



REPUBLIC OF KENYA



**In re Estate of Mbai Gaitho alias Mbai s/o Gaitho (Deceased) (Succession Cause 41 of 2010) [2022] KEHC 12466 (KLR) (17 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12466 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION CAUSE 41 OF 2010  
FN MUCHEMI, J  
AUGUST 17, 2022**

**BETWEEN**

**GABRIEL GAITHO MBAI ..... PETITIONER**

**AND**

**TERESA WANJIRU KIBUI ..... APPLICANT**

**AND**

**TERESA WANJIRU KIBUI ..... APPLICANT**

**RULING**

1. Before this court is Summons for Revocation of grant dated 23/06/2021 brought by the applicant Teresiah Wanjiru Kibui on grounds that her late husband Kibui Gaitho was a rightful beneficiary in this cause. The applicant contends that she was locked out of the distribution of the estate and that the said grant was obtained through fraudulent means. The applicant also seeks for orders to be enjoined in the administration of the estate upon revocation of the said grant that was confirmed on 25<sup>th</sup> march 2011.
2. The application was opposed by the Respondent/Administrator Gabriel Gaitho Mbai through his replying affidavit sworn on 06<sup>th</sup> October 2021.
3. Directions in this cause were taken on 29/03/2022 whereas this Summons was to be disposed of by way of filing submissions. Both parties duly filed and exchanged submissions.

**The Applicant's Case**

4. The applicant's evidence was to the effect that her late husband Kibui Gaitho was a brother to the deceased in this cause and that he died in 1972. She stated that she was not informed by the petitioner/respondent that he was filing this cause and neither was she consulted. It is further stated that the



father of the deceased herein had one wife with five children all of whom are deceased. The applicant's husband was the 4<sup>th</sup> born in the family and has since passed on. None of his siblings are alive.

5. At the time the deceased died, he left land L.R. Thegenge/Karia/667 measuring 2 acres where the applicant resides and LR. Thegenge/Karia/667 measuring 12 acres and registered in the name of her late brother-in-law Mbai Gaitho alias Mbai s/o Gaitho to hold in trust for his siblings. The deceased held the title land in trust for the family of his father which was the custom during emergency period in Kenya.
6. L.R. Thegenge/Karia/667 is the mother title but has since been sub-divided into two parcels L.R. Thegenge/Karia 5805 and 5802. The applicant wants the titles of resultant parcels to be cancelled and the parcels to revert to the old title in the name of the deceased.

### **The respondent's case**

7. It is the respondent's case that he obtained the grant to his father's estate genuinely and that no fraud was involved. Full disclosure was made to the court in all material particulars. That the land L.R. Thegenge/Karia/672 was registered in the respondent's deceased father's name and the rightful beneficiaries are the respondent and his siblings. L.R. Thegenge/Karia/672 was given to the applicant's husband by the deceased and registered in his name in 1958 during emergency period.
8. As far as the respondent is concerned, his deceased father did not hold the land in trust for the applicant's husband or for his siblings. The land in issue was registered in the respondent's father's name in 1964. That the estate of the respondent's father has already been distributed and titles issued to the beneficiaries. The respondent further states that the applicant has no genuine claim on his father's estate and as such, she should not be appointed as a co-administrator.
9. The submissions filed by the parties have been duly considered in this ruling.
10. The law applicable for revocation of grant is section 76 of the *Succession Act* which provides:-

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 I 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 has ordered or allowed; 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.

11. The grounds relied on by the applicant in this summons for revocation of the grant is that the grant was obtained fraudulently and with concealment of facts material to the case. The applicant said she was a daughter-in-law of the deceased Mbai Gaitho alias Mbai s/o Gaitho and that the deceased during emergency time had allowed his son one Mbai Gaitho the deceased herein to be registered owner of his land L.R. Thegenge/Karia/667 measuring twelve acres to hold in trust for himself and his siblings who include the applicant's late husband Kibui Mbai. The applicant argues that having survived her husband is now a rightful beneficiary in the estate of her brother-in-law, the deceased herein. As such, she ought to have been notified of the filing of this cause or be invited under Section 26 of the Act to participate in order to claim her interest.
12. The respondent denies that the applicant is a beneficiary in the estate of his deceased father. It is his evidence that his grandfather and father of the deceased was allocated two parcels of land during land consolidation. The first one LR Thegenge/Karia/667 was registered in his father's name while the 2<sup>nd</sup> one LR Thegenge/Karia/672 was registered in the name of Kibui Mbai, the late husband of the applicant.
13. As far as the respondent is concerned, the applicant is not a beneficiary in his late father's estate and he had no obligation to inform or involve the applicant in this cause. He said he dutifully involved all the children of the deceased and that the grant was accordingly confirmed distributing the estate to the rightful beneficiaries.
14. The claim of the applicant lies in constructive trust whereas her late husband was entitled to a share of land in L.R. Thegenge/Karia/667 which she is claiming. The applicant says she resides on LR Thegenge/Karia/672 which she does not deny was registered in her husband's name during emergency. There was no indication from the applicant that she or her family have ever cultivated or used any portion of the LR Thegenge/Karia/667. Registration of land after land consolidation was done in this region between 1958 to 1964. The respondent gave evidence that L.R. Thegenge/Karia/667 was registered in his father's name in 1964 which was not denied. As for LR. Thegenge/Karia/672, it was registered in the name of the applicant's husband in 1958. The husband of the applicant died in 1972 which was 14 years after registration of LR. Thegenge/Karia/667 in the name of the deceased. There is no evidence that he attempted to claim his share from his deceased brother during his lifetime. Likewise, following the death of the applicant's husband, the applicant has not demonstrated that she ever filed a suit on basis of constructive trust in respect of the parcel of land.
15. If the applicant does not live on the LR/Thegenge/Karia/667 or use any part of it, it is likely that the children of the deceased may not have known of her interest in the land and were therefore not obligated to inform her during the filing of this case. The land was registered in the respondent's father's name and all the children of the deceased were involved in this cause. The applicant not being a direct beneficiary in the estate may not be protected by the provisions of section 26(1) of the Act unless she made her interest known to the respondent following the death of the deceased.
16. The applicant from the evidence of the parties was not a dependant of the deceased and as such the provisions of section 29 of the Act are not in her favour.
17. The applicant's remedy lies in claiming her interest on constructive trust from the estate of the deceased in the Environment and Land Court which has powers to determine the issues.



18. I am of the considered view that the applicant has failed to establish any of the grounds listed under section 76 of the Act to make a case for revocation of the grant confirmed on 25<sup>th</sup> March 2011 in favour of the respondent.

19. Consequently, I find no merit in this application and I hereby dismiss it with no order as to costs.

20. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 17<sup>TH</sup> DAY OF AUGUST, 2022.**

**F. MUCHEMI**

**JUDGE**

**Judgement delivered through video link this 17<sup>th</sup> day of August, 2022.**

