



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE No. 73 OF 2007**

**LESIT, J.**

**IN THE MATTER OF THE ESTATE OF M'KUURA M'MUNYORI**

**PHILIPINUS NJIRU KUURA.....OBJECTOR**

**VERSUS**

**ZAKARIA NYAGA M'MUNGORI.....RESPONDENT**

**JUDGMENT**

1. **KUURA MUNGORI** alias **M'KURA M'MUNG'ORI** the Deceased in this case died on 1<sup>st</sup> July 1996 at Consolata Hospital Kieni, Embu. Zakaria Nyaga M'Mungori, herein after the Respondent, petitioned the court for Letters of Administration Intestate as the deceased's **son** when he filed a **Succession Cause No. 49 of 2002** at the **Senior Resident Magistrates Court** in Chuka. The said petition was supported by an affidavit in the Respondent's name. The Respondent listed the following as having survived the deceased:-

1. **Zakaria NyagaM'Mungori**
2. **M'Murithi M'Mungori**
3. **Njeru Mungori**
4. **AnisetaM'Kuria**

2. The Respondent obtained a temporary grant on 10<sup>th</sup> February 2003 and proceeded to get a Confirmed Grant on 28<sup>th</sup> July 2004. At the time of distribution of the deceased's estate which followed thereafter, the Objector who is the deceased's son came to learn of the Succession case in respect of his late father's estate filed in **Chuka SRM Succession Cause No. 49 of 2002**. He went to inquire at the Chuka Court Registry on suspicion that his Uncles were pursuing his father's estate. It is after confirming that the Succession Cause in respect to the deceased estate had been filed in Chuka Court that the Objector filed his Objection.

3. The following are the listed assets of the deceased that were contained in the confirmed grant to the Respondent:

- i. **Land Parcels No. Karingani/Ndagani/537**
- ii. **Land Parcels No. Muthambi/Karimba/761**

4. The Objector/Applicant then moved this court by filing an application for Revocation of Grant

- dated 7<sup>th</sup> June 2007 under **Sections 76(b), & (c) of Law of Succession Act, Cap 160 Laws of Kenya and Rules 44(1) and 73 of the Probate and Administration Rules.**
5. The Objector filed a chamber summons application under **Rules 49 and 73 of the Probate and Administration Rules Cap 10 Laws of Kenya and Sections 128 (1)(2), 129 and 130(b) and (d) of the Registered Lands Act Cap 300 Laws of Kenya** on 13<sup>th</sup> June 2007 seeking the issuance of a temporary order of inhibition against the said parcels of land pending the hearing and determination of the main application for revocation dated 7<sup>th</sup> June 2007. The application was successful and a temporary order of inhibition pending the hearing and determination of the application for Revocation and Annulment of the Grant was granted.
  6. The application under consideration before this court and which is the subject of determination is the application for revocation of the Confirmed Grant dated 7<sup>th</sup> June, 2007. Before the matter was heard, the Chuka file was transferred to this court and the same consolidated with this one. The parties also agreed to have the application for revocation heard through viva voce evidence and to include the question of distribution as part of the issues for determination.
  7. Grounds upon which the application for revocation is premised are the following:
    - a. **Obtained the grant and confirmation of the grant in CHUKA SRMCC SUCCESSION CAUSE NO. 49 OF 2002, fraudulently by making false allegations and also failed to disclose to the court who the rightful heirs to the estate of the deceased were.**
    - b. **Did not disclose all the properties of the deceased herein.**
    - c. **Did not obtain the consent of the Applicant / Objector herein or from the wife of the deceased**
    - d. **Failed to disclose that the deceased had children who survived him.**
    - e. **Lied to the court by stating that he was the deceased's son and that the beneficiaries of the estate of the deceased were his children whereas they are actually the deceased brothers who had their own separate pieces of land.**
    - f. **Concealed material facts by failing to obtain the Chief's letter from where the deceased hailed from thus denying the court an opportunity to know this fact and those who survived him or who the rightful heirs of the his Land Parcels Nos. KARINGANI/NDAGANI/537, MUTHAMBI/UPPER KARIMBA/ 761, KARINGANI/NDAGANI/1070 and MUTHAMBI/UPPER KARIMBA/342 were.**
  8. The issues for determination are:
    1. **Should the Letters of administration and the subsequent Confirmed Grant issued to the Respondent in CHUKA SRMCC SUCCESSION CAUSE NO. 49 OF 2002 be revoked?**
    2. **Who should be appointed Legal Representative of the Estate of KUURA MUNGORI — Deceased?**
    3. **Who is entitled to the Estate of KUURA MUNGORI —Deceased and how should his said Estate be distributed?**
    4. **Who should bear the costs of this cause?**
  9. There is no dispute that the deceased was the father of the Objector, and a brother of the Respondent. There is no dispute that the deceased died on 1<sup>st</sup> July 1996 at Consolata Hospital Kieni, Embu.

## **THE EVIDENCE AND THE ANALYSIS**

10. The Objector testified and called one witness. It was the Objector's evidence that the deceased was his father and that he died on 1<sup>st</sup> July 1996 at Consolata Hospital Kieni, Embu. He produced in court the Death Certificate he had obtained after the death of his late father as Objector Exhibit No. 1. The Objector also produced a Burial Permit for his late father KUURA MUNG'ORI as Objector Exhibit No. 2 to show that indeed, he properly obtained the Death Certificate of his father.

11. The Objector produced a photocopy of the Death Certificate which according to him had secretly been obtained by the Respondent and was filed in the succession cause at **Chuka Succession 49/02** as exhibit No. 3 which indicated that the late KUURA M'MUNG'ORI was a resident of Embu, a claim that was disputed by the Objector who maintained that his father had never lived in Embu and was only hospitalized there at the time of his demise. As a matter of fact he urged that at the time of death, his Father had a family consisting of the following:

1. **Justine Riungu Kuura** now deceased who was the deceased eldest son who died in 2006.
2. **Benamina Kanyiba Bundia** married daughter.
3. **Ulita Mumu Salesio** a married daughter.
4. **Faith Muiror Kinyua** a married daughter.
5. **Policena Karimi Mukuru** a married daughter.
6. **Cecilia Ciamati Kura** Objector's step Sister
7. **Aniceta Mukwamugo**, the wife of the deceased who was still alive and was aged 100 years.

12. The Objector submitted that due to his mother's incapacity, he had taken up the case on her behalf and that of his siblings. It was his position that prior to his father's demise, the deceased had four pieces of lands namely:

- i. **KARINGANI/NDAGANI/537,**
- ii. **MUTHAMBI/UPPER KARIMBA/761,**
- iii. **KARINGANI/NDAGANI/1070**
- iv. **MUTHAMBI/UPPER KARIMBA/342.**

13. The Objector produced copies of Green Cards for the said parcels of land as Exhibits. He testified that he himself was in occupation of Land Parcel **KARINGANI / NDAGANI /537** at the time, where he had his residence and also where his Father was buried.

14. He argued that at the time of his father's death, all the pieces of lands belonging to him had been shared among his sons and therefore, Land Parcels Nos. **KARINGANI/NDAGANI/537, MUTHAMBI/UPPER KARIMBA/761, KARINGANI/NDAGANI /1070** and **MUTHAMBI/UPPER KARIMBA/342** belonging to his father had by then been shared out.

15. At the same time, the Objector stated that prior to the death of his father, he had distributed all the family land at Upper Karimba to his brothers who included the Respondent herein, and that the deceased was only left with Land Parcel No. **MUTHAMBI / UPPER KARIMBA / 761** being his share of the family land.

16. Of the disputed Land, Parcel NO. **KARINGANI/NDAGANI/537** the Objector stated that it was his father who solely gathered it and did not hold it in trust for anyone. The register for the said land parcel was opened in the year 1976 and the same is apparent from the register. The same had an endorsement to the effect that NJIRU KUURA, the deceased son and the Objector herein had a right of occupation.

17. It was the Objector's case that his father migrated to Land Parcel No. **KARINGANI / NDAGANI / 537** in 1957 and that he also gathered Land Parcel No. **KARINGANI/NDAGANI/1070** within the same area.

18. The Objector also stated that he moved into Land Parcel No. 537 in the year 1978 where he has been living since then. He stated that Land Parcels Nos. **KARINGANI / NDAGANI / 537** and **1070** were not family land and should instead be inherited by his immediate family because these pieces of land were gathered by his late father who was also the first registered owner.
19. When the Respondent was recalled for cross examination by the Objector's Advocate and shown the record of this register indicating the deceased as the first registered owner, he simply disagreed with it, and said they had given out 5 acres of the said land to their brother Ndege also known as Lithaa Mungori as it was their family land.
20. As for Land Parcel No. **MUTHAMBI / UPPER KARIMBA / 761**, the Objector stated that it was part of the family land which his father got after sharing the ancestral land with his brothers.
21. As for land Parcel No. **MUTHAMBI / UPPER KARIMBA / 342** the Objector stated that his father, bought it from one **George Marangu Ndei** whose wife **Ereustelia Muiku George**, confirmed that indeed, **Kuura M'Mung'ori** bought land from his late husband.
22. The Objector stated that Land Parcel No. **MUTHAMBI / UPPER KARIMBA / 342** should go to his late father's concubine one **Jessica Ciambai** because it is the land in which **Jessica Ciambai's** daughter one **Cecilia** lived in.
23. The Objector testified in detail and produced evidence that his uncles who included the Respondent had their own pieces of land at **Upper Karimba**. The Objector produced Green Cards for the parcels of land belonging to his uncles as exhibits to prove the same. The Objector was however categorical that he was not claiming any part of his uncles' pieces of land, and expected them not to claim any part of his father's pieces of land either.
24. It was the Objector's further evidence that during the life time of his father, none of his uncles had claimed any part of his late father **KUURA M'MUNG'ORI's** Land as they were now purporting to. The Objector stated that they only started claiming his father's land after his death.
25. The Objector further stated that his father **KUURA MUNG'ORI** had been given permission by his father **MUNG'ORI BAIKIARE** to gather and share the family land at **Upper Karimba** with his brothers which he did. He stated that the only dispute they had was the ancestral land at **Upper Karimba** which fact was confirmed in evidence by the Respondent's Witness PW2. The dispute had been brought by the Respondent herein against one **KUURA M'MUNG'ORI** over Land Parcel No. **MUTHAMBI / UPPER KARIMBA / 761** and the same was heard and was dismissed.
26. In his evidence in court, PW2 indicated that the said parcel of Land was initially being used by the Objector before his father died. Prior to the deceased death, the Respondent had laid claim to the land, which claim was heard and dismissed in Adjudication with the Respondent being ordered out of the said land. PW2 pointed out that the Respondent had also objected to the registration of **KARINGANI / NDAGANI / 537** but the same was never heard.
27. The Objector stated that the deceased distributed this land at **Upper Karimba** before he died. PW3 in evidence confirmed that Land Parcel No. **761** was being used by the Objector before his father died. He told the court that the Respondent Zacharia, used to live in **MUTHAMBI / UPPER KARIMBA / 761** but left the land after his Objection against his deceased brother Kuura in respect of the said Land Parcel No. **761** was dismissed and he was ordered out.
27. The Objector stated that Land Parcel No. **MUTHAMBI / UPPER KARIMBA / 761** should be shared between him and his late brother one M'Andresa, because he (M'Andressa) had settled in Land Parcel No. **MUTHAMBI / UPPER KARIMBA / 761**. The Respondent on the other hand agreed during cross examination that this parcel of Land had been given to the deceased in 1990. He however alleged foul play in that his brother had cheated them by taking a bigger share while effecting distribution. They allege to have complained at the Lands registry but did not have proof of this complaint.
28. Regarding the issue of Letters of Administration and the subsequent confirmation of grant issued to the Respondent; The Objector in his evidence demonstrated how the Respondent filed **Chuka SRM Succession Cause No. 49 of 2002** secretly by claiming that he was the "son" of **KUURA M'MUNG'ORI** the deceased herein. He produced all the necessary documents in **Chuka SRM Succession Cause No. 49 of 2002** in which the Respondent indicated that he was the "son" of the late **KUURA M'MUNG'ORI** yet he knew very well that he was not.
29. The Objector testified that no Consent was obtained from him or his mother before the said Cause was filed. He further urged that not all the deceased's properties were listed and that instead the

- grant was only issued in respect of Land parcels **MUTHAMBI / UPPER KARIMBA / 761** and **KARINGANI / NDAGANI / 537** yet the Respondent had no rights whatsoever to obtain and confirm these grants.
30. The Objector maintained that when the Respondent filed **Chuka SRM Succession Cause No. 49 of 2002**, he did not obtain the Chief's Letter for introduction in court as required. The failure to obtain the Chief's introductory letter according to him was clear evidence that the Respondent filed the succession cause secretly with the sole aim of disinheriting the Objector and those rightfully entitled to the deceased's Estate. It is also evident from the court record that it was only after the deceased's death that the Respondent stated claiming the subject LAND PARCEL NOS. **MUTHAMBI / UPPER KARIMBA / 761** and **KARINGANI / NDAGANI / 537** yet he did not do so during the lifetime of the deceased.
  31. The Respondent in his case admitted having filed the said case **Chuka SRM Succession Cause No. 49 of 2002**. It was his case that he referred to **KUURA M'MUNG'ORI** as his father because he is the one who nurtured him until he grew up. He also took him for circumcision and financed his marriage.
  32. The Respondent stated that when he filed the **Succession Cause No. 49 of 2002**, he was not lying when he described himself as the son of **KUURA M'MUNG'ORI**. He however indicated that he knew well that the deceased **KUURA M'MUNG'ORI** had a son; however he did not know whether it was him who was supposed to file the case.
  33. The Respondent further stated that when he filed the case at Chuka, the Objector was aware. Before he filed the case at Chuka, he alleged that he and his brothers obtained the Chief's letter to file Succession. The Objector however denied this allegation. The Respondent retracted the piece of evidence in which he indicated in the Petition he filed at Chuka that the deceased was a resident of Embu by blaming the hospital for this error.
  34. The Respondent gave evidence to the effect that his father **MUNG'ORI BAIKAIRE** had 23 acres of land which had not been gathered by the time of his death. He stated that it was the deceased who gathered the pieces of land belonging to his father and distributed them among his brothers. He proceeded to give evidence on how land parcels at **Upper Karimba** were distributed by his brother. He stated that Land Parcel No. **MUTHAMBI / UPPER KARIMBA / 761** measuring 1.13 acres was the balance of the family land which he is supposed to take because he was given a small portion of the land. He further stated that he was to get a portion of Land Parcel No. **KARINGANI NDAGANI/537** so that his acreage could be 9 acres. He alleged that the Objector was present when they discussed the issue of sharing the pieces of land.
  35. The Respondent stated that Land Parcel No. **537** belonged to his father one **M'MUNG'ORI BAIKIARI** and did not agree with the Objector that the said land parcel No. **537** belonged to the deceased **KUURA M'MUNG'ORI**. He urged that Land Parcel No. **KARINGANI / NDAGANI / 537** should be shared among his brothers and even went ahead to state how the said land should be shared.
  36. I noted the fact that though the Respondent referred to documents which he alleged were from Land Adjudication Section at Chuka, he never produced them as exhibits or show them to the court.
  37. PW3 for the Respondent also did not have any documentary evidence to prove that Ndege's Land Parcel No. **KARINGANI / NDAGANI / 1076** came out of Land Parcel No. **537**. He could not remember when Ndege was allegedly given the said land. Just like the Respondent, PW2 and PW3 did not have any documents to support their evidence despite all of them alleging that they had documents to do so.
  38. The Respondent testified that 'Phillipinus', the Objector declined to discuss the distribution of these pieces of land saying that they belonged to his father". He urged that it was the Respondent's evidence that he has never utilized Land Parcel No. **KARINGANI/NDAGANI/537**. However, I noted that from the record that he had let it out to somebody to utilize it for the time being.

Regarding whether the Letters of administration and the subsequent Confirmed Grant issued to the Respondent in **CHUKA SRM SUCCESSION CAUSE NO. 49 OF 2002** should be revoked? Section 76 of the Law of Succession Act Cap 160 deals with revocation of grant and provides as follows:-

**“76. A grant of representation whether or not confirmed may at any time be revoked**

**or annulled if the court decides, either on the 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 in advertently.”**

39. From the record the Respondent was not forthright when he told the court that the Objector was aware of his filing of **Chuka SRM Succession Cause No. 49 of 2002**. In his own testimony to court, he said that the Objector "Phillipinus declined to discuss distribution of these pieces of land saying that they belonged to his father". If at all he was aware, the Respondent would have sought his consent as well as that of his mother when filing this cause, which he unfortunately did not.

40. I find that the Respondent was not candid to the court when he filed **Chuka SRM Succession Cause No. 49 OF 2002** and described himself as the “son” of the deceased KUURA MUNGORI. The excuse he makes for describing himself as a son of the deceased is a false claim because in matters of inheritance, a brother cannot make a mistake and describe himself as a son because that implications of so doing are not only misleading but also far reaching. The mis-description of himself was clearly calculated to deceive when one considers the fact the Respondent did not disclose the surviving spouse of the deceased and his surviving children.

41. The Respondent in his affidavit in support of the petition for letters of administration intestate sworn by the Respondent in **Chuka SRM Succession Cause No. 49 OF 2002** listed four persons surviving the deceased as follows:-

- a. **Zakaria Nyaga M'Mung'ori** (the Respondent herein)
- b. **M'Murithi M'Mung'ori**
- c. **Njeru Mungori**
- d. **Aniseta M'Kuura**

42. He however left out the Objector and his siblings yet he told the court that at the time he filed **CHUKA SRMCC SUCCESSION NO. 49 OF 2002**, he was aware that the Objector was the son of the deceased. It is very clear to me that the Respondent gave false statements and concealed material facts when he filed the Petition for Letters of Administration in the Chuka Cause.

43. The Respondent was also being insincere when he alleged that he had obtained the Chief's letter to file the said case at Chuka, but left it at the hospital, when in fact he simply did not produce it. The truth of the matter is that he never obtained the letter from the Chief, a document that is so vital for the filling of the Succession Cause.

44. There are other serious omissions in the list of the deceased properties. The Respondent left out half of the deceased properties. From the record, the Respondent must have been aware of the deceased's properties as per his evidence in court although he admitted during cross-examination that he was not aware of other properties belonging to the deceased with the exception of Land Parcels No. **MUTHMABI / UPPER KARIMBA / 767 and KARINGANI / NDAGANI / 537**. It is clear that he was only keen on these two parcels of land which he was interested in, and I would not hesitate to find that he mentioned only the property he intended to defraud the Objector and his family of.

45. In this case, I find Respondent obtained the grant fraudulently by making false statements. He failed to state the real beneficiaries of this estate were, he failed to state his real relationship to the deceased or his right of claim over the deceased property and more seriously annexed a death certificate which one of the children of the deceased now claim was irregularly issued. I find 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. That **being the case, then this grant should be revoked.**

46. Regarding who should be appointed Legal Representative of the Estate of KUURA MUNGORI

- the Deceased herein; the persons entitled to be appointed as administrators are set out in **Section 66** of the **Law of Succession Act**. Priority is given to the surviving spouse, followed by the children, in that order. That would appear to suggest that the Objector herein bearing in mind his mother's incapacity has the priority over the Respondent. The Respondent had no business applying for the Letters of Administration before consulting the Objector or alternatively without citing him.
47. **Section 66** of the **Law of Succession Act** clearly gives the surviving spouse preference over the other survivors of the deceased, including the children. The courts have however stated in a number of decisions, for instance in the case of *the estate of Aggrey Makanga Wamuaia Mombasa High Court Succession Cause No. 89 of 1986*, that **Section 66** only provides a general guide, it is not mandatory, the surviving spouse can be overlooked to be made to share administration with persons of lesser preference. In this case, the surviving spouse of the deceased was said to be about 100 years old. The Respondent did not oppose or controvert that statement which would mean it is true she is an old person and of such an age that she should be excused from pursuing this case, given she has able bodied children to do so.
48. Regarding who is entitled to the Estate of KUURA MUNGORI the Deceased in this cause, and how his said Estate should be distributed; Under the **Law of Succession Act**, and specifically **Sections 35, and 38**, the wife and children of the deceased are the persons entitled to a share in the estate of the deceased. Other than the wives and children of the deceased who are entitled to inherit the deceased property, persons who were dependants of a deceased person during his lifetime are entitled to apply for provision under **section 26** of the **Act**.
49. It is clear that the Respondent secretly filed this cause and subsequently obtained a confirmed grant which was confirmed without involving the Objector, the Objector's mother or his siblings. The law of intestate succession makes the children the ultimate destination of their parents' property, and where there is a surviving spouse, he or she will be entitled only to a life interest.
50. This is the position under **Section 35** of the Act. The Objector, his mother and his siblings, in this case are rightfully entitled to their deceased father's estate, but the ultimate destination of that property is the Objector and the other children of the deceased.
51. I find that the Objector proved his right to inherit from his father the deceased in this case on a balance of probabilities. The evidence adduced by the Respondent through both himself and his witnesses had no substance. There was no production of documentary exhibits alluded to by the Respondent and his witnesses. I find that the said documents did not exist, and if they did they were not favorable to the Respondent's case. I am very clear in my mind that the Respondent was not and is not entitled to any part of the deceased estate in this case. The filing of the Succession in Chuka, a court without jurisdiction as the property was definitely more valuable at the time of filing, than the pecuniary jurisdiction of that court in succession cases and I find that taking the cause to that court was meant to facilitate the fraud further.
52. I noted that the Objector had a brother who is now deceased. Objector has proposed a share of his father's, the deceased property to be shared out to his brother's estate. His estate has been provided for and no one is complaining. The Respondent also has sisters and I have noted that he has only provided for one of them. The rest are married. The fact they are married is not a ground to deny them their inheritance if they wanted to share in their father's property. In this case however, the daughters of the deceased have not shown any interest in their father's property, except for the step sister of the deceased children who has been provided for. I find the recommended distribution fair and will allow it.
53. As to costs, I would order that each party bears its costs, being a family matter.
54. In the result I will conclude this matter by making the following orders:

**1]. The Summons application dated 7<sup>th</sup> June, 2007 is allowed.**

**2]. The Confirmed Grant dated 28<sup>th</sup> June, 2004 be and is hereby revoked.**

**3]. The parcels of land belonging to the estate of the deceased be distributed among his children as follows:**

**a). Land Parcel No. MUTHAMBI/UPPER KARIMBA/342 be registered in the**

**name of CECILIA CIAMATI KUURA.**

**b). Land Parcel No. MUTHAMBI/ UPPER KARIMBA/761 be registered in the name of JUSTINE RIUNGU M'NDERESA and PHILIPINUS NJIRU KUURA equally.**

**c).Land Parcel No.KARINGANI/NDAGANI/537 be registered in the name of PHILIPINUS NJIRU KUURA.**

**d)Land Parcel No.KARINGANI/NDAGANI/1070 be registered in the name of PHILIPINUS NJIRU KUURA**

**4]. Each party will bear its own costs of the suit.**

**DATED SIGNED AND DELIVERED AT MERU THIS 12<sup>TH</sup>DAY OF NOVEMBER, 2014**

**LESIIT, J**

**JUDGE.**