



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 432 OF 2009**

**IN THE MATTER OF THE ESTATE OF PETER IGAMBA NJOROGE -  
(DECEASED)**

**MONICA WANGARI NJIRI.....1ST APPLICANT**

**NYAMBURA NJOROGE.....2ND APPLICANT**

**PAULINE NJOKI KUNGU.....3RD APPLICANT**

**GLADYS WAMBUI THUKU.....4TH APPLICANT**

**MARY WANJIRU MWANGI.....5TH APPLICANT**

**VERSUS**

**EUNICE WANJIRU IGAMBA.....1ST RESPONDENT**

**JOHN NJOROGE IGAMBA.....2ND RESPONDENT**

**RULING**

By a summons dated 15th November, 2014 **MONICA WANGARI NJIRI, NYAMBURA NJOROGE, PAULINE NJOKI KUNGU, GLADYS WAMBUI THUKU** and **MARY WANJIRU MWANGI** (hereinafter the applicants) through their counsel J. Ndungu Njuguna Advocate sought orders:

1. Spent

2. Spent

3. That the grant of letters of administration intestate made to **EUNICE WANJIRU IGAMBA** and **JOHN NJOROGE IGAMBA** in this matter and confirmed on or about 13th October, 2010 be reviewed, annulled and or revoked.

4. THAT this honourable court be pleased to make any further orders and/or directions as it may deem fit and in the interest of justice taking into account all the circumstances of this case be it in the interim and/or otherwise.

5. THAT costs of this application be provided for.

The summons is premised under Sections **41, 44, 47, 51, 58, 82(b)(c)(d), 83 (b)(c)(d)(e)** and **76** of the **Law of Succession Act** and **Rules 44(1), 49, 63, 70** and **73** of the **Probate and Administration rules**.

The same is grounded on the affidavit of the applicants sworn at Nakuru on the 15th November, 2014 and on grounds:

- a) The Deceased was husband and father to the 1st and 2nd Respondents herein respectively and a brother to the Applicants herein.
- b) That the Respondents failed to disclose to this honourable court that the deceased herein held the three parcels of land herein in trust of himself and other siblings including the applicants herein.
- c) That the grant herein was therefore obtained fraudulently by concealment from the court of something material to the case.
- d) That the proceedings to obtain the grant were defective in substance
- e) That the grant was obtained by means of an untrue allegation of a fact essential in law to justify the grant.

The gist of the grounds and the affidavit on record is that Peter Igamba Njoroge (hereinafter the deceased) was a husband to the 1st Respondent and father to the 2nd Respondent. The deceased was a brother to the applicants.

Upon the death of the deceased, the Respondents petitioned this honourable court for a grant of letters of administration which was issued and subsequently confirmed. The said grant and the certificate of confirmation of grant are exhibited.

It is deponed that during the petitioning, proceedings and confirmation, Respondent jointly and severally failed to disclose to this court that all those parcels of land known as SHAWA/RONGAI BLOCK 1/220, ELBURGON/ELBURGON BLOCK 3/163 and ELBURGON/ELBURGON BLOCK 1/21 KAMIRITHU (though registered in the name of the deceased herein) he held the same in trust for the family and hence they ought to have devolved to each and every sibling of the deceased in equal shares.

It is the applicants' case that all those pieces of land known as ELBURGON/ELBURGON BLOCK 3/163 and SHAWA/RONGAI BLOCK 1/220 were acquired by their late father NJOROGI IGAMBA who was also known as NJOROGI NJORA KIGAMBA by virtue of being a member of MATUIKU COMPANY LIMITED (they attached copies of members' registers marked RNN 2.) The applicants also informed the court that it was their late father who directed that the said properties be transferred to the deceased (PETER IGAMBA NJOROGI) herein by virtue of their father's age and health and with a view to hold the same in trust for his family as per the affidavit of one JORAM MUNDIA NGARUIYA a former official of the said company (the same was annexed to the affidavit and marked RNN 3).

The applicants state that the issue of the trust herein was well known by their late brother (hereinafter deceased) and at no time during his lifetime did he ever deny that fact they all have been at different time utilizing the said parcels of land without any limitations either from the deceased or otherwise.

They also stated that as a matter of fact, their mother (Julia Wangechi Njoroge), father (Njoroge Igamba), brother (Geoffrey Waithaka), son to the deceased herein (Geoffrey Waithaka), deceased's herein grandon (Peter Igamba) and the deceased herein (Peter Igamba Njoroge) were all buried in the parcel of land known as ELBURGON/ELBURGON BLOCK 1/21 KAMIRITHU being family land.

Efforts by the Chief to resolve the dispute bore no fruits as the Respondents jointly and severally refused to take heed as per the chief's letter annexed and marked 'RNNS'

It is the applicants' case that the Respondents ought to have disclosed the facts of the existing trust to

court during the proceedings herein and they should have involved the applicants given their interest in the suit lands. The grant was thus obtained contrary to the Law and ought to be revoked and or annulled. It is urged that the aforesaid properties should be shared in equal folds in accordance with the number of siblings – children of their late parents.

The application is opposed and a replying affidavit sworn by the 1st Respondent is on record. It is the Respondents' position that the application is misconceived, unmerited, bad in law, unfounded, ridicule of the justice system (sic) and at the utmost an abuse of the court process.

It is urged that the applicants are not beneficiaries of the estate of the deceased herein and they therefore lack the *locus standi* to institute the instant application.

The threshold of the legal requirements warranting revocation of a grant are not met as there is no demonstration that there was any failure of disclosure or that the grant was obtained fraudulently by concealment from the court of something material to the case, the proceedings to obtain grant were defective in substance and/or that the grant was obtained by means of untrue allegation of a fact essential in law to justify the grant.

The respondents further argues that the property in question forms part of the estate of the deceased and are registered in the name of the deceased and there is no indication of a trusthold therein. Copies of the title deeds are annexed.

Additionally it is urged the title deeds to the suit lands were issued between 1988 and 1990 long before the death of deceased's parents and the applicants have not laid claim on the suit land for such inordinately long period.

The deponent avers that land known as SHAWA/RONGAI BLOCK 1/220 has already been disposed off to a third party and hence not forming part of the deceased estate (A copy of the sale agreement marked "EW1 II" was attached).

She also depones that all that parcel of land known as ELBURGON/ELBURGON BLOCK 3/163 is fully developed with permanent rental units. The developments were done during the lifetime of her late husband by the deceased herein and herself. At no one time did the applicants herein object to the developments thereon. She has been enjoying quiet possession, use and title to the said property as the rightful owner thereof (She attached photographs of the buildings marked "EW1 III" to prove that fact).

She stated that all that property known as ELBURGON/ELBURGON BLOCK 1/21 (KAMIRITHU) was their matrimonial home. The fact that her late husband opted to have his family members buried therein did not automatically make the suit land a trust land.

It is the Respondents' case that the petition for letter of administration was filed and duly gazetted. Objections were sought in the gazettelement but none were raised. Again it is contended that the objection to the distribution of the deceased's estate and only part of the estate is a protest that cannot give right and merit to the revocation of grant herein.

The replying affidavit elicited a further affidavit by the applicants in which they aver that their interest in the property of their deceased father and not any property of the deceased herein who is their brother. The deceased herein was very young at the time the properties were acquired and with no income enabling him to acquire the properties.

It is urged that the deceased never claimed absolute ownership of the property and at one time one parcel of the land was used as a surety to a family member. No sale of land parcel No.SHAWA/RONGAI BLOCK 1/220 has gone through as the title is still on the names of the deceased.

On 4th December, 2014, directions were given that the matter be disposed of by way of *viva voce* evidence.

During the hearing, the applicants called the 5th applicant, Mary Wanjiru (P.W.1) as the only witness. In her testimony, she reaffirmed the averments in the supporting and further affidavits sworn by herself and the four (4) other applicants. She reiterated that the 3 parcels under reference were registered in the names of her deceased father. Parcels Nos.163 and 21 were bought from Matuiku Company Limited while parcel No.21 was acquired through Kamirithu Farmers Co-operative Society in which their deceased father was a shareholder. She produced an extract register from Matuiku Company Limited, an affidavit sworn by one Jorum Mundia Ngaruiya (a director of Matuiku Company Limited and an affidavit by Paul Matheri Kinoo indicating that the applicants' father was a shareholder of Kamirithu Farmers Co-operative Society.

Both Jorum and Paul indicated in their affidavits that the land was later registered in the names of the deceased herein on instructions by the applicants' father owing to his age and health. Indeed Paul indicates that the deceased herein was to hold the land as a *Muramati* (trustee).

P.W.1 further states that parcel No.SHAWA/RONGAI BLOCK 1/220 was being used by all family members and that family members who include Geoffrey Waitthaka Njoroge, Juliah Wangechi Njoroge, Njoroge Igamba, Peter Igamba Njoroge and a grandon called Peter Igamba Njoroge are buried on law parcel known as ELBURGON/ELBURGON Block 1/21. All were buried there as this was family land.

P.W.1 further stated that upon being summoned by the chief, the 1st Respondent agreed to return to the family what was not hers but reneged later on the basis that the children had refused to cede the land.

On cross-examination, P.W.1 stated that in her pleadings, she sought no declarations. The land was given to the deceased herein as he used to live with their father. The deceased was the 4th born but all those siblings ahead of him were ladies. She stated that neither her nor the other applicants lived on the suit lands under reference. She confirmed that no succession cause was filed in respect of the estate of their deceased father.

For the Respondents, Eunice Wanjiru Igamba D.W.2 (the 1st Respondent) testified that the deceased herein was her husband. She gave evidence along the lines of her replying affidavit. She reiterated that parcels of land belonged to her husband and not to her father-in-law. The deceased was the registered owner at the time of petitioning. She produced the title deeds. One of the pieces of land (No.SHAWA/RONGAI BLOCK 1/220) is sold. The agreements were produced in evidence.

She acknowledged that the register from the Co-operative Society shows that the land was transferred to the deceased herein by his father. She believes the land was given to her husband as a gift.

On cross-examination, D.W.1 stated that her knowledge on the issue of the ownership of the land is based on information given to her by her husband. She confirms knowing that Jorum Mundia Ngaruiya and Paul Kimani Kinoo were officials of the land companies and they had knowledge about the land.

At the close of the evidence, both parties filed written submissions.

I have had occasion to consider the summons for revocation of grant, the affidavits for and against the application, the oral evidence on record and submissions by counsel.

The issues for determination crystalize into two (2) viz:

1. Whether the court has jurisdiction to determine the dispute herein.
2. If the answer to 1 above is in the affirmative, whether the applicants have achieved the threshold for revocation of a grant.

Naturally, I will start with the question of jurisdiction as it is important to deal with this issue right away as without Jurisdiction, the court lacks the mandate to adjudicate on a matter. I will quote from the celebrated case of **The MV Lilian S**, [1989] KLR in which Nyarangi, JA famously had this to say on

Jurisdiction:

**“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

He goes on to say::

**“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”**

The powers of the court to revoke or annul a grant are premised under the provisions of **Section 76** of the **Law of Succession Act**. Indeed all powers of the probate court are derived from the Law of Succession Act Cap 160 Laws of Kenya.

In our instant suit, the applicants base their application for the revocation of grant on the main ground being ground (b) on the face of the application stating:

**“(b) That the Respondents failed to disclose to this honourable court that the deceased herein held the three (3) parcels of land in trust for himself and other siblings including the applicants herein.”**

Therefore, in essence, there is a challenge to the title of the deceased to the said properties. The objectors have the onus to prove the trust. The question that readily arises is whether these succession proceedings are the appropriate way to challenge the title of the deceased to the said properties.

This court (M.K. Ibrahim, J. as he then was) had the occasion to pronounce itself on the issue of the probate court's jurisdiction to resolve a claim based on land held in trust. The court expressed itself thus:

**“I have also considered the second question which really is of *locus standi* or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position in law is that the Estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objectors' father.**

**In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed.**

The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.

Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary or dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.

In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/rights. They are lucky that the claim or trust is not caught by the laws of limitations of actions. However, this court appreciates that they require a reasonable time to institute proceedings before any distribution of the Estate.

I therefore do hereby hold that this court has no jurisdiction to determine the claim of trust or to give any relief in respect thereof. It is unfortunate that the question of jurisdiction was raised at the end of the hearing. It is always appropriate and reasonable for jurisdictional issues to be raised at the beginning of hearing or trials. Preferably, they should be raised in the pleadings at the outset.

Be that as it may, the fact that it is raised at the end does not change anything. If a court has no jurisdiction, then it has none. The conclusion of hearing does not confer any jurisdiction to the court. This will only go to the question of costs.”

This finding has been subsequently followed by this court in High Court Succession cause No.619 of 1991, (2014 Eklr), **In the Estate of Richard Karanja Javan (Deceased)** where in an application for revocation of grant on similar circumstances of an alleged trust, the court (Musyoka, J.) stated:

“It is not in dispute that the deceased was the registered proprietor of the property in question. His registration as such was not disputed until after his death. The registration in question was under the registered Land Act Cap 300, Laws of Kenya (now repealed). It was a first registration. By dint of *Section 143* of the Registered Land Act, the said registration Cannot be faulted. There is judicial authority on this in **Obiero V. Opiyo & Others (1972) EA 227**, where it was held that a first registration is indefeasible even if fraud is proved. There is therefore no merit in the applicant's case. Even if she had a case that there existed a trust in her mother's favour the same ought to be established in a suit before the Environment and Land Court.”

The mandate of the probate court is limited. A distinction ought to be made between a claim against the Estate of a deceased and a claim on inheritance in respect of the estate of the deceased. In our instant suit the objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. Their claim is that the title to the parcels of land is held in trust for them. Indeed this is a claim for proprietary right.

As held in **H.C. Succession Cause No.864 of 1996 (2015) eKLR**, even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determining issues of ownership of property and declaration of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be

determined by the Environment and Land Court.

Consequently and for the reasons above stated, I must find and hold that this court has no jurisdiction to resolve the proprietary interest on land based on the alleged trust.

In this case therefore, the only path legally open to the applicants is to institute separate proceedings to articulate their claim/rights in the right forum and which is the Environment and Land Court.

Having found as above, I must of necessity down my tools and will therefore not address the 2nd issue for determination.

This court appreciates that the grant herein is already confirmed. The administrators are in the process of distributing the estate. Applying the powers bestowed on this court by **Section 47** of the **Law of Succession Act** and the inherent powers conferred by **rule 73** of the **Probate and Administration rules**, it is in the wider interest of justice that there be preservation of title Nos. SHAWA/RONGAI BLOCK 1/220, ELBURGON/ELBURGON BLOCK 3/163 and ELBURGON/ELBURGON BLOCK 1/21 KAMIRITHU awaiting the institution of appropriate proceedings by the applicants if so desired. I therefore order stay of distribution of the estate of PETER IGAMBA NJOROGE for a period of ninety (90) days.

The application herein is dismissed. This is a family matter. I find it appropriate to make no orders as to costs.

**Date, Signed and Delivered at Nakuru this 9th day of June, 2016.**

**A. K. NDUNG'U**

**JUDGE**