



REPUBLIC OF KENYA



**Numbi v Mambo & another (Succession Cause 33 of 2016)
[2023] KEHC 1893 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1893 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION CAUSE 33 OF 2016
RM MWONGO, J
MARCH 14, 2023**

BETWEEN

MARY WAMURANGO NUMBI APPLICANT

AND

MICHAEL MWITHI MAMBO 1ST RESPONDENT

LUCY WAIRIMU MAMBO 2ND RESPONDENT

JUDGMENT

Background and Summons for Revocation of Grant

1. The deceased, Justus Daniel Mambo, died on April 9, 1987. A grant of probate of his estate was made to his children, Michael Mwithi Mambo and Lucy Wairimu Mambo in High Court Succession Cause Number 1190 of 1991 Nairobi, and confirmed on the February 27, 2007.
2. According to the petition, the deceased left the following children:
 - a. Kenneth Njau Mambo – son
 - b. Grace Micere Mambo – daughter
 - c. Lucy Wairimu Mambo – daughter
 - d. Michael Mwithi Mambo - son
 - e. David Muriuki Mambo – son
 - f. Joy Wambui Mambo. – Daughter
3. The petition indicated that the deceased left the following properties at his death.
 - a. Mutira/Kirimunge/205



- b. Mutira/Kirimunge/210
 - c. LR No 209/8524/51
 - d. Shares in Sasini Tea & Coffee Estates and Wakiri Properties Ltd
 - e. A policy with Pioneer General Assurance
 - f. Vehicles; Death Gratuity; and Bank accounts
4. On January 26, 2012, the applicant filed a summons for revocation of grant pursuant to section 76 of the Law of Succession Act on the following grounds:
- I. That the proceedings to obtain the grant herein were defective in substance.
 - II. That the grant was obtained fraudulently by making of false statement by concealment from court something material to the case.
 - III. That the grant was obtained by means of untrue allegation of facts essential in point of law to justify the grant notwithstanding that the allegation made in ignorance or in advertently.
 - IV. That the person to whom the grant was made has failed to proceed diligently with the administration of the estate.
5. In her supporting affidavit she avers inter alia as follows:
- 1. That she is the surviving sister to the late Justus Daniel Mambo.
 - 2. That the grant was confirmed without informing all the beneficiaries and dependants.
 - 3. That the deceased also had a property namely, Mutira/Kaguyu/197
 - 4. That the applicant Mary Wamurango Numbi was not present on January 20, 2003 when matter was fixed for confirmation of rectification of grant which was issued on February 27, 2007.
 - 5. That the applicant is a dependant, she cultivates and lives on land parcel number Mutira/Kirimunge/205 and Mutira/Kaguyu/197 as she is not married and have built a permanent house where she lives with her children for over 20 years.
 - 6. That the distribution herein has caused confusion in the administration of the estate as she came to know that the grant had been confirmed after being given notice to vacate. That she then I filed LDT NO 19 of 2007, Kerugoya
 - 7. That it is in the interest of the justice that this grant, be annulled, a fresh grant be issued and the estate be distributed to all beneficiaries, among all the dependants and children of the deceased.
6. In support of her summons the applicant annexed to her supporting affidavit a rectified Certificate of Confirmation of Grant amended on February 27, 2007; the grant dated January 31, 1992; Proceedings and award of the Land Disputes Tribunal dated March 21, 2007 with a covering letter; and proceedings of the SRM Court at Kirinyaga in LDT Case No 19/2007.
7. The respondents filed a replying affidavit dated March 5, 2012 setting out the following major averments:



1. That we are children of the late Justus Daniel Mambo (deceased) and the respective Administrators of the Estate on behalf of our other siblings and beneficiaries.
2. That the Petition for the grant of Letters of Administration for the Estate of the late Justus Daniel Mambo was made in compliance with the Law and duly published in the Kenya Gazette.
3. That it is not true that such an exercise could have been carried out secretly or without the knowledge of the bona fide beneficiaries and dependants listed out at paragraph 4 of the Affidavit in support of Summons for Revocation or Annulment of Grant by the Applicant.
4. That the Applicant who is our aunt by virtue of being our late father's sister is a married woman with five grown children with a home in Kagio and was neither a dependant nor a beneficiary of our late father's estate.
5. That the Applicant has made similar back-door attempts at benefitting from the Estate of Justus Daniel Mambo in Kerugoya Senior Resident Magistrate's Court L-DT No 19 of 2007.
6. That the Estate was accordingly distributed among the bonafide beneficiaries and dependants pursuant to the Confirmed Grant and there is nothing left to satisfy the Orders sought by the Applicant.

Hearing

8. A viva voce hearing was held in this matter on October 24, 2018 when the applicant testified. On June 2, 2022, the 1st respondent testified. Parties filed written submissions.

The evidence

Applicant's testimony

9. The applicant testified that she was the brother of the deceased, and that their other siblings were Grace Micere, Daniel Gatuku and another one who had died. She asserted that Justus had been given two acres of land at Mukithi where she was born; and that the land parcels at Kirimunge 205 and 210 had a combined acreage of 45 acres; that land parcel Mutira/ Kaguyu/ 187 was land bought by the deceased measuring 12 acres.
10. She did not dispute that the respondents were the deceased's children. According to her, she said she grew up on her brother's land where she has grown tea; that she was married but her husband left her after selling their land; that the deceased thereafter invited her to his land and she moved in; that the deceased maintained and educated both her and her children; that he gave her a place to live where there was tea, and she lived with him for nearly twenty years. She said her parents were buried on that land.
11. She asserted that she was never made aware of the succession application. She stated that after the deceased died, she filed a case with the Land Disputes Tribunal's which said she could have 10 acres. She exhibited the award which, when she tried to enforce it, led to her eviction.
12. In cross examination she said that she was not aware that the Tribunal award was declined by the Senior Resident Magistrate's court; that the land they were staying on was clan land; that her parents were buried at the land in Mukithi; that before he died the deceased told her he would give her the land at Mukithi; that at the tribunal she claimed 10 acres and 5 acres; that since 2007 she had been renting a house at Njegas after she was evicted.



13. Finally, she admitted that she was taking care of the farm and supervised the tea picking; that she filed a case with the ELC court Civil Case No 9/2012 and that she was trying to get what she did not get at the Tribunal or from the SRM's Court in Kerugoya.

1st Respondent's testimony

14. The 1st Respondent testified that the applicant is his aunt. He said that the land at Mukithi, namely, Mutira Kirimunge/210 and 205 were given to his father; that the applicant filed a case in the Land Disputes Tribunal which was dismissed.
15. He stated that the applicant was an employee of his father on the farm, where she was picking tea. He asserted that the applicant was never a dependant of his father.
16. In cross examination, he said that his father had two parcels of land at Kagumo and Mukithi which he bought. He said he did not know his clan, and acknowledged that his father got some land from the clan, but did not know which it was. He admitted however, that his father was given 40 acres, but did not know whether he was only entitled to 20 acres or that the other 20 acres was for her grandfather.
17. In further cross examination, he said he first saw the applicant on his father's farm in the late '70s; that she came to work and earn an income; that she came with 5-6 children; that he took over the farm after his father passed on; that he used to pay her when he took over the farm; that if she was an owner, she would have had a tea number with KTDA; that he did not know who paid her children's school fees; that his father built a store house in Kagumo for the applicant and that she lived there as an employee.
18. He also admitted that he did not inform the applicant when they took out the succession proceedings; he said that he did not know where she lived; that the Court held that the Tribunal had no right to share the land.

Analysis and Determination

19. From the testimony above, it is not disputed that the Applicant is a biological sister of the deceased. It is not disputed that the deceased had only 2 siblings namely Julia and Mary Wamurango the applicant herein. It is not denied that the deceased, Daniel Mambo, passed away on April 9, 1987 leaving behind his wife and children and left behind 3 land parcels namely: Mutira/Kirimunge/210, Mutira/Kirimunge/205 and Mutira/Kaguyu /197.
20. It is not disputed that the properties in issue were in the name of the deceased. It is also not in dispute that the applicant came to live on the deceased's land, and that she worked on the tea on that land supervising the tea picking there. In addition, it is not in dispute that the applicant sought to obtain some of the deceased's land and to that end filed a case in the Land Disputes Tribunal, and subsequently that she filed a case in the Environment and Land Court. It is also not disputed that the applicant was married and lived with her husband and family at her home with him, before he divorced or abandoned her after selling his land. It is not disputed that she subsequently moved to the deceased's land where she lived and from where she worked. It is not disputed that she is claiming some of the land of the deceased which she worked on.
21. What is disputed is that the applicant was a dependant of the deceased or that her children were dependants of the deceased. It is also disputed that the deceased was holding any land as a trustee of his siblings or any person. It is further disputed that the applicant owned or was given a tea farm, but that she instead was an employee of the deceased supervising the tea picking on his farm.



22. From the evidence and the disputed and undisputed facts, the applicant's case appears to be premised on two prongs: First that the deceased was holding clan land as trustee and she would be entitled to a share thereof; Secondly, that she would in any event be entitled to a share of the deceased's estate by virtue of being a dependent.

Issues for Determination

23. The substantive issues for determination are as follows
- a. Whether the grant should be revoked on grounds that the deceased was holding part of the estate as a trustee for the applicant
 - b. Whether the applicant is a dependent of the deceased and is entitled to be provided for from the estate

Whether the deceased held part of the estate as trustee for the applicant

24. There is no doubt that if the deceased held land as trustee for the applicant, she would naturally be entitled to have a share in the estate. To achieve that, there must be evidence of a trust: namely, that there was arrangement by which a person is holding something of value as benefactor for the benefit of another, and that whatever conditions there were for handing over the benefit or the thing so held had been met or achieved.
25. The applicant's evidence was that the clan registered the deceased as the owner of 40 acres of land; and that of those 20 acres were part of her father's estate as trustee, and the other 20 acres was his absolute property. These important allegations were not proved as facts.
26. She, the applicant, also testified that this land was ancestral property some of which she was entitled to a share as the deceased's sister. On this point, she produced minutes of the Land Disputes Tribunal decision dated March 21, 2007. That there were such proceedings is not disputed. The proceedings show that the Tribunal made an Award that the applicant:

' Should inherit 10 acres of Mutira /Kirimungo/205 which was clan land

And also that she should:

' Inherit 5 acres of Mutira/Kaguyu/197 for she has built and lives there with her four children for over 12 years'

27. However, the applicant also exhibited MWN 2, being LDT Case No 10/2007 in the SRMs Court at Kerugoya, where the Land Disputes Tribunal award came for reading. On March 21, 2007 the lower Court received the Tribunal's award; and on April 19, 2007 dismissed the award stating:

' The same is rejected as a judgment of the court, on grounds that the panel ordered the court in its verdict to order one Wamurango to file succession case. In respect of the land in issue .The Tribunal had no right to share land in respect of which the registered owner is deceased and then recommend that a succession case be filed after sharing out the estate. This court cannot adopt an irregularity and then pronounce it as its own judgment.'

28. Thus, what is clear on the record is that the award of the Tribunal was not crystallised by adoption by the Magistrate's court. It was in fact rejected. The fact that the applicant did not appeal the decision



of the Magistrate means that the position taken by the Magistrate remains the governing position on the issue of the trust.

29. At the hearing in this court, the applicant did not avail any witnesses to augment and corroborate her allegation that the deceased held land as trustee. She appears to have relied solely on the Tribunal's award, which as indicated, was dismissed by the Magistrate's court.
30. It has not been argued here that the content of the evidence availed at the proceedings of the Tribunal and the award made thereat are facts that are to be received in evidence in this court. Even if that argument were to be made, however, it appears to me that the applicant would still have to contend with section 45 of the *Evidence Act* which provides for how we should treat other judgments of a public nature. The provision is as follows:
 - ' 45. Judgments, orders or decrees, other than those mentioned in section 44 of this Act, are admissible if they relate to matters of a public nature relevant to the inquiry, but such judgments, orders or decrees are not conclusive proof of that which they state.'
31. Thus, there is no proof on record of the existence of a trust.
32. Her evidence on the allegation of trusteeships was challenged by the denial by respondents. The 1st respondent said he did not know his clan; that his father bought the two parcels of land and that he did not know what the clan did for those who had no land.
33. On this issue of trusteeship, the applicant cannot thus succeed.

Whether the applicant was a dependant

34. The applicant testimony that she was a dependant of the deceased was strongly contested. The respondent did not deny that she was his aunt and that she came to live on the deceased's farm. However, his position is that she was a worker or employee taking care of the farm for remuneration.
35. The 1st respondent stated that after the deceased died, he, the 1st respondent, continued to pay her salary. In her testimony, the applicant stated that there was a permanent house on the deceased's land, and that it had tea growing on it. She stated that she was taking care of the farm and supervised the tea picking. She made some very telling statements in cross-examination as follows:
 - ' I am claiming land because I have nowhere to live. I am trying to get what I did not get at the tribunal and SRM's Court Kerugoya. The respondents are also supposed to inherit, I can also inherit from my brother.'
36. These statements do not suggest that the applicant was a dependant. It appears that she was trying her luck to see what would stick. Having lost her marriage, and encumbered with children, she appears to have gone to work for the deceased, but thought that she could get a permanent allocation of land.
37. Had she produced evidence to show that she was allocated land, had built on it and planted tea or other crops, it could be imputed that there was a definite intention on the part of the deceased to give her that land.
38. Had she further produced evidence that the deceased was taking care of her needs and financial situation by paying her children's school fees and medical costs for example, that would be appropriate evidence to show that she was a dependant. This she did not avail.



39. The law on dependency is found in Part III of the Succession Act (sections 26- 30). Section 26 makes provision for dependants not adequately provided for by will or on intestacy as follows:

' 26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net

40. Section 29 defines dependency

' Meaning of dependant

For the purposes of this Part, 'dependant' means-

- a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- b) Such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
- c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.'

41. It is not disputed that the applicant is the sister of the deceased. However, she had to show that she was being maintained by the deceased immediately prior to his death. The evidence on record, as already stated, appears to show that she was working on the deceased's farm where she also lived and was being paid even after the deceased died.

42. *In Re Joshua Orwa Ojodeh (deceased) 2014 eKLR* the court held that to be classified as a dependent one must be able to demonstrate that she was dependent on the deceased immediately prior to his death. Ideally before the court can exercise discretion under section 26 of the Act, it must be established that the applicant was dependent on the deceased immediately prior to the deceased's demise.

43. However, even if the applicant had been able to show that she was a dependant, she would have to contend with section 30 of the LSA which places limits on a dependent's right to pursue dependency claims. That section provides as follows:

' No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71.'



44. Here, the grant was confirmed way back on January 20, 2003, and according to paragraph 9 of the replying affidavit of the respondents filed on March 12, 2012:

' The estate was accordingly distributed among the bonafide beneficiaries and dependants pursuant to the combined grant and there is nothing left to satisfy the orders sought by the Applicant'

45. On this prong also, the applicant's application cannot succeed.

The law on revocation of grants and on dependency

46. The law on revocation of grants is at section 76 LSA which provides as follows:

' 76.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.'

Conclusion

47. In light of the findings I have made on the issue of trusteeship and dependency, I do not see the basis on which section 76 is invoked, and can be successfully applied.

48. Ultimately, and for all the reasons stated, the summons for revocation application fails on all limbs and is hereby dismissed

Orders accordingly

DATED AT KERUGOYA THIS 14TH DAY OF MARCH 2023



R MWONGO

JUDGE

Delivered in the presence of :

Ms. Thungu for the Applicant

Mr. Onduso for the Respondent

Mr. Murage, Court Assistant

