



REPUBLIC OF KENYA



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**In re the Estate of Njue Nyaga (Deceased) (Civil Appeal
53 of 2023) [2024] KEHC 9647 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9647 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 53 OF 2023
LM NJUGUNA, J
JULY 31, 2024
IN THE MATTER OF THE ESTATE OF NJUE NYAGA (DECEASED)**

BETWEEN

EDITH IGANDU MIKAEL APPELLANT

AND

JANE IGOKI NJUE RESPONDENT

*(Being an appeal against the ruling to Hon. R.G. Mundia PM in Embu
CM Succession Cause No. 624 of 2016 delivered on 22nd March 2023)*

JUDGMENT

1. The appellant has filed memorandum of appeal dated 20th September 2023 seeking the following orders:
 - a. That the ruling of the trial court be set aside;
 - b. That the appeal be allowed and the grant issued to the respondent be revoked; and
 - c. That costs of this appeal and costs of the lower court be awarded to the appellant.
2. The appeal is premised on the grounds that the learned trial magistrate erred in both law and fact:
 - a. When he found that the appellant did not prove fraud on the part of the respondent in obtaining the grant on a balance of probabilities;
 - b. When he dismissed the appellant's application whereas the respondent concealed to the court material facts to the case that the appellant was the beneficiary of parcel number Ngandori/Kiriari/2277;



- c. By failing to find that the proceedings to obtain the grant by the respondent were defective in substance; and
 - d. By failing to find that the appellant proved sufficient grounds under the provisions of section 76 of the *Law of Succession Act* to warrant revocation of grant.
3. The respondent petitioned for and was granted letters of administration in the estate of the deceased in her capacity as wife of the deceased. The grant was issued on 23rd June 2017 and she filed summons for confirmation of grant which was heard and the estate was distributed. Consequently, the court issued her with a certificate of confirmation of grant on 25th April 2018.
 4. The appellant filed summons dated 04th October 2021 seeking revocation of the grant on the grounds that the same was obtained fraudulently by making false statement or by concealment from the court of some material facts. She also sought for review of the order of the court of 25th April 2018 confirming the grant. In the said application, she stated that she is entitled to land parcel number Ngandori/Kiriari/2277 which belonged to her brother-in-law who died before transferring it to her. That the respondent secretly petitioned for the grant and had the said parcel wholly given to Miriam Muthanje Nyaga.
 5. It was her case that her late husband, Mikael Njiru was the brother of the deceased herein, who was administrator of the estate of their late father Nyaga Fundi. That her late father-in-law was the original proprietor of parcel number Ngandori/Kiriari/270 which was transmitted to the deceased herein as the administrator of her father-in-law's estate. That the deceased herein subdivided the land into two parcels namely Ngandori/Kiriari/2277 and Ngandori/Kiriari/2278. That the family agreed that parcel number Ngandori/Kiriari/2277 be given to the appellant and Fides Wamugo Nyaga who is a sister of the deceased, who died before the land was transferred. That following the death of the deceased, the respondent filed for succession without informing her and she later learned that parcel number Ngandori/Kiriari/2277 had been transferred to Miriam Muthanje Nyaga who is a stranger to her. She stated that she seeks for revocation of the grant and review of the confirmation order to enable redistribution of the estate.
 6. The respondent filed a replying affidavit to the application. She deponed that before his death, the deceased (Nyaga Fundi) gave the deceased (Njue Nyaga) parcel number Ngandori/Kiriari/270 and he gave the appellant's brother (Mikael Njiru Nyaga) parcel number Ngandori/Kiriari/280. That after the death of the appellant's husband, his son Patrick Njagi Njiru was bequeathed parcel number Ngandori/Kiriari/280 through Succession Cause No 514 of 2017 and the said parcel of land was subdivided and transmitted to the beneficiaries.
 7. She stated that the deceased herein subdivided parcel number Ngandori/Kiriari/270 into 2 parcels known as Ngandori/Kiriari/2277 and Ngandori/Kiriari/2278, intending to leave the former to the respondent and her children while the latter was to be given to his nephew Benson Nyaga, son of Fides Wamugo Nyaga, his sister. That the deceased herein died before he could transfer the said properties according to the plan he had. That since Benson Nyaga also died, she included the name of his wife Miriam Muthanje Nyaga as the rightful beneficiary of the parcel of land that would have belonged to her husband. She deposed that the appellant is not a proven dependant of the deceased and that she is not entitled to the property she claims. That it was suspect that the appellant sought for revocation 3 years after the grant was confirmed and she urged the court to dismiss the application.
 8. The application was heard and the court took *viva voce* evidence.



9. PW1 was the appellant who stated that parcel number Ngandori/Kiriari/2277 was owned by her father-in-law and that when her husband and the deceased herein died, she started living on the land. That the respondent excluded her from her share of the land and she has given it to a stranger. On cross-examination, she stated that they had discussed and agreed on how the land is to be divided. She stated that Miriam Muthanje is her niece and that her parents are well know to her. PW2 was Helen Wairimu who stated that she is aware of the land tussles between the appellant and the respondent. That the respondent refused to share the appellant's father-in-law's land with her. PW3 was the applicant's son who stated that the suit land belonged to his grandfather but the respondent refused to share it with the applicant and instead, she wants to give it to a stranger. On cross-examination, he stated that Miriam Muthanje is the wife of his cousin Benson Nyaga.
10. DW1 was the respondent who relied on the facts she deposed in her replying affidavit. She stated that Miriam Muthanje is the wife of Benson Nyaga who is a nephew of the deceased. On cross-examination, she stated that she was given the title deed for the land in the presence of the appellant's husband but the appellant was not present because they had separated at the time.
11. The trial magistrate found that the allegations by the appellant were not proved to the required standard and he dismissed the application. He relied on the provisions of section 76 of the [Law of Succession Act](#) and the case of [In re Estate of Prisca Ong'ayo Nande \(Deceased\)](#) (2020) eKLR.
12. This appeal was canvassed by way of written submissions.
13. The appellant submitted that the respondent failed to prove that Njiru Nyaga and Mikael Njiru refer to the same person as indicated in the green cards produced. That she did not establish that the succession proceedings in succession cause no 514 of 2018 related to the estate of the said Mikael Njiru and that Patrick Njeru Njiru is his son. That even assuming that Njiru Nyaga was the name of the appellant's husband, from the copy of green cards produced, he was the initial owner of the title and that it was not transferred to him by Njiru Fundi. That with regards to parcel number Ngandori/Kiriari/270, the appellant's and the respondent's husbands had equal rights to the resultant titles from subdivision.
14. That in her testimony, she stated that she is in occupation of parcel number Ngandori/Kiriari/2277 but this evidence was not controverted. She relied on section 76 of the [Law of Succession Act](#) and the case of [In re Estate of Prisca Ong'ayo Nande \(Deceased\)](#) (2020) eKLR and stated that the grant was obtained fraudulently since the respondent concealed from the court the fact that the appellant was a beneficiary of the estate of the deceased. That the respondent failed to prove her allegations that the deceased's father gave parcel number Ngandori/Kiriari/280 to the appellant's husband. She urged that the court allows her appeal.
15. It was the respondent's submission that the appellant is unlawfully claiming a part of the estate of the deceased, knowing well that she is not entitled. That she misled the court in saying that Miriam Muthanje is a stranger yet she acknowledged that she is her niece. That the late Fides Wamugo was not given land by the deceased's father and so the deceased herein offered to subdivide the land given to him so as to pass it on to his late sister.
16. That the deceased's sister and her son both died before the land was transferred to them and so Miriam Muthanje, being the wife of the late Benson Nyaga is entitled to the portion of land that would have been given to the deceased's sister, Fides Wamugo. She submitted that the appellant is not occupying or utilizing parcel number Ngandori/Kiriari/2277 and no evidence supporting her allegations was produced. That the conditions to be met before a grant can be revoked were not met as provided under section 76 of the [Law of Succession Act](#). she relied on the case of the case of [In re Estate of Prisca Ong'ayo Nande \(Deceased\)](#) (2020) eKLR and [Albert Imbuga Kisigwa v Recho Karai Kisigwa](#) (2016) eKLR.



17. The issue for determination is whether the court erred in failing to revoke the grant issued to the respondent.
18. The court is required to re-examine the evidence adduced at trial in determining the appeal herein. This was held in the case of *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) EA 123, thus:
- “...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
19. At the time of petitioning for the grant in the estate of the deceased, the respondent herein produced copies of title deeds of parcel numbers Ngandori/Kiriari/2277 measuring 1.62Ha and Ngandori/Kiriari/2278 measuring 0.81Ha. The beneficiaries of the estate were introduced to the court through the chief's letter dated 21st November 2016, wherein Miriam Muthanje is named as a daughter-in-law. The appellant argued that the respondent petitioned for the grant without her knowledge yet she is entitled to parcel number Ngandori/Kiriari/2277.
20. Section 66 of the [Law of Succession Act](#) guides in the person to whom letters of administration may be made, as follows:
- “(a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors”
21. Part V of the Act also largely focuses on the beneficiaries of the estate starting with the spouse, children and proven dependants of the deceased as the persons to whom letters of administration may be made. The appellant herein is a sister-in-law of the deceased. It is her case that a portion of the deceased's land namely parcel number Ngandori/Kiriari/2277 was given to a stranger in her place. When she was cross-examined over this issue, she stated that she knows the parents of Miriam Muthanje and even provided their names. She said that Miriam Muthanje is her niece.
22. In rebuttal, the respondent explained the circumstances under which Miriam Muthanje was bequeathed that parcel of land and the explanation is satisfactory. She stated that Miriam Muthanje is the wife of Benson Nyaga (deceased), who is a nephew of the deceased. That the father of the deceased gave him parcel number Ngandori/Kiriari/270 which the deceased subdivided and intended to give a portion of it to his sister Fides Wamugo and her son Benson Nyaga. That unfortunately, they all died before the transfers were done and so Miriam was added as a beneficiary to the estate of the deceased to take up her husband's place.
23. The appellant sought for an order for revocation of the grant under Section 76 of the [Law of Succession Act](#) and she argued that the proceedings were defective in substance and that the respondent did not



disclose a material fact to the court that the appellant was also a beneficiary of the estate. This provision provides for circumstances under which a grant of representation may be revoked. It states thus:

“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) that the grant has become useless and inoperative through subsequent circumstances.”

24. From the available evidence, it is my view that the rightful beneficiaries of the estate of the deceased have benefitted from the estate. No grounds for revocation of the grant have been established. As I have stated earlier, section 66 of the *Law of Succession Act* applied in this case such that if there was a part of the estate left after all the legitimate beneficiaries had benefited, or if indeed Mirima Muthanje had been a stranger, then the appellant’s claim would have had more weight. In any event, from a perusal of the petition and accompanying documents, all the necessary consents were obtained, to the satisfaction of the court.
25. The respondent testified that the appellant’s late husband was given parcel number Ngandori/Kiriari/280 by his father. That this parcel of land was bequeathed to Patrick Njagi Njiru, the appellant’s son. As proof, the respondent produced a copy of the green card for parcel number parcel number Ngandori/Kiriari/280 which indicates that it was transmitted to Patrick Njagi Njiru through Embu CM Succession Cause No 514 of 2017. In my view, the respondent should pursue that property and not the estate herein. I concur with the findings of the trial court that the appellant did not prove her case on a balance of probabilities.
26. In light of the foregoing, and noting the appellant’s argument that the confirmation was flawed thus the certificate of confirmation should be reviewed, I still find that there is no error in distribution of the estate of the deceased. Furthermore, if the appellant had a legitimate claim and the same is raised, there would have been no need to revoke the grant. It would have been sufficient to set aside the certificate of confirmation of grant which is an order of the court before redistribution can be considered. See the case of *In re Estate of Prisca Ong'ayo Nande (Deceased)* (2020) eKLR.



27. In the end, I find that the appeal lacks merit and it is hereby dismissed. There shall be no order as to costs.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

