



**In re Estate of Mugira M'Chabari alias Mugira Chabari (Deceased) (Miscellaneous Succession Cause E024 of 2021) [2023] KEHC 3204 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3204 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
MISCELLANEOUS SUCCESSION CAUSE E024 OF 2021**

**LW GITARI, J**

**APRIL 18, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE MUGIRA  
M'CHABARI ALIAS MUGIRA CHABARI (DECEASED)**

**BETWEEN**

**JANET MBUNDU KINYAKI ..... OBJECTOR**

**AND**

**IDAH KITHINJI ..... PETITIONER**

**JUDGMENT**

1. The Applicant herein filed two applications before this Court. The first applications is dated 12<sup>th</sup> April, 2021 and seeks for orders that the letters of administration intestate made to the Respondent herein on 9<sup>th</sup> December, 2019 and the Certificate of Confirmation of grant made on 16<sup>th</sup> December, 2020 be revoked.
2. The said application is supported by the affidavit sworn by Janet Mbundu Kinyaki sworn on 12<sup>th</sup> April, 2021 and a supplementary affidavit sworn on 19<sup>th</sup> August, 2021. The application is based on the grounds that the grant was obtained fraudulently, by misrepresentation of facts and concealment of material facts from the court and that the Petitioner intends to have the suit parcels disposed off to the detriment of the Applicant.
3. The second application is dated 3<sup>rd</sup> June, 2021. Looking at the main prayer in the second application, the Applicant sought for an order inhibiting the sale, lease, and/or transfer of land parcels No. Mwimbi/Kiraro/669 and Mwimbi/Kiraro/375 and any other resultant subdivisions pending the hearing and determination of the application. This is prayer no. 2 in that application and the same was granted by this Court on 7<sup>th</sup> June, 2021. As it now stands, therefore, the second application as presented is spent save for the issue of costs which ordinarily follows the event.



4. That said, it follows that the only pending application before this Court is the one dated 16<sup>th</sup> December, 2021. The Respondent filed her response to this application vide the Replying Affidavit sworn by herself on 2<sup>nd</sup> July, 2021 and the application was then canvassed by way of way of written submissions. The Applicant and the Respondent filed their respective written submissions on 8<sup>th</sup> June 2022 and 16<sup>th</sup> June, 2022 respectively.
5. It was the Applicant's submission that the land parcels no.s Mwimbi/Kiraro/375 and Mwimbi/Kiraro/669 (hereinafter jointly referred to as the "suit land") are both ancestral lands and the deceased was holding it on behalf of the Applicant's late husband, who was the deceased's brother. According to the Applicant, she is entitled to half a share of the suit land, which portion she alleges represents the rightful share of her late husband. She further contends that the fact that the Respondent has accepted to give her a small portion of the estate for her sustenance is an admission in itself that the Respondent is knowledgeable about the claims raised by the Applicant. The Applicant thus prayed that the application for revocation of grant to be allowed.
6. On her part, the Respondent denied that the land parcels constituting the suit land herein are ancestral lands. To the contrary, the respondent submitted that the suit land is the exclusive property of the deceased herein. That the Applicant occupies 0.30 acres in Mwimbi/Kiraro/375 which the Respondent is ready to transfer to her. Further, in the succession proceedings in respect to the deceased's estate, the Respondent involved all the rightful beneficiaries who were introduced by a letter from the chief. The Respondent thus maintained that the Applicant is not a dependant or a beneficiary of the deceased and as such she has no known interest in the suit land apart from the portion which she occupies.
7. In addition, the Respondent avers that at one time during the succession proceedings, the Applicant filed an objection dated 6<sup>th</sup> April, 2020, which was dismissed on 6<sup>th</sup> August, 2020. Further, that the Applicant did not file any protest to the confirmation of the grant despite having knowledge of the existence of the proceedings. It was thus the Respondent's submission that the present application is an afterthought and an abuse of the court process. She thus urged this court to dismiss the same for want of merit.
8. I have considered the summons application dated 12<sup>th</sup> April, 2021, as well as the respective affidavits of and submissions by the parties in support and opposition of the application. The only issue for determination by this court is whether the Applicant has laid down a basis to warrant the revocation of the grant issued to the Respondent.

## **Analysis**

9. Section 76 of the *Law of Succession Act* provides for instances when a grant issue by the court may be revoked. The said provision specifically states as follows:

“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 court of something material to the case.
- c. that the grant was obtained by means of an untrue allegation of the 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.”

10. A party need not prove all the above matters as proof of any one of them will lead to the revocation of the grant. In this case, the Applicant contends that the Respondent obtained the subject grant fraudulently through misrepresentation of material facts. The Applicant further contends that the confirmation of the subject grant, disinherited her and other beneficiaries who are entitled to a share of the deceased’s estate.

11. The Applicant is the wife to the late Timothy M’Chabari who is stated to have been a step brother to the deceased herein. The Applicant has raised issues of ownership of the suit land claiming that the same was being held by the deceased in trust of her late husband.

12. Notably, the primary duty of this Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the exact properties forming the estate must first be identified before distribution can take place. Where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. In this case, the Applicant has raised issues pertaining to the existence of a trust hence ownership of the suit land is in question. This is however not the proper forum to interrogate such an issue. The correct forum to articulate a claim of trust in land is the Environment and Land Court and not the probate court.

13. In the case of Owners of the Motor vessels “Lillian S” -Vs- Caltex Oil (K) Ltd. Civil Appeal No. 540 of 1989 it was held that:

“...Jurisdiction is everything. Without it a court has no power to make one more step. Where the Court has no jurisdiction, there would be no basis for a continuation of procedure pending other evidence. A Court of law shall lay down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”

14. The jurisdiction of the court as a Probate and Administration Court is spelt out under the [Law of Succession Act](#) (Cap 160 Laws of Kenya) to be referred to as the Act. Section 3 defines court to mean a court having jurisdiction. The Act provides that the court with jurisdiction is the High Court. Section 47 provides for jurisdiction of the High Court and states as follows:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

This jurisdiction is extended to the Magistrate’s Court under Section 49 of the Act.



15. The matters which the Probate and Administration Court is supposed to deal with are those provided for under Section 2 of the Act which provides for the application of the Act.

Section 2(1) of the [Law of Succession Act](#) provides:

The preamble thereof states-

“(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

The claim by the applicant is based on trust. At paragraph 4 of her affidavit sworn on 3/6/2021 she depones as follows:

“That the land Parcels No. Mwimbi/Kiraro/669 and Mwimbi/Kiraro/375 are ancestral lands where the deceased herein was holding in his trust and on trust of my late husband.” sic

It is clear that the applicant’s claim is based on trust and not on beneficial interest on the estate of the deceased. An issue of jurisdiction where it arises in proceedings before a court must be determined at the pre-liminary stage for the court to determine whether it is clothed with jurisdiction to determine the dispute before it.

The preamble to the [Environment and Land Court Act](#) states that:-

“An Act of Parliament to give effect to Article 162 (2)(b) of [the Constitution](#) to establish Superior Court to hear and determine disputes relating to Environment and the use and the occupation of and title to land and to make provision for its jurisdiction functions and powers and for connected purposes.”

Article 162(2) (b) of [the Constitution](#) on the other hand states:-

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

The Environment and the use and the occupation of and title to land.”

The Supreme Court affirmed the distinct jurisdictions of the High Court and court of equal status and held that- the three are different and autonomous courts and exercise different and distinct jurisdictions, Article 165(5) pre-cludes the High Court from entertaining matters reserved to the ELC and ELRC it should by the same token be referred to ELC and ELRC too cannot hear matters reserved for the jurisdiction of the High Court, See Republic, Karisa Chengo & Jefferson Kalama Kengha –v- Kitsao Charo Ngati Supreme Court of Kenya Petition No.5/2015. The claim by the applicant is that the deceased was registered on the two land parcels in trust. The issue raised touches on ownership of land parcels in dispute. This court lacks jurisdiction to entertain a claim based on trust of a registered land.

16. Guided by the above authority, this Court cannot delve into determining whether the Applicant has proved her claim of the existence of a trust in the suit land, which claim forms the basis of her application for revocation of the grant. Having established that this Court lacks jurisdiction to interrogate the issue of trust, the court has no power to make any more step in this regard.



On the other hand, the applicant lacks locus standi, to file this application. She has deponed that she is the widow of Timothy Kinyaki M'Chabari who died on 29/6/2016 and who was a son of the deceased to whom these proceedings relate. It is her claim that the deceased was holding the land in dispute on his behalf and in trust of her late husband. The

Applicant has not provided evidence to prove that she is the administrator of the estate of her deceased husband. The Court of Appeal in the case of Rajesh Ranjivan Chudasama –v- Sailesh Ranjivahi Chudusama (2014) eKLR, Court of Appeal, the court stated-

“But in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited grant or a full grant of letters of administration in cases of intestate succession.”

The applicant lacks locus standi and her action to enforce the claims of her deceased husband before taking out letters of administration in his estate is incompetent.

17. Finally, the respondent deposes that the applicant was aware of the proceedings in the Magistrate's Court and she filed an objection out of time and the same was dismissed. The applicant did not file a protest thereafter. I am inclined to agree with the submissions by the respondent that this application is an afterthought. The applicant has not proved any of the grounds under Section 76 of the Act to warrant this court to order revocation of the grant. The applicant has also not laid any material before this court to prove that the respondent is intending to dispose off the suit land without the knowledge of the family. There is nothing to support her prayers for inhibition orders.

### **Conclusion**

18. In view of the foregoing, I find that the present application for revocation of grant should fail as the same is devoid of merit.

### **I order as follows:-**

1. The application dated 12/4/2021 is dismissed.
2. The order of inhibition issued exparte on 7/6/2021 expires as it was issued pending interpartes hearing of the application.
3. Costs to the respondent.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 18<sup>TH</sup> DAY OF APRIL 2023.**

**L.W. GITARI**

**JUDGE**

**18/4/2023**

**The Judgment has been read out in open court.**

**L.W. GITARI**

**JUDGE**

**18/4/2023**

