



In re Estate of Kinyanjui Kungu Mungothi (Deceased) (Succession Cause 637 of 2014) [2023] KEHC 24112 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24112 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 637 OF 2014
HM NYAGA, J
OCTOBER 25, 2023
IN THE MATTER OF THE ESTATE OF KINYANJUI KUNGU
MUNGOTHI(DECEASED)**

BETWEEN

ANN WAITHIRA THUO & 4 OTHERS PETITIONER

AND

JOHNSON KARANJA KINYANJUI PROTESTOR

RULING

1. The Protestor herein filed a summons for Revocation of grant dated 24th June,2019 brought under Rule 44(1) of the *Probate and Administration Rules* and Section 76 of the *Law of Succession Act* seeking the following orders:-
 1. Spent
 2. That the grant issued on 25th May, 2015 to Rachael Wanjiku Ngugi be revoked and nullified forthwith.
 3. That the suit land parcel Kabatini/Block 1/59 be registered in the style and title of Johnson Karanja Kinyanjui the Protestor forthwith.
 4. That the Nakuru County Land Registrar executes this order.
 5. That the Gazette Notice number 7691 published in the Kenya Gazette on 24th October,2014 be nullified.
 6. That the costs incidental to the entire cause be paid by the Petitioners.
2. The Application is premised on the grounds that:-



- i. The Land Parcel Kabatini/Block 1/59 is not free property of the estate of the Deceased herein.
 - ii. The Land Parcel Kabatini/Block 1/59 though registered in the name of the deceased was legally purchased by the Protestor.
 - iii. None of the petitioners has a right to inherit the suit parcel Kabatini/Block 1/59.
 - iv. The grant issued to Rachael Wanjiku Ngugi was obtained fraudulently through concealment and misrepresentation of material facts.
 - v. The petitioners are intermeddling with the Land Parcel Kabatini Block 1/59.
 - vi. That the petitioners are deceitfully and fraudulently precluding the protestor from his rights enshrined under Article 40, 43 and 72 of the *Constitution* over the suit parcel.
 - vii. That the protestor has never consented to the institution of this cause.
 - viii. That the objector successfully obtained an injunction to refrain the petitioners from burying his late sister Mary Wambui Kinyanjui on the suit property.
3. The summons is supported by an affidavit of the Protestor sworn on the even date.
 4. Kimunya Kamana a founder member and Secretary General of the Ndeffo Company Limited swore an affidavit in support of summons on 8th October, 2018. He deponed that Ndeffo Company limited was incorporated with express objectives of buying land from European Farmers for purposes of settling its members through a purchase and payment scheme.
 5. It was his deposition that the protestor paid money under the name and title of the deceased herein who was a member of Ndeffo Company Limited for the purchase of suit land and that there is a photocopy of the receipts issued to protestor for payment of the said land between the year 1967 and 1973 totalling to Ksh.860/=.
 6. The Petitioners opposed the application via Replying affidavit sworn by the 1st Petitioner, Rachael Wanjiku Ngugi on 16th July, 2019. She deponed that parcel of land known as Bahati/Kabatini Block 1/59 belonged to the deceased, who died intestate on 9th May, 2014.
 7. She deposed that following the deceased's demise they filed an application in the High Court and cited the objector to take out letters of administration however he failed to file appearance despite a court order requiring him to do so.
 8. She averred that consequently they were allowed to petition to letters of administration and a temporary grant was issued on 25th May, 2015 and therefore the allegation by the Protestor that the matter proceeded without his consent is baseless and unfounded.
 9. She contended that the suit land was purchased by the deceased through his shares in the District Freedom Fighters Organization (NDEFFO) which was a land buying company for its members and subsequently the deceased was issued with a certificate of title registered in his names and thus the claims by the objector over the said parcel are outrageous and only serve to disinherit the lawful beneficiaries.
 10. It was her further averment that the objector's claim to the suit land is fraudulent since at the time he was in detention hence not in gainful employment for him to have purchased the suit land.
 11. She deponed that the objector despite knowing the suit land was registered in the name of the deceased did not claim it during the deceased lifetime.



12. She asserted that there is no intermeddling of the estate as alleged by the objector since there was a court order allowing the parties herein to continue occupying and tiling their respective portions before filing of the petition.
13. She averred that the application herein is misconceived, frivolous, oppressive and an abuse of the court process and should be dismissed with costs to the respondents.
14. The protest was canvassed by way of viva voce evidence.

Protestor's Case

15. The protestor adopted his statement dated 11th November, 2019 and an affidavit sworn on 21st March, 2016 as his evidence in chief.
16. He testified that the deceased was his father and a freedom fighter. He said he was employed in 1967 at West Gilgil Farmers' Co-operative Society and he gave the deceased Ksh.20/= to register the suit land. He testified that when he was employed by the government he continued paying for the suit land and that the deceased was to transfer the said land to him however he died before doing so. He said he was the one who paid the entire purchase price and therefore the suit land belongs to him. It was his further testimony that the deceased had no land of his own.
17. In cross examination, he testified that the petitioners are his siblings and that they stole the document to the land .He confirmed he was not member of Ndeffo Company. It was his testimony that he gave the deceased the money but the receipts were issued in his name. He said he continued paying for the suit land until 1973 and confirmed that the land certificate is in the deceased's name. He said he could not sue the deceased as he had allowed him to occupy the suit land.
18. The 2nd witness did not testify .The protestor relied on his statement and replying affidavit as part of his evidence.

Petitioners'/Respondents' Case

19. DW1 was Rachael Wanjiku Ngugi. She reiterated the averments contained in her aforestated replying affidavit in her evidence in chief.
20. She disputed that the protestor paid for the suit land as he was a minor when the same was purchased. She also stated that the deceased was illiterate and could only thumbprint.
21. In cross examination, she confirmed she did not know when the protestor was born. She said the deceased was a farmer and had capacity to buy land in the company. She stated that in the year 1970 the protestor was not working. She said the protestor has no right to disinherit them.
22. At the close of the oral hearings, directions were given for filing of written submissions. Only the Respondents' submissions are on record.

Respondents' Submissions

23. The respondent submitted that the only issue for determination is whether the application meets the threshold for the revocation of grant within the meaning of Section 76 of the *Law of Succession Act*.
24. The respondent cited Section 76 of the *Law of Succession Act*, and the cases of *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR where the court expounded on the grounds for revoking a grant as provided under Section 76 of the *Law of Succession Act* & *Re Estate of Moses Wachira Kimotho (Deceased)* Succession Cause 122 of 2002 [2009] eKLR where 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.

25. The respondent then submitted that following the demise of the deceased, she made an application to the High Court and cited the Applicant to take out letters of administration but he failed to do so. The respondent cited the case *In Re the Estate of Josiah Muli Wambua - Deceased* [2014] eKLR, court held that:-

“Citations are intended to trigger the process of applying for letters of administration intestate in circumstances where the persons entitled to apply are not willing or are slow in moving the court in that behalf.”

26. The Case *In Re Estate Of Agnes Moruri Osindi (Deceased)* – Succession Cause No. 129 of 2008 in which it was held the person cited fails to enter appearance after being duly served with the citation, or does not or enters appearance and does not take up the grant within 30 days of service(r 22(5) the citor may apply for a grant to himself.
27. In light of the above, the respondent submitted that application herein is best handled by ELC as opposed to this forum.
28. The Respondent prayed for costs. She relied on the case of *Joseph Oduor Anode vs Kenya Red Cross Society* [2012] eKLR where court stated *inter alia* that costs follow the event unless the court is satisfied otherwise and the Judicial Hints on Civil Procedure, 2nd Ed by Justice (RTD)Kuloba page 94 where he stated that costs are means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.

Analysis & Determination

29. The crux of the matter is whether the Letters of Administrations issued to the respondent should be revoked.
30. The circumstances under which a court will order revocation of grant are well laid out under Section 76 of the *Law of Succession Act*.
31. For avoidance of doubt, Section 76 of the *Law of Succession Act* states as follows:

“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—
 - (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.”

32. A reading of the protestor’s application leaves no doubt that the grounds cited fall under section 76 (b) above.

33. The court, in the case of *Jamleck Maina Njoroge vs Mary Wanjiru Mwangi* (2015) eKLR at paragraph 11 of its ruling in revoking a grant reiterated the grounds upon which a grant can be revoked. It stated as follows:

“The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

34. The objector alleged that the respondents obtained the grant by way of concealment of a material fact that the suit property was not free property of the deceased and it belonged to him. He asserted that he paid the entire purchase price of the suit land even though the land certificate was issued in the name of the deceased. He averred that he did so on condition that the deceased would transfer the said land to him however he passed away before transferring it to him. The Respondents vehemently opposed this position. According to the respondent the suit land belonged to the deceased. Before revoking the grant, the issue that I must determine first is the ownership of the suit land. However, this court lacks jurisdiction to determine questions in regards to ownership of the suit property. Under Rule 41(3) of the *Probate and Administration Rules*, the court seized of a confirmation application should be wary of proceeding, within the same confirmation application, to determine questions that relate to disputed ownership of some of the assets placed before it for distribution. The said Rule provides that any such questions ought to be placed before another court, in separate proceedings, ostensibly limited to the question of ownership. This section precisely states as follows:

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to



confirming the grant, but subjected to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules, and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

35. Musyoka J *In re Estate of Stone Kathuli Muinde (Deceased)* [2016] eKLR held that:

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules*. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

36. Similarly, in *Re Estate of Kimani Kinuthia* [2008] eKLR (Ibrahim J), it was stated that succession proceedings were not the appropriate way to challenge title of the deceased to assets said to comprise his estate, and that a claim that such assets were subject to a trust in favour of the claimant ought to be subjected to separate proceedings.

37. The dispute herein is on ownership of land. The court vested with jurisdiction to determine such dispute is the Environment and Land Court, by dint of Article 162(2) of the *Constitution* 2010. The protestor therefore ought to have filed a suit in the ELC to determine the said dispute and thereafter seek revocation of the grant herein but he has not done so.

38. The Protestor also averred that he never consented to the institution of this cause. The *Law of Succession Act* and the rules made thereunder require that all beneficiaries be informed of the commencement of the succession proceedings more so if the petitioner is not a person in order preference set out in section 66 of the Act. The beneficiaries have to be informed and their consent sought and obtained. In the event of a recalcitrant beneficiary, then he has to be cited. Rule 7(7) of the *Probate and Administration Rules* specifically provide:

“Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has-

- a. renounced his right generally to apply for a grant; or
- b. consented in writing to the making of the grant to the applicant; or
- c. been issued with a citation calling upon him either to renounce such right or to apply for a grant.”

39. The respondents demonstrated that prior filing this matter they filed an application citing the protestor to take out letters of administration but he failed to do so. They attached a court order dated 9th December ascertaining this position.

40. In view of the foregoing, it is my considered view that there are no justifiable grounds for granting the orders sought. The Application lacks merit and I dismiss it.



41. This being a family matter, each party should bear their own costs.

42. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF OCTOBER, 2023.

H. M. NYAGA

JUDGE

