



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NUMBER 193 OF 2003**

**IN THE MATTER OF THE ESTATE OF THE LATE IBRAHIM GAKUO GACHAGA (DECEASED)**

**RULING**

1. The summons before court is the one dated 25/5/2005. The summons seeks orders that the grant of letters of administration made to Isaac Muchai Gakuo on 15/4/2005 be revoked on grounds that;

(a) The said grant was made without the disclosure of material facts to the court.

(b) The grant was obtained fraudulently by the petitioner.

(c) The grant was obtained by the petitioner whilst knowing that the objector's daughter Anne Nyambura Gakuo (deceased) was the second wife to Ibrahim Gakuo Gachaga (deceased).

(d) The grant was obtained with the sole intention of ensuring that the dependants of the deceased among them the children of Anne Nyambura Gakuo (deceased) were denied their rightful inheritance.

2. Samuel Mwangi Kamira (applicant) has sworn an affidavit in support of the summons in which he avers that he is the legal representative of Anne Nyambura (deceased). It is his case that the said Anne Nyambura Gakuo was a wife to the deceased and her children were Sammy Mwangi Gakuo, Ruth Wanjiru Gakuo and Stephen Gachaga Gakuo.

3. It is the applicant's case that Isaac Muchai Gakuo (hereinafter the respondent) obtained the grant fraudulently by concealing from the court material facts to the effect that the deceased was married to the 2<sup>nd</sup> wife Anne Nyambura who had three (3) children.

4. The respondent is also accused of failing to disclose that the deceased had sub-divided his land Bahati/Kabatini Block 1/3079 to plot numbers 9033, 9039, 9040, 9042, 9043, 9044, 9045 and 9046 and had sold plot numbers 9039, 9042, 9043 and 9045.

5. The respondent thus disinherited the children of Anne Nyambura by having the property of the deceased transferred to himself and others. The applicant seeks that the grant herein be revoked.

6. The summons for revocation finds support from the affidavit of Sam Muraya Kuria who with authority of Josephat Kinyanjui, John Koskei Biegon and James Njuguna Mbogo, depones that the four named (hereinafter referred to as the interested parties) were purchasers for value from the deceased of parcels numbers Bahati/Kabatini Block 1/9039, 9042, 9043 and 9044 respectively which resulted from a sub-division of the deceased's parcel of land number Bahati/Kabatini Block 1/3079. Sale agreements are annexed as well as a copy of the mutation form.

7. The application is opposed and the respondent has sworn a replying affidavit in which he depones that he applied for the grant procedurally and without misleading the court or committing any acts fraudulently.

8. He accuses the applicant of trespassing into parcel numbers Bahati/Kabatini Block 1/36 and bringing his wife and children onto the land.

9. He depones that he believes the deceased was intimidated and tricked in a fraudulent manner to have a relationship or false marriage with Anne Nyambura Mwangi.

10. He avers that none of the children named by the applicant were sired by the deceased. The 3<sup>rd</sup> child must have been born long after the death of the deceased. He avers that the 1<sup>st</sup> and 2<sup>nd</sup> child came with Anne Nyambura Gakuo at the time she engaged in the funny and false marriage relationship with the deceased.

11. The matter was disposed off through oral evidence. For the applicant, the applicant was the 1<sup>st</sup> witness. He stated that Anne Nyambura was married to the deceased. At the time of the marriage, Anne had one child, Sammy, who moved with her to her husband's shamba at Ahero, Bahati. A daughter Ruth was born. A 3<sup>rd</sup> child was born after the death of the deceased.

12. The 2<sup>nd</sup> witness for the applicant was Nicasio Karuga. He told the court that the deceased was his neighbour. They shared a boundary. The deceased married Anne Nyambura and they got 3 children, Mwangi, Wanjiru and Gachaga. Nyambura came with Mwangi at the time of the marriage.

13. The deceased passed on before the wife and the wife soon thereafter. Their children were left under the care of the applicant who is a grandfather to the children (parent to Nyambura). The witness was aware that the deceased had another wife and other children. He had met the said wife. Deceased and his wife Anne were buried in the land they lived. The other wife attended both burials.

14. It was Nicasio's testimony that the deceased had bought some other land which he sold.

15. On cross-examination he stated that the deceased died on 2/3/2003 and Stephen Gachaga was born on 21/6/2004. This was 16 months after the death of the deceased.

16. Sam Muraya Kuria testified on behalf of the interested parties. He stated that the deceased sold land to John Koskei Biegon, Josephat Kinyanjui and James Njuguna Mbogo. He stated that the deceased sold land parcels numbers Bahati/Kabatini Block 1/9042, 9043, 9039 and 9044 to himself, John Koskei, James Njuguna Mbogo and Josephat Kinyanjui respectively.

17. Sam produced the sale agreements as exhibits. He added that the deceased died before the titles could be transferred. The respondent applied for grant and excluded the purchasers. He was aware of their interest. He produced a notice warning 3<sup>rd</sup> parties not to purchase the plots as there was a court case.

18. For the respondent, we have the evidence of the respondent himself. He told the court that the deceased had two (2) wives his (applicant's) mother and Anne Nyambura. The 1<sup>st</sup> house had 7 children. The 2<sup>nd</sup> house had 1 child. Sammy Mwangi Gakuo was not a son of the deceased. The said Nyambura had not come with any child when she was married.

19. The applicant added that Stephen Gachaga Gakuo was born on 21/6/2004 while the deceased died on 2/3/2003. This was more than 15 months after the death of the deceased.

20. The witness added that he considered Ruth Wanjiru Gakuo who was an actual daughter of the deceased in distribution and provided for her ½ acre of land.

21. He denied that his father ever sold any land when he was alive. At the time of his death, the land was in his names. He asserts that the agreements relied on and the application for consent and mutation forms are not genuine.

22. On cross-examination, the applicant agreed that the name of Anne Nyambura and her children were not in the petition. He acknowledged that in his affidavit at paragraph 15 he stated that Sammy Mwangi Gakuo and Ruth Wanjiru Gakuo came with Anne Nyambura Gakuo.

23. Further cross-examined, he admitted that he was not there when Nyambura was married. He had never lived on the subject land as he was living with his mother at Bahati. He added that he came to know later that some plots had been sold. He acknowledged that under Kikuyu Customary Law, if one married a woman with a child, that child becomes his child.

24. When cross examined by counsel for the interested parties, he stated that Mbogo (one of the purchasers) has built on the land.

25. Directions were given that the parties herein file written submissions. I note all complied and learned submissions by counsel are on record.

26. I have had occasion to consider the application, the supporting grounds, the supporting affidavits and the replying affidavit. I have had regard to the viva voce evidence and submissions by counsel.

27. Of determination is whether the applicant has achieved the threshold required of him by law to warrant the revocation of grant. To establish that, the following questions will have to be answered;

1. Whether Anne Nyambura was married to the deceased.
2. Whether Sammy Mwangi, Ruth Wanjiru Gakuo and Stephen Gachaga Gakuo are children of the deceased.
3. Whether the interested parties have proved they are creditors.
4. Whether if 1 & 2 are in the affirmative the omission of the wife and/or children as survivors of the deceased vitiates the grant.

28. **Section 76 (a), (b) & (c) of the Law of Succession Act** provides;

**“S. 76. 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;**

29. As to whether Anne Nyambura Gakuo was married to the deceased, the applicant’s evidence is corroborated by that of OW2 (Nicasio). On his part, the respondent has blown hot and cold on this issue. At **paragraph 12** of his **affidavit** he states that;

**“... and I verily believe the deceased was intimidated and tricked in a fraudulent manner to have a relationship or false marriage relation with Anne Nyambura Mwangi...”**

This statement when juxtaposed to his oral evidence in court renders the respondent’s denial of the marriage hollow. In his evidence he states;

*“The deceased had 2 wives. One was my mother. The other was Anne Nyambura. In my house we were 7. In Nyambura’s house he had 1 child.”*

30. In view of the above, the issue on whether Anne Nyambura was a wife to the deceased can only answer in the affirmative. There is enough evidence she was and this is confirmed by the respondent himself.

31. As to whether the deceased had children with Anne Nyambura, the applicant’s evidence, again corroborated by the evidence of Nicasio, is that Sammy Mwangi & Ruth Wanjiru Gakuo were children of the deceased.

32. The respondent while addressing this issue lacks a firm stand. At **paragraph 13** of his **replying affidavit** he states;

**“Paragraph 13: That none of the children named in paragraph 4 were sired by the deceased but despite the same.....”**

At **paragraph 15** he depones;

**“Paragraph 15: That the 1<sup>st</sup> and 2<sup>nd</sup> children (read Sammy Mwangi and Ruth Wanjiru Gakuo) came with Anne Nyambura Gakuo at the time she engaged in the funny and fake relationship with my father.”**

33. In his testimony in court he states:

*“Sammy Mwangi Gakuo was not a son of the deceased. Nyambura did not come with any child when Nyambura was married...”*

At another instance he states:

*“Samuel Mwangi Kamira’s complaint is that, I never disclosed all dependants. I considered Ruth Wanjiru Gakuo who is an actual daughter of the deceased. I gave her ½ an acre.”*

34. These glaring contradictions in the evidence of the respondent take away any little credibility that would be given to the witness and his evidence. The witness has demonstrated a deliberate effort to lie before the court for his own selfish gain.

35. From the evidence, Ruth Wanjiru is a daughter of the deceased. There is also evidence that the deceased married Anne Nyambura and took in her child Sammy Mwangi as his own. This makes Sammy Mwangi a child of the deceased within the meaning of **Section 3(2)** of the **Law of Succession Act**. In any event Nyambura was married under Kikuyu Customary Law which recognizes such a child as a child of the person who married the mother. I make a finding that Sammy Mwangi and Ruth Wanjiru are children of the deceased.

36. Is Stephen Gachaga Gakuo a child of the deceased? It is admitted by both the applicant and Nicasio Karuga that Stephen Gachaga Gakuo was born over 15 months after the death of the deceased. Noting the normal gestation period in the human species, it is safe to make the scientific inference that Stephen is not a child of the deceased. While he has every right to inherit from his mother, he has no automatic right of inheritance in the estate of the deceased herein.

37. Flowing from the above analysis and findings, it is now quite clear that the respondent herein ought to have included the house of Anne Nyambura Gakuo as survivors of the deceased. This he did not do, yet, the evidence shows that all along he was alive to their status. His omission of these beneficiaries cannot be anything else but deliberate. That is easily inferred from his untruthful evidence before the court which in my view was a concerted effort to cover his deliberate motive to disinherit Nyambura and/or her children.

38. **Rule 7(1)** of the **Probate and Administration Rules** provides;

**“r.7. (1) Subject to the provisions of subrule (9), where an applicant seeks a grant of representation to the estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition in the appropriate Form supported by an affidavit in one of Forms 3 to 6 as appropriate containing, so far as they may be within the knowledge of the applicant, the following particulars -**

**(a) the full names of the deceased;**

**(b) the date and place of his death, his last known place of residence, and his domicil at date of death;**

**(c) whether he died testate or intestate and, if testate, whether his last will was written or oral, and the place where and the date upon which it was made;**

**(d) a full inventory of all his assets and liabilities at the date of his death (including such, if any, as may have arisen or become known since that date) together with an estimate of the value of his assets movable and immovable and his liabilities;**

**(e) in cases of total or partial intestacy -**

**(i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39 (1) of the Act;**

**(ii) whether any and if so which of those persons is under the age of eighteen years or is suffering from any mental disorder, and, if so, details of it;**

**(iii) for the purposes of determining the degree of consanguinity reference shall be made to the table set out in the Second Schedule;**

**(f) the relationship (if any) which the applicant bore to the deceased or the capacity in which he claims;**

**(g) if the deceased died testate leaving a written will, the names and present addresses of any executors named therein; and**

**(h) the postal and residential addresses of the applicant.”**

39. By failing to include the said beneficiaries the respondent flouted **rule 7** of the **Probate and Administration Rules** and **Section 76(a), (b) & (c)** of the **Law of Succession Act** in that he obtained the grant through proceedings that were defective in substance and the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case.

40. The applicant has thus met the threshold for the revocation of the grant herein.

41. As to whether the interested parties have shown that they are creditors to the estate, evidence was tendered of sale agreements and mutation forms and application for consent of the Land Control Board showing that the deceased had sub-divided his parcel of land Bahati/Kabatini Block 1/3079 and sold to them sub-divisions 9039, 9042, 9043 and 9044. There is also evidence of possession and occupation.

42. In countering this evidence, the respondent testified that the agreements relied on, the application for consent and mutation forms are not genuine. He calls no evidence at all to challenge the genuineness of the documents either through an expert or otherwise. It is on record that he was not living with the father and the evidence available shows very little interaction between him and the deceased before his death. He cannot thus be said to have been at a vantage position to know his father's (deceased's) transactions.

43. There is evidence that one of the purchasers James Njuguna Mbogo has built on the land. The others cultivate the land. There is evidence of duly executed sale agreements, mutation form and application for consent from the Land Control Board.

44. There is evidence that the sale agreements were not concluded as the deceased died before the transactions were completed. There is all indication that the deceased intended to carry the transactions through.

45. Heavy weather, has been made of the lack of consents from the Land Control Board. The circumstances of this case must be put into account when considering the issue of the statutory requirement for the consent of the Land Control Board in transactions of the nature before court.

46. The distinction can clearly be drawn. The deceased was in the middle of the transactions with the interested parties. Among the pending steps were the obtaining of the consents of the Land Control Board and eventual transfers of title. Upon the death of the deceased, the administrator of the estate should be in a position to act on behalf of the estate and carry out the obligations of the deceased by completing the transactions.

47. Section 8(1) of the Land Control Act provides;

**“Section 8(1): An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:**

**Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.”**

48. In our instant suit the agreements for sale are properly executed. The deceased died on 2/3/2003. The time for the lodging of the application for consent was still running at the time the deceased passed on. The deceased having died, only an administrator would hold a legal status to proceed and lodge such applications on behalf of the deceased’s estate and given the lengthy procedures involved in application for letters of administration of grant of probate or letters of administration, it would be against all known tenets of natural justice and common sense to limit such application for consent within 6 months or whatever period was remaining as at the time of death of the deceased.

49. As held by the Court of Appeal in **WILLY KIMUTAI KITILIT VS MICHAEL KIBET [2018] eKLR**, though the requirement to obtain a consent of the Land Control Board is statutory, the court has to consider the circumstances of each case to decide whether to apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of the Land Control Board. The court stated;

**“A contract for the sale of land to which the Land Control Act applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the Land Control Board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (See Section 9(2)). The Land Control Act prescribes the time within which the Land Control Board should reach a decision or the time within which any appeal should be determined. The process from the time of the making the application to the time of the determination of the appeal, if any, may obviously take time. However, the requirement that an application for the consent should be made within six months of the making of the agreement and the provisions of Section 7 of the Land Control Act for recovery of the consideration is an indication that Parliament intended that controlled land transactions should be concluded within a reasonable time.”**

The Court further stated;

**“The Land Control Act does not, unlike Section 3(3) of the Law of Contract Act and Section 38(2) of the Land Act save the operation of the doctrines of constructive trust of proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. Since the doctrines of constructive trust and proprietary estoppel apply to oral contracts which are void and enforceable, in our view, and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the Land Control Board especially where the parties in breach of the Land Control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of Land Control Board will largely depend on the circumstances of each particular case.”**

On the principles of equity the Court rendered itself thus;

**“There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel of the Land Control Act. By Article 10(2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (article 10(1) (b)). Further, by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule of the Constitution, the Land Control Act should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the Constitution.**

The word equity broadly means a branch of law denoting fundamental principles of justice. It has various meanings according to the context but three definitions from *Black’s Law Dictionary. Ninth Edition* will suffice for our purpose:

**“1.**

**...2. The body of principles constituting what is fair and right.**

**3. The resource to principles of justice to correct or supplement the law as applied to particular circumstances...**

**4. The system of law or body of principles originating in the English Court of Chancery and superseding the common and statute law (together called “Law” in the narrower sense) when the two conflict.”**

Thus, since the current constitution has by virtue of Article 10(2) (b) elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent

**of the Land Control Board.”**

50. I am satisfied that the interested parties have made their case as creditors and ought to be recognized as such.

51. With the result that the summons for revocation of grant herein is wholly successful. I proceed to revoke the grant issued to Isaac Muchai Gakuo on 31/7/2003 and confirmed on 15/4/2005 and make the following orders;

**1. The grant of letters of administration issued to Isaac Muchai Gakuo on 31/7/2003 and confirmed on 15/4/2005 is hereby revoked.**

**2. A grant of letters of administration is to issue jointly to Isaac Muchai Gakuo and Samuel Mwangi Kamira.**

**3. The two (2) administrators, to, within sixty (60) days hereof lodge a summons for confirmation of grant in respect of the estate of Ibrahim Gakuo Gachaga.**

**4. In case of default on the part of either of the administrator, the other administrator to be at liberty to apply for confirmation of grant.**

**5. The administrators to adequately provide for beneficiaries Sammy Mwangi Gakuo and Ruth Wanjiru Gakuo.**

**6. The administrators to provide for the respective shares of the creditors namely;**

**1. Sam Muraya Kuria**

**2. Josephat Kinyanjui**

**3. John Koskei Biegon**

**4. James Njuguna Mbogo**

**7. Each party to bear its own costs.**

**Dated and Signed at Nakuru this 8<sup>th</sup> day of May, 2019.**

**A. K. NDUNG’U**

**JUDGE**