



REPUBLIC OF KENYA



**In re Estate of Peter Mbogo Gitunu alias Peter Mbogo Gikunju alias Mbogo Gatimu Theya - (Deceased) (Miscellaneous Succession Application 89 of 2013) [2024] KEHC 12450 (KLR) (15 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12450 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
MISCELLANEOUS SUCCESSION APPLICATION 89 OF 2013**

**RM MWONGO, J**

**OCTOBER 15, 2024**

**IN THE MATTER OF THE ESTATE OF PETER MBOGO GITUNU ALIAS  
PETER MBOGO GIKUNJU ALIAS MBOGO GATIMU THEYA - (DECEASED)**

**BETWEEN**

**MWAI NGANDI MACHIRA ..... 1<sup>ST</sup> APPLICANT**

**NELSON GACHOKI MURAGE ALIAS GACHOKI MURAGE ... 2<sup>ND</sup> APPLICANT**

**AND**

**STEPHEN MWANGI MIRITHI ..... 1<sup>ST</sup> RESPONDENT**

**NELSON DOUGLAS KABUI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The deceased died on 6<sup>th</sup> September 1998. A grant of Letters of administration intestate was applied for in SRM Succ. Cause No. 235 of 2011 by Stephen Mwangi Muriithi who described himself as a nephew. The grant was made on 10<sup>th</sup> October, 2011 and issued on 19<sup>th</sup> October 2011.
2. According to the original petition, the deceased was survived by:
  1. Stephen Mwangi Muriithi; Francis Kangangi Muriithi; Gerald Kinyua Muriithi; Nelson Douglas Kabui Muriithi (his nephews).
  2. Tabitha Njeri Munyagia, Grace Wambura Gatimu, Elizabeth Wangui Kinyua (his nieces).
  3. Peter Kamau Murage, Michael Macharia Murage (his nephews).
  4. Millicent Wambui Murage and Purity Wakio Murage (his nephews' daughters) both of whom were minors.



3. The grant was confirmed on 11<sup>th</sup> May 2012 through a certificate issued on 17<sup>th</sup> May 2012.
4. By an amended summons of Revocation of grant dated 25<sup>th</sup> April 2016, the applicants herein seek orders as follows:
  1. That the proceedings to obtain the grant were defective in substance.
  2. 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.
  3. 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.
5. The summons is supported by the affidavits of Mwai Ngandi Machira and Nelson Gachoki Murage alias Gachoki Murage. The 1<sup>st</sup> Applicant in his supporting affidavit made the following major averments:
  - i. That the deceased died without any wife or child.
  - ii. That the deceased had one brother by name Munge, who died without a wife or child and one sister by name Wamuruana and who was my mother, now deceased.
  - iii. That the deceased was therefore my uncle.
  - iv. That the respondents are not in any way related to the deceased, other than that they are of the same clan.
  - v. That the 1<sup>st</sup> respondent, after filing the succession cause described himself as Stephen Gatimu Theya to conceal his true identity.
  - vi. That the affidavit in support for summons for confirmation of grant whereby the name of the 1<sup>st</sup> respondent changed to Stephen Mwangi Muriithi. The 1<sup>st</sup> respondent lied in that affidavit that the deceased left behind 11 children, among them the respondents herein.
  - vii. That the grant was confirmed on 11<sup>th</sup> May, 2012 whereby the ½ share of plot No.95 Kagumo village belonging to my uncle went to the respondents jointly.
  - viii. That the respondents did not inform me about the existence of this succession cause, yet they knew I was the closest surviving relative of the deceased.
  - ix. That I am also aware that the share that went to the respondents herein had developments belonging to the 2<sup>nd</sup> applicant, pursuant to an arrangement that was there between the deceased and the 2<sup>nd</sup> applicant.
  - x. That there were false allegations at the time of filing of the succession cause, and there was also material non-disclosure of facts which were well within the knowledge of the 1<sup>st</sup> respondent.
  - xi. That the grant which was subsequently confirmed should be revoked, any action and registration done pursuant to the impugned grant and certificate of confirmation of grant should be cancelled for the ½ share to revert to the name of the deceased, to enable this court determine who should be the proper administrator(s) of the estate of the deceased.
6. The Respondents filed a replying to affidavit dated 4<sup>th</sup> July, 2016 with the following major averments:
  1. That the Respondents deny that they concealed any material to Court as averred by the Applicant. The Chief's letter speaks for itself.



2. That the name Theya appearing on the Gazette Notice belonged to the deceased as he was also known as Mbogo Gatimu Theya and this was just an error on the part of the Gazettement which had nothing to do with us. Other documents in the petition have the correct names.
  3. That the 2<sup>nd</sup> Applicant's interest in Plot Number 95 Kagumo Market has not been disturbed since he is still the owner of one part with the Respondents.
  4. That it is not true that the 2<sup>nd</sup> Applicant has done any development on behalf of the Respondent since he is on his portion exclusively.
  5. That the deceased and the father to the Respondents are brothers; and therefore, the Respondent would call the deceased their younger father.
  6. That the 1<sup>st</sup> Applicant will call the deceased an uncle since his mother who is married elsewhere is a sister to the deceased.
  7. That the 1<sup>st</sup> Applicant should take his father's property where his mother is married in Kariko Sub location of Kirinyaga County.
  8. That by any degree the Respondents are closer to the deceased being their younger father.
7. In a further replying affidavit dated 7<sup>th</sup> November, 2016, the respondents averred as follows:
1. That the 2<sup>nd</sup> Applicant's case is only based on the developments he purports to have made on the Plot and should only be entertained in a separate suit.
  2. That the only issue to be determined is the relationship between the 1<sup>st</sup> Applicant and the deceased.
  3. That the Applicant's mother is a sister to the deceased and is married elsewhere.
  4. That the deceased is my father's brother, and is therefore my younger father.
  5. That the deceased had no family and so I am the closest relative.
  6. That the grant has been fully executed and the Plot is now owned by both the 2<sup>nd</sup> Applicant and the Respondents.
8. A hearing was held, followed by submissions.
  9. At the hearing, AW1 Grace Wangu Mwai, the 1<sup>st</sup> Applicant's wife adopted her witness statement and the Affidavit in support of the application for revocation. She asserted that the deceased was the son of Wamuruana, sister to the deceased. She asserted in cross-examination that she used to cultivate on the deceased's plot around 1975 when he was alive. She added that she left the plot after buildings were erected on it.
  10. RW1 Stephen Mwangi Muriithi, the 1<sup>st</sup> Respondent testified that the deceased was his uncle. His father, Muriithi Gikunju, was the brother to the deceased.
  11. In cross-examination, the 1<sup>st</sup> Respondent admitted that the deceased had a sister called Kamuruana, whose son Mwai Ngandi (deceased) was the 1<sup>st</sup> Applicant. He stated that he informed the 1<sup>st</sup> Applicant when he started the succession, and the 1<sup>st</sup> Applicant said he would renounce. However, there was no evidence that the 1<sup>st</sup> Applicant renounced. He denied that the was a step brother of the deceased. He admitted that the name Stephen Muriithi Theya in the Kenya Gazette Notice was an error.
  12. The parties filed written submissions.



13. The applicant submitted that from the evidence of the parties, it is not disputed that the deceased herein died intestate on 6<sup>th</sup> September, 1998. He had no wife or children. However, while applying for confirmation of grant, the 1<sup>st</sup> Respondent herein indicated in paragraph 2 of the supporting affidavit that the deceased had eleven children, among them the two Respondents herein. The first Respondent had conceded during cross-examination that the same was a false statement.
14. They submit that the respondents in the succession proceedings referred to themselves as children of the deceased, the replying affidavit and the written statement of the 1<sup>st</sup> Respondent stated that the Respondents' father was a brother to the deceased. While testifying, the relationship again changed, and the 1<sup>st</sup> Respondent indicated that his father was a step-brother to the deceased.
15. It was submitted that it is not in dispute that the deceased had two siblings, both deceased, by name Munge who also had no wife or children, and Wamuruana, the mother to the 1<sup>st</sup> Applicant, Mwai Ngandi Machira. As at the time of filing of the succession proceedings, the 1<sup>st</sup> Respondent was aware of the existence of the 1<sup>st</sup> Applicant. He deliberately failed to include the 1<sup>st</sup> Applicant in the list of persons left behind by the deceased. This was concealment from the court of something material to the case, another ground which would make the grant issued to the 1<sup>st</sup> Respondent to be revoked.
16. The applicant relied on Section 51(2)(g) of the *Law of Succession Act* which provides that:

“ Every application (for grant) shall include information as to-  
In cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.”
17. According to the applicant the said provision of the law which is mandatory was not complied with. There is no evidence that the Applicants ever filed any affidavit of renunciation.

### **Respondent's Submissions**

18. The Respondents submitted that during the hearing the substituted party Grace Wangu Mwai gave evidence but did not call any witness. In her evidence, she claimed that she did not know the Respondents nor their father Muriithi Gikunju. The witness claimed that at one time she was in occupation of the plot but she did not shed any light as to when she left the Plot and how. All this evidence was not true. The Court should be informed that the Applicant is married to Machira and resides far from the locality of the plot. She may be not in a position to give proper account of the suit plot.
19. It was submitted that it is common ground that the deceased had one brother who died single, and the substituted party herein is a sister and married elsewhere. The deceased had no family and died intestate. The Respondents are in occupation of 50% where the 2<sup>nd</sup> Applicant is in occupation of the other 50%. They are registered as such in that proportion.
20. It was in evidence that the 2<sup>nd</sup> Applicant is a beneficiary of 50% Shares of the suit land. As a beneficiary and an Applicant then it would be correct to state that she was aware of the succession proceedings. She cannot come to Court to claim that any facts were concealed to Court. The application was filed four years later since the Grant was confirmed. This position offends the provisions of Section 76 of the *Law of Succession Act* and Section 44(1).
21. The 1<sup>st</sup> Respondent testified that his father Muriithi Gikunju and the deceased were step brothers. The original applicant Mwai Ngandi Machira was a son of Wamurwana who was a sister to the deceased. It



is therefore true that the deceased was an uncle to the original applicant. The Respondents are stepsons to the deceased. Section 29(b) clearly lays out the true meaning of the dependants. Step sons seem to appear in priority in that line unlike the nephews. It therefore goes without saying that a nephew cannot inherit his uncle when there are closer relatives.

22. The Respondent submits that the only evidence that the Honourable Court can rely on is contained in the Chief's letter dated 8<sup>th</sup> August, 2011. In the said letter the Chief clearly states that the deceased had no children but was survived by his late step brother Gikunju Muriithi's children.
23. On the issue of the names appearing in the Kenya Gazette, the Respondents confirmed that the names Mbogo Gatimu Theya was just a typing error on the part of the Gazette. This error cannot be met on the Respondents. Other Court documents bear the correct descriptions of the parties.

### **Issues for Determination**

24. The only issue for determination is whether the grant should be revoked.

### **Analysis & Determination**

25. The applicants seek for revocation of the grant of letters of administration granted to the 1<sup>st</sup> Respondent on 10<sup>th</sup> October, 2011 issued on 19<sup>th</sup> October, 2011 and confirmed on 11<sup>th</sup> May, 2012. The applicable law is Section 76 of the *Law of Succession Act* which 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.” (emphasis added)

26. Section 76 of the *Law of Succession Act* was clearly expounded on by the court *in re Estate of Prisca Ong'ayo Nande (Deceased)* 2020 eKLR where it was stated that:

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds...It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons...”

27. The Applicants invited the court to revoke the grant of letters of administration for the reasons that the Respondents obtained the confirmed grant by way of concealment of a material fact that the respondents were not in any way related to the deceased.

28. Further, it was submitted that the respondents did not inform the applicants about the existence of this succession cause, yet they knew who the closest surviving relatives of the deceased were.

#### **Concealment of Material Facts**

29. From the evidence of the parties, it is not disputed that the deceased herein died intestate on 6<sup>th</sup> September, 1998. He had no wife or children.

30. On the alleged concealment of material facts, I have perused the original Petition by the 1<sup>st</sup> Respondent filed in SPM Succ. 235/2011 Kerugoya. The Affidavit in support of the Petition Form P & A 5 indicates that the deceased was survived by nephews and nieces and their children. However, the consent to making of Letters of Administration to a person of equal or lesser priority does not indicate the names of the applicants.

31. Further Form P & A 80, the Petition itself, indicates that the Petitioner (1<sup>st</sup> respondent herein) presented the petition as a nephew not as a child of the deceased. Similarly, the Chief's introduction letter clearly indicated the survivors were nephews and nieces of the deceased.

32. However, with regard to the Affidavit in Support of Summons for Confirmation of Grant Form 9 dated 27<sup>th</sup> April 2012, the Petitioner (1<sup>st</sup> Respondent herein) indicated that the deceased was survived by twelve (12) “children” named therein.

33. Thus, at the time of filing of the succession proceedings, the 1<sup>st</sup> Respondent was aware of the existence of the 1<sup>st</sup> Applicant. He deliberately failed to include the 1<sup>st</sup> Applicant in the list of persons left behind by the deceased. This was concealment from the court of something material to the case, a ground which would precipitate the revocation of the grant issued to the 1<sup>st</sup> Respondent.

34. Section 51(2)(g) of the *Law of Succession Act* provides that:

“Every application (for grant) shall include information as to-In cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.”



35. When the grant was confirmed the deceased's property was indicated as Kagumo Village Plot 95. The beneficiaries were indicated as Nelson Douglas Kabui and Stephen Mwangi Muriithi each receiving a half (½) share jointly. From the evidence adduced the other half share was owned by Nelson Gachoki Murage, which is still the position on the ground.
36. It is not contested that the 1<sup>st</sup> Applicant (Mwai Ngandi Wachira) was excluded as a nephew of the deceased. His mother is admitted to have been Wamuruana.

### **Conclusion & Disposition**

37. Section 66 of the *Laws of Succession Act* provides that preference has to be given to certain persons to administer a deceased's estate where the deceased died intestate, and further that the court have the final discretion as to the persons or person to whom a grant of letters of administration shall, in the best interests of all parties concerned, be made. It provides thus:

“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 interest as provided by Part v;
- c) the Public Trustee; and
- d) Creditors:

Provided that, where there is [atrial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

38. The Respondents knew about the existence of the applicants and should have informed them before filing the succession proceedings. Further, guidelines on making of grants are found in Part VII Rule 26(1) and 2 of the *Probate and Administration Rules* which provides as follows: -

“Rule 26

- (1) Letters of Administration shall not be granted to any applicant without notice to any other person entitled in the same degree as or in priority of 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 communication, 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.”

39. To the extent that the 1<sup>st</sup> applicant (now deceased) was omitted entirely from the succession proceedings, he was disinherited from his share. He would have been entitled to an equal share with the Respondents of the deceased's half share of Kagumo Village Plot 95, and to be an equal administrator.
40. There is no evidence that the Applicants ever filed any affidavit of renunciation.



41. Accordingly, the applicant's application succeeds to the extent that the 1<sup>st</sup> Applicant was left out of the succession proceedings despite being a nephew of the deceased.
42. The grant shall be and is hereby revoked to provide for a one third (1/3) share of the estate in Kagumo Village Plot No. 95 to be distributed to the 1<sup>st</sup> Applicant's estate.
43. It is so ordered.

**DATED AT KERUGOYA THIS 15<sup>TH</sup> DAY OF OCTOBER, 2024**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Kungu - holding brief for Mahan for Respondent/Administrator
2. Wambui - holding brief for Kagio for Respondent
3. Murage, Court Assistant

