



REPUBLIC OF KENYA



**In re Estate of Kirogo Njoroge (Deceased) (Succession Cause
557 of 2015) [2023] KEHC 565 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 565 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 557 OF 2015
HK CHEMITEI, J
FEBRUARY 9, 2023
IN THE MATTER OF THE ESTATE OF KIROGO NJOROGE (DECEASED)**

BETWEEN

NYARAU KIROGO 1ST ADMINISTRATOR

MARIA WAMBUI KIROGO 2ND ADMINISTRATOR

AND

JOHN WANYOIKE MBURU 1ST RESPONDENT

JIM MUNGE KINUTHIA 2ND RESPONDENT

WILLIAM NJUGUNA KINITI 3RD RESPONDENT

**ESTHER WANJIRU MAINA (SUED AS ADMINISTRATOR OF THE ESTATE OF
DAVID NJUGUNA KIROGO) 4TH RESPONDENT**

RULING

1. The ruling herein is in respect of Summons dated February 26, 2020 which prays for the following orders; -
 - a. Spent.
 - b. That this honourable court be and is hereby pleased to direct the Land Registrar, Nakuru, to cancel the title deeds for the properties known as Title No. Nakuru Municipality Block 27/699, Title No. Kiambogo/Kiambogo Block 2/66 and the subdivisions thereof Title No. Kiambogo/Kiambogo Block 2/2437-2504, Kiambogo/Kiambogo Block 2/460 and subdivision Kiambogo/Kiambogo Block 2/11997-12086 and Molo South/Ikumbi Block 1/135 issued to the respondents and any subsequent registration arising therefrom.
 - c. That costs of this application be provided for.



2. The application is premised on the grounds that the title deeds mentioned herein above were fraudulently transferred to third parties on the strength of the Certificate of Confirmation of grant issued to David Kirogo Njoroge on September 13, 1994 in Nakuru High Court Succession Cause Number 323 of 1993 which grant was revoked by the honourable Lady Justice Abigail Mshilla vide her judgment delivered on July 10, 2015 in the same cause.
3. That upon revoking the said grant the Learned Judge held that the 1st applicant was at liberty to petition the court for a fresh grant of representation and further ordered that the parcels of land subject hereof do revert to the estate of the deceased. Also, that pursuant to the said directions of the Court the 1st applicant and the 2nd applicant applied for Letters of Administration herein in respect of the estate of the deceased. That said letters was made to them and the same was confirmed on July 27, 2017.
4. Further, that the applicants herein are unable to finalize the distribution of the estate as the properties were still in the names of the respondents. That the honourable judge noted that the 2nd respondent herein did not participate in the proceedings leading to the said judgment despite being granted leave to be enjoined as an interested party to the suit and despite being served with a hearing notice.
5. In addition, that following the revocation of the grant issued to David Njuguna Kirogo, it was only fair that the subsequent registration issued on the strength of the revoked grant be cancelled. That the cancellation sought was aimed at ensuring that the said properties devolve to the rightful beneficiaries as contemplated by Hon J Mshilla in her judgment delivered on July 10, 2015. That it is therefore fair and just that this application be allowed for the ends of justice to be met.
6. The summons is supported by the affidavit sworn by the 1st applicant on the even date where she reiterated the contents of the summons and a supplementary affidavit dated April 6, 2022.
7. The respondents in response to the application filed two replying affidavits sworn by the 1st and 3rd respondents both dated December 22, 2020 and a further affidavit by the 4th respondent dated November 16, 2022.
8. In his replying affidavit the 1st respondent averred that they purchased the said Block 2/699 from the deceased herein via an agreement dated the October 15, 1993. That at the time of purchase the vendor represented himself as the bonafide owner of the said parcel of land which was originally owned by Mwariki Farm Company Limited. Further, that he was issued with a Certificate of Lease on the February 24, 2003.
9. He averred further that had he been kept out of the proceedings and only came to be involved at the stage of cancellation. That he had been informed by his advocates on record which information he believes to be true that him and the subsequent purchasers of Block 2/66 were bona fide purchasers for value holding an indefeasible title. In addition, that this court lacked jurisdiction to hear and entertain the current application and at the earliest convenience his advocates would raise that preliminary issue of law. He prayed that the court dismisses the present application with costs.
10. In his replying affidavit the 3rd respondent averred that he purchased the said Block 2/66 from one David Njuguna Kirogo (Deceased) via an agreement dated the September 21, 1994. That he had been advised by his advocates on record which advise he believed to be true that at the time of purchase there was a valid grant in place and as such the sale transaction was done in absolute good faith. Further, that he was issued with a Title deed on the October 14, 1994, he was able to subdivide the same and therefore Block 2/66 did not exist at the lands registry.
11. He averred further that they had been kept out of the proceedings and only came to be involved at the stage of cancellation. That he had been informed by advocates on record which information believe



to be true that the subsequent purchasers of Block 2/66 were bona fide purchasers for value holding an indefeasible title.

12. Additionally, that this court lacked jurisdiction to hear and entertain the current application and at the earliest convenience his advocates would raise this preliminary issue of law. He prayed that the court to dismisses the present application with costs.
13. When the matter came up for directions the court ordered the same to disposed by way of written submissions.

Applicants' Submissions

14. The applicants' in their submissions identified two issues for determination by this court namely; whether this honourable court should issue an order directing the Land Registrar to cancel the title deeds for the properties issued to the respondents and any registration arising therefrom and whether costs should issue.
15. On the first issue, the applicants submitted that the respondents acquired the properties through fraud and they therefore did not have bona fide title deeds. That as a result the 4th respondent could not pass a good title to any of the consequent buyers of the parcels of land known as Kiambogo/Kiambogo Block 2/66, Kiambogo/Kiambogo Block 2/2437-2504; Kiambogo/Kiambogo Block 2/460 and Molo South/Ikumbi Block 1/135. They submitted that the said titles were impeachable by dint of section 26 (1) (a) and (b) of the [Land Registration Act, 2012](#).
16. They placed reliance on the case of [Arthi Highway Developers Limited v West End Butchery Limited & 6 others](#) [2015] eKLR where the Court of Appeal upheld the high court's judgment in a case where certain people had fraudulently acquired title to land and later sold the same to other parties. The Environmental and Land Court at Nairobi, cancelled all the titles and ordered the land to revert back to the original owner.
17. The applicants submitted further that by virtue of the provisions of section 47 of the [Law of Succession Act](#) as read together with rule 73 of the Probate and Administration rules, this court had inherent jurisdiction to order cancellation of titles arising therefrom as long as a grant was revoked. The placed reliance on the cases of [Santuzzabilioti alias Mei Santuzza \(Deceased\) v Giancarlo Felasconi](#) [2014] eKLR, [In Re Estate of Leah Wangui Nding'uri \(Deceased\)](#) [2020] eKLR and [Re Estate of Ngatia Mukumbu Waibochi \(Deceased\)](#) [2020] eKLR.
18. On issue of costs, the applicants placed reliance on [Judicial Hints on Civil Procedure](#), 2nd Edition (Nairobi) Law Africa 2011 at page 101. They urged the court to direct that the respondents to bear the costs of this application.

1st and 3rd Respondents' Submissions

19. The respondents on their part also identified two issues for determination; firstly, whether or not the court can proceed with the matter in the absence of proper and legal representation of the 4th respondent. Secondly, whether or not a case for cancellation of title had been established before this court.
20. On the first issue, the respondents submitted that this court was estopped from proceeding with cancellation of the titles until the question of representation was determined. That the issue of cancellation of the titles affected the parties involved and it would be extremely prejudicial and unfair to the innocent purchasers for value if the title were cancelled in the absence of proper representation of the Estate of the 4th respondent.



21. They cited section 23 of the *Law of Succession Act* and also placed reliance on the cases of *Sarah Kobilu Chebii & another v David K Chesang* [2019] eKLR, *Trouisik Union International & another v Jane Mbeyu & another* Civil Appeal No 145 of 1990 [1993] KLR 230 and *Julius Gichobi Githaiga & another v Jonathan Njuki Githaiga & another* [2018] eKLR.
22. On the second issue, the respondents placed reliance on section 93 of the *Law of Succession Act* and submitted that the transfer of parcels of land to wit Nakuru/Municipality Block 27/699 and Kiambogo Block 2/66 to 1st and 3rd respondent respectively were valid transfers whose validity cannot be affected or defeated by revocation of the confirmed grant. They submitted further that the applicants had no right over the existing title and in any event if it existed the same had already been overtaken by events both at equity and at any other provisions of the law. Additionally, that the said titles had been held by innocent purchasers for value for over 29 years cumulatively and other parties who were not party to this suit who had been in possession of the said parcels of land.

Analysis and Determination

23. I have carefully considered application, the affidavits tendered by both parties and their submissions. The main issue arising for determination is whether this court has jurisdiction to grant the prayers sought in the application dated February 26, 2020.
24. The respondents in their replying affidavit raised the issue of jurisdiction and the applicants have argued that this court has jurisdiction by dint of section 47 of the *Law of Succession Act* as read together with rule 73 of the Probate and Administration Rules. Jurisdiction is everything and the court must down its tools upon establishing that it has no jurisdiction to hear or determine a case. The Supreme Court in the case of *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others*, Supreme Court Petition No 19 of 2018).

“A court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. (See *Republic v Karisa Chengo & 2 others* [2017] eKLR).
25. When considering the issue of jurisdiction, Nyarangi, JA in the *MV Lillian 'S'* [1989] KLR 1 stated as follows;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there should be no basis for a continuation of proceedings pending other evidence. A court of law should down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
26. Article 162 of the *Constitution of Kenya, 2010* provides as follows;
 1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2);
 2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to;
 - a) Employment and labour relations; and



- b) The environment and the use and occupation of, and title to land.
3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2);
4. The subordinate courts are the courts established under Article 169, or by Parliament in accordance with the Article.
27. Parliament in compliance with article 162 enacted, the *Environment and Land Court Act, 2011* which provides the jurisdiction of the ELC's jurisdiction. Section 13 of *ELC Act* provides;

“Jurisdiction of the court;

- 1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162 (2) (b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land;
- 2) In exercise of its jurisdiction under article 162 (2) (b) of the *Constitution*, the court shall have power to hear and determine disputes;
- a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b) Relating to compulsory acquisition of land;
- c) Relating to land administration and management;
- d) Relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land; and
- e) Any other dispute relating to environment and land.
28. On the other hand, section 47 of the *Law of Succession Act*, the high court has inherent powers to make appropriate orders in the interest of justice and for the preservation of the deceased's estate. It reads as follows;

“The High Court shall have jurisdiction to entertain any application and determine any dispute under the Act and pronounce such decrees and make such orders therein as may be expedient; provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

29. Rule 73 of the *PE&A* also provides;

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

30. In the instant suit, it is not disputed that the grant had been confirmed and issued to the deceased brother on September 13, 1994 but the same was revoked vide the judgment of Justice A Mshilla delivered on July 10, 2015 and the court ordered that the properties belonging to the deceased revert back to the estate. Upon revocation, the applicants were then appointed as administrators on July 27,



2017. In *Santuzzabilioti alias Mei Santuzza (Deceased) v Giancarlo Felasconi* (*supra*) as cited by the parties herein, the court held as follows regarding the jurisdiction of the court in succession matters;

“This cannot be the case as the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed. Further, a succession court can order a cancellation of title deed if a deceased’s property is being fraudulently taken away by non-beneficiaries such as where the property is being sold before a grant is confirmed.”

31. In Succession Cause 265/2004 *Munyasya Mulili v Sammy Muteti Mulili*, the court cancelled titles after revoking the grant. The court in the above case relied on the decision of J Musyoka in Re Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR where the Judge considered when a case can be heard as a succession cause or when it can be heard in other courts with concurrent jurisdiction – like the ELC. The judge said;

“The *Law of Succession Act*, and the Rules made there under, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

27. Disputes of course do arise in the process. The provisions of the *Law of Succession Act* and the *Probate and Administration Rules* are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the *Law of Succession Act* and the *Probate and Administration Rules*. Such have to be resolved through the structures created by the *Civil Procedure Act* and Rules, which have elaborate rules on suits by and against executors and administrators.

28. The *Probate and Administration Rules* recognize that, and that should explain the provision in rule 41(3), which provides as follows –

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

29. 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.”

32. In view of the above cited case it is evident that there are two schools of thoughts on which the court has jurisdiction to deal with a dispute between the administrators of deceased's estate and third parties and the line between the differences is very thin.
33. In the instant case, the applicants filed this cause and brought themselves under the provisions of the *Law of Succession Act*. The grant that was issued to the deceased brother was later revoked which had resulted to the issuance of the titles to the respondents. This means that, all actions including the registration of the deceased's property in the respondents' names was rendered a nullity. Unlike the situation described above by J. Musyoka, the applicants having brought themselves within the *Law of Succession Act*, this court in my view therefore has jurisdiction to order cancelation of the said titles so that the land can revert back to the deceased's name and that will enable the applicants to comply with the grant issued to them on July 27, 2017, appointing them as administrators of the deceased's estate.
34. For the respondents, all is not lost as they will still have recourse whether in seeking to have the grant cancelled again and or pursuing their interest in the other courts clothed with the relevant jurisdiction. Other than this the grant which they had relied on in obtaining their titles is no longer available and legally speaking the titles they are holding to the extent that they obtained it through the said invalidated grant are of no consequence or at all.
35. In the premises, the application is hereby allowed as prayed with no order as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 9TH DAY OF FEBRUARY, 2023.

HK CHEMITEI.

JUDGE

