



**In re Jacob Kairanya alias Jacob Mwithia alias Jacob M'Ibuathu (Succession Cause 136 of 2001) [2022] KEHC 11509 (KLR) (30 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11509 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 136 OF 2001  
EM MURIITHI, J  
MAY 30, 2022  
IN THE MATTER OF JACOB KAIRANYA ALIAS  
JACOB MWITHIA ALIAS JACOB M'IBUATHU**

**BETWEEN**

**ELIUD MUTURA M'ANGICIA ..... APPLICANT**

**AND**

**JOSEPH MUTUMA M'IBUATHU ..... RESPONDENT**

**JUDGMENT**

1. By summons for revocation of grant dated 27/8/2021 drawn by M/S Mutembei & Kimathi Advocates for the applicant, it is sought orders to:
  - a) Revoke and or annul the grant issued to the administrator one Joseph Mutuma M'Ibuathu and confirmed on October 3, 2017;
  - b) Re-distribute LR Kangeta/ Kangeta/8xx; and
  - c) Allow [the applicant] to file protest out of time.
2. The grant having already been confirmed the procedure for protest which is an opposition to an application to a confirmation of grant is not available, and prayer number c) cannot be granted and it is therefore struck out. What remains for consideration is the application for revocation and, if necessary, the redistribution of the estate in accordance with the finding of the court on the prayer for revocation.
3. The application for revocation and subsequent order for redistribution is based on grounds set out in the summons, principally, that:
  - a) The grant was obtained by the petitioner fraudulently making false statements and concealment from the court of something material for the same, [namely];



- b) That the petitioner did not disclose to the court that the applicant is settled in the deceased's estate with his family since 1986 having bought the same from the deceased who died before completing the transfer; and
- c) That the deceased's wife attempted to effect the transfer of Kangeta/Kangeta/8XX, to the applicant on behalf of her deceased husband as she received financial assistance together with the petitioner to enable her subdivide the estate herein but died before completing the transfer.
4. Despite service of the summons and hearing notice, respectively as described by affidavits of service by process servers Paul Irungu Mwangi of 20/10/21 and Daniel Mwenda Kanyamu of 7/2/22, the respondent did not appear, file a response or otherwise attend court. The hearing of the summons therefore proceeded on 9/2/22, *ex-parte* by *viva voce* evidence.
5. The applicants (AW1) testified before the court and set out his claim as follows:
- “I know Jacob Mwithia. He is the owner of the land. I bought the land from Jacob and his wife. The land was parcel number 8XX Kangeta/kangeta. We made the transfer in 1999. I took possession and started using it up to date. I have cultivated the land. I have planted potatoes, maize, trees and other crops. Since 1999, I have been using the land and no one has ever asked for the land from me. When the title was done, it came out in the names of the deceased. I asked one Joseph Mutuma son of the seller to [file] the succession proceedings. When I filed a case in Maua, the refused to come. They came to court in Meru and got letters of administration and obtained title of the land in his name. I pray that the court makes an order granting the title in my name.”
6. The applicant produced documents attached to the affidavit in support of the summons sworn on 27/8/21. He put in as applicants exhibits No 1 a letter to District Land Adjudication and Settlement Officer dated December 17, 2015 citation in Maua succession cause no 8/2016 and succession cause no 8 of 2016 and succession Cause no 78 of 2016 at Maua; rectified certificate of grant in Meru P&A cause No 136 of 2005 dated December 19, 2017, and thereafter called as a witness the District Land Adjudication and Settlement Officer (DLASO) to produce his report on the suit parcel of land.

### **Proof On A Balance Of Probabilities**

7. The District Land Adjudication and Settlement Officer, Igembe Adjudication area, Mr Joseph Mbai testified as AW2 and expounded on a report dated 8/2/22 filed in court, as follows:
- “I have filed a report which is in the court file, dated 8/2/22. The report is that plot no 863 should be recorded in the name of Eliud Mutura M'Angicia. He acquired the plot through a request made by one Ruth Karimi who is the wife of Jacob Mwithia who is the first owner of the parcel. The request was made on December 22, 1999. When the request was brought to adjudication section before the land adjudication officer, proceedings were recorded and the request allowed but as the name was due for recording the records were forwarded to the national titling centre. This was before the name of Jacob Mwithia was substituted with the name of Eliud Mutura. This explains why the title was issued in the name of Jacob Mwithia. There was an error, as the title. should reflect the name of Eliud Mutura not Jacob Mwithia.”
8. Based on the evidence presented before the court, counsel for the applicant M/S Mutembei and Kimathi advocates filed their written submission dated 22/2/22 urging, principally the concealment or material non-disclosure as to the applicant's true beneficial interest as bona fide purchaser of the 0.50 acres of parcel No 863 Kangeta/Kangeta and urged that the confirmed grant dated December 19, 2017



should be revoked. Observing that no evidence had been adduced for the respondent, the applicant urged the court to accept the evidence adduced by the applicant which was uncontroverted, citing *Chevron (K) Ltd v Oshwal Service Station and 2 Others* (2013) eKLR, (Ogolla J) and *Edward Mariga (suing through) Stanley Mobisa v Nathaniel David Schulter and Anor.* (1997) eKLR and urging that where a defendant does not adduce evidence, the plaintiff's evidence is to be believed, as allegations by the defense are not evidence. The decision *Re Estate of Tabitha Waitherera Kamau (deceased)* was cited for the proposition that revocation of grant may be granted for non-disclosure of material information and facts.

9. While the court accepts that failure to adduce evidence denies a defendant the opportunity to rebat the plaintiff's case, it does not accept that the plaintiff's case is proved by reason of want of evidence by the defense. The matter or issue in dispute must be resolved on a balance of probabilities, which means that the court must on the basis of the evidence produced by the plaintiff even in absence of evidence in rebuttal, believe the fact(s) or in issue to be more likely than not.
10. The test of balance of probability in evidence analysis is best explained by the House of Lords in *Re H & R (minors)* [1996] AC 563, [1995] UKHL 16, [1996] 2 WLR 8, [1996] 1 All ER 1, where Lord Nicholls of Birkenhead said:

“The balance of probability standard means that the court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”

11. With respect, the test on the civil standard of balance of probability is not that one party's evidence on a matter is accepted if there is no rebuttal evidence; it is that “on the evidence, the occurrence of the event was more likely than not”. Failure by a party to adduce evidence only denies that party an opportunity to present evidence on which the court may weigh along with other evidence presented by the other party or parties to determine whether the occurrence or existence of the fact was more likely than not.
12. This is how I understand Ogola J in *Chevron Kenya Limited V Oshwal Service Station Ltd & 2 Others* [2013]eKLR:

“13. In conclusion, the defendants chose not to produce any evidence or testimony to discredit the plaintiff's claim. The position in law is that where a party chooses not to give evidence, it can be concluded that there is no evidence, and that any evidence would not support the party's position.

It is trite law that the person who alleges the existence of certain facts must prove the same. Section 107 (1) of the *Evidence Act*, cap 80 states thus:-“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

The learned judge did not say that if a party does not give evidence, the allegations and evidence produced by the opposing party must necessarily be accepted as proved.

13. This is also the effect of the Court of Appeal decision in *Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schulter & another* [1997] eKLR (Kwach, Omolo & Pall, JJA) said of



failure by defendant to adduce evidence in a road accident claim while accepting the plaintiffs case on a balance of probabilities as follows:

“The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother. Mwera J heard the case and held that the accident was substantially contributed to by the appellant’s own negligence and held him 90% to blame. He awarded the appellant Shs 80,000/- general damages for pain and suffering which he then reduced by 90% and entered judgment in his favour for Shs 8,000/- together with interest and costs. In this appeal, the appellant is challenging the apportionment of liability and the quantum of damages. Looking at the evidence as a whole, we get the clear impression that the appellant’s father was determined to reap the maximum financial benefit from his son’s accident by deliberately exaggerating the injuries sustained by him and their long term effect. But that apart, the evidence before the learned Judge established, on a balance of probabilities, that the appellant was on the pavement when the vehicle hit him and there can be no clearer evidence of negligence than this, especially in the absence of an explanation from the first respondent, as to how the accident happened. The allegation in the defence that the appellant had dashed across the road is not evidence and remains forever an allegation. The learned Judge had reasoned that children being what they are, the appellant could have crossed the road in the course of play, but there was no evidence to support this view of the Judge.”

14. The Court of Appeal was emphasizing the test of balance of probability on the evidence available before the court.
15. This court does not accept the plaintiffs case because there is no evidence for the defense but because on the evidence presented by the plaintiff, without any rebuttal evidence by the defendant, the court finds the plaintiffs story or set of facts believable as being more likely than not as explained in *R v H and R (minors)*.
16. In this application for revocation of grant by reason of concealment or nondisclosure of material fact of the applicants interest as purchaser of the unregistered interest in land which was subsequently registered in the name of the deceased in circumstances described by the District Land Adjudication Officer, the court finds the matter proved on a balance of probabilities on the evidence of the applicant as supported by the confirmation by DLASO as to the attempt by the deceased wife to effect the registration in the applicants name.
17. Although there was no formal contract of sale produced by the applicant there is evidence that the land had not been adjudicated, the record of the adjudication indicating the substitution of applicant’s name for the deceased’s upon objection AR Obj 1936 which was allowed under Minute II dated December 20, 1999 by the land adjudication officer in terms that:

“II. Objection allowed. I have allowed the succession of parcel 2601 and 863 and also I have allowed the transfer of the whole parcel 863-0.50 acres.

LAO”

18. The decision of the land adjudication officer is shown to have been arrived at upon a letter of request for transfer written to the land adjudication and settlement officer by one Ruth Karimi M’Ibuathu in terms as follows:

“RE application for land transfer and succession.



I the only wife of Jacob Mwithia, I would like to [have] his name on plot number 863 and P/ No 2601 to read mine and transfer P/No 863 0.50 Ac to Eliud Muturu M'angicia”.

A copy of the letter was produced together with a letter dated 17<sup>th</sup> Dec 2015 and payment receipt for proceedings of land adjudication dated 28/1/2016 under plaintiff exhibit No 1

19. Consistently with the evidence of the applicant AW1 and the District Land Adjudication Officer AW2 the certificate of official search dated December 16, 2015 indicating that the suit parcel of land Kangeta/kangeta 863 was registered in the name of the deceased on October 30, 2013 and title issued in his name.
20. The record of the proceedings in the file indicate that the respondent administrator Joseph Mutura M'Ibuathu filed the petition herein dated 18/4/2005 on 19/4/2005 and a confirmed grant was issued on 3/7/2006 distributing the deceased estate amongst named beneficiaries. The applicants interest was not disclosed and neither was the property plot 863 Kangeta indicated in the list of assets.
21. Parcel of land Kangeta/Kangeta/863 together with Kangeta/Kangeta/2601 were brought in by an application for rectification dated July 9, 2017, apparently after the issue of title deeds upon registration in the name of the deceased. The respondent did not disclose in the application for the rectification the applicant's purchasers interest.
22. The application for rectification was filed on 19/9/2017 and a rectified certificate of confirmation of grant dated December 19, 2017 was issued distributing the parcel of land Kangeta/kangeta 863 to the respondent.
23. By order of the court at Maua in Succession Cause No 18 of 2016, the deceased 2 sons, the respondent herein and one Naphatali Kirema Kailanya, were directed to take out letters of administration within 15 days in default of which the citor the applicant herein would be entitled to obtain grant of letters of administration with respect to land parcel No Kangeta/Kangeta/863 which he claimed.
24. It is clear to this court on a balance of probabilities that the application for rectification dated 7/7/2017 and filed on 19/9/2017 upon which the rectified certificate of confirmed grant dated December 19, 2017 and subsequently rectified on 28/3/2018 and distributing the suit parcel of land Kangeta/kangeta/863 to the respondent was obtained by concealment and nondisclosure of material facts relevant to the making of the rectified grant.
25. Section 76 (b) of the *law of succession Act* allows the revocation of a grant which is obtained by concealment of material facts. I also respectfully agree with the decision of the court in Eldoret P & A No 85 of 2007 *Ngaruiya Kamau v Eliud Kibuga, Re Estate of Tabitha Waittherera Kamau (deceased)* (2019) EKLRL relied on by the applicant that failure to disclose that an objector has an interest in the estate of a deceased person will lead to revocation of the grant.

## Conclusion

26. The fact having been proved that the applicant has an interest in the whole of 0.50 acres of Kangete/Kangeta/863 which was registered in the name of the deceased and subsequently included in the name of the list of assets for the distribution by rectification of grant, the court must make a finding of concealment or nondisclosure of material facts which justify the revocation of the rectified certificate of confirmed grant dated 3/10/2017 and subsequently re-issued on 28/3/2018 and make a consequential order for the distribution for the parcel of land Kangeta/Kangeta/863 to the applicant, Eliud Mutura M'Angicia.



## ORDERS

27. Accordingly, for the reasons set out above, the application for revocation of grant dated 27/8/2021 is granted in terms of prayers Nos 2 and 3 thereof with costs to the applicant.
28. As a consequential order, the court directs that the estate shall be distributed as set out in the rectified certificate of grant dated 28/3/2018 with an amendment that Parcel No Kangeta/Kangeta/863 shall be distributed to the applicant herein, Eliud Mutura M'Angicia.

Order accordingly.

DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF MAY 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mutembei & Kimathi Advocates for the Applicant.

N/A for the Respondent.

