



REPUBLIC OF KENYA



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

In re Estate of Hannah Wanjiku Mwangi (Deceased) (Succession Cause 11 of 2018) [2023] KEHC 20044 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 11 OF 2018**

CM KARIUKI, J

JULY 13, 2023

**IN THE MATTER OF THE ESTATE OF THE LATE
HANNAH WANJIKU MWANGI (DECEASED)**

BETWEEN

GEORGE GABRIEL KIGURU MWANGI PETITIONER

AND

JACINTA WAMBUI MWAURA PROTESTOR

RULING

1. The Applicant herein moved this court by way of summons dated 23rd May 2018 seeking revocation of the grant issued to the Petitioner/Respondent on 25th February 2017 regarding the estate of Hannah Wanjiku Mwangi, the deceased herein. The application sought orders that:-
 - i. That the grant of letters of administration issued to George Gabriel Kiguru Mwangi on 25/2/17 be revoked.
 - ii. That a fresh grant be issued to the Applicant, and the same be confirmed as follows;-
 - i. LR No Nyandarua/Mawingo/2528 and 2529 –Jacinta Wambui Mwaura-whole share
 - iii. That the honorable court be pleased to issue eviction orders against all persons in occupation of LR No Nyandarua/Mawingo/2528 and 2529.
 - iv. That the Petitioner/Respondent bears the costs of this application.



- v. The application was supported by the Supporting Affidavit sworn by the Applicant on even date and the grounds on the face of the application as follows:-
- vi. That the proceedings to obtain the grant were defective in substance.
- vii. That the Petitioner/Respondent is unfit to administer the estate as he has already sold assets registered in the deceased's name.
- viii. That the grant was obtained fraudulently by making a false statement and concealment from the court of material facts and the existence of LR Nyandarua/Mawingo/2529.
- ix. That it is only fair and just for the grant to be revoked and for a fresh grant to be issued to the Applicant and confirmed as prayed.

2. On the other hand, the Respondent replied through the affidavit sworn on 28th September 2018 by himself. He deponed that:-

- i. He is the son of the Late Hannah Wanjiku Mwangi, the deceased whose estate is in dispute.
- ii. That the Applicant herein is her sister and they are four siblings namely:-George G. Kiguru Mwangi, Jacinta Wambui Mwaura, Lucy Wangui Kinuthia, Mary Njeri Ng'ang'a
- iii. That their late mother was the sole proprietor of that parcel of land known as LR No Nyandarua/Mawingo/53 measuring approximately 40 acres which was later subdivided in 2 equal portions namely: Nyandarua/Mawingo/373 measuring approximately 20 acres which remained with his late mother and Nyandarua/Mawingo/374 measuring approximately 20 acres which his other gave to him.
- iv. That Nyandarua/Mawingo/374 was further subdivided by the deceased as follows:-
 - a. Nyandarua/Mawingo/2526 measuring approximately 10 acres- Jacinta Wambui Mwaura
 - b. The remaining 10 acre was further subdivided into 3 portions;
 - c. Nyandarua/Mawingo/2527 measuring approximately 4 acres – George Gabriel Kiguru Mwangi
 - d. Nyandarua/Mawingo/2528 measuring approximately 3 acres- Hannah Wanjiku Mwangi
 - e. Nyandarua/Mawingo/2529 measuring approximately 3 acres- Hannah Wanjiku Mwangi
- v. That during the deceased lifetime she instructed him and within the full knowledge of all his siblings to sell parcel No Nyandarua/Mawingo/2528 measuring approximately 3 acres and they sold as follows:-Michael Mbuthia



Njuguna – 2 acres Peter Kinyanjui Njuguna – ¾ acre Naomi Njeri Muhoi- ¼ acre

- vi. Because of sickness an age, he signed some of the sale agreements on the deceased's behalf as the seller and that all the money was spent by the deceased to cater for her needs and hospital bills.
 - vii. XI. That the deceased passed on or about 13/11/2008 and that since the buyers were pressuring him for their titles they greed as a family that he files succession cause for the estate of their mother as the sole Petitioner since there was no dispute. The estate in question was actually subdivided during their mother's lifetime.
 - viii. XII. That the Applicant herein was given parcel No Nyandarua/Mawingo/2526 measuring approximately 10 acres by the deceased when she was still alive.
 - ix. XIII. That when he made his application for confirmation of grant he mistakenly did not indicate Nyandarua/Mawingo/2529 measuring approximately 3 acres and that it was a bonafide mistake with no ill intention.
 - x. That the Applicant is entitled to a portion of No Nyandarua/Mawingo/2529 like all of us being the remainder of the entire estate of the deceased. It should be shared equally amongst them.
 - xi. That parcel No Nyandarua/Mawingo/2528 measuring approximately 3 acres was sold by the deceased. The purchasers took occupation when their mother was still alive.
 - xii. That their remaining inheritance is only plot No Nyandarua/Mawingo/2529 less access road which he is not disputing.
 - xiii. That the buyers know him and are pestering him for their titles.
 - xiv. That parcel No Nyandarua/Mawingo/53 was found to belong to their mother and the Applicant's case was dismissed. In any event the case is irrelevant and has been overtaken by events. The said land no longer exists and that it is like the Applicant wants to claim Nyandarua/Mawingo/53 when the matter was decided in 1981 and a decree was issued which has never been challenged to date.
3. That from the foregoing it is very clear that he has not concealed any material facts from this court. That it is the Applicant who is trying to mislead this honourable court to believe that all the parcel of land known as LR No Nyandarua/Mawingo/53 belonged to her while in the real sense it was decreed that the land was the deceased.
 4. The Applicant then filed a supplementary affidavit sworn on 19th November 2018 in response to the Respondent's replying affidavit.
 5. Further, the Applicant filed an affidavit of protest dated 4/12/2018 objecting to the summons of confirmation of grant dated 23/12/2017 by the Respondent objecting to the mode of distribution and where she stated that the Respondent had deliberately left out one of the deceased's assets being LR Nyandarua/Mawingo/2529.



Applicant's Written Submissions

7. The Applicant submitted that the issues that arise for determination are:-

a. Whether the grant issued on 25/2/2017 ought to be revoked and/or annulled

8. It was stated that the grant should be revoked because although the Petitioner listed himself and his three sisters as the deceased beneficiaries, he did not acquire their written consent at the time of filing the petition. Reliance was placed on *In re Estate of Kimeto Kapkabai (Deceased)* 2019 eKLR
9. Further, it was contended that the Petitioner omitted LR No Nyandarua/Mawingo/2529 of approximately 3 acres in the Petitioner, a fact that he did not deny. His excuse was that the omission was a bona fide mistake and does not hold water because the omitted property is omitted in the summons for confirmation of the grant. The omission was meant to conceal the deceased's properties from the court.
10. The Applicant pointed out that the proceedings to obtain the grant were, therefore, defective in substance; the grant was obtained by concealment from the court something material to the case and by means of an untrue allegation of facts, and the same ought to be revoked.

a. What constitutes the deceased's estate, and what distribution mode?

11. The Applicant asserted that the deceased left behind LR No Nyandarua/Mawingo/2528 and 2529 of 1.12ha (2.76 acres) each. That the deceased had not disposed of any of the said properties to purchasers for value, and both properties are available for distribution.
12. She contended that the Petitioner has attempted to introduce Michael Mbuthia Njuguna, Peter Kinyanjui Kinuthia, and Naomi Njeri Muhoi to the proceedings as persons whom he claims to be purchasers for value. Still, they were not listed in the chief's letter dated 24/5/2021 filed alongside the petition by the Petitioner, nor were they listed as beneficiaries or creditors of the estate in the P&A 5 form, which was sworn by the Petitioner on 25/5/2021 in the presence of an advocate and commissioner for the oath.
13. It was averred that the copies of the sale agreements attached to the further replying affidavit by the Petitioner sworn on 2/12/2019 are suspect. That the Petitioner admitted that the deposit of the purchase price paid by Michael Mbuthia Njuguna via a sale agreement dated 12/4/08 was indeed paid to him by way of a banker's cheque and not to the deceased. There was no proof of payment of the balance of Kshs 150,000/- that was tendered in court.
14. The Applicant submitted that the agreement in clause 7 provided that the sale was subject to the provisions of the Land's control act. Still, no consent was produced to confirm that, indeed, such consent was obtained during the deceased's lifetime. That the purported buyer Michael Mbuthia Njuguna did not swear an affidavit or testify in court to support the sale despite the Petitioner, through his advocates on record, seeking an adjournment and time to do so.
15. The sale to Peter Kinyanjui Kinuthia is also disputed because the sale agreement dated 17/2/2007 was executed by the Petitioner, who received the deposit of Kshs 50,000/-. The Petitioner received the further payment reflected in the acknowledgments dated 11/3/2007 of Kshs 17, 000/-, 20/1/08 of Kshs 20,000/- and 28/6/08 of Kshs 10,000/-. None of the agreements and acknowledgments were signed by the deceased.
16. The Applicant maintained that the Petitioner did not produce a power of attorney to confirm that he had written authority from the deceased to transact on her behalf and that the money received was



- indeed handed over to the deceased. Again, there was no land control board's consent, and the alleged buyer did not testify or swear an affidavit to confirm the sale. There was no proof of payment of the balance of Kshs 13,000/-
17. Further, it was disclosed that the Petitioner executed the sale agreement for Naomi Njeri Muhoi dated 1/3/08 as the seller, and the deceased's name does not appear anywhere. The deposit of Kshs 30,000/- was paid to the Petitioner, and there is no proof of payment of the balance of Kshs 20,000/-. The purported buyer was not called as a witness.
 18. The Applicant claimed that in the summons for confirmation of grant dated 23/2/2017, the Petitioner did not mention the buyers and he instead proposed that LR No Nyandarua/Mawingo/2528 which he claims was sold by the deceased to the buyers be transferred to him absolutely.
 19. In her evidence and documents, the Applicant demonstrated that the two parcels of land were subdivisions of LR No Nyandarua/Mawingo/373, which was a subdivision of LR No Nyandarua/Mawingo/53, which land was subject to litigation in Nakuru HCC No 322 of 1979 Patrick Ngugi & Jacinta Mwaura v Wanjiku Mwangi. No appeal was filed against the judgment on its findings, and it, therefore, follows that the subdivisions that remained in the deceased's name were parcels No 2528 and 2529 are registered in her name in the trust of the Applicant and her deceased husband.
 20. It was argued that the judgment further confirms that the deceased herein had no authority to sell parcel no during her lifetime. 53 and/or any of its subdivisions without the Applicant's consent. That the court on page 4 of the judgment, further found that parcel No 53 was purchased but the Applicant and her now deceased husband. Based on the foregoing, the Applicant urged the court to transfer the aforesaid properties to the Applicant absolutely.
 21. In conclusion, the Applicant prayed for the summons dated 25/5/2018 and the protest by the Applicant to be allowed with costs.
 22. The respondent's Written Submissions were Unavailable at the time of drafting this decision.

Analysis and Determination

24. Having considered the pleadings herein, the replying affidavit by the Respondent, the supplementary affidavit by the Applicant, the affidavit of protest by the Applicant, and the oral evidence tendered before me and further the Applicant's written submissions filed, I find the main issue for determination is whether the Applicant has presented sufficient evidence to warrant revocation and/or annulment of the grant.
25. I will begin by determining the application dated 23rd May 2018 seeking revocation of the grant issued to the Petitioner/Respondent, as the determination of the same will inevitably settle the application for confirmation of the grant and the subsequent protest against it.
26. The ownership of LR No Nyandarua/Mawingo/53, plot 53 hereinafter is central to the Applicant's case. Evidently, there has been a protracted family dispute as to the ownership of the aforementioned parcel of land and particularly the interpretation of the judgments of previous courts on this very issue.
27. Through Civil Case No 322 of 1979: *Patrick Ngugi Mwaura & Jacinta Mwaura v Wanjiku Mwangi*, the Applicant, and her husband, Patrick Ngugi Mwaura (the plaintiffs then), took the deceased (the defendant then) to court seeking a declaration that the land known as Plot Number 53 Mawingo Settlement Scheme, North Kinangop is held by the defendant as trustee for the plaintiffs. Secondly, an order that the defendant do transfer the said plot to the plaintiff.



28. In the plaintiff's case, they purchased the plot from Muiruri Muthumbi, since deceased, for Kshs 9,600/- and that with the consent of the defendant, they arranged for the transfer of the said plot into the defendant's name to hold the same as trustee for the plaintiffs on the understanding that the defendant would transfer the said plot to the plaintiffs that their request but the defendant had refused to do so. These allegations were denied by the defendant, who claimed that she bought the land herself.
29. In the end, the court decided that the plaintiffs purchased Plot 53, Mawingo Settlement Scheme, and that the transfer of the said plot was affected into the defendant's name with her consent so that she would hold the plot as trustee for and on behalf of the plaintiffs on the understanding that she would transfer the plot into their names when they so required. However, the court went on to hold that because consent was not obtained with respect to the trust agreement, which consent of the relevant land control board was necessary, the declaration of trust was void. In the circumstances, the plaintiff's suit was dismissed with costs to the defendant.
30. In essence, and unfortunately, the court found that although the Applicant intended to have the deceased hold plot 53 in trust for her, the same was nullified due to the lack of consent from the relevant land control board. Therefore there was no trust agreement between the Applicant and the deceased. Having determined that no trust agreement was created, the defendant retained ownership of plot 53 because the title was under her name.
31. Subsequently, after the enactment of the Magistrates' Jurisdiction Act, the plaintiffs filed a suit on the same subject matter, which was referred to a panel of elders who ruled in favor of the plaintiffs. That ruling was confirmed before the Resident Magistrates' Court in Nakuru. However, the award by the panel of elders dated 6th February 1982 was set aside. Also, the order of the Resident Magistrate in RMCC 415/82 based on that decision of the panel of elders was found to be null and void.
32. As a consequence, the previous High Court order, as detailed before, remained in force, meaning that the land remained registered under the deceased, and she was therefore entitled to the plot as the owner. It appears that the Applicant never challenged this decision by way of appeal.
33. The deceased later subdivided plot No 53 to Nyandarua/Mawingo/373 and Nyandarua/Mawingo/374. From the records, it appears that the Applicant went to court vide HCCC No 33 of 2003 seeking the cancellation of titles for the aforementioned parcels. Still, she later withdrew the suit because the deceased agreed to transfer to her 10 acres, i.e., LR No Nyandarua/Mawingo/2526, as she deposed in her supplementary affidavit dated 9th November 2018. Accordingly, the deceased continued to occupy and use the suit land as the rightful owner until her demise. It remains to be seen that in as far as the aforementioned suit was withdrawn, the suit came to an end, and the Applicant was, in turn, relinquishing her claim as far as the withdrawn suit was concerned.
34. On that account, plot 53 remained under the deceased's ownership. It is clear from the parties' submissions that she transferred Nyandarua/Mawingo/374 to the Respondent during her lifetime. The deceased then retained Nyandarua/Mawingo/373. From the same, she transferred 10 acres to the Applicant and 4 acres to the Respondent. Ultimately, what was left registered under the deceased's name by the time of her demise was Nyandarua/Mawingo/2528 and 2529, therefore, forming part of her estate.
35. That being the case, I will resume the initial question before this court which is on the revocation of the grant. The application is premised on Section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The said provision states as follows:

“76. Revocation or annulment of grant



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— that the proceedings to obtain the grant were defective in substance;

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;

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;

that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

36. 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.”

37. Further, the circumstances in which a grant can be revoked were discussed in the case of *In the Matter of the Estate of L.A.K. (Deceased)* [2014] eKLR as follows:-

“Revocation of grants is governed by Section 76 of the *Law of Succession Act*. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.”

38. Notably, in *Albert Imbuga Kisigwa v Recho Kawai Kisigwa* Succession Cause No 158 of 2000 the court stated that:-

“Power to revoke a grant is a 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 the interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

39. The Applicant submitted that the grant was obtained fraudulently by making a false statement and concealment from the court of material facts and the existence of LR Nyandarua/Mawingo/2529. The Respondent contested that the same was a mistake, but I find that he was being economical with the truth. It appears that the Respondent was in a hurry to obtain a grant in order to complete the transfers to the alleged purchasers of LR Nyandarua/Mawingo/2528. Further, looking at his affidavit in support of summons for confirmation of grant, he deponed that he was the only dependant despite the fact that he was aware of the fact that the deceased had other children and despite his knowledge of LR Nyandarua/Mawingo/2529.



- i. I am satisfied that it is in the interest of justice that the grant issued to George Gabriel Kiguru Mwangi on 25/2/2017 be revoked due to the material non-disclosure of facts by the administrator contrary to Section 76 (b) of the *Law of Succession Act*. The estate's beneficiaries should take the necessary steps to pursue a new grant. However, I decline to grant prayers No 2 and 3 of the Application dated 23rd May 2018. In the same premises, the grant having being revoked; the application for confirmation is therefore null and void.
- ii. Parties to bear their own costs.

DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 13TH DAY OF JULY 2023.

.....

CHARLES KARIUKI

JUDGE

