



**Agenga v Ochieng (Succession Appeal E003 of 2021)
[2024] KEHC 232 (KLR) (22 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION APPEAL E003 OF 2021
RE ABURILI, J
JANUARY 22, 2024**

BETWEEN

DORSILA ADHIAMBO AGENGA APPELLANT

AND

MONICA ACHIENG OCHIENG RESPONDENT

(Being an appeal from the Ruling of the Honourable M.I. Shimenga delivered on the 2nd February 2021 in the Chief Magistrates Court at Kisumu in Succession Cause No. 89 of 2017)

JUDGMENT

1. The appellant vide an application dated 5th July 2019 sought the revocation/annulment of the grant issued to the respondent on the 4th July 2017 and subsequently confirmed on the 17th March 2018 and further, the revocation of the transfer by the respondent of land Parcel Numbers Kisumu/Nyalenda “B”/1783, 2705, 2706, 1559, 3023, 3022, 3024, 3025, 1326, 1085, 2310, 1782, 1894, 2962, 1859, 1780 and 2093 and the entries made in the register of the aforesaid titles.
2. It was the appellant’s case that the respondent obtained the grant through fraud, forgery, misrepresentation and non-disclosure of material facts; that land Parcel No. Kisumu/Nyalenda “B”/1324 was registered in the joint names of Christabel Nyasio Agenga (deceased) and the appellant and that after the death of the deceased, the appellant was not involved in the subsequent illegal subdivisions and transfers of the said property. The appellant further averred that she and the respondent lived on the suit property and was at risk of being evicted by the respondent who procured the registration of the aforesaid land by fraud.
3. Opposing the application, the respondent swore a replying affidavit on the 16th September 2019 in which she stated that the suit before the court did not involve land Parcel No. Kisumu/Nyalenda “B”/1324 but rather Kisumu/Nyalenda “B”/2705.



4. She further deposed that land Parcel No. Kisumu/Nyalenda “B”/2705 was jointly owned by the deceased Kristabel Nyasio Agena alias Christabel Nyasio and the appellant in equal shares and further that she and her son Solomon Agenga Ochieng were the only beneficiaries of the deceased’s estate.
5. The respondent also contended in deposition on the issue of subdivision of land Parcel No. Kisumu/Nyalenda “B”/1324 that the dispute could only be resolved before the land court and by involving all the registered owners of the subdivided portions and that therefore, the court did not have jurisdiction to grant the orders sought by the appellant.
6. In her ruling, the trial magistrate found that the appellant had not satisfied the court that the grant issued and confirmed in favour of the respondent was obtained fraudulently by the making of a false statement or by the concealment of material from the court or by untrue allegation. The trial magistrate further noted that the contentions raised touching other parcels of land were strange to the proceedings before her and ought to be instituted in a different suit in the relevant court.
7. Aggrieved by the above holding, of the trial Court, the appellant filed this appeal *vide* a memorandum of appeal dated March 2, 2021 and filed on the even date in which she raised the following grounds of appeal:
 - i. The learned trial magistrate erred in law and in fact by failing to appreciate the principle of *jus accrescendi* noting that the land parcel subject of the estate were registered jointly in the names of the deceased and the objector.
 - ii. The learned trial magistrate erred in law and in fact by failing to appreciate the totality of evidence and exhibits produced in the proceedings thus arriving at totally erroneous conclusion.
 - iii. The learned trial magistrate erred in law by failing to appreciate evidence on record by holding that the appellant did not prove fraud and misrepresentation of facts whereas evidence was adduced to confirm that the parcel of land purported to be the estate of the deceased was under joint tenancy and as such the surviving tenant(s) automatically becomes the sole registered owner of the parcel of land upon demise of the other tenants.
8. The parties agreed to canvass the appeal by way of written submissions but only the appellant had filed submissions as at the time of writing this judgment.

The Appellant’s Submissions

9. It was submitted that the respondent secured a certificate of confirmation of grant with regard to the half of the share of Land Parcel No. Kisumu/Nyalenda “B”/2705 without disclosing fully the material facts surrounding the said parcel of land and thus the said grant ought to be revoked as provided for under section 76 of the *Law of Succession Act* interpreted by the Court in the case of *Jamleck Maina Njoroge v Mary Wanjiru Mwangi* [2015] eKLR.
10. The appellant further submitted that the respondent was aware of the existence of other properties that were part of the deceased’s estate as emerged from her cross-examination but that she had feigned ignorance during filing of the succession matter and opted to omit the property Land Parcel No. Kisumu/Nyalenda “B”/2706.
11. It was further submitted that the grant issued to the respondent ought to be revoked on the ground that as the suit property was jointly registered in the name of the appellant and the deceased, by operation of the law, once the deceased passed on, the said property passed automatically to the appellant and thus did not form part of the deceased’s estate.



12. The appellant submitted that the fraudulent subdivisions and transfers made by the appellant over land parcel No. Kisumu/Nyalenda “B”/1324 ought to be cancelled as provided for under section 80 of the [Land Registration Act](#). Reliance was placed on the case of [Esther Ndegi Njiru & Another v Leonard Gatei](#) [2014] eKLR.

Analysis and Determination

13. I have considered the issues raised in this appeal, the submissions of the appellant and the authorities relied on. I note that the appellant sought to have the grant issued to the respondent on the 4th July 2017 and subsequently confirmed on the March 17, 2018 over the estate of the deceased, Kristabel Nyasiyo Agena alias Christabel Nyasio revoked.
14. The aforementioned grant detailed Land Parcel No. Kisumu/Nyalenda/ “B”/2705 as the only property of the deceased. The respondent testified in cross-examination that she was not aware of any other properties that the deceased was registered as a proprietor
15. Accordingly, the question arising before this court is whether the trial court erred by failing to revoke the grant issued to the respondent on the 4th July 2017 and subsequently confirmed on the 17th March 2018. The burden of proof lay on the appellant to prove that there was reason good enough to revoke the grant aforementioned.
16. The appellant pleaded that Land Parcel No. Kisumu/Nyalenda “B”/1324 was registered jointly in her names and that of the deceased Kristabel Nyasiyo Agena alias Christabel Nyasio and that after the deceased’s death, she was not involved in illegal subdivisions and transfers. Further, the appellant also adduced evidence before the trial court that Land Parcel No. Kisumu/Nyalenda/ “B”/2705, which is the suit property subject of the grant that she wanted revoked/annulled, was registered jointly in her names and that of the deceased, Kristabel Nyasiyo Agena alias Christabel Nyasio.
17. From the evidence adduced before the trial court, it can be discerned that Land Parcel No. Kisumu/Nyalenda/ “B”/2705, despite being registered jointly between the appellant and the deceased, was not carved out of Land Parcel No. Kisumu/Nyalenda “B”/1324.
18. The law providing for revocation of grants is section 76 of the [Law of Succession Act](#), cap 160 of the Laws of Kenya. The section provides as follows:
76. Revocation or annulment of grant
- A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—
- (a) That the proceedings to obtain the grant were defective in substance;
 - (b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the Court of something material to the case;
 - (c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
 - (d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the Court order or allow: or



- ii) To proceed diligently with the administration of the estate; or
- iii) To produce to the Court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) That the grant has become useless and inoperative through subsequent circumstances.

19. The primary reason for seeking revocation of grant as per the affidavit in support was that the respondent secured the grant through fraud, forgery, misrepresentation and non-disclosure of material facts specifically that Land Parcel No. Kisumu/Nyalenda “B”/1324 was registered jointly in the appellant’s name and that of the deceased Kristabel Nyasiyo Agena alias Christabel Nyasio.
20. In her submissions, the appellant submitted that the grant issued to the respondent over Land Parcel No. Kisumu/Nyalenda/ “B”/2705 was obtained without disclosing fully the facts surrounding the said land parcel specifically that the appellant was equally a beneficiary over the said parcel.
21. The appellant sought revocation of grant issued to the respondent, the petition for the grant and the grant as issued provided that Land Parcel No. Kisumu/Nyalenda/ “B”/2705 was the deceased’s only asset. From the search certificate filed in court, Land Parcel No. Kisumu/Nyalenda/ “B”/2705 was registered jointly in the name of the deceased and that of the appellant herein. This was evidently a joint tenancy.
22. The legal position regarding joint tenancies is clear that in such joint tenancies, when one of the tenants passes on, the remaining tenant automatically becomes the new sole owner under the doctrine of survivorship. This is because the shares in the property are undivided and it implies that the property is not up for distribution as the surviving tenant is now the new owner. The property will only be up for distribution upon the demise of the surviving sole owner. Even then, this property would only be the subject of the Estate of this surviving tenant. This is the hallmark of the principle of jus accrescendi which provides for the right of survivorship.
23. This legal position was affirmed by the Court in the case of *In re Estate of Johnson Njogu Gichobi (Deceased)* Succession Cause No. 112 of 2016 [2018] eKLR where L.W. Gitari J held as follows: -

13. Section 60 of the [Land Registration Act](#) provides:

“If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of death delete the name of the deceased tenant from the register by registering the death certificate.”

This means that where property is in the names of joint owners, upon the death of one of them, the surviving owner automatically becomes the owner upon presenting the evidence of death of the joint tenant i.e death certificate to the registrar. The property automatically passes to the surviving joint tenant. This principle of survivorship over jointly owned property operates to exclude the property from the [Law of Succession Act](#) upon the death of one of the joint tenants. I am in agreement with the holding by Achode J. – *Mwangi Gakuri v Bernard Kigotho Maina & another*, H. C NBI. Succ. Cause No. 2335/2011 where she stated:

“Property is capable of passing upon death other than by will. It may pass by survivorship..... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the



property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship..... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants....”

18. My view is that as the objector and the deceased were joint owners, the objector as the surviving joint owner was entitled to acquire ownership without being subjected to the process of intestacy. In the case of *Isabel Chelangat v Samuel Tiro*(2012) eKLR, the principle of survivorship also known as *jus accrescendi* was expounded where it was stated:

“A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities.” The right of survivorship (*jus accrescendi*) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant as long as there is a surviving joint tenant as the right of survivorship takes precedence.”

By the principle of survivorship land owned jointly passes automatically to the surviving owner when one dies without the need to file a Succession Cause. W. M. Musyoka in his book *Laws of Succession* at page 3 states as follows:-

“Property is capable of passing upon death other than by will. It may pass by survivorship..... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship..... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants.”

24. For the foregoing reasons, I find and hold that indeed, the property Land Parcel No. Kisumu/ Nyalenda/ “B”/2705, having being jointly owned by the deceased and the appellant, herein, cannot be the subject of Succession proceedings because the land automatically passed on to the appellant upon the death of Kristabel Nyasio Agena alias Christabel Nyasio .
25. I observe, however, that the respondent was a pro se litigant when she petitioned for grant of letters of administration and thus being a lay person, may have not understood the implications of property being jointly registered between two people.
26. That being the case, this court finds that the material placed before the trial court and this court on appeal, are sufficient to warrant the revocation of the grant issued to the respondent on the 4th July 2017 and subsequently confirmed on the 17th March 2018.
27. The other properties cited by the appellant in her application were not subject of the grant issued to the respondent on the July 4, 2017 and subsequently confirmed on the March 17, 2018 and were thus not for consideration before the trial court or before this court on appeal.
28. The upshot of the above is that the instant appeal is meritorious and is hereby allowed. The ruling of the Honourable trial magistrate delivered on the February 2, 2021 is hereby set aside and substituted with an order revoking and annulling the grant issued to the respondent Monica Achieng Ochieng on the July 4, 2017 and subsequently confirmed on the March 17, 2018.



29. Each party to bear their own costs of this appeal and the proceedings before the trial court.
30. This file is now closed.
31. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF JANUARY, 2024

R.E. ABURILI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

