



**IN THE COURT OF APPEAL OF KENYA**

**AT NYERI**  
**Civil Appeal 179 of 2002**

**JOSEPH WAITIKI NDEGWA**

**DANIEL MATHENGE NDEGWA ..... APPELLANTS**

**AND**

**DUNCAN NDERITU NDEGWA**

**BENJAMIN GITHINJI NDEGWA ..... RESPONDENTS**

**(Appeal from the ruling and order of the High Court of Kenya at Nyeri (Mitey J) dated 1<sup>st</sup> November, 2001**

**in**

**H.C. SUCC. CAUSE NO. 131 OF 2000)**

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**JUDGMENT OF THE COURT**

The appellants are aggrieved by the ruling and order of the superior court, Mitey J. dated 1<sup>st</sup> November, 2001 revoking the grant of letters of administration issued to the appellants on 27<sup>th</sup> June, 2000 in respect of the estate of **HANNAH MURUGI NDEGWA** alias **MIRUGI NDEGWA** (deceased).

The deceased died on 14<sup>th</sup> October, 1995. She was the registered proprietor of land title No. THEGENGE/KARIA/332 comprising of approximately 1.17 Hectares. The deceased had seven sons and three daughters. Two of her sons and one daughter are deceased. In *Nyeri H.C.C.C. No. 168 of 1991* Joseph Waitiki Ndegwa (first appellant) obtained a decree given on 2<sup>nd</sup> December, 1991 against the deceased, *inter alia*, that:

***“That the defendant is a TRUSTEE in land parcel number THEGENGE/KARIA/332 holding it for and benefit of the plaintiff and the other brothers”.***

On 7<sup>th</sup> March, 2001, the two respondents herein filed *Nyeri High Court Succession Cause No. 71 of 2000* for the grant of letters of administration with the consent of Daniel Mathenge Ndegwa – the second appellant herein. The respondents thereafter issued a citation to Joseph Waitiki Ndegwa – the first appellant herein who entered an appearance to the citation.

Again, on 10<sup>th</sup> April, 2000 the two appellants filed *Nyeri High Court Succession Cause No. 131 of 2000* for grant of letters of administration in respect of the estate of Hannah Murugi Ndegwa. The

appellants deposed in paragraph 4 of the supporting affidavit that the deceased:

*“... left the following surviving her:*

- (a) JOSEPH WAITIKI NDEGWA,*
- (b) DANIEL MATHENGE NDEGWA”.*

On 21<sup>st</sup> June, 2000, a grant of letters of administration was issued to the appellants and on 10<sup>th</sup> January, 2001, they filed an application for confirmation of the grant. By paragraph 5 of the affidavit in support of thereof, the appellants deposed:

*“5. That the identification and shares of all persons beneficially entitled to the said estate has been ascertained and determined as follows:*

***JOSEPH WAITIKI NDEGWA AND DANIEL MATHENGE NDEGWA AS JOINT PROPRIETORS OF LAND PARCEL NUMBER THEGENGE/KARIA/332”.***

On 19<sup>th</sup> February, 2001 the grant was confirmed and a certificate of confirmation of the grant was issued confirming that the two appellants were to be registered as proprietors of the land as tenants in common.

By an application dated 8<sup>th</sup> March, 2001 the respondents applied for the revocation of the grant on the ground that the grant was obtained fraudulently by concealing that there was a pending prior petition and that the deceased was survived by other beneficiaries. The first respondent filed a replying affidavit thereto and deposed in paragraphs 10, 11 and 12, thus:

*“10. That non disclosure in my application does not amount to a false statement.*

*11. That the grant itself is not manifest of the intention of distribution of the suit property.*

*12. That I and my co-applicant want to establish a NDEGWA VILLAGE POLYTECHNIC on this land for the benefit of the community ...”.*

In revoking the grant the superior court said in part:

*“I find that the respondents made a false statement in their petition to the effect that they are the only children of the deceased. They concealed from the court the information that the applicants had filed succession cause No. 71/2000. Had this court been so informed the grant may not have been issued to the respondents”.*

The appellants appeal against that decision and the main ground is that the superior court erred in law in holding that the appellants had made a false statement and that the grant was fraudulently obtained.

There is a second ground of appeal which avers that the superior court erred in law in interpreting the effect of **Rules 21** and **22** of the Probate and Administration Rules (P & A Rules).

In support of the second ground of appeal, Mr. Mahan, learned counsel for the appellants, contended that the first appellant was procedurally entitled to file his own petition for grant of the letters of administration after citation and that he filed the petition within the time prescribed by **Rule 22 (7)** of the P & A Rules.

In this case, the respondents filed *Nyeri High Court Succession Cause No. 71 of 2000* on 7<sup>th</sup> March, 2000 and in compliance with **Rules 7 (7)** and **21** of the P & A Rules they issued a citation upon the first appellant. The citation was issued in the succession cause already filed. It had the cause number and

notified the first appellant that the respondents had already filed a petition. **Rule 22 (4)** of P & A Rules provides:

***“A person cited who is willing to accept or take a grant may petition the court for a grant on filing an affidavit showing that he had entered an appearance and has not been served by the citor with notice of any application for a grant to himself”.***

It is implicit in the sub-rule that the person cited can only file a petition if he has no notice that the citor has made an application for a grant to himself. That the person cited cannot file another petition is reinforced by **Rule 4** of P & A Rules which requires a District Registrar to send to the principal registry a notice of every application for grant made in the registry and further provides in part:

***“and no such grant may be signed by the court until the receipt from the principal registry of a certificate in Form 30 to the effect that no such other application made in respect of the same estate of the deceased has been granted or notified to the principal registry as pending”.***

Further by **Rule 26 (1)** of P & A Rules, letters of administration cannot be granted to an applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

It is clear that the policy of the Law of Succession Act and the P&A Rules does not envisage the filing of more than one petition in respect of the same estate.

It follows, therefore, that it was procedurally wrong for the appellants to have filed a second petition in respect of the same estate. They could only have intervened in *Succession Cause No. 71 of 2000* which had already been filed and gazetted.

The application for the revocation of the grant was based on **section 76 (a)** of the Law of Succession Act that the grant was obtained fraudulently by making a false statement or by concealment from the court of something material to the case.

In our view, that ground was sufficiently proved. Although the appellants knew that there were other beneficiaries including the respondents, they did not disclose the existence of the other beneficiaries in the petition. They named themselves as the only two siblings who survived the deceased. Moreover, they proceeded to file an application for the confirmation of the grant and made a false statement that they were the only beneficiaries and they also stated on oath in the affidavit in support of the application that they should be registered as proprietors of the land.

Moreover, the appellants did not ask the court to be registered as holding the land as trustees for the other beneficiaries. Further, it is apparent that the application for the confirmation of the grant was not served on the other beneficiaries. The consent of the other beneficiaries to the inheritance of the land by the appellants was not sought and it is clear that they were not given an opportunity to object to the distribution of the land as suggested by the appellants. By the confirmed grant the two appellants inherited the land absolutely. Notwithstanding the plea of innocence by the first appellant in the replying affidavit to the application for revocation of the confirmed grant the confirmation thereof had the legal effect of disinheriting all the other beneficiaries. The appellants must have intended that consequence.

In the circumstances, the superior court reached a correct and just decision.

Accordingly, the appeal has no merit. We dismiss it with costs to the respondents.

**Dated and delivered at Nyeri this 9<sup>th</sup> day of February, 2007.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**E. O. O’KUBASU**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

DEPUTY REGISTRAR