



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Gatere Ngure (Deceased) (Succession Appeal E001 of 2020)  
[2022] KEHC 13097 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13097 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION APPEAL E001 OF 2020  
FN MUCHEMI, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**CHARLES NGURE GATERE ..... 1<sup>ST</sup> APPELLANT**

**ISAAC NDERITU GATERE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GEOFFREY NGURE WAITHANJI ..... 1<sup>ST</sup> RESPONDENT**

**CHARLES NGURE GATERE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling and Orders of Principal Magistrate,  
Hon. A. Mwangi in the Principal Magistrate court in Karatina,  
Succession Cause No. 249 of 2018 delivered on 5th November 2020)*

**JUDGMENT**

**Brief facts**

1. This appeal was lodged against the judgment of Karatina Principal Magistrate Court Succession Cause No 77 of 2003 in which the court revoked the grant dated August 29, 2019 that had been issued in favour of the appellants on grounds that it was obtained fraudulently and without disclosure of material relevant to the case.
2. Being aggrieved by the decision of the court, the appellants lodged this appeal citing ten(10) grounds of appeal summarised as follows:

The learned magistrate erred in law and in fact in:-

- a) Finding that Land Parcel Number Iriaini/chehe/341 existed and formed part of the estate of the deceased as at July 10, 2009 when the said parcel of land was sub divided back in 2007;



- b) Revoking the certificate of confirmation of grant dated August 29, 2019 when there were no valid grounds for such revocation;
  - c) Holding that without the order dated July 10, 2009 being set aside, what was available for sharing amongst the children of the deceased was 4 ½ acres of LR No Iriaini/chehe/341 when such land did not exist when the orders were made and the succession did not concern such parcel of land;
  - d) Finding that the applicants had no capacity and/or locus standi to file the summons for revocation as they did not rank in priority in degree of consanguinity to the appellants and the other children of the deceased nor were they parties to Karatina Land Case Number 4 of 2008 or the legal representatives of the plaintiffs in that case.
3. By consent parties agreed to dispose of the appeal by written submissions. Further, the respondents filed a replying affidavit in opposition to the appellants' memorandum of appeal. In the interests of justice, the issues in the replying affidavit shall be addressed together with the submissions.

### **The Appellants' Submissions**

4. It is the appellants' submission that the main bone of contention is whether as at July 10, 2009 when the order dated July 10, 2009 in Karatina Principal Magistrate Land Case Number 4 of 2008 was made, Title Number Iriaini/chehe/341 still existed or had it been closed on subdivision and the new numbers registered. If so, could it be said to form part of the estate of the deceased? The appellants answer is in the negative as argued in their submissions.
5. The appellants submit that they listed Title Numbers Iriaini/chehe/1759 to 1761 as the assets comprising the estate of the deceased in their Affidavit in support of the petition for letters of administration. They emphasize that they did not list Title Number Iriaini/chehe/341. They further add that Title Numbers Iriaini/chehe/1759 – 1761 were registered on 28/5/2007 as indicated in the certificates of official search, the consent of the Land Control Board, certificate of compliance, the mutation form and the RIM Amendment Authority. As such, by the time the order of July 10, 2009 was made in Karatina Land Case No 4 of 2008 Title Number Iriaini/chehe/341 did not exist and the petitioners did not file any Succession cause in its respect. Consequently, the appellants submit that the respondents did not prove any fraud and there were no valid grounds for revocation of grant.
6. The appellants further submit that they are the sons of the deceased and are therefore entitled to the grant under section 38 and 66 of the [Law of Succession Act](#). They argue that the respondents are not children of the deceased and are therefore not entitled to his estate. Further, they do not rank anywhere in priority to the appellants in the degree of consanguinity. Neither are the respondents parties to Land Case No 4 of 2008 and as such they lack the capacity or *locus standi* to file the application for revocation of grant. To support their contention, the appellants rely on the decisions in [Immaculate Wangari Munyaga vs Zachary Waweru Ireri](#) [2016] eKLR and [Richard Githae Mwangi vs Ann Wamuyu Baru](#) [2020] eKLR to support their contentions. Based on the foregoing, the appellants pray that the ruling and orders of the lower court dated November 5, 2020 be set aside and be substituted with an order dismissing the application dated July 16, 2020.

#### DIVISION - The Respondents' Submissions

7. The respondents submit that the appellants filed the succession petition for letters of administration without their knowledge or consent yet they were aware that the respondents were beneficiaries of the deceased's estate as interested parties. It is the respondents' case that in 2007, the deceased tried to fraudulently subdivide the land without their consent and was stopped by the court before finishing



the process. The respondents argue that, that is the reason why the petitioners could not get valid/current official search certificates for LR No 1757 and 1758 at the time of filing the instant succession petition. Furthermore, there was no proof of ownership of LR No Iriaini/chehe 1759, 1760, 1761, 1762 & 1763 at the time of filing and confirmation of Succession Cause No 249 of 2018. The respondents contend that the appellants could not get the official search certificates for the parcels of land because the process was stopped by the court before they were registered.

8. The respondents contend that in July 2009 Land Case No 4 of 2008 was heard and determined and LR No Iriaini/chehe/341 was subdivided as follows:-
  - a) Dadson Gatere Ngure – 4 ½ acres
  - b) Alice Wanja Ngure – 1.1 acres
  - c) Erastus Gatere Ngure – 1.1 acres
  - d) Waithanja Ngure – 1.1 acres
9. The respondents further submit that in 2015, the court issued an order authorizing the Executive Officer of the court to execute the necessary documents to facilitate obtaining the Land Control Board Consent to sub divide and Transfer Mutation Forms of Land Parcel No. IRIAINI/CHEHE/341 in place of the deceased who by the time was alive. In 2017, the respondents argue that the appellants proceeded to the Environment and Land Court in Nyeri to stop them from executing the order of the court made on 10<sup>th</sup> July 2009 in which the court dismissed the application. Further in 2018, the respondents state that they contracted the District Surveyor Nyeri to subdivide Land Parcel No. IRIAINI/CHEHE/341 as per the court order issued on 10<sup>th</sup> July 2009. The respondents submit that in the same year, 2018, the appellants filed Succession Cause No. 249 of 2018 without their knowledge which grant was confirmed in April 2020 resulting to the respondents been evicted.
10. The respondents reiterate that they filed summons for revocation of grant and their application was allowed on the grounds that the grant was obtained through concealment of the court order issued on July 14, 2014 in Land Case No 4 of 2008 in respect of LR No Iriaini/chehe/341. As such, the respondents submit that the appeal lacks merit and ought to be dismissed with costs.

### **Issue for determination**

11. The issue for determination is whether this appeal has merit and who ought to meet the costs.

### **The Law**

12. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

13. It was also held in *Mwangi vs Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a



misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

14. Dealing with the same point, the Court of Appeal in *Kiruga v Kiruga & another* [1988] KLR 348, observed that:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

15. Therefore this court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

### **Whether The Appeal Has Merit**

16. The section 76 of the *Law of Succession Act* gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It states that:-

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 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
  - iv. The grant has become useless and inoperative through subsequent circumstances.

17. It is clear from the above provision that a grant may be revoked by the court on its own motion or by application by any interested party. The respondents stated that they are brother and nephew to the deceased to revoke the grant on the basis that the court order issued in Land Case No 4 of 2008 was that the Title No Iriaini/chehe/341 belonged to the family of Ngure Gatere. Being part of the family that was to share the land as per the court order in Land Case No 4 of 2008. The Court of Appeal in



the case of *Re Estate of Yusuf Kipkorir Chepkeitany (Deceased)* [2021] eKLR considered the meaning of the words ‘any interested party’ in section 76 of the Law of Succession and held that:-

It is manifest therefore that the respondents’ argument that an application for revocation can only be brought by a dependant of the deceased is unfounded. Indeed, it is now settled that the above provision is wide enough to include a purchaser. Thus in *Musa Nyaribari Gekone & 2 others v Peter Miyiinda & another* (2015) eKLR the Court of Appeal sitting in Kisumu held that:-

The expression ‘any interested party’ as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate. We are not persuaded, as Mr Oguttu urged that the expression is limited by or should be construed against the provisions of section 66 and 39 of the *Law of Succession Act*. Section 66 provides a general guide to the court of the order of preference of the person(s) to whom a grant of letters of administration should be made where the deceased has died intestate. Section 39 provides for the order of priority of the persons to whom the net intestate estate shall devolve where the deceased left no surviving spouse or children. Those provisions do not in our view have a bearing on the question of who may be an ‘interested party’ for purposes of an application for revocation or annulment of grant of letters of administration under section 76 of the *Law of Succession Act*. There is therefore no merit in the complaint that the learned judge paid undue premium or undue regard to section 76 of the *Law of Succession Act* when he held that the 1<sup>st</sup> respondent has the locus standi to present the application for revocation of grant. We agree with the learned judge that the 1<sup>st</sup> respondent’s interest as a purchaser of the property of the deceased qualifies him as an ‘interested party’ with standing to challenge the grant.

18. Before the Magistrate’s Court in Karatina Succession Cause No 249 of 2018, the appellants established that they were brother and son of the deceased and that under section 66 of the *Succession Act*, they ranked higher in priority to the respondents in obtaining the grant. However the magistrate found that the appellants failed to disclose material facts of the case that there were people with interest in the land of the deceased through a court order. The appellants had proceeded to distribute the whole estate to themselves with the knowledge that part of the land was an entitlement of other people.
19. It is claimed by the appellants that the said court order in Karatina SRM case No 4 of 2008 was set aside but no evidence of that kind was presented before the magistrate.
20. The parcels of land LR Iriaini/Chehe were registered in deceased’s name following sub-division on May 28, 2007. The court order in the Karatina case was issued on July 10, 2007 in regard to the mother parcel LR Iriaini/Chehe/341 which gave part of the land to the respondents and other. To-date the order is still valid and was not challenged on appeal. As such the interests of the respondents cannot be wished away. The respondents have interest on the deceased’s sub-division parcels LR No’s 1757 to 1763 which resulted from the mother title LR Iriaini/Chehe/341. As such the respondents were possessed of the capacity to apply for revocation of the grant.
21. I therefore find that the respondents established their right and expectancy in the estate and as such falls within the category of ‘interested party’ pursuant to section 76 of the *Law of Succession Act*. The learned magistrate was right to find that the respondents had a right to be informed of the filing of the Succession proceedings to give them an opportunity to present their interests.



22. Having established that the respondents had capacity to bring the application for revocation of grant, the question arises whether they sufficiently proved the grounds for revocation of the grant. The respondents based their application that the appellants filed for the petition of letters of administration concealing the material fact that Title No. IRIAINI/CHEHE/341 was subdivided as per the judgment in Karatina SRM Case No. 4 of 2008. The appellants argue that by the time the succession proceedings were filed, Title No. IRIAINI/CHEHE/341 ceased to exist and further in their petition for letters of administration they listed the assets of the deceased as Title No. IRIAINI/CHEHE/1759 – 1761. I have perused the record and noted that the Certificates of Official Search in respect of Title No. 1757 – 1763 indicate that the registered owner of the land is the deceased. The certificates are all dated 3<sup>rd</sup> March 2020 and they indicate that the land was registered in the name of the deceased on 28/5/2007. There is also on record, a caution lodged and registered on 19<sup>th</sup> June 2007 by Jennifer Wamuyu Gatere who is a relative to the deceased. There is also on record a Certificates of Official Search dated 14<sup>th</sup> September 2017 and 11<sup>th</sup> November 2019 which indicates that the deceased is the proprietor of the said property but indicates the caution lodged. Furthermore the respondents attached the order dated 10<sup>th</sup> July 2009 in Karatina Land Case No. 4 of 2008 which shared L.R. No. IRIAINI/CHEHE/341 as follows:-
- a) Dadson Gatere Ngure – 4 ½ acres
  - b) Alice Wanja Ngure – 1.1 acres
  - c) Erustus Gatere Ngure – 1.1 acres
  - d) Waithanji Ngure – 1.1 acres
23. Previously there were other suits between the appellants and the respondents regarding the same land LR Iriaini/Chehe/341. In ELC 146 of 2017 the appellants sued the 1<sup>st</sup> respondent and two others seeking a declaration that they were the beneficial owners of the land. They also sought to restrain the defendants therein from interfering with the same land. The suit was dismissed for being defective.
24. I reach a conclusion that the appellants were all along aware of the interests of the respondents but have made several attempts to take and possess the whole estate of the deceased. The interests of the respondents being within the knowledge of the appellants, they ought to have informed them of this succession cause and disclose to the court during distribution that there were other interested parties in the estate. This was not done and it amounts to non-disclosure of facts material to this cause.
25. The argument that LR Iriaini/Cheche/341 did not exist cannot be valid in the court had already set aside the acreage of the land to which each respondent was entitled to from the original parcel.
26. In my considered view, the evidence before the magistrate in Karatina Succession Cause No 77 of 2003 was sound proof that the appellants had the knowledge that the respondents had a stake in the estate of the deceased, yet they failed to disclose this material fact to the court. The intention of the appellants was to deny the respondents of their right in the estate of the deceased which the court had already given the respondents. No appeal has been preferred against the judgement in the ELC case to date. The magistrate therefore had a good basis for revoking the grant issued in favour of the appellants.
27. In conclusion, I find no merit in this appeal and dismiss it with no order as to costs.
28. It is hereby so ordered.

**DATED AND SIGNED AT NYERI THIS 22ND DAY OF SEPTEMBER, 2022.**

**F. MUCHEMI**



**JUDGE**

**JUDGMENT DELIVERED THROUGH VIDEO LINK THIS 22ND DAY OF SEPTEMBER, 2022**

