



REPUBLIC OF KENYA



**In re Estate of Joseph Kajogi M’rujau alias Kajogi M’rujau (Deceased) (Succession Cause 486 of 2012) [2024] KEHC 7579 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7579 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 486 OF 2012  
EM MURIITHI, J  
JUNE 20, 2024**

**BETWEEN**

**JANE NCORO KAJOGI ..... 1<sup>ST</sup> PETITIONER**

**JAPHET MURIITHI KIUGU ..... 2<sup>ND</sup> PETITIONER**

**AND**

**RONALD MUTUMA MUTAI (SUING AS THE LEGAL REPRESENTATIVE  
OF THE ESTATE OF STEPHEN MUTAI MANYARA –  
DECEASED) ..... INTERESTED PARTY**

**AND**

**MUTUMA MUTAI (SUING AS THE LEGAL REPRESENTATIVE  
OF THE ESTATE OF STEPHEN MUTAI MANYARA –  
DECEASED) ..... INTERESTED PARTY**

**RULING**

**1st Application**

1. By a notice of motion dated 9/9/2022, pursuant to Section 31 of the [Land Registration Act](#), the Protestor herein seeks that:
  1. Spent
  2. The Honourable Court be pleased to allow the Deputy Registrar to execute the necessary transmission and/or transfer documents in favour of the Protestor in respect of Land Parcel No. Abogeta/U-Kiungome/1872.
  3. The Honourable Court be pleased to make an order for the Land Registrar Meru, to dispense with Title Deed for Land Parcel No. Abogeta/U-Kiungome/1872.



4. The costs of this application be borne by the respondent.
2. The grounds upon which the application is premised are set out in the body of the application and his supporting affidavit sworn on even date. He avers that he applied for revocation of the grant issued to the Petitioner vide an application dated 2/7/2018 which was compromised vide a consent dated 30/6/2021 and filed on 1/7/2021. Pursuant to the consent, the grant dated 29/11/2013 and rectified on 20/2/2017 was revoked. Consequently, a fresh grant was issued to the Petitioner in which he was to get 1½ Acres of L.R No. Abogeta/U-Kiungome/1872. Desirous of effecting the transmission, he approached the Petitioner with the requisite forms, but she was adamant to execute them and release the title deed thereto. The Petitioner's willful refusal to execute the transmission documents is causing him anguish and distress and he prays for the application to be allowed.
3. The application has not been responded to.

### **The 2<sup>nd</sup> Application**

4. By summons dated 24/10/2023 pursuant to section 93 of the Law of Succession Act, Rules 49 and 73 of the Probate and Administration Rules, and Articles 40, 47 (1) and 50 of the Constitution and all other provisions of the law, the Applicant/Interested Party seeks that:
  1. The Honourable court be pleased to enjoin the applicant herein as an Interested Party and or protestor in the succession cause.
  2. The Honourable court be pleased to issue an order for stay of implementation of the rectified confirmed grant issued pending inter-partes the hearing of this application and the main suit.
  3. The Honourable court be pleased to vary and or set aside the consent orders dated 30<sup>th</sup> June 2021 and allow the Applicant a chance to be heard.
  4. Costs of this application be provided for.
5. The application is premised on the grounds on the face of it and supporting affidavit of the Applicant sworn on even date. He avers that he is the legal representative of Stephen Mutai Manyara. The Petitioner approached his father to buy the subject parcel and upon conducting due diligence and ascertaining that L.R No. Abogeta/U-Kiungome/1872 was registered in the name of the Petitioner, he purchased it from her for monetary value and the same was transferred to him legally through the due procedure. He was recently astonished when he learnt that the Respondents jointly recorded a consent to the effect that the title deed of the suit property do revert to the name of the deceased and a fresh grant be issued to the Petitioner. The estate of Stephen Mutai Manyara was condemned unheard and it is only fair and equitable that the application is allowed and the consent set aside. The certificate of title issued to his father was directly cancelled with the issuance of the court order. Being aggrieved by the decision of revoking the title deed without according him a chance to be heard or participate in the revocation proceedings he filed this application in order to be able to ventilate his weighty issues and protect his constitutionally enshrined right to own property. He is an innocent purchaser for value after confirmation of the grant and he is informed by his advocates on record that he is entitled to the orders sought. He prays that the current status quo should be maintained to await the hearing and determination of this cause.
6. The Protestor opposed the application vide his replying affidavit sworn on 9/11/2023. He avers that he was born and raised on the suit property where he resides up to date and the estate herein relates to his grand father. His grand father had never sold the suit property to anyone prior to his death, and an illegal purchaser's interest cannot dispense the rights of heirs to an estate. If any due diligence



was done at all, the Applicant would have known that he resides on the land and has set up his home therein. A consent order between competent parties cannot be set aside unless it is founded on fraud and/or misrepresentation. An illegal purchaser's interest ranks last in priority in succession causes, and he ought to be allowed to acquire his share of inheritance. No status quo can be maintained in light of a fraudulent purchase as the same is skim to evicting him from his home, and it is in the interest of justice that the application is dismissed with costs.

### **Submissions**

7. The Petitioner did not file any submissions.
8. The Protestor urges that the grounds to set aside a consent order have been settled already and includes inter alia fraud or collusion. He urges the court to be persuaded by *Flora N Wasike v Destimo Wamboko (1988) eKLR* to find that the Applicant has not pleaded fraud or collusion and as such, the consent was lawfully entered into. He urges that the purchaser's interests do not rank higher than those of a beneficiary to the estate. He urges that even without the sale agreement, the grant was fraudulently acquired and as such no benefit could fall to any person based on an illegality. He urges the court to be persuaded by *Ibrahim v Hassan & Charles Kimenyi Macharia (2019) eKLR*, where the courts cancelled title deed issued from a defective grant and properly reverted to the deceased owner.
9. The Interested Party/Applicant did not file any submissions.

### **Analysis and determination**

10. The issue for determination is whether the orders sought in the applications should be granted. The court notes that the 2 applications are the 2 sides of the same coin and therefore, the outcome of the latter will certainly have a profound effect on the former.

### **Joinder**

11. The pre-requisites to be fulfilled before a party can be joined to proceedings were set out in *Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2016] KESC 12 (KLR) (Civ) (28 January 2016) (Ruling)*, where the Supreme Court rendered thus;

“Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements: The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

12. The Applicant/Interested Party seeks to be joined into these proceedings on the basis of being a son to an alleged purchaser of the suit property. He contends that his deceased father purchased the suit property from the Petitioner after the grant had been confirmed, and thus he has an identifiable stake in these proceedings. He has exhibited a certificate of official search which shows that the suit property was registered in the name of Stephen Mutai M’Imanyara, his deceased father, on 11/12/2017 and a title deed issued on 14/12/2017.



13. In his summons for revocation of grant dated 2/7/2018, the Protestor averred that the deceased herein had a 3<sup>rd</sup> wife namely Kiacia Kajogi who was the mother to his mother Esther Riara.
14. The court observes that the alleged sale of the suit property by the Petitioner to Stephen Mutai M’Imanyara was done before the confirmation of the grant. Therefore, the purported sale of the suit property by the Petitioner to Stephen Mutai M’Imanyara, a 3<sup>rd</sup> party was a nullity and of no legal basis.
15. Sincerely speaking, the Petitioner had nothing to sell to the 3<sup>rd</sup> party because the property in question was not hers, as at that time. Article 40 (6) of *the Constitution* declares that, the rights under that Article do not extend to any property that has been found to have been unlawfully acquired.
16. This court respectfully notes the case of re Estate of M’Ajogi M’Ikiugu (Deceased) [2017] eKLR where the court, (F. Gikonyo J) stated as follows:

“Courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the *Law of Succession Act*, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the *Law of Succession Act*, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable of registration in his name before it could be sold or pledged as security or exchanged with another type of property.”

17. In *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169 at page 1172, Lord Denning stated that:

“...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

18. Stephen Mutai M’Imanyara, being an alleged purchaser of the suit property is a total stranger to these proceedings. It thus follows that the Applicant and his father, Stephen Mutai M’Imanyara are not related to the deceased herein but are third parties who claim ownership of the deceased’s estate. Such a dispute is not to be resolved by this court.

19. In *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR, the court (W. Musyoka J) held that:-

“The *Law of Succession Act*, and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the Probate and Administration Rules are tailored for resolution of disputes between the



personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the Probate and Administration Rules. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators.”

### **Setting aside of the consent order**

20. The Protestor and the Petitioner subsequently entered into a consent, which was adopted as an order of the court, whereby the grant, which is the very instrument which gave rights to the Applicant’s deceased father, was revoked.
21. It is therefore imperative to explore the circumstances under which the consent was executed, to determine whether the same ought to be set aside or not.
22. The law on variation of a consent judgments and/or orders is now settled to the effect that such variation can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts.
23. In *Flora N. Wasike v Destimo Wamboko (1988) eKLR* cited by the Protestor, (Hancox JA as he then was) held as follows:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”
24. The Court of Appeal in *Brooke Bond Liebig (T) Ltd v Mallya (1975) E.A. 266* held as follows:-

“A consent judgment may only be set aside for fraud, collusion, or for any reason which would enable the Court to set aside an agreement.”
25. This court finds that the Applicant has not established that he has an identifiable stake in these proceedings and that he will suffer any prejudice if he is not so enjoined.
26. There was no basis whatsoever for the Petitioner and the Protestor to involve and/or seek the consent of the Applicant before they executed the consent order, because he and his deceased father are not beneficiaries of the estate of the deceased.
27. This court finds that the threshold laid down in *Brooke Bond Liebig (T) Ltd v Mallya (supra)* has not been met to have the consent order of 30/6/2021 set aside.
28. For the reasons set out above, the court finds that the Applicant’s application dated 24/10/2023 is without merit and it is hereby dismissed.

### **Orders**

29. Accordingly, for the reasons set out above, it follows that the Applicant’s application dated 9/9/2022 has merit and it is allowed in the following terms:
  1. The Deputy Registrar is hereby allowed to execute the necessary transmission and/or transfer documents in favour of the Protestor in respect of Land Parcel No. Abogeta/U-Kiungome/1872.



2. The Land Registrar Meru, is hereby directed to dispense with the production of the Title Deed for Land Parcel No. Abogeta/U-Kiungome/1872.

Order accordingly.

**DATED AND DELIVERED ON THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Ms. Mukaburu for Mr. Karanja for the Protestor.

N/A for the Petitioner.

