



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2310 OF 2004

IN THE MATTER OF THE ESTATE OF NDUATI MBUTHIA (DECEASED)

RULING

1. The application or determination is a summons for revocation of grant dated 23rd July 2004. It is premised on Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. It seeks the revocation of a certificate of succession issued to one Muiyuro Kamau by the Kiharu District Magistrate's Court on 19th January 1972 in Kiharu **DMCSC No. 45 of 1971**, in respect of Loc. 8/Ndutumi/280.
2. The same is brought at the instance of Miriam Kianda Michuki, hereinafter referred to as the applicant. It is premised on the grounds set out on the face of the application, as well as on the affidavit of the applicant sworn on 23rd July 2004. The general grounds are that the certificate of succession was obtained by fraud and the proceedings to obtain the certificate were defective in substance in that the legal heir to the estate of the deceased ought to have been his wife.
3. The applicant avers to be the daughter of the deceased herein and the legal representative to the estate of her deceased mother, Wangari Nduati, vide a grant made in **Nairobi HCSC No. 773 of 1995**. The deceased was blessed with daughters only, and they are all dead, save for the applicant. Her mother died in 1994 and was buried at the subject property, Loc. 8/Ndutumi/280. She avers that her mother had bequeathed the said property to her by will. She states that Muiyuro Kamau was a nephew of her father, being the son of her father's elder brother. She accuses him of having entered into the property, Loc. 8/Ndutumi/280 after her father's death, built there and started to cultivate on the same. She alleges that the respondent fraudulently caused the property to be transferred to his name sometime in 1972 without the consent of her mother. She alludes to various land disputes filed in court and at the Land Disputes Tribunal over the said parcel of land.
4. She has attached to her affidavit several documents. There is a certificate of confirmation of grant dated 23rd June 2000 confirming the will of her late mother, Wangari Nduati. There is also a plaint and statement of defence filed in **Murang'a PMCC No. 109 of 1992**, being a suit between the applicant's mother and the respondent on Loc.8/Munyutha/Ndutumi/280. There is also a certificate of succession dated 19th March 1972 issued from Kiharu District Magistrate being in respect of Loc.8/Ndutumi/280. There is a copy of a green card in respect of Loc.8/Munyutha/Ndutumi/280 dated 3rd July 2003. It indicates that the register was opened on

- 14th February 1958 when the deceased, Nduati Mbuthia, was registered as sole proprietor of the subject parcel of land. The said property was then transferred to Muiyuro Kamau on 19th May 1972. There are also proceedings and determinations of the Land Disputes Tribunal and the Provincial Land Disputes Appeals Committee. The Land Disputes Tribunal awarded the applicant 7.6 acres out of Loc. 8/Munyutha/Ndutumi/280 and the respondent 1.5 acres. The Appeals Committee found that the Land Disputes Tribunal had no jurisdiction over the matter and referred the matter to the High Court.
5. To the application the initial respondent Muiyuro Kamau swore an affidavit on 10th July 2005. He states that he obtained the property known as Loc.8/Munyutha/Ndutumi/280 through a succession case in the Kiharu District Magistrate's Court. The proceedings were brought under Section 120 of the Registered Land Act, Cap 300, Laws of Kenya, which was subsequently repealed by the coming into force of the Law of Succession Act, Cap 160, Laws of Kenya. He avers that the provision in Section 120 of the Registered Land Act did not allow for revocation of grants, instead it provided for appeals. He states that he has held the title unchallenged for 33 years. He states that the suit in **Murang'a PMCCC No. 109 of 1992** was withdrawn, while the decision of the Land Disputes Tribunal was overturned on appeal by the Provincial Appeals Committee. He has attached a copy of the title as evidence that he is the registered sole proprietor of the subject property as well as a notice of withdrawal of suit as evidence that the suit in **Murang'a PMCCC No. 109 of 1992** was withdrawn. Muiyuro Kamau has since died and the current respondent is his son, Wilfred Kuria Mbiyu.
 6. Directions were given on 24th February 2014 that the application be disposed of by way of *viva voce* evidence, however on 24th June 2014 the earlier directions were revised so that the application became for disposal by way of written submissions. Both sides did file their written submissions in compliance with the directions of 24th June 2014.
 7. In the submissions filed on behalf of the applicant three (3) issues have been identified for determination. The three issues being – (a) *whether the grant in issue was regularly and lawfully obtained and should therefore stand*; (b) *whether the matter had been caught up by Section 120 of the Registered Land Act*; and (c) *whether the matter is caught up by the law of limitations*.
 8. The applicant submits that the proceedings before the Kiharu District Magistrate's Court were stage-managed so as to make it appear that all the concerned parties, including the deceased's wife, participated and did not object to the respondent being made the sole heir to the land in question. To lend evidence to this argument, the applicant relies on the proceedings before the Land Disputes Tribunal in the attempt to demonstrate that the respondent got himself dishonestly and fraudulently registered as the owner of the subject property.
 9. On the second issue, the applicant reproduces the provisions in Section 120 of the Registered Land Act, and asserts that the said provision does not bar the court from setting the record straight. She accuses the District Registrar of colluding with the respondent to defeat justice. On the third issue, it is submitted that there is no time limitation to the filing of a grant of representation once it is established that the same was obtained fraudulently. She submits that the court is enjoined to do justice in the circumstances based on the overriding objectives.
 10. On his part, the respondent submits that the application dated 23rd July 2004 is totally defective. He grounds this submission on four (4) reasons. Firstly, that under Section 120 of the Registered Land Act there was no provision for grants of representation, but a certificate of succession issued under the said law. The said law did not provide for revocation of the certification of succession, and the only remedy available to the applicant was an appeal. It is further argued that the Law of Succession Act was not in operation at the time the certificate of succession was issued and therefore the provisions of that law cannot be called in aid of revocation of a certificate of succession issued under another law before the said Act came into force.

11. The respondent cites Section 2 of the Law of Succession Act to buttress his argument that the provisions of the Law of Succession Act were of no application to events that occurred before the said law came into force on 1st July 1981. It is submitted that the deceased died in 1958 and succession to his estate should have been subject to the written laws and customs that were in force then, virtue of Section 2(2) of the Law of Succession Act. When the certificate of succession was issued in 1972, the Law of Succession Act had not come in operation, but the same was issued under the law that was then in operation. It is submitted that it is that law and not provisions of the Law of Succession Act that should be cited in relation to the matter at hand.
12. The other argument is that the application dated 23rd July 2004 is filed too late in the date, some thirty-three (33) years after the certificate of succession was issued in 1972. It is therefore belated and an afterthought. It is submitted that the application is time-barred and an abuse of the process of court.
13. It is further argued that the application is wholly without merit. It is submitted that the record of the District Magistrate in **Kiharu DMCSC No. 45 of 1971** indicates that all the relatives of the deceased, including the applicant's mother, participated in the proceedings where it was determined that the respondent would be the sole heir of the deceased.
14. The application dated 23rd July 2004 invites me to invoke Section 76 of the Law of Succession Act to revoke the certificate of succession issued in **Kiharu DMCSC No. 45 of 1971**. The central issue that arises revolves around jurisdiction. Can I invoke the said provision to revoke the said certificate of succession?
15. The deceased person the subject of these proceedings, Nduati Mbuthia, died on 2nd May 1966, according to the certificate of death lodged in **Kiharu DMCSC No. 45 of 1971**. Although the respondent avers that he died on a different date, 1958, no proof has been provided to support that assertion. Either way, whether he died in 1958 or 1966, the Law of Succession Act had not come into force, for it became operative on 1st July 1981.
16. The scope of the Act is stated in Section 2 thereof. For evidence of doubt, the same states as follows:-

“2(1). Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the Law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of persons dying after the commencement of this Act and to the administration of estates of those persons.

(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”
17. The effect of Section 2(1) of the Law of Succession Act is that the provisions of the said Act are to apply to the estates of all persons dying after the commencement of the Act on 1st July 1981, subject of course to the exceptions created by the Act. The Act applies both as the substantive law as well as the procedural law to the estates affected.
18. Section 2(2) of the Law of Succession Act defines the application of the Law of Succession Act with respect to persons who died before the said Act commenced on 1st July 1981. The provision is categorical that the substantive provisions of the said Act are not applicable to the estates of persons who died before the said Act commenced. The substantive provisions of the Act are those governing devolution or distribution of the estate of the dead person, whether such person died testate or intestate. These provisions are to be found in Parts II, III, IV, V and VI of the Law of Succession Act. The substantive law of succession for estates of the persons who died before 1st

July 1981 is not to be found in Parts II, III, IV, V and VI of the Law of Succession Act, but in the written laws and customs that applied at the date of the death of the person in question.

19. The second part of Section 2(2) of the Law of Succession Act states that the administration of the estates of persons who died before 1st July 1981 should commence or proceed so far as possible in accordance with the provisions of the Law of Succession Act. In other words the procedure with respect to administration of estates of such persons is to be governed, not by the law as at the time of death, but by the procedures set out in the Law of Succession Act. The said provisions in the Law of Succession Act governing procedures and processes in administration of estates are to be found in Part VII. Part VII of the Law of Succession Act applies universally to the estates of persons dying either before and after the commencement of the Act.
20. It is not in dispute that the deceased person the subject of these proceedings died before the Law of Succession Act came into force. Consequently, the substantive law governing devolution to his estate is that stated in Section 2(2) of the Law of Succession Act – that is the written laws and customs in force as at the time of his death in 1966.
21. From the material before me the deceased person died intestate, for there is nothing on record to suggest that he died otherwise. The affidavits by the rival parties to the summons dated 23rd July 2004 do not suggest that he left any valid will, whether written or oral. As of 1966, estates of African Kenyans who died intestate were subject to customs of the community from which such African hailed, while the written wills of any African who had reduced his death wishes into writing were governed by the African Wills Ordinance of 1960. This position changed in 1981 when the Law of Succession Act came into force, for it ousted the application of African Customary law of intestate succession, except in respect of the estates of persons subject to Sections 32 and 33 of the Law of Succession Act.
22. I can deduce from the names of the parties herein that they are Kikuyu by ethnicity from the Murang'a area of what used to be the Central Province. The fact of being Kikuyu meant that the estate of the deceased, dying as he did in 1966, was subject to the Kikuyu customs then governing devolution of the estate of a person who died intestate.
23. The Kikuyu customary law of intestate succession is notorious. It is well documented in such treatises as **Eugene Cotran's *Restatement of African Law: Kenya II the Law of Succession***, and **Jomo Kenyatta's *Facing Mount Kenya: The Tribal Life of the Gikuyu***, among others. It has also been restated in several judicial pronouncements, such as in ***Kanyi vs. Muthiora (1984)KLR 712***. I am though conscious of the dynamism of African Customary Law and alive to the caution sounded by the Court of Appeal in ***Atemo vs. Imujaro (2003)KLR 435*** that the position as stated in the treatises may not be true today.
24. Under the Kikuyu Customary Law of intestacy, succession is patrilineal. Devolution is in favour of the male relatives of the deceased. Where a male deceased person is survived by a widow and male and female children, the land devolves upon the sons with the widow being entitled to life interest. Daughters are not entitled to inherit, they play their part in the family or clan in which they married, but it is permissible for daughters who attain the age of marriage but never marry to inherit from their parents. Where the deceased person has daughters only and the said daughters are all married, the property will pass to his brothers or their sons, with the widow having life interest.
25. The position stated in paragraph 24 here above is no doubt discriminatory in favour of men and against women. This was however sanctioned by Section 82(4) of the old Constitution. Section 82(1) of the said Constitution states that “... ***no law shall make any provision that is discriminatory either of itself or in its effect.***” Section 82(4) of the said Constitution make a number of exceptions to Section 82(1); it states that:

“... **Subsection (1) shall not apply to any law so far as that law makes provision ... (b) with**

respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.”

26. The coming into operation of the new Constitution, 2010, has radically changed the position, for the new law has outlawed discrimination in all its forms. Article 10 of the Constitution, 2010, states the national values and principles. Article 10(2)(b) includes human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, among the said values and principles. Article 27 of the Constitution, 2010, states the principle on equality before the law and the right to equal protection and equal benefit of the law. It also states that men and women have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. There is also Article 2(4) of the Constitution, 2010, which states that any law, including customary law, which is inconsistent with the Constitution, 2010, is void to the extent of the inconsistency.
27. The property the subject of these proceedings is land. The same was not held under customary law tenure, but rather under statutory tenure for the same was registered under the Registered Land Act.
28. Succession to land held by Africans in the 1960s and 1970s was subject to two separate legal regimes. If the land was held under African Customary Law, that is if it was not registered under the Registered Land Act, its inheritance was subject to African Customary Law and the procedural law governing succession to such land would be the Magistrate's Courts Act, Cap 10, Laws of Kenya. Jurisdiction on such matters was, and still is, conferred, on the District Magistrate's Court by Section 9 of the Magistrate's Courts Act. Under Section 9 of the said Act, such a court has jurisdiction and power in proceedings of a civil nature where the proceedings concern a claim under customary law. Section 2 of the Magistrate's Act defines claim under customary law to mean a claim concerning, among others, intestate succession and administration of estates so far as the same were not governed by any written law and land held under customary tenure.
29. Procedure and practice with respect to matters handled by the magistrates courts is set out in Section 15 of the Magistrates Courts Act. The said courts followed, and still follow, the principles of procedure and practice laid down by or under the Criminal Procedure Code, Cap 75, Laws of Kenya, for criminal cases, and the Civil Procedure Act, Cap 21, Laws of Kenya, for proceedings of a civil nature. This means that a claim to inherit under customary law, being civil in nature, must be brought under the provisions of the Civil Procedure Act and the Rules made thereunder.
30. By virtue of Section 2 of the Magistrates Courts Act, land held under the Registered Land Act could not fall under a claim under customary law, and a claim to inherit it could not be subject to Sections 2 and 9 of the Magistrates Courts Act. The law regulating succession by an African to such property was stated in Section 120(2) of the Registered Land Act to the effect that the Land Registrar, after satisfying himself of the death of the proprietor of the land, was obliged to apply to the court for the determination of the heirs, and the court was to determine the persons entitled.
31. There are several judicial determinations on Section 120(2) of the Registered Land Act. The Court of Appeal in ***Karanja Kariuki vs. Kariuki (1983) KLR 209***, for example, stated that customary succession to land in areas where land was registered under the Registered Land Act were subject to the process set out in Sections 120 and 121 of the said Act. The process being that the land registrar upon being informed of the death of the proprietor of the land and that he had died intestate, applied to the relevant court to determine the matter on who was entitled to the law according to the Customary Law applicable to the deceased proprietor. The High Court had stated similarly previously in ***Mbuthi vs. Mbuthi (1976) KLR 120, (1976-80) 1 KLR 145***, adding that the provision in Section 120 of the Registered Land Act did not preclude the taking out of letters of administration. Other pronouncements on Section 120 of the said Act are to be found in ***Simiyu vs. Watambamala (1985) KLR 852***, ***Njoroge vs. Mbiti (1986) KLR 519*** and ***Gathiba vs. Gathiba (E&L) 356***.

32. The proceedings in **Kiharu DMCSC No. 45 of 1971** should be understood against the background stated above.
33. According to the record in **Kiharu DMCSC No. 45 of 1971**, the said proceedings were initiated by the Murang'a Land Registrar when he lodged with the Kiharu District Magistrate's Court a letter dated 21st December 1971 applying for a certificate of succession in respect of the estate of Nduati Mbutia regarding parcel Number Loc 8/Ndutumi/280. The letter forwarded to court the original death certificate in respect of the deceased, together with a list of seven (7) individuals stated to be the relatives of the deceased. These were Wangari Nduati (wife), Muiyuro Kamau (stepson), Kimani Kamau (witness), Kibunja Kamau (witness), Njoroge Kamau (witness), Gitau Kimani (witness) and J. Mwangi (subchief and witness).
34. There are on record seven original hearing notices issued out of the Kiharu District Magistrates Court on 22nd December 1971 in respect of a hearing scheduled for 19th July 1972. The same was returned as duly served on all the seven (7) persons stated to be relatives of the deceased on 9th January 1972.
35. All the seven (7) attended court on 19th January 1972. The father of the respondent herein, Muiyuro Kamau, gave a sworn statement to the effect that they, the relatives, had spoken over the matter before the headman and that they had agreed that he, Muiyuro Kamau, be registered as owner of Loc.8/Ndutumi/280. The record reflects that although the widow of the deceased and the mother of the applicant were present at the proceedings before the District Magistrate Court she did not cross-examine Muiyuro Kamau on the matter. The court thereafter certified that the proprietor of the subject properties had died and ordered that Muiyuro Kamau be registered as the sole proprietor thereof. A certificate of succession was to issue thereon after 30 days, and the same did indeed issue on 13th March 1972.
36. Was the certificate of succession issued under Section 120 of the Registered Land Act equivalent to a grant of representation? I think not. A grant of representation appoints a personal representative and vests the person so appointed with powers to administer the estate of the deceased with the mandate to eventually distribute it. The certificate of succession envisaged in Section 120 of the Registered Land Act did not appoint a personal representative and the same did not constitute the person named therein as proprietor or the administrator of the estate of the deceased. In holding so I have cognizance of the remarks by Harris J. in ***Mbuti vs. Mbuti*** that the provision in Section 120 of the Registered Land Act did not bar the taking out of letters of administration.
37. The application dated 23rd July 2004 is grounded on Section 76 of the Law of Succession Act, which states that:-
- “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 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 ...; or**
 - e. **that the grant has become useless and inoperative through subsequent circumstances.”**

38. Section 76 of the Law of Succession Act falls in Part VII of the Act, and, by virtue of Section 2(2) of the Act, it applies to proceedings in respect of estates of persons who died before the Act

commenced, such as that of the deceased herein, Nduati Mbutia. However, it applies only in respect of grants of representation. As the certificate of succession envisaged in Section 120 of the Registered Land Act is not a grant of representation, Section 76 of the Law of Succession Act does not apply to it. Consequently, I have no jurisdiction under Section 76 of the Law of Succession Act to revoke or annul the said certificate of succession.

39. Even if there were such jurisdiction, and I state herein that there is no jurisdiction; I am not satisfied that the proceedings were defective nor founded on fraud. Defects in the process of obtaining the certificate of succession have not been demonstrated, neither has it been shown that there was fraud. The lower court had been called upon to determine heirs to the estate in accordance with Kikuyu Customary Law. The deceased though survived by a widow did not have sons, hence the next in line as heirs were his brothers or their children. Muiyuro Kamau is said to have been a nephew of the deceased, and given that the deceased had no sons he was entitled to inherit the deceased's property. He could be described as a son under custom. The record reflects that the widow of the deceased was present in court on 19th January 1972 and did not object to the said Muiyuro Kamau being described as a son of the deceased nor did she object to the declaration that he was to be registered as sole proprietor of the subject property.

40. I am in agreement with counsel for the respondent, Mr. Kimani, that the remedy availed by Section 76 of the Law of Succession Act is not available to the applicant. If her mother was aggrieved with the proceedings of 19th January 1972 she ought to have appealed against them in accordance with the law that governed the matter.

41. I need not say more, the application dated 23rd July 2004 is without merit. It is for dismissal and I do hereby dismiss the same with costs to the Respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF JULY, 2015.

W. MUSYOKA

JUDGE

In the presence of advocate for the Applicant.

In the presence of advocate for the Respondent.