



In re Estate of Ntutua Mungania (Deceased) (Miscellaneous Succession Cause E027 of 2021) [2022] KEHC 17138 (KLR) (22 November 2022) (Ruling)

Neutral citation: [2022] KEHC 17138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS SUCCESSION CAUSE E027 OF 2021**

LW GITARI, J

NOVEMBER 22, 2022

BETWEEN

LAWRENCE NJERU NJAGI APPLICANT

AND

SABASTIAN NJAGI MARANGU RESPONDENT

RULING

1. This cause relates to the estate of the late Ntutua M’Mungania (the “deceased”). This court has been called upon to determine the summons for revocation and/or annulment of grant dated 27th April 2021. The specific orders sought in the application are as follows:
 - a. Spent.
 - b. Spent.
 - c. That the letters of administration issued to Sabastian Njagi Marangu made on 22nd October 2001 and certificate of confirmation of grant confirmed on the 8th day of August 2002 be revoked.
 - d. That the honourable court be pleased to revert the land parcel number Muthambi/ Chamunga/237 to the name of the deceased Ntutua M’ungania.
 - e. That cost of this application be in cause.
2. The application is supported by the Applicant’s affidavit sworn on 27th April 2021 and based on the following grounds:
 - a. That the grant was obtained by means of untrue allegations of a fact essential in point of law to justify the grant in that the adminitratrix in his supporting affidavit left out other beneficiaries.



- b. That the Chief's letter filed before this honourable court on 31st May 2001 is deceiving since it does not disclose the actual and true dependents of the late Ntata M'mungania.
 - c. That the petitioner one Sebastian Njagi Marangu is malicious and acting with greed to deprive other families members the rightful shares of land.
 - d. That one Sebastian Njagi Marangu maliciously appointed himself as the petitioner of the estate without the consent from the other family members.
 - e. That the Respondent herein has been threatening to evict all other dependents out of the said suit land and he has been cutting off other indigenous plants in the said land some belonging to the other dependents of the estate.
 - f. That the grant was obtained fraudulently by concealing certain facts material to this case.
 - g. That the applicant was fraudulently left out during the distribution of the estate of the late.
 - h. That the effect of the said Certificate of Confirmation of Grant has been highly prejudicial to the Applicant and other beneficiaries.
3. The Respondent opposed the Application vide the Replying Affidavit sworn on 10th June 2021. He deposed that he is a grandson of the deceased and that the deceased bequeathed him land parcel no. L.R. Muthambi/Chamunga/237 (the "suit land"). According to him, the deceased died on 14th July 1980 testate.
 4. The Respondent further deposed that the aforementioned sons of the deceased benefited from the deceased intervals during the deceased's lifetime in the following manner:
 - a. Nelson Njagi – L.R. Muthambi/Chamunga/378 – 3.00 Acres
 - b. Joses M'Dubai Ntata – L.R. Muthambi/Chamunga/371 – 3.00 Acres
 - c. M'Ribu Ntata – L.R. Muthambi/Chamunga/315 – 3.00 Acres
 5. According to the Respondent, the deceased was left with the suit land which he orally bequeathed to the Respondent on or around 1974. That on or around June 1980, the deceased repeated his oral will whereby he bequeathed the suit land to the Respondent in the presence of M'Ribu Ntata (deceased's son), Didacause M'Ribu (deceased's grandson), and the Respondent himself. The Respondent thus stated that there was no secrecy in filing and prosecuting the succession cause as averred by the Applicant.
 6. The Application was canvassed by way of viva voce evidence. Below is a summary of the respective testimonies by the parties.

The Applicant's Case

7. The Applicant testified as PW1. He relied as his evidence the affidavit and supplementary affidavit that he swore in support of his application on 27th April 2021 and 3rd December 2021 respectively. He testified that he was the deceased's grandson and that the late Nelson Njagi was his father. He is also the step-brother to the Respondent. According to him, the introductory letter from the chief that the Respondent used to obtain the subject grant was incorrect as it did not disclose all the beneficiaries of



- the deceased. He stated that his late father was living in the suit land and that he (the Applicant) does zero grazing on the land and has planted some trees. The Applicant denied that the deceased made an oral will bequeathing the suit land to the Respondent and thus urged this court to revoke the grant.
8. PW2 was Gervasio Njabani Jose Nelson. He is the son of the late Dubai Ntutua hence the deceased's grandson. He confirmed that the Applicant and the Respondent are stepbrothers. That their father, the late Nelson Njagi had two wives. The first wife had four children and the second wife also had four children. According to PW2, the deceased left the suit land for all the children of Nelson Njagi. On cross examination, PW2 stated that the deceased gave each of his sons 3 acres each and since Nelson Njagi had two wives, each house got 1.5 acres. That the land parcel that Nelson Njagi got from the deceased was registered in the names of his children because he was mentally sick. The first house and second house being registered in the names of Peter Kaburu and the Respondent respectively. That the 1.5 acres that Peter Kaburu held are land parcels no. 613 and 614.
 9. PW3 was Peter Miriti Njeru. He adopted his affidavit sworn on 3rd December 2021 as his evidence. He stated that he was the grandson of the deceased and that Ntutua Dubai was his father. That the suit land was occupied by Nelson Njagi Ntutua and that Sebastian Njagi, John Peter Nyaga, Fidelis and Lawrence Njeru also live on the land. According to him, the deceased had indicated that he left the suit land to Nelson Njagi and his two wives. He corroborated PW2's testimony that the deceased had in his lifetime divided the suit land to his sons and stated that his father got land parcel no. 651. That Nelson Njagi was given land but the same was registered in the name of his children as he had a mental problem. Further, that Peter Kaburu and Sebastian were each given 1.5 acres each to hold for their respective houses.
 10. PW4 was Fides Gaaji Nyaga, the wife to Nyaga and daughter-in-law to Nelson Njagi. She stated that she lives and farms on the suit land but the Respondent asked them to vacate. She further stated that she moved to the suit land in October 1988 and lived there until now.
 11. PW5 was Dominic Murithi, the assistant chief of Githitu sub-location. He stated that he attended a meeting regarding the deceased's estate in 2018. He was called for the meeting by the Respondent and the meeting was held on the suit land. In the meeting, they discussed how the land was to be subdivided into four portions for each of the family members living on the land. He noted that the Respondent had constructed a homestead on the suit land while the Applicant had put up a cow shed. There was no other home on the land.

The Respondent's Case

12. M'Arumbu Ntutua testified as DW1. He is a son to the deceased. He recognized both the Applicant and the Respondent as his nephews and sons of Nelson Njagi. He conceded that the deceased gave his children parcels of land before he died. That he was given L.R. Muthambi/Chamunga/315 and his brother Ndubai was given L.R. Muthambi/Chamunga/371. That the deceased was also left with some land. According to DW1, the deceased stated that he would give the land he remained with to the person who would take care of him in his old age. It was further his testimony that in 1974, the deceased called his sons and told them that he would give his portion of the land to the Respondent. This was before the deceased passed away in 1980.
13. According to DW1, the deceased gave the Respondent the go ahead to build on the suit land and the Respondent consequently built his house while the deceased was alive. He further testified that when the deceased died, he accompanied the Respondent, and his brother to the chief's office to collect the introductory letter and nobody objected to the Respondent getting the suit land. He thus stated that the Applicant was not supposed to get a portion of the suit land as per the wishes of the deceased. DW1



further testified that the Respondent allowed his brothers to use the suit land and the Applicant built a cowshed thereon. This court noted that although DW1 was quite elderly, he had no impediment to giving coherent evidence.

14. The Respondent subsequently testified as DW2. He corroborated DW1's testimony that he is the grandson of the deceased and that the deceased distributed his land to his sons and was left with the suit land as his portion. That the deceased had given him the suit land by the time he died and that the deceased's sons, save for DW2's father who was mentally sick, were witnesses when the deceased decided to give the Respondent the suit land. DW2 explained that the deceased decided to give him the land because he (DW2) was the one taking care of him (the deceased). To prove ownership of the various parcels of land that he the deceased gave him and the sons to the deceased, DW2 produced in evidence the green cards in respect of the said parcels of land. That is, the green card in respect of L.R. Muthambi/Chamunga/237, 378, 371, and 318 were produced as exhibits no. 1, 2, 3, and 4 respectively. DW2 confirmed that he was given L.R. Muthambi/Chamunga/378 to hold for his household because his father was mentally ill and that he did distribute it to his brother. He produced as exhibits no. 5 and 6 the green cards for land parcels no. L.R. Muthambi/Chamunga/613 and 614 which he stated was given to Kaburu to hold for the other household of his father. DW2 also testified that the Applicant lives on L.R. Muthambi/Chamunga/613 and 614 and that he has never occupied the suit land. According to DW2, he allowed the Applicant to use the suit land and the Applicant move in, constructed a cowshed and refused to vacate. DW2 claimed that the Applicant was aware when he filed the succession cause and raised no objection.
15. DW3 was Didakus M'Aribu, a grandson of the deceased and son to DW1. He testified that the deceased was living with DW1 before he died. He identified both the Applicant and the Respondent as his cousins. According to him, the suit land belongs to the Respondent on account that the deceased gave him the land. He stated that in 1974, the deceased sent him to call the Respondent, DW1, and Joseph Dubai and when they came, the deceased expressed that the suit land should go to the Respondent. He thus corroborated the testimonies of DW1 and DW2.

Issues for Determination

16. Having considered the summons application dated 27th April 2021, the respective testimonies of the parties, as well as the written submissions by counsel for the Respondent, the main issue that come out for determination by this court is whether the Applicant has laid down a basis to warrant the revocation of the grant issued to the Respondent.

Analysis

17. The instant application is expressed to be brought pursuant to the provisions of Section 76 of the *Law of Succession Act*, Chapter 160 of the Laws of Kenya (hereinafter referred to as the "Act"), Rule 44 of the *Probate and Administration Rules* (hereinafter the "Rules"), and Section 68 of the *Land Registration Act*, 2012.
18. From the onset, it is notable that the deceased died on 14th July 1980 while the Act came into force in 1981. Section 2 of the Act provides for such an estate as the present one which is in respect of persons dying before the commencement of the Act. Such estates are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates should commence or proceed so far as possible in accordance with the Act. The Act is therefore applicable in the administration of the subject estate.



19. Moving to the present application, Section 76 of the Act provides for instances when a grant issue by the court may be revoked. The said provision specifically states as follows:

“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 court of something material to the case.
- c. that the grant was obtained by means of an untrue allegation of the fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.”

20. For the court to order revocation of grant, a party must prove that:

- a. Proceedings to obtain the grant were defective in substance;
- b. The grant was obtained fraudulently by the making of a false statement or concealment from court of something material to the case;
- c. That the grant was obtained by means of untrue allegations.

21. A party need not prove all the above matters as proof of any one of them will lead to the revocation of the grant. In this case, the Applicant contends that the Respondent obtained the subject grant through misrepresentation and concealment of material facts. The Applicant further contends that in confirming the subject grant, the Respondent disinherited him and other beneficiaries who are entitled to a share of the deceased’s estate.

22. From the testimonies of both parties, it is not in dispute that deceased had three sons, namely: Joses Dubai (deceased), Nelson Njagi (deceased) and M’Ribu Ntata. It is also not in dispute that the deceased had 10 acres of land which he gave 3 acres to each of his aforementioned sons and remained with 1 acre, being the disputed land in these proceedings. It is therefore not disputed that the deceased had during his lifetime distributed his estate by way of gifts inter vivos to some of the beneficiaries, more specifically, his three sons.

23. The Applicant and the Respondent are stepbrothers as their father was the late Nelson Njagi but the two came from different mothers. Thus, both the Applicant and the Respondent are grandchildren to the deceased. According to the Applicant, all the grandchildren of the deceased ought to have benefited from the suit land after the passing away of the deceased. On the other hand, the Respondent contends that the deceased gave him the suit land during his lifetime and that the Applicant already benefitted from the land that was allocated to their late father, that is, L.R. Muthambi/Chamunga/613 and 614.

24. The testimonies of the Respondent’s witnesses suggest that the deceased made an oral will sometime in 1974 bequeathing the suit land to the Respondent. Section 9(1) of the Act makes provision for what constitutes a valid oral Will. It provides:

- “i. No oral will shall be valid unless:
- a. It is made before two or more competent witnesses.



- b. The testator dies within a period of three months from the date of making the Will.”

25. *In Re- Estate of Evanson Mbugua Thong’ote (deceased)* 2016 eKLR, Justice Musyoka had the following to say on oral wills:

“An oral will is made simply by the making of utterances orally relating to disposal of property. In assessing whether the deceased had made a valid oral will, it needs to be considered first whether there was an utterance of the will. The question being whether there was an oral utterance of the terms of the will.” The Honourable judge continued “... The other consideration is that the utterance ought to be made in the presence of two or more persons”

26. The above view is correctly in line with Section 9 of the Act which provides that a valid oral Will are pronouncements made by the deceased not later than three months prior to his death in the presence of two or more competent witnesses which are not reduced in writing directing how his properties would be disposed off upon his death. The period of three months before the death of the deceased seems to suggest that the person making an oral will was contemplating his death.

27. In this case, it is alleged that the deceased expressed that the suit land should go to the Respondent sometime in 1974. The deceased died on 14th July 1980. As such, there could not have been a valid oral will as the three months threshold had long passed after the deceased made the said pronouncements, if at all. In any case, the Respondent instituted the succession proceedings in the lower court as an intestate succession. Thus, the Respondent’s contention that the deceased died testate, as contained under paragraph 4 of his affidavit in response to the present application, cannot be true.

28. Having established that the deceased died intestate, the rules of intestacy come into play in the distribution of his estate.

29. Section 29 of the Act defines a “dependant” as follows:

“For the purposes of this Part, “dependant” means-

- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- b. such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- c. Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

30. It follows from Section 29 of the Act that a child to a deceased person under Section 29 (supra) is automatically a dependant and therefore entitled to a share of the estate. A grandson to a deceased person, on the other hand, has to have been maintained by the deceased prior to his demise to qualify to be a dependant within the meaning assigned by Section 29 of the Act.



31. In the case of *Cleopa Amutala Namayi v Judith Were Succession Cause 457 of 2005* [2015] eKLR Mrima, J. observed thus:

“Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents indirectly through their own parents.... The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren’s own parents are dead...”

32. The question that then begs determination by this court is whether the Respondent had an automatic right to inherit from the deceased. That is, whether the Respondent was being maintained by the deceased at the time of his death.

33. From the letter by the Chief, Muthambi Location, dated 29th June 1993, the deceased left behind the suit land which he had given to his grandson namely, Sebastian Njagi (the Respondent) herein. DW1, the only surviving son of the deceased, and who the court found was elderly but coherent, testified in agreement with the Respondent’s case that the deceased left the disputed land to the Respondent who built a house on the land and who consequently gave the Applicant some share part of the disputed land on which the Applicant built a cowshed. It is apparent from the evidence on record that the Respondent occupied a special status in the life of his grandfather, the deceased herein. The Applicant, on the other hand, although also a grandson of the deceased as the Respondent, benefited from the deceased’s estate through his father. In my view, the Respondent fits into the description of a dependant of the deceased.

It is trite that he who alleges must proof.

34. Section 107 of the *Evidence Act* (Cap 80 Laws of Kenya) provides that;

“(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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

35. Further, Section 108 of the *Evidence Act* provides that the burden of proof in a suit or proceedings lies on the person who would fail if no evidence at all were given on either side.

36. In the case of *Mbuthia Macharia v Annab Mutua & another* [2017] eKLR, the Court of Appeal in discussing the burden of proof stated thus that the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden.

37. The Applicant herein had the burden to prove that the true dependants of the deceased were not disclosed and that they were left out from the distribution of the deceased’s estate as alleged. As noted herein above, some beneficiaries of the deceased benefited from the subject estate through gift inter vivos. In addition, the testimony of DW1, a son of the deceased, is believable that the deceased left the suit land to the Respondent herein.



38. The Applicant, being a grandson of the deceased, ought to have claimed from the estate of his father if aggrieved or proved to this court that he was maintained by the deceased prior to his death to warrant his inheritance in these proceedings as of right. In my view, the Applicant did not prove either of these two factors in support of his application.

Conclusion

39. For the reasons stated above, I come to the conclusion that the present application lacks merits. I therefore dismiss the application.

Dated, signed and delivered at Chuka this 22nd November 2022.

L.W. GITARI

JUDGE

22/11/2022

The ruling has been read out in open court

L.W. GITARI

JUDGE

22/11/2022

