



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of M’ntiba Mbobua (Deceased) (Miscellaneous Succession Cause E010 of 2021) [2023] KEHC 25194 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEHC 25194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS SUCCESSION CAUSE E010 OF 2021**

LW GITARI, J

OCTOBER 5, 2023

IN THE MATTER OF THE ESTATE OF M’NTIBA MBOBUA (DECEASED)

BETWEEN

JENNIFFER KANINI MATI 1ST APPLICANT
TERATISIO MURIUKI RWIGI 2ND APPLICANT
MATI RWIGI 3RD APPLICANT
NDEKE RWIGI 4TH APPLICANT
DAVID NYAGA RWIGI 5TH APPLICANT
MUTEGI RWIGI 6TH APPLICANT
мбака RWIGI 7TH APPLICANT
MUTHONI RWIGI 8TH APPLICANT
GITONGA RWIGI 9TH APPLICANT
LENAH RWIGI 10TH APPLICANT

AND

JAMES MURITHI RWIGI 1ST RESPONDENT
ALFRED EDWIN MUTURA 2ND RESPONDENT



RULING

1. This matter relates to the estate of M’Ntiba Mbobua (deceased). A grant of Letters of Administration was issued to James Muriithi Rwigi on 21/2/2012 and the estate of the deceased was distributed vide a certificate of confirmation of grant dated 21/2/2012 as follows:-
 - Magumoni/Itugururu/826
 - Genasio Gitonga Kabara - ¼ Acre
 - Magumoni/Itugururu/826
 - James Muriithi Rwigi - Balance thereof
2. What is pending before this court is summons dated 3/2/2021 which seeks orders that this court be pleased to annul and/or revoke the certificate for confirmation of grant issued on 21/2/2012. That the court be pleased to issue an order cancelling any subsequent sub-division and or void the sale and transfer of subsequent sub-divisions of Land Parcel No. Magumoni/Itugururu/826.
3. The applicant also seeks an order of inhibition against the Land Parcel No. Mugumoni/Itugururu/826 prohibiting any sale, transfer, lease, subdivision or any other form of interference pertaining to the aforementioned parcels of land pending the hearing and determination of this cause.
4. That the court be pleased to call for Succession Cause No.167/2011 for further orders.
5. The application is based on the following grounds:
 1. That the grant was obtained through misrepresentation and concealment of material facts.
 2. That the proceedings to obtain the grant were defective in substance.
 3. That the grant was obtained fraudulently by making false statements in court.
 4. That for the interest of justice the grant ought to be annulled.
6. The summons is supported by the affidavit of Taratisio Muriuki Rwigi sworn on 3/2/2021. He deposes that the deceased to whom these proceedings relates is his father who died intestate on 7/5/2008. The deceased was the registered owner of Land Parcel No. Magumoni/Itugururu/826 as per the copy of the green card and the title deed. It is the contention by the applicant that the petitioner who is his brother filed the succession cause secretly without involving him despite him ranking in priority to the Petitioner.
7. The applicant faults the Petitioner for listing none dependants of the deceased and distributing the estate to them. These are:-Alfred Edwin MuturaGenasio Gitonga Kabara
That as a result the rightful dependants of the deceased were left out in the distribution of the estate in addition to failing to distribute the estate in accordance with his wishes.
8. The applicant further states that the petitioner caused the land to be sub-divided and disposed off two portions to a 3rd Party who is the second respondent. That the respondent did not seek the consent or renunciation when filing the cause.



Finally the applicant contends that he was not aware of the Succession Cause filed by the Petitioner and had no opportunity to file a protest on the distribution of the estate.

The second respondent Alfred Edwin Mutura opposed the summons and filed a replying affidavit on 6/5/2021. His contention is that he is a stranger to the allegation made by the applicant. According to him he bought Land Parcel no. Magumoni/Itugururu/2232 from the 1st respondent sometimes in May 2013 at a consideration of Kshs.1,000,000/-

9. Later Genesio Gitonga Karara sold land Parcel No. Magumoni/Itugururu/2231 at a consideration of Ksh.2,000.000/-
10. He thus avers that he is an innocent purchaser for value without notice of any fraud or other circumstances that may invalidate the transaction. The 2nd respondent deposes that if grant is revoked he will suffer great injustice.
11. The 2nd respondent contends that the protestors have filed Succession Cause No.158/2015 and have not disclosed that there is a pending Civil suit No.69/2014 in the Chief Magistrate's Court at Chuka where he has sued them for trespass and malicious damage. The 1st respondent filed affidavit evidence and contends that he is the last born son of the deceased. According to him the deceased had three wives and during his lifetime, he settled all his sons on different parcels of land according to the three houses. The deceased signed a distribution agreement and the matters were captured in his last Will. That is not true that the land in dispute is the only property forming the estate of the deceased. The summons was canvassed by way of written submissions.

For the applicants/protestors submissions were filed by Kijaru Njeru and company advocates. It is the submission by the applicants that the 1st respondent misrepresented facts and concealed material facts. The applicant submits that the 1st respondent failed to disclose material facts that the deceased had other children and distributed the estate to Genesio Gitonga who was not a son of the deceased.

12. It is also the submission by the applicant that the lower court lacked the pecuniary jurisdiction to entertain the succession as the value was way above Ksh.100,000/- which was provided by the statute then. The applicant further submits that the 1st respondent committed fraud as he filed the succession cause without a death certificate, present a forged Chief's letter and swore an affidavit that the title deed was lost whereas it was with the daughter of the deceased. The applicants further submit that they were left out when the succession cause was filed.
13. For the respondents, submissions were filed by Shaban and Company Advocates. He has raised the issue as to whether the application has merits. The respondent submits that the allegation of forgery of the Chief's letter has not been substantiated to the required standard. He further submits that the Land Parcel in question does not exist as the same has been sub-divided and has chased hands.

The respondent relies on the case of *Mathew Njenga Njogu & Another v Rosemary Muthoni Njue* (2021) eKLR.

I have considered all the submissions. The issue for determination is whether the court should order the revocation of grant which was issued to the 1st respondent.

14. The law on revocation of grant is anchored at Section 76 of the *Law of Succession Act* (Cap 160 Laws of Kenya) to be referred to as the *Act*. The Section provides as follows:

“ 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
- (e) that the grant has become useless and inoperative through subsequent circumstances.”

15. The circumstances under which the probate and administration court can revoke a grant were discussed in the matter of the *Estate of L.A.K (deceased)* (2014) eKLR where the court stated that –

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

Thus the court will revoke a grant where it is proved that it was obtained through misrepresentation that the proceedings to obtain the grant were defective in substance, the grant was obtained fraudulently by the making of a false statement or by the concealment from court something material to the case. The grant will also be revoked it is proved that it was obtained by means of an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadequately. The grant will also be revoked if it has become useless and inoperative through subsequent circumstances.

16. In [Albert Imbuga Kisigwa v Recho Kawai Kisigwa](#) Succession Cause No.158/2000, Mwita J stated:-

“The power to revoke a grant is discretionary and must be exercised judiciously and only on sound grounds..... There must be evidence of wrong doing for the court to invoke Section 76, and order to revoke or annul the grant. And when the court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”



17. The court has jurisdiction to revoke a grant if the conditions under Section 76 of the *Act (supra)* are met. In furtherance of the court's duty to distribute the estate of the deceased to the rightful beneficiaries the court will revoke a grant where the property has been distributed to the wrong people so that the property reverts to the estate of the deceased for the purpose of proper distribution. This court has jurisdiction to entertain matters falling under the Act.

Section 47 of the *Act* provides as follows:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by resident magistrates appointed by the Chief Justice.”

18. On the other hand Rule 44 of the *Probate and Administration Rules* provides as follows:-

- “(1) (1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the *Act* to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.
- (2) There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him-
- (a) whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and
- (b) the extent to which the estate of the deceased has been or is believed to have been administered or to remain unadministered, together with any other material information.
- (3) The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds therefore.
- (4) When the persons (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court on notice by the court to the applicant and to every person so served, and the court may either proceed to determine the application or make such other order as it sees fit.



- (5) Where the High Court requires that notice shall be given to any person of its intention of its own motion to revoke or annul a grant on any of the grounds set out in section 76 of the Act the notice shall be in Form 69 and shall be served on such persons as the court may direct.”

This is a succession matter. This court has jurisdiction to entertain the application. The contention by the 2nd respondent that this court lacks jurisdiction as he has already acquired title to the land. The Supreme Court has held that Article 40 of the Constitution entitles every person to the right to property subject to the Limitations set out therein. Article 40 (6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire the title regularly the ownership of the suit property thereafter cannot therefore be protected under Article 40 of the Constitution. The root of the title having been challenged as we have already noted above, the appellant could not benefit from the doctrine of bona fide purchaser.”

19. The Supreme Court quoted with approval the Court of Appeal decision in Munyu Maina v Hiram Gathiba Maina (2013) eKLR, where it was stated;

“where the registered proprietor’s root title is under challenge it is not enough to dangle the instrument of title as prove of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

20. See Paragraph 93 &111, Dina Management Limited v County Government of Mombasa and Others, Supreme Court of Kenya Pet No.8 [E010] of 2021.

The Supreme Court was stating that a person who does not have a good title cannot pass a good title. Article 40(6) of the Constitution provides that-

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

The duty of this court is to distribute the estate of the deceased to the rightful beneficiaries. The court has jurisdiction to revoke grants which have not been obtained through the right process.

21. In this case, the appellant has proved that the grant was obtained through misrepresentation as the 1st respondent did not disclose that there were other children of the deceased. The 1st respondent distributed the estate to Genesio Gitonga who was not a beneficiary of the estate. The respondent concealed from the court that there were other beneficiaries. As if that was not enough, the grant was obtained fraudulently as the 1st respondent used a forged Chief’s letter swore a false affidavit that the title deed was lost. Finally, the court that issued the grant had no pecuniary jurisdiction as the value of the property exceeded Kshs.100,000/- which was the jurisdiction of the court. I find that all these facts fall squarely on the grounds set out under Section 76 of the Act (*Supra*). The grant was a nullity as it was issued without jurisdiction.

Conclusion:

22. For the reasons stated, I find that the summons has merit.



I order that:-

1. The certificate of the confirmed grant issued to the 1st respondent on 21/2/2012 is revoked and the subsequent subdivision of Land Parcel No. Magumoni/Itugururu/826 are nullified and the land is restored to the estate of the deceased.
2. The Land Registrar is ordered to cancel the entries on the register which were issued pursuant to the said grant.
3. The 1st respondent's appointment as an administrator is revoked.
4. I appoint the 2nd applicant/protestor, Taratisio Muriuki Rwigi as the administrator of the estate.
5. Costs to the protestors.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 5TH DAY OF OCTOBER, 2023.

L.W. GITARI

JUDGE

