



**In re Estate of the Late Patrick Mbugua Itotia (Deceased) (Succession Cause 73 of 2014) [2023] KEHC 25455 (KLR) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 25455 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
SUCCESSION CAUSE 73 OF 2014**

**GL NZIOKA, J  
MAY 23, 2023**

**BETWEEN**

**JOSEPH KIBANYU KIRATU ..... 1<sup>ST</sup> APPLICANT**

**JOHN NGANGA KIRATU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PAULINE WANGECI MBUGUA ..... 1<sup>ST</sup> RESPONDENT**

**MURENGA MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant filed an application dated 21<sup>st</sup> October 2016, brought under the provisions of; Rules 44(1) and 58 (2) of the Probate and Administration Rules and section 76 of the [Law of Succession Act](#) (Cap 160) Laws of Kenya seeking for the revocation and/or annulment of the Grant of Letters of Administration dated 13<sup>th</sup> May 2015 issued to Pauline Wangeci Mbugua.
2. The application is based on the grounds as here below stated that:-
  - 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 and by the concealment from the Honourable Court of things that were 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.
3. The application was further supported by the joint affidavit of the applicants of the even date, wherein they aver that the deceased died on 26<sup>th</sup> October 2014. That, subsequently on 18<sup>th</sup> December 2014 the respondents filed a succession cause and Grant of Letters of Administration issued 15<sup>th</sup> May 2015.



4. That on 4<sup>th</sup> December 2015, the respondents filed summons application for Confirmation of the Grant which was confirmed on; 21<sup>st</sup> March 2016 and the Certificate of Confirmation of grant issued on 4<sup>th</sup> August 2016.
5. That, in the succession cause the respondents claimed to be the wife and brother-in-law of the deceased respectively and that, the deceased was survived by the alleged beneficiaries listed therein, a claim the applicants repudiate.
6. The applicants aver that, the 1<sup>st</sup> respondent was never married to the deceased under any system of law recognized in Kenya and is therefore not a wife or former wife to the deceased. That, the only relationship between her and the deceased was of a lessor – lessee, as the 1<sup>st</sup> respondent had leased from the deceased two (2) acres land; parcel number Nyandarua/Ol Aragwai/1567.
7. Furthermore, the deceased had a severe mental illness and lacked capacity to contract a marriage or consummate one and, in the circumstances, he could not have married nor fathered and maintained children. That, the children listed as beneficiaries and the 2<sup>nd</sup> respondent were not known to the deceased or the applicants.
8. That, the applicants and their two siblings; the late Francis Gachuhi Itotia and late Teresia Wairimu Itotia took care of the deceased during his illness until his demise. Further, Teresia Wairimu Itotia resided on the said parcel of land and was buried there upon her demise on 1<sup>st</sup> April 2016.
9. That, on 30<sup>th</sup> October 2014, and 4<sup>th</sup> December 2014, the applicants’ family had meeting that was also attended by the 1<sup>st</sup> respondent and the Ol Magogo Area Assistant Chief where they discussed and agreed on the mode of distribution of the deceased’s Estate. Subsequently, the applicants obtained a certificate of death serial No. 0140981 in readiness to file a petition for a grant of representation.
10. However, the respondents without the knowledge of the applicants obtained a second death certificate serial No. 0243005 and filed the current succession cause with the aid of the Ol Magogo Area Assistant Chief who wrote a contradictory letter to the Honourable Court.
11. The applicants further aver that, the deceased acquired the subject parcel of land parcel No. Nyandarua/Ol Aragwai/1567 as a gift from his late grandmother, but the 1<sup>st</sup> respondent placed a caution on the land on 11<sup>th</sup> July 2014, before the deceased’s death.
12. However, the respondents opposed the application vide a replying affidavit dated 26<sup>th</sup> March 2016, sworn by the 1<sup>st</sup> respondent; Pauline Wangeci, wherein she avers that, the deceased was a prominent farmer and of sound mind and that, the cause of his death was not associated with mental illness.
13. Further, the deceased could marry and consummate marriage. That she got married to the deceased in the year 2010 under Kikuyu Customary Law. Furthermore, at the time of the marriage she had seven children whom the deceased accepted as his own and provided for and educated the younger ones. Further, the deceased indicated he did not want any more children.
14. The 1<sup>st</sup> respondent further stated that, she lived with the deceased on the said land and she took care of him until his death. That, the deceased allowed her sister to live and build on the subject land on humanitarian grounds, after she was chased away by the applicants.
15. That after the deceased died the applicants chased her away from the land, destroyed her house and settled on that land where they are engaged in farming without her consent.



16. The 1<sup>st</sup> respondent denied having been involved in the alleged family meeting and maintained that she is the wife of the deceased and the sole heir to his estate. That, the 2<sup>nd</sup> respondent is her true brother in law and that she included him in the succession cause as she could not trust the applicants.
17. The 1<sup>st</sup> respondent denied concealing any material facts, making any untrue allegations or being involved in fraud in the course of the succession proceedings and alleged that, the present application by the applicants is full of fake allegations in a bid to dis-inherit her and her children.
18. The respondent's case was further supported by the affidavit of one; Peter Kamau Ndegwa dated 19<sup>th</sup> July 2017. He averred he was the immediate neighbour of the deceased since 1964 and was his classmate at Murungaru Primary School. That, the deceased was a long distant truck driver, while the witness was a mechanic in Nairobi where they would often meet.
19. That he retired in the year 2002 and returned to Murungaru, while the deceased retired in the year 2006 and returned to Murungaru where he built a home. Further, the deceased introduced the 1<sup>st</sup> respondent to him as his wife and they had two small children. Further, the deceased wanted to change the 1<sup>st</sup> respondent's name in the identification card to reflect his name.
20. However, the applicants filed further affidavits dated; 27<sup>th</sup> February 2017, and maintained that, the 1<sup>st</sup> respondent was never married under the Kikuyu customary law, as no elders were sent to her father and neither was any dowry negotiations commenced under that law. Furthermore, she was not involved or included in the funeral arrangements of the deceased.
21. That, the cause of death of the deceased was a cardiopulmonary arrest due to tuberculosis and meningitis due to retroviral diseases, which are symptoms of AIDS. Further, the tuberculosis and meningitis affected his mind and he was emaciated, physically weak and nursed by his sister until his demise. Further the claim that the 1<sup>st</sup> respondent was evicted is a ploy to seek the sympathy of the court. That, the late sister resided on the subject land for over fifty (50) years until her death.
22. The applicants' case was further supported by an affidavit dated 27<sup>th</sup> November 2017 sworn by Peter Maina Wamburu, a Nyumba Kumi elder. He averred that the deceased was his classmate at Murungaru Primary School and on completing school, he was employed as long distance truck driver.
23. That, to the best of his knowledge, the deceased never got married nor did he have any children. Further, he never built a residence on Land Parcel Nyandarua/Ol Aragwai/1567.
24. Further, the deceased suffered from a mental illness and tuberculosis, was emaciated forcing him he retired from his job and went to live with his deceased sister, who took care of him. Furthermore, although he saw the 1<sup>st</sup> respondent cultivating the deceased's land but never saw any children.
25. The applicants relied on a further affidavit dated on 27<sup>th</sup> November 2017 sworn by John Maina Macharia, the deceased's brother in law, married to Margaret Gathoni, the deceased sister, in 1988. He deposed that he knew the deceased for about 30 years.
26. That, he gave the deceased both material and emotional after he fell ill. That, he took him to hospital when his health deteriorated and on 24<sup>th</sup> October 2014, he visited the deceased at Naivasha District Hospital, and the deceased informed him that, a woman named Pauline had leased two acres of land and that she should be given one acre upon his death, but the deceased never gave him an explanation for the same.
27. He averred that, after the deceased was buried, his family and the 1<sup>st</sup> respondent plus her two brothers met at Ol Magogo Assistant Chief to discuss the distribution of the suit property and it was agreed



- that, the late Teresia Wairimu Itotia who took care of the deceased, be given one acre, while the rest of the property would be shared equally among the 1<sup>st</sup> respondent and the brothers of the deceased.
28. The applicants further filed an affidavit dated, 10<sup>th</sup> December 2019 sworn by Joseph Kimani Mwangi, the Senior Chief in charge of Murangaru location, where the deceased hails from. He averred that, the deceased was a long distance truck driver and was never married nor did he have any children. Further the deceased never built a home within the location.
  29. That, around the year 2002, the deceased became ill and was rescued by his brother who placed him under the care of his elder sister who nursed him until his death.
  30. That, the deceased family went to his office after the burial in a bid to obtain a letter to enable them apply for grant of representation. However, he advised the deceased family to first agree on distribution of the estate and to include the deceased's nephews who were all minors. Subsequently, the family presented minutes from a family meeting and he issued them with an introduction letter for purposes of applying for Grant of Letters of Administration.
  31. The application was heard by way of viva voce evidence. The applicant's case was supported by evidence of four witnesses. Joseph Kibanya Kiratu (AW1) the deceased's younger brother reiterated that, the deceased was not married and neither did he have any children.
  32. Further, that the deceased did not have a house and lived in his mother's house with his sister. Furthermore, the deceased suffered from meningitis and tuberculosis for about five years could not work and he took care of the deceased and his treatment.
  33. That, all the deceased siblings were given shambas and the deceased inherited given 8 ½ acres that belonged to their grandmother, but he never visited his rural home in Murungaru, Githunguri in Ol Araguai.
  34. (AW1) Kibanya denied that, the 1<sup>st</sup> respondent was married to the deceased either in accordance with traditional law or by other ceremony. That she had only leased a plot from the deceased. Further, he knew the 1<sup>st</sup> respondent's family and they were never given dowry. Furthermore, after the deceased died, the 1<sup>st</sup> respondent was never included in the program as she was not family.
  35. However, when the deceased was in hospital, he stated that, the children named; Mbugua should be given some land and 1<sup>st</sup> respondent be given 1 ½ acres, however, the deceased died before they could clarify the gifts.
  36. Furthermore, on the eve of the funeral, the 1<sup>st</sup> respondent and her two brothers were called for a meeting where he explained the wishes of the deceased and the minutes of meeting were signed by the parties and witnessed and confirmed by the Assistant Chief of Ol Magogo.
  37. That although he obtained a death certificate, the 1<sup>st</sup> respondent used a letter from the chief and obtained a second death certificate and proceeded to file for letters of administration without their knowledge.
  38. Peter Maina Wamburi (AW2) and John Maina Macharia (AW3) adopted their affidavits on record already referred to herein. Joseph Kimani Mwangi (PW4), the Senior Chief, adopted his affidavit on record and further stated that, the 1<sup>st</sup> respondent was among the people who went to his office in the presence of the Assistant Chief. That, he wrote the letter for the deceased family according to their wishes.
  39. However, he learnt that, the Assistant Chief also wrote for the 1<sup>st</sup> respondent a letter which resulted in their being summoned by the District Commissioner (DC) and it was agreed that the Assistant Chief



- should withdraw the letter he wrote on the ground that in Nyandarua County only a Chiefs is allowed to write the subject letter, and in any case, the letter by the Assistant Chief was dated after that of (AW4) Senior Chief Kimani's letter.
40. The respondents on their part called two witnesses. Joshua Maina Kihara (RW1) the Assistant Chief, Ol Magogo sub-location who testified that, he wrote a letter dated 8<sup>th</sup> December 2014, but was summoned by his superiors, who intimidated and threatened him to withdraw the letter, but, he stood by the content of his letter.
  41. That, he was the deceased immediate neighbour and his in law and knew that the deceased married the 1<sup>st</sup> respondent in 2006, in a traditional wedding under Kikuyu Customary law. Further, at the time of the marriage, the 1<sup>st</sup> respondent had seven (7) children from a previous relationship but lived with two (2) children in the deceased's home.
  42. Furthermore, the deceased attended teacher parents meeting for the 1<sup>st</sup> respondent's children and even built a house for them. That during information gathering exercise the deceased introduced the 1<sup>st</sup> respondent as his wife to Nyumba Kumi elders. Additionally, during the deceased burial the Village elder and the Padre recognized the 1<sup>st</sup> respondent as the deceased's wife.
  43. That one month after the deceased was buried, the 1<sup>st</sup> respondent was evicted from her house by the deceased's brothers who demolished the houses on the property.
  44. Pauline Wangeci Mbugua (RW2) the 1<sup>st</sup> respondent reiterated that she was married the deceased in the year 2006 and had seven children at the time but moved with only two of them as the rest were adults. That, the deceased accepted her children as his own and paid school fees for the two children.
  45. Further, the deceased gave her father Kshs. 10,000 and informed him that she was living with him. Further, on 7<sup>th</sup> April 2014, she visited the registration office in the company of her father in order to change the name of her identification card to reflect the name of the deceased Mbugua. Furthermore, her father asked the deceased for a token which he was given.
  46. She averred that, land registration No. Nyandarua/Ol Aragwau/1568 was their matrimonial home until the deceased's demise in the year 2014. She conceded that, they lived together with the deceased's sister on the subject land and that the deceased acquired the said land from his grandmother.
  47. That, after the death of the deceased the applicants chased her away from the subject property and brought down her house as they wanted the title. However, she rejected their proposal to have the property subdivided between her and the deceased siblings and/or estate and urged that she should inherit the whole of deceased property.
  48. The application was disposed of vide written submissions. The applicants filed submissions dated, 27<sup>th</sup> February 2023 and argued that, the 1<sup>st</sup> respondent had the evidentiary and legal burden of proving she contracted customary law marriage, as held in the case of, Re Estate of Stephen Ngigi Karwigi (Deceased) [2020] eKLR.
  49. That, all the requirements of a Kikuyu customary marriage were never met and there was no meaningful or proper celebration of a Kikuyu customary marriage. Further, no reliable evidence was marshalled in that, the 1<sup>st</sup> respondent's witnesses all were related to her. Further change of name is not proof of a kikuyu Customary marriage. The applicants relied on the case of; Florence Kanyora v Njorge Kinyanjui as cited in the case of Re Estate of Stephen Ngigi Karwigi (supra).
  50. The applicants further submitted that, the presumption of marriage arises under certain conditions such as; long cohabitation, where the parties have children or properties together, or where the



community regards them as husband and wife. However, there was no evidence that the relationship between the deceased and the 1<sup>st</sup> respondent satisfied any of the conditions.

51. That, the Supreme Court of Kenya has held that “come we stay” is not a marriage and that the doctrine of presumption of marriage is on its deathbed. The applicants cited on an article in the Daily Nation Newspaper of; 30<sup>th</sup> January 2023.
52. However, the respondent in response submissions argued that, the applicants failed to prove on a balance of probability that she was not the deceased’s wife. That, there was evidence of Kikuyu customary marriage and that she cohabited with the deceased in their matrimonial house in Ol Aragwai Scheme in Nyandarua. Further, she changed her name in her national identification card to reflect the deceased’s name.
53. Furthermore, the evidence by the applicants that they agreed to give her one and a half (1 ½) acres proved there was a relationship between her and the deceased. Lastly, the harassment by the applicants’ after the deceased’s death was an emerging trend where widows are chased away by the brothers of the deceased.
54. After considering the application in light of the materials placed before the court and/or the arguments advanced by the respective parties, I find that, the first issue to determine is whether the applicants have met the threshold of grant of the orders sought and/or revocation or annulment of the grant herein.
55. The provision of section 76 of the *Law of Succession Act* (Cap 160) Laws of Kenya which deals with the subject matter 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 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.”



56. To revert back to the subject matter herein, the key issue in contention is whether the 1<sup>st</sup> respondent mislead and/or misrepresented facts to the court in the succession cause when she averred that she was married to or was the deceased's wife. Further whether (if that is true) it amounts to fraudulent misrepresentation that warrants grant of the orders sought.
57. The applicants aver that, she was not a spouse and that the deceased merely leased part of his land in question to the 1<sup>st</sup> respondent but the question is: is there evidence to that effect. Is there proof of a lease agreement between the deceased and the 1<sup>st</sup> respondent.
58. It is also the contention of the applicants that the deceased had no biological children with the 1<sup>st</sup> respondent. That fact is not in dispute but it is alleged he adopted the 1<sup>st</sup> respondent's two children she moved with, which is subject to proof.
59. The applicants further aver that, the deceased had no house yet again it is alleged that, they demolished his house after his death. So which house was the deceased residing in with the late sister, as stated by the applicants and what happened to the house after the deceased and the late sister he resided with died.
60. In fact, it suffices to note that, although the applicants' evidence is that, the deceased stayed in his mother's house, they also state that he stayed on the subject land herein with the late sister. Indeed, it is conceded that he inherited 8 ½ acres of land from the grandmother, therefore he had his own parcel of land.
61. It is also noteworthy at page 7 of 30 of proceedings herein that, evidence has been adduced by inter alia (AW1) to the effect that, the deceased indicated before his death that, the 1<sup>st</sup> respondent be given, be given 1 ½ acres and her children named Mbugua too be given land. Similarly, (AW3) John Maina Macharia stated that the deceased told him 1<sup>st</sup> respondent be given 1 acre and (ARW4) Joseph Kimani Mwangi Chief Murangaru Location testified that the family said the 1<sup>st</sup> respondent should be a beneficiary.
62. The key question is: If the 1<sup>st</sup> respondent was a tenant and/or lessee, why would the deceased have said she and children be given land? Notably, (AW1) further testified that the deceased died before they could clarify the gift, which is inconsistent with his alleged of lease arrangement.
63. Further evidence indicates that, after the burial of the deceased, the family held a meeting wherein the 1<sup>st</sup> respondent was invited to attend. Indeed, Assistant Chief: Ol Magogo confirmed the same. The question is: Why were family members inviting a "stranger" to attend the meeting.
64. The other issue revolves around the alleged mental state of the deceased. AW2 Peter Maina Wambui testified that the deceased had severe mental illness, however, no medical document was produced in support thereof.
65. To revert back to the key issue of the marriage between the deceased and the 1<sup>st</sup> respondent, it is clear that, there is parallel views on the same. In fact that is supported by the fact that, the local administration being the office of the Chief and the Assistant Chief issued two different letter to confirm and deny the 1<sup>st</sup> respondent was married to the deceased.
66. In the same vein, the evidence adduced in support and opposition to the effect that, the 1<sup>st</sup> respondent was married to the deceased under the Kikuyu Customary law and indeed the deceased attempted to assist her change her surname to his.
67. From all the aforesaid, it is clear that neither party can claim to have exclusive right of inheritance of the deceased property. A lot of unresolved issue negates the same as such the Grant of Letters of



Administration, the confirmation of the Grant and/or resultant Certificate cannot be upheld and or confirmed and the same is annulled as prayed. The parties can petition afresh for the Grant of Letters of Administration and or negotiate the settlement, which I encourage them to do for expeditious and harmonious resolution of the matter. Failure of which the court will resolve it.

68. It is so ordered

**DATED, DELIVERED AND SIGNED ON THIS 23RD DAY OF MAY 2023.**

**GRACE L. NZIOKA**

**JUDGE**

**In the presence of:**

**Mr. Njihia for the applicants**

**Mr. Ngunjiri for the respondents**

**Ms. Ogutu Court Assistant**

