



**In re Estate of Thwait Matoke Gichana alias Twait matoke Gichana (Deceased) (Succession Cause 1530 of 2017) [2024] KEHC 13005 (KLR) (Family) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13005 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 1530 OF 2017  
PM NYAUNDI, J  
OCTOBER 11, 2024  
IN THE MATTER OF THE ESTATE OF THWAIT MATOKE  
GICHANA ALIAS TWAIT MATOKE GICHANA (DECEASED)**

**BETWEEN**

**ONESMUS WANYOIKE MUNYUA (SUING AS THE REPRESENTATIVE OF  
THE ESTATE OF KENNETH KAHURO MUNYUA) ..... OBJECTOR**

**AND**

**MACKLINE KERUBO MAKORI ..... 1<sup>ST</sup> ADMINISTRATOR  
EUNICE BOSIBORI ..... 2<sup>ND</sup> ADMINISTRATOR**

**RULING**

**Background**

1. The Substratum of the dispute herein is whether Land Parcel No. Ngong/ Ngong/22778 comprises the estate of the deceased herein, Thwait Matoke Gichana Alias Twait Matoke Gichana. Vide Certificate of Confirmation of Grant issued on 6<sup>th</sup> September 2010, the subject parcel was included in the assets of the deceased and transmitted to the 1<sup>st</sup> Administrator to hold in trust for the benefit of her 3 children.
2. In a separate cause, Vide Certificate of Confirmation of Grant issued on the 1<sup>st</sup> day of April 2014, the same parcel of land was included in the estate of Kenneth Kahuro (deceased) and transmitted to Onesmus Wanyoike Kinyua the Applicant herein.
3. The claim to ownership of the subject parcel of land by the deceased Thwait Matoke Gichana Alias Twait Matoke Gichana is hinged on sale agreement dated 20<sup>th</sup> June 2002 whilst that of the Estate of Kenneth Kahuro finds its footing in the fact that the deceased is the registered proprietor as evidenced



- by Certificate of Official Search dated 22<sup>nd</sup> August 2019 and Certificate of Title issued on 16<sup>th</sup> February 1999.
4. In a bid to resolve the quagmire the Applicant filed Ngong SPM ELC Suit No. 73 of 2019 seeking to void the sale agreement and lift caution placed by the Administrator herein over the subject parcel of land. The Court dismissed the suit stating that it lacked jurisdiction.
  5. It is this action of the Environment and Land Court that has necessitated the Applicant herein to file summons dated 9<sup>th</sup> August 2023 seeking-
    - a. Spent
    - b. That the Respondents herein, Mackline Kerubo Makori And Eunice Bosibori, by themselves, their agents or servants, employees and all those persons claiming under them be restrained from interfering, disposing, selling, alienating, sub dividing, leasing, charging, transferring, mismanaging and/ or mis- administering and / or in any other manner whatsoever, intermeddling with the estate of the deceased, Thwait Matoke Gichana Alias Twait Matoke Gichana and in particular;
      - i. Land Parcel Number Ngong/ Ngong/ 22778 pending the hearing and determination of this Application and the cause herein and or further orders of this Honourable Court.
    - c. That the Grant of Letters of Administration made and confirmed to the respondents herein Mackline Kerubo Makori And Eunice Bosibori on 6<sup>th</sup> September 2010 be revoked (or annulled)
    - d. That costs be in the cause.
  6. The Applicant challenges the validity of the sale agreement and further contends that even if the sale agreement is valid the same is of no legal consequence as there is no land control board consent, the agreement has lapsed by virtue of completion date having long passed and there was non-payment of the agreed consideration. The Applicant therefore contends that the Grant was fraudulently obtained and should be revoked.
  7. The Respondents oppose the application and contend that it is the Applicant who has rescinded the agreement and has declined to accept the balance of the purchase price thus stalling the finalization of the transaction.
  8. For good measure the Respondents contend that this Court lacks jurisdiction to entertain the application as it relates to ownership and the jurisdiction of the probate court is limited to distributing the free estate of a deceased person.
  9. The Application was canvassed via written submissions. The Submissions of the Applicant are dated 5<sup>th</sup> June 2024. Reliance is placed on the decision in Succession Cause No 12 of 2019, In the Matter of the Estate of the Late Epharus Nyambura Nduati (Deceased) [2021] eKLR where the Court proceeded to revoke a grant on the application of a purchaser.
  10. The Respondent's Submissions are dated 3<sup>rd</sup> June 2024. The Respondent identifies the following as the issues for determination
    - a. Whether the Applicant's Application meets the threshold for revocation of grant within the meaning of Section 76 of *Law of Succession Act*?
    - b. Whether this Honourable Court can grant injunctive orders in a succession matter?



11. On the 1<sup>st</sup> issue the Respondent relies on the decisions in the case of Jamleck Maina Njoroge vs Mary Wanjiru Mwangi [2015] eKLR and Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR for the legal threshold to be met before a grant is revoked.
12. The Respondents further submit that the injunctive orders sought by the Applicant seeks can only be granted by the Environment and Land Court and cites the decisions in Republic v Chief Land registrar & Anor, JR ELC No. 11 of 2010 [2019] eKLR and Estate of Alice Mumbua Mutua( Deceased) [2017] eKLR

### **Analysis And Determination**

13. Having considered the pleadings filed herein and the rival submissions I discern the following as the issues for determination
  - a. Whether the Court should revoke the grant herein
  - b. Whether the Court is vested with jurisdiction to determine the issues herein
  - c. If in the affirmative what are the appropriate orders.
14. The grounds upon which a Court may revoke a grant are stipulated under Section 76 of the [Law of Succession Act](#), which provides;
  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.”
15. The Applicant alleges that the grant herein was fraudulently obtained as the Deceased is not the proprietor of the subject parcel of land and in any event the sale agreement on which his interest is pegged is null and void. The Applicant is not challenging the issuance of the grant to the Administrators but rather the inclusion of the disputed parcel of land. His interest will be served by



determining ownership of the subject parcel of land and not by revocation of the grant. For this reason, I decline to revoke the grant to the administrators.

16. On the 2<sup>nd</sup> Issue, whether the Court has the mandate to resolve the dispute herein, the limits of the jurisdiction of the probate court were well articulated by Musyoka J In Re Estate of Alice Mumbua Mutua (Deceased) Succession Cause No. 3142 of 2003 [2017] eKLR where he stated;

Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above." [Emphasis added

17. This position was further elucidated upon by the Court in Matthew Njenga Njogu & another v Rosemary Muthoni Njue [2021] eKLR where the Court reiterated that the mandate of the Court is to distribute the free estate of the deceased. In that case a purchaser sought to revoke a grant on the basis that the Administrator failed to disclose that he had a purchaser's interest. The Court in dismissing the appeal cited the decision in Alexander Mbaka –vs- Royford Muriuki Rauni and 7 Others [2016] eKLR; where it was held

“It is only where one has established claim against the estate that has already crystallised that he can litigate it before a Family Court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the Family Court can entertain it.”

18. The law is therefore clear that the Court has no jurisdiction to determine the issue at the heart of the dispute herein; ownership of Ngong/ Ngong/ 22778.
19. Having found that this Court is not vested with jurisdiction to determine the issues and that the Applicant's attempt to have a determination on the validity of the sale agreement was stumped by the dismissal of the case by the Environment and Land Court which misapprehended the suit before it to be seeking the revocation of the respective grants. This places the parties in a quagmire. At the end of the day, however the parties are entitled to a decision that enables them find closure to the dispute. The Applicant is not without remedy as he can appeal the decision of Magistrate's Court.
20. Back to the Estate of Twait Matoe Gichana and its assets. It is not contested that the interest of the deceased in the subject parcel of land is yet to crystallize. The validity of the sale agreement that forms the basis of the claim is contested. The probate court can only decide on the free property of the deceased. Once there is a legitimate challenge to that ownership the court must pave the way for that dispute to be resolved.



21. The grant herein was confirmed on 6<sup>th</sup> September 2010, 14 years ago, since then the Administrators have not been able to transmit this asset on account of the dispute over ownership. In re Estate of the Late Mwaura Makuro (Deceased) [2021] eKLR, Ogola J, invoking rule 73 of the Probate and Administration Rules reiterated that the overarching duty of the Court is to uphold substantive justice
22. The Court cannot shirk the responsibility to steer the ship of justice to safe harbor. The property is clearly not the free property of the deceased, a third party has a claim to it. Until the issue of ownership is resolved, the Administrators are unable to transmit the estate in accordance with the confirmation of grant.
23. I have had opportunity to consider the Petition for grant and the summons for confirmation of grant. In both instances Administrators relied on agreement for sale dated 20<sup>th</sup> June 2002 as the basis of title. In the Petition of Grant, the Administrators submitted the Certificate of Title in the name of Kenneth Kahuhu Munyua alongside the agreement of sale. The Agreement of sale categorically states that the sale agreement is between Kenneth Kahuhu Munyua ( Deceased) and his intended administrators ( as Vendors, on the one part) and the deceased herein as the purchaser.
24. It is not in dispute that the purchase price was not paid in full. Simply put the transactions to complete the sale on the face of it are not yet complete. The Administrators are duty bound to secure title before the asset is available for distribution in the manner proposed.
25. Accordingly, by virtue of the powers conferred on this Court by Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules I vary the orders of the Court made on 6<sup>th</sup> September 2010 and remove property No. Ngong/ Ngong/ 22788 from the Certificate of Confirmation of Grant and vacate all the consequential orders relating to the said parcel of land and its transmission, this will nudge the parties to have the issue of ownership resolved. In the event that the Administrators are able to establish the asset is part of the estate of the deceased, available for distribution they will be at liberty to move the court for the appropriate orders.
26. On costs each party will bear their own costs

It is so ordered

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 11TH DAY OF OCTOBER, 2024.**

**P. NYAUNDI**

**JUDGE**

In presence of: -

Fardosa Court Assistant

Ochieng Advocate for Administrator/ Respondent

Nyairo h/b for E K Njagi Advocate for Applicant

