



**In re Estate of Mwangi Kamau (Deceased) (Succession Cause
594 of 2014) [2023] KEHC 24108 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
SUCCESSION CAUSE 594 OF 2014
J WAKIAGA, J
OCTOBER 25, 2023
IN THE ESTATE OF MWANGI KAMAU (DECEASED)**

BETWEEN

JOYCE WANJIKU MWANGI APPLICANT

AND

DANSON NDUGIRE WAKAGWI 1ST RESPONDENT

MUCHIRI MACHARIA 2ND RESPONDENT

DAVID MUCHINA KAMAU 3RD RESPONDENT

SAMUEL MAINA KAMAU 4TH RESPONDENT

JUDGMENT

1. The First and the Second Respondents applied for the petition for probate of the written Will of the deceased and on the 18th day of February 2017 the Court issued the letters of administration herein to the same who on 17th July 2017 applied for confirmation thereon and proposed the mode of distribution as per the Will. On the 15th day of January 2018 the same was duly confirmed.
2. On the 11th September 2020 the Respondents filed application for rectification of the certificate of confirmed grant on the ground that a co-executor Muchiri Macharia had passed away before the transmission process and therefore proposed that Danson Ndugire Wakagwi be the sole executor which application was duly allowed.
3. On 8th February 2021 the said executor filed an application for rectification of the certificate of confirmation of grant to be adjusted in the Will and that land Registrar at Muranga be authorized to dispensed with the production of the original title deeds with regards to the transmission of land parcels number LOC.2/Kanderendu/294 and 733 and further that the inhibition order registered against the titles be withdrawn to allow transmission, which application was allowed as prayed.



4. It is the said application which triggered the present application which was filed under certificate of urgency and in which the Applicant Joyce Wanjiku Mwangi sought for orders restraining the Respondents from trespassing on, wasting, constructing on alienating or otherwise interfering or dealing with the property known as LOC.2/Kanderendu/294 pending the hearing and determination of summons for revocation of grant.
5. She further sought the orders that the grant of letters of administration with annexed purported Will issued to Danson Ndugere Wakagwi and Muchiri Macharia be revoked or annulled and certificate of confirmation be set aside and the entries in the subject property be cancelled and the same be registered in her name as per grant of letters of administration issued to her on 16. 05. 2016 and confirmed in Thika Succession Cause No 14 of 2016.
6. The application was supported by her affidavit in which she deposed that she was the wife of Mwangi Kamau deceased who was survived by herself and Joseph Mungai Mwangi (son), Anna Wanjiru Mwangi (daughter) and Ruth Wanjiku Mwangi (daughter in law) who were the beneficial owners of land LOC.2/Kanderendu/294 which the Respondents secretly transferred to the 3rd and 4th Respondents.
7. It was contended that the Respondents were cousins and brothers of the deceased who had no right to petition for grant of letters in priority to the wife and children of the deceased whose consent was not sought at the time of the said application.
8. As a result of the grant herein the Applicant was now threatened with eviction from the property they had lived in for the last fifty years.
9. In response to the said application David Muchina Kamau on 9th February 2023 swore a replying affidavit in which he deposed that the deceased was his brother who left a Will dated 16th February 2002 and that upon his death he instituted a Civil Case in Thika Chief Magistrate's Court Civil Case No 1029 of 2010 in which he sought orders barring the Applicant herein from burying the deceased on land reference LOC.2/ Kanderendu/294 which Order was issued on 4th October 2010 and that the second Respondent had also filed a similar Cause No 1119 of 2010, since the said land belonged to their father the late Kamau Kiguru who nominated the deceased herein to be registered in trust for himself and the other brother, the same having been given land LOC 2/Kanderendu/733 to be held by his wife the Applicant and her sons and married daughters as per the Will in which he was buried.
10. They applied for grant with a Will which was duly granted and that the issues of consanguinity do not arise in view of the Will of the deceased wherein the Applicant is granted LOC.2/Kanderendu/733.
11. On 22nd May 2023, the Respondent filed a Supplementary Affidavit in which he produced the proceedings from the lower Court.
12. Direction were issued on the disposal of the application by way of oral evidence and on behalf of the Applicant PW1 Joyce Wanjiku Mwangi, testified and stated she was married to the deceased in the year 1966 and that the deceased was given the subject property by his father and that when he died, she applied for grant of letters of administration in Thika Succession Cause No 14 of 2016, the deceased having not left a Will. She stated that the Respondents were her neighbours and brothers of the deceased who had land in Londiani and that the subject property should be shared by the children of the deceased.
13. In cross examination, she confirmed that when the deceased married her, she came with three children and did not get any children with the deceased. She denied having stolen the two title deeds from the deceased to register tea till numbers in her name. She confirmed that there was a case in the year 2002



- where the deceased indicated that her children wanted to kill him and that the deceased was buried in 733 as a result of a Court Order. It was her contention that the Will was a forgery and that the deceased did not hold the land in trust for the Respondent.
14. DW1 David Muchina Kamau stated on oath that the deceased was his brother and that the suit property was registered in his name as the first born in trust. The Applicant had left the deceased and came after twelve years wanting to bury the deceased on the disputed property leading to Court cases and that on the strength of the Will the same was buried on the land he had identified as his own. The Applicant was in the year 2011 called by the local Chief for the purposes of granting the family introductory letters but she declined to attend.
 15. In cross examination, he stated that he had lived on the disputed property before leaving for Rift Valley where he had lived for the best part of his life and that he lived with the deceased when he became sick. He stated that the tea bushes on the disputed property were planted by their father. He confirmed that the deceased wrote his Will through an advocate and that the Applicant had distributed the estate of the deceased without their knowledge and that he came to live with the deceased in the year 1976 with her three children.
 16. DW2 Danson Ndungire stated that the deceased had differed with the Applicant and that he witnessed the execution of the Will in Thika in the year 2002 and that when he became sick his brothers took him to Rift Valley and upon his death he was buried on 733 as per the Court Order and that they distributed the estate as per the Will. In cross examination, he stated that the Applicant was the wife of the deceased and that she lived on 294 and at Makomboki but that the deceased was buried in 733 where one of his children was living and that the Applicant had a right over 733.
 17. DW3 Samuel Maina Kamau stated that the deceased was his elder brother and that he lived in Gilgil. He had earlier been charged with the offence of arson by the Applicant on the ground that they had burned her house when their father wanted to subdivide the suit land and was in remand for a period of six months. He denied having forged the Will. In cross examination he confirmed that he knew the Applicant in the year 1978 as the wife of the deceased though they had not been married customarily and that she lived in 294 with her children and that he did not have any document to show that the disputed land belonged to their father.

Submissions

18. On behalf of the Applicant it was submitted that Section 76 of the laws of Succession gives the Court the power to revoke grants and as was stated in *In the matter of the Estate of LAK (deceased)* [2014] eKLR that a grant may be revoked where the proceedings leading up to its making were defective or were attended by fraud and concealment of important matter or was obtained by an untrue allegation of fact essential to the point and that though the power to revoke the grant were discretionary, it must be exercised in a judicious and sound grounds taking into account the interest of all the beneficiaries as was stated in *In Re estate of Prisca Ongaya Nande* [2020] eKLR .
19. It was submitted that the Applicant's case was that the grant was obtained by was of concealment of the material fact that she was the widow of the deceased and was not informed of the process so as to probe the veracity of the Will and that the other beneficiaries did not consent to the mode of distribution of the estate as was stated *in Re estate of Moses Wachira Kimotho (deceased)* [2009] eKLR
20. It was submitted that the Applicant established sufficient reasons to warrant revocation of the grant and therefore the application should be allowed with cost.



21. On behalf of the Respondents it was submitted that the application was based on the wrong assumption that the deceased did not write a Will and that without challenging the Will the application was defective in substance and that the content of the Will was the subject matter of the proceedings in Thika CMCC No 1119 of 2010 and that the issue of trust was the subject of Thika CMCC No 227 of 2002 and that the deceased knew that the property belonged to himself and his brothers and that no appeal has been lodged against the said decision .
22. It was submitted that the Applicant had not met the threshold set out in Section 76 of the Act for revocation of grants and that the burden of proof of the allegation of forgery of the Will was with the Applicant who did not lead any evidence to that extent as was stated in the matter of the estate of Julius Mimano [2019] eKLR to the extent that it must be proved beyond reasonable doubt or at least beyond balance of probability.
23. It was contended that the deceased left a valid Will and that the Court in Samuel Maina Kamau v David Muchina Kamau and Joyce Wanjiku Mwangi Thika CMCC No 119 of 2010 declared that the deceased was holding the land in trust for the Respondents and that the deceased adequately provided for the Applicant and her children in his Will despite the existence of the case in Thika CMCC No 227 of 2002 in which he had accused the Applicant and his children of chasing him away from home and attempting to kill him.

Determination

24. From the proceedings herein, the following issues have been identified by the Court for determination:
 - a. Whether the deceased left a valid Will?
 - b. Whether the Applicant has made up a case for the revocation of the grant issued herein?
 - c. Whether the Applicant has made up a case for the grant of restraining orders?
25. The following facts are not disputed from the pleadings herein, that there have been multiple litigations between the parties herein in respect of the estate of the deceased herein, including two Succession Causes in respect of the same estate and as dispute between the deceased and the Applicant herein during his life time in Thika CMCC No 227 of 2002 in which the Court made the following finding of fact, the issues of the marriage were not fathered by the deceased and that the title deeds of the subject properties were held by the Applicant who was ordered to surrender the titles to the deceased.
26. As submitted by the Respondents, the deceased in his evidence in chief stated that the titles were in his name and that of his two brothers, the Respondents herein. Upon the death of the deceased, there once again arose a dispute between the parties herein as to the place of the burial of the deceased which was the subject matter of Thika CMCC NO 1119 of 2010 in which the Court once again made the following findings of facts, the deceased moved out of his home with the Applicant and stayed away for twelve years. The father of the deceased and the Respondents moved his family to Londiani leaving only the deceased at the subject property in 1966 and that the deceased thereafter acquired of his own land No. 733 and that the deceased made several attempts to transfer the suit property to the Respondent as a clear indication that he was aware of the trust bestowed upon him and found as a fact the existence of the trust.
27. That on the 16th day of February 2002, the deceased executed a Will in which he appointed the Respondents as the executors of his Will and distributed the estate as between the parties herein, with the Applicant being bequeathed LOC. 2/Kanderendu/733 to hold in trust for her sons and her



unmarried daughter while the subject property LOC.2/ Kanderendu/294 to Flida Wairati to hold in trust for the Respondents.

28. The validity of this Will has not been challenged by the Applicant save for her allegation that the same gave the subject property to people who were not his dependants and therefore had no right to petition for the grant. It is my finding that the Applicant missed the essence of the grant of probate and as such her claim herein has no basis in law. The deceased had the right to deal with his estate in any manner he deemed fit and to appoint any person he so wished as the Executor of his Will the issue of dependency notwithstanding.
29. I therefore find and hold that the Applicant has not placed any material before the Court to challenge the validity of the Will herein and therefore find and hold that the Will presented before the Court was a valid Will duly executed by the deceased and as confirmed by the evidence on record and in execution of the issue of trust as found by the lower Court which issue has not been appealed against. It therefore follows that the Applicant has not made up a case for the revocation of the grant issued herein and as such is not entitled to the relief sought.
30. The Applicant has further not come to Court with clean hands and as it is trite that he who seeks equity must do equity as it is clear that in applying for grant before the lower Court the same deliberately left out the property which was in the name of the deceased and only sought to administer one where the lower Court had made a finding of fact to be held by the deceased in trust for the Respondents, I decline to grant the injunctive Orders sought and proceed to dismiss the application dated 27th October 2022 in its entirety.
31. It is not for the Court to find out the intention of the deceased as at the time of the execution of the Will. The duty of the Court is to find out if the Will was validly executed which I herein find.
32. This being a family dispute each party shall bear their own cost and in view of the finding herein, the validity of the grant issued to the Applicant is in doubt but shall not comment thereon as the Court was not moved on the same and it is ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 25th DAY OF OCTOBER 2023

J. WAKIAGA

JUDGE

In the presence of:

Mr. Mwangi for 1st, 3rd and 4th Respondent

No appearance by the Appellant

Jackline - Court Assistant

