



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Estate of Rugunku M’Iria (Deceased) (Succession Cause
220 of 2005) [2023] KEHC 3034 (KLR) (6 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3034 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 220 OF 2005**

EM MURIITHI, J

APRIL 6, 2023

IN THE MATTER OF THE ESTATE OF RUGUNKU M’IRIA (DECEASED)

BETWEEN

CHARLES MUTWIRI PETITIONER

AND

DANIEL MURIUNGI APPLICANT

RULING

1. By Summons dated October 6, 2021, the applicant seeks an order of inhibition in respect of land parcel Nos Nkuene/ngonyi/281 & Nkuene/nkumari/558 pending the hearing and determination of this application interpartes; and revocation of the grant of letters of administration issued to Charles Mutwiri Rugunku on May 21, 2007 and confirmed on March 9, 2018.
2. The application is supported by the grounds that the applicant, who is a son to the deceased and a brother to the petitioner was not allocated any share of his father’s estate. The petitioner is accused of not only filing this cause secretly without involving the applicant, but also fraudulently concealing material facts. It is averred that the petitioner is in process of subdividing the land, and unless the court intervenes, the applicant will be disinherited.
3. In his replying affidavit sworn on November 30, 2021, the petitioner acknowledges that the applicant is his brother. According to him, the application is brought in bad faith and an afterthought meant to malign his position as an administrator of the estate with a view to try and wrestle the land the applicant sold. Contrary to the applicant’s assertions, the cause was filed with the involvement of the applicant. Since the applicant had sold his portion to one John Murithi Mutonga way back on September 10, 2003, the applicant was categorical that his share which is 0.60625 Acres should go directly to the said purchaser. During the confirmation of grant on May 21, 2007, the applicant who was in court affirmed the above position and the grant was confirmed. He is aware the applicant used the proceeds from the



sale of his share to purchase another land where he settled with his family, and the court should not allow the applicant to have his cake and eat it.

4. The applicant in his further supporting affidavit sworn on February 14, 2022 vehemently denied either selling his share of the estate to anyone or attending court on May 21, 2007.

Evidence

5. The applicant (AW1), John Gituma Mugambi (AW2), the petitioner's nephew and Evangeline Mugambi Julius (AW3), a daughter-in-law to the deceased herein, filed witness statements on September 6, 2022. They stated that the cause was filed secretly without their involvement, and the petitioner allocated himself the big share as compared to some of the beneficiaries who got smaller portions. They stated that John Murithi Mutonga is a stranger who was included and provided for by the petitioner. The parties then called respective witnesses who had filed witness statements for cross-examination on their statements.
6. The applicant AW1 presented a case was that he had only given his portion of shamba to one John Murithi M'Itonga to cultivate at a fee for a period of 15 years and he took the land back when the period of lease had expired.
7. AW2 and AW3, respectively, son and widow of the deceased's late son Julius Mugambi testified that they were not involved in the succession petition filed by the Petitioner and they did not sign any consent for the appointment of the administrator and distribution of the estate of which they objected that the petitioner got a bigger share of the estate than their family.
8. The respondent's (PW1) case was that the applicant had been given a share by their father but he had sold his portion and agreed that the buyer Jon Murithi M'Itonga should be included in the petition for succession proceedings in his place.

Submissions

9. The applicant submits that he was left out of the distribution of his father's estate, and relies on [*Re Estate of Stone Kathuli Muinde \(Deceased\) \(2016\) eKLR*](#) and [*Jamleck Maina Njoroge v Mary Wanjiru Mwangi \(2015\) eKLR*](#). He prays for the application to be allowed as he has met the threshold of section 76 (b) of the [*Law of Succession Act*](#).
10. The petitioner faults the applicant for failing to satisfy any grounds set for revocation of grant under section 76 of the [*Law of Succession Act*](#), and cites [*Estate of Johnstone Kirigia Kirimi \(Deceased\) \(2017\) eKLR*](#). He maintains that the cause was filed transparently and all the beneficiaries were involved including the applicant.

Analysis and Determination

11. Section 76 of the [*Law of Succession Act*](#) sets out the requirements for revocation or annulment of grant 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.'
12. The applicant is asking the court to revoke the grant issued to the petitioner on May 21, 2007 and subsequently confirmed on March 9, 2018, because he was completely disinherited yet as a son to the deceased, he was entitled to a share of his father's estate.
 13. The petitioner admits that the applicant is indeed a son of the deceased, but he falls back to a sale agreement dated September 10, 2003 allegedly entered into by one John Murithi Mutonga and the applicant. It is said that the applicant sold his share of the estate to John Murithi Mutonga, and used the proceeds thereof to purchase another parcel of land, where he has settled with his family.
 14. The applicant strongly denies entering into any such agreement for the sale of his entitlement of the estate.
 15. The obvious observation from the said agreement is that it was entered into on September 10, 2003 way before a grant of letters of administration intestate could be issued to the petitioner on May 21, 2007. Section 80 (2) of the *Law of Succession Act* is clear that a grant of letters of administration takes effect from the date of issue and it cannot apply retrospectively. Therefore, the purported sale by the applicant to a 3rd party of his share of the estate was a nullity and of no legal basis. In law, the applicant had nothing to sell to the 3rd party because the property in question was not his, as at that time. Article 40(6) of the *Constitution* declares that, the rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
 16. This court respectfully notes the case of *re Estate of M' Ajogi M' Ikingu (Deceased) [2017] eKLR* where the court, (F Gikonyo J) stated as follows:-

' Courts have said time and again- and I will not be tired of stating it again- that, under section 82(b) (ii) of the *law of Succession Act*, sale of immovable property of the estate before confirmation of grant is prohibited. Again, under section 55 of the *Law of Succession Act*, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. Therefore, no person shall have any power or legal authority or capacity to sell immovable property of the deceased before confirmation of grant. As such, any such attempted sale of immovable property of the estate before confirmation of grant shall be null and void for all purposes and intents. I need not also state that beneficial interest of a person beneficially entitled to a share in the estate must be identified and be capable



of registration in his name before it could be sold or pledged as security or exchanged with another type of property. It is during confirmation hearing that the court establishes the respective identities and shares of persons beneficially entitled, and when confirmed the grant specifies such persons and their respective shares in the estate. See section 71 of the [Law of Succession Act](#). Therefore, before confirmation, the interest of the beneficiary remains amorphous and entangled within the estate; and vested in the administrator or executor as the estate property as by law stated.'

17. In [Macfoy v United Africa Co Ltd \[1961\] 3 All ER 1169](#) at page 1172, Lord Denning stated that:

' If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'

18. Having found that the instrument that allegedly took away the applicant's right to inherit a share of his father's estate was a nullity, the court finds that a proper case for the revocation of the grant of letters of administration intestate issued to the petitioner has been made. The petitioner concealed from the court a material fact to wit the applicant was a beneficiary of the deceased, and thus entitled to share in his estate. It can be seen from the evidence of John Gituma Mugambi and Evengaline Mugambi Julius that there were other beneficiaries who were also left out of the distribution.

Orders

19. Accordingly, for the reasons set out above, the Court finds that the application dated October 6, 2021 is merited and it is allowed in the following terms:

1. An order of inhibition is hereby issued in respect of land parcel Nos. NKUENE/NGONYI/281 and NKUENE/NKUMARI/558 pending the hearing and determination of this cause.
2. The Grant of Letters of Administration issued to Charles Mutwiri, the petitioner herein, on May 21, 2007 and confirmed on March 9, 2018 is hereby revoked.
3. Any of the beneficiaries of the deceased is at liberty to apply.

20. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED ON THIS 6TH DAY OF APRIL, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Muia Mwanzia & Co. Advocates for the Petitioner.

M/S Muchomba Law Advocates for the Applicant.

