



REPUBLIC OF KENYA



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In re Estate of Charles Muriithi Kahiga (Deceased) (Succession Appeal E012 of 2021) [2023] KEHC 18263 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION APPEAL E012 OF 2021
CM KARIUKI, J
MAY 31, 2023**

IN THE MATTER OF THE ESTATE OF CHARLES MURIITHI KAHIGA (DECEASED)

BETWEEN

CHARLES MUREITHI KAHIGA II 1ST APPELLANT

JAMES KIHUNGA KAHIGA 2ND APPELLANT

MAGDELENE WANJA NGECHU 3RD APPELLANT

AND

ROSE WATARE NDUMBI RESPONDENT

(Being an Appeal from the Ruling of Hon. Ruth Kefa, delivered in Nyeri Succession Cause No. 29 of 2020 on 29th April 2021)

JUDGMENT

1. The Appellant filed an application for the revocation of the grant in the trial court dated 7/5/2020, which, upon being heard, was dismissed. Being aggrieved by a trial court ruling, lodged the instant appeal and set out seven grounds of appeal set out as follows: -
 - i. The Learned Honourable Magistrate erred in law and fact when she held and directed that the Application dated 7/5/2020 be dismissed without considering the facts.
 - ii. The learned Honourable Magistrate erred in law and, in fact, when she failed to take into account Section II (c) of the Marriage Act and the evidence of the 2nd Appellant that the Respondent was married to one Mr. Michael Kagiri Maina.
 - iii. The learned Honourable Magistrate erred in Law and in fact, when she failed to take into account the provisions of Section 76 (b) of the Law of Succession Act and revoke and/or annul the grant of Letters of Administration.



- iv. The Learned Honourable Magistrate erred in law and in fact when she disregarded the Ruling delivered by her sister Hon. F. Muguongo where it was held that the Respondent had failed to prove that she was a wife of the deceased.
 - v. The Learned Honourable Magistrate erred in law and in fact when she failed to take into account the fact that the Respondent was a party to an existing land matter that was pending hearing and determination.
 - vi. That the learned honourable trial magistrate erred in law and in fact when she failed to consider the fact that the Respondent has no locus standi to file the summons for confirmation of grant.
 - vii. The Learned Honourable Magistrate erred in law and in fact when she failed to consider the fact that the Respondent has no locus standi to file the summons for confirmation of grant.
 - viii. The learned honourable magistrate erred in law and, in fact when she failed to consider the Appellant's submissions.
2. Reasons hereof the Appellants pray this court orders that:-
- i. This appeal is allowed with costs.
 - ii. The ruling of the honourable court in Nyeri Succession Cause No. 29 of 2020- Charles Mureithi Kahiga II & 2 Others v Rose Watere Ndumbi be set aside with costs.
 - iii. Any other order that this court may deem expedient and just to grant.
3. Parties were directed to canvass the same via submissions that they filed and exchanged.
4. Appellants' Submissions
5. The Appellants submitted that the honourable magistrate erred in law and fact when they held and directed that the Application dated 7/5/2020 be dismissed without considering the facts of the case. That the honourable magistrate ought to have considered the following facts while delivering its ruling on the Application dated 7/5/2020: -
6. The fact that the Respondent was not a wife to the deceased.
 7. The fact that in the case of Rose Watere Ndumbi v James Kihungi Kahiga & Magdalene Wanja Ngenchu MCL&E case No. 81 of 2019, the Honourable F. Muguongo in her ruling, held that the Respondent had failed to prove that she was a wife of Charles Mureithi Kahiga (Deceased) under Kikuyu customs.
 8. The fact that the Respondent did not adduce any evidence to establish before the Honourable Court that she was married to the deceased under the Kikuyu Customs.
 9. The Respondent was married to Mr. Michael Kagiri Maina who swore and affidavit confirming that he was the husband of the Respondent and stated that they used to live together as husband and wife at Chaka in Nyeri.
 10. The fact that the Chief's Letter is not proof that the Respondent was the wife of the deceased.
 11. The fact the Respondent obtained the Grant of Letters of Administration to Estate of the deceased by the making of a false statement and concealment of material facts from the court.
 12. Reliance was placed on the case of JKN v HWN [2019] eKLR which cited with authority the case of JWN v MN [2019] eKLR.



13. Further, the Appellants stated that the Magistrate erred in law and in fact when she failed to consider Section II (c) of the Marriage Act and the evidence adduced by the 2nd Appellant that the Respondent was previously married to one, Mr. Michael Kagiri Maina. Section II (c) of the Marriage Act defines void marriages and provides that:-

“ A union is not a marriage if at the time of the making of the union-

(c) either party is incompetent to marry by reason of a subsisting marriage
14. That the magistrate in her ruling relied on the case Hortensia Wanjiku Yawe versus- The Public Trustees, Civil Appeal 13 of 1976
15. The Appellants asserted that in the case of In Re-Estate of John Kiruki Wanuthu (deceased) [2022] eKLR cited with authority by the Court of Appeal in Gituanja versus Gituanja [1983] KLR 575 and in Kimani v Gikanga [1965] EA 735 which held that the existence of a customary marriage is a matter of fact, to be proved through evidence.
16. The Appellants further relied on Section 107 of the Evidence Act stating that the magistrate relied on the Chief’s letter dated 9th December, 2019 which introduced the Respondent as a wife to the deceased whereas the Respondent did not provide any other evidence to establish that she was married to the deceased. They submitted that the said Chief’s letter is not evidence of marriage between the Respondent and the deceased therefore the Respondent was not a wife to the deceased.
17. It was argued that the magistrate failed to consider the evidence adduced by the Appellants vide an annexed order and consent illustrating that the Respondent was married to one, Mr. Michael Kagiri Maina who swore an affidavit that he was the husband of the Respondent. That the Affidavit further confirmed that they used to live together at Chaka in Nyeri as husband and wife therefore the Respondent did not have any capacity to be married to the deceased.
18. The Appellants stated that the magistrate erred in law and fact since the Respondent did not prove any elements of a customary marriage existing between her and the deceased and as such her marriage was void ab initio since she was already in an existing subsistence marriage.
19. It was averred that The Respondent obtained the Grant of Letters of Administration on the basis of a false statement that she was the wife to the deceased. That this is a valid ground to revoke and/or annul the grant of Letters of Administration issued to the Respondent herein since she is not a wife to the deceased and as such fraudulently obtained the grant of letters of administration in relation to the deceased Estate. The fact that the Respondent was not a wife to the deceased, the Grant of Letters of Administration Intestate of the Estate of the deceased was obtained fraudulently and therefore the Learned Honourable Magistrate erred in law and fact when she failed to take into account Section 76 (b) of the Law of Succession Act.
20. The Appellants pointed out that the magistrate did not take into account the reasons by Hon. F. Mugongo in her Judgment that the Respondent did not adduce any evidence to prove that she was the wife of the deceased but instead focused on the Chief’s Letter which introduced the Respondent as wife to the deceased. That the Magistrate relied on the Chief’s Letter introducing the Respondent as the wife to the deceased and determined that the Grant of Letters of Administration Intestate issued to the Respondent should not be revoked and/ annulled and which the Chief’s Letter is not proof of marriage.
21. Respondent’s Submissions



Whether court erred in law and in fact by failing to take into account Section II (I) (c) of the Marriage Act and the evidence of the 2nd Appellant that the Respondent was married to one Mr. Michael Kagiri Maina.

22. The Respondent stated that it was not disputed or controverted by any of the Appellants or even by the 2nd Appellant. That the Magistrate considered Section II (c) of the Marriage Act and found that there was no subsisting marriage between her and one Mr. Michael Kagiri Maina, they were however later divorced and the Respondent remarried. The Chief confirmed the marriage to the deceased and indicated so in the letter dated the 9th December, 2019.
23. The Respondent submitted that there was no false statement or concealment of something material to the case to warrant the revocation or annulment of the grant. Reliance was placed on Section 76 of the Law of Succession Act, Cap 160 and Re Estate of Prisca Ong'ayo Nande (Deceased) 2020 eKLR.
24. It was asserted that none of the above grounds have been established and thus this appeal should fail and that a subordinate court's ruling by one judicial officer is not binding on another in so far as they are of equal and or parallel jurisdiction thus there was no error either in law or acting disregarding the ruling by Hon. F. Muguongo in Nyeri CMMCL & E No. 81 of 2019.
25. The Respondent averred that the aforesaid was determined, and it involved burial dispute and was not a succession cause.
26. The Respondent affirmed that being a wife married under the Kikuyu Customary Law marriage, she had locus to apply for the confirmation grant.
27. Analysis And Determination
28. Having considered the memorandum of appeal herein, the response thereto and the rival submissions filed by counsel for the parties, it is my view that the main issue for determination is whether the Appellant has met the threshold for issuance of the orders sought and costs.
29. The Appellants filed the instant appeal against the ruling of of Hon. Ruth Kefa, delivered in Nyeri Succession Cause No. 29 of 2020 on 29th April 2021, the impugned ruling hereinafter wherein the trial magistrate dismissed their application dated 7/5/2020. The aforementioned application sought to have the grant of letters of administration granted to the Respondent on 9th April 2020 and confirmed on 14th April 2020 be revoked and/or annulled. The application was made on the following grounds:-
 - i. That the grant was obtained fraudulently by making of a false statement or/by concealment from the court of something material to the case.
 - ii. That the grant was obtained by means of untrue allegation of the facts essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
 - iii. That the person to whom the grant was made has failed to proceed with the administration of the estate by excluding the applicants and thereby disinheriting them.
 - iv. That the Respondent/petitioner failed and/or refused to disclose to the court the existence of the 1st Appellant Charles Mureithi Kahiga II being a beneficiary and his entitlement in the estate of the deceased which he qualify by virtue of being the son of the deceased.
30. The Appellants' also alleged that the Respondent/petitioner is a stranger to the deceased's estate thus she lacks capacity to administer the estate as an administrator. The Appellants contended that the Respondent was not the deceased wife and that she was already married to one Michael Kagiri Maina.



31. It is therefore incumbent upon this court to establish whether the trial court erred in law and fact by dismissing the Appellant's application dated 7/5/2020.
32. The Authority to revoke a grant is conferred upon the court by dint of Section 76 of the Law of Succession Act, which provides that: -

“76. Revocation or annulment of grant

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—

- i. that the proceedings to obtain the grant were defective in substance;
- ii. 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;
- iii. 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;
- iv. that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
- v. 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
- vi. to proceed diligently with the administration of the estate; or
- vii. 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
- viii. that the grant has become useless and inoperative through subsequent circumstances.”

33. Moreover, Section 76 was clearly expounded on by the court In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR where it was stated that:-

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The



second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

34. Additionally, the court also has the jurisdiction to revoke a grant suo moto. However, even where the court can revoke a grant suo moto there must be evidence that the proceedings to obtain the grant were defective in substance or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of the untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate. (See *Matheka and Another –vs- Matheka* [2005] 2 KLR 455)
35. The trial magistrate held that the Respondent is the wife of the deceased as per the letter dated 9th December 2019 submitted by the Chief of Thigu Location to the effect that the Respondent was the wife of the deceased. She further went to find that the annexed court order dated 10th May 2011 for the adoption of baby David (child) with a sworn affidavit indicating that the Respondent was married to one Michael Kagiri Maina is not sufficient proof that the Respondent was not married to the deceased person. That the order was made in 2011, and the deceased died on 29th April 2019.
36. However, I disagree with the trial magistrate in that, as has been previously held, a chief’s letter is not proof of marriage. I associate with the remarks of the court in the case of *ASA v NA & another* [2020] eKLR, which held that:-
- “.....Regarding the chief’s letter, it is of little evidentiary value towards proving dowry payment. It attests to an event the chief did not witness. As described in the foregone paragraphs. It is hearsay evidence which cannot be relied upon by this court.....”
37. Furthermore, I have examined the deceased’s Death Certificate, Serial No. 3708152, and it states that at the time of his death, the deceased, who died in the United States of America, was divorced and not remarried. Therefore, It is my view that the Respondent should have adduced concrete evidence to prove on a balance of probabilities that she was married to the deceased, contrary to the Appellants’ submissions. Whilst the trial magistrate stated that the annexed court order dated 10th May 2011 for the adoption of baby David (child) with a sworn affidavit indicating that the Respondent was married to one Michael Kagiri Maina is not sufficient proof that the Respondent was not married to the deceased person, I find that the same together with the ruling of Hon. F. Muguongo in *MCL & E No. 81 of 2019, Rose Watere Ndumbi v James Kihungi Kahiga & Magdalene Wanja Ngechu* in which the Respondent was found not be the deceased’s wife cannot be ignored.
38. The same death certificate stated that the informant’s name was Charles M. Kahiga II, the deceased’s son. This is the same death certificate that the Respondent used while petitioning for a grant of letters of administration so she cannot feign ignorance regarding the existence of the 1st Appellant as the deceased’s alleged son. The Respondent did not include him as a beneficiary to the deceased’s estate,



averring that he was not personally known to her and that the deceased never recognized him as his son. In *Re Estate of Moses Wachira Kimotho (Deceased) Succession Cause 122 of 2002 [2009] eKLR*, the court made pronouncements on the importance of disclosing all material facts before a court of law while seeking letters of administration and confirmation thereof. It observed;

“I am certain that had the Applicants been made aware of the application for the confirmation of grant by being served, they would have brought to the fore their aforesaid interest in the estate of the deceased, and the resultant grant would have taken care of those interests. Further, had the Respondent been forthright and candid and included the Applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court, in confirming the grant, would have taken into account their interest in the estate of the deceased. Therefore, the grant was obtained fraudulently by making a false statement and or concealment from court of something material to the cause. The Respondent knew of the Applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant.

39. At the same time, I cannot turn a blind eye to the fact that the 2nd Appellant failed to disclose the existence of Kandara Succession Cause No. 148 of 2019 with respect to the estate of the deceased. In that cause, one Patrick Munyingi Kahiga, who is the 2nd Appellant’s brother, presented himself as the son of the deceased and was issued with a certificate of confirmation of grant for the deceased’s bank accounts. The said Patrick Munyingi Kahiga produced a forged death certificate to the effect that the deceased died domiciled in Kenya, yet he died in the United States of America. The said accounts do not form part of the estate of the deceased in this succession cause. It goes without saying that “equity aids those who approach it with clean hands.” The 2nd Appellant approached this court with unclean hands, having not disclosed the fact of the existence of Kandara Succession Cause No. 148 of 2019. I find that his interest in the deceased’s estate is marred with deceit. His act to seek to revoke the grant seems to be actuated by another motive other than to have the estate justly administered.
40. In the circumstances, two critical issues emerge from the appeal herein; is the Respondent the deceased wife? An issue that I view must be conclusively settled to determine whether she can rightfully administer the deceased’s estate. The second is the concealment of the fact that the 1st Appellant was the deceased’s son by the Respondent while obtaining the grant of letters of administration. If indeed the 1st Appellant is not the deceased’s son, the respondent must prove the same.
41. According to Section 47 of the *Law of Succession Act*, this court is bestowed with jurisdiction to determine any dispute which comes before it in relation to an estate of the deceased and further as stipulated by Rule 73 of the Probate and Administration Rules 1980, the inherent powers to make orders so as to make the ends of justice meet or to prevent abuse of the process of the court. Therefore, this court is tasked with ensuring that justice is served and must take into account the interests of all beneficiaries entitled to the deceased’s estate and ensure that any action taken pertaining to the deceased’s estate will be in the interest of justice.
42. For the foregoing reasons, invoke the inherent powers of this court granted under Article 159 of *the Constitution* and Section 76 of the *Law of Succession Act*, I set aside the ruling of the court in *Nyeri Succession Cause No. 29 of 2020- Charles Mureithi Kahiga II & 2 Others v Rose Watere Ndumbi* and make the order to revoke the letters of the grant of administration issued to the Respondent and subsequent confirmation as it was obtained fraudulently by the making of a false statement or by the concealment from a court of something material to the case, particularly in relation to the omission of



Charles Mureithi Kahiga II, the deceased's alleged son. The beneficiaries of the Estate should take the necessary steps in pursuit of a new grant.

43. Thus, the court makes the orders that;
- i. The grants issued to the Respondent and subsequent confirmation are revoked as it was obtained fraudulently by the making of a false statement or by the concealment from a court of something material to the case i.e. particularly in relation to the omission of Charles Mureithi Kahiga II, the deceased's alleged son.
 - ii. Costs to the appellant.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 31ST DAY OF MAY 2023

CHARLES KARIUKI

JUDGE

