



**In re Estate of Mbaabu M'Abutu (Deceased) (Succession Cause
383 of 2003) [2023] KEHC 18344 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 383 OF 2003**

EM MURIITHI, J

MAY 30, 2023

IN THE MATTER OF THE ESTATE OF MBAABU M'ABUTU (DECEASED)

BETWEEN

SAINA KALIMI GEORGE PETITIONER

AND

ADAMSON MUTHURI BABU 1ST RESPONDENT

MUSA MBAABU ALI 2ND RESPONDENT

HENRY MWORIA 3RD RESPONDENT

AND

NURU MBAABU INTERESTED PARTY

RULING

1. This is a composite ruling on four applications and preliminary objection raised by the respective parties and urged by oral submissions of Counsel herein as follows.

The 1st application

2. By a notice of motion under certificate of urgency dated 18th August 2021, the petitioner seeks that, "3. The Honorable court be pleased to issue an order of eviction against the respondents Adamson Muthuri, Musa Mbaabu, Henry Mworira and their agents or anyone claiming through them ordering that they vacate from land parcel nos. Ntima/igoki/11645, 11647, 11649 and 11651, immediately and in default they be evicted forcefully. 4. The OCS Meru police station to ensure compliance with the order issued above."
3. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of the petitioner, sworn on even date. She avers that after the issuance of the grant



- on 23/11/2020, the distribution was done and title deeds issued. The land was surveyed as per the court orders and none of the beneficiaries was left without a share. Since the respondents have denied some beneficiaries access to land parcels nos. Ntima/igoki/11645, 11647, 11649 and 11651, she urges the court to grant the orders sought to enable them take their possession.
4. Henry Mworira, the 3rd respondent herein filed a preliminary objection on 24/9/2021 and swore a replying affidavit on 28/9/2021 in opposition to the application. He avers that he lawfully purchased 0.32 Acres to be excised from L.R no Ntima/igoki/1032 from Musa Mbaabu, Adamson Muthuri and Nuru Mbaabu, after the grant had been confirmed. Upon the said purchase, he took possession thereof and embarked on developing it with the full knowledge of the beneficiaries of the deceased. He avers that the amendment to the grant was done on 23/11/2020 long after he had purchased the said portion in 2013. He accuses the petitioner of acting in extreme bad faith and maliciously in order to deprive him of his land, and urges the court to dismiss the application with costs. He has been advised that this court became *functus officio* after confirmation of the grant, and it therefore lacks jurisdiction to determine this matter. He avers that the application offends section 150 of the [Land Act](#), which vests the jurisdiction to hear and determine such disputes on the Environment and Land Court.
 5. Musa Mbaabu, the 2nd respondent herein swore a replying affidavit on 21/10/2021 in opposition to the application. According to him, the amended certificate of confirmation of grant dated 23/1/2021, and on whose strength the petitioner is purporting to carry out administration of the deceased estate was obtained through a fraudulent process and concealment of material and pertinent facts as he and his brothers were excluded from the subdivision process. Him and his brothers, Adamson Muthuri and Henry Mworira are currently in occupation of L.R no Ntima/igoki/1032 measuring 1.6 ha having resided there even from when the deceased was alive. The deceased had prior to his death given them permission to construct and develop the said land. He accuses the petitioner of conducting the administration of the estate in a very clandestine and fraudulent manner to his exclusion and that of other rightful beneficiaries. The petitioner and his sisters proceeded to facilitate the subdivision of L.R no Igoki/ntima/1032 and even obtained titles thereof to his exclusion and that of his brothers. The petitioner is seeking to unjustly enrich herself from his eviction and that of his brothers as she will benefit from all the improvements and developments thereon. He is ready to give up his entitlement in another property in exchange for the petitioner's and his sisters' share in L.R no Ntima/igoki/1032 and he urges the court to dismiss the application with costs.
 6. Nuru Mbaabu, the interested party swore a replying affidavit on 11/11/2021 in opposition to the application. He avers that he is a son of the deceased and he sold a portion of the suit land to the 3rd respondent after confirmation of the grant and transmission. He urges that the application is meritless since the revocation of the grant was obtained without their involvement.
 7. The petitioner filed her submissions on 28/9/2021 urging that the preliminary objection ought to be dismissed as it has been raised by a party who is not a beneficiary of the estate but an unlawful purchaser. She urges that she is merely seeking to facilitate the implementation and conclusion of the amended certificate of confirmation of grant in order to finalize this matter.
 8. The 3rd respondent urges that the application is vexatious, an abuse of the court process and it offends section 150 of the [Land Act](#) because the applicant's remedy lies elsewhere.
 9. In praying for the dismissal of the application, the 2nd respondent submits that the subdivision of the suit property as carried out by the petitioner is unfair, unjust and not in accordance with the amended certificate of confirmation of grant, and cites [Re Estate of Njoroge Kamuru \(Deceased\)](#) (2018) eKLR.
 10. The interested party urges that the petitioner's deliberate failure to involve him and other beneficiaries at the time of seeking the revocation of the grant was in bad faith and amounts to concealment of



material facts. He urges that the proceedings leading to the issuance of the amended certificate of grant are defective in substance as the court was not made aware of the existence of other beneficiaries, and cites *Re Estate of Wahome Mwenje Ngonoro Deceased* 92016) eKLR. He urges that the Probate and Administration Rules do not provide for an injunctive relief because Order 40 of the *Civil Procedure Rules* is not applicable to succession matters as was stated in *Re Estate of Kibomen Komen (deceased)* (2019) eKLR. He urges that 3rd respondent is a purchaser for value and this court is now *functus officio*, as the court with jurisdiction to hear and determine land disputes is the Environment and Land Court.

The 2nd Application

11. By chamber summons under certificate of urgency dated 7/4/2021 pursuant to section 47 of the *Law of Succession Act*, Rules 49, 63 and 73 of the *Probate and Administration Rules* and Articles 40 and 50 of the *Constitution*, Raphael Kimani Ngugi seeks that, “The orders made on the 28th February 2022 and issued on 22nd March 2022 be reviewed, set aside and cancelled and/or revoked.”
12. The application is premised on the grounds that Raphael Kimani Ngugi, as the owner of L.R no Ntima/igoki/11645 was never given a chance to be heard when the inhibition orders against his land were being issued. He prays for the application to be allowed so that he can get an opportunity to be heard and the issues herein are determined on merit.
13. That application has not been responded to.

The 3rd Application

14. By summons under certificate of urgency filed on 17/10/2022 pursuant to section 47 of the *Law of Succession Act* and Rules 49, 63 and 73 of the *Probate and Administration Rules*, Musa Mbaabu Ali, the 2nd respondent herein seeks that, “2. This Honorable Court be pleased to issue a temporary injunction restraining the respondents either through themselves, agents, servants and or employees from alienating, sub-dividing, transferring or otherwise dealing with the deceased’s parcels of land, to wit, L.R no Nyaki/kithoka/440 And The Resultant Sub-divisions, Land Parcels nos. Nyaki/kithoka/6774, 6775, 6776, 6777, 6778, 6779, 6780, 6781, 6782, 6783 and 6784 pending hearing and determination of this Application. 3. This Honorable Court be pleased to order that an inhibition be made in respect of all parcels of the deceased’s properties, to wit, Land Parcels nos. Nyaki/kithoka/123, Ntima/igoki/1032, Nyaki/kithoka/440, Kiirua/nkando/542 pending full hearing and determination of this Application.”
15. The application is premised on the grounds on the face of it and his supporting sworn on even date. He avers that he is one of the beneficiaries of the deceased by virtue of being his son. Despite the judgment of the court of 10/7/2018 directing that the estate properties be shared equally among all the children of the deceased, Saina Kalimi George, Judith Kagiria Moses, Ann Aminah Mwari Kamathi and Saina Mariam Zuberi have been subdividing and disposing off the estate properties to his exclusion and other beneficiaries. Ann Aminah Mwari Kamathi has in the very recent past attempted to forcefully evict him together with his family from his current home in a bid to offer vacant possession to one of the buyers. Saina Kalimi George, Judith Kagiria Moses, Ann Aminah Mwari Kamathi and Saina Mariam Zuberi have also embarked on wanton destruction and wastage of the resultant subdivisions of L.R no Nyaki/kithoka/440 by cutting the trees and ploughing on the land to his exclusion and other beneficiaries, and if this court does not intervene, he and other beneficiaries stand to suffer irreparable harm and loss.
16. The petitioner has opposed the application vide her replying affidavit sworn on 15/12/2022. She avers that she has a legal obligation to ensure that the estate of the deceased is distributed expeditiously and in accordance with the certificate of confirmation of grant dated 6/12/2018 and amended on 22/1/2021.



The 2nd respondent has always been an impediment in the administration of this cause, and she requests the court to visit the said parcels of land to ascertain the truth on the ground. She avers that litigation must come to an end so that they can enjoy the fruits of their judgment.

The 4th Application

17. By summons under certificate of urgency dated 17/6/2021 for inhibition and amendment or variation the grant, Peter Gituma Kimathi seeks that, “2. This hon Court be pleased to grant an order of inhibition on L.R Ntima/igoki/1032 pending the hearing and determination of this application. 3. That this hon Court be pleased to annul/vary the grant to include the applicant as a beneficiary of plot measuring 40 × 80 from Ntima/igoki/1032.”
18. The grounds upon which the application is premised are set out in the body of the application and his supporting affidavit sworn on even date. He avers that he entered into a land sale agreement way back on 22/2/2005 with one Mukaria Mbaabu Mwambuthu (now deceased) who was a joint administrator of the estate of the deceased herein for the sale of a portion of land measuring 40 × 80 to be excised from L.R no Ntima/igoki/1032. Pursuant to that agreement, he paid ksh 300,000 and took possession thereof. The seller Mukaria Mbaabu Mwambuthu died during the pendency of this cause and after going back and forth, the court confirmed the grant on 10/7/2018. The petitioner omitted him while knowing very well that he was a purchaser and a beneficiary of 40 × 80 from L.R no Ntima/igoki/1032, and he stands to lose that plot which he legally bought.
19. The petitioner has opposed the application *vide* her replying affidavit sworn on 22/2/2021. She avers that the transaction between the applicant and Mukaria Mbaabu Mwambuthu is void *ab initio* since the seller did not have the capacity to sell the suit land. The applicant is not a *bonafide* purchaser for value since he knew that the said land was subject to an ongoing succession cause. She feels that the applicant’s recourse is in the Environment and Land Court or in a civil case for breach of contract against Mukaria Mbaabu Mwambuthu. She urges the court to dismiss the application with costs so that they can enjoy the fruits of their judgment.
20. Japheth Kobia Maranya, opposed the applications *vide* his replying affidavit sworn on 9/2/2023. He avers that he is the registered proprietor of land parcel nos. Nyaki/kithoka/6781, 6782 and 6783 having purchased them from Amina Mwari Kamathi, Judith Kagwiria Moses and Saina Mariam Zubethi, the daughters of the deceased herein and beneficiaries of the estate. He purchased the said parcels after the grant had been confirmed and therefore he is an innocent purchaser for value who is protected by the provisions of section 93 of the *Law of Succession Act*. They went through all requisite stages in law, right from the land control board until the final transfer process, and he is in full occupation thereof. He prays that no proceedings of any form should affect his proprietorship and/or ownership to his parcels of land.
21. In his submissions filed on 21/3/2022, Peter Gituma Kimathi urges the court to vary or nullify the grant in order to include him.

Analysis and determination

22. Before delving into the merits of this case, the jurisdiction of this court has been questioned. It is said that after the court confirmed the grant herein, it became *functus officio*, and therefore lacks jurisdiction to hear and determine this matter. With respect, that objection has been wrongly raised as the court has the requisite jurisdiction under Section 47 of the *Law of Succession Act* to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein



as may be expedient. The court equally has jurisdiction to hear and determine an application for the revocation of the grant in accordance with the provisions of Section 76 of the *Law of Succession Act*.

23. The issues for determination are whether the orders sought in the applications should be granted.

Review, Inhibition and Eviction

24. The 3 main grounds for review are stipulated under Order 45 of the *Civil Procedure Rules* as follows: “i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or ii. That there was a mistake or error apparent on the face of the record; or iii. That sufficient reasons exist to warrant the review sought. In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.”
25. Raphael Kimani Ngugi seeks the setting aside and/or review of the orders of 28/2/2022 on the basis that, as the registered owner of L.R no Ntima/igoki/11645, he ought to have been heard first before the inhibitory orders against his land could be issued. Those orders were to the effect that, “3. Meanwhile to preserve the estate there be an order of inhibition against any dealings over estate generally and in particular Ntima/igoki/11645 pending further orders of this court.”
26. According to the title deed on record for L.R no Ntima/igoki/11645, Raphael Kimani Ngugi became the registered owner thereof on 18/2/2022, having purchased it from the petitioner herein. It is true that Raphael Kimani Ngugi was not a party to the proceedings leading to the issuance of the inhibitory orders against his land.
27. This court finds that, Raphael Kimani Ngugi has made out a case for review of the orders of 28/2/2022 because the same were made in respect to his parcel of land and in his absence.
28. Whereas the application by the 2nd respondent dated 17/10/2022 seeks inhibition against all the estate properties, the application by Peter Gituma Kimathi, dated and 17/6/2021 seeks inhibition against L.R no NTIMA/IGOKI/1032. The petitioner is opposed to these applications on the grounds that they stand on the way of the expeditious implementation of the grant.
29. There are title deeds on record showing that as at 26/7/2021, the petitioner was the registered owner of L.R no Ntima/igoki/11645 Measuring 0.066 ha, Judith Kagwiria Moses Was The Registered Owner Of Ntima/igoki/11651 Measuring 0.066 ha, Ann Aminah Mwari Kamathi Was The Registered Owner Of L.R no Ntima/igoki/11649 Measuring 0.066 ha And Saina Mariam Zuberi Was The Registered Owner Of L.R no Ntima/igoki/11647 Measuring 0.066 ha. The Said Parcels Of Land Are Resultant Subdivisions Of L.R no Ntima/igoki/1032 Measuring 1.6 ha. The Court In Its Judgment Of 10/7/2018 Ordered That Said Parcel Of Land Be Shared Equally Among The 8 Beneficiaries Of The Deceased. The Petitioner Now Wants The Respondents Evicted From Ntima/igoki/11645, 11647, 11649 And 11651. It Is Conceded That Henry Mworia Purchased A Portion Of L.R no Ntima/igoki/1032 From Nuru Mbaabu, Adamson Muthuri And Musa Mbaabu. Musa Mbaabu Has Also Admitted That He And His Brothers Are Currently In Occupation Of L.R no Ntima/igoki/1032 measuring 1.6 ha having resided there even from when the deceased was alive. According to him, the deceased had prior to his death given them permission to construct and develop the said land.
30. This court finds that the occupation of Nuru Mbaabu, Adamson Muthuri and Musa Mbaabu of the whole of L.R no Ntima/igoki/1032 to the exclusion of the other beneficiaries is against the decision of the court of 10/7/2018 and the prayer for their eviction is justified.



31. Having found that the eviction orders ought to issue, the court is minded that the issuance of the inhibition orders sought by the 2nd respondent and Peter Gituma Kimathi will impede the implementation of the eviction orders herein issued.

Revocation of the grant

32. Section 76 of the *Law of Succession Act* sets out the requirements for revocation or annulment of grant as follows:-

“76. 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.”

33. Peter Gituma Kimathi seeks revocation of the grant on the strength of a sale agreement between him and one Mukaria Mbaabu Mwambuthu (now deceased) entered into on 22/2/2005. He admits that the said agreement was executed way before the grant herein could be confirmed and therefore, the purported sale by the said Mukaria Mbaabu Mwambuthu to him of a portion of L.R no Ntima/igoki/1032 measuring 40 × 80 was a nullity and of no legal basis. Frankly speaking, the said Mukaria Mbaabu Mwambuthu had nothing to sell to Peter Gituma Kimathi because the property in question was not his, as at that time. Article 40(6) of the *Constitution* declares that, the rights under this Article do not extend to any property that has been found to have been unlawfully acquired.



34. This court respectfully reiterates the case of *re Estate of M'ajogi M'Ikiugu (Deceased)* [2017] eKLR where the court, (F. Gikonyo J.) stated as follows:-

“Courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the *Law of Succession Act*, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the *Law of Succession Act*, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property. It is during confirmation hearing that the court establishes the respective identities and shares of persons beneficially entitled, and when confirmed the grant specifies such persons and their respective shares in the estate. See section 71 of the *Law of Succession Act*. Therefore, before confirmation, the interest of the beneficiary remains amorphous and entangled within the estate; and vested in the administrator or executor as the estate property as by law stated.”

ORDERS

35. Accordingly, for the reasons set out above, the court makes the following orders on the four applications urged before it:

- i. The court finds that no proper case for revocation of the grant of the letters of administration intestate issued to the petitioner has been made by Peter Gituma Kimathi, and his application dated 17/6/2021 is dismissed.
- ii. The 2nd respondent's application dated 17/10/2022 is without merit and it is dismissed.
- iii. The Preliminary Objection was improperly raised and it is hereby struck out.
- iv. The application dated 7/4/2021 by Raphael Kimani Ngugi is merited and it is allowed as prayed.
- v. The petitioner's application dated 18/8/2021 is merited and it is allowed as prayed.

36. There shall be order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF MAY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Muthomi J. Advocate for 1st 2nd and 3rd Respondents.

Mr. Nyiha Advocate for 1st Respondent.

Mr. K. Muriuki Advocate for J. Kobia Maranya.



Mr. Omari Advocate for Henry Mworira, 3rd Respondent.

Mr. Nyenyire Advocate for Saina Kalimi George and Raphael Kimani Ngugi.

Mr. Maranya Advocate for Mr Musa Mbaabu, Petitioner with Ms.Wagura.

Miss Kamotho Advocate for Mr. Gichunge for 1st Interested Party.

