



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Kariuki Iruku Bachia (Deceased) (Succession Cause 69 of 2009) [2024] KEHC 7524 (KLR) (24 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7524 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 69 OF 2009**

**PN GICHOHI, J**

**JUNE 24, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE KARIUKI IRUKU  
BACHIA (DECEASED**

**BETWEEN**

**MARY NYAWIRA MWANGI ..... 1<sup>ST</sup> APPLICANT**

**MONICA NJOKI KARIUKI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JERIOTH WANGUI GITONGA ..... RESPONDENT**

**JUDGMENT**

1. By Summons dated 2<sup>nd</sup> August, 2016, the Applicants (Mary Nyawira Mwangi and Monica Njoki Kariuki) seek orders that:
  1. Spent
  2. The letters of administration intestate issued herein to Jerioth Wangui Gitonga on 17/5/2011 and the certificate of confirmation of grant issued thereafter on the 3/3/2016 be revoked and/or annulled.
  3. Spent
  4. Spent
  5. The cost of this summons be provided for.
2. The grounds on the face of the application are that the letters of administration intestate issued to Jerioth Wangui Gitonga on 17/5/2011 and the certificate of confirmation of grant issued thereafter on the 3/3/2016 were obtained fraudulently by the making of false statements.



3. The Applicants further state that the Respondent/Administrator is a fraudster as far as the estate herein is concerned as she is neither a dependant nor the beneficiary of the estate and that she was never a wife of the deceased and neither did the deceased sire children with her.
4. They further state that she does not reside on the only asset of the deceased and has now embarked on subdividing it and is also in the process of selling it to unsuspecting third parties. They state that in the event she shall dispose of any portion of the said asset , it shall be to the detriment of the true and valid beneficiaries of the estate.
5. In support of the application is the affidavit sworn on 03/08/2016 by Mary Nyawira Mwangi and Monica Njoki Kariuki in their capacity as the daughter -in law of deceased and daughter of deceased respectively, and representing other beneficiaries and with their consent duly filed. They maintained that the Grant issued to the Respondent was obtained by making a false statement in that the Court was misled to the extent that Mary Nyawira Mwangi had participated in the proceedings.
6. Mary Nyawira Mwangi deponed that they never participated in these proceedings and never instructed any advocate. She maintained that the Respondent was never a wife of the deceased and neither had any children with the deceased and never had any children. She acknowledged that on 27/6/2016, she attended the meeting before the chief as duly summoned and the Administrator read out to her the suggested mode of distribution. That she registered her protest as she was not aware of succession proceedings.
7. The Respondent filed a Replying Affidavit sworn on 24<sup>th</sup> August, 2016 opposing the application. She deponed that under the [Law of Succession Act](#), at Section 28, the profile of persons who are entitled to the net estate of a deceased person is well set out. That Mary Nyawira Mwangi deponed as a daughter in law of the deceased and therefore, the application for revocation of grant should be struck out for want of *locus standi*.
8. On merit, she annexed the application she filed in the burial dispute before Nakuru CMCC No. 1025 of 2008 and the Memorandum of Appearance, and the Replying Affidavit thereto and maintained that Mary Nyawira Mwangi (1<sup>st</sup> Applicant herein) had sworn that the deceased had three wives and therefore, having been admitted, that is not an issue requiring proof. That the 1<sup>st</sup> Applicant also stated in the replying affidavit that she had declined to take out letters of administration.
9. Further, she deponed that in the circumstances , she opted to apply for letters of administration and served the Applicants upon which, counsel for the Applicants filed an Affidavit of Protest and when the matter came for directions, she indicated to Court that the same should proceed by way of written submissions upon which the Court directed all parties to file submissions which they actually filed. That in the circumstances, the 1<sup>st</sup> Applicant participated in the proceedings. She therefore urged the Court to dismiss the application with costs.

### **Submissions**

10. Parties filed their respective submissions as a mode of disposal of this Application. The Applicants filed theirs on 8<sup>th</sup> July, 2022 and while relying on Section 76 of the [Law of Succession Act](#), they submitted that the pleadings that were prepared on behalf of the 1<sup>st</sup> Applicant/Beneficiary in the burial dispute claim were not as per the instructions of the 1<sup>st</sup> Applicant/ Beneficiary and they urge the honourable court not to place reliance on the said pleadings.
11. They further submitted that the said summons for confirmation of grant were fraudulently obtained on the ground that the Respondent/Administrator made a false statement in court misleading the



- court that she was a wife when it was clear and evident that she was not as she has not tabled anything to prove the same.
12. Further, they submitted that the Respondent/Administrator in fraudulently obtaining the said grant, is a clear indication that she wanted to deny the Applicants/Beneficiaries and other dependants the right to inherit the deceased's properties which form part of this estate. That whilst the Respondent/Administrator insist that the Applicants/Beneficiaries were aware of the succession matter, the same is false and the Respondent/Administrator is merely trying to deceive this court into believing the same. They submitted that the only proceedings the 1<sup>st</sup> Applicant/Beneficiary participated in were Nakuru CMCC 1025 of 2008 which matter was in relation to burial dispute and therefore the proceedings are totally different from the succession cause.
  13. The Applicants submitted that the pleadings attached by the Respondent/Administrator indicating that indeed the Applicants/Beneficiaries participated in the succession matter and which pleadings have been drafted by the firm of M/s B.W Mathenge & Co Advocate the same was done not to the knowledge of the Applicants/Beneficiaries as the Applicants/Beneficiaries had not given explicit instructions to the said Advocate to come on record on the said succession matter.
  14. While relying on Section 107 of the *Evidence Act* and several cases including the case *Re Estate of Joseph Irungu Gichiri (Deceased)* [2020] eKLR and *Re Estate of Kihara Thatu Gatuu (Deceased)* [2019] eKLR, they submitted that the Respondent/Administrator failed to provide cogent evidence that she was married to the Deceased, and therefore, it is only fair that this Court issue an order declaring that she was not married to the deceased under Kikuyu customary law and as such is not the legal wife as she alleges. They urged the Court to disregard the said pleadings and the same be expunged from record.
  15. They submitted that it is not enough for the Respondent / Administrator to claim that she is a wife based on "botched" pleadings and owing to the nature of the case, it would be fair and just that the court does consider whether the Respondent/Administrator had undergone the aforementioned rites as proof of Kikuyu Customary marriage.
  16. Further, they submitted that in any event in the issue as to whether or not the Respondent/Administrator was a wife was never arbitrated upon in the burial proceedings, as the matter was concluded at the interlocutory stage and a consent as to burial was reached and therefore, the Respondent/Administrator therefore ought to prove she is a wife.
  17. While relying on Section 39 (1) of the *Law of Succession Act*, the Applicants submitted that the 1<sup>st</sup> Applicant/Beneficiary is a beneficiary of the deceased's estate as she has survived her deceased husband who was a son a child of the deceased and the Court has discretion to determine the relatives based on the nearest degree of consanguinity and affinity. On this issue, reliance was placed on the case of *Re Estate of the Late M'thigai Muchangi (Deceased)* [2020] eKLR that a daughter was held to be a beneficiary.
  18. They further submit that the 2<sup>nd</sup> Applicant/beneficiary is a dependent of the deceased by virtue that the deceased was his father and as such meets the qualification provided for under Section 29 of the *Law of Succession Act*. They therefore urged the Court to disregard the Respondent's argument that the 1<sup>st</sup> Applicant is not a dependant of the deceased as per section 29 of the *Law of Succession Act*.
  19. Lastly, they submitted that it is only fair and just that they be allowed to take out letters of administration for the deceased estate and the Respondent/Administrator be restrained from interfering with parcel Title No. Nyandarua/Wanjohi/489.



20. On her part, the Respondent filed submissions on 28<sup>th</sup> July, 2022. It was submitted that the present application is premised on Section 76 of the *Law of Succession Act* and it seeks the revocation of the grant as well as the certificate of confirmation thereof. She submitted that the Applicant's case is that she is not a wife under the act.
21. She submitted that admissions made in pleadings limit the scope of the controversy and secondly, a party cannot be allowed to approbate and reprobate in the course of the same controversy.
22. She further submitted that in the course of determination of the burial dispute, the applicant swore an affidavit and deposed as follows:

“That the deceased had married three wives under Kikuyu customary law namely:

  - a. Susan Wamucii,
  - b. Jerioth Wangui Gitonga,
  - c. Beatrice Waithera Kariuki.”
23. He therefore submitted that her status as a wife was not in issue at the time of the consideration of the application for the confirmation of the grant. That is the presumption of the law that before signing the affidavit, the Applicant read and understood the contents thereof.
24. The Respondent submitted that the requirement of proof proceeds from the premise that there is a fact in issue; a matter which has been asserted by one party and denied by the other and therefore, she submitted, facts which have been admitted need not be proved. She urged that the Applicant's submission be disregarded.

### **Analysis And Determination**

25. This Court has considered the application dated 2<sup>nd</sup> August, 2016, the affidavits and the annexures thereto, the submissions filed by both parties and the case law cited therein . To start with, the Respondent argues that the application should be struck out as the 1<sup>st</sup> Applicant is a daughter in law of deceased hence not entitled to the net estate of the deceased cannot stand in the circumstances herein.
26. A beneficiary is defined by Section 29 of the *Law of Succession* thus:-

“For the purposes of this Part, "dependant" means—

  - (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
  - (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
  - (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”
27. The 1<sup>st</sup> Applicant is survived her deceased husband who was a son of the deceased and from the first house. Her deceased husband's mother has also died. There is no evidence of any other child in the first house. This Court is persuaded by the decision *in Re Estate of James Kiani Kiranga (deceased)* [2020] eKLR that a daughter- in- law is a beneficiary of the estate of the deceased father- in- law in a



situation where she has survived her deceased husband who is a child of the deceased (father- in -law) to whose estate the matter relates.

28. On merit , and from the Court record, it is clear that the main issue for determination is:-

Whether the letters of administration intestate issued to Jerioth Wangui Gitonga on 17<sup>th</sup> May, 2011 and the certificate of confirmation of grant issued thereafter on the 3<sup>rd</sup> March, 2016 should be revoked and/or annulled.

29. The Applicant's case is that the summons for confirmation of grant were fraudulently obtained on the ground that the Respondent/Administrator made a false statement in court that she was a wife when it is clear that she is not.

30. The Application's grievance is particularly based on Section 76 of the Law of Succession Act Cap 160 Laws of Kenya 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) 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.” [Emphasis added]

31. The Respondent on the other hand states that Mary Nyawira Mwangi who was the Applicant in the burial dispute had admitted in her affidavit that the deceased had three wives married under Kikuyu Customary Law and that these were Susan Wamucii, Jerioth Wangui Gitonga and Beatrice Waithera Kariuki. As a result, the Respondent states that at the time of the consideration of the application for the confirmation of grant, the issue was only distribution of property and that was what prompted the protest. The Court directed that it be disposed of by way of *viva voce* evidence.

32. Indeed, in its judgment dated 3<sup>rd</sup> March 2016, High Court acknowledged that in her submissions, the protestor (Mary Nyawira Mwangi ) raised the issue that Jerioth Wangui Gitonga was not a wife of the deceased and that her children were not the children of the deceased . A. Ndungu J found



that argument untenable for reasons that she had named the three wives of the deceased in her earlier affidavit sworn in Nakuru CMCC No. 1025 of 2008 and in so holding, High Court held:-

“The protestor cannot approbate and reprobate having accepted earlier that the Applicant is a wife.”

33. The Court held there were three family units with two surviving wives and distributed the estate thus:-
- a. First House : 0.5 hectares to Mary Nyawira Mwangi being the only child of this unit , the mother having died.
  - b. The remainder of 4.5 hectares to be shared out equally between the house of Beatrice Waitthera Kariuki and Jerioth Wangui Gitonga.
  - c. This being a family matter, each party is to bear its own costs.”
34. There is no evidence that the said judgment has been appealed against. Further, a look at the Court record reveals that one Jimmy Aggrey Simiyu, an advocate of the High Court of Kenya, had represented Mary Nyawira Mwangi in the Chief Magistrates Court Civil Case No. 10225 of 2008 which was a burial dispute and Mr. Githui Advocate represented Plaintiff therein.
35. He testified as a witness for the Applicants in the Summons for revocation and or annulment of grant dated 2<sup>nd</sup> August, 2016. According to his testimony, the burial dispute was compromised by a consent. He was also an associate of the firm of B.W Mathenge & Company Advocates representing Mary Nyawira Mwangi and therefore acted for her in this Succession Cause No. 69 of 2009.
36. In cross-examination on 26<sup>th</sup> June, 2023 by Mr. Githui, counsel for Jerioth Wangui Gitonga ( the Respondent/Administrator ), he stated as follows:-

“The affidavit of protest herein filed by Mary on the last page indicates it is to be sworn by Mary Nyawira Mwangi. Paragraph 2 of the said affidavit says ‘my advocate on record: M/ s B.W Mathenge were the advocates then and I was working for that firm. I am the one who prepared the document. The affidavit of protest was in response to application for confirmation of grant. Mary is the one who brought me the summons for confirmation of grant. Paragraph 5 of the protests lists 8 survivors of deceased whose names were given to by my client Mary. Exhibit 4 on replying affidavit herein is a reply by Mary. She has given her postal address it is indicated to be sworn and signed by her. In paragraph 3 of exhibit 4 she says my advocates on record read to me application dated 14<sup>th</sup> October, 2008. I am the one who read her the application. She responded as a consequence of my advice. In paragraph 5 she said the deceased had 3 wives. She gave me the information.....the case was determined in 2015. I was surprised that my client decided to challenge my instructions instead of an appeal.”

37. The *Black's Law Dictionary*, 10<sup>th</sup> edition, 2014, defines an affidavit as:-

“A voluntary declaration of facts written down and sworn to by a declarant, usually before an officer authorised to administer oaths.”

38. In that Replying Affidavit in the burial dispute, affidavit, she named the three wives of deceased and Jerioth Wangui Gitonga (Respondent/Administrator ) was one of them. The only issue they had during the confirmation of grant was the mode of distribution not whether Jerioth was a wife of deceased. They cannot purport to raise the issue here. Parties are bound by their testimonies and



affidavits. A party cannot choose what he fills suits them in this application. The Applicants cannot probate and reprobate. The issue of proof of marriage does not lie and therefore the cases *Re Estate of Joseph Irungu Gichiri (Deceased)* and *Re Estate of Kihara Thatu Gatutu (Deceased)* (*supra*) cited by the Applicants herein do not aid them in the circumstances.

39. Fraud has been defined in *Black's Law Dictionary* 11<sup>th</sup> Edition as:

“A knowing misrepresentation or knowing concealment of material facts made to induce another to act to his or her detriment.”

40. Regarding the burden of proof of allegation of fraud, the Court of Appeal in *Ratilal Gordhanbhai Patel v Lalji Makanji* [1957] EA 314, 317 held:-

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

41. Further, in *Kinyanjui Kamau vs George Kamau* [2015] eKLR, the Court of Appeal held: -

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

42. It is clear that the burden of proof of fraud lies on the Applicants. From the material before this Court and together with the Court record, the Applicants have totally failed to discharge the burden of proof that the Respondent obtained the impugned grant fraudulently.

43. As a consequence, this Court makes the following orders:-

1. The summons for revocation and/ or annulment of grant dated 2<sup>nd</sup> August, 2016 lacks merit and therefore dismissed in its entirety.
2. Due to the nature of the dispute, each party to bear his own costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 24<sup>TH</sup> DAY OF JUNE, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

**In the presence of:**

**Ms Mwaniki holding brief for Njeri Njagua for Applicants**

**Mr. Machoka holding brief for Githui for Respondent**

**Ruto - Court Assistant**

