



REPUBLIC OF KENYA



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**In re Estate of Joel Kangara Muthara (Deceased) (Succession Cause
550 of 2013) [2023] KEHC 23362 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
SUCCESSION CAUSE 550 OF 2013**

LW GITARI, J

OCTOBER 12, 2023

IN THE MATTER OF THE ESTATE OF JOEL KANGARA MUTHARA (DECEASED)

BETWEEN

PETER MWANGI KANGARA APPLICANT

AND

LAWRENCE MUCHIRI DWIGA RESPONDENT

AND

JAMES MAINA MUGWANDIA INTERESTED PARTY

JAMES MURIMI WANJOHI INTERESTED PARTY

JUDGMENT

Background:

1. This matter relates to the estate of Joel Kangara Muthara, (deceased) who died on 25/3/1998. He died testate and so a petition for Probate of written Will was filed by Lawrence Muchiri the respondent herein on 19/3/1999 at Nairobi High Court, Succession Cause No.206/1999. A grant of Probate of the written Will was issued on 2/6/1999 and confirmed on 29/9/2000. A certificate of confirmation of grant was issued and the estate distributed as per the Will of the deceased, that is:-

1. Peter Mwangi Kangara - LR/Mwerua/Kagioini/451- 2 acres
2. John Macky Mwangi Kangara- LR Mwerua/Kagioini/451-2 acres.
3. Josephine Wambui Kangara- Mwerua/Kagioini/451- 1 acre
4. Tabitha Wangechi Kangara - Mwerua/Kagioini/451- 1 acre
5. Sofia Muthoni- LR Mwerua/Kagioini/622 – 1 acre



6. Jane Wanguru –LR Mwerua/Kagioini/622 - 1 acre
7. Tabitha Wangechi Kangara- LR Mwerua/Kagioini/622 -3 ½ acres.
8. Benard Warui Kangara-LR Mwerua/Kagioini/165- Whole.

What is now pending determination before this court is the summons for revocation or annulment of grant brought under Section 76 of the *Law of Succession Act* and Rule 44 of the *Probate and Administration Rules*. The applicant Peter Joel Mwangi alias Muthara Joel prays that the grant of representation issued and confirmed on 20/8/2007 be revoked and/or annulled. The application is based on the grounds that-

1. That the grant was obtained fraudulently by making a false statement and/or concealment from court of information material to the succession cause.
 2. That the grant confirmed included property which was fraudulently transferred to the names of deceased Joel Kangara Muthara.
 3. That the respondent in bad faith concealed this information from the court.
2. The application is supported by the affidavit of the applicant sworn on 20/8/2007 and he avers that he was initially registered as proprietor of Land Parcel No. Mwerua/Kagioini/451 but it was fraudulently transferred to the deceased Joel Kangara Muthara. He filed the disputes in the Land Disputes Tribunal which ordered the subdivisions were null and void and the land should revert back to him. This could however not be affected as the grant of probate had been confirmed by the High Court. He further contends that he did not get a share of the estate of the deceased who was his father.
1. The respondent Lawrence Muchiri Ndwiga oppose the application and filed a replying affidavit sworn on 12/11/2018. His contention is that Land Parcel No. Mwerua/Kagioini/451 belongs to the deceased who is his father.
 2. James Maina Mugwandia joined the suit as an Interested Party and claims that he owns plot No. Mwerua/Kagioini/1267 having bought it from the deceased on 10/3/1996 at a consideration of Kshs.150,000/- which he paid in full and is therefore entitled to have the said parcel of land.
 3. James Murimi Wanjohi also joined the suit as Interested Party claiming ownership of plot No. 1. Kiburu in Kirinyaga County. He contends that he acquired the plot through purchase from Tabitha Wangechi who is the wife of the deceased and the plot had been bequeathed to her by her late husband. He avers that he was not aware of the claim by the applicant.
 4. The parties agreed to proceed by way of viva voce evidence. Below is the analysis of the evidence which was tendered.

The Applicant's Case

1. The Applicant herein, Peter Mwangi Kangara, testified as PW1. He stated that he is a farmer and lives on the land parcel no. Mwerua/Kagioini/451 (the "suit land"). He relied on the affidavit which he swore on 20th August, 2007 and adopted the same as his evidence. He deponed that the deceased herein, the late Joel Kangara Muthara, was his father and that he passed away on 25th March, 1998. He further deponed that this succession cause was filed secretly and he was never notified of the same. According to him, the suit land was registered in the name of Muthara Kangara which refers to him. That the Respondent was aware of the dispute that existed between the Applicant and the Applicant's father. That the Applicant never transferred the land to his father and that in the year 2002, the Applicant



- filed a case with the Land Dispute Tribunal which tribunal ordered that the suit land be returned to the Applicant's name. It was the Applicant's case that he later learnt that the suit land was sub-divided by the Respondent without the Applicant's consent and in the presence of a surveyor and police men.
2. On cross examination, the Applicant conceded that the name that appears on the green card of the suit land was Muthara Joel K. and yet his identity card read Peter Mwangi Kangara. He contended that the two different names refers to the same person which is him and explained that in 1961, he did not have an identity card and when he went to apply for an identity card, he started using the name Peter Mwangi Kangara. The Applicant further testified that he was given the suit land because his deceased father was never given land by the clan of Ambui. According to him, the deceased name was Joel Muthara Kangara and he bought land parcel known as Mwerua/Kagioini/622. That the Applicant has a brother by the name of Benard Warui Joel and that the deceased had filed Civil Suit No. 77/1997 against the Applicant and his brother Benard Warui Joel and the court ordered that the cautions placed on the land be removed.
 3. The Applicant further stated that he sued one Tabitha Wangechi Kany'ara, the deceased's third wife, over the suit land as one acre of the same had been allocated to her under the will of the deceased. She appealed at the Provincial Appeals Tribunal and that is when the Applicant allegedly came to learn that this succession cause had been filed. The Applicant is challenging the will left behind by his father on ground that it included the suit land which the Applicant maintains belongs to him.
 4. The Applicant further testified that he physically knew one James Maina Mugwandia, the 1st Interested Party herein, but did not know that the said James had appeared before the Land Control Board and obtained a title deed. The Applicant said that he cautioned the suit land because part of the land belongs to him. He denied knowledge that the deceased's widow, Tabitha Wangechi, sold Plot No. 1 to the 2nd Interested Party.
 5. PW2 was one Nahason Kagwima, the step-brother to the Respondent. He adopted as his evidence his witness statement that is dated 25th April, 2014 and filed the same day. He stated that he knew the deceased and that the deceased had 3 (three) wives and 12 (twelve) children. According to him, the deceased used to live on his land in Muthara before he later moved to the land parcel no. 622. That the deceased had a disagreement with the clan elders and that is why he got no land from the clan and had to move. That the Applicant was given land parcel no. 451 in 1961 by the clan of Kerienye after the deceased moved and settled in the clan of Muhono and that one Warui, another son of the deceased, was given land in a different clan.

The Respondent's Case

6. The present application for revocation of grant is opposed by the Respondent and the two Interested Parties herein. DW1 was Rev. Lawrence Muchiri Ndwiga, the Respondent herein. He relied on his affidavit which he swore on 12th November 2018 as his evidence. The deceased herein was his uncle. He stated that the deceased left behind a will and appointed him as the executor and trustee. According to him, the deceased was healthy, strong, and of sound mind when he signed his will and that the will was drafted by an advocate called Mboroki and witnessed. It was his evidence that the suit land belonged to the deceased and that the written will he produced before this court expressed the last wishes of the deceased which catered for all the beneficiaries including the Applicant.
7. DW2 was James Maina Mugwanja, the 1st Interested Party herein. He relied on the contents contained in the affidavit which he swore on 16th January 2012 as his evidence. He testified that on a date that he could not remember, the deceased and the wife to the deceased went to DW2's house. The deceased allegedly wanted to subdivide the suit land to his children. It was DW2's testimony that the deceased



promised to give him one (1) acre that would remain after the sub-division and that they entered into an agreement to that effect at consideration of Kshs. 150,000/=. According to DW2, the deceased never completed the transfer of the land to him as the deceased passed away. He stated that the grant in respect of the deceased's estate was obtained and consequently confirmed on 29th September 2000 in Nairobi High Court Succession Cause No. 206/1999. That DW2 and Tabitha Wangechi then went to the Land Control Board where DW2 got land parcel no. Mwerua/Kagioini/1267 from the suit land. Further, he stated that he took possession of the said land and planted bananas and nappier grass. He however left the land after the Applicant allegedly visited the land and threatened to cut DW2's employees with a panga. It was DW2's case that he later on realized that the Applicant had placed a caution on the land hence he could not secure his title over the land.

8. DW3 was James Murithi Wanjohi, the 2nd Interested Party herein. He adopted as his evidence the Replying Affidavit which he swore on 11th July, 2017 as well as his Supplementary Affidavit sworn on 7th March, 2018. It was his case that he purchased Plot No. 1 Kiburu, Kirinyaga County, sometime in September 2016 and upon application to the National Land Commission, he was issued with a Certificate of Lease for the said plot of land. He conceded that while the said plot was given to one Tabitha Wangechi as per the will annexed to these proceedings, the same was not included in the confirmed grant.
9. The parties had indicated that they would file written submissions. However, it is only the applicant who filed the submissions through his counsel on record Magee Law LLP.

Analysis

10. I have considered the summons seeking revocation of the grant issued and confirmed in these proceedings as well as the affidavits in support and in opposition to the said application. The issue for the Court's determination is whether the grant obtained by the respondent should be revoked or annulled on the basis that it was obtained by fraudulent means.
11. The grounds for revocation of grant are anchored under Section 76 of the Succession Act (the "Act") 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 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.”
12. It is upon any party seeking the revocation or annulment of a grant to demonstrate the existence of any, some, or all of the grounds set out in Section 76 as outlined above. In the present case, the Applicant has invited this Court to revoke the Grant of Probate made to the Respondent stating that the proceedings to obtain the grant were filed secretly and were based on concealment of material facts. It was his case that the Respondent included the suit land as part of the properties that formed part of the estate of the deceased herein and yet the same supposedly belonged to the Applicant. That the deceased’s estate ought to have been shared equally after excluding the suit land.
13. The Respondent provided a copy of a written Will with respect to the estate of the deceased. The said Will is dated 6th December, 1996. Clause 1 of the Will appoints the Respondent as the executor of the Will of the deceased while Clause 3 of the Will itemizes how the deceased wished his estate to be distributed.
14. For a written Will to be considered to be valid, Section 11 of the *Law of Succession Act* provides for the requirements that it needs to meet. The said section states as follows:
- “No written will shall be valid unless-
- (a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
 - (b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will;
 - (c) the Will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of that person; and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”
15. From the above legal provision, it follows that a written Will can only be valid if the same has been duly executed by the testator and attested by two competent witnesses. In this case, the Will on record was executed by the deceased and attested by one James Ruita Wanandu and one Simon Peter Gichuru Thumi. However, none of the two attesting witnesses came before this Court to testify that they were present at the time the Will was executed. In addition, none of the advocates from the law firm known as Mbichi Mboroki & Co. Advocates, who prepared the Will, came to testify in this cause. Be that it may the validity of the Will is not in dispute.

The respondent had the legal burden to prove that the deceased had a valid Will. In every case before a court, the decision will depend on whether the party concerned has satisfied the particular burden



and the standard of proof. The issue of burden of proof is provided under Section 107, 108 and 109 of the Evidence Act (Cap 80 Laws of Kenya)

“ 107. Burden of proof:

- (1) 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.
- (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.

108. Incidence of burden:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

It is a trite rule of evidence that whoever asserts the existence of a certain fact, is under a burden to prove it. In civil cases, the burden of prove is on a balance of probabilities. In *Miller-v- Minister of Pensions* (1947) 2 All ER 372, Lord Denning states as follows on the standard of proof in civil cases.

“The standard of proof is well settled. It must carry a reasonable degree of probability..... if the evidence is such that the tribunal can say. We think it more probable than not, the burden discharged.”

The respondent proved the deceased made a valid Will. The said Will was produced in evidence. There was no allegation that the deceased had no capacity to make the said Will. The Law of succession Act under Section 5(3) which provides:

“ 5

- (3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is, at the time of executing the Will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.”

Provides for a rebuttable presumption that a person making a Will is of sound mind and that the Will has been duly executed. The applicant’s contention is that the land in dispute belonged to him and therefore the deceased could not distribute it in the said Will.

He never raised the issue of lack of capacity or any of the ingredients which may affect the validity of a Will. I therefore find that the Will was properly executed by the deceased who had capacity to make the Will and knew what he was doing at the material time. See Section 11 of the Law of Succession Act (*supra*) for the ingredients of a valid Will which include testamentary intent, capacity, none-existence of fraud, duress, undue influence or mistake and must have been duly executed.



The applicant testified that he was aware of alleged Will, he has however not raised any issue on the manner in which it was written and executed. He has also not disputed the fact that the Will signed by the testator was signed in the presence of the witnesses and an advocate. I therefore come to the conclusion that the respondent discharged the burden of proof on a balance of probabilities that the written Will dated 6/12/1996 is the valid last Will and testament of the deceased.

16. The applicants has raised the issue that the grant which was confirmed included property which was fraudulently transferred to the names of the deceased Joel Kangara Muthara and the respondent in bad faith and concealed this information from the court. In essence the applicant states that the grant was obtained fraudulently by making a false statement and/or concealment from the court of information material to the case. The alleged material fact is that the confirmed grant included Land Parcel No.Mwerua/Kagioini/451 which had been allotted to the applicant by the clan in 1961. That this land parcel was transferred to the deceased without the applicant’s knowledge in 1996. The applicant relies on a copy of the green card PMJ-1, his exhibit 1. The applicant avers that he had no knowledge that the land was transferred to the deceased and he never attended any Land Control Board Consent to transfer the said land to the deceased.

The applicant called Nahashon Kagwima Ndwiga who swore and affidavit on 25/4/2018 and avers that the deceased did not get any clan land from his clan and that it is the applicant who got LR Mwerua/ Kagioini/451. He contends that this land did not belong to the deceased.

17. The applicant relies on a green card annexure “PMJ -1” which is for Land Parcel No. Mwerua/ Kagioini/451. The green card shows that on 19/4/1961 the said land was registered in the name of Muthara Joel K. and certificate issued on 6/1/1966. The applicant further relies on a decree from the Land Disputes Tribunal Case No. 3/2002 between Peter Mwangi Kangara and Tabitha Wangechi Joel. The Tribunal directed that the sub-division of Land Parcel No. Mwerua/Kagioini/451 was well (sic) and void and should be cancelled. That the resultant subdivisions be registered in the mane of the claimant Peter Mwangi Kangara, the decree is annexure “PMJ-2”.

The applicant did not annex the proceedings of the Land Disputes Tribunal. The annexure “PMJ– 2” is a decree from the Magistrate’s Court dated 19/4/2002. There is also proceedings from the Magistrate’s Court Kerugoya in Civil Suit No. 77/1997 long before the said decree was issued which had held that the land in dispute was registered in the name of the plaintiff, the deceased in this matter and had obtained the consent of the Land Control Board to sub-divide the land. Documents on record shows that the Provincial Appeals Tribunal held that the matter was ‘res-judicata’. The applicant –can therefore not rely on the Land Disputes Tribunal Award.

I have considered the annexure PMJ -2 which the applicant relies on. Section 3(1) of the Land Disputes Tribunal Act (Cap 303) Laws of Kenya (Repealed) provided that:

“subject to this Act all cases of Civil nature involving a dispute as to-

- a. the division of, or the determination of boundaries to land including land held in common;
- b. claim to occupy or work land; or
- c. trespass to land shall be heard and determined by a tribunal establishment under Section 4.”

It follows that the Land Dispute Tribunal had no jurisdiction to determine disputes touching on title to land. It is trite that a decision made by a court or tribunal without jurisdiction is null and void ab-intion and the resultant decision is a nullity.



In law a decision that is null and void means that it is of no legal effect whatsoever and any action which is nullity is treated as something that had never existed.

I find that the decision of the Land Disputes Tribunal, PMJ-2 which was a nullity had no legal effect and this court cannot therefore rely on it to find the land belongs to the applicant. The said decree PMJ-2 on the other hand was an abuse of court process as there was a decision of the magistrate which held that the deceased was the registered owner of the land in dispute long before the matter was filed in the Land Disputes Tribunal. The applicant admitted that the deceased had sued him and his brother and he never appealed that decision. He filed the dispute in the Land Disputes Tribunal after the deceased died.

Finally on the issue of the green card annexure PMJ-1, it is clear that the deceased Muthara Joel K. was the registered proprietor of the land. The contention by the applicant that this name refers to him is a sham as the name on his National identity card is Peter Mwangi Kangara. The names Muthara Joel K. who is the first registered owner refer to the deceased.

I find that the applicant has not proved on a balance of probabilities that the land was fraudulently transferred to the deceased. There is evidence that Land Parcel No. Mwerua/Kaigoini/451 belonged to the deceased.

18. I find that the applicant has not demonstrated the existence of the grounds set out under Section 76 of the Law of Succession Act (*supra*) to warrant this court to annul and/or revoke the grant. The section empowers the court to revoke the grant where any of the grounds are disclosed and where the proceedings of obtaining the grant were defective. The contention by the applicant that material facts were concealed has not been proved. From the record in File No. P&A 206/1999 which was transferred to this court, it is clear that cause was gazetted as required under the Act and no objection was filed, the allegation of concealment by the applicant is therefore moot. The grant was obtained following the probate of the Will of the deceased whose validity was not challenged. The applicant is bound by his own pleadings. His only contention is that Land Parcel No. Mwerua/Kagioini/451 belonged to him and ought not to have been included in the grant. He has failed to prove this ground. The applicant admitted during cross-examination that plot No.1 Kiburu Market was allocated to Tabitha Wangechi alone. This was as per the deceased's Will which the applicant has not challenged.

It follows that there is no ground to warrant revocation of the grant based on distribution of this plot as it was distributed in accordance with the wishes of the deceased. As for Land Mwerua/Kagioini/451 the magistrate's ruling dated 11/7/97 shows that the deceased had obtained the consent of the Land Control Board to sub-divide it.

I find that the applicant has failed to prove that Land Parcel No. Mwerua/Kagioini/451 belonged to him. He has no claim over the land. It was therefore properly included in the schedule of the assets of the deceased.

In the circumstances I find the applicant's application lacks merits.

Order:

1. The application dated 20/8/2007 is dismissed.
2. Costs to the respondents and the Interested Parties.

Dated, signed and delivered at Chuka this 12th day of October 2023.

L.W. GITARI

JUDGE

