



REPUBLIC OF KENYA



**In re Estate of Julius Muturi Muhuthu (Deceased) (Succession Cause
2485 of 2003) [2024] KEHC 11966 (KLR) (Family) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11966 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 2485 OF 2003
MA ODERO, J
OCTOBER 4, 2024
IN THE MATTER OF THE ESTATE OF JULIUS MUTURI MUHUTHU (DECEASED)**

JUDGMENT

1. Before this court for determination is the summons for Revocation or Amendment of Grant dated 16th March 2007 by which the Objector Grace Wanjiru Macharia seeks the following orders:-
 - “ 1. That the Grant of Representation issued to Leah Mwanjoria Macharia on 30th October 2003 and confirmed to Leah Mwanjoria Wanjohi and Gladys Njeri Muturi on 13th July 2005 be revoked or annulled.
 2. That costs of this application be borne by the Respondents.”
2. The summons which was premised upon Section 76 of the *law of Succession Act* and Rules 44 and 73 of the Probate and Administration Rules was supported by the Affidavit of even date sworn by the Objector. The Summons was based on the grounds that:-
 - “(a) The Grant was obtained fraudulently by the making of false statements and/or the concealment from the court of material facts to the case.
 - (b) The Grant was obtained by means of untrue allegations of fact essential in point of law to justify the Grant.”
3. The Respondents Grace Mwanjoria Wanjohi and Gladys Njeri Muturi opposed the Summons through the Replying Affidavit dated 2nd August 2016 and a further Affidavit dated 16th July 2008 both sworn by the 2nd Respondent.
4. The matter was heard by way of Vive Voce evidence. Hon Lady Justice Muigai commenced the hearing on 16th March 2015 and heard the first two (2) witnesses. Upon the transfer of the trial judge to the Machakos High Court I took over the case and concluded the hearing.



Background

5. The Succession Cause relates to the estate of the late Julius Muturi Muhuthu (hereinafter ‘the Deceased’) who died intestate on 29th May 2003. A copy of the Death Certificate Serial Number 745601 is annexed to the Affidavit in support of the Petition for Grant of letters of Administration Intestate dated 4th September 2003.
6. The Deceased was survived by the following persons;-
 - (i) Leah Mwonjoria Wanjohi - Wife
 - (ii) Gladys Njeri Muturi - Daughter
 - (iii) Tecla Wanchi Muturi - Daughter
 - (iv) Beth Wambui Muturi - Daughter
7. The assets left behind by the Deceased were listed as follows:-
 - (a) Parcel No. Mavoko Township Block 3 (Waswa) 3943
 - (b) Parcel No. Mavoko Township Block (Waswa) 3944
 - (c) Mitsubishi Pajero Registration KAJ 515J
8. The liabilities of the estate were listed as follows;-
 - (d) Consolidated Bank of Kenya - Kshs. 500,000/=
 - (e) Dr. Githinji (Care Vet Ltd) - Kshs. 467,500/=
9. Following the demise of the Deceased his widow Leah Mwonjoria Wanjohi filed a Petition seeking Grant of letters of Administration Intestate dated 4th September 2003. The Grant was duly issued in the name of the widow and her daughter Gladys Njeri Muturi on 13th July 2005. Thereafter the Grant was confirmed on 13th July 2005. The Certificate of confirmed Grant indicated that the entire estate was to devolve to the two Administrators and one Grace Wanjiru Macharia to hold in trust for the other beneficiaries.
10. The widow Leah Mwonjoria Wanjohi later passed away on 16th May 2009 leaving Gladys Njeri Muturi as the sole Administrator of the estate. A copy of the widows Death certificate Serial No. 175708 is in the court file.
11. The objector herein who claims to have also been married to the Deceased then filed this Summons seeking the revocation/Annulment of the Grant which had been issued to the two Administrators.

The Evidence

12. The Objector told the Court that she got married to the Deceased in July 1988 under Kikuyu customary law. That their union was blessed with three children namely:-
 - (i) Peter Muhuthu Muturi born on 7th October 1989.
 - (ii) Derrick Macharia Muturi born on 1st January 1999.
 - (iii) Johnson Kambuga Muturi born on 14th November 2002.



13. The Objector therefore claims to be a co-wife to the 1st Respondent and a beneficiary to the estate of the Deceased.
14. The Objector complains that the Respondents moved to petition for letters of Administration secretly without involving her and without obtaining her consent as required by law. That being unaware of the petition filed by the Respondents the objector on 2nd May 2004 filed a citation against the 1st Respondent which citation was however not prosecuted due to lack of advice from her counsel on record at the time.
15. The objector in her supporting Affidavit averred that the Respondents in obtaining the Grant deliberately concealed the existence of various assets belonging to the Deceased as follows;-
 - (i) Dandora Block G Plot No. H8.
 - (ii) Dandora Plot No. 114 Komarock Road
 - (iii) Deceased's Shares and interests in the following companies and Businesses;-
 - a. Hodari Creameries Ltd
 - b. Hodari Industries Ltd
 - c. Hodari Kenya Company
 - d. Hodari Poultry Farm
 - e. Waswa Investment Services
 - f. Monies held in the following Bank Accounts
 - a. Standard Chartered Bank Current Account Number 01001xxxxxxxx
 - b. Standard Chartered Bank Current Account Number 01020xxxxxxxx
 - c. Standard Chartered Bank Current Account Number – 01002xxxxxxxx
 - d. Standard Chartered Bank Current Account Number – 01002xxxxxxxx
 - e. Kenya Commercial Bank Current Account Number – 30110xxxxxx
 - f. Deceased's Pension benefits with the City Council of Nairobi where he worked as an Accountant for several years and his NSSF contribution.
 - g. Motor vehicles owned by Deceased but still registered in the names of the previous owners being;-
 - a. KAJ 515P, Mitsubishi Pajero
 - b. KAK 035 U, Subaru Legacy
 - c. KAL 184X, Nissan Van
 - d. KAE 308 N' Nissan Pick up
 - e. KAJ 411D Nissan Pick up
16. The Objector further accused the Respondents of having sold of and disposed of some of the above properties without informing her and without sharing any of the proceeds of sale with herself or her



- children. That no provision has been made in the confirmed Grant for the children of the objector borne for the Deceased.
17. The Objector finally prays that the Grant which was obtained fraudulently be revoked and that a fresh Grant be issued to include her as one of the Administrators of the estate.
 18. The 2nd Respondent Gladys Njeri Muturi told the court that she was a daughter to the Deceased. She confirmed having been appointed together with her late mother Leah Mwonjoria as Administrators of the estate of the Deceased. That upon the demise of her co-administrator she remained as the sole Administrator of the estate.
 19. The 2nd Respondent states that she does not know the objector at all and categorically denies that the objector was ever married to the Deceased.
 20. However the 2nd Respondent concedes that the Objectors three sons were fathered by the Deceased and states that the three have been included in the distribution of the estate. She asserts that the distribution of the estate was done in a just and equitable manner.
 21. The 2nd Objector denied the objectors claim that the Administrators failed to disclose some of the properties owned by the Deceased. She states that certain assets were sold off to pay debtors, school fees and hospital bill left by the Deceased. That the bank accounts listed by the objector held very low balances which have now been dissipated up by bank charges.
 22. The 2nd Respondent denies that the Grant was obtained secretly and/or fraudulently as their petition was gazetted as required by law. She denies that the objector is a beneficiary/heir of the estate of the Deceased and urges the court to dismiss this summons for revocation of Grant with costs.
 23. DW2 Joseph Kahuho told the court that he purchased the property known as Plot No H31 measuring 0.2 Hectares situated at Dandora Light Industrial Area Block G from the Administrators upon confirming that they held a confirmed Grant.
 24. DW3 Samson Kungu Ndungi was an Administrative Officer in charge of urban planning with the Nairobi City County. He told the court that Plot NH31 Dandora Light Industrial Area Block G was originally allocated to Julius Muturi (the Deceased herein) on 27th October 1992. That following the demise of the Deceased this 'Dandora Plot' was transferred to the 1st Respondent and when the 1st Respondent died was transferred to the 2nd Respondent. He states that both the 1st and 2nd Respondents were the Administrators of the estate of the Deceased.
 25. Upon conclusion of the oral evidence the parties were invited to file and exchange their written submissions. The Objector filed the written submissions dated 16th October 2023 whilst the Respondent relied upon her written submissions dated 17th March 2017.

Analysis and Determination

26. I have carefully considered this summons for revocation of Grant the reply filed thereto, the evidence on record as well as the written submissions filed by both parties.
27. It is common ground that the Deceased in this matter passed away on 20th May 2003 at Kenyatta National Hospital. A copy of the Death Certificate is annexed to the supporting affidavit dated 16th March 2007 sworn by the objector (Annexure 'A').
28. It is further not in dispute that the 1st and 2nd Respondents in their capacities as widow and daughter respectively of the Deceased sought and obtained Grant of letters of Administration to the estate which Grant was confirmed on 13th July 2005.



29. The issues which arise for determination are:-
- (i) Whether the Objector was a wife to the Deceased.
 - (ii) Whether the Grant ought to be revoked.

i. Whether the Objector was a wife to the Deceased

30. The Objector asserted that the Deceased married her under Kikuyu Customary Law on July 1988. That as a wife (widow) to the Deceased she ought to have been consulted/involved by the Respondents when they petitioned for the Grant. The Objector demands that she be included as a beneficiary to the estate and as Co-Administrator.
31. The 2nd Respondent who following the demise of the 1st Administrator remained as Sole Administrator of the estate categorically denies that the Deceased ever married the Objector under either customary law or indeed under any other legally recognized system of marriage.
32. It is trite law that he who alleges must prove. Section 107 of the Evidence Act Cap 80 Laws of Kenya provides as follows:-
- “Burden of Proof”
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person.
33. The burden of proving that she got married to the Deceased therefore lies squarely upon the Objector.
34. The Objector told the court that the Deceased visited her parents in accordance with Kikuyu Customary traditions. That the Deceased came to her father’s home in the company of elders and paid dowry.
35. The Objector has not indicated what amount in cash and or livestock was paid as dowry. She has not called any witness who was present during this occasion to confirm her evidence that the Deceased paid dowry to her parents. Marriages in Africa are not conducted in a secretive or clandestine manner. These are joyful events at which several family/clan members would be in attendance.
36. In order to find that a customary union existed between the Deceased and the Objector, it must be shown that all the elements (rites) of a Kikuyu customary marriage were conducted.
37. In the case of *Eva Naima Kaaka & Another -vs- Tabitha Waithera Mararo* [2018] eKLR the Court of Appeal quoted Eugene Cotrans Casebook on Customary Law which at Page 30 sets out the essentials of a Kikuyu customary marriage as follows;-
1. Capacity;- the parties must have the capacity to marry and also the capacity to marry each other.
 2. Consent; the parties to the marriage and their respective families must consent to the union.
 3. Ngurario; No marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.



4. Ruracio; there can be no valid marriage under Kikuyu law unless part of the ruracio (dowry) has been paid.
 5. Commencement of Cohabitation;- the moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation i.e under the capture procedure when the marriage is consummated after eight days seclusion and nowadays when the bride comes to the bride grooms home [own emphasis]
38. In the same case the Court of Appeal noting that the Ngunario ceremony was not proved to have taken place observed as follows:-
- “From the above it becomes apparent that no ram or goat was slaughtered to mark the coming into existence of a marriage. Without the presence of the central feature of the Ngunario ceremony, it cannot be said that a valid Kikuyu customary marriage came into existence between Waithera and the Deceased’ [own emphasis]
39. In this case there is no proof that the ‘Ngunario ceremony’ which a the central feature of a Kikuyu customary marriage ever took place. No witnesses to that ceremony were called by the Objector.
40. Similarly despite the objector asserting that the Deceased paid a dowry to her parents once again no proof of the payment of this dowry was tendered. No document confirming payment of any dowry was produced and not witness to the payment of that dowry was called to testify. The Objector does not even specify how much was paid as dowry. Indeed under cross-examination the Objector admits that
- “I have no evidence at all that I was married.”
41. It is pertinent to note that by her own admission the Objector did not participate in the funeral arrangements for the Deceased. She was not named as a wife in the obituary and neither did the objector attend the burial of her so called husband. I have no doubt that if she genuinely considered herself to be a wife to the Deceased, the Objector would have insisted or even pursued legal action to compel her inclusion in the funeral arrangements.
42. I find that there is no evidence to prove the existence of a customary marriage between the objector and the Deceased. Likewise I find that no evidence has been adduced to prove a presumption of marriage by way of cohabitation. There is no evidence from any witness that the Deceased and the Objector conducted themselves or represented themselves to other members of the public as man and wife. (See [*Hortensiah Wanjiku Yawe -vs- Public Trustee CA NO. 13 of 1976*](#))
43. The Objector testified that she bore three sons for the Deceased. This is a fact which has not been contested by the Respondents. However the fact that the objector bore children with the Deceased does not in any way amount to proof that the two were married to each other. Based on the above I find that it has not been proved on a balance of probabilities that the objector was a wife to the Deceased. As such I find that the objector is not a beneficiary/heir to the estate of the Deceased.

(ii) Should the Grant be revoked

44. The Objector sought the revocation of the Grant issued to the Respondents. The grounds upon which a Grant may be revoked are set out in Section 76 of the [*Law of Succession Act*](#) as follows:-
- “A grant of representation whether or not confirmed may at time be revoked or annulled if the court decides either on application by any interested party of its own motion –



- i. that the proceedings to obtain the grant were defective in substance;
- ii. 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;
- iii. that the grant was obtained by means of an untrue allegation of a fact essential in point in law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- iv. 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
 - iv. that the grant has become useless and inoperative through subsequent circumstances.

45. In the case of Albert Imbuqa Kisigwa vs Recho Kawai Kisigwa Succession Cause No. 158 of 2000 Mwita J stated as follows:-

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically.

46. The Objector complains that the Respondents moved to court secretly without informing her.
47. That the Grant was obtained fraudulently by concealing her existence and the existence of the children she bore for the Deceased.
48. This court has already found that no marriage customary or otherwise existed between the objector and the Deceased. As such the Respondents had no obligation to inform and/or consult the objector before filing a Petition for letters of Administration. The omission to include the objector as a beneficiary to the estate cannot in the circumstances be faulted.
49. The three children born to the objector and the Deceased have been included as beneficiaries to the estate. The three have been included as beneficiaries in the certificate of confirmed Grant dated 13th July 2005.
50. Indeed in the Supporting Affidavit to the Summons for confirmation of Grant filed by the Administrators the three children Peter Muhuthu Muturi, Derrick Macharia and Johnson Kabuga have all been named beneficiaries to the estate of the Deceased. All three have been included in the distribution of the estate as is required by law.
51. Finally the Objector accuses the Respondents of concealing certain assets owned by the Deceased. The objector in her supporting Affidavit dated 16th March 2007 at Paragraphs 13-14 has listed several assets, shares and bank accounts which she claims were owned by the Deceased.



52. No bank statements and/or records have been produced to prove that these accounts were held in the name of the Deceased. Indeed the 2nd Respondent has tendered in evidence a letter dated 14th July 2008 from Standard Chartered Bank (Annexure GWN'4' to the Affidavit dated 27th June 2016 which letter indicates that the cited accounts do not exist in the banks records. No C12 Forms in respect of any company has been produced by the objector to prove that the Deceased was a Director and/or shareholder of the named companies.
53. Regarding the Bank Accounts cited in Paragraph 13 (iv) no bank statements and/or records have been produced to prove that these accounts were held in the name of the Deceased.
54. The Objector also claims that the plots which the Deceased owned in Dandora were concealed. I have perused the certificate of confirmed Grant and I note that Dandora Block g Plot No. 30 and 31 have been included as assets available for distribution.
55. With respect to the assets named in Paragraph 13 of her supporting Affidavit there is no documentary or title documents to prove that these belonged to the Deceased at the time of his demise. Under cross-examination the Objector admits

“The properties listed in paragraph 13 are confirmed. There is no search to the effect that the property belonged to the Deceased.

56. In her supporting Affidavit the Objector also listed certain vehicles which she claims were owned by the Deceased. However the Objector in the same breath admits that the said vehicles were not registered in the name of the Deceased but were registered in the names of the previous owner. A vehicle which is registered in the name of a third party cannot be included as part of the estate of the Deceased. Only vehicles registered in the name of the Deceased can be deemed to belong to the Deceased. In the circumstances this court cannot fault the Respondents for their failure to include said vehicles as assets belonging to the estate.
57. Finally the objector claims that she is entitled to Plot H30 on Dandora Light Industries which she claims is her matrimonial home on which she resides. However under re-examination by her own Advocate the Objector states that

“I live on Dandora Light Industries Block G Plot 30. It does not exist”

How can the Objector claim to be living on a nonexistent property. Since the court has found that the objector was never married to the Deceased the issue of a matrimonial home does not arise.

58. Further DW3 Samson Kungu an Administrative Officer with the Nairobi City Council told the court that according to their records no property known as Plot H 30 exists. The witness stated that their records only show the existence of Plot H31.
59. PW2 Joseph Kahuho told the court that he purchased Plot H31 from the Administrators of the estate at an agreed purchase price of Kshs. 1.75 million.
60. Regarding any claim either the Objector or PW2 may have to estate property, the same cannot be canvassed in this Succession Cause. They are however at liberty to pursue their claim in the Environment and Land Court, which is the only court mandated to determine disputes relating to ownership, use and occupation of land. Accordingly I will make no finding regarding the ownership of Plot H31 Dandora Light Industries.



61. I find that the Objectors claim that certain assets were concealed and/or excluded by the Respondents in the list of Assets has not been proved on a balance of probabilities.
62. Based on the foregoing I find that no valid reasons have been advanced to prove any of the grounds for revocation of a Grant as set out in Section 76 of the *Law of Succession Act*.
63. Finally I find no merit in this Summons for revocation of Grant. The same is hereby dismissed in its entirety. This being a family matter each side will bear their own costs.

DATED IN NYERI THIS 4TH DAY OF OCTOBER, 2024.

MAUREEN A. ODERO

JUDGE

