



In re Estate of Kangangi Charawe (Deceased) (Succession Cause 519 of 2009) [2024] KEHC 3647 (KLR) (17 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3647 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 519 OF 2009
LM NJUGUNA, J
APRIL 17, 2024**

IN THE MATTER OF THE ESTATE OF KANGANGI CHARAWE (DECEASED)

BETWEEN

NYAGA KANGANGI NGARI APPLICANT

AND

RUTH NJOKI CYRUS RESPONDENT

JUDGMENT

1. A grant of letters of administration in the estate of the deceased was issued to the Cyrus Mbogo Njiru (deceased) on 11th December 2009. Cyrus Mbogo Njiru (deceased) proceeded to file summons dated 15th February 2010 for confirmation of grant together with a supporting affidavit wherein he deposed that he was the only beneficiary of the estate of the deceased. Consequently, a certificate of confirmation of grant was issued on 15th March 2012, distributing the estate to himself, Justus Muchangi Kangangi, Church Commissioners for Kenya St. Peter's Church Gatituri and Church Commissioners for Kenya St. Peter's Primary School Gatituri.
2. The applicant filed summons dated 05th April 2013 seeking revocation of the grant issued to Cyrus Mbogo Njiru (deceased) on grounds that the same was obtained fraudulently and that Cyrus Mbogo Njiru (deceased) concealed from the court the material fact that the applicant was also a son of the deceased. In the supporting affidavit thereof, he deposed that the administrator failed to inform the court that parcel numbers Ngandori/Kirigi/37, Ngandori/Kirigi/706 and Ngandori/Kirigi/ 631 also formed part of the estate of the deceased and that he transferred the said properties to him without involving the applicant. That prior to his death, the deceased wrote down his intentions over his estate and he produced a copy of this letter as evidence. He sought that the grant be revoked and be issued to him and the said Cyrus Mbogo Njiru (deceased) as administrators jointly.



3. Cyrus Mbogo Njiru (deceased) filed a replying affidavit dated 18th November 2013 wherein he deposed that he did not procure the grant fraudulently. That there is no portion of the estate of the deceased that is due to the applicant. He stated that the applicant had been given land by the deceased before he died but the applicant sold the piece of land and has no right to claim from the estate. That land parcel number Ngandori/Kirigi/37 in the name of the deceased was subdivided into parcel numbers Ngandori/Kirigi/4052 & 4053 which he sold to 3rd parties but the transfers were not completed before the deceased died. That parcel number Ngandori/Kirigi/4054 was given to Justus Muchangi Kangangi because when his parents separated, he became a dependant of the deceased.
4. That he bought land parcel number Ngandori/Kirigi/706 and the same is registered in his name. That land parcel number Gaturi/Kithimu/631 was given to him by the clan but because he was too young and did not have an identification card, the same was given to the deceased. That he bought parcel number Ngandori/Kirigi/2393 from one Munyi Gaciethire at Kshs.3,000/= but since he was working far from home, his father, the deceased, completed the sale transaction on his behalf and registered the same in his own name. That Justus Muchangi Kangangi inherited from the estate as a proven dependant of the deceased.
5. Before the summons for revocation of grant was prosecuted, Cyrus Mbogo Njiru died on 14th June 2016. 3 years after his death and as the summons for revocation was pending, the applicant filed a citation against the respondent to accept or refuse letters of administration ad litem dated 02nd May 2019. The respondent accepted to file for grant ad litem and the same was issued to her to enable her to substitute Cyrus Mbogo Njiru (deceased) in the summons for revocation. Having been substituted as the respondent in the summons for revocation of grant proceedings, she filed her witness statements and the matter was set for hearing of the summons for revocation of grant dated 05th April 2013.
6. The respondent filed a replying affidavit dated 17th April 2023 wherein she deposed that the applicant who is her uncle was given parcel number Gaturi/Githimu/633 measuring 2.40Ha and she produced a copy of the greencard. That parcel number Ngandori/Kirigi/706 was registered in 1961 to Sylas Lazaro and was later changed to the name Cyrus Njiru Lazaro, and she produced a copy of the greencard detailing the transactions. That in the year 2000, the said parcel of land was closed after subdivision into 4 portions.
7. That in the year 1983 the deceased subdivided parcel number Ngandori/Kirigi/37 into 3 portions namely parcel number Ngandori/Kirigi/4054 which he gave to his grandson Justus Muchangi Kangangi, Ngandori/Kirigi/4052 was sold to Church Commissioners for Kenya St. Peter's Primary School Gatituri and Ngandori/Kirigi/4053 was sold to Church Commissioners for Kenya St. Peter's Church Gatituri. That parcel number Ngandori/Kirigi/2393 belonged to Cyrus Mbogo Njiru (deceased) who purchased it through his father the deceased and the applicant is well aware of this position.
8. The respondent also filed a supplementary affidavit dated 01st March 2022, stating that the applicant was allotted parcel number Gaturi/Githimu/691 by the clan, which he sold before disappearing from home for a long period. She produced a copy of the greencard for the property.
9. The court took viva voce evidence. PW1 was the applicant who stated that the deceased, his father, was born in 1935. That between the years 1958-1962, he was in charge of the land adjudication process for all the parcels of land for his father and so he knows all the land parcels. That in 1977, his mother was killed in a road traffic accident and the matter was reported at Manyatta Police Station and he has a letter dated 29th August 1977 addressed to Lazaro Kangangi Charawe. That before his mother died it was her wish that the land be subdivided and shared out and he has come to court to claim his father's



property. That the respondent was not there when the land was being subdivided. That he was not notified when the succession proceedings were filed.

10. In his statement which was adopted as evidence, PW1 stated that the deceased owned properties number Ngandori/Kirigi/37, Ngandori/Kirigi/706, Ngandori/Kirigi/2393 and Gaturi/Weru/451. That he was the owner of parcel number Gaturi/Kithimu/633 which he gave to Embu Municipal Council but was never compensated for it. That his brother Cyrus Mbogo Njiru (deceased) owned Gaturi/Kithimu/631. That in the year 1978 he went to Saudi Arabia to work as a domestic driver and in 2012, a friend of his from Embu informed him that the people in Embu were saying that he had died.
11. That on hearing this, he returned home and Cyrus Mbogo Njiru (deceased) informed him that his father had died and his house was occupied by the respondent. That one Njeru Mbuina told him to look for some documents on the roof of a house and the documents showed him that the properties of the deceased had been sold and so he filed the summons for revocation. That the local administration colluded with others to dispose of the property of the deceased. On cross-examination, he stated that when his father died, he was in Nairobi and that the Chief said that they should not inform him. That he was a member of the clan when the land was being subdivided.
12. DW1 was the respondent who stated that the deceased had 3 children namely, the applicant, Cyrus Mbogo Njiru (deceased) and Jane Karemi (deceased). That the applicant as the eldest son was given land no. Gaturi/Kithimu/633 by the clan through his father but he sold the said land and disappeared for over 10 years. That he did not attend the burial of the deceased and has not been in touch with the family to know any developments. That Cyrus Mbogo Njiru (deceased) inherited property number Ngandori/Kirigi/2393 from the estate of the deceased but the property belonged to him even though it was registered to the deceased. That Cyrus Mbogo Njiru (deceased) used to send money to the deceased for purchase of the property on his behalf.
13. It was her testimony that the properties Ngandori/Kirigi/4052 and Ngandori/Kirigi/4053 were registered to Church Commissioners for Kenya St. Peter's Church Gatituri and Church Commissioners for Kenya St. Peter's Primary School Gatituri respectively according to the wishes of the deceased and that the same should not be unsettled as they have already developed the same. That the share of the estate that was inherited by Cyrus Mbogo Njiru (deceased) was passed on to his children, the respondent and Stephen Munyi and so the applicant's claim has been overtaken by events. That she is visually impaired and has been residing on her portion of the land Ngandori/Kirigi/6522 for 34 years and she has extensively developed it.
14. DW2 was Justus Muchangi Kangangi who is a grandson of the deceased and the son of Jane Karemi (deceased). He stated that his mother who was epileptic died in 1975 out of shock following the news of the passing of her mother. That since the death of his mother, he remained under the care of the deceased for more than 20 years. That in the 1990's, the deceased became incapacitated and he took care of him until 1994 when he died. That Cyrus Mbogo Njiru (deceased) also took care of him and paid for his secondary school education between 1989-1992.
15. He stated that the deceased gave him parcel number Ngandori/Kirigi/4054 and at the same time parcel numbers Ngandori/Kirigi/4052 and Ngandori/Kirigi/4053 were registered to Church Commissioners for Kenya St. Peter's Church Gatituri and Church Commissioners for Kenya St. Peter's Primary School Gatituri respectively. It was his testimony that his mother did not benefit from the clan land but both the Applicant and Cyrus Mbogo Njiru (deceased) were given land. That the applicant disappeared from home for a long time and has a sour relationship with the deceased. That he has a family and has developed the land which he was given by the deceased.



16. DW3 was Abiud Munyi Gachurire who stated that he sold land parcel number Ngandori/Kirigi/2393 to Cyrus Mbogo Njiru (deceased) through the deceased. That at the time, Cyrus Mbogo Njiru (deceased) was working at Teleposta in Nairobi and would send money through his father. That the negotiations, payments and transfer were conducted by the deceased on behalf of his son and the agreement was that the deceased would transfer the land to Cyrus Mbogo Njiru (deceased) at a later date when he would avail himself.
17. DW4, Catherine Njoki, daughter-in-law of Cyrus Mbogo Njiru (deceased) stated that she is the widow of Stephen Munyi (deceased), son of Cyrus Mbogo Njiru (deceased). She stated that parcel number Ngandori/Kirigi/2393 was sold to Cyrus Mbogo Njiru (deceased) by DW3 through the deceased herein. That a portion of the said land was left to her by her late husband and that the same has been developed and it has been a source of their livelihood all along.
18. The issue for determination is whether the grant issued to Cyrus Mbogo Njiru (deceased) should be revoked.
19. Section 76 of the *Law of Succession Act* provides for circumstances under which a grant of representation may be revoked. It states thus:

“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.”
20. The applicant herein has alleged that the grant was obtained fraudulently by concealment from this court of material facts of: and
 - a. existence of the applicant as a survivor of the deceased;
 - b. existence of written intentions of the deceased on mode of distribution of the estate.



21. Section 107 of the *Evidence Act* puts onus on the applicant to prove these allegations:
- “ 107 (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.”
22. Similarly, in the case of *Re Estate of Kiura Wari (Deceased)* (Succession Cause 266 of 2007 & 264 of 2006 (Consolidated)) [2022] KEHC 10009 (KLR) the court stated as follows:
- “Where fraud is pleaded, the burden and standard of proof was well explained by the Court of Appeal in *Kuria Kiarie & 2 Others v Sammy Magera [2018]* eKLR thus:
25. The law is clear and we take it from the case of *Vijay Morjaria v Nansigh Madhuisngb Darbar & Another [2000]* where Tunoi JA (as he then was) stated as follows; “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.””
23. In his supporting affidavit to the summons for revocation, the applicant deposed that he was not included in the list of the deceased’s survivors at the point of petitioning for letters of administration. He produced a copy of a letter from the deceased stating how he intended for his property to be distributed upon his death and the letter was marked as exhibit “NK2”. However, he also deposed that he is seeking for the grant to be revoked and another one issued naming him as a co-administrator of the estate. I have perused the petition of letters of administration and all the accompanying documents and I note that the same were filed by Cyrus Mbogo Njiru (deceased). He is the only named survivor of the deceased while DW2 is the only named dependant of the deceased.
24. Throughout the succession proceedings, there was no mention of the applicant or his late sister Jane Karemi, the mother of DW2 even though through the evidence on record, they are children of the deceased. From the testimonies of PW1 and DW1 the applicant is a son of the deceased who was away from home for a long time. In light of section 76(b) of the *Law of Succession Act*, there was indeed concealment of a material fact from the court. The applicant stated that the deceased wrote down his wishes in the letter he produced as evidence. That notwithstanding, he asked the court to add his name as an administrator of the estate of the deceased. These are 2 different concepts but the applicant has not argued his case for consideration of testate succession. Again, to allow the alleged will and also appoint the applicant as an administrator is to let the applicant have 2 bites at the cherry. It is unconscionable.
25. Accompanying the petition were copies of greencards for parcel numbers Ngandori/Kirigi/4052, Ngandori/Kirigi/4053 and Ngandori/Kirigi/4054 (all being subdivisions from Ngandori/Kirigi/37) and Ngandori/Kirigi/2393. According to the applicant, the deceased owned parcel numbers Ngandori/Kirigi/37, Ngandori/Kirigi/706, Ngandori/Kirigi/2393 and Gaturi/Weru/451. In his testimony as PW1 at the hearing, he stated that he was away in Saudi Arabia working since 1978 but at the time of death of his father, the deceased, he was in Nairobi but no one informed him. That it was only when he heard that he had been presumed dead that he returned home in 2012. That he was given parcel number Gaturi/Kithimu/633 by the clan and he sold it to Embu County Council but they did not pay him a dime.



26. This was confirmed by DW1 who stated that indeed parcel number Gaturi/Kithimu/633 belonged to the applicant and he sold it and now wants the portions that belong to her father. She stated that parcel number Ngandori/Kirigi/2393 was purchased by her father from DW3, who also said the same, adding that the same was transacted through the deceased and was intended to be transferred to the respondent's father once he availed himself. PW4 also testified that the property was purchased by the respondent's father under the aforementioned circumstances from DW3. DW2 stated that he was included as a beneficiary of the estate because he was a proven dependant of the deceased.
27. In my view, there is contention as to ownership of the parcels of land that should form part of the estate of the deceased. Rule 41(3) of the *Probate and Administration Rules* refers to Sections 71(2) and 82 of the *Law of Succession Act* on the duties of personal representatives in regards to defining the estate for distribution, whether or not the question involves 3rd parties. It provides thus:
- “Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of *section 82 of the Act*, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under *Order XXXVI, rule 1 of the Civil Procedure Rules* and may thereupon, subject to the proviso to *section 71 (2) of the Act*, proceed to confirm the grant.”
28. The applicant stated that parcel number Ngandori/Kirigi/2393 forms part of the estate while the respondent stated that the same was bought by her late father from DW3. According to DW3, the property was registered in the name of the deceased but was purchased by Cyrus Mbogo Njiru (deceased) who was sending money for the purchase. The applicant also stated that parcel number Ngandori/Kirigi/37 forms part of the estate of the deceased. It was the respondent's case that prior to his death, the deceased had already subdivided the property into 3 portions namely Ngandori/Kirigi/4052, Ngandori/Kirigi/4053 and Ngandori/Kirigi/4054 which were available for distribution. Cyrus Mbogo Njiru (deceased) stated in response to the summons for revocation that he bought parcel number Ngandori/Kirigi/706 and that the same was in his name but the applicant stated that it forms part of the estate of the deceased. The applicant stated that parcel number Gaturi/Weru/451 forms part of the estate of the deceased. The respondent has not rebutted this position.
29. From this, it is clear that there are questions of what properties form the estate of the deceased. Further, there is also the question of whether the applicant benefited from the estate by way of gift inter vivos before the death of the deceased and if so, to what extent. It is also clear from the documents that were filed by the late Cyrus Mbogo Njiru that there was concealment of material facts in that he did not disclose to the court that there were other beneficiaries/dependants of the estate of the deceased.
30. In the end, I find that the application has merit and the same is allowed. The following orders shall issue:
- a. The grant of letters of administration issued to Cyrus Mbogo Njiru (deceased) in the estate of the deceased on 11th December 2009 is hereby revoked;
 - b. A fresh grant of letters of administration to be issued jointly in the names of the applicant and the respondent immediately following this judgment;
 - c. The certificate of confirmation of grant issued of 15th March 2012 is hereby set aside;



- d. In light of Rule 41(3) of the *Probate and Administration Rules*, the administrators of the estate of the deceased shall file fresh summons for confirmation of grant within 30 days from the date of this judgment; and
- e. There shall be no order as to costs, given that the applicant and the respondent are uncle and niece respectively.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF APRIL, 2024.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent

