



**In re Estate of Mwangangi Mutula Ngwili (Deceased) (Succession Cause 2004 of 1999) [2024] KEHC 11626 (KLR) (Family) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 11626 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 2004 OF 1999  
PM NYAUNDI, J  
JULY 5, 2024  
IN THE MATTER OF THE ESTATE OF MWANGANGI  
MUTULA NGWILI (DECEASED**

**BETWEEN**

**KASIVA MWANGANGI ..... 1<sup>ST</sup> APPLICANT**

**MUTULA MWANGANGI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**FRANCIS MUTINDA MUTULA ..... 1<sup>ST</sup> RESPONDENT**

**HANSON MUINDI MUTULA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Mwangangi Mutula Ngwili (the Deceased) died on 7<sup>th</sup> November 1992. Francis Mutinda Mutula and Hanson Muindi Mutula the deceased's brothers petitioned this court for grant of letters of administration intestate. The said grant was issued on 30<sup>th</sup> January 2012 and confirmed on 24<sup>th</sup> January 2014.
2. The Deceased is said to be survived by the following;
  - a. Wayua Mwangangi – wife.
  - b. Kasiva Mwangangi- wife.
  - c. Peter Kimeu Mwangangi-son.
  - d. Mumbua Mwangangi- daughter.



- e. Mutula Mwangangi- son.  
ASSETS
- a. KITETA/KIAMBWA 469.
3. Kasiva Mwangangi and Mutula Mwangangi (the applicants) filed summons for revocation or annulment of grant dated 3<sup>rd</sup> July 2023 seeking the following orders;
- a. Spent.
- b. Spent.
- c. Spent.
- d. The Honourable Court be pleased to order that the confirmed grant issued to Francis Mutinda Mutula and Hanson Muindi Mutula be revoked.
- e. That costs of this application be provided for.
4. The Summons is brought pursuant to Section 76 of the Law of Succession Act and Rule 44 (1) of the Probate and Administration Rules and all enabling provisions of the law is supported by the Applicants sworn affidavit of even date.
5. The applicants' case is that the deceased was survived by two wives and children. That the Respondents did not conceal material facts to the court that the deceased helped them purchase land at Kalima-Emali and Taita Taveta in return, the deceased would retain L.R No.KITETA/KIABWA/469. The Respondents distributed the deceased's land to members of their immediate family and excluded the beneficiaries of the estate of the deceased. Some of the people listed in the certificate of confirmation of grant were not interested in getting a share of the deceased's property.
6. The summons for revocation was disposed by way of viva voce evidence.

### **Summary Of Evidence**

7. OW 1, Kasiva Mwangangi gave oral evidence on 24/10/2023. She told the court that the deceased was her husband and they had eight children together. She learnt about these proceedings from the administrators. She and her co wife live in part of Kiteta/Kiambwa/1469. She has a good relationship with the administrators who are her brothers in law. An eviction notice was issued against her in ELC No. 9 of 2018.
8. During cross examination, she stated that she was not aware that the houses demolished were on other people's parcels. According to her, the deceased's sister, Katulya Nginga is not entitled to inherit from the deceased's estate. Kisavi, the deceased's brother has a separate land. Patricia Musili, the deceased's sister was given money to buy land elsewhere. The land belonged to her father in law. When the subdivision was done, she was not consulted. She was not aware that the land was to be sub-divided amongst the deceased's brothers.
9. OW2, Dickson Mutula Mwangangi told the court that OW1 is his mother and the deceased was his father. His mother and siblings were not notified of these proceedings. OW1 holds in trust land for 5 of her children; 4 of them were excluded. When the land was subdivided, they were evicted. There is a pending suit in Makueni ELC No. 9 of 2019 where he has been sued as a defendant. The deceased had subdivided other parcels with his siblings. Katulya Nginga has a separate portion of land. OW1 and her co-wife were allocated 8.3% while Katulya Nginga was allocated 16.6%. The deceased was not holding



land in trust of his siblings. The land in Makueni belonged to his grandfather and was later transmitted to the deceased. His late father did not take out letters of administration for his grandfather's estate.

10. During cross examination, he stated that he knew of these proceedings when they were summoned by the chief in 2014. Katulya, Kisavi's children and wives and Patricia expressed that they are not interested in the deceased's estate. They took long to file for summons for revocation because they did not have funds. He lives in a portion allocated to him by his late father.
11. RW1, Rebecca Ktulya Nginga testified on 6/3/2024. She stated that the deceased was her elder brother. She adopted her witness statement dated 21/2/2023 as her evidence in chief.
12. In cross examination, she stated that the deceased was holding the property in trust of his siblings. The deceased lived in Kiteta/ Kiambwa/469 while Francis Mutula and Hanson Muindi Mutula were staying in Makueni. She is not aware of Karima, Emali and Taita Taveta land. Kiteta/Kiambwa/469 belonged to their late father, Mutula Ngwili. According to her, the sub division was done equally.
13. RW2, Hanson Muindi Mutula, one of the administrators told the court that the deceased was their elder brother. He adopted his replying affidavit dated 5/10/2023 as his evidence in chief. His evidence was that the 1<sup>st</sup> and 2<sup>nd</sup> applicants each got 8.3% because the deceased had two houses. He told the court that OW1 and OW2 refused to attend court. He filed a case in Makueni against Mwangangi and obtained eviction orders to enable other beneficiaries access their respective portions.
14. During cross examination, he told the court that Kiteta/Kiambwa/469 belongs to their late father. The deceased did not buy land in Karima Emali Taveta. He stays in Kiteta/Kiambwa/469. He has another home in Karima/Emali. The deceased held the property in trust for his family. Emali and Taita Taveta belong to individuals.
15. In re-examination, he stated that the farm in Taveta belongs to Francis Mutinda and others.

### **Applicants Submissions**

16. The Applicants submissions are dated 19<sup>th</sup> March 2024. It was their submission that the respondents did not disclose to the court that the deceased had an agreement with the Respondents to buy them land in Kalima, Emali and Taita in exchange of Kiteta/Kiambwa/469 which was ancestral land. Relying on the decision in *In Re Estate of Gamamiel Otieno Onyiengo (deceased)* [2018] eKLR, they argued that the order of preference to whom grant of letters of administration intestate according to Section 66 of the *Law of Succession Act* was not followed. The Respondents had no legal interest in the deceased's property who was the legitimate owner and therefore, members of the immediate family should have petitioned for letters of administration.
17. Relying on the decision in *Simiyu Wafula Waseke v Hudson*(1993) KLR CA, they submitted that they had priority over the respondent but their consent was not obtained.

### **Respondent's Submissions.**

18. The Respondents filed written submissions dated 2<sup>nd</sup> May 2024. They identified the following three issues for determination;
  - a. Whether some of the beneficiaries were left out on the schedule of distribution.
  - b. Whether the suit land was subdivided wrongly and subsequent Makueni ELC No. 9 of 2019 which is at the execution stage.



- c. Whether the grant was obtained fraudulently by making false statements and concealing some material facts from the court concerning the property L.R NO. KITETA/KIAMBWA/469.
19. On the first issue, it was submitted that all the beneficiaries got a share of the estate. All the beneficiaries are satisfied with the mode of distribution except the applicants.
20. On the second issue, it was submitted that the subdivision was done pursuant to the confirmation of grant in 2016. The applicants got 8.3% because the deceased's share was shared between his two wives. That ELC No. 9 of 2019 has been concluded and the applicants were evicted from the respondents' portion of land.
21. On the third issue, it was submitted that the applicants had failed to prove that there was an agreement between the deceased and the respondents to buy them land in exchange of retaining the ancestral land. According to them the land in dispute was ancestral land which the deceased was holding in trust for himself and his siblings on the account that he is the first born. The fact that the land was registered in his name did not preclude him from holding it in trust for himself and his siblings. Reliance was placed on the decisions in *Kanyi v Muthiora* (1984) KLR 712, *Ngugi v Kamau & another* (Environment & Land Case No. 36 of 2020) [2022] KEELC 2261 (KLR) and *Justus Maina Muruku v Jane Waitihira Mwangi* [2018] eKLR.
22. Finally, they submitted that the applicants were aware of these proceedings but they refused to participate because they did not want the deceased's estate to be shared with other dependants. All the beneficiaries of the deceased are satisfied except the applicants.

### Analysis And Determination

23. I have carefully considered this summons for revocation of Grant, the oral evidence as well as the written submissions filed. In determining the issue for revocation of grant, this court is enjoined to look at the law as regards the preference on priority in seeking for grant of letters of administration of a deceased estate intestate.
24. Section 66 of the *Law of Succession Act*, provides preference to be given to certain persons to administer deceased's estate where the deceased died intestate and provides that the court shall, save as otherwise expressly provided, have final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall without prejudice to that discretion, accept as a general guide the order of preference as set out in the aforesaid section. Section 66(a)-(d) provides: -

“66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and



(d) creditors”

25. Part VII, dealing with making of grants under Rule 26(1) and (2) of the *Probate and Administration Rules* provides: -

“26.

- (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
- (2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

26. Under Part V referred under Section 66(b), the persons given priority over an intestate are the surviving spouse and children. That where the intestate has unfortunately left no surviving spouse and children, the provisions of Section 39 of the *Law of Succession Act* stipulate the net intestate shall devolve up to the kindred of the intestate in manner of order of priority.

Section 39(1) and (2) provides –

“39.

- (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-
  - (a) father; or if dead
  - (b) mother; or if dead
  - (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
  - (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
  - (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
- (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”

27. In the instant case, the applicants argue that they ranked in priority as the wife and son of the deceased and their consent was not sought during confirmation of grant. They told the court that they were not aware of these proceedings. I have gone through the court file and records. Before the respondents filed for letters of administration, they filed and served Mumbua Mwangangi, Peter Kimeu Mwangangi, Wayua Mwangangi, Kasiva Mwangangi and Mutula Mwangangi citation to accept or refuse letters of administration intestate dated 24<sup>th</sup> November 2009. An affidavit of service dated 18<sup>th</sup> June 2010 was duly filed in court. This shows that the applicants and the other beneficiaries who ranked in



priority were served but they did not accept or refuse that the respondents be issued with letters of administration. Satisfied that there was service, the court then allowed the respondents to petition for letters of administration intestate. The applicants were therefore aware of these proceedings and in their absence to petition for letters of administration intestate, the respondents were the next in rank.

28. The Applicants rely on Section 76 of the [Law of Succession Act](#) in seeking the grant issued to the respondents revoked. Section 76 of the [Law of Succession Act](#) 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.”

29. The applicants argue that the respondents failed to disclose to the court that the deceased bought land for the respondents in Emali Taveta in exchange of Kiteta/Kiambwa/469. They argued that most of the beneficiaries in the certificate of confirmation of grant are not interested in the deceased’s estate.

30. It is trite law that he who alleges must prove. Section 107 (1) of the [Evidence Act](#) provides:

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 those facts exist.”



31. Further, Section 108 provides thus:

The burden of proof in a suit or proceeding lies on that person who will fail if no evidence at all were given on either side.”

32. The applicants were required to prove that the deceased indeed purchased land for the respondents to occupy in exchange for Kiteta/Kiambwa/469. From the evidence of both parties, what is coming out clearly is that Kiteta/Kiambwa/469 was ancestral land and it belonged to the deceased’s father. The failure/ refusal by the Objectors to participate in the Citation proceedings that laid a foundation and basis for the Administrators to lodge the Petition is the most telling sign that the Objectors are not as candid as they should be.

33. Having held as above, it is my finding that the summons for revocation or annulment of grant dated 3<sup>rd</sup> July 2023 lacks merit and is consequently dismissed with no order as to costs.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 5th DAY of July, 2024.**

**P. NYAUNDI**

**JUDGE**

In presence of: -

Fardosa Court Assistant

