



REPUBLIC OF KENYA



KENYA LAW
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**Mbogonye v Mugambi (Civil Appeal 80 of 2019)
[2023] KEHC 18015 (KLR) (22 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18015 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 80 OF 2019
RM MWONGO, J
MAY 22, 2023**

BETWEEN

SUSAN MICERE MBOGONYE APPELLANT

AND

TERESIA WAINOI MUGAMBI RESPONDENT

*(Being an appeal against the judgment dated 31/10/2020
by Hon. E Wambo SRM in CM's Succession No 73 of 2018)*

JUDGMENT

1. The deceased died on November 7, 2005. His daughter Teresia Wainoi Mugambi (“Teresia”), took out letters of administration in Succession Cause No 73 of 2018 in the Magistrate’s Court, Kerugoya. In the petition, she indicated the survivors of the deceased to be herself and her sister, Janet Wangithi Gachoki. The deceased’s property was indicated as being only LR Inoi/ Kiamburi/ 673. Letters of administration were granted on June 28, 2018.
2. On February 22, 2019, the appellant, Susan Micere Mbogonye (“Susan”). filed a summons for revocation of grant. She asserted that she was the deceased’s wife, and the petitioner her daughter. She listed her children as: Manasseh Wachira Mbogonye, Wilfred Mugo Mbogonye, Monica Wainoi Gichigo, Rose Wangithi Njiraini, Alice Wangari Muchiri, Janet Wangithi Gachoki, Teresia Wainoi Mugambi (Petitioner) and Mugo Mbogonye.
3. The appellant sought revocation of the grant issued to Teresia on grounds that it was obtained fraudulently by making false statement and concealment of something material from the court.
4. Teresia responded admitting that Susan is her step mother, and asserted that during his lifetime, the deceased distributed his land amongst his family members as follows:
 - a) Inoi/Kiamburi/668 measuring 3 acres was given to Thomas Muthike Mbogonye her brother.



- b) Inoi/Kiamburi/669, measuring 3 acres was given to Mugo Mbogonye, her brother.
 - c) Inoi/Kiamburi/670, measuring 3 acres was given to Harrison Mwangi Mbogonye the applicant's son.
 - d) Inoi/Kiamburi/671, measuring 3 acres was given to Wilfred Mugo Mbogonye, applicant's son.
 - e) Inoi/Kiamburi/672 measuring about 1.5 acres was given to the applicant and her 3 daughters but was grabbed by her son Manasseh Wachira Mbogonye, also from the second house.
 - f) Inoi/Kiamburi/673 measuring 1 acre, and the subject matter of the succession cause, was given to her and her sister Janet Wangithi Gachoki. It remained in the name of the deceased.
5. The application was heard orally in the lower court. Susan and Manasseh Wachira Mbogonye testified for the applicant. Teresia was the sole witness for the respondent's case. The trial court found in favour of Teresia. Following that determination, Teresia filed a Summons for Confirmation of grant, which was issued on November 7, 2019.
6. Dissatisfied, Susan filed this appeal dated November 5, 2019 on the following grounds:
- a) The Learned Magistrate erred in law and fact in failing to appreciate the grounds upon which a grant can be revoked.
 - b) The learned magistrate erred in law and fact in failing to consider in totality the evidence adduced before him, while arriving at his decision.
 - c) The learned magistrate erred in law and fact in failing to consider that some children and dependants of the deceased were not informed or involved in the succession proceedings and there was need to have the process of distribution started afresh.
 - d) The decision was against the evidence and applicable law.
7. The parties filed written submissions.

Appellant Submissions

8. The appellant submitted that the deceased, was the owner of land parcel number Inoi/Kiamburi/23, measuring about 14 ½ acres. He subdivided that land sometime in 1995 into 6 portions being land parcel numbers Inoi/Kiamburi/668, 669, 670, 671,672 and 673.
- i) Land parcel number Inoi/Kiamburi/668 measuring 3 acres was transferred and registered in the name of Thomas Muthike Mbogonye of the first house.
 - ii) Land Parcel number Inoi/Kiamburi/669, measuring 3 acres was given to Samuel Mugo, also from the first house.
 - iii) Land Parcel number Inoi/Kiamburi/670, measuring 3 acres was given to Harrison Mwangi Mbogonye. a son from the second house.
 - iv) Land parcel number Inoi/Kiamburi/671, measuring 3 acres was given to Wilfred Mugo Mbogonye, from the second house.
 - v) Land parcel number Inoi/Kiamburi/672 measuring about 1 acre was given to Manasseh Wachira Mbogonye, also from the second house.



9. The 6th portion, land parcel number Inoi/Kiamburi/673 measuring 1 acre, remained in the name of the deceased. It is the subject matter of the said succession cause.
10. The trial court identified only one issue for determination, namely, whether or not the petitioner made a false statement, and concealed something material to the case. The trial magistrate then made a finding that though the Respondent had indicated that the deceased had 3 children, the evidence showed that the applicant was a wife of the deceased, and that the applicant has 6 children. The court made a finding that there was no material non-disclosure by the Respondent when she commenced the succession proceedings as all other beneficiaries had obtained their gift inter vivos, and that the applicant Susan Micere Mbogonye should be contented with what her household was given by the deceased during his lifetime.
11. She submitted that the said finding was erroneous, both in law and fact, hence this appeal. Not all children of the deceased obtained land as gift inter vivos. The surviving wife who is the appellant herein, as well as her daughters did not get any land.
12. According to the provision of Rule 40(3) of the *Probate and Administration Rules*, the affidavit in support of summons for confirmation of grant should contain the names, ages and addresses of the children of the deceased as well as the wife, wives or former wife or wives of the deceased in case of a male deceased. This provision of the law was not complied with. It is equally not in dispute that the appellant and her daughters have never renounced their right to inherit the properties of the deceased.
13. She relied on the case of *In re Estate of Muthoni Kanvua (deceased)* [2018] eKLR Nyeri High Court Succession Cause No. 502 of 2Q13, where the court, while citing another case, stated:

“In *Mary Wangari Kihika v John Gichuhi Kinuthia & 2 Others* [2015] eKLR the court cited and applied several authorities on the place of daughters when it comes to inheritance. The fact of the matter is unmarried or married, that is neither here nor there. The only ground would be renunciation of the right to inherit. And that applies equally to both the male and the female children. These ladies are each beneficially entitled.”
14. She concluded by stating that the findings of the learned trial Magistrate were erroneous, and we humbly urge the Court to allow the appeal in the manner proposed in the memorandum of appeal.

Respondent's submissions

15. The respondent, Teresia, submitted that the deceased had two wives namely: Margaret Wakiaga (Respondent's Mother) and Susan Micere Mbogonye (the Appellant). Margaret Wakiaga had four children and Susan Micere Mbogonye had six children. All the parties who testified confirmed that the deceased had during his lifetime subdivided the land parcel number Inoi/Kiamburi/23 into four portions as follows:
 1. Inoi/Kiamburi/670- measuring 3 acres was given to the appellant which she later subdivided into Inoi/Kiamburi/1441 and Inoi/Kiamburi/1442.
 2. Inoi/Kiamburi/671- measuring 3 acres was given to Wilfred Mugo Mbogonye.
 3. Inoi/Kiamburi/672-measuring 1/2 Acres which was given to the appellant and her daughters and which was later transferred to Manaseh Wachira.
 4. Inoi/Kiamburi/673- measuring 11/8 Acres which was distributed to the Respondent herein through confirmation of grant issued on 7th February, 2019 and it is the subject suit herein which was only available for distribution in the estate of the deceased herein.



16. The Appellant herein filed summons for revocation of grant dated February 22, 2019 on the ground that the grant had been obtained by the concealment of the facts that majority of the children and the appellant herein who is surviving spouse of the deceased were not involved in the succession proceedings since the respondent herein only stated that the deceased had three children.
17. The court held that no material non-disclosure was done since all other beneficiaries had obtained their land through intervivos gifts and that the Appellant should be content with what her household was given. The Appellant and her son, Mannaseh Wachira Mbogonye both testified that they had been given land by the deceased during his lifetime and that only 1 acre was left out which they both testified should be distributed to the appellant herein. They also confirmed that Teresia and her sister were not given land during the lifetime of the deceased.
18. Section 42 of the [Law of Succession Act](#) provides that where an intestate had during his lifetime or by will paid, given or settled any property to or for the benefit of a child, grandchild or house, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.
19. The respondent submitted that the court took into account the provisions of section 35 of the [Law of Succession Act](#) by holding that it was only fair and just that the Respondent herein inherits Land Parcel Number Inoi/Kiamburi/673 and that the Appellant and her family should be contented with what they were given during the lifetime of the deceased.

Issues for determination

20. The only issue for determination is:
Whether the trial court erred in dismissing the summons for revocation of grant dated February 22, 2019, and if so, what remedy is available.

Analysis and determination

21. The Appellant's summons for revocation of grant dated February 22, 2019 was premised on the ground that the grant confirmed on February 7, 2019 had been obtained by the concealment of facts. These included that the some of the deceased's children and the appellant, as surviving spouse of the deceased, were not involved in the succession proceedings. The respondent had in fact falsely indicated that the deceased was survived only by three children.
22. The courts routinely face applications for revocation of grants under section 76 of the [Law of Succession Act](#). That provision was well explained in the case of [In re Estate of Benjamin Kiregenyi Muiri \(Deceased\)](#) [2022] eKLR where it was held:

“Section 76 of the [Law of Succession Act](#) gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It states that: -

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”

23. In this case, the trial court held that no material non-disclosure had occurred since all other beneficiaries had obtained their land through gift *inter vivos* and that the Appellant should be contented with what her household was given. Additionally, that land parcel number Inoi/Kiamburi/673 be inherited by Teresia Wainoi Mugambi.
24. At the hearing the applicant/appellant, Susan, testified as PW1, whilst her son, Manasseh Wachira Mbogonye, testified as PW2.
25. She stated that she was the deceased’s wife. That he had also taken his elder rother’s wife, Margaret Wakiaga, who had two children, before he sired two more with her.
26. The picture that emerges, which is not disputed, is as follows. The deceased had 6 children with the appellant, Susan Micere Mbogonye (House 1), namely:
- 1) Monicah Wainoi Gichigo,
 - 2) Manasseh Wachira,
 - 3) Rose Wangithi,
 - 4) Alice Wangari,
 - 5) Harrison Mwangi, and
 - 6) Wilfred Mugo.
27. It is also not disputed that the deceased had taken in as his wife, his brother’s wife Margaret Wakiaga after the death of that brother, also called Mbogonye, Margaret Wakiaga (House 2) had two children with the deceased’s brother, namely:
1. Teresia Wainoi and
 2. Janet Wangithi.
- Subsequently, she bore two more children with the deceased, namely:
3. Thomas Muthike and
 4. Mugo Mbogonye
28. It is also not disputed that the deceased owned LR No Inoi/Kiamburi/23 (14.5 acres) which he subdivided in 1995 into parcels 668, 669, 670, 671,672 and 673. It is also not disputed that *inter vivos* gifts were given by the deceased as follows:
- Land BeneficiaryName& House
- 1) Inoi/Kiamburi/ 668 - 3 acres Thomas Muthike Mbogonye 1
 - 2) Inoi/Kiamburi/ 669 - 3 acres Samuel Mugo 1
 - 3) Inoi/Kiamburi/ 670 - 3 acres Harrison Mwangi Mbogonye 2
(subdivided into Inoi/Kiamburi/1441 and Inoi/Kiamburi/1442.)
 - 4) Inoi/Kiamburi/671 - 3 acres Wilfred Mugo Mbongoye. 2



5. Inoi/Kiamburi/672 - 1/2 acres Manaseh Wachira Mbogonye 2
(later given to the appellant and her daughters and which was later transferred to Manasseh)
6. Inoi/Kiamburi/673 - 1 1/8 Acres remained in deceased's name
29. It is clear that the daughters of the deceased did not benefit from the intervivos gifts, and neither did the deceased's wives.
30. Section 42 of the *Law of Succession Act* provides that:
- “Where –
- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
 - (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.”
31. The principle here is that the law seeks to equalize those that have received a prior benefit of a gift with those who have received less, or nothing
32. The appellant submitted that not all children of the deceased obtained land as gift inter vivos. The surviving wife who is the appellant herein, as well as her daughters did not get any land. these facts are supported by the evidence.
33. The respondent submitted that the court took into account the provisions of section 35 of the *Law of Succession Act* by holding that it was only fair and just that the Respondent herein inherits Land Parcel Number Inoi/Kiamburi/673 and that the Appellant and her family should be contented with what they were given during the lifetime of the deceased.
34. The affidavit in support of the summons for confirmation of grant by Teresia Wainoi dated March 12, 2019 indicates in paragraph 5(e) that Land Parcel Inoi/ Kiamburi/672-measuring 1 1/2 Acres was given to the appellant and her daughters and that it was grabbed by her son Manaseh Wachira. However, the evidence did not bear this out.
35. Ultimately, it is clear from the evidence of the witnesses that the deceased land had been gifted to his sons. The 1st house had two sons who were gifted 6 acres. The 2nd house had three sons who were gifted 7 ½ acres. The remaining 1 acre was held in the deceased's name. Further, it is clear that the appellant and her three daughters did not inherit any land from the deceased, nor did they ever renounce their right to inherit the properties of the deceased.
36. In Nyeri High Court Succession Cause No. 502 of 2Q13, *in re Estate of Muthoni Kanyua (deceased)*[2018] eKLR, while citing another case, stated;
- “In *Mary Wangari Kihika v John Gichuhi Kinuthia & 2 Others* (2015) eKLR. the court cited and applied several authorities on the place of daughters when it comes to inheritance. The fact of the matter is unmarried or married, that is neither here nor there. The only ground would be renunciation of the right to inherit. And that applies equally to both the male and the female children. These ladies are each beneficially entitled.”



37. There are other authorities that support the position that daughters have the same inheritance rights as sons. *In the Matter of the Estate of Elizabeth Wanjiku Munge (Deceased)* [2015] eKLR it was stated by Musyoka J as follows:

“ 25. The provisions of Part V of the Act refer to “child” or “children.” They make no distinction as between sons and daughters or male and female children. No distinction is made on their marital status. The effect of this is that the estate ought to be shared equally among all the children of the deceased without considering their gender or their marital status. It should be shared equally between sons and daughters, where reference to daughters includes those that are married. This is the position so long as the deceased died after 1st July 1981 and the *Law of Succession Act* applied to the estate.”

38. Similarly, the Court of Appeal in the case of *Peter Karumbi Keingati & 4 Others v Dr Ann Nyokabi Nguthi & 3 Others* [2014] eKLR I was stated as follows:

“ As we understand it, the provisions of the Constitution on non-discrimination and equality are meant to address, not abstract and theoretical postulates, but very real problems of discrimination, exclusion and marginalization rooted in and perpetuated by the realities of our society, including our cultures and customary laws and practices. The applicants will be contending that customary law excludes married daughters from inheriting their father’s estate because such daughters will inherit from the families where they are married. Hence, they should not inherit twice. On the other hand, the *Law of Succession Act* makes no distinction between sons and daughters. So, the Act puts sons at a disadvantage, as the daughters will inherit twice while the sons only inherit once. Accordingly, it is submitted, the *Law of Succession Act* is contrary to the Constitution in that it discriminates against sons. Customary law must, in the circumstances, be given primacy over the *Law of Succession Act* because under it both sons and daughters inherit only once.

The arguments are based on many assumptions that are, in our opinion, Prima facie questionable. Why is there an underlying and unstated assumption that in this day and age in Kenya, Kikuyu daughters will only marry in Kikuyu families from which they will inherit? Suppose they chose to get married into a community, any community in the world, where the rules of succession are completely the reverse of Kikuyu customary practices? Suppose they married, as happens every day, into families that have absolutely nothing to be inherited? Does a son inherit twice when he inherits from his father and his wife inherits from her family? Somehow the applicants have adeptly, if dubiously, framed customary practices as the paragons of equality and equity.”

Conclusions and disposition

39. Taking all the foregoing into account, it is clear that the respondent concealed material facts that the deceased had 3 daughters from the second house of Susan Micere, who had not renounced their right to inherit the deceased’s land, land parcel Number Inoi/Kiamburi/673

40. I am persuaded that the trial court’s decision was erroneous in not considering the whole evidence on record, and in particular that some beneficiaries had not been included in the succession.

41. Accordingly, the appeal succeeds, and the judgment of the lower court is hereby set aside.

42. The orders of injunction granted by the court on September 15, 2020, are hereby confirmed



43. Any party that wishes to renounce their share of the deceased's estate shall do so in the required manner at the time of filing a fresh petition.
44. This being a family matter, I make no order as to costs.
45. Orders accordingly.

DATED AT KERUGOYA THIS 22ND DAY OF MAY, 2023

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R. MWONGO

JUDGE

In the presence of:

1. Wanjiru holding brief for Kagio for the Applicant.
2. Githinji holding brief for Makworo for the Respondent.
3. eresia Wainoi Mugambi - Respondent present in Court.
- 4. Murage, Court Assistant.**

