pay the costs of the application.

DATED and DELIVERED at NAIROBI this 6th July 2015.

A.O. MUCHELULE

JUDGE