



**In re Estate of Kyalo Ndunda (Deceased) (Succession Cause
600 of 2006) [2023] KEHC 1237 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1237 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 600 OF 2006**

MW MUIGAI, J

FEBRUARY 16, 2023

**IN THE MATTER OF THE ESTATE OF KYALO NDUNDA
(DECEASED)**

BETWEEN

MICHAEL NICHOLAS NDUNDA APPLICANT

AND

BONIFACE MUTINDA MUSILI RESPONDENT

RULING

1. Kyalo Ndunda died intestate aged 87 years on December 5, 2005 vide Death Certificate serial No 92xxx and Chief's letter of November 13, 2006 from the Chief of Masinga who deposed that the deceased was a resident of the area. The deceased was married to Syokau and they had 1 child Morris Musili Kyalo who with his wife appointed Mr Boniface Mutinda Musilli to inherit the shamba/Plot 1122 at Makueni District/Makueni/Kalawani area. Mr Boniface Mutinda Musilli ID 144xxxxx is a grandson to the late Kyalo Ndunda.
2. Boniface Mutinda Musili, grandson of the deceased petitioned for letters of administration intestate and annexed the following documents:
 - a. The Death Certificate of Death Certificate No 92xxxx Kyalo Ndunda died on December 5, 2005 aged 87 years issued at Machakos.
 - b. The Chief's letter dated November 13, 2006 confirming the list of beneficiaries left behind by the deceased.
3. The Deceased left the following heirs/beneficiaries surviving him;-
 - i. Syokau Kyalo – (widow)



- ii. Musili Kyalo (son)
- iii. Boniface Mutinda Musili (grandson)
4. The deceased left behind LR No 1122/Kalawani.
5. The Grant of letters of Administration was issued to Boniface Mutinda Musili on January 16, 2007 after gazettelement on November 24, 2006
6. Summons for confirmation of grant dated June 21, 2007 was filed and the Certificate of Confirmation of Grant was issued on June 11, 2008 that the property be registered in the name of Boniface Mutinda Musili.

Summons for Rectification or Annulment of Grant

7. The Applicant herein Michael Nicholas Ndunda filed summons for rectification of annulment of Grant dated May 11, 2022 and sought the following orders:-
 - i. That paragraph 5 of the Affidavit sworn by the Administrator/Respondent in the summons for confirmation of grant dated June 21, 2007 be revoked;
 - ii. That the distribution order made by the Court at the confirmation of Grant on the June 11, 2008 be set aside.
 - iii. That the title deed issued to one Boniface Mutinda Musili for the Parcel of land No Mbooni/Kalawani/1122 be revoked.
 - iv. That the land parcel No Mbooni/Kalawani/1122 be registered under the Applicant's name.
 - v. That the Administrator/Respondent be barred from disposing/transferring the parcel of land No Mbooni/Kalawani/1122.
 - vi. That the costs of these proceedings be provided for.
8. The grounds were that the Administrator/Respondent obtained letters of Administration and certificate of confirmation fraudulently, deceitfully, by making of false statements and/or concealment from the court of certain material facts; that the Applicant has a Purchaser interest and/or liability to the deceased's estate herein in specific Land Parcel No Mbooni/Kalawani/1122 the same having been sold in full to him by the deceased herein Kyalo Ndunda.
9. Before his demise the deceased had in 1980 entered into an agreement with the Applicant herein for the sale of the property Mbooni/Kalawani/1122 and the Respondent's father Morris Musili Kyalo who is the only heir of the deceased witness the agreement. The Applicant took possession of the property and has been in possession for over 30 years; that the Administrator did not include the name of the Applicant as a liability in the estate of the deceased.
10. The Administrator/Respondent ought to have included the Applicant as a beneficiary of the land parcel No Mbooni/Kalawani/1122 in the distribution list. The Applicant has no interest in disinherit any beneficiary of the deceased's estate but considering the circumstances of the case, the orders sought ought to be granted as the Applicant will suffer irreparable damage by losing the land, the only place he calls home. He annexed copies of series of documents written in Kamba that consist of the Agreement.



11. Michael Nicholas Ndunda filed Further Affidavit and deposed that the grant and certificate of confirmation were obtained fraudulently; that he has a purchaser interest in the said parcel No Mbooni/Kalawani/1122; that he is only claiming his rightfully purchased land in the Deceased's estate.

Replying Affidavit

12. The Administrator/Respondent filed Replying Affidavit sworn on 4/08/2022 and deposed as follows; that the allegations that the title to land parcel No Mbooni/Kalawani/1122 was obtained fraudulently are hollow and founded on malice. The Respondent already acquired title deed to Mbooni/Kalawani/1122 which was issued way back on July 29, 2008 which is now 14 years since and he has been peacefully in possession of the said land without any interference by the Respondent or any other person. If the Applicant purchased the same, he would have showed interest since the time of the alleged sale, his grandfather (the deceased) did not enter into land sale agreement with the Applicant as alleged. The alleged agreement is denied and is a forgery as the same is not legible and it is not interpreted. The Respondent attached copy of the title deed in his name dated 29/7/2008.

Supplementary Affidavit

13. The Applicant filed a Supplementary Affidavit sworn on October 15, 2022 and deposed as follows:- that he entered into an agreement of the sale of land parcel No Mbooni/Kalawani/1122 with the owner Kyalo Ndunda (deceased). The Respondent fraudulently obtained grant of letters of administration for the estate of Kyalo Ndunda since he failed to declare to the Court that the land had been fully sold to the Applicant. Morris Kyalo and Syokau Kyalo (The Administrator's father and grandmother respectively) were witnesses to the sale agreement.
14. The signatures of Morris Musili are clearly visible in the sale agreement and clear testimony that Morris was aware of these transactions. Morris Kyalo and Syokau Kyalo (The Administrators parents) by granting the Administrator/Respondent consent to acquire the grant of letters of administration was an outright intention to grab his legally acquired land. After the death of the deceased he had been pushing the heirs Morris Musili Kyalo and Syokau Kyalo to take out the letters of administration to no avail.
15. The Applicant came to learn through the Area Chief of Kalawani that the parcel of land was being sold by the Respondent to another person and that the grant of letters of administration had been issued and the land registered in the name of the Respondent. The Applicant pursued the Respondent to transfer the same piece of land to him including sending him a demand letter through the firm of Ngwili & Co Advocates but the Respondent did not reply.
16. The Applicant attached sworn affidavits of Dominic Musyoka Katie, Boniface Munywoki Kioko, Stephen Maingi Katie and Joseph Mbithi Kioko who are witnesses to the sale of land by the deceased and/or neighbours who have seen the Applicant in possession of the land and farming the land since 1980. It is deposed that the sale was an extended family affair and transacted in good faith by both parties and witnesses. They support the Applicants averments.

Written Submissions

Applicant's Submissions Dated October 15, 2022

17. On behalf of the Applicant it is submitted that he is the rightful owner of the parcel of land Mbooni/Kalawani/1122 by virtue of being a purchaser. An agreement was entered on September 7, 1980 for



Kshs 30,500/- . That on the same date a deposit of Kshs 4,000/- was paid and the balance cleared on various dates. The seller (deceased) died before transferring the property to the Applicant.

18. That the respondent agrees that the Land Parcel No Mbooni/Kalawani/1122 was the property of his grandfather.
19. That the Applicant has been in possession of the said land tilling the land and even at times leasing it out for tilling to other persons save for the fact that he had not transferred the property to his name. Reliance was made in the case of *Johnson Muinde Ngunza -vs- Michael Gitau Kiarie & 12 others* [2017] eKLR the Court stated that;

“The Law of Succession Act recognizes the purchaser’s rights and in support of these submissions the said (sic) the law of succession defines a “purchaser’ purchaser according to the Act means a purchaser for money or money worth.”

20. In the case of *Jamleck Maina Njoroge -vs- Mary Wanjiru Mwangi* [2015]eKLR the Court discussed circumstances when a grant can be revoked. The court observed;-

“The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

21. In the case of *In Re Estate of Moses Wachira Kimotho (Deceased)* [2009] eKLR, Hon A Makhandia JA observed;

"Section 76(c) of the Law of Succession Act and rule 44(1) of the Probate and Administration rules allow any person interested in the estate of the deceased to have a grant revoked or annulled. The grounds upon which a grant can be annulled are set out in section 76 thereof. It is also important to note that a grant of representation, whether or not confirmed may at any time be revoked..... Do the applicants have an interest in the estate of the deceased? Of course, they do. They are purchasers for value of a portion of the deceased estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of land reference numbers Nyeri/Mweiga/943 and Nyeri/ Mweiga/1186 to the applicants respectively. He had been fully paid the purchase price and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them. The respondent, who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the applicants. The deceased pursuant to the sale agreements and as required by law made an application to Kieni West Divisional Land Control Board for the necessary consents to the subdivision of the said parcels of land and subsequent transfer to the applicants of the portions they had purchased. However, he passed on just before he could attend the board meeting. Yet the respondent knowing very well the interest of the applicants in the suit premises when she petitioned for the grant of letters of Administration and later had the same confirmed completely ignored that interest of the applicants in the suit premises. Indeed, in her application for the confirmation of the grant she proposed that land parcel number Nyeri/Mweiga/1186 some portions whereof



had been purchased by the 1st and 3rd applicants be inherited by her sons, James Ngatia Wachira and Elijah Macharia, absolutely. As for Nyeri/Mweiga/943, a portion whereof had been purchased by the 2nd applicant, she proposed that the same goes to yet her other son, David Kimotho Wachira absolutely."

22. That the conduct of the Respondent in the application for the grant was not in good faith and in fact his actions were to take away the said parcel from the applicant since the property Mbooni/Kalawani/1122 formed part of the deceased estate.
23. That the applicant had undoubtedly proved that he purchased the whole parcel of land for Mbooni/Kalawani/1122 for value/money; that the respondent being a grandchild of the deceased and whose father was a signatory to the sale agreements must have been aware of the said sale and his action only depicts a case of a child who wants to fault the actions of his parents and grandparents and resorts to malice to grab a legally acquired land.
24. That the Respondent failed to disclose material facts that the land had been wholly bought and that it was under the possession of the Applicant since 1980 and his possession has been uninterrupted since 1980 to date; that the applicant sought the intervention of this court after many years of trying to resolve the matter at family level since both parties in this matter are members of the same family.

Respondents Submissions Dated 3/11/2022

25. On behalf of the Respondents it is submitted that that according to Section 76 of the [Law of Succession Act](#), 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 part or of its own motion.
26. Reliance is made [in the matter of the Estate of LAK \(deceased\)](#) 2014 eKLR and in the case of [Jamleck Maina Njoroge –Vs- Mary Wanjiru Mwangi](#) [2015] eKLR.
27. It is submitted that it's upon any party seeking revocation or annulment of a grant to demonstrate the existence of any, some or all of the grounds set out in Section 76 of the [Law of Succession Act](#). The Applicant has not clearly demonstrated that he purchased the suit property as alleged. The annexed sale agreements are illegible and the respondent has denied them. The applicant has not possessed the suit property at any time.
28. That the Respondent acquired a Title deed to the suit property having inherited from the deceased herein. All beneficiaries to the mode of distribution and the Applicant is a stranger to the estate of the deceased herein.
29. The power to revoke a grant is a discretionary one. The principle was enunciated in the decision in the case of [Albert Imbuga Kisigwa –Vs- Recho Kawai Kisigwa](#) Succession Cause No 158 of 2000.
30. It is finally submitted that the grant of letters of administration was issued and confirmed in accordance with the law. The Applicant has not demonstrated that there was material non-disclosure or the proceedings were defective in any manner.

Determination

31. The Court considered the Application, Replying Affidavit, Supplementary Affidavit and Written Submissions and what emerges for determination by this Court is whether the suit property Mbooni/Kalawani/1122 (2.3Ha) in the name of the deceased Kyalo Ndunda was part of his estate and available for distribution to his family/beneficiaries or whether the suit property was sold by the deceased to the



- Applicant who was/is a Creditor of the deceased's estate and the suit property did not form part of the deceased's estate.
32. On the one hand, the Applicant claims ownership of the whole Land Parcel Mbooni/Kalawani/1122 (2.3Ha) upon a sale from and by the owner/vendor Kyalo Ndunda, the deceased in 1980. The Applicant annexed faint copies of series notes attesting to payments made for sale of land.
 33. On the other hand, the Respondent, Boniface Mutinda Musili, grandson to the deceased and son to the deceased's son and widow of the deceased, namely, Musili Kyalo & Syokau Kyalo all listed as beneficiaries of the deceased's estate consented to appointment of the deceased's grandson as Administrator and sole heir of deceased's estate and hence the confirmed grant was issued.
 34. These are contrasting and competing legal interests over suit property Mbooni/Kalawani/1122 (2.3Ha), the beneficial interest over the said property claimed by the Respondent conferred via Confirmed grant of 11/6/2008 and the proprietary right claimed by the Applicant arising from a sale of the same property by the deceased.
 35. In *Betty Sation Kisoso v Priscilla Jeruto Kisoso*, Succession Cause no 2119 of 2010, Hon L J L Achode (as she then was) rendered herself as follows:
 - "(24) On the issue of confirmation of grant, the circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law."
 36. In the case of *Albert Imbuga Kisigwa v Recho Kawai Kisigwa*, Succession Cause no 158 of 2000, Hon Mwita J noted thus:
 - "(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice."
 37. Hon W Karanja L J (as she then was) in *Ireru Nyaga vs Karani Ngari & another* Embu HC Succ Cause No 68 of 2007 [2010]eKLR held that:

"A buyer or purchaser cannot cause an otherwise valid grant to be revoked for the only reason that he was not recognized in the proceedings. As stated earlier in my ruling, his recourse lies in suing whoever sold the property to him and if such person be dead, then he can only sue the administrator of the deceased's estate." [Emphasis added]
 38. Applying the above case-law and the principles set out by Section 76 *LSA* on the process and standard of proof of evidence adduced to prove any of the grounds for revocation of grant, this Court finds that the process of obtaining the grant and confirming the grant was legally and regularly conducted and the petition was gazetted on November 24, 2006 to enable any party join /oppose the petition and/



or lay their legal claim for the Court to consider. The Court record confirms that no one objected nor protested from 2006 to date until the instant application close to 15 years later.

39. This Court observed that whereas the widow and son of the deceased were entitled to pursue their beneficial share from the estate of the, deceased, the Applicant deposed that the series of notes that comprise of a sale agreement were signed by the deceased upon receipt of funds and witnessed by his son Morris father of Boniface the beneficiary of the deceased's estate. The Applicant's claim is accompanied by sworn affidavits of persons who may attest to the sale. However, there is no evidence that the grandson of the deceased was involved or aware of the sale.
40. For these reasons, this Court cannot at this stage in the absence of tangible and/or cogent evidence revoke the grant on any of the grounds provided by Section 76 LSA unless and until a hearing interpartes is conducted to disclose uncontested and unchallenged evidence of either the beneficial interest or the proprietary interest.

Disposition

41. The grant of 16/1/2007 confirmed on 11/6/2008 that conferred beneficial interest of the deceased's estate to the Respondent, remains a valid regular and legal order of the Court.
42. Interpartes hearing to commence on the Applicant and witnesses to prove the Applicant's claim of purchase and occupation of Mbooni/Kalawani/1122 (2.3Ha) to enable this Court revoke the grant in light of the new evidence on record or
43. The Applicant to sue the Beneficial owner and registered Proprietor Boniface Mutinda Musili in the ELC Court to confirm the Applicant's proprietary interest in Mbooni/Kalawani/1122 (2.3Ha).
44. The *status quo* remains, there shall be no sale, registration, subdivision, eviction, demolition, transfer, or any interference on Mbooni/Kalawani/1122 (2.3Ha) to alter the present circumstances or situation by any party until hearing and determination of the dispute.
45. No order as to Costs.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 16TH FEBRUARY 2023
(VIRTUAL/PHYSICAL CONFERENCE)**

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

Ngwili - For the Applicant

Munyasya for the Administrator/Respondents

Geoffrey/Patrick - Court Assistant(s)

