



REPUBLIC OF KENYA



**In Re Estate of Irene Karimi Ndigwa (Succession Cause
547 of 2014) [2023] KEHC 532 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 532 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 547 OF 2014
LM NJUGUNA, J
FEBRUARY 1, 2023**

BETWEEN

HARRISON MUGO NJAMBEERE 1ST APPLICANT

NJIRU NJAMBEERE 2ND APPLICANT

AND

JOHN MAINGI NTHIGA 1ST RESPONDENT

PAULINE MUKAMI JOHN 2ND RESPONDENT

RULING

1. Before this court is the summons dated August 16, 2017 and which seeks revocation and/or annulment of the grant of letters of administration made to John Maingi Nthiga and Pauline Mukami John in relation to the estate of the deceased herein.
2. The said summons is based on the grounds on its face and it is supported by the affidavit annexed to the application.
3. In a nutshell, it is the applicants' case that the said grant was obtained by means of untrue allegations of facts, fraudulently by making of a false statement or by concealment from court of something material to the case and the proceedings to obtain the grant being defective in substance. That land parcel number Ngandori/Kiriari/865 was registered first in the name of Njeru Njambeere (deceased) and that there was no indication on any entry that the deceased herein was gifted the said land by his uncle. That there was no way Njeru Njambeere (deceased) could have bequeathed any property to his niece since his own brothers were still alive including the father of the deceased herein. That Ndwigwa Njambeere (deceased) having been in possession of the title deed, fraudulently caused the same to be transmitted to the name of his daughter, the deceased herein, thus disinheriting his siblings, the applicants herein.



4. The application is opposed by the respondents vide a replying affidavit sworn on October 31, 2017 which was sworn by the 1st respondent on his own behalf and on behalf of the 2nd respondent wherein he deposed that the deceased herein was his wife while the 2nd respondent is his daughter. That the applicants are insincere by stating that they have been living on the suit land yet they have never set foot on the said land. It was his case that there was no fraudulent *dealing* given that succession took place and thereafter transmission was done and none of the applicants ever laid any claim on the suitland. It was deposed that the applicants are taking this court for granted given that the caution placed on the land was removed by the 1st applicant after the 1st respondent talked to him over the same.
5. Directions were taken that the application be canvassed by way of viva voce evidence and thereafter, parties were ordered to file written submissions and all parties complied with the said directions.
6. The applicants submitted that the main issue for determination is whether the grant was obtained fraudulently and by concealment of material facts to the court and whether they are entitled to inherit a share of the deceased's estate. It was contended that the respondents ought not to inherit the estate for the reasons that: they rank lower in the order of consanguinity and affinity and further, the respondents being administrator and surviving child of the deceased's estate did not prove how the subject land parcel got transferred to the deceased's name. Reliance was placed on sections 66 and 39 of the LSA and further *in the matter of the estate of Hillsry Wambugu (deceased)* Succession Cause No. 46 of 2015 and *In the estate of John Musombayi Katumanga (deceased)* [2014] eKLR.
7. The applicants further submitted that the subject land parcel was registered first in the name of Njeru Njambeere (deceased) and that there was no indication on any entry that the deceased herein was gifted the said land by his uncle. Moreover, that it came out clearly from the applicants' testimony that there is no way the deceased herein could have known Njeru Njambeere (deceased) as he was never buried on the suit land. That the alleged Succession Cause No. 95 of 2002 in respect to the estate of Njeru Njambeere (deceased) is what caused the suit property to be transmitted to the estate of the deceased herein. That there was no way Njeru Njambeere (deceased) could have bequeathed any property to his niece as his own brothers were still alive including the father of the deceased herein. That Ndwiga Njambeere (deceased) herein having been in possession of the title deed of the land, fraudulently caused it to be transmitted to his daughter thus disinheriting his siblings, the applicants herein.
8. The applicants contended that having lived on the land for over forty years, they only came to find out on or about March, 2016 that the land they had called home and which is heavily covered up with tea and other crops had already been sold to two strangers claiming to have purchased the same from the respondents. It was their case that they were never involved in the succession proceedings and that the respondents concealed material facts to the court by not disclosing that the subject land parcel was fraudulently transferred to the deceased. Further, the respondents intermeddled with the deceased's estate by disposing the same to third parties. It was their humble submission that the summons herein be allowed with costs to them.
9. The 1st respondent on his own behalf and on behalf of the 2nd respondent submitted that the applicants have not shown or proved to this court any fraud or concealment from court of something material to the case and the proceedings to obtain the grant being challenged herein. That there was no evidence presented before this court to show that Njeru Njambeere (deceased) held the land in trust for the applicants or his family. It was his contention that Ngandori/Kiriari/865 was owned by Njeru Njambeere (deceased) and that while he was alive, he gifted the land to the deceased herein. Further that, the succession to the estate of Njeru Njambeere was carried out way back in the year 2003 and that of the deceased herein in the year 2014 and that the applicants were aware of both. That the applicants failed to protest against the first succession process and have now rushed before this court to stop the



succession of the respondents who have no relationship with them. In the same breadth, that though the 1st applicant cautioned the suit land in the year 2003, he proceeded on his volition to remove the same and therefore, it would be insincere for them to contend that they were deceived. The respondents relied on the case of Joel Ngui Mwau (deceased), *Mwikali Ngui v Mary Kalolia Mutisya Machakos* High Court Succession 547 of 2012.

10. I have perused the application herein and the response thereto by the respondents and it is my view that this court has been called upon to determine whether the orders sought for revocation of the grant issued to the respondents could be granted.
11. As I have already noted, the application herein seeks revocation of the grant made to the respondents. The said grant was issued to the respondents on February 16, 2016.
12. The circumstances under which a grant of representation may be revoked are provided for under section 76 (a)- (e) of the *Law of Succession Act* and include;
 - a. Where the proceedings to obtain the grant were defective in substance;
 - b. Where 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. Where 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. Where 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. Where the grant has become useless and inoperative through subsequent circumstances.
13. What is clear from the above provision is that when a court is dealing with an application for revocation of grant, it is supposed to consider only the process of obtaining the grant. Such that issues touching on the process of confirmation of the grant and distribution of the estate amongst the beneficiaries is beyond what the court should consider as it is not covered by section 76 and thus cannot form a basis of revoking a grant but ought to be challenged through a review or appeal. *In re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR, W. Musyoka, J. after analyzing section 76 and discussing the meaning of a grant within the provisions of the laws governing succession in Kenya held thus: -
 - “ 17. I have very closely perused through the provisions of the *Law of Succession Act*, and I have not come across any provision that provides a remedy to a person who is aggrieved by confirmation orders. Sections 71, 72 and 73 of the *Law of Succession Act*, which deal with confirmation of grants, do not address



the question of redress for parties who are unhappy with the confirmation process, nor do they deal generally with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process. In the absence of any provision in the Law of Succession Act, for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say appeal and review, to the extent that the same is permissible under the Law of Succession Act. I would believe that one can also apply for the setting aside or vacating of confirmation orders, where the same are obtained through abuse of procedure.”

14. From the perusal of the application herein, the applicants’ ground for seeking the revocation is mainly that the respondents obtained the grant fraudulently after having misrepresented facts to the court and further; that the respondents ought not to inherit the estate of the deceased for the reason that they rank lower in the order of consanguinity and affinity as provided for in the LSA
15. Section 66 of the Law of Succession Act bestows this court with the discretion to as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made. The court in exercising the said discretion is mandated to 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 interests as provided by Part V;
 - c. the Public Trustee; and
 - d. creditors:
16. Section 39 on the other hand stipulates that (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—
 - (a) Father; or if dead
 - (b) Mother; or if deadbrothers and sisters, and any child or children of deceased brothers and sisters, in equal shares;
17. Rule 26 provides that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. Further that, in 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 renunciation, or written consent in Forms 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.
18. The effects of the above provisions is that where a person is applying for a grant of letters of administration intestate, he must get consent from persons of equal or lower priority than himself.
19. In the instant case, the applicants’ case is that the grant was obtained fraudulently for the reason that the respondents did not inform them of the process of succession and further, they rank lower in



- the order of consanguinity and affinity as provided for in the LSA. That there was no way Njeru Njambeere (deceased) could have bequeathed any property to his niece since his own brothers were still alive including the father of the deceased herein. That Ndwiga Njambeere (deceased) having been in possession of the title deed of the land, fraudulently caused it to be transmitted to the name of the deceased herein thus disinheriting them.
20. From the evidence before the court, PW1 testified that Njeru Njambeere (deceased) was the first registered owner of the suitland but the deceased died without a wife and/or children. He stated that he didn't know the deceased herein but along the way, changed the narrative and stated that he knew the deceased as the daughter of one Ndwiga Njambeere (deceased). That he had been in possession of the suitland for forty years and he registered a caution on the land when he learnt that the same had been registered in the name of the respondents. He claimed that he was misled by a chief into withdrawing the caution as he is illiterate and he could not read. The applicants averred that the suitland was given to them in as much as there was no witness who could substantiate their claims. PW2 on the other hand stated that he does not reside on the suitland and neither does any member of his family. In my honest view, it seems that the main contest revolves around how the estate herein changed hands from the name of Njeru Njambeere (deceased) to the deceased herein.
 21. The succession cause being contested and to which summons for revocation of the grant relate, is for Irene Karimi Ndwiga. The applicants are aggrieved by the fact that the respondents inherited the estate from the deceased herein (Njeru Nyambeere) yet they rank lower in the order of consanguinity and affinity and further that, there is no evidence how the subject land was transferred into the name of the deceased herein. What I gather therefore, is that the estate to which the revocation of the grant relate belongs to the deceased (Irene Karimi) and that it was incumbent that the same only devolves to the rightful beneficiaries who in this case are the respondents herein. I say so for the reason that the land was in the name of Irene Karimi Ndwiga and the respondents are the husband and daughter of the deceased respectively. The import of this is that while relatives can inherit the estate of a deceased person, they are the last in priority in a case where the deceased has been survived by a spouse and child/ren. [See Sections 66 and 39 of the LSA].
 22. Though the applicants in their evidence stated that they are the brothers to the deceased Njeru Nyambeere and that the land had been given to them by the deceased, they did not satisfy the court why the land was not transferred to them during the lifetime of their late brother or why they did not file the succession cause of their late brother upon his death. It came out clearly during the hearing that they have not been in possession of the subject land contrary to what they alleged.
 23. The deceased herein filed a succession cause to the estate of Njeru Nyambeere way back in the year 2002 and she was issued with a certificate of confirmation of the grant. The green card for the land shows that the 1st applicant placed a caution on the land on the 28.03.2003 claiming beneficial interest on the land but withdrew it on the 4.03.2016.
 24. The court notes that this caution was placed when the succession cause for the estate of Njeru Nyambeere was on going. The reason given by the 1st applicant why he removed the said caution is not convincing at all. I am persuaded by the evidence of the 1st respondent that the 1st applicant removed the said caution on his own volition and the only reasonable explanation for it, is that, he knew or he had a reason to belief that the land had been given to the deceased herein.
 25. On how the subject land parcel was transferred into the name of the deceased herein, from the green card, I note that the change of ownership from Njeru Njambeere (deceased) to the deceased herein took place sometime in the year 2003. The applicants contended that there was no way Njeru Njambeere (deceased) could have bequeathed any property to his niece since his own brothers were still alive



including the father of the deceased herein. From the averments, I gather that the applicants contest the transmission and thereafter ownership of the said estate in the name of the deceased herein. In my view, the primary duty of the Probate Court is to distribute the estate of a deceased to the rightful beneficiaries and which jurisdiction is over the net estate of the deceased being that which she was free to deal with during her lifetime. In this case, the rightful beneficiaries are the respondents who are the husband and the daughter of the deceased.

26. In the foregoing I find that the application herein is devoid of any merit and I hereby dismiss it with no order as to costs.
27. It is hereby ordered.

Delivered, dated and signed at Embu this 1st day of February, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

