



**Githaiga v Maina (Succession Cause 525 of 2014)
[2023] KEHC 20548 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 525 OF 2014
FN MUCHEMI, J
JULY 20, 2023
IN THE MATTER OF THE ESTATE OF PHILIP GACHIRIGWA
THAGANA (DECEASED)**

BETWEEN

PRISCILLA WANDIA GITHAIGA APPLICANT

AND

GITUKU MAINA RESPONDENT

RULING

1. The application for determination dated June 13, 2014 brought under section 76 (b) (c) of the [Law of Succession Act](#) seeks for orders for revocation of grant issued on November 30, 2011 and confirmed on October 25, 2012.
2. The summons proceeded by way of viva voce evidence.

The Applicant's case

3. The applicant testified that she is a daughter of the deceased and that the deceased had two wives namely Wanjiru Kirungi and Muthoni Kiambati. Further that her mother was Muthoni Kiambati whereas Wanjiru Kirungi had one child namely Martha Wambui.
4. The applicant testified the deceased died on February 4, 1976 and the respondent filed Succession Cause No. 9 of 2011 in Karatina in respect of the deceased's estate comprising of L.R. No. Kiine/Nyangio/12. The applicant further testified that Joel Maina Gituku the respondent's father was not related to the deceased yet the respondent obtained a grant in respect of the deceased's estate. It was further stated that upon fraudulently obtaining the certificate of confirmation of grant on October 17, 2012, the respondent sub divided L.R. Kiine/Nyangio/12 into four pieces namely, Kiine/Nyangio/1454, 1455, 1456 and 1457 which parcels of land were bequeathed to the respondent and his



four (4) siblings. The respondent's brothers and sisters who benefited from the estate of the deceased are Joseph Maimbwa Maina, Daniel Gachirigwa, Gladys Wanjiku Maina and Mary Muthoni Maina respectively. The applicant further stated that in the same year, the respondent petitioned for letters of administration in the estate of his own father Joel Maina Gituku in Succession Cause No. 10 of 2011 and he was issued with a grant dated October 23, 2012.

5. PW2, Cyrus Gachirigwa Kanatha, a grandchild of the deceased testified that the deceased had two wives namely, Wanjiru Gachirigwa and Muthoni w/o Gachirigwa. He further testified that the applicant's mother was Muthoni w/o Gachirigwa whereas his mother was Monica Wambui who was a daughter of Wanjiru Gachirigwa. The witness further testified that the deceased had two properties, one in Nyeri and one in Kirinyaga land parcel Kiine/nyangio/12. He further stated that the deceased shared out his properties between his two wives with each getting one parcel.
6. The witness stated that the respondent is a descendant of the brother of the deceased one Gituku Thagana and father of Maina Gituku the respondent's father.
7. PW3, Peter Kagocha Murithi, a stepbrother of the applicant testified that his father, Muriithi Kababi was a stepbrother to the deceased. He further testified that the deceased had two wives namely Wanjiru Gachirigwa and Muthoni Gachirigwa. The deceased's 2nd wife Muthoni w/o Gachirigwa had one child of the deceased, the applicant. The 1st wife Wanjiru Gachirigwa had one daughter namely Monicah Wambui.
8. The witness stated that the deceased had two properties, one in Nyeri Konyu location where he lived and the other in Kirinyaga L.R. No. Kiine/Nyangio/12 which was given to the applicant's mother.

The Respondents' Case

9. DW1, Gituku Maina testified that the applicant is a sister to his father, Joel Maina Gituku. He further stated that both the applicant and his father are children of the deceased. DW1 testified that Gituku wa Thagana was a brother to the deceased and he died before the deceased and left his children with the deceased to take care of them.
10. The witness testified that he did not include the applicant in the succession proceedings before Karatina court because she was married and had her own land wherever she is married. He further testified that the applicant did not ask for land from the deceased and the deceased left the land parcels to the respondent's father. The witness further testified that he was issued with letters of administration intestate and sub divided L.R. Kiine/Nyangio/12 into four portions being Kiine/Nyangio/1454, 1455, 1456 and 1457 now registered in the names of Joseph Maimbwa Maina, Daniel Gachirigwa, Gituku Maina and Gladys Wanjiku Maina and Mary Muthoni Maina. Gladys and Mary hold L.R Kiine/Nyangio/1457 jointly. The respondent in cross-examination said that the applicant is the only surviving child of the deceased. he further testified that his father was Joel Maina Gituku a son of Gituku Thagana the grandfather of the respondent.
11. The respondent further testified that there was a meeting attended by elders whereby the elders agreed to give his father the land of the deceased. After the death of his grandfather, the deceased took in the respondent and his siblings and took care of them. He further stated that his father, Joel Maina was the registered proprietor of land parcel number Kiine/Nyangio/11 which is separated from the deceased's land by a railway line and reserve. He further testified that he has always lived on land parcel number Kiine/Nyangio/12 whereas his brothers have lived on land parcel Kiine/Nyangio/11.
12. DW2, Joseph Maigwa Maina the respondent's brother testified that the deceased had a younger brother Gituku Thagana who had a son Joel Maina Gituku the father of the respondent. The witness further



- testified that Gituku Thagana passed away when he was young and the deceased took up his children and cared for them. The witness further stated that before the deceased's death, he held a meeting and bequeathed land parcel number Kiine/Nyangio/12 to Joel Maina Gituku.
13. On cross-examination, DW2 stated that although the deceased gave the suit land to his father, he did not transfer the land to him and that his brother Daniel Maina, is the only one who lives on the suit land since 2014 whereas him and his other brothers live on their father's land.
 14. DW3, Samuel Mwangi Kangata a grandson of the deceased testified that his mother was Monica Wambui who was a daughter of the deceased and Waguthi. The witness further testified that the deceased brought up Joel Gituku as his son and he bequeathed land parcel number L.R. Kiine/Nyangio/12 to him. The witness on cross-examination, stated that the applicant has never lived or cultivated the suit land.
 15. DW4, Samuel Maina Githemu testified that he cultivated the suit land from 1978 – 1980. He further stated that the said land was leased to him by Joel Maina Gituku the father of the respondent. The land had been bequeathed to Joel Maina by the deceased. The witness stated that Joel administered and developed the land following the demise of the deceased.
 16. By way of written submissions the parties disposed of this Summons for revocation of grant.

The Applicant's Submissions

17. The applicant submits that the respondent is a son to the late Joel Maina Gituku who was a younger brother to the deceased. She further submits that the respondent made false statements before the Karatina Law Courts where he told the court that he was the son of the deceased and listed his siblings as beneficiaries of the said estate. Thus, the applicant argues that the false information provided by the respondent informed the court's decision to grant him the letters of administration. As such, the applicant states that the grant of letters of administration was fraudulently obtained by the respondent who concealed material facts and thus it ought to be annulled.
18. The applicant further submits that the respondent did not include her as a beneficiary of the estate of the deceased or seek her consent before filing the petition. The applicant states that the respondent misled the court by obtaining a counterfeit chief's letter that included his name and those of his siblings as the heirs of the estate of the deceased and excluded her yet the respondent was fully aware that she was the only heir of the estate.
19. The applicant argues that the respondent was not entitled to be an administrator of the deceased's estate and neither was he entitled to get any share of the estate since he was not a dependent or beneficiary of the said estate. The applicant submits that the respondent indicated that he filed Succession Cause No. 9 of 2011 in his capacity as the grandson of the deceased whereas in his affidavit in support of the petition for letters of administration intestate filed on June 25, 2012, he referred himself as the son of the deceased. The applicant argues that this discrepancy in the two documents evidently indicates that the respondent wanted to share the estate amongst himself and his siblings to her exclusion.
20. The applicant states that she filed her petition for letters of administration intestate on June 11, 2012 but she was informed that a grant was issued to the respondent. She further states that she delayed to pursue her petition for letters of administration since she knew that she was the only beneficiary of the said estate and did not anticipate that someone could have obtained grant of letters of administration of her father's estate without her consent.



21. Pursuant to section 39 of the *Law of Succession Act*, the applicant argues that according to the degree of consanguinity and affinity of the deceased's estate, she is the only one entitled to inherit her father's land as the only surviving child of the deceased.
22. The applicant states that her mother was apportioned land parcel number Kiine/Nyangio/12 which she was cultivating until her demise. She further states that with her father's consent, she continued to farm in the said land until 1978 when Joel Maina Gituku evicted her from her father's land and took it over.
23. The applicant submits that the deceased did not bequeath any parcel of land to Joel Maina Gituku. Moreover, the applicant submits that the respondent has not produced any evidence to prove that the deceased gave his father the said land. Furthermore, the applicant argues that Joel Maina Gituku died on March 7, 2011 and before his death, he had not transferred the suit land to his name. The said land in the year 2011 was still registered in the name Gachirigwa Thagana which indicates that Joel Maina Gituku was aware that the land did not belong to him and thus he could not transfer it.
24. The applicant submits that the respondent and his siblings inherited land from their father's estate and that is where they live. She further submits that no one lives or has built on land parcel number Kiine/Nyangio/12.

The Respondent's Submissions

25. The respondent relies on section 76 of the *Law of Succession Act* and submits that the applicant has not demonstrated any grounds set out to warrant the revocation of grant. The respondent argues that he is a son and dependant of the deceased and thus a beneficiary of the deceased's estate. He further submits that he filed the succession cause in 2011 in respect of the deceased's estate but no objection was raised. Moreover, the respondent argues that the applicant was not a child of the deceased as she came with her mother to the deceased's homestead and after the demise of her mother, the applicant was taken by her grandparents and later returned to the deceased when she immediately got married to one Peter Githaiga. As such, the respondent argues that the applicant has never been a dependant of the deceased and thus she cannot claim to be a beneficiary to the estate. The respondent further argues that since the applicant is not a dependant of the deceased, she has no locus standi to apply for revocation of grant.

Issue for determination

26. The main issue for determination is whether the applicant has presented sufficient evidence to warrant revocation or annulment of the grant;

The Law

Whether the applicant has presented sufficient evidence to warrant revocation or annulment of the grant.

27. 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;
- 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 has ordered or allowed; 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
 - iv. The grant has become useless and inoperative through subsequent circumstances.

28. The deceased herein died on February 4, 1976 and the respondent petitioned for letters of administration intestate vide Karatina Senior Resident Magistrates Court Succession Cause No. 9 of 2011 on May 20, 2011 in his capacity as the son of the deceased. The respondent listed those as surviving the deceased as follows:-

- a. Gituku Maina – grandson
- b. Joseph Maimbwa Maina – grandson
- c. Daniel Gachirigua Maina – grandson

29. The court issued letters of administration intestate on November 30, 2011 to the respondent. Upon filing the summons for confirmation of grant, the respondent decided to include his two sisters Gladys Wanjiku Maina and Mary Muthoni Maina in the distribution whom he had left out of this cause. There being no objection, the application to that effect was allowed.

30. Subsequently, the grant was confirmed on October 17, 2012 and a certificate of confirmation issued on October 25, 2012. The applicant argues that the grant was fraudulently obtained as the respondent misled the court by stating that he and his siblings were grandchildren to the deceased and that the respondent was a son of the deceased. The applicant further argued that the respondent excluded her from the succession proceedings knowing very well that she was the only surviving child of the deceased.

31. Evidence has been adduced to the effect that the deceased married two wives Wanjiru Kirungi and Muthoni Kiambati and had one child with each of them, the applicant being the daughter of the 2nd wife Muthoni Kiambati. Although the respondent in his submissions stated that the applicant is neither a dependant nor beneficiary, he admitted in his evidence that she is a daughter of the deceased. It is also not disputed that the deceased had a younger brother Joel Maina Gituku who is the father of the respondent and his four (4) siblings names Joseph Maigwa Maina, Daniel Gachirigua Maina, Gladys Wanjiku Maina and Mary Muthoni Maina. It is important to note that Joel had his own land L.R No. Kiine/Nyangio/11 that was registered in his name even at the time this cause was filed in 2014.



32. The respondent claims that the said property was bequeathed to his father during the lifetime of the deceased yet the land was registered in the name of the deceased at the time of commencing those proceedings. The respondent has not provided any evidence to support his allegations that the deceased took up the family of Joel Maina Gituku and raised them as his own children as he claimed. As such the children of Joel could not be called dependants of the deceased under the provisions of section 29 of the Act. The respondent and his two brothers testified that their father is Joel Maina Gituku and that he was the younger brother of the deceased and admitted that the applicant was the only surviving daughter of the deceased.
33. The respondent alleged that there was a meeting of the clan elders that gave the estate of the deceased to the father of the respondent Joel Maina Gituku. It is noted that the minutes of the meeting or any other record was not produced in evidence. None of the elders present in the meeting was called to testify. Even assuming that such a meeting took place, the elders had no authority to give out the land of a deceased person to the respondent's father or to any other person. It is only the court that is empowered to determine succession matters upon death of a person who owned property. However, it is important to note that the land L.R KIINE/NYANGIO/12 remained registered in the name of the deceased until distribution of assets was done in this cause based on the grant issued and confirmed in favour of the respondent.
34. In the evidence of the respondent there were major contradictions on how the land of the deceased turned out to be theirs and on who lives on the land. The respondent said that his siblings and himself have always lived on the land of the deceased while his own brother DW2 testified that it is only his brother one Daniel Maina who lives on the land. The respondent on cross-examination said he lives on the land he inherited from his own father Joel Maina Gituku but not on the land of the deceased as he had said earlier in his evidence in chief. This confirmed as credible the evidence of his brother DW2 that only one of their brothers Daniel Maina lives on the land. The respondent in my view, was not a credible witness and was determined to give false evidence in order to retain the portion he got from deceased's estate.
35. During the confirmation of the grant, the respondent listed himself and his four siblings as the beneficiaries of the deceased and proceeded to inherit shares in the estate knowing very well that the applicant who is a child of the deceased was alive. In the petition filed in this cause, the respondent referred to himself as the son of deceased while in actual fact he was a nephew. He presented his brothers and sisters as grandchildren of the deceased while he knew very well that this was not true. Up to the stage of confirmation of grant, the respondent never disclosed that the applicant, the daughter of the deceased was alive and well. The applicant came to learn of the existence of this cause in June 2014 two years after the estate had been distributed.
36. By his failure to inform the applicant of his action of filing this cause, the respondent failed to comply with Rule 26(1) of the *Probate and Administration Rules* which provides:-
- 26(i) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
- It was within the knowledge of the respondent that a child of the deceased was alive and that she ranked higher in priority on entitlement to the estate. Under section 66 of the *Law of Succession Act*, the applicant also ranks higher than the respondent in applying for letters of administration.
37. The failure by the respondent to disclose his actions was an act of fraud designed to disinherit the applicant of the estate of her deceased father. The respondent appears to have taken advantage of the delay of the applicant to move the court in way of filing a Succession cause. The argument of the



respondent that the applicant was a married daughter, who according to him, did not deserve to inherit from her deceased father is misguided in view of article 27(1) of the Constitution and the Law of Succession.

38. It is my considered view that the applicant has established that the respondent obtained the grant through fraud and by non-disclosure of facts material to the case which are valid grounds for revoking or annulling a grant.
39. It is important to note that the deceased's land upon subdivision was shared out in equal shares between the respondent and his four (4) siblings as follows:-

L.R Kiine/Nyangio/1454 – Joseph Maimbwa Maina

L.R Kiine/Nyangio/1455 -Daniel Gachirigwi

L.R Kiine/Nyangio/1456 -Gituku Maina

L.R Kiine/Nyangio/1457 - Gladys Wanjiku Maina & Mary Muthoni Maina

It follows that the process of sub-division and issue of tittles on the basis of a grant obtained through fraud are null and void. The law requires that the rightful beneficiaries be given their right irrespective of whether such parcels of land have been sold to third parties and title changed hands.

40. Consequently, I allow the Summons for Revocation of grant dated June 13, 2014 and give the following orders:-
- a. That the grant issued in favour of the respondent Gituku Maina on 30th November 2011 is revoked.
 - b. That the titles issued upon subdivision of L.R Kiine/Nyangio/12 namely L.R Kiine/Nyangio/1454, L.R Kiine/Nyangio/1455, L.R Kiine/Nyangio/1456 and L.R Kiine/Nyangio 1457 are hereby cancelled.
 - c. That the land L.R Kiine/Nyangio/12 shall revert to the name of the deceased Gachirigwa Thagana.
 - d. That the applicant is hereby appointed administrator of the deceased's estate herein.
 - e. That the applicant shall file Summons for Confirmation of grant within thirty (30) days.

41. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 20TH DAY OF JULY, 2023.

F. MUCHEMI

JUDGE

