



**In re Estate of Teresa Nyabate Asango (Deceased) (Succession Cause  
19 of 2000) [2024] KEHC 5767 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5767 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
SUCCESSION CAUSE 19 OF 2000**

**TA ODERA, J**

**MAY 9, 2024**

**IN THE MATTER OF THE ESTATE OF TERESA NYABATE ASANGO  
(DECEASED)**

**BETWEEN**

**MONICAH NYABOKE JOHN ..... APPLICANT**

**AND**

**ASCAH MOCHACHE MOMANYI ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. This Ruling concerns an Application dated July 25, 2022 filed by the Applicant herein seeking this court to order the Deputy Registrar of this court to sign and/or execute and do all matter necessary to effect transmission and transfer of land parcel Nyaribari Chache/Boburia/5054 (hereinafter referred to as the suit property) as per the certificate of grant issued by this court on June 28, 2018 as well as cost of this Application.
2. In support of his application the Applicant averred that the grant of letter of administration were issued on June 28, 2018 but the respondent who is core administrator to the estate has refused to sign all relevant documents necessary for the transmission in accordance with the mode of distribution confirmed by this court. He averred too that the respondent and her children have refused to produce their identification documents for purposes of applying for transmission. He averred further that the Applicant cannot execute the certificate of confirmation unless the documents are signed by the Deputy Registrar of this court on behalf of the Respondent and her children.
3. In response to the Application the Respondent filed a replying affidavit on 4<sup>th</sup> April, 2023 wherein he averred that he had proceedings between himself and a brother to the Applicant one Alfred Mongare in KISII CMCC No. 55 OF 2008 in regard to the Marriage of the mother of the two and the lower



court resolved in its judgment delivered on August 16, 2008, that the Respondent's mother, the late Bethsheba Bosibori having contracted been married previously to one Orangi Mogoi, she was capable of contracting another marriage to Teresa Nyabate Asango (deceased) in a woman to woman marriage. He averred that the verdict of the lower court was upheld by the Environment and Land Court on March 29, 2019 and held that the Respondent was the absolute owner of the suit property.

4. The Respondent decried that the decision of the Environment and Land Court was delivered after this court had revoked the grant initially issued to the Respondent and thus it meant that there were two diametrically opposed judgments of two concurrent jurisdictions and there was need for a determination as to which one of the two should carry the day.
5. The Applicant filed a supplementary affidavit in reply to the response by the Respondent. She claimed that the issues raised by the Respondent had been adjudicated upon and thus cannot be raised again.
6. She disclosed that initially the respondent had filed a Succession Cause no. 19 of 2000 and confirmed grant issued to her on February 6, 2000. The Confirmed grant were duly revoked by this court on May 16, 2011. On December 12, 2013, the Respondent moved this court to have the orders issued on May 16, 2011 set aside but his Application was dismissed vide a ruling of this court dated June 19, 2015. On April 6, 2016, afresh grant was issued in their joint names. The Applicant later applied for confirmation of the grant in their joint names. However, the Respondent protested on the mode of distribution citing the decision regarding the burial dispute between the respondent and the Applicant's brother which protest was dismissed vide a ruling of this court delivered on March 30, 2017.
7. According to the Applicant, this court substantially dealt with all issues relating to Appeal in the Environment Court in its ruling dated March 30, 2017 and that the issue of marriage between Teresa Asango (deceased) and the Applicant's mother ought to have been ventilated in the Application for revocation of grant. She reiterated that as it had been held in the said ruling, the only recourse that was available to the respondent for purposes of reopening this issue was by way of appeal against the revocation of his grant that happened way back in 2011.
8. The Applicant equally revealed that the Respondent being dissatisfied with the decision of the High Court appealed against the decision of *vide* Civil Appeal No. 52 of 2017 which Appeal was dismissed on September 28, 2021.
9. This court directed that this application be disposed of by way written submission. Both parties have filed their submissions for consideration by this court.

### **Analysis And Determination**

10. Having judiciously analysed the Application, the Response thereto, all annexures supplied by all parties to support their position the written submissions the respective parties' I find that the main issue that arises for determination is whether this court to forge ahead and direct the Deputy Registrar to append to all documents necessary to the facilitate the transmission of the estate the manner outlined in the certificate of grant issued by this court on June 28, 2018.
11. It is the position of the Applicant that there exists a valid certificate of grant issued by this court that has never been varied or set aside by this court or the Court of Appeal. According to the Applicant, the respondent having unsuccessfully failed to set aside the Ruling of this court delivered on March 30, 2017 when his Appeal against the said Ruling was dismissed on September 28, 2021 on an account of the Applicant's mother's marriage not being a legal marriage he cannot be heard again raising the same issue in this court.



12. The Respondent's on the other hand is a person at cross roads. While she appreciates that there exists a ruling of this court revoking his grant and issuing a fresh grant in the joint names of the Applicant and the Respondent, he presents yet another judgment of the Environment and Land Court wherein she was found to be the absolute owner of the suit property herein. She has urged this court to make a determination as to which of the two Judgement is the most appropriate decision that will resolve the decision once and for all.
13. It is outright that this dispute arose in 2008 when the Applicant's brother attempted to bury their mother on the suit property. The Respondent moved the Lower Court and succeeded in convincing the Lower Court that the Applicant's mother was not a legal wife to her mother whose property she had inherited after carrying out succession in the year 2000. Applicant after learning that the Respondent had carried out succession and caused the suit property to be transmitted to herself, she moved to this court in the year 2008 seeking to have the grant revoked. She succeeded in her cause and the grant was revoked on May 17, 2011 and ordered for fresh grants to be issued in the joint names of the Applicant and the Respondent. On September 12, 2013, the Respondent filed an application seeking review of the revocation orders issued on 17<sup>th</sup> May, 2011. In support of her application, the Respondent alleged the Appellant was a daughter to Bathsheba who was alleged have been married to Teresia Nyabate (deceased) and whose marriage was successfully challenged in CMCC No. 55 of 2008 where the court made a finding that the said Bathsheba was never a wife to the deceased and her remains could not be buried on the suit property. She stated that the Applicant was a sister to one Wilfred Mongare Orina who was a party to that suit and who had opted to appeal against the decision of the Lower Court in this court. This court delivered its Ruling June 19, 2015 dismissing the Application. The court stated as follows;

The court orders made on May 23, 2011 - which orders the applicant endeavours to discharge, vary and set-aside, were that a fresh grant be issued in the joint names of the applicant and the Respondent and either of them or jointly do apply for confirmation of grant.

By the application dated May 23, 2011 the applicant sought a stay order pending the hearing and determination of the intended Appeal which application was granted in terms that the Status quo be maintained pending the hearing and determination of the intended Appeal.

The appeal was never pursued, as the record of Appeal was not filed within 60 days of filing of the Notice of Appeal.

Not only 60 days within which the record of Appeal ought to have been filed elapsed, two long years elapsed. The maintenance of the Status quo, in my view, was what the applicant herein wanted and obtained.

Against the maintenance of this mute status quo, the Respondent filed application dated 17<sup>th</sup> May 2013 to have the orders issued on 23<sup>rd</sup> May 2013, set-aside, varied and or discharged, this being the first application herein.

Kisii HCCC No.111 of 2002 between Askah Mocheche Momanyi vs Bethseba Bosibori abated and has never been heard. It ought to be fixed for hearing afresh.

The application dated 12<sup>th</sup> September 2013 is but diversionary. It is not different from the appeal that never was.

The allegations of plucking affidavits from court records are not persuasive enough, it does not take long years to resuscitate this matter and bring it to conclusion.



For reasons above stated, the court finds the application dated 12th September 2013 is yet another delaying tactic, and must therefore not be allowed.

14. The Respondent challenged the above the decision of the court at the Court of Appeal but his Appeal was dismissed. Once in 2016 he again showed up with a protest against the confirmation of the joint grant issued by this court on April 6, 2016. In her protest, she averred that there was an Appeal filed by the Applicant's brother against the decision of the Lower Court pending in the environment and land court which would have an effect to the confirmation of grant and thus requested the court to stay the process pending the hearing of such determination. This court once again dismissed his protest in its Judgement dated 30<sup>th</sup> March 2017. The court observed as follows;

“ Apparently, it was on the basis of the impugned grant that the respondent was able to register the estate property in her own name on the February 15, 2001. But, with the revocation of grant by the court on the May 16, 2011, and the issuance of a fresh grant on 6th April 2016, the registration of the property in the name of the respondent became obsolete. The, respondent's success in CMCC N0.55 of 2008 was somehow rendered invalid and was more or less a pyrrhic victory.

In the circumstances, this court holds the view similar to that of the applicant that the success or failure of the pending appeal would have no bearing on this matter. If it is not too late, the only window open to the respondent to pursue her perceived right over the estate property to the exclusion of the applicant is to appeal the decision of this court to revoke the original grant made in her favour”

15. The Applicant has in her supplementary affidavit averred which averment has not been controverted that the Appellant attempted to appeal against the above ruling of the court at the Court of Appeal but his Appeal was dismissed in September, 2021.
16. From the forgoing therefore it appears that the Applicant is a litigant clutching at every straw in her bid to stop the succession process from going through. He has presented before this court the decision of the Environment and Land Court wherein it was determined that she holds a valid title over the suit property. As was correctly observed this court in its decision dated November 30, 2017, the Respondent's victory in this case is just but less a pyrrhic victory given that the grant upon which her title emanated had already been rendered obsolete in 2011. Having failed in his endless challenges to have her grant reinstated she cannot claim to have a valid title upon which she can rely on stop the succession process that ended on June 28, 2018 upon the issuance of the certificate of confirmation of grant.
17. In my view the decision of the Environment and Land Court which is of the same level to this court and which was entered on March 29, 2019 exactly two years after this court rendered its decision can be not said to be of a probative value or force than the decision of this court. This court having decided that the grant that was held by the Applicant stood revoked on two instances, such decisions could only be reversed by the Court of Appeal. The Respondent having failed to successfully challenge the revocation of his grant at the Court of Appeal, he cannot wave a decision of a court of equal status to this court entered 2 years later to stop the completion of the succession process.
18. From the forgoing therefore and in the interest of Justice taking into account the age of this matter, I will proceed to allow this Application dated July 25, 2022 and proceed to direct the Deputy Registrar of this court to within 30 days from this date hereof to execute all documents necessary to effect the transmission of land Parcel Nyaribari Chache/B/B Boburia/5054 as per the certificate of grant issued on June 28, 2018.



19. It is so ordered.

20. This being a family matter each party shall bear its own cost.

**DELIVERED VIRTUALLY ON 9<sup>TH</sup> MAY, 2024**

In the Presence of: -

Court Assistant - Oigo

**T.A. ODERA**

**JUDGE**

**9.5.24**

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