



In re Estate of Boke Nyagisire Matiko (Deceased) (Succession Cause 613 of 2014) [2023] KEHC 27515 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEHC 27515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
SUCCESSION CAUSE 613 OF 2014
RPV WENDOH, J
NOVEMBER 23, 2023
IN THE MATTER OF THE ESTATE OF BOKE NYAGISIRE MATIKO (DECEASED)
AND
IN THE MATTER OF REVOCATION OF GRANT OF LETTERS OF ADMINISTRATION
AND
IN THE MATTER OF SECTION 76 OF THE LAW
OF SUCCESSION ACT CAP 160 LAWS OF KENYA
BETWEEN
WEISIKO BOKE NYAGISIRE 1ST APPLICANT
JACKSON MAROA MATIKO 2ND APPLICANT
AND
SAMWEL GISIRE MATIKO RESPONDENT**

RULING

1 This cause relates to the estate of Boke Nyagisire Matiko (Deceased) who died intestate. Jackson Maroa Matiko (the 2nd applicant) commenced this Chamber Summons (the application) dated 15/7/2022 seeking the following orders: -

1. The Registrar of Lands Kuria East and West Sub - Counties be directed to cancel all entries made in the register of parcel No. Nyabasi/Busonga/84 on 6/1/2017 in favour of the respondent Samwel Matiko Gisire;
2. This court be pleased to issue summons to the Registrar of Lands Kuria East and West Sub - Counties to appear before this court and provide all the records pertaining to all the titles that emanated from the original parcel No. Nyabasi/Busonga/84;



3. That the Registrar of Lands Kuria East and West Sub - Counties be directed to cancel titles to parcel No. Nyabasi/Busonga/1388, 1389, 1390, 1391, 1392, 1410,1411, 1545, 1546 & 1547;
 4. Upon issuance of Order No. 3, this court be pleased to issue an order to the Registrar of Lands Kuria East and West Sub - Counties to revert ownership of the suit estate, L.R. No. Nyabasi/Busonga/84 to the names of the deceased herein, Boke Nyagisire Matiko.
 5. Upon issuance of Orders 1, 3 and 4 the court be pleased to issue an order for restricting to restrict any further dealings on the suit estate i.e. L.R. No. Nyabasi/Busonga/84 pending the issuance and confirmation of the grant.
 6. Costs be provided for.
2. The grounds upon which the application is based, are found in the body of the application and the supporting affidavit of Jackson Maroa Matiko, the 2nd applicant herein. The 2nd applicant deposed that he is a beneficiary of the estate of the deceased; that vide Chamber Summons dated 20/4/2018, he moved the court for revocation of the grant made to the respondent on 13/2/2015; that on 19/7/2021, this court dismissed the succession cause and revoked the grant issued to the respondent; that as a result, it is only prudent to seek the orders herein.
 3. The 2nd applicant stated that the respondent has subdivided the suit estate into several new titles and he is intent on further subdividing the estate in a bid to disinherit the rightful beneficiaries of the estate of the deceased despite being aware of the orders made on 19/7/2021; that it is imperative that the Lands Registrar be summoned to give account for the parcel numbers that emanated from the subdivision of the original parcel of the suit land. The 2nd applicant deposed that no prejudice will be suffered by the respondent if this application is allowed and it will be in the interest of justice if the application is allowed as prayed.
 4. The application was opposed. Samwel Gisire Matiko (the respondent) filed a replying affidavit dated 16/3/2023. The respondent deposed that the succession cause was filed and the estate of the deceased was gazetted on 19/9/2014; that at the time of the succession cause, there were three petitioners being the 2nd applicant, Monica Gati Matiko and himself; that the 2nd applicant refused that the land be surveyed on three occasions; that as a result, the court appointed the respondent as the sole administrator; that on 13/9/2015, the respondent was issued with a grant of letters of administration intestate which was later confirmed on 24/11/2015; that upon being given the grant, the respondent lodged RL 7 and 19 and paid the fee required for their registration and the suit land was registered in his name as per the certificate of confirmation of grant.
 5. The respondent further deposed that the beneficiaries who paid the survey fees were able to acquire their titles including Samwel Boke Matiko & Jomo Matiko Boke the brothers of the 2nd applicant, Sofia Robi Gisire the widow of David Gisire Matiko (Deceased) and Zephania Wangenyi Matiko who facilitated the survey process; that the other beneficiaries who have refused to find a surveyor to demarcate the suit land, the respondent left to them land parcel no. Nyabasi/Busonga/1811; that at the time of revoking the grant, the estate had already been duly administered as directed and the court became functus officio; that the court cannot grant the orders herein as the owners of the said titles have not been joined in this suit and they cannot be condemned unheard. The respondent urged that the application is an abuse of the court process and it ought to be dismissed with costs.
 6. Both parties filed their written submissions. The applicants filed their written submissions dated 31/7/2023. The applicants submitted on two issues. On the consequences of the revoked grant, it was submitted that Section 47 of the [Law of Succession Act](#) and Rule 73 of the [Probate and Administration](#)



- Rules* gives this court powers to make orders necessary to meet the ends of justice; that prior to grant of conservatory orders, the court has to satisfy itself that the suit property is at risk of being disposed, the refusal to grant orders of inhibition will render the applicant's suit nugatory and the applicant has an arguable case as it was held in *RE: Estate of Jeremiah Ngiri Kibati (Deceased)* (2019) eKLR; that the applicant herein seeks orders to preserve the deceased's estate after various subdivisions into 10 parcels; that the multiple subdivisions were made in an attempt to cause confusion and make it impossible to recover the said portions of land for the benefit of the estate.
- 7 The applicants further submitted that in the case of *Santuzzabilioti alias Mei Santuzza (deceased) vs Giancarlo Felasconi* (2014) eKLR the court held that a succession court can order a cancellation of title deed if a deceased's property is being fraudulently taken away by non-beneficiaries such as where the property is being sold before grant is confirmed; that in the case of *RE: Estate of Alice Mumbua Mutua (Deceased)* (2017) eKLR the court dealt with instances where a case can be heard as a succession cause or when it can be heard in other courts with concurrent jurisdiction like the Environment and Land Court .
 - 8 It was further submitted that once the grant was revoked, all actions taken by the administrators is null and void and any transfer of any part of the estate is nullified and all properties comprising the estate should revert back the name of the estate of the deceased as it was held in *RE: Estate of Leah Wangui Nding'uri (Deceased)* (2020) eKLR. The applicants asked this court to find that the application is merited and should be allowed with costs. The applicant further urged that the revocation of grant served no purpose if the illegal/fraudulent actions of the respondents are not reversed.
 - 9 The respondent filed his written submissions dated 28/9/2023. On whether the court was functus officio at the time of making the order revoking the grant on 19/7/2021, it was submitted that Forms RL7 and RL19 were duly filed and lodged at the registry for registration showing that the order had been executed; that the court had no jurisdiction to make any order as it was functus officio. The respondent relied on the findings in *RE: Estate of the Later Kipngeny Arap Chepkwony (Deceased)* (2021) eKLR.
 - 10 On whether the resultant titles ought to be revoked, the respondent referred to the provisions of Section 26 (1) of the *Land Registration Act*; that the respondent obtained the grant together with the certificate of confirmation of grant and followed the legal procedures in being registered as the proprietor of the land of the deceased through transmission; that the applicant has not explicitly stated the acts of fraud committed by the respondent in having the land registered in his name and subdividing the same; that the titles sought to be revoked were subdivided between the periods between 15/4/2019 - 17/9/2020 yet the order revoking the grant was issued on 19/7/2021.
 - 11 The respondent submitted that the decision of the court cannot apply retrospectively due to the fact that the titles were obtained before the grant was revoked as it was held by the Supreme Court in *Mary Wambui Munene vs Peter Gichuki King'ara & 2 Others* (2014) eKLR on the retrospective application of judicial decisions. It was submitted that the persons whose titles are being sought to be revoked, have not been joined in this suit and their titles cannot be revoked without hearing from the registered proprietors; that there are no sufficient grounds advanced by the applicants to warrant the court revoking the titles.
 - 12 On whether the application is merited, the respondent submitted that the order seeking that the land registrar to be summoned is not reasonable as he diligently carried out his duty having been supplied with all the requisite documents for registration. The respondent submitted that should this court find that the application is devoid of merit, the applicant should bear the burden of costs of this application.
 - 13 I have considered the application, the response thereto and the submissions by both parties.



- 14 The deceased's estate was confirmed and a certificate of confirmation of grant was issued on 24/11/2015. The suit land of the estate of the deceased wholly devolved to the respondent. On 21/5/2021, the applicant filed an application seeking reconstruction of this file since it went missing. The applicant also prayed that the subdivided suit land be preserved. This court issued orders on 25/10/2021 directing that the now already subdivided estate of the deceased be preserved pending the hearing and determination of the application. The application for reconstruction of the file was allowed as prayed on 6/12/2021. The court further directed that mention be on 28/3/2022 for directions on the objection. On 28/3/2022 this court was informed that there was an application for revocation of the grant pending. The court deferred the matter to 25/5/2022 where it was informed that the grant was revoked on 19/7/2021 after a notice to show cause was served. This court proceeded to close the file.
- 15 The notice to show cause dated 7/7/2021, was for the parties to show cause why they have not applied for the confirmation of grant for over one year pursuant to Section 73 of the *Law of Succession Act*. The notice for court attendance was sent to the firm of Thomas Muniko & Co. Advocates who were acting on behalf of one James Mwita. There is no indication that the respondent was served with the notice to show cause.
- 16 On behalf of Wesiko Boke Nyagisire, the firm of Abisai & Co. Advocates, filed an application dated 20/4/2018 seeking revocation of the confirmed grant as rightly deposed by the 2nd applicant herein. Similarly, the firm of Thomas Muniko & Co. Advocates filed on behalf of James Mwita, an application dated 14/7/2020 for summons for revocation of grant. The aforementioned summons for revocation of grant applications were neither heard nor prosecuted since this succession file had gone missing from the registry. They are still pending to date.
- 14 The notice to show cause dated 7/7/2021 was particularly meant for the parties to show cause why they had not applied for confirmation of grant. Guided by the notice to show cause dated 7/7/2021, by an order dated 19/7/2021, this court observed that since not much had happened since the grant was issued on 13/2/2015, the grant was revoked. At the time of issuing the said order, this court was under the impression that the certificate of confirmation of grant to the estate of the deceased had not yet been applied for and confirmed. The orders of 19/7/2021 dismissing the grant was not in relation to the application dated 20/4/2018 as deposed by the applicant herein.
- 17 The correct position is that the letters of administration intestate were confirmed on 24/11/2015. Therefore, the order of the notice to show cause stating that nothing much has happened since the letters of administration intestate were issued on 13/2/2015 was made on the mistaken belief that the said grant had not yet been confirmed. This was an oversight and error on the part of the registry staff as they were preparing the notice to show cause which this court profusely apologizes on their behalf to the parties. As matters stand, the confirmed grant still stands and until there is an application filed to set it aside.
- 18 The instant application is premised on a revoked grant. I have made a finding that the grant has not yet been revoked and therefore the orders being sought cannot be granted. Evidence has to be first led that at the time of the issuance of the grant, the process of obtaining the grant was defective in substance, that it was obtained fraudulently or through concealment of material facts, or that it was obtained by untrue allegation of fact essential in a point of law to justify the grant notwithstanding that the same was made ignorantly and that the person to whom the grant was made has failed to apply for confirmation within a year, he has failed to proceed diligently with the administration of the estate, he has failed to produce in court accounts and inventory as and when needed; and lastly the grant has become useless and inoperative. See Section 76 of the *Law of Succession Act*.



- 19 It is not possible to have the estate of the deceased revert to his name because there is a valid subsisting confirmed grant. I reiterate that from the record, the summons for revocation of the grant dated 20/4/2018 and 23/7/2020 are still pending and the confirmed grant issued on 24/11/2015 still stands. The resultant orders dated 19/7/2021 of the notice to show cause dated 7/7/2021 were made on the mistaken belief that the grant had not yet been confirmed. Having been made in error, it is only proper that this court moves *suo moto* to set aside the orders of 19/7/2021 dismissing this cause.
- 20 The application dated 15/7/2022 is not merited. Owing to the fact that this court made an order without notice of some facts before it which led the applicant to file the instant application, there will be no orders as to costs.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 23RD DAY OF NOVEMBER 2023

R. WENDOH

JUDGE

Ruling delivered in the presence of;

Mr. Singei for the Applicants.

Mr. Oywer h/b for Ms. Apondi for the Respondent.

Emma & Phelix - Court Assistants.

