



REPUBLIC OF KENYA



In re Estate of Kiraithe Mucheke (Deceased) (Miscellaneous Succession Cause E022 of 2022) [2024] KEHC 3411 (KLR) (9 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3411 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS SUCCESSION CAUSE E022 OF 2022**

LW GITARI, J

APRIL 9, 2024

BETWEEN

MARIA MUKWAITI MPUTHIA APPLICANT

AND

JANE MUYIA MBAE (SUING ON BEHALF OF HER LATE HUSBAND MBAE KIRAITHE - DECEASED) RESPONDENT

RULING

1. Before this court is the summons application dated 5th December, 2022 and filed under certificate of urgency seeking the following orders from this court:-
 - i. Spent.
 - ii. Spent.
 - iii. That the Honourable Court be pleased to annul and/ or revoke the grant of representation that was issued to Mbae Kiraithe on 21st June, 2004 over the estate of the deceased at Meru High Court and fresh distribution of the estate be done.
 - iv. That the costs be provided for.
2. The application is based on the following grounds, inter alia:-
 - i. That the proceedings to obtain the grant were defective because of concealment of material facts by the Respondent's husband.
 - ii. That the grant was obtained fraudulently by making false statements and concealment from the court of material facts.
 - iii. That the Respondent's husband failed to disclose to the court that the parcel of land Muthambi/ Chamunga/104 was jointly owned by him and the late father in law to the



Respondent's husband (Mbae Kiraithe) and thus obtained the grant with the intentions to defraud the applicant's late husband (Mpuitha Kirathe) his rightful inheritance.

- iv. That the deceased was survived by one Mpuitha Kirathe (now deceased).
 - v. That the applicant is one of the beneficiaries of the estate of the deceased by virtue of being the wife to Mpuitha Kiraithe who was the brother to Mbae Kiraithe and who were the biological sons to the deceased herein.
 - vi. That the grant was issued through non-disclosure of material facts to the court.
 - vii. That neither the Applicant, being s sister-in-law to the deceased nor her husband during his lifetime were consulted or involved in the succession proceedings.
 - viii. That after the demise of Kiraithe Mucheke, the deceased herein, the Respondent's husband undertook succession and transferred the land to himself.
 - ix. That unless the grant is revoked, the applicant and other beneficiaries who were not involved in the proceedings stand to suffer great loss and disinherited of their rightful share of the estate of the deceased.
3. The Application is supported by the affidavit sworn by the Applicant on 5th December, 2022 and wherein she reiterates the grounds laid out on the face of the application.
 4. The Respondent opposed the Application vide the Replying Affidavit sworn on 20th January, 2023 and wherein she acknowledged that a grant of letters of administration were made to her husband in the year 2004 and states the applicant is guilty of indolence and inordinate delay as more than 19 (nineteen) years have lapsed after the said grant was issued and 12 years after the death of the Administrator in this cause. The Respondent conceded that the suit land herein was jointly owned by the deceased herein and the Respondent's late husband but alleged that the rule of survivorship applies as the suit land should have passed to her deceased husband freely.
 5. The Respondent further conceded that upon the Applicant filed a citation as alleged in the Application, and that she instituted a succession cause, the same being Chuka Succession Cause No. 133 of 2022 and that she intends to distribute her late husband's estate including the suit land herein. That the Applicant has filed a protest raising similar grounds to the ones raised herein. Further that in the said protest, the Applicant alleges that the suit land was being held in trust for her husband and that the Applicant in the aforementioned citation acknowledged that this case is a pure case of trust and not an issue of non-disclosure of the existing succession cause. She thus prayed that the application be dismissed.
 6. The Applicant then filed a supplementary affidavit pursuant to the leave granted by this court on 10th February, 2023. She deposed that the deceased had during his lifetime pointed out where each of the families should settle and that the families of the Applicant and the Respondent have been residing on their respective portions and that it was right to say that the Mbae Kiraithe and Kiraithe Mucheke had equal share in respect of the suit land herein. Further, that the deceased left the Applicant in occupation of the suit land and she had been residing on the same land peacefully from the time she was married to her late husband Mpuitha Kiraithe without any disturbance until the demise of the respondent's husband and that is when the respondent and her children started threatening to evict the applicant and her children from where they lived and settled. That the deceased herein (her father in law) was in possession of half of the land where they reside to date as the Applicant's husband was already deceased as at the time demarcation was done and titles issued. She proceeded to reiterate the contents of the affidavit in support of the application and in so doing denied the contents of the Respondent's



replying affidavit on the effect that the grant given to the respondent's husband in 2004 was defective in substance, obtained fraudulently and by making a false statement or by concealment of material facts and that she was not aware that the Respondent's husband had filed succession cause in Meru and caused the suit land to be transferred into his names and came to know of the same when she filed a citation and protest and when she went to the Land registry and realized that the respondent's husband undertook and caused the suit land which was registered in joint names to be registered in his names. That she was only interested in the portion her father in law had in the suit land where she has settled and occupied. That the grant ought to be revoked and the suit land revert back into the joint names of Mbae Kiraithe and Kiraithe Mucheke for fresh distribution.

7. The application was canvassed by way of written submissions. Below is a summary of the respective submissions by the parties.

Applicant's submissions

8. It was the Applicant submission that the Applicant has locus standi to sue on behalf of the estate of her late husband as she had a limited grant dated 14th December, 2021 and reliance was placed on the case of *Re Estate of Moraii Bhanii Dhanak Succession Cause No. 1731 of 2000*. Further that despite the land having been registered jointly, the intentions of the joint owners create peculiar circumstances that exempts the application of the doctrine of survivorship to this cause. It was submitted that since the Applicant was occupying her own portion whereon she had planted coffee and built permanent structures and that the suit property was divided into two wherein the family of Mbae Kiraithe occupied one portion and that of Mputhia Kiraithe occupied the other half and the Applicant's family has been in occupation of their part with no disturbance until the death of Mbae Kiraithe. Further, that the Applicant resided on the said half portion with the deceased Kiraithe Mucheke who was her father-in-law before his demise. That she buried her deceased husband on the said portion. As such, the Applicant contended that the doctrine of survivorship was not applicable in the instant case as the evidence is clear that the land was held in common. Relying on Section 26 of the [Land Registration Act](#), it was submitted that the certificate of title issued by the Land Registrar was obtained through concealment of material facts as the late Mbae Kiraithe did not involve nor name his late brother as one of the children of the deceased so as to enable the court make an informed decision. Reliance was placed on the case of *Mwangi Gakuri v. Bernard Kigotho Maina & Another* [2016] eKLR. The applicant further submitted that there was concealment of material facts to warrant revocation of the grant made to one Mbae Kiraithe as he did not produce the letter from the chief and that he did not name his late brother as one of the children of the deceased which was meant at circumventing the wheels of justice and making sure that the Applicant and her children were not aware of the proceedings yet they had an interest in the same. In trhis respect, reliance was placed on the case of *John Ogalo Omeso - v- Kephar Langi Oguwi* [2016] eKLR.

Respondent's submissions

9. On her part, it was the respondents' submission that the suit land herein was registered in the joint names of Kiraithe Mucheke and Mbae Kiraithe and that the same was not available for distribution by virtue of doctrine of survivorship which operates to remove the jointly owned property from the operation of the law of succession upon death of a joint tenant. Reliance was placed on W. M. Musyoka's Law of Succession book at page 3 and it thus the Respondent's submission that upon the death of Kiraithe Mucheke, the property passed by operation of the law to the surviving joint tenant Mbae Kiraithe and that it was only that Mbae Kiraithe lacked information on how to go about it and that is why he filed a succession cause and which was not the right process as provided for under the Section 49 of the [Land Act](#) 2012 and Section 60 of the [Land Registration Act](#) 2012. Reliance was



placed on the case of *Diana Muchiri - v- Lydia Wariara Njenga & Another* (2022) eKLR and Re Estate of Johnson Njogu Gichohi (deceased) (2018) eKLR. The Respondent further submitted that the application was filed after two decades which is unreasonable delay. Further that this court does not have jurisdiction to determine on trust and which was the basis upon which the summons for revocation of the grant were premised on. That such disputes should go to another forum and not this court. As for the costs, it was submitted that costs follow events.

Issue for determination

10. I have considered the summons application dated 5th December 2022, the affidavits presented in support and opposition of the application, as well as the respective submissions by the parties. In my view, the main issue for determination is whether the applicant has made out a case warranting the revocation of the grant made to Mbae Kiraithe on 21st June 2004. However, the respondent in the replying affidavit raised the issue as to the applicability of the doctrine of survivorship by reasons that the estate was registered in the joint names of the deceased and the respondent's husband. The same was responded to in the further affidavit. When the court was giving directions, parties indicated that the same was a legal issue which needs to be heard by way of submissions. Both parties submitted on the issue of survivorship. The applicant submitted that the circumstances of the case made the tenancy not joint but in common. The respondent on the other hand submitted that the estate was not available for distribution by virtue of doctrine of survivorship and which operates to remove the jointly owned property from the operation of the Law of Succession upon death of a joint tenant. Reliance was placed on W. M. Musyoka's Law of Succession book at page 3. Further the respondent in her submissions raised the issue as to the jurisdiction of this court to determine the issue before me on the basis that the issue touches on trust and which should be handled elsewhere. As it is trite, courts ought to handle the issue as to jurisdiction in limine as if the court finds that it has no jurisdiction, it ought to down its tool at that moment. This was held in the *locus classicus* case of *Owners of Motor Vessel "Lilian s" - v-. Caltex Oil (K) Ltd* [1989] KLR 1. A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. A court of law cannot expand its jurisdiction through judicial craft or innovation. (See *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others* [2012] eKLR). Further in my view, the issue as to availability of the property for distribution and the availability of the estate for distribution is also an issue which should be determined first. This is since if at all the estate is not available for distribution, the proceedings in this cause will be a nullity.
11. I will thus frame the following as the issues for determination;-
 - a. Whether this court has jurisdiction to determine the issues before it
 - b. Whether the applicant has made a case for revocation of the grant made to Mbae Kiraithe on 21st June, 2004.
 - c. Whether the doctrine of survivorship applies to the estate herein by virtue of being registered in joint names.

Analysis

Whether this court has jurisdiction to determine the issues before it

12. As I have already stated elsewhere, the Respondent raised the issue as to the jurisdiction of this court to determine the issue before me on the basis that the issue touches on trust and which should be handled elsewhere. The Applicant did not file any response to the issue. Though the issue was raised during



the submissions, this is proper as was held by the Court of Appeal in *Jamal Salim - v- Yusuf Abdulabi Abdi & another* Civil Appeal No. 103 of 2016 [2018] eKLR where the court held that jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

13. When it comes to trust, the courts have pronounced themselves on the jurisdiction of the Probate and Administration Court to hear and determine issues to do with trust and the answer to the same is basically that a probate court does not have jurisdiction to hear and determine issues to do with trusts.

Whether the Doctrine of survivorship applies to the Estate herein.

14. The jurisdiction of the Probate and Administration Court is well laid down in the *Law of Succession Act* Cap 160 Laws of Kenya. The Preamble to the Act states as follows:-

“An Act of Parliament to amend, define and consolidate the law relating to interstate and testamentary succession and administration of estates of deceased persons and for the purpose connected therewith and incidental thereto.”

Section 47 of the *Act* provides for the jurisdiction of the High Court and provides as follows:

“High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient: provided that High Court may for the purpose of this section be represented by a resident magistrate appointed by the Chief Justice.”

Thus the jurisdiction of the High Court extends to determination of the net estate of the deceased available for distribution to the rightful beneficiaries and their respective shares of the estate.

15. The claim by the applicant is based on the facts that the deceased herein was registered as the joint owner of Land Parcel No. Muthambi/Chamunga/104 and the respondent's late husband. The contention by the respondent is that the rules of survivorship apply. Thus the land should have passed to her deceased husband freely. There is no dispute that the said land Parcel No. Muthambi/Chamunga/104 to be referred as the land in dispute was registered in the joint names of the Kiraithe Mucyheke deceased and Mbae Kiraithe deceased. The land in dispute was registered on 25/1/74 under The Registered *Land Act* (Cap 300 Laws of Kenya Repealed) Section 101(1) of the Act provided:-

“An instrument made in favour of two or more persons, the registration giving effect to it shall show-

- a. Whether those persons are joint proprietors or proprietors in common, the share of each proprietor.”
- b. Whether they are proprietors in common, the share of each proprietor.”

16. The section contemplated that where the instrument had more than one proprietor, the register would reflect whether they were proprietors in common or joint. Sections 102(1) and 103 of the Registered *Land Act* had provided as follows:-

“Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land and consequently-

A disposition may be made only by all joint proprietors and



(b) on the death of a joint proprietor his interest shall vest in the surviving proprietor or the surviving proprietors jointly.”

103 (1) “where any land, lease or charge is owned in common each proprietor shall be entitled to undivided share in the whole and on the death of a proprietor his share shall be administered as part of his estate.”

17. The distinction drawn between these two land holding is that where proprietorship is joint the persons did not have separate shares in the land and if one proprietor dies, his interest automatically vests upon the surviving proprietor.
18. A look at the registration of the two deceased, their shares were not determined and for all intents and purposes, they were joint owners as the Act did not contemplate a situation where the register did not indicate whether the land was held jointly or in common. Julius Mbae Baini depones that the land in dispute was held jointly.
19. The applicant in Misc. Succession File stated that she wanted to prosecute her interest with regard to the estate of Mputhia Kiraithe. Her claim is a claim to recover land she claims that it should go to her late husband Mputhia Kiraithe. This is evidenced by her submissions where she has stated that the intention of the two deceased can be construed from the way they interacted with the property. That the land was sub-divided into two with the family of Mbae Kiraithe occupying one portion and the late Mputhia Kiraithe occupying the other half. Her contention is that the doctrine of survivorship is not applicable. It has been held that the doctrine of survivorship is applicable in joint tenancies. In the book by W.M. Musyoka, Law of Succession at page 3 (quoted by the respondent). It is 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.”
20. The principle of survivorship is that land jointly owned passes automatically to the surviving joint owner. The principle is buttressed by Section 60 of the [Land Registration Act](#). I had occasion to deal with this issue.
21. In Re-Estate of Johnson Njogu Gichohi where I held that the surviving joint owner automatically becomes the owner upon presenting the evidence of death of the joint tenant and the property automatically passes to the surviving joint tenant. I find that the land in dispute was jointly owned by the two deceased.
22. One pre-deceased the other and therefore became the sole proprietor . He did not follow the right procedure of having the name of the deceased removed as proprietor but followed the route of Succession. I have therefore to deal with two twin issues of jurisdiction namely:
 1. Claim to own land .
 2. Claim to dependency.
23. The applicant submits that there was none disclosure of a customary trust. I have observed that this court lacks jurisdiction to determine the issue of trust. The question whether the applicant’s husband had a right to claim land is not a matter that is within the jurisdiction of this court. Since the applicant



is not claiming the estate as a beneficiary, she is supposed to establish her claim in the right forum. A probate and administration court is concerned with identifying the estate (assets) the beneficiaries and the distribution of the estate. Establishing whether a third party claiming entitlement under an alleged trust is not within the purview of the jurisdiction of this court. This has been held by the High Court in various authorities.

24. *In Re-Estate of Late Jonathan Kinyua Waititu (Deceased)* 2017 eKLR.

The court stated that;

“I have also considered the second question which is really of ‘Locus Standi’ or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim any right to inherit any property or asset of the deceased. The correct position in law is that the estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objector’s father.

25. In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased’s estate from obtaining letters of administration and having the same confirmed.
26. The objectors are able in law to prosecute their claim and secure any rights without interfering with rights of the petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.
27. Secondly I do not think that these succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust which is the gist of their claim. This requires declaratory orders of the existence of trust. This is not the function of a succession court where the claimant is not a beneficiary nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claim against the estate by 3rd parties.
28. In this case the objectors ought to institute separate proceedings to articulate or vindicate their claims/ rights..... I therefore do hereby hold that this court has no jurisdiction to determine the claim of trust or to give any relief in respect thereof.”
29. I have dealt at length on the issue of trust which the applicant has based her application for revocation of grant. The claim based on trust has not been established. The applicant is not claiming dependency which this court has jurisdiction to determine. It is then follows that her claim cannot defeat the right of the respondents who are dependants and beneficiaries before she has established a basis for revocation of the said grant which I find she has not. The deceased filed succession which was error or ignorance. All that he was supposed to do was to go to the lands office and have the title deed issued in his name by the Land Registrar. So nothing has arisen to warrant the court to revoke the grant which the deceased was not supposed to apply in the first place. As matters stand, it is my view that the applicant lacks locus standi to apply for revocation of grant.
30. Rule 41(3) of the *Probate and Administration Rules* provides that Succession Proceedings are not appropriate for determining disputes between the estate and third parties over title to or ownership of assets placed before the court for distribution.
31. The Act gives High Court Jurisdiction to deal with applications and determine disputes that arise over matters that are governed by the *Law of Succession Act* and pronounce orders which fall under Probate and Administration matter. Matters raised by the applicant do not fall under that mandate.



32. A distinction has to be made between a claim against the estate of a deceased and a claim on inheritance in the estate of deceased. A claim on inheritance is filed in the Probate and Administration court while a claim against the estate has to be determined in the right forum then enforced against the estate. A trust is a claim against the estate and this court lacks jurisdiction to determine proprietary interests on land based on alleged trust.
33. On the other hand it is my view that since the applicant is not claiming beneficial interest in the estate, even if that were to be the claim, my view is that the claim is time barred. This is because a person claiming as share as a dependant must present that claim before the grant is confirmed. Section 26 of the [Law of Succession Act](#) provides:-
- “Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased’s net estate.”
34. On the other had Section 30 of the [Law of Succession Act](#) provides:
- “No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71.”
- No claim for dependency can be brought as the same is time barred.
- Furthermore though there is no time limit in filing an application for revocation of grant it has been held that the same should be subject to the test of a reasonable time. The courts have held that the power to revoke a grant is discretionary.
- In *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR Justice Ondunga as he then was stated that;
- “.....If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy and the appeal should be dismissed as time barred even at the risk of injustice, lordship to the appellant.”
35. I associate myself with this holding. It is a maxim of equity that “Equity aids the vigilant not the indolent.” It is also a maxim of equity that a person who sleeps on his right for too long should be removed from the seat of justice. The applicant was not vigilant, she slept on her rights for too long and will not be aided to achieve justice. The delay from 2004 when the grant was confirmed, a period of nineteen (19) years was unreasonable.

Conclusion:

36. For the reasons stated, I find that the application lacks merits. I therefore order as follows:-
1. The application has no merits and is dismissed
 2. Costs to the respondent

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF APRIL 2024.



L.W. GITARI
JUDGE

