In re Estate of Josephine Wanjiru Waweru (Deceased) (Succession Cause 551 of 2015) [2025] KEHC 4812 (KLR) (23 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4812 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION CAUSE 551 OF 2015

DKN MAGARE, J

APRIL 23, 2025

IN THE MATTER OF THE ESTATE OF JOSEPHINE WANJIRU WAWERU (DECEASED)

BETWEEN

JOHN WAWERU RUKWARO ..... APPLICANT

AND

TERESA NYOKABI MBOGO ..... 1ST RESPONDENT

JOHN MWANIKI WAWERU ..... 2ND RESPONDENT

JUDGMENT

Background and historical perspective

1. Josephine Wanjiru Waweru died at a ripe old age of 70 years on 12.04.1979 of carcinoma of the breast secondary to dehydration and starvation. Despite the pain in her life, she has never known peace. The petitioners/Respondents are John Mwaniki Waweru and Teresa Nyokabi Waweru. They claimed that they were the deceased's stepchildren, a fact that is now contested. The petitioners applied for letters of administration intestate on 22.07.2015.

2. Letters of administration intestate were issued to the petitioners on 2.10.2015. The petitioners applied to confirm the grant on 23.11.2016 through summons for confirmation of grant dated 2.11.2016. The grant was confirmed by Mshila J on 11.4.2017.

3. The matter was thereafter placed before Matheka J, on 4.12.2017, under a certificate of urgency dated 1.12.2020. The application was subsequently amended on 7.2.2020. The court was satisfied that prior proceedings were not disclosed. She issued orders in terms of prayer 2 and partly prayer 3 as follows:

    i. An order of injunction do issue [Restraining] the Respondents, their servants, agents, and assigns from dealing with, in any manner whatsoever, either by subdivision, mortgaging,

charging, leasing, or selling all that parcel of land known as Nyeri/Gatarakwa/814 pending hearing and determination of this application.

ii. The Land Registrar is restrained from carrying out any transaction in the parcel of land known as Nyeri/Gatarakwa/814 pending the hearing and determination of this application.

iii. The application shall be served.

4. The court directed that there be no other dealings pending interpartes hearing of the application. Subsequently, the Respondents were served via advertisement.

5. The matter has a chequered history, a story of fraud per excellence. The Respondents caused the Chief of Gatarakwa location to write a letter identifying the duo as beneficiaries and a list of 19 beneficiaries, who were said to be purchasers. They ignored the existence of the biological children of the deceased herein.

6. Subsequently, the Applicant filed an application dated 1.12.2017 claiming to be a grandson of the deceased. He sought to revert the land to the deceased's estate. He stated that the grant was obtained by fraud and concealment of material facts. The applicant stated that he was a grandson of the deceased through a daughter known as Philomena Nyokabi Rukwaro (deceased).

7. He stated that he lived on the suit land, and the co-wives of the deceased were also accommodated there. His case was that there was a pending case in court, another succession cause, Succession Cause Number 242 of 1990. This cause was later transferred to the High Court as Nyeri HC P & A No. 371 of 1999.

8. The Applicant stated there was collusion with strangers and the area chief, where strangers were involved. He indicated that his mother died at the ripe old age of 85 in 2013. Annexed thereto was a search showing the deceased as the registered owner. A chief's letter dated 4.6.2001 included three houses. The applicant is said to be a grandson of the first house. It is not lost on the court that the deceased was female.

9. However, the deceased's daughter, Philomena Nyokabi Rukwaro (deceased) filed an earlier Succession Case, Nyeri HC P & A No. 371 of 1999. This had been filed as MCC P & A 242 of 1990.

Submissions

10. The Applicant submitted that he moved the court through an Amended Summons or revocation of the grant dated 7th February 2020. He stated that the Respondents herein and that of the deceased were co-wives. The Applicant set out the grounds under Section 76 of the Law of Succession. He submitted that the application and proceedings to obtain the grant were defective in substance. He further submitted that the grant was obtained fraudulently by making false statements or by concealing something material to the case from the court. Finally, it was submitted that the confirmed grant was obtained by means of untrue allegations of fact essential in a point of law to justify the grant.

11. He submitted that the Respondents were strangers to the estate and had no legal claim. The chief's letter evidenced who was a beneficiary of the estate and that they were the only beneficiaries. He submitted further that by dint of the chief's letter, the deceased had a daughter, Philomena Nyokabi Rukwaro, and a grandson, who is the Applicant.

12. It was submitted that a party is under a duty to disclose all relevant information to the court. Reliance was placed on the case of Brinks Matt Ltd vs Elcombe [1988] 3 ALL ER 188. He submitted that courts have revoked grants where a petitioner failed to seek a beneficiary's consent. Reliance was placed on the

cases of Re: Estate of Komu Muthigani and in Re Estate of Mwaura Mutungi alias Mwaura Gichichio Mbura alias Mwaura Mbura.

13. The Applicant submitted that Sections 35, 36, 38, and 40 of the *Law of Succession Act* contemplate intestacy rules to apply where the deceased died and left survivors. The applicant further submitted that the deceased was survived by two daughters who have since passed on, but one of whom, Philomena Nyokabi Rukwaro, was survived by the Applicant herein. It was his submissions that the Applicant was a beneficiary entitled to the deceased's estate. He prayed that the amended summons for revocation be allowed.

14. The Respondents did not file submissions.

Analysis

15. The question then arises whether this cause could have been filed in the face of the pending succession cause. The other issue is that I note that on 12.8.1997, the second deceased, Philomena Nyokabi Rukwaro, filed a caution on the suit land. She died in 2013. The petitioners ought to have regard to that person, given that her interest as a beneficiary was disclosed in the register or her estate.

16. Unfortunately, the title was subdivided pursuant to the grant on 8.6.2018, and new numbers came out, being 3812-3838. The subdivision occurred during the pendency of an order prohibiting the same. Such subdivisions are voidable if there were no orders. However, where there were orders, as in this case, such a subdivision is void. In the case of Kiptum *v Birir & another (Civil Appeal 66 of 2020)* [2023] KECA 482 (KLR) (12 May 2023) (Judgment), the court of appeal [Kiptum v Birir & another (Civil Appeal 66 of 2020) [2023] KECA 482 (KLR) (12 May 2023) (Judgment)] posited as follows;

> However, it is clear that during the pendency of the suit, the Respondents undertook subdivisions of the said land into several pieces some of which were sold. The Appellant's position was that the Respondents ought not to have disposed of part of the suit property when the suit property was the subject of the ongoing litigation. In this case, however, the persons to whom part of the suit property were sold were not made parties to these proceedings. That however does not necessarily mean that the Appellant's entitlement is lost. This Court in Naftali Ruthi Kinyua vs Patrick Thuita Gachure & another (2015) eKLR expressed itself as hereunder:"Black's Law Dictionary 9th edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending. Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in Bellamy vs Sabine [1857] 1 De J 566 held as follows:
>
> > " It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings." In the case of Mawji vs US International University & another [1976] KLR 185, Madan, JA stated thus:
> >
> > "The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in

dispute so as to prejudice the other..."In the same case at page it was observed inter alia that:- "Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit."

65.As regards the relevancy of the said doctrine in light of the current legislative framework, the Court expressed itself as hereunder:

"The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of section 52 of the ITPA by the *Land Registration Act* (LRA) Number 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of Section 107 (1) of the LRA which provides the saving and transitional provisions of this Act, and which stipulates, "Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act." The effect of this provision is to allow for the continued applicability of the rights and interests ensuing from legislation that governed titles of properties established prior to the repeal of such legislation. Given that the concerned property involved land eligible for registration under the Registration of Titles Act (now repealed), having regard to section 107 (1) of the LRA, it is evident the rights flowing from section 52 of the ITPA including those under doctrine of lis pendens would remain applicable to the circumstances of this case. Furthermore, lis pendens is a common law principle, and in addressing the relevance of common law principles within the Kenyan context, section 3 (1) of the *Judicature Act* Cap 8...would remain applicable to this case."

17. The matter has two aspects: whether the grant should be revoked, and the effect of the revocation. The first issue is fairly straightforward. The Respondents, despite being served, did not respond. They indicated that they were step-children of the deceased, and there was already a succession proceeding going on. A new one could not be filed. I have perused the file and cannot trace form 30. This explains the failure to detect the presence of another cause filed first in time.

18. A party that wishes to challenge succession does this in the same file, not a different one. Faced with a similar situation, Justice J.N. Onyiego, in the case of in re Estate of Nyambia Mukaya (Deceased) [2019] eKLR posited as follows:

    31. I do agree with Mr. Gacheru there cannot be two separate succession files in respect of the same estate. It does not matter whether there is a Will. The best the respondent would have done was to disclose to the High court of the existence of a similar file already determined. Alternatively, the respondent should have filed an appeal to the high court for revocation of the grant on account of discovery of new material evidence in this case a Will. It is embarrassing to the court process to have two parallel proceedings touching on the same estate with different enforceable orders.

    32. Without considering the merits or validity of the Will, it is my conviction that the respondent is guilty of concealment of material facts and or information by failing to disclose that there was another case having been filed at Murang'a, fully determined and estate fully distributed.

    33. The respondent cannot argue that Murang'a SRM Court had no jurisdiction yet she was the one who petitioned the court for a grant. Definitely, the petition filed before the High Court

being a fresh succession cause after losing before Murang'a court and having had the appeal No. 371/2000 dismissed is indeed an abuse of the court process.

34. We cannot have two grants for enforcement at the same time. Although courts are quite often at the receiving end for the slow motion of the wheels of justice, in this case, inactivity of both parties in presenting the revocation application and prosecuting the same contributed in delaying this matter unreasonably. However, there is no time limitation in filing succession cause proceedings. We cannot blame the applicant alone for the delay. Both parties contributed by not substituting their deceased relatives who were parties to the case. I do not agree with Mwaniki that the application should be dismissed for want of prosecution at this stage. They should have moved the court before fixing the suit for hearing.

19. The second aspect is the priority of the Respondents to petition for letters of administration as step-children. They were not persons entitled to priority over the Applicant and his mother. They ought to have proved their stake in the pre-existing case if they were beneficiaries. Section 29 of the *Law of Succession Act* provides the following to be beneficiaries of a deceased person:

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

20. Step-children, children whom the deceased had taken into her family as her own, prior to her death. No evidence was led to the said effect. The petitioners were not persons entitled to benefit from the estate. They had no priority at all in applying for the letters of administration. They concealed the existence of the deceased's child, Philomena Nyokabi Rukwaro (deceased). There appears to be another daughter who is deceased. The court will determine her dependants in fullness of time.

21. It is noted that the court issued orders protecting the suit land. After those orders were issued, the Respondents subdivided the suit land. Such a blatant breach of the order of injunction ipso facto causes all such subsequent actions null and void. What do you do with a nullity? There is nothing that can be built on a nullity. In Macfoy Vs. United Africa Co. Ltd [1961] 3 ALL E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

22. Further, the proceedings are on top of other proceedings. Such proceedings can't be defended. Such proceedings are a nullity and fraudulent. The net effect of this order is that I shall set aside all proceedings in this matter. The confirmation of the grant is set aside.

23. The next question is, what do we do with the title deeds already issued? Section 93 of the Succession Act provides as follows:

Purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2) 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 the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.

24. However, no purchaser was disclosed as having title as at 4.12.2017 when the court issued an injunction order. The title deed was one indivisible title as at that time. With an order in situ, there could have been no subdivisions. The subdivisions were done when they were prohibited. In any case, the case where succession could be completed was HC P & A 371 OF 1999. Ex facie, all proceedings initiated in this matter leading to confirmation were a nullity and fraudulent. In Karissa v Juma & 3 others (Environment & Land Case E038 of 2023)[2025] KEELC 3137 (KLR) (2 April 2025) (Judgment), Makori J , posited as follows regarding fraud:

> ... and 2nd defendants, which were acquired fraudulently. The issue of fraud is a well-established fact, as stated in ELC No. 39 of 1996. I agree with Mr. Wameyo that, based on the foregoing, the doctrine of a purchaser for value without notice is not available to the 3rd defendant as a defense.
>
> 28. In the case of Samuel Kamere v Land Registrar (Kajiado Civil Appeal No. 28 of 2005) [2015] eKLR, the Court of Appeal held that:
>
> > " .....to be considered a bona fide purchaser for value, they must prove that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from when they acquired a legitimate title, thirdly, that they paid valuable consideration for the purchase of the suit property".
>
> 29. To benefit from the defense of a bona fide purchaser for value without notice, a purchaser must take the necessary steps to investigate the history of the land and examine the root of the title rather than simply assuming that the title held by the seller demonstrates the seller's absolute and indefeasible title.

25. In Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR, the Court of Appeal [Waki, Nambuye & G.B.M. Kariuki, JJ.A] addressed what happens to the fruits of fraud as doth:

> *67.* Furthermore, the protection accorded by law in the event of fraud, is to a "bona fide purchaser without notice" and even then, only against equitable interests. We have seen the definition of "bona fide purchaser" from Black's Law Dictionary and from the Katende v. Haridar & Company Ltd (2008) 2 EA 173. The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner. Snell's Principles of Equity illustrate the issue, thus;-
>
> "An important qualification to the basic rule is the doctrine of the purchaser without notice, which demonstrates a fundamental distinction between legal estates and equitable interests.
>
> 1. The doctrine. A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void

> against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B's right, although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser's conscience not being in any way affected by the equitable right. Where there is equal equity, the law prevails."

68. It is also stated therein that "the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests".

So, even if the issue of a bonafide purchaser arose in this matter, which, in our finding, it did not, we are not satisfied that the evidence tendered by Arthi supports a credible finding that it was a bona fide purchaser of the disputed land.

26. It is therefore clear that the Respondents ignored the applicant's mother, who was on the suit land. Why is the element of possession by family members important? Possessory rights cannot be defeated by an allegation of a sale without notice. For example, an administrator cannot sell land where the other beneficiaries reside, and the purchaser alleges to have been without notice. The question was well enunciated by the Supreme Court in the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR, where the court posited as follows:

> What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered *Land Act* (now repealed), in Section 25 of the *Land Registration Act*, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered *Land Act*, have now been subsumed in the "customary trusts" under Section 25 (b) of the *Land Registration Act*. Thus, under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land.

27. The consequence of the foregoing is that the Respondents, participated in fraudulent concealment. The grant was obtained by untrue allegations and fraudulently. The same cannot be sustained and is accordingly set aside.

28. Secondly, the cause herein is a duplication of Nyeri HC P & A 371 of 1999, formerly Nyeri CM Succession Cause No. 242 of 1990. The latter was filed 25 years before the cause herein was filed. This cause was filed immediately after the petitioner in the first succession cause died. At that time, she had registered a caution in 1997 claiming beneficial interest in the said parcel of land. The Respondents could not have been blind to the subsisting entries in the register.

29. Therefore, the court has no option other than to cancel all entries fraudulently created by strangers on the face of subsisting succession. It is therefore imperative that the land registrar, Nyeri County cancels all subdivisions and all entries in the register and revert to Nyeri/Gatarakwa/814 in the name of the deceased Josephine Wanjiru Waweru pending completion of succession in Nyeri HC P & A 371 of 1999, formerly Nyeri CM Succession Cause No. 242 of 1990.

30. This cause is struck out as a duplicate. For historical reasons, the file should be placed together with Nyeri HC P & A 371 of 1999.

31. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

32. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

33. The Applicant was forced to incur costs to mount the application herein, including advertisement. A sum of Ksh. 95,000/= as the Applicant's costs shall service.

Determination

34. In the end, I make the following orders:

    a. The grant issued herein is set aside as the same was fraudulently obtained by strangers to the estate without citation.

    b. The subdivisions arising from the subdivision of the deceased's parcel of land, Nyeri/Gatarakwa/814, are null and void. The said subdivisions and any transfer or dealing is hereby set aside.

    c. The land registrar, Nyeri county, to cancel all subdivisions and all entries in the register and revert to Nyeri/Gatarakwa/814 in the name of the deceased Josephine Wanjiru Waweru pending completion of succession in Nyeri HC P & A 371 of 1999 formerly Nyeri CM Succession Cause No. 242 of 1990.

    d. This cause, being a duplicate, is struck out. For historical reasons, the file should be placed together with Nyeri HC P & A 371 of 1999.

e. Costs of Kshs. 95,000/= to the Applicant.

f. File No. P&A 371 of 1999 be brought to court on 24/7/2025 for purposes of directions.

g. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23RD DAY OF APRIL, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Maina for the Applicant

John Maina Rukwaro present

N/A for the 1st Respondent

N/A for the 2nd Respondent

Court Assistant – Michael