



**In re Estate of Maina Nyongo (Deceased) (Succession Cause  
38 of 2013) [2023] KEHC 23728 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23728 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
SUCCESSION CAUSE 38 OF 2013  
RM MWONGO, J  
OCTOBER 19, 2023**

**BETWEEN**

**JACKSON WANJOHI MWANGI & ERIC MWANGI WANJIRA (SUING AS  
LEGAL REPRESENTATIVES OF THE ESTATE OF BEATRICE WANJIRA  
GITHINJI) ..... 1<sup>ST</sup> APPLICANT  
PURITY WAMBURA GITHINJI ..... 2<sup>ND</sup> APPLICANT  
ANNROSE WANJIKU GITHINJI ..... 3<sup>RD</sup> APPLICANT  
GEOFFREY MWANGI MUTHONI (SUING AS LEGAL REPRESENTATIVE OF  
THE ESTATE OF PURITY MUTHONI GITHINJI ALIAS MONICA MUTHONI  
GITHINJI) ..... 4<sup>TH</sup> APPLICANT**

**AND**

**ROSE NJERI MAINA ..... 1<sup>ST</sup> RESPONDENT  
JOYCE NJOKI MAINA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. The deceased died intestate on 2<sup>nd</sup> August 1997. Grant of letters of administration intestate were issued on 11<sup>th</sup> May, 1998 to Rose Njeri Maina, his wife and Joyce Njoki Maina, his daughter. The grant was confirmed on 24<sup>th</sup> February, 2000. The petition indicates that the deceased's other survivors were his daughters Regina Wanjiru Maina, Faith Wamukuria Maina and Charity Wambura Maina.
2. Under the confirmed grant the deceased's estate Ndia/Mukangu/156 was shared equally between the deceased's five survivors.



3. The applicants filed this summons for revocation or annulment of grant on 10<sup>th</sup> June 2011, on the grounds that:
  - a. The grant was obtained fraudulently by making of a false statement or concealment from the court of something material to the case.
  - b. The applicants were never informed about the cause and were left out of the proceedings to obtain the grant.
  - c. The said grant has disinherited the applicants and their children.
4. The 1<sup>st</sup> applicant, Beatrice Wanjira Githinji, was the deceased's sister. Upon her death, she was substituted by her sons Jackson Wanjohi Mwangi and Eric Mwangi Wanjira. The 2<sup>nd</sup> and 3<sup>rd</sup> applicants are sisters of the deceased.
5. In their supporting affidavit the applicants state, inter alia, that:
  - i. The deceased's estate is family land and the deceased was registered as a trustee for the whole family since their father Githinji Alias Nyoingo was in detention and women were not being registered.
  - ii. The late Nyongio died in 1997 and their mother died in 2008. They had four daughters and one son who have been born and brought up in the estate herein being Kiine/Nyangio/156, and both were buried in the same land
  - iii. The other two applicants are not married and live on the suit land with their adult children who have also settled and utilize the suit land.
  - iv. The suit land was sub-divided by their parents while still alive and each of the parties herein has a distinct portion which they utilize with their families upto date.
  - v. The respondents with an intention to disinheriting the applicants never informed us of the succession proceedings herein, and they only discovered on obtaining a copy of official search after the 1<sup>st</sup> respondent started threatening us with eviction for being on suit land illegally. They attached is a copy of search marked (B1).
  - vi. The search indicated that transmission to respondents had been done vide High Court Succession Cause but it did not indicate where the succession had been filed.
  - vii. It was only after a demand letter threatening to apply for cancellation of the title deed of Kiine/Nyangio/156 was issued that the respondents supplied the C.I.D with forms P & A 41, 54, RL19 & 7.
  - viii. As dependants of the deceased's estate they had been disinherited by orders issued on 11<sup>th</sup> May 1998 and 24<sup>th</sup> February, 2000 and it's only fair that the same be revoked.
6. The respondents filed a Replying Affidavit of which the following are the major averments:
  - i. That the said application is an abuse of this courts process, vexatious frivolous and should be dismissed.
  - ii. That I they were not aware of any trust that existed between the deceased and the Applicants.
  - iii. That any issue of trust should have been dealt with when the deceased was alive.
  - iv. That the Applicants do not reside in the suit land number Kiine/Nyangio/156.



- v. That the issue of disinheritance does not arise since the Applicants are not beneficiaries in the estate of the deceased who was the 1<sup>st</sup> respondent's husband.
- vi. That what happened at the time of demarcation and registration of the suit has been overtaken by events.

### **Evidence at the hearing**

7. Before her death, PW1 Beatrice Wanjira Githinji, the 1<sup>st</sup> applicant, testified that the 1<sup>st</sup> respondent was her sister-in-law married to her brother, the deceased, and that the 2<sup>nd</sup> respondent was her daughter. She stated that she was left out of the succession process despite the fact that she and her sisters were all born in Kiine/Nyangio/156; that at the time of demarcation their father Githinji Mwai was dead thus the land was registered in their deceased brother's name; that her mother continued living on the land with them after demarcation until she died. As such, she testified, the land ought to have been shared out equally between all the children of Githinji, namely, Amos Maina (deceased), Purity Nyambura, herself, and Ann Rose Wanjiku,
8. In cross examination she said she had never been married; that she has two children and one of them lived on the subject land with his family, that she had no other shamba; that Purity Nyambura and Ann Rose are married and did not live on the shamba; that Rose Njeri (deceased's widow, 1<sup>st</sup> respondent) also lived on the land; that she did not find it necessary to ask the deceased to give her a share of the land, or make any move to have the land registered in her name after the death of the deceased; that her mother could not have been registered as owner since women at that time were not allowed to own or inherit land; that the land was first owned by their grandfather who left it to their father.
9. In re-examination she testified that her father was taken into detention in the 1950s and that she had been born and lived on that land since with her family.
10. PW2 Harun Gatumbo Maina testified that he was a member of the Kambura clan, which is the same clan as the deceased was a member of. He asserted that parcel No Kiine/Nyangio/156 was given to Maina in 1958 by the clan when Maina was 12 years old; that during that time, women could not be registered so the land was given to the boy (Maina) who would grow to be a man; that Maina's mother was alive but their father was deceased; and that he sat on the clan committee that was giving out community land.
11. He further testified that he also knew the 1<sup>st</sup> respondent Rose Njeri Maina as the wife to Maina Nyong'o the deceased; that she got married when Maina was living on the said parcel of land; that Beatrice and Ann rose Wanjiku also lived there; and that Jackson had not built a house on that land.
12. In cross-examination, he said that he was born in 1928, and was 86 years old; that he knew the father to Maina Nyong'o who died during the emergency; that he was in the committee of 3 persons which gave the land to Maina Nyong'o to hold it on trust for the rest of the family members; that women could not hold land then or inherit it; that Maina Nyong'o was the only male as he had only sisters; that Beatrice had not been married but the other sisters got married; and that he knew Rose Njeri who was married to Maina and that she has children
13. RW1 Rose Njeri Maina, said that she was married to the deceased in 1976; that she was Joyce Njoki Maina's mother; that Beatrice Wanjira Githinji was her husband's sister; that the land in question was first registered in 1960 in the name of her husband and no one else; that her husband's father was not shown in the title; that her children were born there; that her husband's sisters were married and would visit when they had problems; that she found only her husband's mother Jemima Wambui on the land; that her mother-in-law never mentioned anything about the land belonging to her in-laws; that none



of her in-laws live on the land nor did they sue her late father in law; that the land is supposed to be given to her children and that she never chased anyone from the land.

14. In cross examination, she said that she was married under customary law; that she lived on the land and her husband left her there when he died; that her mother in law and her husband are buried on the land; that her husband's sister Beatrice Wanjira who is the mother of Jackson Wanjohi Mwangi and Eric Wanjira, was also buried on the land; that her mother in law did not have any home other than on the land where she lived all her life; that her. She further admitted that she did not the applicants when she filed the succession cause; that Jackson lives in her mother-in law's house on the land and he built a small house nearby; that Jackson's child lives there with him; and that her husband's siblings visited the home without any problem as it was their home when they were small.
15. RW2 Peter Mwangi Koine testified that he grew up with the deceased in Mukango Village; that he was also the deceased's workmate in the Prisons Department; that his home and the deceased's home were about only one kilometer apart; that he knew the deceased's sisters Beatrice Wanjira, Wambura and Monica; and that the house at the boma belongs to their mother.
16. In cross- examination, he confirmed that Maina Nyongo (deceased) and his sisters all went to school together in Mukango Primary; that the deceased and his sisters all lived in Mukango village before titles were issued; that when titles were issued people went to their shambas; that Rose lives on the shamba that the Maina (deceased's) parents were given; that at the time Maina's father had died; that when they left the village land was being given to parents; and that at the time the land was being given only Maina (deceased) was alive; that when people left the villages and titles were issued, Maina's family went to the family shamba.
17. RW2 further confirmed that at present on the land, there are three bomas, namely, boma of Jackson, boma of Maina Nyongo, Rose's place, and Maina's mother's boma; that the deceased's sisters were brought up there before they were married; that

### **Parties' submissions**

18. Despite consent and directions agreed for the filing of submissions, only the applicants filed written submissions
19. The applicants claim is that the deceased herein was registered in the suit land as a family trustee since their father was in detention during demarcation and women could not be registered. Thus, their mother who was available could not be registered to hold their land.
20. The applicants submit that all their family members have lived on the suit land. Their father and mother passed on in 1997 and 2008 and were buried on this land. The 1<sup>st</sup> and 4<sup>th</sup> applicants from the evidence adduced were buried on the suit land and no objection was raised by the respondents.
21. They submit that the 1<sup>st</sup> applicant's children have built on the suit land and they live there. The other applicants being daughters share their mother's house. The 1<sup>st</sup> respondent was married to the deceased in 1976 and found the mother in law and applicants on the suit land as she confirmed during cross examination.
22. Further, they submit that the respondent's witness, Peter Mwangi Koine, confirmed that they grew up together with the deceased and schooled together. They attended the same school even with deceased's sister namely Beatrice, Wambura and Monica all of whom were living on the suit land with their mother at Mukangu village.



23. The applicants submit that the suit land herein is family/ancestral land and the deceased was merely a trustee. It was thus fraudulent of the respondents to file this succession cause far away in Nairobi without informing other family members. The concealment of the fact that there are family members on the suit land from the court is also fraudulent.
24. It was submitted that the fact that the 1<sup>st</sup> respondent insists that the land is registered in her husband's name and should thus be distributed to her and her children only, confirms her intention to disinherit the other family members of their ancestral land. This is unfair and should not be allowed since the land was held on trust.
25. The applicants relied on the case of *Isack M’Inanga Kiebia v Isaaya Theuri M’Lintari & Another* [2018] eKLR where it was held by the Supreme Court at Par.48 that:
- “a customary trust as long as the same can be proved to subsist, upon a 1<sup>st</sup> registration is one of the trusts to which a registered proprietor is subject under the provision to Section 28 of the Registered *Land Act*.”
26. It is therefore clear that where a trust exists in respect of a parcel of land, prior to the registration of that parcel, that interest overrides the proprietary interest of the registered owner of the title.

#### **Issues for determination**

27. The issues which arise for determination are as follows:
1. Whether the deceased’s land was held on trust
  2. Whether the grant should be revoked.

#### **Whether the deceased’s land was held on trust**

28. In their supporting affidavit applicants deposed that the estate herein, Kiine/Nyangio/156, is family land and the deceased was registered as a trustee for the whole family since their father Githinji Alias Nyoingo was in detention and women were not being registered.
29. On her part, the 1<sup>st</sup> Respondent deposed in her replying affidavit that she was not aware of any trust that existed between her deceased husband and the Applicants.
30. There is no dispute that the said title is registered in the name of the deceased, and no one else. It is also not disputed that there is nothing in writing availed to this court that establishes the existence of a trust. A trust need not be expressed in writing, although that is the clearest and most ascertainable form it can take. It can be proved by other evidence.
31. The Supreme Court settled the issue of trusts of land in *Isaac M’Inanga’s* case (supra). The court identified some of the elements that constitute a trust on land as follows:
- “Some of the elements that would qualify a claimant as a trustee are:
1. The land in question was before registration, family, clan or group land
  2. The claimant belongs to such family, clan, or group
  3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.



4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
  5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”
32. All that is required is to establish whether the applicants have established these or some of these elements. The evidence adduced is as follows:
33. PW 1 Beatrice Wanjira Githinji’s evidence was that the deceased was her brother; that and that the other applicants are her sisters. That is, they are all from the same parentage. Further, that:
- “I and my sisters were born in that land. During the time of demarcation, our father Githinji Mwai was dead and therefore that land was registered in our only brother’s name, Maina”
34. PW 2 Harun Gatumbo Maina testified that he was in the committee of three persons that gave the deceased, Maina Nyongo, the suit land to hold in trust for the rest of the family members. This was because Maina was the only male child and women were not allowed to inherit land. Further, he testified that PW1 was never married and lived in the house belonging to her deceased mother.
35. RW1- Rose Njeri Maina testified that the suit land belonged to her husband and she lived in it from 1976. She admitted that her mother in law lived all her life in that land, and that the deceased, her mother in law and PW1 were buried on the suit land. She also admitted that the applicants were born on the same land. On cross-examination, she stated that a son of PW1, Jackson Wanjohi, lives on the suit land in a house belonging to her deceased mother in law.
36. The respondents’ own witness, RW 2 Peter Mwangi Koine, testified in cross examination, that the applicants lived on the suit land before they were married. He admitted that PW1’s son, Jackson Wanjohi lives on the suit land. Further, he confirmed that on the land:
- “At present there are bomas of Jackson, boma of Maina Nyongo and Maina’s mother’s boma...  
....the sisters were brought up there before they were married”
37. Further RW2 testified in cross examination that;
- “When people left the villages and titles were issued Maina’s family went to the family shamba”
38. From the testimony of both above witnesses, there is overwhelming proof that the suit land herein is family/ancestral land; it is also clear that family members other than the deceased have their homes on the land; it is clear that when the first registration took place other family members resided on the land; it is clear that the deceased’s parents also lived on that land prior to the first registration.
39. Accordingly, the case is easily made that that at the time of first registration there were other interested beneficiaries to the land whose interests subsisted, and the deceased was merely a trustee. The deceased acquired the land through a first registration to hold in trust for his mother and siblings. There is no doubt therefore, that this case exemplifies some of the elements that would qualify the claimant as a trustee.
40. Accordingly, I find and hold that the subject land was held by the deceased for himself and also as a trustee for the claimants.



## Whether the grant should be revoked

41. The applicants seek that the grant of letters of administration issued to Rose Njeri Maina and Joyce Njoki Maina on 11<sup>th</sup> May 1998 and subsequent certificate of confirmation dated 24<sup>th</sup> Feb 2000 be revoked or annulled. They claim that the grant was obtained fraudulently by making of a false statement or concealment from the court of something material to the case. That the said grant has disinherited the applicants and their children.
42. Section 76 of the Law of Succession Act which is invoked for the revocation sought herein provides:
- “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 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.” (Emphasis added)
43. The applicants relied on Section 76(b) LSA and the fact that they were not informed of the filing of the succession cause, leading them to presume they were being disinherited, Sec 76(c) is also an apt provision that characterises what happened in the present case. The respondents, whether by ignorance or inadvertence, appear not to have disclosed to the court that there were family members other than themselves occupying the subject property.
44. In this case, I have determined that the applicants were lawfully on the said land as beneficiaries of a trust under which the deceased held the land. I have not found that there was fraud, an element that would require a higher standard of proof than on a balance of probabilities, although this was clearly a case of non-disclosure of the full facts before the court.

## Disposition

45. On the first issue, I found and held that the land was held by the deceased for himself and also as trustee for the claimants.



46. On the second issue, I hereby make the finding and do hold that the respondents failed to disclose to the court the existence of the rights of the applicants to the land; and that such non-disclosure whether negligent or inadvertent, leads to the result that the applicants were deprived of a beneficial equitable interest in the deceased's land. In the result, the grant cannot stand, and is hereby revoked.
47. A fresh grant shall be issued in the names of the 1<sup>st</sup> respondent and one representative selected by the applicants from amongst themselves.
48. The parties are directed to agree on the mode of distribution of the deceased's land and should they fail to do so, the 1<sup>st</sup> respondent shall file a summons for confirmation of grant to which any opposing party may file a protest.
49. As this is a family matter, each party shall bear its own costs.
50. Orders accordingly.

**DATED AT KERUGOYA THIS 19<sup>TH</sup> DAY OF OCTOBER 2023.**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Mrs. Wahome for Applicant
2. No representation - Wamahiu for Respondent
3. Rose Njeri Maina - Present in court
4. Joyce Njoki Maina - Present
- 5.

Murage - Court Assistant

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