



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of M'Mkiriti Mbwiria (Deceased) (Succession Cause
345 of 2015) [2022] KEHC 14239 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14239 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 345 OF 2015
EM MURIITHI, J
OCTOBER 21, 2022**

IN THE MATTER OF THE ESTATE OF M'MKIRITI MBWIRIA (DECEASED)

JUDGMENT

1. By Summons dated 15/8/2016 brought under section 76 of the [Law of Succession Act](#), Rule 44(1) of the Probate and Administration Rules, the applicant seeks:
 1. That the Grant of Letters of Administration issued to Salome Kinya Kiogora on 22/1/2013 be revoked.
 2. Spent
 3. That LR No Ntima/Ntakira/4089 do revert to the estate of M'Nkiriti Mbwiria for distribution.
 4. That costs of this application be borne by the Respondents.
2. The application is premised on the grounds on the face of it and the supporting affidavit of the applicant sworn on even date. He avers that he is the son to Delfina Cioburu (deceased), who was the daughter to a brother of the deceased herein namely M'Ituruchiu M'Mbwiria (also deceased). The deceased herein M'Nkiriti M'Mbwiria held land parcel No Ntima/Ntakira/166 (henceforth called the suit property) in trust for the benefit of himself and the late M'Ituruchiu M'Mbwiria, the grandfather of the Applicant. The late M'Ituruchiu M'Mbwiria was entitled to half share of the suit property and settled on his entitlement in his life time. Flowing from this state of affairs his two sisters and him through their mother Delfina Cioburu grew up on a portion of the suit property and have made extensive developments thereon.
3. The applicant deponed that on 15/8/2009, he initiated the clan meeting to deliberate on the issue of the family land after it emerged that the children of the deceased herein were plotting to disinherit them. During the deliberation, the deceased expressly acknowledged that his brother M'Ituruchiu M'Mbwiria was entitled to a share of the family land which should in his absence devolve to his grandchildren, who were in any case settled thereon. The deceased proceeded to subdivide the family



land into 2 equal shares in preparation of transferring one half thereof to him. The deceased however passed away prior to completing the transaction.

4. The applicant averred that upon the death of M’Kiriti M’Bwiria, the family of the deceased secretly and with the intention to defraud his sister and himself filed Chuka CM Succ. No 310/2011 and had the estate distributed. The Applicant further contended that 2nd respondent, who is the step daughter of the 1st respondent has obtained the registration of LR No Ntima/Ntakira/4089 through fraudulent means as the deceased had already passed away when the registration was done. He avers that he had previously initiated Meru H.C Succ. No 51/2014 challenging the grant and obtained interim order of inhibition. The probate registry at Meru has closed the file as the lower court record had not been forwarded to it by the time the High Court at Chuka was established. He was thus advised to pursue his grievances before this court hence this application.
5. He said that he is advised by his counsel on record that the Chuka Court lacked the requisite jurisdiction to entertain a succession cause relating to the subject estate for the reason that the suit property is situated at Gikumene area approximately 5 Kilometres from Meru Law Courts, the pecuniary value of the subject property far exceeds Kshs 100,000. He avers that he and his sister lived on the family land and petitioner has effectively disinherited them. Indeed, they are apprehensive that the numerous strangers in whose favour the subject property was illegally distributed may seek to evict them therefrom. He prays that the grant issued to the petitioner be revoked for proper distribution of the estate of the deceased to be undertaken.
6. The application was opposed by the replying affidavit of Salome Kinya, the 1st respondent herein filed on 1/11/2016. She avers that M’Ituruchiu M’Mbwiria did not in his lifetime lay a claim against the deceased over the suit property on trust, as he had a separate parcel of land. She denies the allegation that the deceased held the suit property in trust for himself and the said M’Ituruchiu M’Mbwiria, and maintains that the applicant is not a beneficiary of the deceased estate, and thus he did not need to be notified of the filing of the cause. She avers after the death of M’Ituruchiu M’Mbwiria, his daughter Cioburu came to live on his land which is opposite to the suit property. She avers that the applicant and his siblings live on a separate land which is distinct from the suit property, and denies the applicant’s contention of intending to evict them. She denies the allegation that elders met to deliberate on any claim regarding the applicant in regard to the suit property or at all, and questions the authenticity of the minutes therefrom. She avers that the registration of parcel No Ntima/Ntakira/4089 in the name of Hellen Gacheri is the subject of Meru ELC Case No 55 of 2016.
7. The 2nd respondent, Hellen Gacheri, in her replying affidavit sworn on 31/10/2016, avers that she is the daughter to the deceased herein, the 1st respondent is her step mother while the applicant is her cousin. She said that the deceased herein was the owner of the suit property which was subsequently subdivided into 2 equal portions namely Ntima/Ntakira/4089 and Ntima/Ntakira/4090. She is the registered owner of land parcel No Ntima/Ntakira/4089 which was given to her as a gift inter vivos by the deceased during his lifetime. When the 1st respondent left the deceased over 40 years ago and went to settle at Kiirua Division, the deceased married her mother (now deceased) and she was the one who took care of the deceased in his old age. It was the deceased desire to transfer land parcel No Ntima/Ntakira/4089 to her and land parcel No Ntima/Ntakira/4090 to the 1st respondent and her children. On 12/1/2010, the deceased successfully obtained the Land Control Board Consent to transfer land parcel No Ntima/Ntakira/4089 to her. She only registered the transfer in July 2010 since after the death of the deceased on 24/11/2010, she was engaged on his burial preparations and faced financial constraints. She avers that land parcel No Ntima/Ntakira/4089 does not form part of the deceased estate and the applicant resides on another parcel owned by M’Turuchiu M’Bwiria and not on either Ntima/Ntakira/4089 or Ntima/Ntakira/4090.



8. The applicant filed a statement on 4/9/2018 rehashing what he had stated in his supporting affidavit. James Munyua, in his statement dated 9/7/2018 confirmed to have attended a meeting at the applicant's home with members of the family, some elders, the then area chief Mr. Kinyua and the assistant chief, where the issue of subdivision of the suit property was deliberated on. He urges the court to allow the applicant's application. According to the statements by M'Rintari M'Ramare, Bishop Erastus Kathurima and M'Mukindia Gararu all dated 9/7/2018, the deceased and Muturuchiu M'Mbwiria lived on the suit property in harmony, and the deceased had, prior to his death, vowed to allocate the late Muturuchiu's portion to his grandson, the applicant herein. Mrs. Julia Ruguru, in her statement dated 9/7/2018 states that the deceased and the late Muturuchiu M'Mbwiria were her uncles. She states that the deceased agreed before the council of elders to give the applicant the portion of land that they used to cultivate, but he unfortunately died before fulfilling that promise.
9. The 1st respondent, vide her statement dated 18/8/2018 states that the applicant and her siblings were not born on either the suit property or the land belonging to M'Ituruchiu M'Mbwiria. She denies the claim that the deceased gave the applicant's mother any land. Monicah M'Ngaruti and Ruth Karimi, filed their statements dated 18/8/2018, fully supporting the averments by the 1st respondent.

Viva Voce evidence

10. The parties and their witnesses were subsequently orally examined on their witness statements before the court. Thereafter, the court directed that the application be canvassed by way of written submissions which were respectively filed on 10/5/2022 and 30/5/2022.
11. The applicant testified as AW1 and called as witnesses AW2 M'Mukindia Guraru, AW3 Stephen MArintari M'Arermere, AW4 Erastus Kathurima M'Mugambi and AW5 Julia Ruguru. The 1st respondent testified as RW1 and called RW2 Ruth Karimi and RW3 Monica Nkirote M'Ngaruti.
12. The 2nd respondent did not attend court to testify in the matter.

Submissions

13. The applicant submits that since the grant was issued by a court that did not have jurisdiction, the proceedings thereof were defective in substance, and there was concealment from the court of the material fact that the applicant was a beneficiary of the deceased. He urges that the 1st respondent had admitted on cross examination that she was coerced to sign the petition for Letters of Administration, some of her children were left out and the instant application was filed without her consent and/or proper knowledge. He urges that he has sufficiently demonstrated that the grant was issued irregularly and fraudulently and, therefore, calls for revocation. He urges that he is entitled to a beneficiary interest from the deceased estate having proved existence of customary trust between his grandfather and the deceased herein, and relies on the Court of Appeal case of *Mbui Mukangu v Gerald Mutwiri Mbui* (2004) eKLR. He submits that the grant ought to be revoked so that the estate can be distributed to the rightful beneficiaries. He relies on *Re Estate of Obedi Ndwiga Rubarita (Deceased)* (2021) eKLR, *Antony Karukenya Njeru v Thomas M. Njeru* (2014) eKLR, *In the matter of the Estate of Muriranja Mboro Njiri* Nairobi H.C Succ. Cause No 935 of 2003), *In the matter of the Estate of Isaac Kireru Njuguna (deceased)* (2019) eKLR and *Matheka and Anor v Matheka* (2005) 2KLR 455, in support of his submissions.
14. The 1st respondent submits that the applicant lays a claim as a grandson of one M'Ituruchiu M'Mbwiria who was a step brother to the deceased herein. The applicant's claim is that his grandfather was entitled to a share of the suit property, which was subdivided to Ntima/Ntakira/4089 and 4090. She urges that the applicant has no locus to claim from the estate of his step father. She refutes the



claim that the suit property was ancestral property held by the deceased for himself and his brother M'Ituruchiu, as the deceased acquired the suit property while his brother acquired Ntima/Igoki/377, and in any case, issues of trust can either be dealt with by a succession court or an ELC court. She accuses the applicant of failing to prove that his grandfather had developments on the suit property, and relies on *re Estate of Thuruaime Mwitari (Deceased)* [2020] eKLR. She faults the applicant of failing to prove the existence of a customary trust or at all, and therefore he is not entitled to inherit from the deceased estate, and relies on *Timothy Muchina Chege & Anor v Elisipha Wanjiku Thiongo* Nyeri Court of Appeal Civil Appeal No 134 of 2010.

15. The 2nd Respondent did not file submissions.

Analysis and Determination

16. Having considered the application, the affidavits, witness statements and examination thereon together with the submissions on record, the issue for determination is whether the grant should be revoked, on the basis that there existed a trust.

Locus standi of the Applicant

17. As a grandson of the brother of the deceased herein who in the absence of his mother the only daughter of the late M'Ituruchiu, and who seeks to establish a trust on the suit property registered in the name of the deceased herein for himself and the said M'Ituruchiu, the applicant is clearly a person interested within the meaning of section 76 of the *Law of Succession Act* upon whom is bestowed statutory right to apply for revocation of a Grant or Confirmed grant as follows:

“76. 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—

- i. that the proceedings to obtain the grant were defective in substance;
 - ii. 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;
 - iii. 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—
 - iv. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - v. to proceed diligently with the administration of the estate; or
 - vi. 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
 - vii. that the grant has become useless and inoperative through subsequent circumstances.
18. Whereas the applicant alleges that the suit property was held by the deceased in trust for himself and his grandfather, M'Ituruchiu M'Mbwiria, the 1st respondent is certain that the deceased and the said



M’Ituruchiu M’Mbwiria had their distinct portions of land. The Court was called upon to hear and determine the dispute as to existence of trust in the matter. The applicant has clear locus standi.

Jurisdiction of the Succession Court on Trust

19. I take guidance and respectfully agree with the Court of appeal decision in *[Zipporah Wanjiru Mwangi v Zipporah Wanjiru Njoroge](#)* [2017] eKLR (GBM Kariuki, Sichale & Kantai, JJA.) on the jurisdiction of the succession court to determine an issue of trust:

“The context in which the issue of trust was determined was succession proceedings. The learned Judge gave orders on the procedure to be followed in tendering evidence to enable him to determine the matter. He ordered that viva voce evidence would be given. A party who had opportunity to present or adduce evidence but declined to do so cannot be heard to complain if the court makes a fair determination based on the evidence before it. In succession proceedings where, as here, existence of trust is alleged in respect of land claimed to be family land, it is appropriate for the court to give directions on the procedure to be followed for adduction of evidence. Such procedure cannot be discredited merely on account of the fact that succession proceedings are designed to determine heirs and distribution of estate and not issues of trust. The fact that the court was called upon to determine whether the suit land was beneficially held and therefore not subject to distribution or whether it was family land and therefore liable to distribution among the heirs in the succession in itself justified the determination of the issue of trust. Where, as here, the issue (of trust) arises in succession proceedings whether the land is family land and therefore is subject to trust or whether it is owned absolutely by the deceased, and therefore is not subject to distribution, the court hearing the succession proceedings has jurisdiction to determine the issue and to give appropriate directions on the hearing. This is in line with the jurisdiction vested in the High Court by Article 165 (3) (a) of the *Constitution* and Section 47 of the *Law of Succession Act*, Cap. 160. Moreover, the *Constitution* of this country enjoins and expects the courts to determine the dispute fairly and with expedition, and without undue regard to technicalities of procedures - see Articles 159 (2) (d), 48; 50 (1); 10(1) (A); 10 (2) (b); 20 (2); 21(1), 165 (3) (a) and 164 (3).”

See also *re Estate of Thuruaine Mwitari (Deceased)* [2020] eKLR (F. Gikonyo, J)

20. The copy of Green Card registers on record shows that the suit property was registered in the name of the deceased on 7/4/65 and he was subsequently issued with a land certificate on 17/1/72. The suit property was on 26/8/09 subdivided to Ntima/Ntakira/4089 and 4090, which were both registered in the name of the deceased. It appears that the deceased on 18/6/2010 transferred Ntima/Ntakira/4089 to the 2nd respondent and she was issued with the title deed thereto. It is evident that the process through which the 2nd respondent acquired title to Ntima/Ntakira/4089 is pending determination at Meru Environment and Land Court.
21. The determination of trust in this case does not affect or prejudice the hearing and termination of the Environment and Land Court proceedings on the acquisition of the parcel of land Ntima/Ntakira/4089. The determination in this suit on trust only finds whether the original parcel of land making the two equal subdivisions parcels nos. 4089 and 4090 was held upon trust over a portion thereof for the deceased’s brother M’Turuchiu. Even with trust established, the deceased still lawfully held substantial portion of the parcel No Ntima/Ntakira/166 of which could lawfully transfer to the 2nd Respondent, if that is established, in fact, to have been the case.



Proof of Trust

22. The Court notes the decision of *T M C & another v E W T* [2014] eKLR (Visram, Koome (as she then was) Otieno Odek, JJA) relied on the 1st respondent in her submission of want of evidence to support an implied trust:

(19) It is trite law that he who makes an allegation must prove it. In this case, the appellants alleged the existence of a trust; that the respondent held the suit land in trust for the appellants and C (deceased) as well as for herself. Therefore, the issue for determination is whether the appellants proved the existence of the alleged trust over the suit land. In *Mumo v Makau*, (2004) 1 KLR 13, this Court held that trust is a question of fact and has to be proved by evidence. In *Mbothu & 8 others v Waitimu & 11 Others*, (1986) KLR 173, this Court expressed itself as follows:-

“The law never implies, the court never presumes a trust, but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

Further, this Court in *Gichuki v Gichuki*,- Civil Appeal No 21 of 1981 stated that a party relying on the existence of a trust must prove through evidence the creation and existence of such trust.”

23. This statement of the law is valid where the trust is express or to be implied based on the intention of the parties as evidenced by their conduct. This is to be distinguished from constructive trust which is imposed by the court of equity to avoid unconscionable consequences of the offending party.

Constructive trust and resulting trusts

24. The Respondent based her objection to the applicant’s suit by submission on absence of an express trust. With respect the applicant’s case appears to be based on constructive trust on the basis of the ownership of land originally by M’Mbwiria the father of two step brothers M’Kiriti and M’Turuchiu. This Court is grateful and respectfully agrees with the exposition on the types of trusts by the Court of Appeal in *Twalib Hatayan & another v Said Saggat Ahmed Al-Heidy & 5 others* [2015] eKLR (Makhandia, Ouko (as he then was) M’Inoti, JJA.):

“Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. *Halsbury’s Laws of England* vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see *Black’s Law Dictionary*) (*supra*). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust



will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. *Halsbury's Laws of England supra* at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore, there is no unjust enrichment to be forestalled.

This leaves us with resulting trusts; upon which the appellants had laid their claim. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see *Black's Law Dictionary*) (*supra*). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See *Snell's Equity* 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see *Snell's Equity* at p.177) (*supra*)."

25. The intention, albeit belated intention, of the parties this case may also be read from conduct at the family meeting of 2009 where the registered proprietor of the suit land agreed that he held the land upon trust for his brother and was willing to transfer a portion thereof before he passed away.

Trust conceded

26. From the minutes of the family meeting held on 15/8/09 at the applicant's home at 12.00 Noon, the applicant, the 1st respondent, James Munyua and Bishop Erastus Kathurima were present. In that meeting, it was recorded that, "The host was asked to give some briefs on the issue to be deliberated on. He claimed that the Late M'Ituruchiu M'Mbwiria, his grandfather had left a piece of land which they have owned for over forty years. Part of the land which is across the road is said to have been given to the late M'Ituruchiu M'Mbwiria by his brother M'Nkiriti M'Mbwiria. The bone of contention is on this part of land which the dependants of M'Nkiriti M'Mbwiria claim to be theirs....M'Nkiriti said that he gave that part of land to his brother with no intentions whatsoever of reclaiming the land. He also said that his late brother had planted all the coffee in that particular land and everything else in that land belonged to his late brother. On being asked whether he will give title deed to this particular parcel of land to the dependants of his late brother, he said he will do so since he had no intentions of claiming the same from the grandchildren of his late brother who are now the occupants of the land following the death of their grandfather and their mother. The clan members present argued that the entire land belonged to M'Mbwiria, who is the father of M'Ituruchiu and M'Nkiriti and that each one of them should remain in the land where they've been for years."
27. M'Rintari M'Ramare, in his statement, admits that, "Late Maturuchiu has been cultivating the land in question since when the land was demarcated...Late Maturuchiu used to stay alone yet on the contrary his brother was married thus taking the lions share and cultivating the larger portion of the land." This is equally acknowledged by the applicant, Bishop Erastus Kathurima, M'Mukindia Gararu and Julia Ruguru Mwiti in their statements. Julia Ruguru Mwiti states that, "Late Ntongiriti had given his brother Maturuchiu a piece of land whereby he planted coffee trees and used it for cultivation. I used to go and assist them to pick the coffee....Ntongiriti agreed before the council of elders to give Muriungi



(grandson to his brother) the portion of land that they used to cultivate but Ntongiriti's second wife objected on claims that some of her siblings were not present. She requested chief for another meeting. Unfortunately, the late Ntongiriti died before accomplishing his wish." The applicant in his statement states that, "during the deliberations M'Nkiriti M'Mbwiria expressly acknowledged that his brother M'Ituruchiu M'm'Mbwiria was entitled to a share of the family land which should in his absence devolve to his grandchildren who were in any case settled thereon."

28. The 1st respondent and her witnesses seem to suggest that since the applicant and his siblings were neither born nor lived on the suit property or that belonging to their grandfather, which according to them is distinct from the suit property, the applicant is not entitled to a share thereof. The place of birth of the applicant and his siblings is immaterial. Their claim is derived from their relationship with the late M'Turuchiu whose brother the deceased herein held upon trust a portion of the suit property for him.
29. This court is, on a balance of probabilities, convinced that it is more likely than not that the deceased in recognition of the fact of his brother taking a smaller portion across the road and considering that the entire land belonged to their father M'Mbwiria, accepted that he held a portion of the parcel of land (originally plot 166) on behalf of his brother M'Turuchiu who had only been registered to a smaller parcel of land.
30. The applicant has demonstrated, by way of evidence that the deceased indeed held the suit property in trust for himself and the applicant's grandfather (now deceased). This court finds that the intention of the deceased and M'Ituruchiu M'Mbwiria to concede create a trust has been clearly determined. However, the applicant's claim succeeds on the ground, rather than this express or implied trust, of constructive trust in the registration of the suit property in the name of one of two brothers of their father's land, which constituted the registered brother M'Kiriti M'Mbwiria a constructive trustee, and unlike in *Muchungu v. Muchungu* (1984) KLR 202, there is ample evidence in this case establishing a trust. It is clear from the minutes of the family meeting held on 15/8/2009 is that, "Part of the land which is across the road is said to have been given to the late M'Ituruchiu M'Mbwiria by his brother M'Nkiriti M'Mbwiria."

Conclusion

31. The Grant made in this cause to the 1st respondent was fraudulent for concealing the fact of the deceased held the suit land upon trust for his brother. In addition, the petition also concealed the existence of deceased children such the Petitioner/Respondent's witnesses Nos. 2 and 3, who while denying the entitlement of the Objector applicant to share in the estate, wish to be provided for from the estate of their father, M'Kiriti M'Mbwiria..
32. It was common ground that M'Kiriti and M'Turuchiu were step brothers sons of the deceased M'Mbwiria by different mothers and they were entitled to inherit his property. It was also common ground that the two brothers had settled on portions of land across a road by pass, and M'Turuchiu, his wife and daughter had been buried on their portion of the land across the road from M'Kiriti's side. The point of disagreement was whether the family of M'Turuchiu who had their home across the road from M'Nkiriti also had a portion on the side occupied by M'Kiriti where they had planted coffee, and the exact size of such portion, if any, was not stated.
33. While the respondent's case was that the family of M'Turuchiu had their share of the inheritance from M'Mbwiria across a road by-pass and the family of the M'Kiriti on the other side of the road, there was no suggestion that or explanation as to why M'Turuchiu should have inherited a smaller portion of his father's Estate than his brother M'Kiriti. A mention that he had not married at the time of the



demarcation was not developed by any further evidence of any family meeting and his concurrence that he should take a smaller share. The Court is not able to assign to him a smaller share of his father's estate merely because he had, at the time of demarcation, not married or of full sound mind, though by the testimony of some witnesses he was the elder of the two brothers, if that counted for anything in the practices and customs of the Ameru before the enactment of the [Law of Succession Act](#).

34. The Court shall, therefore, order distribution of the family parcel as originally registered LR Ntima/Ntakira/ 166 be distributed in EQUAL shares to the M^oMwibiria brothers, M^oTuruchiu and M^oKiriti, and, as they are now deceased, their respective half share of their father's land as it existed before demarcation and registration of the two parcels of land in the names of the brothers including the bigger parcel of land Ntima/Ntakira/166 registered in the names of M^oKiriti Mbwiria, shall be shared to their respective Estates. The outcome should be that the Estates of M^oKiriti and M^oTuruchiu will upon distribution have obtained equal shares of the land originally belonging to their father M^oMbwiria.
35. Necessary re-survey of the parcels of land and any subdivided portions occupied by the families of the two brothers, which originally made the estate of their father M^oMbwiria shall be done with view to ascertaining the exact acreage that each family should inherit from their father and subsequently re-arrange the two parcels of land accordingly. Needless to say, the court accepts the principle that in the distribution of estates the scheme of sharing should as much as possible having regard to the size, position, equality and equity in distribution agree and coincide with the areas of the estate that respective beneficiaries have already occupied so as to occasion minimal expensive disruption of prior and long settlement of the beneficiaries.

Powers of the Court

36. Section 47 of the [Law of Succession Act](#) spells out the jurisdiction of the High Court in the administration of estates in these terms: "The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient."
37. Rule 73 of the [Probate and Administration Rules 1980](#) provides that, "Nothing in this rule shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court."
38. This court is satisfied that the Grant of Letters of Administration issued to the 1st respondent herein and confirmed on 22/1/2013 was obtained by concealment of the material fact that the suit property was held by the deceased upon trust for himself and his brother M^oIturuchiu M^oMbwiria. In terms of section 76 of the (1) of the [Law of Succession Act](#), the Grant so obtained must be revoked as being fraudulent.

Orders

39. Accordingly, for the reasons set out above, and in the exercise of power of the Court under section 47 of the [Law of Succession Act](#) and Rules 73 of the Probate and Administration Rules to make such orders as are necessary for the administration and distribution of estates of deceased persons, the Court makes the following Orders:
 1. The Grant of Letter of Administration issued to the 1st Respondent herein and confirmed on 22/1/2013 is hereby revoked.



2. A new Grant of Letters of Administration shall be issued in the names of the Applicant and the 1st Respondent jointly.
3. Parcel of Land LR No Ntima/Ntakira/4089 and Parcel of land LR No Ntima/Ntakira/4090, the two subdivisions of Parcel of Land LR. No Ntima/Ntakira/166, shall revert to the estate of M'Nkiriti Mbwiria, if already transferred on transmission, and the same shall be distributed in such a manner so that together with Parcel of land LR. No Ntima/Ntakira/377 the aggregate acreage of the two plots of land is divided between the Estates of two M'Mbwiria brothers, M'Turuchiu Mbwiria and M'Kiriti Mbwiria, in equal shares.
4. There shall be liberty to apply for any necessary orders with regard to implementation of the decision of the Court hereinabove.
5. The matter shall be mentioned for compliance within ninety (90) days of this court's judgment.
6. Each party to bear its own costs.

DATED AND DELIVERED THIS 21ST DAY OF OCTOBER, 2022.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Ashaba Advocate for the Applicant.

Mrs. Ntarangwi Advocate with Ms. Athieno Advocate for the Respondent.

N/A for the 2nd Respondent.

