



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. SUCC. CAUSE NO. 33 OF 2012

IN THE MATTER OF THE ESTATE OF STANLEY MURIU NGUGI ALIAS GITHUMBI NGUGI ALIAS MUREI NGUGI

ALICE NJERI KANGI.....APPLICANT

-VERSUS-

JOSEPH MIUKI MURIU.....1<sup>ST</sup> RESPONDENT

BERNARD MWAI MURIU.....2<sup>ND</sup> RESPONDENT

AND

PRISCILLAH MUTHONI.....INTERESTED PARTY

WOODLEY WEIMAH CO. LTD.....INTERESTED PARTY

J U D G M E N T

1. This cause relates to the estate the late Stanley Muriu Ngugi Alias Gathumbi Ngugi alias Murei Ngugi (the deceased) who died on 1<sup>st</sup> March 1986. A grant of Letters of Administration ISSUED to Joseph Muriuki Muriu (the 1<sup>st</sup> respondent herein) on 25<sup>th</sup> May 2007 and the same was confirmed on 21<sup>st</sup> July 2011 in **Senior Resident Magistrate Court Succession Cause No. 6 of 2003 (Kerugoya)**.

2. This court has now been called upon to determine the application dated and filed on 14<sup>th</sup> October 2011. The application seeks for the revocation or annulment of the above mentioned grant. It is expressed to have been brought under the provisions of **Section 76(a), (b), (c) (iii)** of the **Law of Succession Act** and **Rule 44** of the **Probate and Administration Rules**.

3. The application is supported by the affidavit of Alice Njeri Kangi sworn on 14<sup>th</sup> October 2011 and based on the grounds THAT:

*a. The proceedings to obtain the grant herein were defective in substance.*

*b. The grant was obtained fraudulently by making false statement by concealment from court something material to the case.*

*c. 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. The persons to whom the grant was made has failed to proceed diligently with the administration of the estate.*

4. The Respondents, who are the sons of the deceased, opposed the application vide the Replying affidavit sworn by Bernard Mwai on 20<sup>th</sup> November 2012 and filed on 12<sup>th</sup> August 2014. The Respondents denied that the Applicant was a wife to the deceased's son, Meshak Kangi, and purported that the said Meshak Kangi was never married at the time of his death. For those reasons, the Respondents maintained the position that the Applicant was not entitled to any share of the deceased's estate and thus, there was no need for them to inform the Applicant when they were filing the succession cause in respect of the deceased's estate.

5. The interested party equally opposed the application vide the Replying Affidavit sworn by Stephen Mithamo on 15<sup>th</sup> June 2016. The said Stephen Mithamo is stated to be the director of the Interested Party company. He deponed that the Interested Party company is the registered proprietor of the land parcels known as L.R. No. Mwerua/Mukure/2208 and L.R. No. Mwerua/Mukure/2209 having allegedly purchased the same for value on 20<sup>th</sup> December 2011. He maintained the said parcels were registered in the names of the Respondents herein at the time of purchasing the same. He thus submits that the suit should be dismissed with costs.

6. The application was canvassed through *viva voce* evidence on 6<sup>th</sup> December 2017 with the Applicant being the sole witness in support of her case and the Respondents calling six (6) witnesses in opposition of the application. The parties also put in their written submissions with Applicant filing hers on 1<sup>st</sup> February 2021 while the Respondents filed theirs on 22<sup>nd</sup> February 2021.

#### **Submissions:**

The applicant submits that the deceased died on 1/3/1986 and was survived by;

1. Priscilla Wanjiru Muriu- wife
2. Joseph Muriuki Muriu- son
3. Bernard Mwai Museu- son
4. Misheck Kanga Muriu – son

That the estate of the deceased comprised in Land Parcel No. Mwema/Mukure/117. That before the completion of the succession, the wife and one son Misheck Kangi passed away and the estate was distributed amongst the two sons. She submits that she has filed the summons for revocation of grant as she is the wife of Misheck Kangi Muriu who passed away on 27/6/2010. That she ought to have been informed when the grant was confirmed. That she came to know of the cause when she filed **Misc. Application No.57/2011** where she was seeking leave to file the succession cause for the estate of Stanley Muriu Ngugi without a certificate of death and a Chief's letter which the respondent opposed and contended that the application had been overtaken by events as the estate had been distributed. She contends that she was married to Misheck Kangi sometimes in 1989 under Kikuyu customary laws and performed the rites thereto. That they settled on Land Parcel no. Kiine/Kiangai/117 where they constructed 3 structures, a main house, 1 kitchen and a pit latrine. The applicant relies on **Section 76 of the Law of Succession Act**. She has also cited the case of ***Matheka & another –v- Matheka, Court of Appeal (2005) eKLR 455***.

The applicant submits that she is an Interested Party by virtue of being the wife of the late Misheck Kangi and a dependant on the suit property. She has urged the court to consider the bundle of documents which shows that they were blessed with one child Alice Njeri Kangi. She submits that she is a dependant under **Section 29 of the Law of Succession Act**.

The applicant has urged the court to find that the grant was obtained fraudulently and the respondents who sold land to the Interested Parties could not pass a good title. She relies on ***Musa Nyaribari Gekone & 2 Others (2015) eKLR and Adrian Nyamu Kiugu & Another (2014) eKLR***.

She prays that her application be allowed. For the respondents, it is submitted that the applicant was not the wife of Misheck Kangi and she had never lived on the suit land. It is submitted that the deceased died in 1986 while the Applicant claims to have been married long after the deceased's death and she was therefore not a dependant. That the applicant is a stranger and they had no duty or obligation to inform her when they filed succession. The respondents submit that the proceedings to obtain the grant were not defective, the grant was not obtained fraudulently or by false statement, nothing was concealed and no untrue allegations of facts were made.

7. They further submits that the applicant admitted during cross- examination that she was not married under any system. It is further submitted that her claim that she got a child S.N with Misheck Kangi was pure lies and she relied on fake documents. The respondent submits that the applicant was not a dependant of the deceased. The respondent submits that the applicant is guilty of fraud in an attempt to justify her claim.

8. For the Interested Party it is submitted that Woodley **Weimah Co. Ltd** is the registered proprietor of LR No. Mwema/Mukure/2208 and 2209 and that it was a bonafide purchaser for value of the two parcels without notice. He submits that he bought the two parcels of land from the respondents for valuable considerations as supported by the agreements of sale of land which he produced. That no evidence of fraud was produced by the applicant. He relies on **Section 26 of the Land Registration Act**. That his registration of land is not open to challenge. He relies on ***Nancy Kahonya Amadira- Expert Credit Limited & Another (2015) eKLR*** to state that fraud ought to be proved to a standard higher than of a balance of probabilities. That where a person is registered as proprietor of a parcel of land, the title can only be impugned on grounds of fraud and or misrepresentation to which he is shown to have been involved and/or a party to. He urges the court not to interfere with the Interested Party's ownership of the land parcels.

#### **Issue for determination**

9. From the pleadings, arguments, and submissions of the parties, it is my view that the main issue for determination by this court is whether the grant confirmed on 21<sup>st</sup> July 2011 should be annulled or revoked.

#### **Analysis**

10. The circumstances under which a grant of representation may be revoked by this court are provided for under **Section 76 of the Law of Succession Act**. This provision was construed in the case of ***Matheka and Another vs Matheka [2005] 2 KLR 455*** where the Court of Appeal laid down the following guiding principles.

“i. A grant may be revoked either by application by an interested party or by the court on its own motion.

ii. *Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.*”

11. This being a probate court, it follows that its jurisdiction is limited to ascertaining what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate (See the holding of Mabeya J in the decision in the estate of Zakaria Nthiga Matumo (Deceased)).

12. It is not in dispute that the deceased was survived by:

- i. Priscila Wanjiru Muriu – Wife (deceased)
- ii. Joseph Muriukii Muriu – Son (1<sup>st</sup> Respondent herein)
- iii. Bernard Mwai Muriu – Son (2<sup>nd</sup> Respondent herein)
- iv. Misheck Kangi Muriu – Son (deceased)

The applicant alleges that Misheck Kangi was her husband. He who alleges must prove. This is the burden of proof which a party must discharge. **Section 107 & 109 of the Evidence Act** provides:

**“(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.”**

13. It is also not in dispute that the late Misheck Kangi Muriu was one of the surviving sons of the deceased and therefore entitled to a share of the subject estate. The only contention is whether the late Misheck was survived by any spouse or children.

14. The Applicant testified on oath that she was married to the late Meshack Kangi in 1989 under the Kikuyu customary law and that together they had one issue. She produced a birth certificate as her evidence in proof of the same. On the other hand, the Respondents alleged that their late brother did not leave any wife or issue(s) behind and that the birth certificate produced by the Applicant was a forgery done by inserting the name of Misheck Kangi as the father of the said child.

15. Whatever system of marriage the Applicant alleges, it was incumbent upon her to prove it on a balance of probabilities. In **Gituanja v Gituanja (1983) KLR 575**, the Court of Appeal held that the existence of a customary marriage is a matter of fact which must be proved with evidence. In that case, the Court found that the evidence adduced had proved a valid marriage under Kikuyu customary law as was evidenced by the slaughter of the “ngurario”. **Hortensia Wanjiku Yawe v The Public Trustees, Civil Appeal 13 of August 6, 1976** (Wambuzi, P Mustafa V-P and Musoke, JA) is to the same effect. In this case, Justice Kneller laid down three important and salutary principles regarding proof of customary marriages in Court. These are:

- i. The onus of proving customary law marriage is generally on the party who claims it;***
- ii. The standard of proof is the usual one for a civil action, namely, on the balance of probabilities; and***
- iii. Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.***

16. In this case, the Applicant testified that her and the late Meshack fell in love sometime in 1988. She alleged that the parents of the late Meshack went to her home with sodas in the same year 1988 and consequently, she started living with the late Meshack Kangi Mweu as his wife. The Applicant also testified that the said marriage was blessed with one issue and produced a birth certificate of SW as evidence. According to the Applicant, she lived with her husband in the suit land until when the said Meshack died and then the Respondents allegedly kicked her out of the home. On cross examination, the Applicant claimed that she was claiming a share of Meshack’s share of estate but admitted that she had not yet taken out letters of administration in respect of the estate of Meshack’s estate. According to her **“she was married ordinarily.”**

17. The Respondents however took issue with the fact that the Applicant’s minor had two different Birth Certificates with conflicting information. On the other hand, it was the Applicant’s contention that her child only had one birth certificate and that she did not know where the one that was issued in Nyeri came from. According to her, she obtained the birth certificate from Kerugoya.

18. The respondents took the trouble to confirm or dispute the authenticity of the birth certificates. DW1 was Rufus Kuria, the County Registrar of Persons in Kirinyaga. He testified that they acted on the information provided by the Applicant to issue her with the birth certificate she had produced in evidence. According to him, the Applicant had indicated that her daughter was born at home hence they only used the letter from the area chief to issue her with the birth certificate. Later, they received information that the Applicant’s daughter was born in a hospital at Nyeri and that the birth had already been registered. It was thus DW1’s testimony that the Applicant used false information to obtain the birth certificate which indicates that Meshack was the father of her daughter.

19. DW1’s testimony was corroborated with the testimony of DW2, Geoffrey Karanja Kamau, who is the deputy sub-county registrar of Nyeri Central County. It was his evidence that the Applicant’s daughter was born at Karatina District Hospital and that the Applicant never

gave any indication on who was the father of the child. The Applicant had provided this information on 13/10/2001.

20. From the evidence presented in court, it is clear that the applicant was not candid and used fraudulent means in efforts to justify a claim on the estate of the deceased. It is not lost to this court that in her affidavit in support of the summons for revocation of grant, the applicant had not deponed that she had an issue (a child) with the deceased. It is only after she had testified in court on 6/12/2017 that she stepped down and thereafter came to court and produced a birth certificate which she obtained on 15/12/2017. In her further affidavit she depones that she lived with the deceased on Kiine/Kiangai/117 (NB this is not the suit property) where they had constructed structures. She also swore that they were blessed with one child Misheck Kangi Muriu and annexed birth certificate of Sofia Waithera, see paragraph 7 & 8 of the further affidavit.

21. From the evidence tendered, it is clear that the birth certificate of Sopia Waithera was obtained by the applicant fraudulently in attempts to authenticate her claim. This was confirmed by DW1 the Registrar of births Kirinyaga who admitted that the applicant approached his office fraudulently and the certificate issued was not a correct and genuine certificate. On the other hand the Registrar from Nyeri (DW2) gave evidence that the birth of Sofia Waithera was registered on 13/1/2001. This evidence was in the line with the evidence of the Head Teacher (DW3) of the School where Sofia schooled. The evidence tendered shows that he applicant was not truthful. She did not even seem to know how the deceased Misheck met his death. She testified that he died instantly in a road accident which is not the information on the death certificate. The applicant has not come to court in clean hands.

22. Based on the pleadings and evidence on record, it is my view that the Applicant did provide false information at the office of Births and Deaths registration in order to obtain a birth certificate that indicated that the late Meshack was the father of the Applicant's daughter. In addition, the fact that the Applicant has never taken letters of administration for the estate of the late Meshack is in my view sufficient to conclude that the Applicant has not demonstrated to the satisfaction of this court that she was indeed a wife of the late Meshack entitled to a share of the deceased's estate. The deceased died on 1/3/1986 long before the applicant was allegedly married to Meshack. She was therefore not a dependant and could only claim through her alleged deceased husband. In *Touristic -v- Union International and Another -v- Jane Mbeyu & Another C.A. (1993) eKLR*. The court stated that an administrator is not entitled to bring an action as an administrator before he has taken out letters of administration. If he does the action is incompetent. The applicant who was not claiming the share of her alleged husband who is deceased, ought to have obtained letters of administration in his estate. The fact that she had not, his claim is not properly before this court and the application is therefore incompetent.

23. The late Misheck died on 27<sup>th</sup> June 2010 while the deceased died on 1<sup>st</sup> March 1986. Having survived the deceased, the late Misheck was entitled to a share of the estate of the deceased. However, now that he is also deceased, his estate should devolve on his surviving spouse or children but if he left no surviving spouse or children then it should devolve upon his kindred in the order of priority set out under **Section 39** of the **Law of Succession Act** which provides that:

*“(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-*

*(2) (a) father; or if dead*

*(3) (b) mother; or if dead*

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*(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none*

*(d) ...*

*(e) ...”*

24. Moving on the belief that their late brother left no spouse or children; the Respondents obtained a grant and shared the estate among themselves and consequently sold a portion of it to a third party. It is therefore my view that the proceedings leading to the Respondents obtaining the subject grant were neither defective nor obtained by the concealment of any material fact.

On the issue of the interested parties, it is my view that they were bonafide purchases for value without notice. They tendered evidence inform of sale agreements and there was no evidence that they committed any fraud. The applicant did not prove that the respondents had obtained the grant fraudulently. The court has powers to order revocation of the grant on its own motion or on an application where the grounds set out under **Section 76 (a) (b) (c) (d) (i) (ii) iii (e) of the Law of Succession Act**.

The Section provides:

*“A grant of representation, whether or not confirmed, may at anytime 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.”*

There must be evidence to prove these grounds for a court to order the grant to be revoked. The applicant has not availed evidence to prove her allegations. She admits that the respondents are rightful beneficiaries of the deceased being children of the deceased. On the other hand the applicant is an impostor in the estate who has tried by hook or crook to get a share when there is glaring evidence that she is not entitled to the estate. She had not come to court with clean hands and she cannot get anything.

**Section 93 (1) of the Law of Succession Act** provides:

***“(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”***

The Interested Parties bought land from the respondents who had obtained a grant of letter of administration in the estate of the deceased. The transaction was valid and is protected under this section.

### **Conclusion**

25. Based on the above findings, I opine that the Applicant’s prayer for the revocation of the subject grant that was confirmed on 21<sup>st</sup> July 2011 is not merited.

I order that:

1) The application is dismissed

2) I make no orders as to costs.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF DECEMBER 2021.**

**L.W. GITARI**

**JUDGE**

**9/12/2021**

The Judgment has been read out in open court.

**L.W. GITARI**

**JUDGE**

**9/12/2021**