



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Muombe Tele (Deceased) (Family Appeal E002 of 2022)  
[2023] KEHC 18571 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18571 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
FAMILY APPEAL E002 OF 2022  
TM MATHEKA, J  
JUNE 14, 2023**

**BETWEEN**

**ARISON KYUMWA MBALI ..... 1<sup>ST</sup> APPELLANT**

**KENNEDY SULI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**TITUS KIVANGA NZUVE ..... RESPONDENT**

*(From the Ruling of Hon. Otieno J (RM) in Makueni Resident Magistrate  
Court Succession Cause No. E051 of 2021 delivered on 31st March 2022)*

**JUDGMENT**

1. Muombe Tele died on 24/08/2011 at Makueni aged 107 years old.
2. She was survived by her three sons Mbali, Suli and Mutua Tele, and a daughter in law Ndulu Mwanzii, whose date of birth is indicated as 1935.
3. Vide petition dated 26/02/2021, her two grandsons Arison Kyumwa Mbali and Kennedy Suli filed Succession Cause E051 of 2021 in the CM Court Makueni. They listed the four beneficiaries, and the only asset of the Estate as Nzaui/Kilili/158.
4. On 06<sup>th</sup> Septembers 2021, the two were granted grant of letters of administration intestate of their grandmother's estate.



5. Vide a plaint dated 20<sup>th</sup> September 2021 the two filed a suit CM ELC No. E035 of 2021 on behalf of the estate of Muombe Tele against one Elizabeth Nduku Richard seeking
 

“ a permanent injunction restraining the defendant either by her employees, agents, agencies, and/or servants from trespassing or otherwise interfering in any way with the applicant’s occupation/possession of land title no. Nzai/Kilili/158 ....”
6. It is clear from the record that it is this suit that provoked the Summons for Revocation of Grant by Titus Kivanga Nzuve dated 26<sup>th</sup> October 2021 seeking the revocation of the grant issued to the Petitioners. The Summons is brought under sections 48(1) and 76 of the Law of Succession Act, and rule 44(1) of the P&A Rules.
7. The grounds as set out on the face of the Summons are that the petitioners failed to disclose the full list of the beneficiaries of the deceased’s estate; that they were not the proper parties to file the petition since they are grandchildren of the deceased yet the children of the deceased are alive; and that no reason had been given as to why they (children) did not bring the petition; that the petitioners embarked on an abuse of their powers as administrators by bringing claims against a 3<sup>rd</sup> party who had purchased property with the full knowledge and acquiescence of the deceased during her life time.
8. The Summons is supported by the affidavit of Titus Kivanga Nzuve.
9. He claims that the deceased was wife of Tele Kalu, brother to his father Nzuve Kalu and that Tele and Nzuve had moved to that land in 1995. That the property though registered in the name of Muombe Tele – wife of Tele Kalu – it was so registered in trust for the families of Tele and Nzuve and Tele Muombe held the same under a customary trust for the two families. That on or about 24<sup>th</sup> October 1996, elders of the Ethanga clan subdivided the land between the two brothers– thereafter the house of Nzuve Kalu sold a portion of their share to Richard Kalui and Elizabeth Nduku Richard. That there was an understanding that upon obtaining letters of administrative and the confirmation of the grant, the petitioners would facilitate the subdivision of the property between them and the family of Nzuve – who would then transfer this property to the alleged purchaser.
10. All these claims were denied in the joint affidavit of the petitioners – they explained that their parents, the immediate beneficiaries of the estate were quite elderly and had given their consent for the two to be administrators. That the applicant was a stranger to the estate as he was not a beneficiary of the deceased’s estate and in any event – his father Nzuve Kalu was the registered proprietor of LR Nzai/Kilili/157. That the subject land parcel was registered in the name of the deceased without any encumbrance, and the house of Nzuve Kalu was not beneficially entitled to any share thereof.
11. This Summons for Revocation of Grant was heard by way of *viva voce* evidence. At the end parties through their respective counsel filed written submissions.
12. By a ruling dated 31<sup>st</sup> March 2022, the learned magistrate Hon. Otieno rendered herself and revoked the grant – on the ground that;
 

“ the applicant [had] proved on a balance of probabilities that the respondent listed the parcel of land as an asset of the deceased with the knowledge of the existence of a customary trust by the family of Nzuve Kalu in which the applicant belongs. The applicant has established that the grant was irregularly obtained ... on the basis of concealment of facts material to the case hence rendering it defective”.



13. The petitioners were obviously riled e by this finding and promptly filed this appeal on the following grounds;
  - a. The learned trial Magistrate erred in law and fact and misdirected herself by revoking the grant issued on 06/09/2021.
  - b. The learned trial Magistrate erred in law and fact and misdirected herself by making a determination on customary trust which is under the jurisdiction of the Environment and Land Court.
  - c. The learned trial Magistrate erred in law and fact and misdirected herself by failing to consider the applicable case law availed by the plaintiff.
  - d. The learned trial Magistrate erred in law and fact and misdirected herself by failing to consider the evidence tendered.
  - e. The learned trial Magistrate erred in law and fact and misdirected herself by disregarding the fact that there is an ongoing environment and land case No. E035 of 2021 where the issues of customary trust could have been ventilated upon.
  - f. The learned trial Magistrate erred in law and fact and misdirected herself by considering the agreement dated 23/10/2019 yet the same had not been properly translated as required by the law.
  - g. The learned trial Magistrate erred in law and fact and misdirected herself by awarding costs on a dispute that involves close family members.
14. Evident from the grounds of appeal the main complaint being that the learned magistrate was in error on the two fronts – (i) failing to considers the evidence on record and (ii) making a finding on customary trust yet she lacked jurisdiction to do so.
15. Parties through their respective counsel filed written submissions

### **The Appellants' Submissions**

16. On first ground the appellants cite s. 76 of the *LOSA* on the power of the court to revoke a grant. They rely on *Re Estate of Kisigwa Asuga Asuga (deceased)* [2016] eKLR on the proposition that the power to revoke a grant must be exercised judiciously and n sound ground taking into account the interests of beneficiaries to the estate and the interests of justice.
17. They demonstrate with a list of authorities summons seeking the revocation of a grant on similar ground have been dismissed for want of jurisdiction of the probate court. *Re Estate of Raphael Kwama Shituku* [2016] eKLR, *Re Estate of Elijah Mbiti Kiamba* [2020] eKLR and *Re Estate of James Muiruri Kamau (Deceased)* [2018] eKLR where the court (Ndung'u J) stated;
  - “66. To that extent, if the Applicants held that the said title was held in trust for them, it would be incumbent upon them to mount a legal challenge against the estate of the deceased through the administrator of the estate.
  67. In essence, what this gives rise to is a position of competing interests in land. The question arises as to whether this ground suffices to warrant the revocation of a grant and whether this court has the necessary jurisdiction to entertain a suit seeking determination of a question of land held in trust.



74. From the foregoing, the Applicants' application seeks orders that are not available under Section 76 of the Law of Succession Act that provides for revocation of grant... I find no merit in the summons for revocation of grant dated 7th May 2012 and I dismiss the same.”
18. In Re Estate of Elijah Mbiti Kiamba (Deceased) [2020] eKLR where the court (Kemei J) stated;
11. The primary duty of this court in the exercise of its jurisdiction as a probate court can be coined in what William Musyoka J, stated In Re Estate of G K K (Deceased) [2017] eKLR that:
- “The primary function of a probate court is distribution of the estate of a dead person.”
12. A perusal of the pleadings and analysis of the evidence on record indicates that the claims by the objectors are based on customary trust.....In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed. The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased...Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.
19. On whether the trial magistrate erred by determining the issue of a customary trust which is reserved for the Environment and Land Court. They submit that they led evidence on the existence of a suit in the Magistrates ELC Court and that the trial magistrate had no jurisdiction to determine the issue of a customary trust in succession proceedings. They have relied on the two cases cited above as well as; Malindi Law Society v the AG & Others Constitutional Petition No. 3 of 2016, Re Estate of Mbai Wainaina (Deceased) Re Estate of Richard Karanja Javan [2014] eKLR, Re Estate of James Muiruri Kamau (deceased) [2018] eKLR, Re Estate of Raphael Kwama Sbitiku [2016] eKLR where the court stated;
- “21. The objector's claim being founded on trust or customary trust coupled with prolonged occupation and use of land, this, in my view, is not a matter that falls within the jurisdiction of this court.
22. ... Article 162(2) of the Constitution establishes courts of equal status to the High Court which are to specifically deal with Employment and Labour relations and the environment and the use and occupation of, and title to Land. The Environment and Land court (ELC) was established by The Environment and Land Court Act (No.19 of 2011) and the court has since been duly constituted following appointment of Judges to that court.
24. The Constitution has in very clear terms excluded this court's jurisdiction from matters that relate to occupation, use of and title to land. Prior to the establishment of the Environment and Land Court, this court had jurisdiction to hear and determine any issue including the one raised by the objector herein.



However, as things stand now, this court has no such latitude and cannot proceed as though Article 165(5) did not exist.”

20. On ground (e), they submit that the trial magistrate was sufficiently informed of the existence of ELC Case No. E035 of 2021 touching on the issue of customary trust. They contend that they also submitted on the issue before the trial court and argued that the issue of customary trust could only be resolved by the Environment and Land Court.
21. On the 4<sup>th</sup> ground it was submitted that the agreement dated the learned trial magistrate relied on a document that was not in the language of the court citing an agreement dated 23<sup>rd</sup> October 2019. They rely on *Timothy Musau Mutua v Kamala Isingi* [2017] eKLR where the court stated;
- “ 14. To support that allegation, the Plaintiff has annexed on his Affidavit two copies of “sale agreements” dated 31<sup>st</sup> February, 1980 and 20<sup>th</sup> April, 1980.
15. The purported sale agreements are in Kamba language and have not been translated in English.
16. It is trite that under the provisions of Section 86 of the *Civil Procedure Act*, the language of this court is English.
17. Consequently, having failed to translate the said agreements as required by the law, I find and hold that the same cannot be used as evidence by the court.”
22. On fifth ground it is submitted that considering that this was a family matter no costs should have been awarded because even the jurisprudence from our courts is that such parties are directed to bear their own costs.

#### **The Respondent’s submissions.**

23. The respondent submits that the power to revoke a grant under section 76 of the *Law of Succession Act* is discretionary. He argues that in the prevailing circumstances of the case before the trial magistrate it was prudent to revoke the grant so as to give the parties the opportunity to resolve the disputed issues of distribution of the estate before the distribution by the court. He relied on *Albert Imbuga Kisigwa -vs- Recho Kawai Kisigwa*, Succession Cause No.158 of 2000 where the court stated that;
- “Power to revoke a grant is discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of the beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interests of justice.”
24. To support the argument further, that the grant needed to be revoked to allow the resolution of the dispute on distribution he cited *Priscilla Ndubi and Zipporah Mutiga -vs- Gerishon Gatobu Mbui*, Meru Succession Cause No. 720 of 2013 where the court stated;
- “The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3)



of the *Probate and Administration Rules* was enacted so that claims which are *prima facie* valid should be determined before confirmation.”

25. As to whether the trial court could determine issues of customary trust, he took the position that the appellant did not bring to the attention of the learned trial magistrate the existence of the ELC Case No E035 of 2022. That the appellant was bound by his pleadings and could not be allowed to sneak evidence which was not at the trial stage. He argues that he is not a party to the said proceedings and there was no application to bring the respondent into the said proceedings.

26. The respondent further submits that a

“customary trust is a concept of intergenerational equity where the land is held by one generation for the benefit of succeeding generations.”

He argues that the whole matter was not about customary trust and the respondent had raised other issues including that his claim over the estate is one of a beneficiary. For this proposition he relies on *Isack Kieba M'inanga –vs- Isaaya Theuri M'Lintari & another* [2018] eKLR where the court stated as follows:-

“...it is not every claim of right to land that will qualify as a customary trust. In this regard we agree with the high court in *Kiarie vs Kinuthia*, that what is essential is the nature of the holding of the land and the intention of the parties...”

27. He contends that the trial magistrate considered the evidence tendered and applied the relevant laws.

### **Analysis and Determination**

28. I have carefully considered the evidence on record, the submissions by counsel and the issues that stand up for determination are;

- a. Whether the petitioners are the rightful administrators of the estate of the deceased.
- b. Whether pleadings and evidence filed in the trial court raised issues of customary trust.
- c. Whether the Subordinate Court had jurisdiction to deal with issues of customary trust.
- d. Whether the Grant of Letters of Administration issued to Arison Mbali and Kennedy Suli on 06/09/2021 should have been revoked.

29. With respect to the jurisdiction of this court as a first appellate court both parties cited *Selle & Another Associated Motor Boat Co. Ltd & Others* (1969) EA 123 where this court in its appellate capacity is required to re-evaluate the evidence and judgment of the trial court and to draw its own conclusions – always well aware that it neither saw nor heard the witnesses. It is not just re-evaluation but “a fresh and exhaustive scrutiny”.

30. It is settled that in order to revoke a grant there must be evidence of wrongdoing and the discretion to do so must be exercised judiciously. The court is guided by the provisions of section 76 of the *LOSA*. The grounds are based listed and must be proved by the person claiming them.

31. The applicant/respondent and his witnesses testified. Their evidence was to support the depositions in the applicants' affidavit – what evidence did the applicant provide the court with?



32. On the issue whether the petitioners are the rightful administrators of the estate of the deceased; this was evidently not the business of the respondent. The court under section 66 of the [Law of Succession Act](#) has the discretion to choose an administrator for an estate in the interest of justice. It states
66. Preference to be given to certain persons to administer where deceased died intestate When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference -
- (a) surviving spouse or spouses, with or without association of other beneficiaries;
  - (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
  - (c) the Public Trustee; and
  - (d) creditors.
33. Other than the fact that the parents of the current administrators are still alive the applicant/respondent did not demonstrate any specific wrong doing on the part of the petitioners in order to stake the claim that they were not the rightful persons.
34. On whether pleadings and evidence filed in the trial court raised issues of customary trust the question is what is the proof of the claim made by the applicant – that he and others sold the land to the purchaser in the lifetime of Muombe Tele? She died in 2011. The sale agreement is dated 18<sup>th</sup> October 1996. If she was involved why is her name/signature not on the sale agreement? The agreement is between Richard Kalu – purchaser and Titus K. Nzuve and Wambua Nzuve. The agreement states that they are selling 2 acres out of plot no. 158 “which belongs to Nzuve Kalu”. If by plot 158 they meant Nzau/Kilili/158 – by this time it was already in the name of Muombe Tele as per the register’s the proprietorship section which shows the first entry to have been made on 1<sup>st</sup> August 1976. Looking at the record it is evidently surprising that on the same date a similar entry on the same dated was made with respect to LR Nzau/Kilili/157 in the name of Nzuve Kalu.
35. While I am here I might as well point out that from the documents provided by the parties, the title deed for Muombe Tele was issued on the same date the title deed was issued for Nzuve Kalu the father the applicant/respondent. What is the explanation for this? I do not know because the applicant respondent did not offer any when the appellants’ annexed his father’s title deed details to their affidavit in reply, but it is curious that the applicant whose father was registered the same way as the grandmother of the petitioners would come up to say his family had a share in their grandmother’s land which share they sold.
36. The sale agreement with whoever they sold land to is misleading as that parcel of land LR Nzau/Kilili/158 did not belong to his father Nzuve Kalu – it was registered in the name of Muombe Tele. They would not have sold it when she was alive without her participation and they cannot now raise a claim when she is deceased – yet there is no evidence to support their claims.
37. The applicant is clearly a stranger to the estate of Muombe Tele despite the fact that she was his aunt by marriage – there is no evidence that Muombe Tele sold any land to any one out of her parcel of land LR Nzau/Kilili/158. Neither was there any evidence that the family of Nzuve Kalu had a stake in Muombe Tele’s parcel of land. I find no evidence of any beneficial interest on the part of the applicant/respondent in the estate of Muombe Tele.



38. On Whether the Subordinate Court had jurisdiction to deal with issues of customary trust, It is in *Isack Kieba M'inanga* that the court stated that
- “...it is not every claim of right to land that will qualify as a customary trust. In this regard we agree with the High Court in *Kiarie vs Kinuthia*, that what is essential is the nature of the holding of the land and the intention of the parties....”
39. *In Re estate of Richard Karanja Javan* (2014) eKLR that Court observed with respect to a similar issue
- It is not in dispute that the deceased was the registered proprietor of the property in question. His registration as such was not disputed until after his death. The registration in question was under the registered and *Registered Land Act* Cap 300, Laws of Kenya (now repealed). It was a first registration by dint of Section 143 of the *Registered Land Act*, the said registration cannot be faulted. There is judicial authority on this in *Obiero –vs- Opiyo & Others* (1972) EA 227, where it was held that a first registration is indefeasible even if fraud is proved. There is therefore no merit in the applicant’s case. Even if she had a case that there existed a trust in her mother’s favour the same ought to be established in a suit before the Environment and Land Court.
40. And *In Re Estate of the Late Jonathan Kinyua Waititu - (Deceased)* [2017] eKLR. The court held that
- “This court (M.K. Ibrahim J. as he then was) in a decision cited with approval by this court in In the Matter of the Estate of Peter Igamba Njoroge, Succession Cause No. 432 of 2009 (unreported) had this to say on the issue of probate court's jurisdiction to resolve a claim based on land held in trust. He stated:
- “I have also considered the second question which really is of locus standi or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position in law is that the Estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objectors' father. In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed. The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed. Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third part”
41. I agree with the learned Judge and add only that the learned trial magistrate was in error as indeed the succession proceedings are not the place to challenge the title of a deceased person or rise issues of trust in land. That is the jurisdiction of the environment and land court.



42. In the end there is CM ELC 035/2022 which is conceded by the applicant/respondent where the person he is fighting for has been sued – in the right forum and the issues he is raising here can only be canvassed in that forum. The applicant/respondent’s argument that the appellant did not bring this case to the attention of the trial court is untenable. He makes reference to the issues in that case and cannot deny that it is the said suit that provoked his application for revocation. Let him read the grounds on the face of the summons again. – which the petitioners have not been afraid to approach. In any event even without that suit applicant/respondent and the alleged purchasers will only be able to deal with their issues with respect to sale, occupation, ownership customary trust for land in the ELC Court as he the applicant/respondent did not establish that he is a beneficiary of the estate of Muombe Tele.
43. On whether the Grant of Letters of Administration issued to Arison Mbali and Kennedy Suli on 06/09/2021 should have been revoked: It is evident from the foregoing that the applicant/respondent did not establish any ground to warrant the revocation of the grant as provided for under s. 76 of the [law of Succession Act](#).
44. The appeal succeeds. The entire ruling and orders of the learned trial Magistrate dated 31<sup>st</sup> March 2022 be and is hereby set aside.
45. The grant that was revoked be and is hereby reinstated to the two petitioner respectively.
46. The respondents to bear the costs of this appeal.

**DATED, SIGNED AND DELIVERED VIA EMAIL THIS 14<sup>TH</sup> DAY OF JUNE 2023.**

**MUMBUA T. MATHEKA**

**JUDGE**

Appellants’ Advocates;

O. N Makau & Mulei Advocate

Respondent’s Advocates;

Kitindio Musembi & Co. Advocates

