



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Mwinga Gatua (Deceased) (Succession Cause
21 of 2004) [2023] KEHC 21045 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 21 OF 2004**

LM NJUGUNA, J

JULY 26, 2023

BETWEEN

ALIET GICUGU GICOVI (DECEASED) 1ST APPLICANT
PURITY MUTHONI MWINGA 2ND APPLICANT
NANCY WARUNJI MISHECK 3RD APPLICANT
JACINTA MUTHONI NJIRU 4TH APPLICANT
JANE MUTHONI MUNYI 5TH APPLICANT

AND

MICHAEL KATHURI MWINGA RESPONDENT

JUDGMENT

1. The applicants instituted summons for revocation of grant dated May 04, 2017 seeking orders that:
 - a. The Letters of Administration made to Michal Kathuri Mwinga on June 30, 2004 and confirmed April 28, 2005 be revoked and/or annulled;
 - b. Land parcel no Gaturi/Nembure/2239 be restored in the names of the deceased;
 - c. The costs of the application be awarded to the applicants.

The application is premised on the grounds that the grant was issued following concealment of material fact by failing to disclose all the dependants, leaving out the 1st 2nd and 3rd applicants from the distribution.

2. According to the supporting affidavit to this application, it is averred that the grant of letters of administration was issued to Ann Njoka Mwinga (now deceased) and Michael Muthuri Mwinga. That the 1st 2nd and 3rd applicants are daughters of the deceased co-administrator while 4th and 5th applicants



are daughters-in-law of the deceased. That pursuant to the certificate of confirmation of grant, property Gaturi/Nembure/2239 was subdivided into 8 titles, among others, Gaturi/Nembure/10731 and Gaturi/Nembure/10729. That upon the death of Ann Njoka Mwinga who was the co-administrator with the respondent, the respondent fraudulently transferred the 2 subdivided titles to himself and is planning to transfer them to third parties. That parcel number Gaturi/Nembure/10731 in the names of both administrators ought to have been distributed to the 1st, 2nd and 3rd applicants. They also proposed that parcel number Gaturi/Nembure/10729 be given to Ann Njoka Mwinga to hold in trust for Dennis Gitonga Nyaga (deceased) be shared by James Muthee Mwinga, Jacinta Muthoni, Jane Muthoni Munyi, Bedan Kimotho Mwinga and Michael Kathuri Mwinga. Further, that the applicants stand to suffer irreparable loss if the properties are transferred to third parties and if they the applicants do not get the right share of the estate.

3. In the respondent's replying affidavit, he stated that all the applicants were present in court when the grant in question was confirmed. That the 4th applicant's husband one Stephen Mwaniki Mwinga was given 0.25 Hectares of Gaturi/Nembure/2239 per the distribution. That the 5th applicant has no right to claim the share allocated to her daughter Mercy Murugi Ileri whose portion of 0.25 hectares in title number Gaturi/Nembure/10733 was being held by Ann Njoka Mwinga in trust.
4. The respondent further averred that all the applicants gave consent to the petition for grant of letters of administration and that all the beneficiaries were aware of the succession proceedings. That the application is an afterthought and in bad faith as applicants waited for the co-administrator of the estate to die before they lay claim on the properties. That the applicants have no basis for applying for revocation of grant and that they ought to have substituted the deceased co-administrator instead. He also stated that the applicants will not suffer irreparable loss since they have not been living in the said properties.
5. It was submitted to the court that the 1st applicant passed away but they intend to proceed with the matter without substituting her. A statement was duly filed by the remaining applicants to that effect. The court proceeded to take *viva voce* evidence and directed that the parties do file written submissions.
6. PW1 who is also the 4th applicant adopted the joint statement on behalf of all the applicants, as evidence-in-chief. She stated that the deceased had called them with their husbands before he died and told them that the two administrators should be duly appointed as such. That he told them his intention was to leave his property to all his children including the daughters. That they all agreed to file the succession cause as it was filed. On cross-examination, she confirmed that she did not attend court during the succession proceedings but her husband did and that she knows all the beneficiaries were given a share of the estate. She also confirms that some properties were to be held in trust by the deceased co-administrator. She stated that she had no issue with the distribution according to certificate of confirmation of grant dated April 28, 2005.
7. DW1 who is the respondent adopted his witness statement dated November 14, 2018 as evidence-in-chief, testified that he is a son of the deceased and co-administrator of the estate of the deceased alongside Ann Njoka Mwinga. It was his testimony that before the death of the deceased, he summoned all his children together with the 4th and 5th applicants who were daughters-in-law of the deceased. He stated that all the applicants together with the beneficiaries listed in the certificate of confirmation of grant were present in court when the succession proceedings were ongoing. That land parcel number Gaturi/Nembure/2239 was to be sub-divided into 8 portions and none of the applicants raised objection to this at the point of confirmation of the grant. That the 1st applicant was supposed to hold 2 properties in trust for minors namely Dennis Gitonga Nyaga, who is now deceased and Mercy Murugi Ileri who is the daughter of Jacob Ileri (deceased) who was a son to the deceased herein. That



the portion for Mercy Murugi Ileri has since passed to her upon attaining the age of the maturity and in the absence of her father. That the portion of land that belonged to Ann Njoka Mwinga devolved to him as they were registered as joint owners. On cross-examination, DW1 stated that the portion belonging to 1st applicant was given to him. It was put to him that the land registrar summoned them to the lands office and advised that DW1 to file a case in court. He further stated that at the court annexed mediation session, DW1 produced the green card for the property but none of the parties showed interest. It was further put to him that he could not benefit from the property of the 1st applicant alone.

8. In the applicant's submissions, it is their case that upon the death of the deceased, his property parcel number Gatari/Nembure/2239 was divided into 8 portions and 2 of those properties were registered in the name of Ann Njoka Mwinga to hold in trust. That Gatari/Nembure/10729 was registered in her name and Gatari/Nembure/10731 was registered in her name to hold in trust for Dennis Gitonga, a minor at the time. That upon the death of his co-administrator, the respondent fraudulently obtained title for Gatari/Nembure/10729 in his name as the sole absolute proprietor. That the applicants did not know that the grant had already been confirmed until they noticed that the respondent had begun distributing the estate. That the applicants, while still dissatisfied with the mode of distribution, learned that the respondent was in the process of sub-dividing the suit land without their involvement and they presented themselves to the lands office to object. The land registrar advised them to go and settle the dispute but the same was not done.
9. The applicants further submitted that the succession cause was filed without disclosing that the deceased also had daughters-in-law who should have been included in distribution of the estate. On this argument, they relied on section 35(4) of the *Law of Succession Act*. They further submitted that land parcel no. Gatari/Nembure/10729 ought to be divided between the 2nd and 3rd applicants and Gatari/Nembure/10731 be shared amongst the 4th and 5th applicants together with their husbands Bedan Kamotho Mwinga and Michael Kathuri Mwinga.
10. In their written submissions, the respondent submitted that before the certificate of confirmation of grant was issued, the 2nd and 3rd applicants were present in court and they signed consents to show that they are not interested in the estate of the deceased. That this position was confirmed in the statement by the 4th applicant, who also said that the applicants had not issue with the distribution of the estate in the grant. The respondent denied that material facts were concealed during the succession process. He also denied the allegations that he is in the process of selling the properties and no evidence was tendered to that effect. He submitted that the properties in the names of the Ann Njoka Mwinga and Dennis Gitonga Nyaga both who are now deceased can only be pursued by personal representatives of their various estates. He stated that the issue of distribution of the estate of the 1st applicant cannot be litigated in this cause and also that the applicants have misled the court in stating that the 1st applicant died before execution of the certificate of confirmation of grant. That the circumstances under which a grant may be revoked as provided by section 76 of the *law of succession act* have not been satisfied. They relied on the case of *Angelas Maina v Rebecca Waiyego Mwangi & Another* [2016] eKLR.
11. From the evidence adduced before the court, I deduce that the issues for determination are:
 - a. Whether the applicants have provided sufficient grounds in support of their application for revocation of the grant.
 - b. Whether the estate of the deceased co-administrator can be administered through the present cause.



12. Revocation and/or annulment of a grant is governed by section 76 of the [Law of Succession act](#) which provides as follows:

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“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—

- 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—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.”

For clarity, courts have discussed this section of the [Law of Succession Act](#) and I shall now refer to the case of [In re Estate of the Late Epharus Nyambura Nduati \(Deceased\)](#) [2021] eKLR the court cited with approval, the case of [In re Estate of Prisca Ong'ayo Nande \(Deceased\)](#) [2020] eKLR where the court extensively discussed the provisions of section 76 of the [Law of Succession Act](#) as follows:

“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.”

13. On the first parameter on the process of applying for the grant, a perusal of the court record shows that the applicants of the grant were well competent to apply as required under the *Law of Succession Act*. The petition for the grant and the supporting documents were also filed accordingly and they included the 1st, 2nd and 3rd applicants who were dependants as declared in the letter by the chief. I note that on April 28, 2005, all the beneficiaries were in court and no objection was raised as to the distribution of the estate and the grant was confirmed as prayed. Therefore, in my view, the grant was not obtained fraudulently as alleged.
14. It has been proven that the deceased co-administrator one Ann Njoki passed away in November 30, 2011, after the certificate of confirmation of grant had been issued and executed. That is, her role as the administrator under section 79 of the *Law of Succession Act* was completed and she continued to enjoy the estate as a beneficiary and trustee for the minors as stated in the certificate of confirmation of grant. I say this because the titles were subdivided and issued in the names of the beneficiaries in January 2017.
15. It is imperative that we isolate the issues relating to the estate of the deceased herein and those of the beneficiaries of his estate. In our present case, Ann Njoka Mwinga’s role as administrator ceased when the estate was distributed. Her role as trustee for the portion of land issued to Mercy Murigi was complete after the beneficiary became an adult. She was also a trustee for the parcel allocated to Dennis Gitonga Nyaga (deceased). According to the death certificates produced in the name of Dennis Gitonga Nyaga, the date of death is January 19, 2008 and he died at the age of 20 years that means, as of the date of confirmation of the grant, Dennis Gitonga Nyaga was a minor for sure. It is my view that the properties that had been issued in the name of the deceased co-administrator in her name and in her capacity as trustee ought to be subjected to their own succession causes independently.
16. That the applicants’ joint testimony is that they do not contest distribution of the estate. However, they also stated that they would like redistribution of the same in relation to the properties in the name of the 1st applicant in favour of the 2nd, 3rd and 4th applicants.
17. Having examined the evidence, and the submissions, I am not convinced that the applicants have made a case for revocation of the grant. I also do not find any reason to interfere with distribution of the estate.
18. In the upshot, the summons for revocation of grant is hereby dismissed. Each party shall bear their own costs.
19. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF JULY, 2023.

L. NJUGUNA



JUDGE

.....for the Plaintiff

.....for the Defendant

