



REPUBLIC OF KENYA



**In re Estate of Samuel Mwangi Gitonga (Deceased) (Succession Cause
88 of 2007) [2023] KEHC 19885 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19885 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 88 OF 2007**

LM NJUGUNA, J

JULY 12, 2023

BETWEEN

JANE WANGUI KIGANDA APPLICANT

AND

SHELMISE KABAIRE MWANGI RESPONDENT

JUDGMENT

1. The matter for determination is a Summons for Revocation and/or Annulment of Grant dated 12 April 2007. The applicant seeks this revocation and/ annulment based on the grounds stated on the face of the application together with the supporting affidavit thereon. The principal grounds for the application are that the grant was obtained fraudulently by the making of false statement and/or concealment from the court of information material to the succession cause and that the property in question was the subject of ongoing litigation to ascertain legitimate ownership at the time when a grant was issued in favour of the respondent, a fact that was well within the knowledge of the respondent thereby depicting bad faith on the respondent's part.
2. The applicant is Jane Wangui Kiganda who is co-administratrix with the Late Jeriuthi Wanjiku Kiganda of the estate of Macharia Wanjagira alias Macharia Njagira vide Grant of Letters of Administration issued on 16 October 2002 and a Certificate of Confirmation of the Grant issued on 26 April 2003. The said grant was issued and confirmed at the Senior Resident Magistrate's Court at Karatina. Following issuance of the grant and a certificate of confirmation, the applicant and her co-administratrix (who was also her co-wife) proceeded to the lands office to have title No Kiine/Ruiru/143 issued in their joint names. To their surprise, they discovered that the land, which they knew was registered in the name of their late husband's step-brother Macharia Wanjagira alias Macharia Njagira had 3 cautions registered against it by their husband Kiganda Mathanjuki (deceased) claiming licensee's interest and 2 other persons claiming purchaser's interest. One of the cautions was placed by the late Samuel Mwangi Gitonga (also known as Samuel Mwangi Ibrahim Gitonga) who was claiming to be the owner through purchase from the registered owner. Transfer by transmission having failed, the applicant and her co-



administratrix proceeded to court vide succession cause No 44 of 2002 in Karatina (the same court that has determined their succession cause) to ascertain true ownership of the land. The application was filed through chamber summons dated 12 May 2003 seeking orders for lifting of the caution placed by one John Muhindi Rugo and registration of the transfer by transmission. The applicant argues that the respondent learned of the said application before the court and in fact proceeded to request to be enjoined as an interested party. She was admitted as an interested party and she filed her response through replying affidavit dated 16 June 2003.

3. The respondent is Shelmise Kabaire Mwangi who has now been substituted by her son James Ndumbi Mwangi as guardian ad litem due to ill health and physical incapacity. Shelmise Kabaire Mwangi is the widow of the late Samuel Mwangi Gitonga (also known as Samuel Mwangi Ibrahim Gitonga) and personal representative of his estate vide grant of letters of administration issued on 22 March 2002 and a certificate of confirmation of the grant issued on 08 March 2006 by Senior Principal Magistrate's Court at Chuka. The respondent filed her replying affidavit dated 30 May 2008 and a further affidavit dated 21 September 2019.
4. The court took viva voce evidence and then directed that the parties file their written submissions.
5. In her evidence tendered before me in open court, the applicant averred that the suit land belonged to her late husband's step-brother named Kiganda Mathanjuki (deceased) and that since his death, she has been continuously residing thereon with her 5 children and her late co-wife Jeriuthi Wanjiku Kiganda who died in 2010. On cross examination, she confirmed that she and her co-wife never alleged that they were widows of the late Macharia Wanjagira alias Macharia Njagira. She stated that she was aware of the summons for revocation of grant dated 24 September 2014 filed in Nyeri High Court succession cause No 791 of 2014 by the respondent in an attempt to have the grant issued to the applicant revoked. That she learned of the 1985 sale transaction between Macharia Wanjagira alias Macharia Njagira and Samuel Mwangi Gitonga from the CID and not any time before 2002. She is also aware of the eviction orders being sought against her in Kerugoya ELC No 65 of 2012.
6. In her written submissions, the applicant relied on the decisions made in *Re Estate of Njau Kanyora (deceased)* (2016) eKLR and *Re Estate of Charles Ngotho Gachunga (deceased)* (2015) eKLR where the courts discussed Section 76 and the circumstances under which a grant may be revoked or annulled. While discussing section 76 (a), (b) and (c) the applicant relied on the decision of the court *In the Matter of The Estate of Edith Wangui Kabindo (deceased)* succession cause No 426 of 2014 where it was stated that deliberate concealment or misstatement of a material fact was good enough ground for revocation of a grant.
7. The Respondent James Ndumbi Mwangi adopted his statement dated 30 January 2023 that had been filed in court. In the statement, he avers that his mother wrote a letter dated 23 July 2006 to the applicant demanding that they vacate the suit land as it neither belonged to them nor their late husband. When they failed to act on the demands, the respondent proceeded to report the matter at the C.I.D. offices at Kerugoya claiming attempted fraudulent registration of the land by the applicant and her late co-wife. Further, he avers that his mother through counsel, filed Nairobi Civil Suit No 2323 of 2007 vide plaint dated 19 November 2007. He states that the applicant countered their efforts by filing the summons for revocation of grant for determination herein. He avers that his mother filed an application by way of chamber summons dated 04 June 2009 seeking to evict Jane Wangui Kiganda and the Late Jeriuthi Wanjiku Kiganda from the land title No Kiine/Ruiru/143. This application has not been prosecuted to date. He also verifies the information already presented before the court that his late father did indeed purchase the suit land from Macharia Wanjagira alias Macharia Njagira (deceased) that after signing sale agreement and all other relevant documentation, the documents were taken to the lands office for registration. The registration was not completed owing to multiple cautions placed



on the title even though Land Control Board had issued a letter of Consent to Transfer and stamp duty had been paid.

8. The respondent in his written submissions drew the attention of the court to the petition for letters of administration filed by the applicant, pointing out that the applicant falsified information stating that the petitioners were filing in their capacity as the wives of the deceased (Macharia Wanjagira alias Macharia Njagira). It is his argument that the grant issued in favour of the applicant should be the one to be revoked on grounds of falsehood. He further alleges that a title deed was issued in the name of his mother on authority from the chief land registrar following arbitration proceedings who permitted lifting of the cautions to allow for transfer by transmission. He further argued that there were sufficient documents to show that Samuel Mwangi Gitonga (deceased) purchased the property. He relied on the case of *Re Estate of Mugo Kanyotu (Deceased)* (2018) eKLR wherein the court cited with approval the case of *Matheka & Another v Matheka* (2005) eKLR 455 in which the court of appeal laid down the guiding principles for revocation of a grant.
9. Having considered the evidence and affidavits by both parties, relevant laws and caselaw, in my view the issues for determination are:
 - i. Whether or not the applicant has demonstrated that there are sufficient grounds to revoke the grant. Section 76 of the *Law of Succession Act* which provides 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 an 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 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 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.”
 - ii. Whether or not the respondents present bad faith by failing to inform the court of a pending case filed by the applicant seeking to determine ownership of the suit land, even though the respondent was enjoined as an interested party upon her request.
10. In order to make a determination in this matter, it is important to note that the issues for determination fall strictly under Section 76 (a), (b) and (c) of the *Law of Succession Act*. This provision is explained by the Musyoka J. In *re Estate of Prisca Ong’ayo Nande (Deceased)* [2020] eKLR as follows;
 - “8. Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems.where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, It could also be that the process was marred by fraud and misrepresentation or concealment of matter,



such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons.....”

11. I have noted that the issue identified for determination is likely to be entangled in the question of whether or not the applicant has proper rights to claim the suit land. It is prudent to note that on this, my hands are tied as this court lacks jurisdiction to delve into matters of land ownership. The issue is to be placed before a forum with the proper jurisdiction as stipulated under Article 162(2)(b) and Article 165(5)(b) of the Constitution of Kenya 2010:

Article 162(2)(b)

- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
- a.and
 - b. the environment and the use and occupation of, and title to, land.

Article 165(5)(b)

- (5) The High Court shall not have jurisdiction in respect of matters—
- c. or
 - d. falling within the jurisdiction of the courts contemplated in Article 162 (2).

12. On this, I am also guided by *In re Estate of Prisca Ong'ayo Nande (Deceased)* (supra). My dilemma as expressed herein was also expressed in the case of *In re Estate of Late M'kuura Mukindia (Deceased)* [2021]eKLR where the court stated as follows:

“ 17. Having perused the Plaintiff in the ELC matter, this Court observes that the Plaintiff therein founds his claim on ownership acquired following the confirmation of grant issued on 23rd September 2014 in the present succession matter. The said grant is the very same one which the Applicant herein seeks to have revoked by his Application dated 8th July 2019. The Court appreciates that there is a common factor in the matters to this extent and that the orders issued in the succession matter may affect the ELC case. This notwithstanding, this Court is bound by the rules of procedure and it will thus not make any orders where it lacks jurisdiction to do so. See the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR.”

13. Fraud has been alleged by the applicant as against the respondents. Section 107 of the Evidence Act Cap 80 of the laws of Kenya puts onus on the applicant to demonstrate such allegations:

- “ 107 Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (1) dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”



In re Estate of Kiura Wari (Deceased) (Succession Cause 266 of 2007 & 264 of 2006 (Consolidated)) [2022] KEHC 10009 (KLR) the court stated as follows:

“Where fraud is pleaded, the burden and standard of proof was well explained by the court of Appeal in *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR held thus :

25. The law is clear and we take it from the case of *Vijay Morjaria v Nansigh Madbuisngh Darbar & Another* [2000] where Tunoi JA (as he then was) stated as follows; It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].”

14. The applicant specifically alleges that the respondent was well aware of the ongoing case seeking determination on ownership of the suit land. This court takes note of the fact that the respondent approached the court to be enjoined in that case as an interested party. More so, the respondent was well aware and is still aware that that issue stands unresolved. Regardless, the respondent went ahead to pursue confirmation of the grant albeit 4 years after the grant was issued and during pendency of a decision by the relevant court. This might pass as fraud on the part of the respondent but again, this court will not be able to determine that for sure unless the issue of true ownership of the land is determined fully. I say this because the alleged land transaction between Macharia Wanjagira alias Macharia Njagira (Deceased) and Samuel Mwangi Gitonga (Deceased) happened between the years 1985-1986 which is long before any of the grants were issued.
15. That said, seeing as the focal point of my determination is placed within a decision to be reached by the Environment and Land Court, I shall not dwell further on the merits of the present application. The most I can do is to advise the parties to expedite on the important matter of ownership by arguing their case in the relevant court.
16. Accordingly, I do order that the summons for revocation of grant is hereby dismissed. Each party to bear their own costs.
17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....**for the Applicant**

.....**for the Respondent**

