



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Mutuku Mbithi Muunguu (Deceased) (Succession Cause 647 of 2008) [2025] KEHC 2205 (KLR) (21 January 2025) (Ruling)

Neutral citation: [2025] KEHC 2205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 647 OF 2008**

FR OLEL, J

JANUARY 21, 2025

IN THE MATTER OF THE ESTATE OF MUTUKU MBITHI MUUNGUU (DECEASED)

BETWEEN

JOHNSON KYALO WATHI 1ST APPLICANT

GEDION MBITHI WATHI 2ND APPLICANT

AND

VERONICA MUTUKU MBITHI RESPONDENT

RULING

A. Introduction

1. Before the court for determination is the summons for revocation and/or annulment of grant dated 27th February 2023 filed by the Applicants, pursuant to provisions of section 76 of the [Law of Succession Act](#), and Rule 44(1) & 49 of the [Probate and Administration Rules](#). The applicants seek for orders that;
 - a. Spent.
 - b. Spent
 - c. Spent
 - d. Spent
 - e. The confirmed grant issued to Veronica Kanini Mutuku be revoked.
 - f. Any subsequent entries made into the lands register over land parcel Machakos /Kiandani/576 be annulled and cancelled and the property reverted back to Johnson Kyalo Wathi.
 - g. This Honourable court be pleased to direct that the Respondent together with the purported beneficiaries be held for contempt of court for using fake documents and appearing before this



court knowing well that they were using forged certificate of official search which impersonates different persons who were not the legal and beneficial owners hence exposing the Honourable court to ridicule and embarrassment.

- h. The this Honourable court be pleased to summon the registrar Machakos lands office to appear before the court to verify the contents of the certificate of official search dated 11th February 2019 which is the basis in which the grant herein was issued
2. The said application is supported by the grounds on the face of the said Application and the supporting affidavit of the 1st Applicant Johnson Kyalo Wathi dated 26th June 2024, and opposed by the respondent through her replying affidavit dated xxxx, further Affidavit dated 30.08.2024 and supplementary Affidavit dated 19.07.2024.

B. Pleadings

3. The Applicant depone that they are the sole, absolute and indefeasible proprietor of all that land known as LR No Machakos/Kiandani/576 (hereinafter referred to as the suit parcel of land), which the respondent had wrongly listed as part of the estate herein on the basis that it was jointly owned by her late husband, Mutuku Mbithi Muunguu and their father (applicants father), the late Simon Mbithi Wathi. It was noted that the two deceased persons were brothers.
4. The applicant further averred that the proceedings to confirm the grant of letters of administration herein were defective for the reason that the certificate of official search dated 11th February 2019, used by the respondent, to show that the deceased herein jointly owned the suit property (half share each) with their father, Wathi Mbithi was a forgery, as they had sole/exclusive ownership of the suit parcel of land and its actual possession.
5. Upon the demise of their father, Wathi Mbithi, they had filed Machakos High Court Succession Cause No 190 of 2005 and had the grant confirmed on 26th January 2009. Subsequently, the suit property was transmitted to the 1st Applicant and a title deed dated 23rd April 2010 was issued. It was the applicant's further contention that before his demise, the deceased herein never claimed ownership of the suit property, but upon his demise, on 5th July 2006, his wife, the respondent here laid a claim thereto and purposed to bury the deceased on the suit parcel, which forced them to obtain a restraining order from court to prevent her from burying her husband thereon.
6. When the respondent filed this succession cause, she listed LR No Machakos/Kiandani/3889 as the only asset belonging to the estate of the deceased herein, but later in 2017 applied suo moto to add the suit property as part of the estate, on the basis that her husband owned half of the said property. They believed that the applicant had colluded with the land registrar Machakos to perpetrate a fraud leading to the cancellation of earlier entries/ registered in their favour and the creation of the non-existent title, showing that the two brothers owned the suit parcel jointly, which in fact, that was not true.
7. The applicants further faulted the lands registrar, Machakos for deleting, altering and cancelling entries made in the register without a court order and therefore creating a situation where two title deeds exist with respect to the same parcel of land. Hence it was their contention that the procedure to obtain grant was defective in substance and it was in the interest of Justice to grant the orders sought to prevent a situation, where they would be unlawfully deprived of their constitutional right to own the suit parcel of land.
8. The Applicants thus urged the court to find that their Application had merit and be pleased to allow the same.



9. This application was opposed by the respondent, who filed her replying affidavit dated 11th September 2023, wherein she deponed that the application as filed was grossly incompetent, misconceived, misleading and amounted to an abuse of the process of the court as the applicants had not met the criteria set out under section 76 of the [Law of Succession Act](#), Cap 160 to warrant cancellation of the confirmed grant issue herein.
10. The respondent further urged the court to note that what was in contention herein was a land dispute camouflaged as a matter falling for determination under the law of succession and would be best handled by the Environment and Land court. She had placed before the court all relevant facts in support of her case and demonstrated that her husband was entitled to a half share of the suit property, and thus the said property was rightly bequeathed to her. The applicants had not placed before the court any credible, cogent or watertight evidence to demonstrate that the confirmed grant ought to be revoked and thus urged this court to dismiss the said application under consideration.

C. Analysis and Determination

11. I have considered all the pleadings filed concerning the summon for revocation of grant dated 26th June 2024, the submissions made by the parties before this court, and primarily note that the only issue for determination is whether the application disclosed proper grounds the basis upon which the order sought can be granted
12. Section 76(a), (b), and (c) of the [Law of Succession Act](#) provides as hereunder:

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;
13. That section provides that a grant of representation may at any time be revoked or annulled as long as the court is satisfied that the facts contemplated under the said section are proved. It is therefore clear that there is no limitation in so far as matters revocation or annulment of grant are concerned. However, it is not in every situation where transgressions are alleged that the grant must be revoked
14. This position was adopted in the case of [Albert Imbuga Kisigwa v Recho Kavai Kisigwa](#) [2016] eKLR Succession Cause No 158 of 2000, Mwita Where it was held that:-

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account the interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”
15. The applicants contend that the suit property was exclusively owned by their father, Wathi Mbithi (deceased) and upon his demise, they applied for grant of letters of administration of his estate and



subsequently after the said had been confirmed, the suit property was lawfully transmitted to the 1st applicant, as the sole registered proprietor thereof. The respondent, who was their Aunt had gone behind their back and colluded with officers at Machakos lands registry, and had irregularly cancelled their registration and made new entries purporting that half of the suit property was owned by their uncle, Mutuku Mbithi Muunguu (the deceased herein) a fact they knew was not true. They therefore urged this court to cancel the confirmed grant issue herein on the basis that the process used to obtain the grant was defective in substance

16. The respondent on the other hand denied committing any fraud and stated that the initial land dispute between the two brothers was conclusively determined by the Special District Commissioner on Minister's land Appeal case No 375 of 1986, who made a finding that the suit parcel be jointly registered in the names of the two brothers (the deceased herein and the Applicants father). The said decision was not appealed and was implemented by the lands Registrar. Both families therefore were entitled to get 0.41Ha each being half share of the suit parcel of land.
17. The issue which then arises for determination is whether based on the facts pleaded the court has the jurisdiction to resolve this claim.
18. That, jurisdiction is so central in judicial proceedings, is a well-settled principle in law. A court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

“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...”

19. The Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & another* Civil Appeal No 103 of 2016 [2018] eKLR stated as follows: -Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was also appreciated by this court in *Adero & another v Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;
20. On the source of a court's jurisdiction, the Supreme Court of Kenya in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* (2012) eKLR stated as follows: -

A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings ... where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament



confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

21. In Re; Estate of Atibu Oronje Asioma (Deceased) (Succession Cause 312 of 2008) [2022] KEHC 11046 (KLR) (22 July 2022) (Ruling), the Court stated:

“The design of the Law of Succession Act was that the mandate of the probate court was limited to distribution of the assets, and where a dispute arose on ownership of any asset, then the same should be placed in another forum, and not the succession cause, for litigation and determination. That was the spirit of rule 41(3) of the Probate and Administration Rules. Succession proceedings were not appropriate for determining disputes between the estate and third parties over title to or ownership of assets placed before the court for distribution. Besides the provisions of the Law of Succession Act and the Probate and Administration Rules, the applicants had to also contend with the Constitution of Kenya, 2010 (Constitution), so far as the jurisdiction of the High Court was concerned, with respect to disputes over title to land and trusts over land related to title to the land. Article 162(2) of the Constitution envisaged a court with jurisdiction to handle disputes relating to title or ownership of land. Under article 165(5) of the Constitution the High Court should not exercise jurisdiction over the matters to be placed under the court contemplated by article, 162(2). The court envisaged in article 162(2) was subsequently established under the Environment and Land Court Act, to handle the disputes stated in article 162(2). The Land Registration Act and the Land Act identified the Environment and Land Court as the court for the purposes of disputes relating to matters touching on land, including registration, which was at the core of the instant application. Those provisions were in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act. Section 47 of the Law of Succession Act did not grant the High Court elastic jurisdiction to grant such orders as it pleased. It had been equated with section 3A of the Civil Procedure Act as saving the inherent powers of the court. Section 47 of the Law of Succession Act merely stated that the High Court had jurisdiction to deal with applications and determine disputes that arose over matters that were governed by the Law of Succession Act, and pronounce decrees and make orders as could be expedient, in the context of the provisions of the Law of Succession Act. It did not confer jurisdiction to handle disputes and applications that were not provided for under the Law of Succession Act. Inherent power was not saved under section 47 of the Law of Succession Act, but under rule 73 of the Probate and Administration Rules. The High Court could only exercise jurisdiction, according to section 47, with respect to the matters covered by or provided for under the Act. It said no more than that. The Law of Succession Act was divided into 8 parts, and the High Court was limited to handling applications that arose with respect to the matters that were governed in those 8 parts. The jurisdiction of the High Court came out clearly when juxtaposed against that of the Magistrates Courts as set out in section 48(1) of the Law of Succession Act. The jurisdiction of the Magistrate’s Court was not as wide as that of the High Court.”

22. The dispute herein falls squarely within the ambit of the Environment and Land Court as both parties claim to have valid/genuine title deed for the suit property, and are entitled to ownership and/or half ownership thereof. That issue has to be determined by the Environment and Land Court as mandated under Section 4 as read with Section 13 of the Environment and Land Court Act, 2011 and not this



court which has limited jurisdiction of identifying the deceased estate and distributing the said estate to the right beneficiaries.

Disposition

23. The upshot is that the summons for revocation of grant dated 26th June 2024 lacks merit and the same is dismissed with no orders as to costs.
24. The Applicants are directed to file their claim, challenging the respondent's title deed at the Environment and Land court, which has jurisdiction to deal with the matter.
25. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MARSABIT THIS 21ST DAY OF JANUARY 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 21st day of January 2025.

In the presence of;

No appearance for Applicant

No appearance for Respondent

I Jabo Court Assistant

