



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate Kagwimi Gatega (Deceased) (Succession Cause
268 of 2014) [2024] KEHC 308 (KLR) (23 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION CAUSE 268 OF 2014
RM MWONGO, J
JANUARY 23, 2024**

IN THE MATTER OF THE ESTATE OF KAGWIMI GATEGA (DECEASED)

BETWEEN

**SOPHIA KARUANA KARANI 1ST APPLICANT
LUCY WANGECHI 2ND APPLICANT
JULIA MUTHONI 3RD APPLICANT
MARGARET WAINOI 4TH APPLICANT
MARY WANJIRA 5TH APPLICANT**

AND

**STEPHEN MUCHIRA MUGO KAGWIMI 1ST RESPONDENT
ISAAC MURIUKI MUGO 2ND RESPONDENT
JAMES KARIUKI MUGO 3RD RESPONDENT
JOSEPH WANJOHI GATEGA 4TH RESPONDENT
PETER MUCHOKI WAHOME 5TH RESPONDENT
WILFRED MWAI GITHINJI 6TH RESPONDENT**

JUDGMENT

1. The applicant filed summons for revocation of grant dated 16th April, 2014 complaining that:
 - i. The proceedings to obtain grant were defective in substance.



- ii. The grant was obtained fraudulently by making of false statement or by the concealment from the court of something material to the case and or otherwise some of rightful beneficiaries have been excluded from the share of estate accordingly.
 - iii. The grant was obtained by means of untrue allegation of facts essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
 - iv. The person to whom the grant was made, has not diligently given a true account of the estate.
2. The application is premised on the grounds that the modus of share distribution as outlined in the grant as issued on 12/9/2008 has left out the daughters of the deceased who are entitled to the estate, otherwise the daughters being the applicants herein beneficial right has been violated which further their constitutional rights breached consequently thereto.
3. In their supporting affidavit the applicants state, inter alia, that:
 - i. The above named Kagwimi Gatega deceased died in the year 2006 as outlined in the petition as filed vide Kerugoya Principal Magistrates Court Succession Cause No.314 of proof and letter of administration intestate made to Stephen Muchiri Mugo Kagwimi, on 15/5/2008, and subsequently the grant was confirmed and accordingly issued on 12/9/2008.
 - ii. The person to whom the grant was made is guilty of such mis-direction to court otherwise failed to produce a true account of the estate in the event of make the inventory of the same as reflected in the certificate of grant dated 12/9/2008.
 - iii. The grant should be revoked and a fresh distribution be made inclusive of the daughters right to inherit. Otherwise, the grant be made as relating to Land Parcel No. Mutithi/Strip.242 and part of portions out of Land Parcel No. Inoi/Kaitheri/342 and Land Parcel No. Inoi/Kaitheri/247 and otherwise all that portion of land wherein there be the burial ground of the deceased parents be allocated to the daughters jointly.
4. In his replying affidavit, the 1st respondent averred: That the application is a waste of court's time since the grant was obtained by consent of all parties; and that the applicants sold their shares of the Land Parcel No. Inoi/Kaitheri/ 247-257 and shared the money among themselves and hence didn't object to the grant.
5. The 4th respondent filed a replying affidavit with the following major averments:
 1. That before filing of the succession cause, they had met as a family and agreed that since Sophia Karuana, the 1st applicant had left her matrimonial home, and she was to get land parcel number Inoi/Kaitheri/342. The other sisters had no interest in sharing of their father's properties as they are settled where they were married. The deceased's sons were to share parcel numbers Inoi/Kaitheri/247 and Mutithi/Strip/242.
 2. That around 1999, the 1st applicant entered into a sale agreement with one James M. Mwai for sale of parcel number Inoi/Kaitheri/342, which was meant to be her inheritance.
 3. That when their mother Ciliaka Waruguru came to know of the said sale, she was not agreeable and decided to refund the money to the purchaser. The 1st applicant therefore could not claim any other land.
 4. That their mother fell ill and again and the family met and agreed to sell land parcel number Inoi/Kaitheri/342 the land that had been redeemed by their mother, to one Wilfred Mwai Githinji, who had been sought by their sisters Julia Muthoni and Mary Wanjira. After payment



of the medical bills, what remained from the proceeds of sale was shared equally by all the children of the deceased, including the applicants herein. This is why the name of Wilfred Mwai Githinji appears in the certificate of confirmation of grant.

5. That on 15/8/2008, all family members appeared in court and nobody had any problem with the proposed mode of distribution as there was a family agreement. The grant was therefore confirmed.
6. On his part the 5th respondent deposed a replying affidavit to the effect that:
 1. That sometime in 2014, he intended to purchase a parcel of land. He was introduced to Isaac Murithi Mugo, James Kariuki Mugo, Stephen Muchira Mugo and Joseph Wanjohi Gatega, who were to succeed land parcel number Mwea/Mutithi/Strip/242 measuring 2.02 hectares. He visited the land and was satisfied with it.
 2. On 10th October, 2014. he entered into a written sale agreement with the four vendors.
 3. On 16th October, 2014, he became the registered owner of the land, and took occupation of it. He has been in possession of the same to date, and had fenced the land and extensively developed it.
7. In his replying affidavit, the 6th respondent stated, inter alia, that:
 1. On 11th December, 2007, he entered into a written sale agreement with Stephen Muchira Mugo who later became the administrator of the estate of the deceased.
 2. The succession cause was filed whereby all the children of the deceased were listed in form P&A 5. No one had any objection and Stephen Muchira Mugo was issued with letters of administration. Later summons for confirmation of grant were filed in court and all the children of the deceased were listed in the affidavit supporting summons for confirmation.
 3. He came to learn that the reason why the daughters did not want a share is because they were all married and had properties with their husbands, and therefore they desired to have the brothers share what the father left behind.
 4. That when the grant was confirmed in 2008, he took occupation of his 4 acre parcel being number Inoi/Kaitheri/342. I have constructed and have been in exclusive occupation since 2008, and no one raised any issue even at the time I was doing the construction.

Parties' Submissions

Applicants' submissions

8. The applicants' case is that they were not involved in the succession cause and specifically the 1st applicant testimony was that they never executed any consents for confirmation of the grant nor did she attend the trial court on the date of the confirmation of the grant.

4th Respondent's case

9. The 4th Respondent's case is that he is a beneficiary and a brother to the applicants. He stated that they had met before filing the succession case as a family and agreed that the 1st applicant was to get land parcel no. Inoi/Kaitheri/342 while the sons were to share parcels no Inoi/Kaitheri/247 and Mutithi strip/242. The other daughters were to get nothing as they were married. Their mother then fell ill and they sold the said Inoi/Kaitheri/342 to the 6th respondent to clear medical bills and split the balance.



On cross examination he could not explain how the 1st applicant could purport to sell land for his father (deceased) when he was still alive. He also stated that the 1st applicant was never the transferred any land.

5th Respondent's case

10. The 5 respondent's case is that he purchased land parcel no Mwea/Mutithi/strip/242 from the 1st – 4th respondents vide a sale agreement dated 10/10/2014 for Kshs. 2,200,000. The land was then transferred to him and registered in his name 6 days later on the 16/10/2014. He claims to be protected as a purchaser by dint of section 93 of the [*Law of Succession Act*](#).

6th Respondent's case

11. The 6th respondent's case is that the 1st respondent approached him in 2007 and informed him that his father was deceased and that the family wanted to sell land parcel no.Inoi/Kaitheri/342. He was informed that all children of the deceased had no problem with the sale. He thus entered into a sale agreement dated 11/12/2007 with the 1st respondent. He said the money was to be utilised for the deceased's wife medical bills.
12. The 6th Respondent pleads protection by section 93 of the [*Law of Succession Act*](#). He, however, does not meet the threshold as that section provides that the transfer of the interest must be by a person to whom representation has properly been granted.
13. In the case of the sale to the 6th respondent, it was done before the succession was even filed and the 1st respondent who sold him the land was not an administrator by then. Thus, he does not qualify for protection under the LSA. The sale was actually an act of intermeddling with the property of a deceased person.

Respondents' submissions

14. In their submissions, the 1st applicant contends that she was not present in court as she was by then residing in Lamu. In the affidavit in support of summons for confirmation of grant sworn on 15 April, 2014, there is no single averment that the applicants were not present in court. In fact, their only contention is that there was violation of their constitutional rights as daughters of the deceased not being awarded land.
15. The other applicants have not indicated where they were living in 2008 when the grant was confirmed, yet the 6th Respondent in his replying affidavit sworn on 3rd September, 2019 has deponed that he took occupation of his portion in 2008, has made developments and nobody raised an issue when he was constructing.
16. In the absence of any explanation as to why no action was taken to stop the construction when the 6th Respondent was building, the only inference, according to the respondents, is that the applicants were involved all through from the beginning to the conclusion of the succession proceedings.
17. The 4th and 6th respondents who were present in court insist that the applicants attended court for the confirmation of grant and there was no protest to the confirmation. The applicants contend that they did not attend.
18. The 1st applicant has submitted that the signatures appearing in the consent form filed in court was a forgery. The applicants have all along been aware of the said consent form filed in court. There is nothing produced in court to show that the applicants did not sign the said consent form.



19. The respondent submits that the applicants appear to have no issue with the 5th Respondent's title. The 5th Respondent's replying affidavit sworn on 3rd September, 2019, the documents annexed to it and the evidence in court shows that the 5th Respondent is protected by Section 93 of the [Law of Succession Act](#).

Issues for Determination

20. The only issue is whether the grant should be revoked in the present circumstances.

Analysis and Determination

21. The deceased died intestate on 24th April 2006. According to the papers and petition filed in the petition at Kerugoya Principal Magistrates Court Succession Cause No. 314 of 2007, the deceased was survived by his wife, six daughters (indicated as married) and four sons. All the applicants and respondents were named in the Chief's letter, and in the Affidavit in support of the petition. The 1st Respondent was the petitioner.
22. A grant was issued to the 1st Respondent Stephen Muchira Mugo Kagwimi on 12th September, 2008.
23. The applicants herein filed the Summons for Revocation of Grant dated 12th April, 2014. They seek that the said certificate of grant issued on 12th September, 2008 be revoked.
24. The applicants depose that the 1st Respondent is guilty of such mis-direction to court otherwise failed to produce a true account of the estate in the event or make the inventory of the same as reflected in the certificate of grant dated 12/9/2008.
25. The applicants contend that the grant should be revoked and a fresh distribution be made inclusive of the daughters' right to inherit.

Applicants case

26. The applicant's case is that they were not involved in the succession cause and specifically the 1st applicant's testimony was that they never executed any consents for confirmation of the grant nor did she attend the trial court on the date of the confirmation of the grant.
27. In her testimony as PW1, Sophia Karani stated that she did not sign any documents for the succession and any such signatures were forgeries. She had been living in Lamu between 2004 and 2013.
28. She testified that she did not sign the consent form to the making of Letters of Administration filed on 7th December, 2007. It has 9 persons but the ID numbers are 10. She denied that the thumb print on the document belonged to her. She gave to court her ID Number which was 3402936. The ID number written against her name in the said form was No 13773025, which is not her ID Number. She denied ever signing any succession forms.
29. In cross examination, she denied she was in court on 15th Aug 2008; that she was in court in 2014 and that was when she saw her siblings; that she did not sell any plot or receive any money; that she did not sign any agreement on 24th December 1999 for refund of money; and that she did not affix her thumbprint or fingerprint to any document
30. RW 1 testified that he was not sure whether the 1st applicant went to live in Lamu. All the 10 children of the deceased attended the confirmation of grant session in court. None of those present objected to the confirmation of grant.



5th Respondent's case

31. The 5th respondent's case is that he purchased land parcel no Mwea/Mutithi/strip/242 from the 1st – 4th respondents vide a sale agreement dated 10/10/2014 for Ksh. 2,200,000. The land was then transferred to him and registered in his name 6 days later on the 16/10/2014. He claims to be protected as a purchaser by dint of section 93 (1) of the [Law of Succession Act](#), which provides as follows:

“(1) All transfers 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 valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

32. Section 26 (1) of the [Land Registration Act](#) provides as follows:

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.” (Emphasis added)

33. Thus, the 5th Respondent contends he is a bona fide purchaser for value.

34. However, the 1st Respondent stole a march over the other beneficiaries who were also to benefit on equal status on the property of the deceased and it would be unfair to validate the illegal actions of the Respondents by invoking Section 93 of the [Law of Succession Act](#).

35. Nagillah J held as follows in *Monica Adhiambo v Maurice Odera Koko* [2016] eKLR:

“The reality of the situation is that the provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawful issued then, Section 93 can come to the rescue of such a purchaser. In my humble view the underlying objective of the [Law of Succession Act](#) is to ensure that beneficiaries of deceased persons inherit the property.”

6th Respondent's case

36. The 6th respondent's case is that the 1st Respondent approached him in 2007 and informed him that his father was deceased and that the family wanted to sell land parcel No.Inoi/Kaitheri/342. He was informed that all children of the deceased had no problem with the sale. He thus entered into a sale agreement dated 11/12/2007 with the 1st respondent. He said the money was to be utilised for the deceased's wife medical bills.



37. Testifying as RW3, Wilfred Mwai Githinji, the 6th Respondent, testified that he entered into a sale agreement with the 1st Respondent on 11th December 2007 before the succession of the estate was confirmed.
38. He has been listed as an interested party in the introductory letter by the Chief dated 29th November, 2007.
39. The respondent submits that in the absence of any explanation as to why no action was taken to stop the construction when the 6th Respondent was building, the only inference is that the applicants were involved all through from the beginning to the conclusion of the succession proceedings.
40. It was held as follows in *Jecinta Wanja Kamau v Rosemary Wanjiru Wanyoike & Another* [2013] eKLR:
“ Before the appellant could seek protection as a purchaser under Section 93 of the Act she had first to prove that she is a purchaser. In this case, there was no prima facie evidence that she was a purchaser. In any case, and as provided by Section 82 (b) (II) of the Act, it would have been illegal for Beatrice Njeri Magondu to sell the land before the confirmation of the grant.”
41. The applicants submits that the sale to the 6th respondent was affected before the succession was even filed. Further that the 1st respondent who sold him the land was not an administrator by then and thus the respondent does not qualify for the statutory protection under Section 93 of Law of Succession. The sale was in fact, an act of intermeddling with the property of a deceased person.
42. This argument is borne out by the facts on record.
43. Section 73 of the Probate and Administration Rules which provides that:
“ 73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

This provision gives the court over-acting powers to meet the ends of justice.

Conclusion & Disposition

44. Taking all the above matters into consideration, it is clear that the applicants did not feature in the Petition filed for the succession of the deceased's estate, and that the signatures were falsified.
45. Accordingly, it is evident that the applicants were not present when the suit property was shared among the beneficiaries.
46. Further, there is no doubt that the 6th Respondent's purchase was done before the succession was filed and is therefore untenable and illegal.
47. *Nyakundi J* held as follows in *Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party* [2019] eKLR:
“ It must be noted that the object of the court is uphold substantive justice. It is my considered view that substantive justice will be done by ensuring that the beneficiaries who were left out when the proceeds of the suit property were shared are given their share of the Estate in question. It is for that reason, that I invoke the inherent powers of this court granted under



Article 159 of *the Constitution*, Section 76 of the *Law of Succession Act* and Section 73 of the Probate and Administration Rules.”

48. In the result, this Court has no alternative but to revoke the said grant. It is hereby revoked. The properties forming the deceased’s estate shall revert back into the deceased’s name until a proper grant thereon is issued and confirmed.

49. Orders accordingly.

DATED AT KERUGOYA THIS 23RD DAY OF JANUARY 2024

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R. MWONGO

JUDGE

Delivered in the presence of:

Wambui holding brief for Kagio for 2nd, 4th, 5th, & 6th Respondents

Mbugua for Applicants

