



REPUBLIC OF KENYA



**In re Estate of the Late Kangangi Kairaria (Deceased) (Succession Cause  
2 of 2020) [2024] KEHC 1465 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1465 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
SUCCESSION CAUSE 2 OF 2020**

**LW GITARI, J**

**FEBRUARY 15, 2024**

**FORMERLY MERU HIGH COURT SUCCESSION CAUSE NO. 246 OF  
1995 AS CONSOLIDATED WITH SUCCESSION CAUSE NO. 251 OF 2021**

**IN THE MATTER OF THE ESTATE OF THE LATE KANGANGI KAIRARIA (DECEASED)**

**BETWEEN**

**M'NDAKA KANGANGI ..... 1<sup>ST</sup> APPLICANT  
MWITI M'NDAKA ..... 2<sup>ND</sup> APPLICANT  
BENEDICTOR NJIRU RIUNGU ..... 3<sup>RD</sup> APPLICANT  
MARTIN MIRITI M'NDAKA ..... 4<sup>TH</sup> APPLICANT  
CELINA KAIMENTI KIRUGARA ..... 5<sup>TH</sup> APPLICANT  
JEDIEL MURIUKI ..... 6<sup>TH</sup> APPLICANT  
ROBERT MUGENDI NABIA ..... 7<sup>TH</sup> APPLICANT  
SAUL NTHIGA MBIUKI ..... 8<sup>TH</sup> APPLICANT**

**AND**

**PETER GITONGA MUTUAMWARI ..... ADMINISTRATOR**

**AND**

**MAJANI GARDENS LIMITED ..... RESPONDENT**



## RULING

### Background

1. This matter relates to the estate of Kangangi Kairaria deceased who died intestate on 13/5/1981. A petition for the grant of letters of administration in his estate was issued to M’Ndaka Kangangi in the Succession Cause No. 246/1995. The said grant was confirmed on 8/4/1997 in favour of M’Ndaka Kangangi. The estate was stated to be Mwimbi/Chogoria/1086. The estate was distributed as follows:-
  - i. M’Ndaka Kangangi - 8.307 Acres
  - ii. Mwiti M’Ndaka - 6.0 Acres
  - iii. Martin Mwiti M’Ndaka - 5.0 Acres
  - iv. Ashford Nkonge M’Ndaka - 5.0 Acres
  - v. Teresio Njaban Mutua Ndaka- 5.0 Acres
  - vi. Hampaly M’Ndaka - 5.0 Acres
  - vii. Eugenio Murungi Henry - 5.0 Acres
2. This grant was later revoked following an application made by Joseph Murungi Gitonga who was claiming to be a cousin to the Petitioner and a nephew to the deceased. It was alleged that the Petitioner had failed to disclose some of the beneficiaries and that he had sub-divided the estate into six portions namely Mwimbi/Chogoria/2355, 2357, 2358, 2359, 2360 and 2361 which were disposed off. In a ruling by Justice Ouko (as he then was) and delivered to the parties on 13/7/2009 by Justice Kasango (retired.) The said grant was revoked and the Judge ruled that-

“ This in effect means that the subdivision and transfer of the suit property was of no effect.”
3. Thereafter another Succession Cause in the estate of the deceased was filed by Joseph Muriungi Gitonga being Succession Cause No.251/2012. The two Succession Causes were consolidated on 22/9/2014 and matters proceeded in Succession Cause No.246/1995. It is important to note that after the grant was revoked in Succession Cause 246/1995, the Judge did not appoint an administrator. The grant issued to Joseph Murungi Gitonga the Petitioner in Cause No.251/2012 was revoked vide an order by Justice Gikonyo on 22/5/2018. A fresh grant was issued to Peter Gitonga M’Amwari on 22/5/2018 and confirmed on 18/9/2018. The estate was distributed as follows:Joseph Murungi Gitonga - 12.58 AcresPeter Gitonga M’Amwari - 12.58 AcresBenard Njeru Kariuki - 12.58 Acres
4. On 18/7/2018, Justice Gikonyo rectified and confirmed the said and determined that the matter was finalized.
5. The 1<sup>st</sup> Applicant herein, M’Ndaka Kangangi (now deceased), filed the summons for revocation of grant dated 4<sup>th</sup> March, 2021. The application is brought under the provisions of section 76 of the *Law of Succession Act* and rule 73 of the *Probate and Administration Rules*. The 1<sup>st</sup> Applicant sought for the revocation of grant of letters of administration intestate issued to the 1<sup>st</sup> Respondent herein, one Peter Gitonga Mutwamwari, in respect of the estate of Kangangi Kairaria who died intestate on 13<sup>th</sup> May, 1981.
6. The application is based on the grounds that:



- i. The proceedings to obtain the grant were defective in substance.
  - ii. The grant of letters of administration and subsequent confirmation was obtained, inter alia, by fraud by the then Petitioner's/Applicant's/Interested Party's advocate, by concealment of material facts from the court and by the administrator/1<sup>st</sup> Respondent making false claims in filing and having summons for confirmation of grant confirmed.
7. The application is supported by the affidavit of the son to the deceased herein, the M'Ndaka Kangangi (now deceased), which was sworn on the same 4<sup>th</sup> March, 2021.
  8. It is the applicants' case that the 1<sup>st</sup> Respondent secretly and fraudulently filed Meru H.C. Succession Cause No. 251 of 2012, obtained a grant of letters of administration, and sold the whole estate to the 2<sup>nd</sup> Respondent herein. That the 1<sup>st</sup> Respondent secretly filed summons for confirmation of grant without informing the 2<sup>nd</sup> Applicant and that the said summons were heard ex-parte and the grant confirmed on 18<sup>th</sup> September, 2018.
  9. In response to the present application, the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by himself on 4<sup>th</sup> May, 2022. He deposed that the Applicants have always been aware of the proceedings in this cause and in fact filed an application dated 1<sup>st</sup> July, 2014. That the said application clearly shows that all the applicants have been alive to the proceedings in this case. That the Applicants concede that they filed an application for revocation of grant dated 9<sup>th</sup> June, 2014 which was compromised by consent of the parties although they allege that their advocate, was compromised to enter into consent on 22<sup>nd</sup> May, 2018.
  10. The 1<sup>st</sup> Respondent further deposed that since the application for revocation of grant dated 9<sup>th</sup> June, 2014 was settled by consent, the present application is *res judicata* to the application dated 9<sup>th</sup> June, 2014. The 1<sup>st</sup> Respondent stated that this Honourable Court pronounced itself in this matter vide its ruling of 19<sup>th</sup> November, 2020 to the effect that the matter had been finalized and there was no pending application for revocation of grant. The 1<sup>st</sup> Respondent contends that the Applicant has not shown or produced any fraud on the part of his former advocate. That he was related to the 1<sup>st</sup> Applicant as they were cousins and that their respective rights to the suit land was determined by the land disputes tribunal and the same adopted as an order of the court. It is the 1<sup>st</sup> Respondent's contention that the Applicants are only trying to delay justice
  11. On behalf of the 2<sup>nd</sup> Respondent, one Ronald Mutuma Mutai, with the authority of the 2<sup>nd</sup> Respondent Company, deposed, vide his Replying affidavit sworn on 13<sup>th</sup> June, 2023, that the present application is riddled with false averments and that all the applicants herein were aware of all proceedings. That the applicants were represented by counsel throughout the proceedings and that if indeed their lawyer was compromised, they have not shown any action that they took against the lawyer. Mr. Ronald deposes that the instant application is an afterthought and that the same was instituted as with the sole intention and purpose of refreshing the judgment obtained by the 2<sup>nd</sup> Respondent herein against them in Chuka E.L.C. No. 8 of 2020. According to him, the Appellants herein are trying to appeal against the judgment that was delivered in Chuka E.L.C. No. 8 of 2020.
  12. The present application is opposed by the Replying Affidavit sworn by Peter Gitonga M'Amwari the Administrator herein on 4<sup>th</sup> May, 2022. According to him, this matter was concluded and the Applicants have always been aware of the proceedings in this cause. That the Applicants participated by filing an application for revocation of grant dated 9<sup>th</sup> June, 2016 but the same was decided by consent between the parties. According to the Administrator, the present application for revocation of grant is *res judicata* to the application dated 9<sup>th</sup> June, 2014 as the same was determined by a consent order on



- 22<sup>nd</sup> May, 2018. That this Court pronounced itself by its ruling of 19<sup>th</sup> November, 2020 to the effect this matter was finalized.
13. On 14<sup>th</sup> June, 2023, the Respondents filed a Notice of Preliminary Objection dated 13<sup>th</sup> June, 2023 on the grounds that:
- i. The application dated 4<sup>th</sup> March, 2021 is *res judicata* to the application dated 24<sup>th</sup> July, 2014;
  - ii. The court is *functus officio* by dint of the ruling delivered by this honourable court on 19<sup>th</sup> December, 2020.
  - iii. The application and the suit be struck out with costs.
14. In response, the 2<sup>nd</sup> Applicant (referring himself as the 1<sup>st</sup> Applicant) swore a supplementary affidavit on 22<sup>nd</sup> June, 2023 in which he deposed that the allegation that the present application was *res judicata* is a misunderstanding of the law of succession. That the application dated 9<sup>th</sup> June, 2014 sought to revoke the grant issued and confirmed in Meru Succession No. 251 of 2012, which grant was subsequently revoked. That, on the other hand, this application seeks to revoke the grant that was confirmed on 18<sup>th</sup> September, 2018 on the grounds that some of the beneficiaries were not aware and were not served with the summons for confirmation of grant. Further, that the firm of Kirimi Mbogo & Co. Advocates was not representing all the Applicants herein and the said advocate cannot be said to be representing people whom he was not representing. According to him, this court could issue summons to the said advocate to confirm who he was representing in the matter as his Notice of Appointment indicated that he was only representing some of the applicants in the matter and not all of them. He who alleges must prove. Section 107 of the *Evidence Act* provides:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
15. The legal burden was on the applicant who would lose the ease if the allegation was not proved. Section 108, & 109 of the *Evidence Act* provides:
108. Incidence of burden
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
109. Proof of particular fact
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
16. A party cannot therefore urge the court to descend into the arena of conflict. It remains impartial.
17. The contention that the revoked grant was issued in Meru High Court Succession Cause No. 251 of 2012 is wrong. The Ruling by Justice Ouko was issued in Succession Cause No.246/1995 and revoked the grant issued to M’Ndaka Kangangi.



## Analysis

18. The late M’Ndaka Kangangi (the 1<sup>st</sup> Applicant herein) is the father to the Mwiti M’Ndaka (the 2<sup>nd</sup> Applicant herein). He deposed that he instituted succession proceedings in respect of the subject estate vide Meru High Court Succession Cause No. 246 of 1995 and obtained a grant upon which he distributed the estate to his sons prior to the said grant being revoked on 7<sup>th</sup> July, 2009. The 1<sup>st</sup> Applicant died before the summons for revocation of grant could be heard and determined. He thus obtained letters of administration ad litem for purposes of substituting his late father in this cause which application was allowed on 13<sup>th</sup> October, 2022. The said Mwiti M’Ndaka deposed that he wished to rely on the affidavit evidence sworn by his late father in support of the present application.
19. The Applicant alleges that their advocate was compromised to enter the consent for 22<sup>nd</sup> May, 2018 which consent compromised the application for revocation dated 9<sup>th</sup> June 2016. In response to this contention, the Respondent maintains that the Applicant has not brought any evidence to substantiate his claim that his former advocate was compromised through fraud. According to the Respondent the present application should be dismissed with costs.
20. I have considered the issues raised by the parties. A brief background of this cause would suffice at this point so as to facilitate the expeditious disposal of the same.
21. The matter relates to the estate of the late Kangangi Kairaria who was the father to M’Ndaka Kangangi (now deceased). The deceased herein only had one property to his name, that is, Mwimbi/Chogoria/1086 (the “suit property”). The said M’Ndaka Kangangi was the father of the 2<sup>nd</sup> Applicant herein.
22. The letters of administration in respect of the estate of the deceased herein were issued and later confirmed on 8<sup>th</sup> April, 1997 in favour of the late M’Ndaka Kangangi. After the grant was confirmed as above, one Joseph Murungi Gitonga (also deceased) brought an application indicating the grant that the grant confirmed in favour of the late M’Ndaka Kangangi had been obtained fraudulently and making of a false statement.
23. Despite due service of the application, the late M’Ndaka Kangangi did not appear before court or send his counsel to represent him. The application was thus argued ex parte. W. Ouko, J. (as he then was) noted that while the late Joseph Murungi Gitonga had filed an affidavit filed on 19<sup>th</sup> February 2009, but sworn on 19<sup>th</sup> February 2006 which affidavit indicated that he was representing two other people.
24. The court found that the two were strangers to these proceedings as there had been no mention of them in the summons other than that they were beneficiaries of the deceased. The court further found that the confirmed on 8<sup>th</sup> April, 1997 in favour of the late M’Ndaka Kangangi had been issued by the Deputy Registrar who had no power to issue or confirm the grant. For this reason, the grant was revoked on 13<sup>th</sup> July, 2009. However, the late M’Ndaka Kangangi had already sub-divided the suit land into six (6) portions and some of the new registered owners had disposed off their shares.
25. Consequently, the late Joseph Murungi Gitonga filed Chamber Summons dated 25<sup>th</sup> February, 2010. The Court (M. Kasango, J. as she then was) ruled on 28<sup>th</sup> May, 2010 that on the subsequent hearing of the Chamber Summons dated 25<sup>th</sup> February, 2010, the registered owners of the sub-divided parcels should be served with the application so that they could be heard. I note that the ruling by Justice Ouko addressed the issue of the sub-division and the transfer and said they were of no effect.
26. The Counsel for the respondents has urged the court to find that the application dated 4/3/2021 is res judicata. The principle of res judicata is that a court of law cannot entertain a matter which it has



heard and determined to its finality. The court becomes *functus official* when it has heard a matter and determined it. In this matter the court revoked the grant issued to M’Ndaka Kangangi. Thereafter the parties entered a consent to have Peter Gitonga M’Amwari as the sole administrator. Justice Gikonyo marked the matter as finalized.

27. I find that the court having revoked and re-issued the grant, it cannot again be called upon to revoke the grant. This would be taking the court in a circus and extending the jurisdiction of the court to revoke the grant too far. The grant herein was issued by consent. There is a procedure for setting aside consent orders which are stringent. This includes proving to court that there was fraud or misrepresentations. The applicant has not laid material before this court to prove that the Counsel had no instructions to represent him. It is also clear from the record that Succession 246/1995 and Succession 251/12 had been consolidated when the grant was conformed. Section 76 a, b & c of the *Law of Succession Act* lays down the threshold for revocation of grant. It is provided:
- (a) that the proceedings to obtain the grant were defective insubstance;
  - (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.”
28. The applicant has not demonstrated these grounds. This court in a ruling dated 19/11/2020 held that the matter was finalized. The court is *‘functus official’*. I find that the summons for revocation lacks merits. The ruling by Justice Ouko (as he then was) had conclusively determined the issue of subdivisions done by the applicant as pointed out above. The court cannot revisit them.

**Conclusion:**

29. The application is without merits and is dismissed. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 15<sup>TH</sup> DAY OF FEBRUARY 2024.**

**L.W. GITARI**

**JUDGE**

**15/2/2024**

Ms Wanjiku for Mr. Muthomi for Applicant

Ms Mutegi or Respondent

Ruling has been read out in open court.

**L.W. GITARI**

**JUDGE**

**15/2/2024**

