



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**SUCCESSION CAUSE NO. 126 OF 2014**

**IN THE MATTER OF THE ESTATE OF PETER MATHENGE MBURUGA (DECEASED)**

**JOYCE MABUTI MATHENGE.....APPLICANT**

**VERSUS**

**PAULINE MUTHONI MBURUGA.....RESPONDENT**

**VERSUS**

**NANCY WAMBUI MURIITHI & 6 OTHERS.....INTERESTED PARTIES**

**JUDGMENT**

1. The applicant has filed a summons for revocation and/or annulment dated 20<sup>th</sup> of April, 2017. She seeks orders that the Grant which was issued to the Respondent on 19<sup>th</sup> November, 2014 and confirmed on 8<sup>th</sup> July, 2015 be revoked. Application is brought Under **Section 76 of The Laws of Succession Act and Rule 44 of the Probate and Administration Rules.**
2. The application is based on the ground that the proceedings to obtain the ground were defective in substance, the grant was obtained fraudulently by the making of a false statement or by the concealment of court or something material to the case and the grant was obtained by means of untrue allegations of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. She also seeks that the title issued in pursuant to revoked grant being lands parcels number Kabare/ Nyangati/ 8301 to 8311 be cancelled and be consolidated to the original parcel number Kabare/ Nyangati/ 5950 in the name of Peter Mathenge Mburuga (deceased).
3. Application is supported by the affidavit of Joyce Mabuti MATHenge sworn on 20<sup>th</sup> April, 2017. The applicant is stating that she is the wife of Peter Mathenge Mburuga ( deceased) and the respondent who is the administratrix of the estate of the deceased is a sister of the deceased.
4. The grant of letters of administration was issued on 24<sup>th</sup> November, 2014 under certificate of confirmation of grant was subsequently issued on 13<sup>th</sup> of July, 2015. The deceased Peter Mathenge Mburuga died inte-estate on 16<sup>th</sup> January, 2014 and prior to his death the deceased and herself lived on land parcel number Kabare/ Nyangati/5950 together with their son David Murimi Mathenge.
5. That she further depones that the respondent and her siblings demolished her matrimonial home and evicted her and her son David Murimi Mathenge.
6. It is her contention that the respondent obtained the said grants of letters of administration without her knowledge and thus disinheriting her and her son and she has gone ahead and sold the land to other people who are not related to the deceased in any way. That it is therefore necessary to have the orders granted so that the estate can be distributed to the rightful beneficiaries.
7. The respondent opposed the application and filed a replying affidavit sworn 2<sup>nd</sup> May, 2017, her contention is that the applicant is a stranger to her family.
8. Further she depones that while filing the Succession she followed the right procedures, by obtaining the introductory letter from the area chief and the applicant did not raise any objection.

9. That during the burial of the deceased the applicant who is their neighbor did not raise any objection by saying that she had a relationship with the deceased.
10. The applicant never reaped nor had she built any structure on the land Kabare/ Nyangati / 5950 as alleged.
11. The applicant never raised any objection during the partition of the estate and the application is an afterthought.
12. The interested parties filed replying affidavits. They allege that they own land parcels number Kabare/ Nyangati/ 8310 -8305, and the applicant is a stranger that while buying the parcels of land there was nobody on the ground nor was there anyone to challenge the transactions of sub-divisions and transfer.
13. That the certificate annexed to her summons to the confirmation of grant her name is given as Mabuti Murumia and not Joyce Mabuti Mathenge.
14. The interested parties have sworn a further affidavit, and further depone that Joyce Mabuti Mathenge is married elsewhere to one Misheck, and she has three kids with Misheck where she is legally married, namely; Dennis Murimi Misheck, Wambui Misheck and a small boy Misheck, and Misheck has accepted fully the responsibility of her children Dennis Murimi and the two others and is taking parental responsibility on them.
15. The introductory letter which was issued by the Chief shows that the deceased had no wife or children. They further contend that the deceased died in year 2001 and the applicant has waited for more than 13 years to claim the deceased's property.
16. They further contend that some of the interested parties are innocent purchasers for value without notice who diligently follow the right channel to buy the land, conducted search on the land and there were no cautions or encumbrance's on the land.
17. The parties agreed to proceed by way of oral evidence in court, the applicant Joyce Mabuti Mathenge (PW1) testified that she knows the deceased Peter Mathenge who was her husband and got married to him in 1999, and they had a child Dennis Murimi Mathenge. She testified that she was not informed when the Succession was filed in court, that Wanjohi Mwea Kamotho who is mentioned is not related to the deceased and the same Micheal Wachira, Manasse Njeru and Nancy Wawira Miriti, She had lodged a caution on the land number Kabare/ Nyangati/ 5950 and she prays that the land be restored.
18. In cross - examination she told the court she was not married in church. The deceased came with his brother and one elder and was ordered to buy a goat, and they brought a goat, they were told that the elders wanted something, and they were told to go and come back when he has money. She said that she got married in 1999 and they were living in town before the deceased went back to his home. She further told the court that after the deceased died, her house was demolished and she reported to the Chief. She had however, had no evidence to prove that she reported about the house and she denied that she has remarried. She also admitted that she has two (2) children whose fathers' are other womens' husband. She said she was not married to one Misheck and does not live with him. Dennis Murimi was 1 year and 3 months when the deceased died. She admitted that she knows that the interested parties bought land and are living there. She did not apply to evict them, because she came to know when they were already on the land, and they have lived on the land for sixteen (16) years.
19. Pauline Muthoni Mburuga (Dw1) defence witness 1 testified that the land belonged to her father and she was not shown the land as she never used to be there.
20. The deceased Peter Mathenge told her to live on the portion. Rufus Muthike was the one who was doing the Succession and distribution, she decided not to live alone and called her sisters so that they could share the land.
21. Rufus Muthike assisted her to file the Succession. She told the court that when she went to the land it was clean, there was no person living on the land, she has lived on the portion she was shown as her father's property.
22. In cross -examination she told the court that the deceased had not built a house as he used to live at Kibibi where he used to work. He died at home due to illness. She told the court during cross-examination she did not know the applicant before the deceased died, and that the deceased was not married.
23. She further told the Court she did not serve Joyce Mabuti with any papers, she further told the court that there people who bought the land which she sold to them to assist her in the Succession.

Dw2 Wanjohi Mwea,

DW3 Nancy Wambui Muriithi

DW4 David Mbatia

Dw5 Manasse Njeru Nyamu

All testified that they bought land which was the resultant sub-division of the deceased land.

24. Dw6 Rufus Muthike Mburuga testified that the deceased was his brother, he had not married and he had no child. He told

the court that he never saw elders going to pay dowry. The deceased was a young man and he had no wife and had no house. He was 21 years old at the time of his death.

25. The succession started in 1997 in the estate of Mburuga Gachau who was their father and the land was Kabare/Nyangati/565 measuring 16 acres.

26. He testified that they were 6 sons who inherited the land, each got 2 ½ acres. Before the succession was completed the deceased fell sick and died in the year 2001. Before he died the deceased told him to give his land to his sisters who were taking care of him as he had no wife, and that is what he did. Pauline Muthoni filed the succession so that she could distribute the land to the other sisters, the three sisters inherited the land.

27. When they came to court, nobody objected. There was no other person claiming the land and the court allowed them to distribute the land. The sister sold the land to finance the sub-division. The deceased did not say that he had married Joyce and that they had a child.

**28. Dw7 Jeremiah Kabiru Mbuteti** he told the court that the deceased was not married and a young man who used to work at hotels at Kibibi and he did not pay dowry. He told the court that he knows the people who have bought the land. The applicant was not from that home, she is a stranger. He testified that he has known the family from 1958 before Independence.

29. The applicant has never lived on the land, she had no house which was demolished. The family lives about 1 km from his home and would not have failed to know. The parties proceeded to file submissions at the close of the Respondents case.

**30. For the applicant it is submitted that;**

The applicant's evidence was that sometime in 1999 she started co-habiting with the deceased as husband and wife and in the year 2000 they got a child by name Dennis Murimi.

31. The applicant submits that she was not informed about the Succession cause and that despite the fact that she had cautioned the land to prevent any interference with the land that caution was lifted without her consent.

32. That the deceased only managed to get a he-goat which was slaughtered for Ngurario and also paid some money for dowry and also promised to go back to the in-laws once his financial conditions improved. She stated that the property was given out to strangers who were not related to the deceased.

33. The applicant produced a copy of her National identity card and a copy of the letter of the clan elders as her exhibits. The said letter from the clan elders among them Muriu Njogu Kimwere who had accompanied the deceased during the payment of dowry and Ngurario. She also submit that the area Chief issued a letter dated 10<sup>th</sup> January, 2014 which identified the applicant as a wife of the deceased and her son Dennis Murimi as those left behind by the deceased.

34. I urge the court she has proved on a balance of probabilities that there was a relationship between her and the deceased and out of that union there was an issue one Dennis Murimi and the copy of the birth certificate for Dennis Murimi was supplied to the respondents, and the interested parties way back in 2017.

The applicants further submit that the evidence on record is sufficient to warrant revocation of grant.

35. They submit that the proceedings to obtain the grant were defective in substance. It appears that there are conflicting information from the chief as to who the real beneficiaries of the estate were.

36. That the information contained in the chief's letter used by the respondent is different from the information in the chief's letter given to the applicant herein. The signatures are also different.

37. The grant was obtained differently, fraudulently by making of a false statement or concealment to a court of something material to a case.

38. It was submitted that the applicant stated that and this is supported by a copy of a search certificate issued to court at the time of filing the succession to court that she had placed a caution on the land. She was not served with the court papers that lead to removal of the said caution.

39. That is the application dated 24<sup>th</sup> November, 2015 it was intended to be served upon the applicant herein, there is an affidavit of service sworn by one Kunga Mugi and paragraph 3 states that the applicant was pointed out to the process server by the respondent Pauline Muthoni Mburuga. The respondent denied having pointed the applicant to the process server at any one time.

40. That the filing of a false affidavit in court was meant to mislead into issuing order for lifting of the caution. That it came out clearly that there are strangers on the land who were given 2.5 acres save for a small portion of 1.8 acres.

41. The applicant has relied on a persuasive decision on the case of; **M'Ngarithi M'Miriti alias Paul M' Ngariti M'Miriti (deceased) (2017) eKLR and Gitau & 2 Others -vrs- WAndai & 5 Others (1989) KLR 231**, dealing with the issue of entering

into an agreement to sale the estate property before getting a grant or without such a grant is an act of intermeddling. The act of the respondent and her sisters amounted to intermeddling with the Estate.

42. He submits he has referred the court to; **Benard Muchiri Mutugi -versus- Stephen Muchiri ( 2018) eKLR**, where the court cited the case of; **Santuzzabilioti alias May Santuzza -versus- Giancarlo Filasconi ( 2014) eKLR**, as authority that the court has power to revert the Title deed to revert to the name of a deceased person if the deceased property is been taken away by none beneficiaries.

He submit that the titles be cancelled to revert back to number Kabare/ Nyangati/5950 in the name of Peter Mathenge Mburuga. For the interested parties it is submitted that;

-The applicant never produced any marriage certificate she only alleged that there was a traditional ceremony conducted to assimilate her in the family.

-She never produced any photographs for the ceremony, neither did she bring a witness to court to testify and support her claim that she was indeed the wife of the deceased.

- The applicant is married to one Misheck with whom she has two children, and she admitted that she had other kids and admitted having other kids with different men but denied been married to Misheck.

- The applicant never introduced her child to the family and the birth certificate is questionable. At the time of his death the deceased was 21 years old and had no family and had never married.

43. Rufus Muthike, the Interested parties witness testified that he is the one who took care of the hospital bills and mortuary bills and burial arrangements for the deceased.

44. He further testified that his brother ( Peter Mathenge deceased) instructed him to share his properties to his sisters and therefore that is exactly what he did.

45. He further submits that the applicant never attended burial of the deceased with her child.

That he was able to tell the court that even his 1<sup>st</sup> born child are not given the name Murimi which is given to the applicant's son.

He further told the court that their late father was called Mburuga.

46. That he further told the court that, the deceased had not built any home, disputing the African story that her house was demolished and that she was chased away from the home.

47. The applicant submits that the deceased has another brother who is deceased, and the family has never chased them away. The applicant did not explain why she waited for 16 years to file a revocation of grant. She submits that the interested parties bought the land genuinely and they conducted a search before the purchase.

48. After the Succession of their father's estate Peter Mathenge Mburuga was given 2 ½ acres which the rest of the siblings decided it should go to the sisters. The sisters decided to sell their shares to the interested parties.

49. The interested parties have been in the suit land for five years. They are bona fide purchasers for value without notice and therefore ought not to be condemned, and in one of the sale agreements dated 3<sup>rd</sup> March, 2012 the area Chief of Nyangati Immaculate Wanjira Njoka also witnessed and signed the agreement.

50. The Chief gave a letter for the Succession proceedings of the deceased estate to commence, and later the Chief gave another letter to the applicant.

51. The question is, if she knew the deceased had a wife and a child why did she write a letter dated 8<sup>th</sup> October, 2013 saying the deceased was not married and had no children.

52. The applicant did not object the burial of the deceased, and in conclusion she said that the applicant is married to one Meshack and ought inherit from her husband.

53. The applicant never called any witness to support her claim, and he submit that the applicant is lying about her marriage to the deceased. She is not a wife to the deceased neither did they have a child together. The interested parties are bona fide purchasers for value without notice. They conducted due diligence before purchasing the land. There was no objection.

54. The Succession cause went smoothly, and they now live on the land which they have developed extensively. They urge the court to dismiss the application.

#### **ANALYSIS AND DETERMINATION**

I have considered all the evidence adduced and the submissions and the various affidavits sworn by the parties.

**There are two issues for determination:**

1. whether the applicant was the wife of the deceased.
2. revocation of grant.

**1. Whether the applicant was the wife of the deceased:**

The applicant has stated that she is the wife of the deceased. He who alleges must prove.

The applicant had the burden to prove that she is the wife of the deceased and therefore entitled to a share of his estate. **Section 107 and 108 of The Evidence Act.**

**Burden of proof**

**(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.**

**108 Incidence of burden**

**The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side**

**109. Proof of particular fact**

**The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

55. The applicant had the legal burden to prove the allegation in Halsbury's Laws of England 4<sup>th</sup> Edition Volume 17 paragraph 13 and 14 describes the legal burden as follows;

**“ the legal burden is the burden of proof, which remains constant throughout a trial, it is the burden of establishing the facts, and the contentions, which will support a parties case. If at the conclusion of the trial , he has failed to establish this at the appropriate he will lose. The legal burden of proof normally rests among the party desiring the court to take action thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be, separate burdens in a case with separate issues.”**

56. The legal burden in a case is supposed to be discharged by way of Evidence with the corresponding party having a corresponding duty of adducing evidence in rebuttal. This is what constitutes evidential burden.

57. In this case the applicant had the legal and evidential burden to prove that she was the wife of the deceased.

58. Upon considering the evidence by the applicant, she did not discharge the legal burden to prove that she is the wife of the deceased. She did not prove that she had contracted any form of marriage with the deceased. Her allegation that a goat was taken by the deceased to her father was not credible. She did not call any witness, it is a well-known fact that such a function involves members of the family and photographs are taken, and it is something that one would expect a party to prove by calling witnesses, this the applicant did not do.

59. The respondents denied that the deceased was not married and called witnesses who confirmed that he was never married and was a young man who had not even built in his home.

60. The applicant stated that he had a child with the deceased but strangely enough this child was called Murimi he would adopted a name of the father of the deceased, and she could not explain why the child was not named in deceased father name.

61. Thirdly the applicant said the deceased had a home and that she was evicted and he house demolished. Upon been asked if she reported the matter she answered in the negative.

62. The applicant never attended the burial of the deceased, nor did she raise any objection to the burial, and I find that all this matters show that she could not have been the wife of the deceased.

63. The applicant admitted that she saw people on the land which belonged to the deceased but she raised any complaint and she never filed Succession in the estate of her alleged husband.

64. I fail to see why even after she alleged that she is the wife of the deceased, she never moved to court for over 15 years to claim the estate of her deceased husband.

65. The applicant also admitted that she has two other children, though she denied that she is married to one Meshack. Her response in court when asked who the father of her children was left a lot to be desired and further shows that she was not a truthful witness.

66. If we go with the evidence of the respondents that the applicant has a husband and two children she is precluded from getting a share from the estate of the deceased, even if she were to prove that she was the wife of the deceased.

Under Section 36 (1) which provides for intestate has left one surviving spouse, the section provides that; the surviving spouse if she be a widow the net interest shall be determined upon her remarriage to any person.

Under Section 35 (5) where a surviving spouse is a widow any interest that she has in the estate terminates upon remarriage.

67. The applicant is making a claim for dependency, and under Section 26 of the Act the court is empowered to make a reasonable provision for a dependant out of the deceased net estate. The applicant though claiming to be the wife of the deceased, has come to court when it is too late.

**Section 30 of the law of Succession Act provides that;**

**“No application under this part shall be brought after a grant of representation in respect of the estate to which the application refers has been made and confirmed as provided by Section 71.”**

68. The section puts a limit as to the time a person may file a claim for dependency. The applicant coming after the grant has been confirmed and the estate distributed, even if she had a claim it is time bad.

69. In view of the fore-going, I find that the applicant has not discharged the burden to prove that she was the wife of the deceased.

**2. Revocation of Grant;**

The law on revocation of grant is anchored at Section 76 of the Law of Succession Act.

**Section 76 of The Law of 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 – 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.**

70. The applicant has not shown that the grant was obtained fraudulently by concealment from court something material to the case and that the proceedings were defective and that the grant was obtained by untrue allegation of fact.

71. The respondents have shown that the deceased was not married and therefore, they were closest relatives and were entitled to succeed in his estate and therefore the allegation of fraud and failing to disclose were not proved to the required standards.

72. The estate has been sold to interested parties who had no notice of the allegations by the applicant. The law of Succession Act protects a purchaser for value without notice. **Section 93 (1) of The Law of Succession Act provides that;**

**“ a transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this act, by a person to whom representation has been granted shall be buried notwithstanding any subsequent revocation or variation of the grant, either before or after commencement of this act.**

**(ii) a transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason**

**only that the purchaser may have notice that all debts, liabilities, funeral, and testamentary, or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.”**

73. The interested parties bought the land after the grant was confirmed. The only restriction on dealings with immovable property is the one found at **Section 82 of the Law of Succession Act**, which provide that;

**“no immovable property shall be sold before the confirmation of grant.”**

74. The interested parties have deponed that they bought land genuinely, and they did conduct a search before purchasing. The interested parties bought the land and have been in quiet possession for over five years now. They are bonafide purchasers for value without notice, and they cannot be condemned. Their interest is protected under **Section 93 of the law of Succession Act**. The applicant has failed to establish grounds to warrant the revocation of the grant.

**In conclusion:**

I find that the application is without merit and is dismissed with costs to the respondent and the Interested parties.

**Dated, signed at Kerugoya this 29<sup>th</sup> day of May 2020**

**L.W. GITARI**

**JUDGE**