



In re Estate of Muraguri Ndaiga Wairindi alias Kageni Ndaiga (Deceased) (Miscellaneous Application 1 of 2016) [2022] KEHC 15382 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS APPLICATION 1 OF 2016
FN MUCHEMI, J
NOVEMBER 17, 2022**

**IN THE MATTER OF THE ESTATE OF THE LATE MURAGURI
NDAIGA WAIRINDI ALIAS KAGENI NDAIGA (DECEASED)**

BETWEEN

BETH WANGUI KAGENI 1ST APPLICANT

MARY WANJIRU KAGENDO ALIAS MARY WANJIRU

KAGENI 2ND APPLICANT

AND

JOSEPHAT KAGENI NDAIGA RESPONDENT

RULING

Brief facts

1. The summons for revocation dated December 10, 2015 is brought under section 76 of the *Law of Succession Act* and Rule 44(1) of the *Probate & Administration Rules*. The applicants seek for revocation of grant issued in Thika Succession Cause No. 331 of 2010 on the grounds that the grant was obtained fraudulently by making of false statement or by the concealment of facts particularly that the court in Thika had no jurisdiction to entertain the matter.
2. The respondent filed a replying affidavit dated April 11, 2017 in opposition of this application. The summons was heard by way of viva voce evidence.
3. The background facts are that this case was heard by Ngaah J up to the close of the applicant's case. I took over the case following transfer of judge Ngaah out of the station. Directions were taken on 28/06/2021 that the case proceeds from where the trial judge reached. During the pendency of the case, the respondent died and was not substituted despite the court granting his counsel time again and again to file an application for substitution. The counsel at one time indicated through the plaintiffs counsel that the respondent had two wives and it was not possible for them to agree on who was to be



substituted in place of their late husband. The court extended time for substitution once again but no substitution was done. The counsel for the respondent was served with several mention dates and later with the hearing date but failed to attend court. The court then proceeded with the remaining part of the case and set it for delivery of this ruling.

The Applicants' Case

4. The 2nd applicant states that she is a daughter to the deceased whereas the 1st applicant is her mother. The 1st applicant has since passed on. The 2nd applicant testified that the deceased had two wives, the 1st wife was called Njeri Kageni now deceased. The 1st wife had six (6) children:-
 - a. Ndaiga Kageni – deceased
 - b. Wangui Kageni- deceased
 - c. Kamau Kageni- deceased
 - d. Mutahi Kageni- deceased
 - e. Githinji Kageni – no known whereabouts
 - f. Gacheke Kageni – alive
5. The 2nd applicant testified as PW1 and stated that the respondent is a son to Ndaiga Kageni and that the deceased married her mother Beth Wangui Kageni after the demise of the first wife. The couple was blessed with one child being herself. PW1 further stated that the deceased subdivided the land parcel number Muhito/Ngamwa/268 measuring 4.0 acres into two parcels Muhito/Ngamwa/549 measuring 1.5 acres and Muhito/Ngamwa/550 measuring 2.5 acres. The witness further stated that the deceased gave the father of the respondent who was his first born son L. R. No. Muhito/Ngamwa/549. He later sold it to one Waigera Muchiri who then transferred it to a third party and that the deceased retained L.R No. Muhito/Ngamwa/550 measuring 2.5 acres.
6. The witness further testified that the respondent's father lived with his family in Thika as he was employed by Kenya Power & Lighting Company and that the respondent filed the succession cause in Thika to enable him acquire the estate fraudulently. PW1's further evidence was that the land was situated in Mukurweini in Nyeri County and thus the lower court in Thika did not have the jurisdiction to determine the matter.
7. PW1 testified that the agreement produced by the respondent as annexed in his affidavit relates to the estate of the father of the respondent and did not concern the properties of the deceased. The witness thus testified that the 1st applicant was the legal wife to the deceased and as such she was entitled to 2.0 acres of land parcel number Muhito/Ngamwa/550 which the deceased had set aside for 2nd family.
8. PW2, Mwangi Karira Tava relied on his supplementary affidavit dated May 10, 2017 and testified that he and the deceased hailed from the same clan known as "Mbari ya Marigu" that he knew the parties in this cause. He further testified that the deceased married two wives, the 1st wife being Njeri Kageni and the 2nd wife, Beth Wangui Kageni. He further testified that the deceased had six children with the 1st wife and one child with the 2nd wife. He stated that the 1st wife was the grandmother to the respondent whose father was Ndaiga Kageni. The witness testified that the father of the respondent lived with his family in Thika where he worked with Kenya Power & Lighting Company and that the deceased lived with the 1st applicant as his wife until his demise.
9. It was the evidence of PW2 that before the deceased died, he gave 1.5 acres out of Land Parcel Number Muhito/Ngamwa/268 measuring 4.0 acres to the father of the respondent who sold it to one Waigera



Muchiri. The land was later transferred to a third party by the new owner. The original parcel of land measured 4.0 acres had been subdivided into two portions L.R. Nos. Muhito/Ngamwa/549 and Muhito/Ngamwa/550. The witness proposed that the estate comprising of Land Parcel Number Muhito/Ngamwa/550 ought to be distributed as follows:-

- a. Beth Wangui Kageni – 2.0 acres
 - b. Josephat Kageni Ndaiga – 0.5 acres
10. PW3, Gichimu Mbuthi, relied on his affidavit dated May 10, 2017 and testified that he hailed from the same clan as the deceased. He testified that he knew the two wives of the deceased and the parties herein. The deceased in his life time married the 1st wife Njeri Kageni deceased and the 2nd wife Beth Wangui who survived the deceased. He said that the respondent was a grandson to the deceased and he lived in Thika with his father who was an employee of Kenya Power & Lighting Company. The entire family of the deceased lived in Thika until his death.
 11. PW4, Dispatcher Muhindi Mutahi, relied on his affidavit sworn on February 6, 2019 to the effect that he is a cousin to the 1st applicant and an uncle to the 2nd applicant. He testified that the deceased married the 1st applicant as his second wife. The deceased and Beth Wangui lived together until the death of the deceased.
 12. Having considered the evidence of the parties, I identify the main issue for determination as to whether the applicant has presented sufficient evidence to warrant revocation or annulment of the grant;
 13. 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.

14. The 2nd applicant testified that the respondent obtained the grant fraudulently and failed to disclose material facts to the court in Thika CM Succession Cause No. 331 of 2010. The applicant said she was convinced that the succession cause was filed in Thika instead of Nyeri where the land is situated with a view of obtaining the grant fraudulently and finally for the respondent to solely inherit the only asset of the deceased.
15. The evidence of the 1st applicant Beth Wambui is that she was the 2nd wife of the deceased. His 1st wife Njeri Kagani later died. Beth deposed that she was aged 85 years in 2016 when she filed this summons for revocation. Her husband died in 1992 leaving her and the 1st applicant as survivors.
16. In his affidavit of evidence, the respondent stated that the deceased was his paternal uncle in that the respondent's father and the deceased were brothers. This evidence was disapproved by the other witnesses who knew him as a grandson of the deceased. The respondent denies that, the deceased was ever married and that he was the only surviving beneficiary of the deceased and thus entitled to inherit from the estate. He attached two affidavits in support of his case sworn by one Githinji Kagani and Gaceke Kagani. The two depose that they are children of the deceased and that after the death of their mother, the deceased did not get married. However, the 1st applicant's mother came with her daughter the 2nd applicant to and lived with the deceased but no formal marriage ever took place. It is also stated that the 2nd applicant later got married and ought not to claim the deceased's estate.
17. In the affidavit of one Githinji Kagani it is deposed that he is the father of the respondent who is a child of his elder brother. Further that he (Githinji) was the last born child of the deceased. He further deposes that his son the respondent is the one who occupies the land of deceased and is therefore entitled to inherit it and further that the deceased was buried on the land in issue at Ngamwa measuring 2.5 acres. The deponent says he has surrendered his entitlement to the deceased's estate to his nephew respondent. It is also noted that the married daughter of the deceased Gacheke Kagani does not claim any share in the estate.
18. In regard to the provisions of section 76 of the Act, the respondent did not explain why he filed the case at Thika whereas the land is situated in Nyeri County. The respondent did not explain why he failed to inform the applicants that he was filing the said case. From the evidence of both parties, it is clear that the respondent knew the 2nd family of the deceased well. There is evidence from PW2, PW3 and PW4 that the respondent lived in Thika with his father, his step mother the 1st applicant and his step sister the 2nd applicant. As such, he knew the applicants and their relationship with the deceased well. It is noted that the witnesses of the respondent, and especially Gaceke Kagani knew the applicants very well. She stated the 1st applicant went to the deceased's home accompanied by her daughter the 2nd applicant. She further stated that the applicants lived with the deceased following the death of his first wife but their marriage was never formalized. Even if the said marriage was never formalized the applicant who was 85 years old at the time of filing the summons for revocation must have lived with the deceased as his wife for decades before he died in 1992. From such a relationship a marriage may be presumed under the law. However the 1st applicant is now deceased and is survived by her daughter the 2nd applicant who relationship with the deceased is the one in issue herein.
19. At the time the Thika Succession cause was filed, the 2nd wife of the deceased was alive and still living in the deceased's home. Section 66 places the two applicants to being the widow and daughter of the deceased in priority over the respondent who is a grandson. The act of the respondent to filing these succession proceedings without informing or consulting the widow of the deceased and the daughter



demonstrates bad faith. The respondent had the intention of fraudulently obtaining the grant and disinheriting the widow and the daughter of the deceased.

20. The affidavit evidence of a married daughter of the deceased by his first wife was to the effect that the 2nd applicant is not a biological daughter of the deceased. Even if that was the case, the 2nd applicant had lived with the deceased after her mother married him until his demise.

Section 3(3) of the Succession Act provides:-

“A child born out to a female person out of wedlock and a child as defined by subsection (2) as a child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.”

As such I find that the 2nd applicant under the law is a child of the deceased and thus a beneficiary of the estate.

21. It is not in dispute that the father of the respondent had been given 1.5 acres L.R. Muhito/ Ngamwa/549 by the deceased which he sold out. The land Muhito/ Ngamwa/550 measuring 2.5 acres was occupied and used by the applicants and it would be correct to draw the inference that the deceased left the land for the exclusive use of the 2nd family. This is based on the fact that the land was divided into two portions. Section 42 of the Succession Act requires that the court take into consideration any gifts given by the deceased during his lifetime. The father of the respondent was gifted the land measuring 1.5 acres in his capacity as the first born of the first wife. There are two surviving children of the deceased Gaceke Kageni and Githinji Kageni who are not claiming inheritance in the deceased's estate. In the affidavit of Githinji he deposes that his share can be taken by the respondent, his elder brother's son. This proposal will depend on whether there is a share for the first house or not.
22. The 2nd applicant's evidence and that of her witness PW2 and PW3 is that she is willing to give 0.5 acres to the grandson of the deceased. The respondent is not a direct beneficiary of the estate and is only entitled as a right to inherit the share of his father in the estate which does not exist as was confirmed by the applicant's witnesses. The share has been spent since his father sold what was the share of the first house being L.R. Muhito/ Ngamwa/549.
23. Having considered the foregoing, I hereby reach a conclusion that the grant obtained by the respondent was through fraud and that failure to disclose the filing of the case was material to the case. I find that the 2nd applicant has established her case for revocation of the grant under section 76 of the Act. I declare the 2nd applicant as the first in order of priority over the respondent in issue of the grant in the estate of the deceased. I therefore make the following orders:-
- a. That the grant issued and confirmed in favour of the respondent in CM Thika Succession Cause No. 331 of 2010 is hereby revoked.
 - b. That the 2nd applicant Mary Wanjiru Kagendo alias Mary Wanjiru Kageni is hereby appointed the Administrator of the deceased's estate.
 - c. That the estate of the deceased being L.R. Muhito/ Ngamwa/550 will be distributed as follows:-
 - i. Mary Wanjiru Kagendo alias Mary Wanjiru Kageni – Two(2) acres
 - ii. Josephat Kageni Ndaiga – 0.5 acres
 - d. That the certificate of confirmation of grant do issue in the foregoing terms
 - e. Each Party to meet their own costs.



24. It is hereby so ordered.

DATED AND SIGNED AT NYERI THIS 17TH DAY OF NOVEMBER, 2022.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 17th day of November, 2022

TABLE

