



**In re Estate of Mutethia Tharaka (Deceased) (Succession Cause  
477 of 2015) [2024] KEHC 4425 (KLR) (9 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4425 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
SUCCESSION CAUSE 477 OF 2015**

**LW GITARI, J**

**APRIL 9, 2024**

**IN THE MATTER OF THE ESTATE OF MUTETHIA THARAKA (DECEASED)**

**BETWEEN**

**AJERICA KAARI NJUE ..... 1<sup>ST</sup> APPLICANT**

**ROSEMARY CIAMBAKA NGARI ..... 2<sup>ND</sup> APPLICANT**

**WILDRED MUTHOMI NJOKA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**ELIPHAS MBUBA NGARI ..... 1<sup>ST</sup> RESPONDENT**

**ERASTUS MUTEKI NTARI ..... 2<sup>ND</sup> RESPONDENT**

**EUNICE KAGANI KIAMBI ..... 3<sup>RD</sup> RESPONDENT**

**JOSPHAT NJEGA GIBSON ..... 4<sup>TH</sup> RESPONDENT**

**ALFRED MUGENDI KANGA ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. This succession cause is in respect of the estate of the late Mutethia Tharaka (the “deceased”) who died intestate on 24<sup>th</sup> December, 1964. The deceased left behind a parcel of land known as L.R. No. Karingani/Ndagani/179 (the “suit land”) measuring approximately 1.4 Ha.
2. As per the Chief’s letter dated 20<sup>th</sup> December, 2012, the deceased was survived by the following dependants:
  - a. Eliphas Mbuba Ngari – Son
  - b. Erastus Mutegi Ntari – Son



- c. Kabunge Mutethia – Daughter
  - d. Karimi Mutethia – Daughter
  - e. Ciambaka Mutethia – Daughter
3. Grant of Letters of Administration was issued to the 1<sup>st</sup> Respondent herein on 26<sup>th</sup> March, 2013 and subsequently confirmed on 16<sup>th</sup> May, 2016.
  4. Before this Court is the Summons for Revocation of Grant dated 5<sup>th</sup> October, 2019 seeking to revoke the Certificate of Confirmation of issued in this Cause.
  5. As per the Certificate of Confirmation of a Grant dated 19<sup>th</sup> May, 2016, the aforesaid grant was confirmed in the following terms:  
Land parcel No. Karingani/Ndagani/179 to be shared as follows:
    - a. Eliphas Mbuba Ngari – 1.80 Acres
    - b. Erastus Mutegi Ntari – 1.80 Acres
    - c. Kabunge Muthethia
    - d. Kanini Muthethia 0.15 (jointly)
    - e. Ciambaka Muthethia
  6. The present Application is opposed by the 1<sup>st</sup> Respondent vide the Replying Affidavit sworn by the 1<sup>st</sup> Respondent on 24<sup>th</sup> October, 2019. He deposed that he is the administrator of the subject estate and that he distributed the estate of the deceased in accordance to the Meru Customary Law as the deceased died before the Law of Succession Act came into force. That in accordance to the Meru Customary Law, the married daughters of the deceased were not provided with individual pieces of land but a general piece of land in case any of them got divorced. It is thus the Respondent's case that the present application should be dismissed in its entirety for being malicious and not supported in law.
  7. The said Application was subsequently canvassed by way of written submissions.

### **The Submissions**

8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their written submissions jointly on 12<sup>th</sup> July, 2023. They stated that the two were the sons of the deceased and submitted that since the 2<sup>nd</sup> Applicant, Rosemary Ciambaka, died and no substitution was done, then her case abated. In respect to the 3<sup>rd</sup> Respondent, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent submitted that she was not an heir to the estate of the deceased and as such, her case in this suit was not substantiated. They further submitted that the Law of Succession Act is not applicable nor is the Constitution of Kenya 2010 as the deceased died in 1964 and the Ameru customary Law is the one applicable.
9. With regards to the 1<sup>st</sup> Applicant, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that it was not true that the 1<sup>st</sup> Applicant was never informed of the filing of these proceedings. That all the family members met and decided how the suit land was to be distributed. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents maintained that according to custom, since the daughters of the deceased were all married, a piece of land was made available for them to cater for any eventuality of a divorce of any of them. Further, that given the alleged small size of the estate, the distribution of the estate as confirmed on 16<sup>th</sup> May, 2016 was fair and equitable. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents thus urged this Court to find that the present application has no merits and



dismiss the same in its entirety with costs. Their contention is that the applicant did not adduce any evidence in support of her case.

10. On the other hand, the Applicants also filed their written submissions jointly on 13<sup>th</sup> July, 2023. It was their submission that the implementation of the resultant certificate of confirmation of grant in this cause did not correspond with the order of the court as pronounced in the grant.

### Issues for Determination

11. The main issues for determination herein are:
  - a. Whether Section 2(2) of the [Law of Succession Act](#) is applicable in the circumstances of this Cause.
  - b. Whether the interests of the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents in the suit land are protected under the provisions of Section 93 of the [Law of Succession Act](#).
  - c. Whether the Applicants' application dated 5<sup>th</sup> October, 2019 meets the threshold for the revocation of a grant within the meaning of Section 76 of the [Law of Succession Act](#).

### Analysis

#### a. Applicability of Section 2(2) of the [Law of Succession Act](#)

12. The scope of the [Law of Succession Act](#) is stated in Section 2 thereof. For avoidance of doubt, the said Section states as follows:-
  - “2(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of persons dying after the commencement of this Act and to the administration of estates of those persons.
  - (2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”
13. The effect of Section 2(2) of the [Law of Succession Act](#) is that the substantive provisions of the said Act are not applicable to the estates of persons who died before the said Act commenced. It follows that the substantive law of succession for estates of the persons who died before 1<sup>st</sup> July 1981 is to be found in the written laws and customs that applied at the date of the death of the person in question.
14. In this case, it is not in dispute that the deceased died before the [Law of Succession Act](#) came in to force. Consequently, the substantive law governing devolution to his estate is that stated in Section 2(2) of the [Law of Succession Act](#) – that is the written laws and customs in force as at the time of his death.
15. Going by the material on record, the deceased died intestate. As of the time of the deceased's death, estates of African Kenyans who died intestate were subject to customs of the community from which such African hailed. In this case, the deceased hailed from the Meru community. His estate was therefore subject to the Meru customs which governed devolution of the estate of a person who died intestate.



Customary Law applies by dint of Section 2(2) of the [Law of Succession Act](#), to estate of persons dying before July, 1<sup>st</sup> 1981 and since the deceased herein died before that date Section 2(2) applies in his estate. I will then proceed to consider the Meru Customary Law of Intestate Succession.

16. The Meru customary law of intestate succession is well documented in such treatises as the Eugene Cotran, Restatement of African Law: 2 Kenya II Law of Succession, (Sweet & Maxwell, 1969). At page 30 of the Eugene's Restatement of African Law (supra), the estate of a deceased in Meru community was divided equally among the sons. The position as regards inheritance of daughters is that they generally cannot inherit land. Cotran (supra) was mentioned as an authority in the court of appeal case of Mukindia Kimuru & another v Margaret Kanario [2000] eKLR where the court noted as follows:

“The sum total of the Meru customary law as regards inheritance of land as set out by Cotran is in his Restatement of African Law, volume 2 at page 8 which reads:

“Daughters are normally excluded, but may also receive a share if they remain unmarried.”

See also Republic –v- Joel M’Thara Ruria (deceased) (2021) eKLR where the court quoted from Eugene Contran’s Book and stated that, “the estate of a deceased in Meru and Tharaka communities was divided among the sons. The daughters and the widows received no share from the Estate.

17. It is clear that the Ameru is a patrilineal community. The respondents submitted that daughters get a share where they can occupy in the event that they are divorced by their husbands. Section 3 (2) of the [Judicature Act](#) (Cap 8 Laws of Kenya) which state as follows:

“The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

The applicants have relied on In Re-Estate of Asoga Shabanga (deceased) (2022) eKLR. Where the court stated that the new Constitution of Kenya 2010 frowns on discrimination based on gender. He also relies on Re- Estate of Peter Gathogo (Deceased) (2020) eKLR. The question is whether courts can apply Meru Customary Law which the applicant’s contention is that it is discriminatory. The respondents contention is that [the Constitution](#) of Kenya 2010 cannot apply in retrospect. The record shows that the certificate of confirmation of grant which is the subject matter of the summons for revocation of grant was issue on 19/5/2016. This is the operational date when determining whether [the Constitution](#) applies in this matter. There is therefore no doubt that [the Constitution](#) applies in these proceedings as it was promulgated in 2010.

Article 27 of [the Constitution](#) provides that:-

“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”

The principle of equal distribution of the estate of the deceased to his children has now in upheld and entrenched in our jurisprudence. The court of Appeal in binding decisions has held that women



should not be denied their rights to inheritance. In *Douglas Njuguna Mungai –v- Jolin Bosco Maina Kariuki & Another* (2014) eKLR the Court of Appeal held that

“That –fully under *the Constitution* of Kenya 2010 all these rights are enshrined and they cannot be derogated against, they are ‘jus cogens’. The general rules of International Law also form part of the Law of Kenya.

See Article 2(5) of *the Constitution*. The yoke and burden of discrimination should not be worn by female gender any more, *the Constitution* set it apart.

Further the Court of Appeal referring to the decision of *Rono-v- Rone* on none discrimination on grounds of sex held as follows-

It would appear from the totality of the submissions made before us and the stance adopted by appellants all through this protracted litigation that the kernel of their disenchantment lies in the fact that their sister Florence, a married daughter of the deceased, became not only a beneficiary but also an administratrix of the estate. That much was clear from Mr. Kioga’s resort to Meru Customary Law which stipulated as captured by Dr. E Conran in his Restatement of customary Law. Vol. 2 page 30. Daughters receive no share of the estate. In the absence of sons, the heirs are the nearest paternal relatives of the deceased namely father, full brothers, half-brothers and paternal uncles with greatest respect such full throttled patriarchy that flies in the face of current conceptions of what is fair and reasonable cannot stand scrutiny; not least because it is plainly discriminatory of and itself and its effects. It is anachronistic and misplaced notwithstanding that it was the norm for a fact majority of Kenya’s communities. This court has long accepted that a child is a child, none being lesser on account of gender or the circumstances of his or birth. Each has a share without shame or fear in the parents’ inheritance and may boldly approach to claim it. What *Rono-v- Rono* decided about the prohibition of discrimination of sex under the retired Constitution applies with yet another greater force under the current progressive Constitution.”

See also *Stephen Gitonga M’Murithi –v- Faith Murithi* (2015) eKLR where the Court of Appeal held that failure to accord equal distribution of the estate (to sons, daughters and widows) is a violation of Section 38 of *the Constitution* by discriminating against the married daughters of the deceased. Guided by these binding decisions, it follows that distribution of administrator which discriminated against the daughters of the deceased should not be entertained by this court. There is no doubt that by dint of Section 2(2) of the *Law of Succession Act* the applicable Law is Meru Customary Law as the deceased died before the *Law of Succession Act* came into force. However the court will shun the custom which discriminates women on account of gender and marital status and is inconsistent with any written law. The administrator distributed 0.15 of an acre to the three married daughters while the sons got 1.8 acres each. This was no doubt discriminatory and total injustice.



**b. Whether the interest of the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents in the suit land are protected under Section 93 of the Law of Succession Act**

18. Section 93 of the Law of Succession Act avails protection for a purchaser in a regular sale made in strict compliance with the law. For avoidance of doubt, the said Section 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.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.”

19. The subject grant that was issued to the 1<sup>st</sup> Respondent was confirmed on 16<sup>th</sup> May, 2016. After the said confirmation, the 1<sup>st</sup> Respondent as the duly appointed administrator of the estate went ahead and distributed the estate as per the Certificate of Confirmation of Grant. Subsequently, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent decided to dispose of their interests.

It follows that after the grant was confirmed and a certificate was issued, the disposal of the land by way of sale to the respondent was lawful. The respondent sold his interest in the estate after securing a good title. It follows that he could pass a good title to the purchasers who are some of the respondents in this case. I find that Section 93 of the Law of Succession Act shields the purchasers and their interest in their respective parcels of land cannot be challenged or impugned even if the court orders the grant to be revoked. That is to say that since the purchasers were bonafide purchasers for value from the administrator who had a valid grant, the validity of their transfer cannot be affected by the revocation of grant. The purchase and the subsequent transfer to them of the suit property is protected under Section 93 of the Law of Succession Act.

20. The 1<sup>st</sup> Respondent disposed off and a sub-divided his share of the estate into 5 and the resultant parcels of land were L.R. No. Karingani/Ndagani/11924-11927. The 1<sup>st</sup> Respondent then sold L.R. No. Karingani/Ndagani/11924 to the 3<sup>rd</sup> Respondent after entering into a land agreement that is dated 5<sup>th</sup> July, 2017. On the other hand, the 4<sup>th</sup> Respondent purchased L.R. No. Karingani/Ndagani/11925 from one Japhet Kariuki, a son of the 1<sup>st</sup> Respondent. In the circumstances, I therefore agree with the submissions of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents that whether or not the subject grant is revoked, her purchaser’s interest in L.R. No. Karingani/Ndagani/11924 should be protected.

**c. Revocation of Grant**

21. Under Section 76 of the Law of Succession Act, the court has discretion to revoke a grant on an application by an Interested Party or on its own motion if grounds for revoking a grant exists. The said 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.”

22. It is clear from the above provisions that a grant may be revoked by a court as long as the grounds listed above have been disclosed. In this case, the current application was indicated to be premised on the following grounds, inter alia:

- a. That the interested parties are not beneficiaries of the estate of the deceased.
- b. That the proceedings to obtain the grant were defective in substance.
- c. That the grant was obtained fraudulently by the making of a false statement and concealment of a fact material to the case.
- d. That the grant was obtained by means of an untrue allegation of fact essential in point of law.

23. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in this case have recognized that the deceased left behind three daughters. According to them, the daughters of the deceased were entitled to a joint share of a portion of the subject estate, which share would be utilized by any of them in the event one got divorced. On this basis alone, it is my view that the Applicants did provide a good ground to revoke the grant issued to the 1<sup>st</sup> Respondent. As observed above, children are entitled to equal shares of the estate without discrimination.

24. I however note that although the application dated 5<sup>th</sup> October, 2019 is headed ‘Summons for Revocation of Grant,’ and is founded on Section 76 of the *Law of Succession Act*, it does not seek



revocation of the grant made in this cause but instead, it seeks revocation of the certificate issued on 16<sup>th</sup> May, 2016 following confirmation of the grant.

25. This Court is being invited to revoke a certificate of confirmation of grant. A certificate of confirmation of a grant is not a grant of representation, but a certificate to the effect that the grant had been confirmed by the court. The discretion given to the court by the provisions in Section 76 of the [Law of Succession Act](#) is for revocation of grants of representation, not certificates that confirm those grants. There is therefore no power in those provisions for the court to revoke a certificate of confirmation of grant.
26. The Applicants have however invoked the provisions of Rule 73 of the Probate and Administration Rules which means that this Court can exercise its inherent power to meet the ends of justice.

Rule 73 of the Probate and Administration Rules provides:

“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.”

### **Conclusion**

27. For the reasons stated, above, I find that this application has merits. I order that the grant be revoked. A fresh grant shall be issued to Erastus Mutegi Ntari and Ajelica Kaari Njue jointly. They shall apply for confirmation of grant within 30 days as this is an old matter. The title deeds of 3, 4, & 5<sup>th</sup> Respondents shall not be cancelled as they are protected under the Law, them having acquired bona fide purchaser's titles.

The title deeds for the 1<sup>st</sup> & 2<sup>nd</sup> respondent shall be cancelled and revert to the estate of the deceased for distribution on equal basis to the beneficiaries taking into account the parcels of land they have sold to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents to reduce their share in the estate.

Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 9<sup>TH</sup> DAY OF APRIL 2024.**

**L.W. GITARI**

**JUDGE**

