



REPUBLIC OF KENYA



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In re Estate of Gichu s/o Mwenjeri (Deceased) (Succession Cause 1079 of 2011) [2023] KEHC 21226 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 1079 OF 2011**

FN MUCHEMI, J

JULY 27, 2023

**IN THE MATTER OF THE ESTATE OF GICHU S/O MWENJERI
(DECEASED)**

BETWEEN

STEPHEN MUGO GICHU APPLICANT

AND

JANE WANJIRU KIBIRA PETITIONER

RULING

Brief Facts

1. This application is dated December 8, 2016 brought under section 76 (c) of the [Law of Succession Act](#) seeks for orders for revocation of grant issued on March 6, 2012 and confirmed on September 20, 2016.
2. The respondent opposed the application and filed a replying affidavit dated May 16, 2017 containing several grounds.
3. The matter proceeded by way of *viva voce* evidence.

The Applicant's Case

4. PW1, the applicant, testified that the deceased had eight children namely:-
 - a. Munjeri Gichu
 - b. Kibira Gichu
 - c. Wachuka Gichu
 - d. Wanjiku Gichu



- e. Peter Mwangi Gichu
 - f. Njeri Gichu
 - g. Wanjiru Gichu
 - h. Stephen Mugo Gichu –
5. He testified that he is the son of the deceased and that the deceased died on December 12, 1964. Alexander Kibira Gichu the applicant's elder brother applied for grant of letters of administration intestate which was on February 9, 2012. The administrator passed away on February 16, 2012. The grant was obtained fraudulently and through concealment of facts since the chief's letter dated October 9, 2011 only listed four survivors of the deceased as follows:-

- a. Alexander Kibira Gichu
- b. Lucy Wanjiru Mwangi
- c. Naomi Wanjiku Kiragu
- d. Mary Njeri Wagana

The applicant further that the wife of Alexander Kibira Gichu, the petitioner while applying to be substituted as administrator in place of her husband also listed only four children as surviving the deceased leaving out four (4) others.

6. The witness stated that his brother, Peter Mwangi Gichu died on April 15, 2016 and was survived by his wife Wachira Mwangi and their six children. He further stated that his sister Mary Njeri Wandana is deceased but he could not recall which year she died. The applicant further testified that the deceased was the registered owner of LR No Chinga/Gathera/D26 measuring approximately 3.5 acres.
7. PW2, Lucy Wanjiru Mwangi, a daughter of the deceased testified that the deceased married one wife, Wangui Gichu and together they had 8 children as follows:-
- a. Mwenjeri Gichu – died in 1983
 - b. Kibira Gichu – died in 2012
 - c. Wachuka Gichu – died in 2011
 - d. Peter Mwangi Gichu – died in 2016
 - e. Mary Njeri – died in 2016
 - f. Lucy Wanjiru Mwangi
 - g. Naomi Wanjiku Kiragu
 - h. Stephen Mugo Gichu
8. PW2 further testified that she was not aware that these succession proceedings had been filed and she only came to learn that the petitioner, her sister in law had omitted her name and those of other beneficiaries in her summons to be substituted as the administrator to replace PW2's deceased brother in-law. The witness deemed signing any consent for Alexander Gichu to apply for letters of administration. Neither did she sign the application for substitution by the petitioner to take over this cause from her late husband.



9. PW3 Naomi Wanjiku Kiragu testified that she is the daughter of the deceased and that the deceased had eight children including the applicant, their two sisters PW2 Lucy Wanjiru Mwangi and Mary Njeri. It was her evidence that she did not give her consent to the respondent being appointed administrator or to the confirmation of grant. Her identity card number shown against her name in the original petition of the late Alexander and in the papers filed by the respondent must have been included in the documents without her consent because she never participated in this cause.

The Respondent's Case

10. The respondent testified that she is the wife of Alexander Gichu who was the petitioner in the deceased's estate. She further testified that her husband died on February 16, 2012 before administering the estate and she applied to be substituted in his place. It was her further evidence that the deceased and his wife had four children as follows:-

- a. Alexander Kibira Gichu
- b. Lucy Wanjiru Mwangi
- c. Naomi Wanjiku Kiragu
- d. Mary Njeri Wagana

The respondent states that she has never seen or heard of the applicant since she married her husband in the year 1964. She thus states that the applicant is not a son of the deceased and he is not known to the family and residents of their area.

11. The respondent further testified that after the demise of her husband, she applied to be substituted in place of her husband in the instant succession cause and her sisters in law gave their consent for her to take over the cause. Further that during confirmation of grant, she was present in court with Naomi Wanjiku Kiragu PW3, Lucy Wanjiru Mwangi PW2 and Maria Njeri Wagana (deceased) and they did not object to the confirmation of grant and the court declared her the sole heir of the estate of the deceased. The respondent further stated that upon being issued with the certificate of confirmation of grant she registered the same at the land registry and became the registered proprietor of land parcel number Chinga/Gathera/D26. It is her evidence that she did obtain the grant fraudulently as alleged by the applicant but with the blessings of the family of the deceased. The respondent further stated that she did not know Peter Mwangi Gichu and Mwenjeri Gichu. She said that she married her husband after the deceased had died. The respondent stated that she did not disinherit anyone but only inherited her husband's property. She stated that the suit property was in the name of her husband and not in the name of the deceased.

12. DW2, Stephen Kamweru Kamau testified that he was the Assistant Chief Mumbuini sub location from 1992 to 2007. He further stated that the deceased was his uncle as he was a brother to his father. He testified that the deceased had four children namely:-

- a. Alexander Kibira Gichu - deceased
- b. Naomi Wanjiku Kiragu
- c. Wanjiru Mwangi
- d. Njeri Wagana – deceased

The witness denied knowing the applicant and his brothers. According to him they were not children of the deceased.



The Applicant's Submissions.

13. The applicant submitted that although his two sisters, Naomi Wanjiku Kiragu and Lucy Wanjiru Mwangi participated in the succession proceedings, the issue of his omission did not arise. The applicant further submits that he has demonstrated that he was a son of the deceased as indicated in the funeral programme of his sister Mary Njeri Wagana where he is indicated as a brother to the deceased and the funeral programme of Alexander Kibira Gichu indicating that he is his brother. The applicant has further produced photographs which he said are of himself and all the other children of the deceased during the burial of their mother.
14. The applicant further submitted that the respondent's evidence consists of mere denials as DW2 admitted that the respondent was married into the family after the deceased's widow had relocated from the suit land in the 1960's to her death in 1998 thus contradicting the respondent's allegation that she invariably stayed with her mother-in-law on the suit land with no other son apart from Alexander Gichu. Furthermore, the respondent asserted that she had the grant confirmed as it was as she believed that the suit land belonged to her deceased husband absolutely.
15. The applicant further submits that he has proven to the required standard that he is a son to the deceased and his two sisters corroborated his evidence and their testimonies remain unshaken. Thus, the applicant argues that by omitting him when applying for the grant, the respondent and her late husband concealed his existence which is a ground for revocation of the grant. To support his submissions, the applicant relies on the case of *Matheka & another vs Matheka* (2005) 1E.A 251.

The Respondent's Submissions

16. The respondent submits that the three sisters of her late husband, Alexander Gichu signed the consent to the making of a grant of representation which was filed together with the petition on October 10, 2011. The beneficiaries filed a consent to the making of the grant where their names were listed as the only survivors of the deceased together with Alexander Gichu and submits that after her husband died on February 16, 2012, the three sisters appeared before Mr C. M King'ori Advocate on October 16, 2014 and executed the consent to the making of grant de bonis non. The respondent contends that during the confirmation of grant, Lucy Wanjiru Mwangi and Naomi Wanjiku attended court and had no objection to the confirmation of grant. By that time, Mary Njeri Wagana a daughter of the deceased had already passed away. The respondent submitted that after the application for revocation was filed, Naomi Wanjiku Kiragu swore an affidavit dated May 16, 2017 to the effect that the applicant was a total stranger to her and her family. The respondent urges the court to find that PW2 and PW3 are not credible witnesses as they have given contradictory evidence in their affidavits and the testimony before the court.
17. The respondent further submits that the applicant is not a son of the deceased because Alexander Kibira Gichu did not know him and had never heard of him from 1964 when she was married in the family. It was after this application was filed that the respondent came to know the applicant. DW2, Stephen Kamweru Kamau did not know the applicant as a brother to Alexander Gichu and the applicant did not call anyone from the village or clan elder to support his case. The respondent avers that the eulogies produced in court are fake as she does not know Peter Mwangi, Mwenjeri Gichu and Wachuka Gichu whose names appear in the said documents. It is further argued that none of the alleged six children of Peter Mwangi or the children of the other alleged children of the deceased said to have died have gone to court to lay any claim on the deceased's property or even appeared in court to support the applicant.



The Law

Whether the applicant has presented sufficient evidence to warrant revocation or annulment of the grant.

18. Section 76 of the [Law of Succession Act](#) gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It states 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 has ordered or allowed; 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
 - iv. The grant has become useless and inoperative through subsequent circumstances.
19. The evidence of the applicant is that he is a son of the deceased. he named the eight children of the deceased as follows:-
1. Mwenyeri Gichu -deceased
 2. Kibira Gichu -deceased
 3. Wachuka Gichu -deceased
 4. Peter Mwangi Gichu -deceased
 5. Mary Njeri – deceased
 6. Lucy Wanjiru Mangi
 7. Naomi Wanjiku Kiaragu
 8. Stephen Mugo Gichu
20. The applicant's evidence is that he was disinherited by the respondent, the widow of Alexander Kibera. That being a child of the deceased, he was not informed of the filing of this cause. Alexander was the



initial administrator but passed on in 2012 when the applicant applied to substitute her husband as the administrator. She was issued with the necessary documents and proceeded to give the land to herself. The respondent produced copies of burial programmes for two of his siblings and of his parents where his name Stephen Mugo Gichu appeared as a child of the deceased. He then called two of his sisters as his witnesses PW2 and PW3 who supported his case.

21. The respondent vehemently opposed the Summons for revocation of grant. She gave the background facts of how her late husband Alexander applied and obtained letters of administration intestate issued to him on February 9, 2012. Thereafter he passed on and the respondent took over the administration of the estate with the consent of her sisters-in-laws namely Njeri Wagana(deceased), PW2 and PW3. According to the respondent, she got married in the deceased's home in 1964 and never found the respondent there. She lived with the deceased mother –in-law for 34 years till her demise. Her further evidence is that she never came to know the applicant until he stepped in these proceedings. Neither does she know where he lives but noticed that the papers he filed indicated he was a resident of Wiyumiririe in Laikipia.
22. The respondent called one witness PW2 who testified that he was the chief of the area known as Chinga Location from 1992-2007 when he retired. He said the deceased was his uncle being a brother to his father. He knew the family of the deceased which consisted of four (4) children namely Alexander Kibira, Naomi Wanjiku, Wanjiru Mwangi and Njeri Wagana. The respondent is the widow of Alexander who was the first born in the family. He denied knowing the applicant at all. According to him, the deceased had no other children. He said that the deceased's widow had left home in 1960 and returned home in 1997. He got information that the widow of the deceased was staying in Nyandarua for the said period. He said he was not aware that he widow of deceased got any other children while she was away from home.
23. It is on record that PW2 and PW3 were aware of the filing of the proceedings by the husband of the applicant, Alexander and were also aware of the applicant taking over this cause as the administrator when her husband passed on. Alexander in his petition named four (4) children as survivors of the deceased namely himself, Naomi Wanjiku PW3, Lucy Wanjiru Mwangi PW2 and Mary Njeri Wagana now deceased. The three sisters of alexander executed consent of making a grant dated October 10, 2011.
24. Following the demise of Alexander, the same three daughters of the deceased executed a second consent in favour of the respondent dated October 16, 2014 to take over the matter as the administrator. The respondent was issued with letters de bonis non. On August 15, 2016 PW2 and PW3 executed a consent to the confirmation of grant in favour of the respondent as the sole beneficiary. The grant was confirmed on September 20, 2016 and the respondent was bequeathed LR No Chinga/Gathera/D.26 measuring 3.5 acres the only asset of the deceased. This application for revocation of grant was filed on 8/12/2016. The respondent opposed this application and PW3 Naomi Wanjiku filed her own replying affidavit in support of the applicant's summons that the grant was obtained procedurally. PW3 proceeded to challenge the claim of the applicant and said he did not know him and he was not a child of the deceased. Further that the deceased had only four (4) children named in the petition filed by alexander and the petition of the respondent. Her affidavit was sworn on May 16, 2017 and was commissioned by one C.M Kingori advocate.
25. On November 21, 2017 PW2 Lucy Wanjiru Mwangi who had consented together with Naomi (PW3) to the petitions filed earlier and to the distribution of the estate filed a witness statement which contradicted her earlier position on the number of children the deceased had and on the position that the respondent was to be the sole beneficiary. She took the applicant's position that the deceased had eight (8) children including the applicant, herself and Naomi Wanjiku. Her evidence supported



- revocation of the grant. PW3 filed a similar affidavit with similar depositions. The two daughters of the deceased became witnesses of the applicant claiming that they were never informed of the filing of the petition by the respondent and claiming that their names were omitted from the list of beneficiaries.
26. The evidence of Naomi PW3 in the affidavit sworn on May 16, 2017 is still part of the court record and was not withdrawn or struck out. It is not acceptable that PW3 is both the witness of the applicant and a witness of the respondent. I do not know whether PW3 got the right advice from her counsel on record about this anomaly. It is noted from the record that the issue of C.M Kingori being the advocate of the applicant herein and also commissioning the respondents affidavit in support of her petition and the replying affidavit opposing this application was raised earlier before another judge and was not determined. However the act of the counsel cannot be said to be free from conflict of interest.
 27. However, of great concern to this court is the contradictory evidence on oath by PW3. The witness said that her signature in the affidavit sworn on May 16, 2017 and the consent to the petition of the respondent dated August 15, 2015 as well as that to the confirmation of grant were forged. The witness did not say who could have forged the documents filed by her advocate on record. In my view, this claim was untruthful. Infact, it puts the witness in a position of lack of honesty and credibility. PW2 also consented to the petition of Alexander to that of the respondent as she applied for letter de bonis non but she later joined another camp. Neither PW2 or PW3 claimed to have signed the consents or the earlier affidavits under duress. In my considered view, the evidence of PW2 and PW3 is incredible and lacks integrity.
 28. The applicant on the other hand gave evidence that was supported by photographs and burial programme of his deceased relatives. These were challenged by the respondent as fake and giving contradictory dates and years of the death of the deceased in this cause. The applicant did not call any witness who would have shed light on his relationship with the deceased from Chinga location where the known home of the deceased was located. The deceased is said to have lived in Laikipia or in Nyandarua County with the respondent as his child for a number of years. If this was true, the respondent would have called evidence to that effect. It has been held in the cases of *Lucy Wanjiru mwangi v Daniel Njuguna Njiba* [2016]eKLR that photographs cannot be proof of a relationship to another person unless supported by other evidence. Having found the evidence of PW2 and PW3 unreliable, it is only the evidence of the applicant that is before the court that he is a son of the deceased. I did not find that evidence credible either. It consisted of major gaps as to where the respondent lived for years to an extent that he was not known to the respondent for over 35 years, or even by neighbours.
 29. The evidence of the respondent was in my view credible and detailed. It was further corroborated by that of DW2 the area chief who was a nephew of the deceased and knew his four (4) children well. Having been a chief of the area for over 15 years in the neighbourhood of the deceased, the court believed him that he knew no other children except the four (4) named in the petitions of the respondent and that of her late husband. As for the other living children of the deceased PW2 and PW3, it is evident that they denounced their rights of inheritance the moment they consented to the respondent being the sole heir. It is a bit late in the day to ask the court to give them shares upon revocation of grant in this application. The consents were given voluntarily to the respondent for no evidence has been produced of forgery, duress or coercion.
 30. I am of the considered view that the applicant has failed to prove existence of any fraud or non-disclosure of facts material to this cause on part of the applicant in obtaining the grant de bonis non.
 31. The application for revocation of grant dated December 8, 2016 is hereby dismissed for lack of merit.
 32. It is hereby so ordered.



DELIVERED, DATED AND SIGNED AT NYERI THIS 27TH DAY OF JULY, 2023.

F. MUCHEMI

JUDGE

