



In re Estate of the Late M'Rucha M'Mbwiria (Deceased) (Succession Cause 2 of 2023) [2024] KEHC 13874 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13874 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
SUCCESSION CAUSE 2 OF 2023**

LW GITARI, J

OCTOBER 17, 2024

IN THE MATTER OF THE ESTATE OF THE LATE M'RUCHA M'MBWIRIA (DECEASED)

BETWEEN

JOSEPH NYAGA M'RUCHA 1ST PETITIONER

LEONARD MUTEMBEI 2ND PETITIONER

AND

ELIUD NYAGA M'RUCHA 1ST APPLICANT

HEZEKIEL MIRITI 2ND APPLICANT

TIMOTY NJAGI M'RUCHA 3RD APPLICANT

NDIGA G M'RUCHA 4TH APPLICANT

CHARLES NJAGI MIRITI 5TH APPLICANT

JUDGMENT

1. This matter relates to the estate of the late M'Rucha M'Mbwiria (deceased) who died intestate on 13/10/1995. A grant of letters of administration was issued to Joseck Nyaga Rucha and Leonard Mutembei on 15/8/2000 was confirmed on 15/10/2001. The estate of the deceased comprised in Land parcel No. Muthambi/Gatua/429 was distributed as follows:-Phillis Mpii & Leonard Mutembei - ½ Acre
Joseck Nyaga & Mary Gaaji – ½ Acre
Keneth Kimathi - 2.1 Acres
2. The matter pending before this court is the summons for Revocation of Grant dated 22/12/2022. The applicant seeks orders that-

That this application be certified urgent and service be dispensed with in the first instant.



That pending inter-partes hearing of this application, orders of inhibition do issue inhibiting any dealings with land parcel numbers Muthambi/Gatua/2294, Muthambi/Gatua/2295 and Muthambi/Gatua/2296.

That pending the hearing and determination of this application, orders of inhibition do issue inhibiting any dealings with land parcel number Muthambi/Gatua/2294, Muthambi/Gatua/2295 and Muthambi/Gatua/2296

That the grant confirmed on 15/10/2001 and dated 18/10/2001 be revoked.

That the title deeds in respect of land parcel numbers Muthambi/Gatua/2296 be cancelled and the ownership to revert to land parcel number Muthambi/Gatua/429 in the name of the deceased.

That costs be provided for.

3. The summons is based on the grounds that the grant was obtained through concealment of material facts with the intention of depriving the rightful beneficiary of the estate property. It is also contended that the rightful beneficiary is Charles Njagi Miriti and not persons appearing on the grant. That the grant was obtained secretly without the consent of all the family members and particularly the applicants.
4. The summons is supported by the affidavit of the applicant Eliud Nyaga M'Rucha sworn on 2/12/2022. He has deponed that, the deceased was his father who was also the father of 2-4 applicants and 5th applicant is his nephew. That the 1st and 2nd petitioner are his siblings. That the deceased had two houses as he had married two wives. The applicant further depones that the deceased had during his lifetime given all his sons land except Leonard Mutembei and Keneth Kimathi who were not his biological children. That the deceased's sons are settled on their respective portions as shared out by the deceased.

The applicant further avers that the deceased had given his first wife Mary Gaaji 3.10 Acres located on the Nithi side and the second wife Peris Mpii 2.30 Acres located on the Kenywa side.
5. That Leonard Mutembei and Keneth Kimathi were to benefit from the share of land given to their mother. That the meeting was held on 6/12/1986. The applicant further depones that Land Parcel No.Muthambi/Gatua/429 was gifted to the 5th applicant in 1995 and that is where he lives todate. That the 5th applicant was given Meru South Farmers Sacco Membership.
6. It is the contention by the applicant that the respondents concealed material facts and had the land parcel shared against the wishes of the deceased. He therefore prays that the grant be revoked.
7. The respondents have opposed the application and filed a replying affidavit sworn by Leonard Mutembei Girishon. He contends that he prosecuted the succession with the full knowledge of and participation of all the beneficiaries including the applicants. That the applicant did not protest to the confirmation of grant or seek its revocation but instead filed Civil suit No.40/20223 in Meru which they failed to prosecute and was dismissed for want of prosecution. Thereafter in the year 2020 the 5th applicant filed originating summons for adverse possession but he was not successful. That the present application is a fishing expedition. That the deceased died intestate and the estate was distributed in the year 2003 and title deeds were issued. He prays that application be dismissed.
8. The applicant filed a supplementary affidavit in reply to the replying affidavit and denied the averments by the respondents . The matter was heard by way of and parties adduced evidence. The applicant testified as PW1 and adopted his statement and produced documents.



In cross-examination the applicant stated that the deceased had two wives and that Mary Nganji is his mother who was the 1st wife. She was also the mother of Joseph Nyaga and the second Petitioner Respondent. He further testified that Peris was the mother of Mutembei who is the 1st Petitioner Respondent. The applicant admitted that the case at Meru his mother and Joseph Nyaga were given land. The applicant was shown the grant of letters administration which was issued in High Court Meru in 2001 and he admitted that the 2nd respondent and his mother were given land. The applicant further stated the sons of the wives of the deceased are the ones who were given land and in turn gave to the sons. Of importance is that the applicant admitted that he annexed a title deed to show that he was given land. The applicant further stated that he did not have any green cards showing that the wives were given land during the lifetime of the deceased. The applicant further admitted that he had no minutes showing that Charles Njagi Miriti who was a grandson of the deceased. The applicant admitted that he filed Civil Case No.40/2002 and OS 6/2020 in ELC seeking to have the land given to Charles Njagi but the cases were dismissed and he then filed the summons for revocation of grant.

9. PW2 testified that he is a grandson of the deceased and that he gave him land which he is claiming in court. In cross-examination the witness admitted that the minutes he was relying on were written after the deceased died. He admitted that the deceased did not leave a will.

10. PW3 Ezekiel Miriti M'Arucha testified his son was given land parcel No.429 by the deceased.

PW4 Timothy Njagi testified that he has no claim on the land in dispute.

DW1 Joseck Nyaga M'Rucha he told the court that the Land Parcel in dispute Muthambi/Gatua/429 belongs to Kimathi which he was given by the deceased. The succession was filed in Court and the estate was distributed. He testified that Charles Njagi was a young child and he was to get land from his father. He said he had no interest in Land Parcel No.429.

11. DW2 Leonard Mutembei testified the land in dispute belongs to Keneth Kimathi.

12. The Parties filed submissions. The respondent submits that the proceedings to obtain he grant were defective in substance as the 1st respondent did not involve all the family members. He relies on the case of In Re Estate of Wahome Mwenje Ngonoro deceased (2016) eKLR where the court stated that;

“No consent was obtained from the applicants at the time of filing the petition. To me the petition was filed contrary to Rule 26 of the Probate & Administration Rules which states:-

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 applicant and such other evidence as the court may require.”

Under Section 76 of the [Law of Succession act](#) the court can on its own motion revoke a grant where there are sufficient grounds to do so. This is a proper case for the court to revoke the grant on its own motion under the foregoing section on account of the fact that the proceedings leading to the issuance of the grant were defective in substance. The petition ought to have been accompanied by a consent as provided under Rule 26 of the Probate



and Administration rules signed by all the beneficiaries of the appropriate renunciation or in the alternative a renunciation duly signed as required.

13. He submits that the proceedings were defective in substance. It is also the contention by the applicant that the grant was obtained fraudulently as other beneficiaries were not included and they were denied a chance to sign a protest. It is also submitted that material facts were concealed from the court as there were other beneficiaries and that the deceased had distributed Land Parcel No. Muthambi/Gatua/429.

14. The applicant submits that the grant was obtained by means of making untrue allegation of facts which are essential on a point of law as they failed to disclose that the deceased had distributed most of his properties during his lifetime.

The applicant relies on Section 68(1) of the *Land Registration Act* 2012 and Embu ELC 334/2015 and submits that they have made a case for issuance of an order of inhibition.

15. The respondent submits that the suit property belongs to one Keneth Kimathi who is a son of the deceased and who was not provided for during the life time of the deceased, since he was still in school where he was studying in Japan. That the applicants have come to court when it is too late and the delay was inordinate. The respondent further submits the 5th applicant is not entitled to the estate of the deceased.

16. I have considered the evidence adduced and the submissions. The issues which arise are:

1. Whether the 5th applicant is entitled to a share of the estate of the deceased.
2. Whether the court should order revocation of grant

1. Whether the 5th applicant is entitled to a share of the estate of the deceased

17. The duty of this court sitting as a probate and administration court is to identify the properties forming the estate of the deceased, the identification of the beneficiaries entitled to the estate and the distribution of the estate.

The *law of Succession Act* defines dependants. Section 29 of the Law of Succession Act defines dependants as follows:

- “(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- (c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

18. It is important to note that wife, wives, or former wives and the children of the deceased are direct dependants who do not have to prove that they were being maintained by the deceased. Any other person claiming dependency must prove that they were being maintained by the deceased.

A dependant under Section 29(a) of the *Law of Succession Act* has priority over the estate of the deceased. The 5th applicant is a grandson of the deceased. The applicant’s allege that he was given the land in dispute by the deceased as he was taking care of him. However it emerged that the 5th applicant



was a minor aged twelve years when the deceased died. The 1st applicant admitted that there was no evidence to prove that the land was given to 5th applicant and that documents relied on bear dates which was long after the deceased passed away. There was no evidence to substantiate the claim that 5th applicant was a given land by the deceased.

The 5th applicant is claiming that he was a dependant. Section 30 of the [Law of Succession Act](#) provides as follows:

“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.”

19. The grant was issued in 2001. The claim by the 5th applicant is time barred as the grant was confirmed. It is also my view that the conduct by the 5th applicant clearly demonstrates that he is not a dependant. I have noted the suit he filed in Environment and Land Court Chuka Suit No.06/2020 O.S where he was claiming adverse possession. The suit was dismissed for want of merits. The applicant had also filed civil suit No.40/20003 at Meru where he was claiming that he was given Land Parcel No.Muthambi/Gatua/429 by the deceased. The suit was also dismissed. The 5th applicant has claimed dependency after he lost the two cases. The claim is an afterthought.
20. It is trite law that grandchildren inherit estates of their grandparents through their parents. The father of the 5th applicant admitted that he was given land by the deceased during his lifetime. The 5th applicant should therefore claim from his father to avoid a situation where he gets an advantage from the rest of the dependants.
21. The petitioners have adduced evidence that the land in dispute belongs to Kenneth Kimathi a son of the deceased who was not given land during the life time of the deceased as he was outside the Country for further studies in Japan. It is my view that a son has priority over the estate of this father unlike a grandson. Section 38 of the [Law of Succession Act](#) provides as follows:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.’

I find that the 5th applicant is not a beneficiary entitled to the estate of the deceased.

Revocation of grant:

22. Section 76 of the [Law of Succession Act](#) provides for the grounds upon which the court may order revocation of grant.

It provides as follows:-

“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 has ordered or allowed; 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.”

23. The court may order revocation of grant if it is proved that the proceedings to obtain the grant were defective in substance, that the grant was obtained fraudulently making a false statement or concealing something material to the case, was obtained by means of untrue allegation of fact essential to the case, that the person to whom the grant was issued has failed to apply for confirmation of grant or that the grant has become useless and in operative through subsequent circumstances.

24. In this case the applicant contends that the respondents failed to disclose that there were other beneficiaries.

I have perused the record and noted that the succession cause was gazette as required giving notice to all interested parties to file objections and protests. I have also noted that the affidavit in support of the letters of administration did disclose all the beneficiaries from the two houses of the deceased. There is therefore no proof that the beneficiaries were not disclosed. The confirmed grant distributed the estate to Keneth Kimathi who got a lion’s share as he had not received gifts intervivos. The rest was distributed to the two houses of the deceased in equal shares. The 1st applicant admitted that his brother got a share and the other share went to the wife of 2nd house.

25. All the applicants testified in this court and admitted that they had obtained gift intervivos and had no claims to the land in question save for the allegation that it should have gone to the 5th applicant I find that the grant was obtained lawfully and procedurally. The 1st applicants admitted that both houses of the deceased were given land during his lifetime. I find that the applicant have not proved any of the grounds under Section 76 (supra) to warrant this court to order revocation of grant. As submitted by the respondents there was in-ordinate delay in bringing the application and a court of equity does not aid the indolent. The delay in filing this application when the applicants were fully aware of must be held against them with a conclusion that they had no claim to the land which was distributed under the grant as they had already obtained their entitlement to the estate by receiving the shares intervivos.

I find that this application is a clear afterthought. It lacks merits.

Conclusion:

26. The application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 17TH DAY OF OCTOBER 2024.



L.W. GITARI

JUDGE

17/10/2024

Mr. Mithega for Appellant – Absent

Mr. Kijaru for Respondent- Absent

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

17/10/24

