



REPUBLIC OF KENYA



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In re Estate of the Late George Ngugi Muchai (Deceased) (Succession Cause 2593 of 1996) [2023] KEHC 2576 (KLR) (Family) (24 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 2593 OF 1996

PM NYAUNDI, J

MARCH 24, 2023

**N THE MATTER OF THE ESTATE OF THE LATE
GEORGE NGUGI MUCHAI (DECEASED)**

BETWEEN

JANE WAMBUI MUCHAI APPLICANT

AND

MARGARET NGUGI 1ST RESPONDENT

PETER KARANJA KAMAU 2ND RESPONDENT

JUDGMENT

1. The applicant, Jane Wambui Muchai presented summons for revocation dated March 20, 2019 seeking the following orders:
 1. Spent
 2. That there be a revocation of grant of letters of administration issued to the respondents from utilizing and/ or distributing the estate of George Ngugi Muchai specifically Githunguri/riuki/49 as per the grant issued on April 3, 1998.
 3. That costs be in the cause.
2. The application is brought under section 47 and section 76 of the *Law of Succession Act* and was based on the following grounds:
 1. That the grant was acquired fraudulently by making false statements and concealment of vital information from the court



2. That the respondents failed to inform the court that land parcel Githunguri/riuki/49 was never the property of the deceased
3. That the respondent failed to serve all interested parties with the pleadings of the succession to date
4. That the respondent more so the 1st respondent is harassing and intimidating the applicant herein by reporting to the Githunguri Police Station that the applicant maliciously destroyed property on the suit property, which she legally holds the title.
3. The application was supported by the affidavit of Jane Wambui Muchai, (the applicant) sworn on March 20, 2019.
4. The 1st and 2nd respondents opposed the application *vide* separate replying affidavits sworn on the July 15, 2019
5. On June 26, 2019 the court directed that the matter would proceed by way of *viva voce* evidence and the parties were directed to file and exchange witness statements.
6. At the hearing the applicant called 3 witnesses whilst the respondent called 2 witnesses

Summary Of The Applicants Case

7. OW1 Jane Wambui Muchai, the applicant testified that she is the mother of the deceased, who was her 2nd born son. The subject land Githunguri/ Riuki/49 was registered in the name of her mother-in-law at the material time. Prior to that it was in the name of Francis Ngugi (grandfather to the deceased).
8. She further testified that the deceased herein predeceased his father, John Muchai Ngugi. That at the time her son died the estate had not devolved to his father.
9. It was her position that she was not informed when the applicant filed for letters of administration.
10. She has always stayed on the farm with her sons except for the deceased.
11. She does not recognise the 1st respondent as the wife of the deceased as the marriage between the two was not formalised in accordance with Kikuyu Customary law.
12. She stated that they proceeded to apply for the administration of the estate of the estate of her mother-in-law in Githunguri SRM Succession Cause No 27 of 2001, and now the land has been subdivided and everyone has their share.
13. The deceased was buried on the land, the portion that has been allocated to her. The land is now registered in her name.
14. On cross examination she stated that the deceased was her son, and he was a teacher by profession. She stated that he moved away from home, and she was not aware of what he was doing when he moved away from home. She refuted that the deceased was a businessman.
15. She denied that the deceased built her a house, or that he built wells or connected electricity for her. Prior to his death the father had communicated to the deceased that he was not allocated a share of the land.
16. She denied that pictures were taken during the funeral and stated she was not aware of who prepared the eulogy at the funeral. She was also not aware who was issued with the permit for the burial of the deceased. She confirmed that her son died in 1996.



17. She denied that the deceased had children.
18. On re-examination she insisted that the deceased did not have a home on the subject land. She is the one who built him the house on the land. She denied that the deceased set up water and electricity for her.
19. She denied that it was her family that prepared the funeral programme and as far as she was concerned many people come to funerals.
20. OW 2 Kanyara Ngugi he knew George Ngugi Muchai(deceased) to be the son of Jane Wambui the applicant and John Muchai. The subject land was registered in the name of Ngugi Njoroge the father-in-law to the applicant. Later it passed on to the applicant to hold for her children. He is a neighbour and brother-in-law to the applicant.
21. He did not know the respondent as the wife of the deceased. It was his position that if George had married, they would have participated in the cultural rites. The deceased was unmarried at the time of his death. He attended the funeral of the deceased. It was his evidence that there was no eulogy at the funeral.
22. At the time the deceased died the land had not been subdivided, it was in the name of Hannah Njoki (mother-in-law to the applicant).
23. On cross examination he reiterated that the deceased was not married. He passed away in Limuru. He did not have a house on the parcel of land.
24. On re-examination he stated that he was in the team that organised the burial of the deceased.
25. OW3- Boniface Ngugi. He is a cousin of the deceased. He was raised by his grandfather Ngugi Njoroge as he was orphaned at an early age. His grandfather died in 1976 when he was 15. At all times material, he was staying on the subject land. When his grandfather died the land passed on to his grandmother. His grandmother died in 2001. After the death of his grandmother the land was sub divided.
26. He denied that George Muchai was married. As close relatives if he had married, they would have known. He therefore does not recognise Margaret as the wife of the deceased. She has no right to inherit property.
27. He was not made aware when this petition was filed. At the time of his death, George did not own the land as his father was still alive and upon his death the land was vested in his mother.
28. On cross examination he asserted that he and George were good friends and they kept in communication. He did not know who processed the burial permit. He stays on the subject land. He is a casual labourer.
29. He stated that George had built a house on the subject land, and he is not aware of who demolished the house.
30. On re-examination, he denied that he was pictured during the funeral of the deceased. The deceased was shown a place to build so that he could stay there. He did not know who processed the burial permit. He stated that the deceased was buried by his father.

Summary Of Respondent's Case

31. RW 1 Margaret Wairimu Ngugi in examination in chief she relied on her replying affidavit, witness statement and bundle of documents filed.



32. On cross examination she asserted that she is the widow of the deceased. She asserted that they were married under the traditional marriage. The deceased visited their home. Then he took her to his home, and they started living together. He was unaccompanied when he went to her home.
33. At her home, he met her mother. They did not slaughter a goat. As proof of the marriage, she also relied on the affidavit included in her list of documents. Her brother was present when the deceased visited her home.
34. She stated that under Kikuyu Customary Law a son can ask to be shown where to build but cannot take land when his father is still alive.
35. She stated that the deceased is the one who organised for electricity in the home and relied on the receipts in the bundle of documents as proof of this.
36. She stated that the application by the applicant was the second application for revocation. The first was by the father of the deceased. When he failed to prosecute it, the court dismissed it for want of prosecution.
37. While the deceased was admitted in hospital, the Doctor barred the family from visiting because they were very hostile. The doctor gave her a letter to that effect, but she did not have it in court.
38. The deceased swore an affidavit confirming their marriage. She did not sign the affidavit as the magistrate did not ask her to sign. She confirmed that the affidavits by her and the deceased were not signed. She stated that it was the family of George that prepared the eulogy. He was admitted in hospital on the October 18, 1996 and died on October 28, 1996. Earlier when discharged from the hospital he had gone to the house on the subject parcel of land and stayed there for 4 days.
39. Following the harassment by the family of the deceased she went to the Chief's Office and the District Officer's office. She does not have the minutes of those meetings.
40. She filed the petition in 1996. The father of the deceased filed summons for revocation of grant. She was also served with a caution not to use anything that belonged to the deceased. In her petition she wanted to be given the portion of the land that belonged to the deceased.
41. She did not serve the petition on the father of the deceased. She was aware that she should have notified the other family members.
42. At the time of death of the deceased, his father was alive and the land was in his grandmother's name.
43. She asserted that she bought cement and bricks in 1996 to construct the house on the subject land. The deceased was buried on the subject parcel of land.
44. On re-examination she asserted that she has children with the deceased. Her father signed an affidavit confirming that she was married to the deceased. The affidavit was sworn when the deceased was discharged from hospital. The doctors letter confirmed that the deceased was in sound mental health.
45. At the time she filed the petition she was 8 months pregnant and depressed. She expected her lawyer to serve her in laws.
46. She attended the burial of the deceased along with her parents and her children. They had a quarrel at the mortuary. She also took pictures with her father and mother-in-law.
47. She stated that the house they were constructing was demolished. The confirmed grant shows that the land is hers. In her bundle of documents, she showed pictures of the demolished structures. She is seeking this land for the sake of her children so that they can have a home. She stated that when she



- applied for the grant, she published it in the Kenya Gazette and therefore the applicant ought to have seen it.
48. RW 2 Peter Karanja Kamau He adopted his replying affidavit, witness statement and list of documents as his testimony in examination in chief.
 49. On cross examination, he stated that the deceased came to his home to introduce himself. His parents approved of the marriage.
 50. He stated that he was not an expert on Kikuyu traditions, but the deceased had done enough to formalise the marriage.
 51. When the deceased passed on both his parents were still alive, He did know who the owner of the property at the time of the death of the deceased was. According to tradition one cannot inherit property while et the parents are alive unless the parents gift.
 52. He stated that the deceased was entitled to a portion of the land and the applicant should have allocated him some.
 53. He stated that the deceased had married his sister. Now the land has been subdivided. The deceased has not been given his share.
 54. He accompanied his sister and father when they went to court to swear the affidavits. He would be surprised to learn that the affidavits were not signed, as they were signed in his presence.
 55. On re-examination he stated that marriage processes are done over time.
 56. The Witness responded to some questions by the court. He confirmed that he accompanied his sister when she went to swear the affidavit at the Kiambu Court. He stated that a traditional marriage is conducted when dowry is paid, He knows about Ngurario and Ruracio.
 57. At the close of the hearing parties agreed to file written submissions. The applicants submissions are dated July 22, 2020 and those of the respondents dated November 29, 2021.

Applicant's Submissions

58. The applicants summons for revocation is presented under section 76 (b) and (c) of the *Law of Succession Act*. The applicant argues two main grounds. Firstly, that the grant was obtained by means of an untrue allegation of a fact essential in point of law.
59. It is the applicants case that the subject land LR Githunguri/Riuki/49 did not belong to the deceased. At the time of the death of the deceased the property which originally belonged to the grandfather of the deceased was registered in the name of his grandmother Hannah Njoki Ngugi.
60. Further the applicants takes issue with the fact that the respondent failed to serve her with the petition of letters of administration. The failure to serve was a demonstration of the intention to conceal the grant.
61. That since the applicant was not made aware of this petition she proceeded to file Succession Cause No. 27 of 2001 at Githunguri was issued grant and has proceeded to distribute the estate of Hannah Njoki Ngugi.
62. Secondly, the applicant argues that the respondent is guilty of making a false statement or concealment from the court of something material to the case.



63. The applicant contends that the respondent failed to adduce evidence to prove that she was married to the deceased. The applicant relies on precedents that have spelt out what comprises a valid marriage under Kikuyu Customary Law. These include *Eliud Maina Mwangi v Margaret Wanjiru Gachangi* [2013]eKLR; *In The Matter of the Estate of Karanja Kigo* [2015] eKLR and *Priscilla Waruguru Gathigo v Virginia Kanugu Gathigo* [2004]eKLR. The applicant also cited *Hortensia Wanjiku Yawe v Public Trustees*, civil appeal 13 of 1976.
64. The applicant also countered the respondent allegation that the deceased has constructed a house on the subject land.
65. In concluding the applicant made relied on the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] eKLR which enumerated the grounds on which a grant may be revoked.

Respondent's Submissions

66. The respondent denies that there was fraud as in her petition she only sought the portion of land on which the four-bedroom house under construction stood.
67. That the applicant applied for grant of letters of administration in respect of the estate of her mother-in-law and has since sub divided the original parcel of land
68. That no provision was made for her deceased husband despite him being a son to the applicant. Following the subdivision of the original title, the respondent now lays claim to a portion of Githunguri/ Riuki/1411.
69. The respondent further submits that the current matter is res judicata. That a previous application presented by the father of the deceased was dismissed by Justice Msagha Mbogholi. The applicant relies on the decision in *John Florence Maritime Services Limited v Conked Cargo Forwards and Anor*, Malindi Court of Appeal Case No 42 of 2014. and *Kamunye & others v Pioneer General Assurance Society Ltd* [1971] EA 263.
70. The second issue by the respondent is that she was legally married to the deceased. As evidence of marriage, she relies on the fact that she changed her identity card to include the name of the deceased. She also has a child named after the applicant in accordance with Kikuyu custom. She further relies on the fact that she attended the burial of the deceased and has photographs showing her playing a role, including laying the heart wreath. She relies on the cases of *Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge* Nrb HCCC No 330 of 2005 [2004]eKLR; *Mary Wanjiru Githatu v Esther Wanjiru Kiarie* [2010] 1 KLR 159; *Hortensiah Wanjiku Yawe v Public Trustee* (supra) and section 119 of the *Evidence Act*
71. In conclusion the respondent prays that all the titles derived from the original title LR Githunguri/ Riuki/49 be cancelled and revert to the initial title.

Analysis And Determination

72. Upon reviewing the evidence adduced, documents, witness statements and submissions of the parties I identify the following as the issues for determination
 1. Whether the current application is res judicata
 2. Whether the grant issued to the respondent with respect to the estate of the deceased and specifically in relation to LR Githunguri/Riuki/49 should be revoked
 3. Whether LR Githunguri/Riuki/49 comprised the estate of the deceased



4. Whether the respondent was married to the deceased
 5. Who should pay costs?
73. Whether the current application is *res judicata*? The issue is of fundamental importance as if the answer is in the affirmative, I shall proceed to lay down my tools.
74. The substantive law on *res judicata* is found in section 7 of the *Civil Procedure Act* cap 21 which provides that:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”
75. The respondent has presented the ruling of Mbogholi Msagha J delivered on July 31, 1998 reinstating an application that was dismissed for want of prosecution. The application was presented by John Muchai Ngugi (the late husband of the applicant). Apart from this ruling there is nothing on the record to show whether the summons for revocation filed by John Muchai Ngugi was prosecuted and final judgment delivered. Suffice it to state that the ruling relied upon as the basis of the claim of *res judicata* reinstates rather than dismisses the summons
76. In the case of *Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Limited* [2005] KLR 97 the court stated:
- “Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *Res judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of *res judicata*. The last issue (dismissal for want of prosecution) was the issue in *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that *res judicata* does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits”.
77. Given that there was nothing to show that the previous summons for revocation had been heard and finally decided by a court I find that the current application is not *res judicata*.

Whether LR Githunguri/Riuki/49 comprised the estate of the deceased

78. It was common ground that the subject land originally belonged to the grandfather of the deceased and that upon the death of the grandfather the land passed on to Njoki Ngugi the grandmother of the deceased.
79. It was also common ground that the deceased predeceased his father. It is therefore indisputable that at the time of his death the deceased did not have a proprietary claim to the subject land to comprise part of his estate.



80. The facts in this case are on all fours with the facts in *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] eKLR in which, the court having determined that the land did not belong to the deceased found that the land was therefore not available for distribution.
81. The subject land was not available for distribution as an asset of the estate of George Ngugi Muchai. Its inclusion in the petition for grant for letters of administration therefore amounts to an untrue allegation of a fact essential in point of law and renders the grant revocable under 76 of the *Law of Succession Act*.

Whether the Respondent was married to the deceased

82. As set out in paragraph 71 above, the respondent adduced evidence to support the assertion that she was the wife of the deceased. Her assertion that that she was married to the deceased under Kikuyu Customary Law did not get off the start blocks as no evidence was adduced to show that the cultural rites were performed.
83. The respondent in her submission asserts that she has placed before the court evidence to show that there was a presumption of marriage between her and the deceased person.
84. Whereas in her submissions the 1st respondent invites the court to hold that there was a presumption of marriage, in her evidence and statement it was her contention that she was married to the deceased under Kikuyu Customary Law and that the evidence lay in the fact that they had sworn affidavits in this regard, and she had altered her Identification card to bear the name of the respondent. She also placed reliance on the fact that they had 2 children with the deceased.
85. I find that the respondent failed to establish that there was a marriage. The affidavits before court were not signed. change of name on identity card on its own is not proof of marriage and paternity and marriage are separate issues.
86. The attendance at a funeral is not helpful in establishing that there was a marriage.
87. For the above reason I find that the 1st respondent has not discharged the burden of proving that there was a marriage between her and the deceased.
88. In the submissions the 1st respondent invited the court to cancel titles issued pursuant to the grant of letters of administration to the applicant in Githunguri Succession Cause No 27 of 2001. The only arena for resolving the entitlement of the deceased is within the succession matter at the Magistrate's Court in Githunguri and not the current matter.
89. In addition, I observe that this prayer was not sought in the replying affidavit. Parties are bound by their pleadings.
90. I have looked at the certificate of confirmation of grant issued on April 3, 1998. Apart from the portion of land that is said to be a portion of the subject land, the other assets include:
1. Plot No 1776 (LR No 10901/311 Waingumu Neke Ranch certificate No 201776
 2. M/V KQM 496
 3. Barclays Bank A/C No 3xxxx6
91. The applicant has not challenged the grant with respect to these assets. It is safe to conclude that these form the estate of the deceased.



92. The court is a court of justice, this is an application for revocation of grant. I am of the view that it will occasion unnecessary hardship on the 1st respondent if the entire grant were to be revoked.
93. In light of the above and in exercise of the inherent powers of the court granted under article 159 of the Constitution, section 47 and 76 of the Law Of Succession Act, I make the following orders.
1. That certificate of grant issued on April 3, 1998 is rectified to exclude the parcel of land referred to as LR Githunguri/ Riuki/49.
 2. Parties to bear their own costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24th DAY OF March 2023.

P M NYAUNDI

JUDGE

In the presence of:

Karanja.....Advocates for the Applicant

Ms. Kalulu.....Advocates for the Respondent

Karani Court Assistant

