



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CIVIL APPEAL NO. E077 OF 2024

GRACE NG'ENDO KANGORI.....1ST APPELLANT
PAUL KAMAU KANGORI.....2ND APPELLANT
VERSUS
CATHOLIC DIOCESE OF MURANG'A.....
.....RESPONDENT

(An appeal from the Judgment of Hon. Martha Opanga (P.M) in Wang'uru Succession Cause No. 61 of 2019 delivered on 2/7/2024)

JUDGMENT

Introduction

- [1] By an application dated 18/4/2024, the Respondent, an alleged purchaser of L.R No. Kirinyaga/Gathigiriri/822 (*hereinafter referred to as the suit land*) sought, *inter alia*, revocation of the confirmed grant issued on 6/5/2022.
- [2] Fr. William Kamau Kuria, the registered trustee of the Respondent swore a supplementary affidavit on 13/5/2024 in support of the application.
- [3] Joseph Mbugua Mbatia and Angelus Muriithi Kaara, members of Kiamanyeki Local Catholic Church swore affidavits on 13/5/2024 affirming that the Respondent was in occupation of the suit land where it had planted trees.
- [4] James Maina Githongo confirmed in his affidavit sworn on 13/5/2024 that he had taken part in the tree planting exercise on the suit land occupied by the Respondent.
- [5] The Appellants allegedly filed a Replying Affidavit which is neither in the Record of Appeal nor the lower court record!
- [6] By that as it may, the application was canvassed by way of written submissions, which were duly filed by both parties.

Decision of the trial court

[7] In revoking the grant, the trial court ruled that:

“In the instant case the applicant purchased the land in question from the deceased before his demise. They applied for consent of land control board which consent was granted as shown in annexures exhibited. Unfortunately, the deceased passed on before transfer was effected. The applicant has also shown that he has been in occupation and use of the said land as shown in his supplementary affidavit which in effect mean that the respondents were fully aware of the applicant’s interest on the said land but chose to exclude him in this succession proceedings and thereby disinheriting him of his entitlement as bonafide purchaser. The upshot of it all is that the application has merit is allowed as prayed accordingly grant confirmed and issued on 6th May 2022is revoked to allow inclusion of the applicant as beneficiary of the estate. The respondents to bear the cost of this application.”

The Appeal

[8] On appeal, the Appellants filed their memorandum of appeal dated 10/7/2024 raising 4 grounds as follows:

1. *The learned trial Magistrate erred in law and fact in not making a finding that she had no jurisdiction in a succession matter to make a determination as to whether there was a valid and enforceable sale agreement.*
2. *The learned trial Magistrate erred in law and fact in making a finding that the Respondent has been in occupation of land parcel number Kirinyaga/Gathigiriri/822 whereas there was no such evidence availed in court.*
3. *The learned trial Magistrate erred in law and fact in failing to make a finding that the Respondent’s claim as a purchaser/creditor had not crystallized for it to have capacity to seek for revocation of grant.*
4. *The ruling of the court was against the pleadings and the applicable legal principles.*

Duty of the court

[9] This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See **Selle v Associated Motor Boat Co. & others [1968] E.A. 123**).

Submissions on the Appeal

[10] The Appellants fault the trial court for revoking the confirmed grant yet leaving the grant itself intact, and cite **Re Estate of Samuel Kariuki Kiragu (2023) KEHC 26573 (KLR)**. They urge that the trial court, handling succession matters, had no jurisdiction to determine whether there was a valid sale agreement capable of enforcement, and cite **Mathew Njega Njogu & Another v Rosemary Muthoni Njine (2021) eKLR**. They urge that the Respondent's claim had not crystallized by way of a valid court's decree for the probate court to make a finding in its favour.

[11] The Respondent maintains that the trial court had jurisdiction to deal with the matter because the suit land was a liability rather than free property, and cites **Re Estate of George Gikundi (Deceased) (2019) eKLR**. It urges that it met the threshold under section 76 of the Law of Succession Act to warrant revocation of the grant, and cites **Albert Imbuga Kisigwa v Recho Kawai Kisigwa (2016) eKLR**.

Analysis and Determination

[12] From the grounds of appeal, the singular issue for determination is whether the trial court was divested of jurisdiction to revoke the grant herein.

[13] The court takes cognizance of the letter of consent dated 8/2/1984 for the sale of the suit land by the deceased herein to Catholic Mwea Parish for a consideration of Ksh. 7,000. The court further notes the letter dated 27/3/2024 by the Chief of Kiarukungu Location acknowledging the sale of the suit land by the deceased to the Catholic Church.

[14] The incontrovertible evidence is that the Respondent has been in possession and occupation of the suit property, subsequent to its purchase. This court finds that the

Respondent proved on a balance of probabilities that it purchased the suit land from the deceased, during his lifetime, and took immediate possession thereof.

[15] In *re Estate of Nasotokini Ole Sane alias Nasotokini Lesane (Deceased)* [2019] KEHC 6589 (KLR), the court (R. Nyakundi J) expounded that;

“60. The enjoyment of those proprietary rights over land continued to subsist even after the death of the deceased. This is given credence by the administrators in their own affidavit (P and A.5 form) confirming existence of the purchasers’ interest or liabilities. Therefore, there is misrepresentation and concealment of material facts, lack of notice to the protestors when they applied for confirmation of the grant of letters of administration. The administrators intended to seek confirmation of the grant and have the estate left by the deceased to be distributed without their involvement.”

[16] In *Re Estate of George Gikundi (Supra)* cited by the Respondent, the court (R.K Limo J) expounded that;

“The jurisdiction of this court to deal with properties (including land) belonging to the deceased person is donated under Section 2(1) & 47 of Law of Succession Act Cap 160. As I have observed the above the suit land in this cause though comprises properties registered in the name of a deceased person is not considered "free property" as defined under Section 3 (1) of Law of Succession Act but a liability to the estate. When a creditor to an estate has a claim over the estate of a deceased person particularly where the claim was admitted by the deceased, such a claim can be lodged vide a Succession Cause in this court sitting as a probate court because it has jurisdiction to determine it. It is of course different where the claim was denied by the deceased directly or through his actions. In that case the claim becomes a land dispute that can only be adjudicated by ELC as established by Article 162(2) of the Constitution of Kenya. In this instance the deceased clearly sold his parcel of land after subdividing it and proceeded to the Land Control Board with the Applicant and obtained the requisite consent to transfer the suit land to the Applicant. Besides that he allowed the Applicant to take free occupation and develop it. That conduct in my view clearly indicates that the deceased gave out his parcel willingly to the Applicant (purchaser) for value.”

[17] Section 116 of the Evidence Act places the burden of disproving ownership on the Appellants as follows:

“When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

[18] There is no doubt that the sphere of inquiry of a probate court is confined to determining the assets of the deceased, the legitimate beneficiaries together with other persons beneficially interested, and the ultimate distribution of the estate.

[19] **Section 66 of the Law of Succession Act gives preference to certain persons to administer an estate of an intestate as follows:**

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference - (a) surviving spouse or spouses, with or without association of other beneficiaries; (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V; (c) the Public Trustee; and (d) creditors.”

[20] One of the duties of the personal representatives under section 83 of the Law of Succession Act is to ascertain and pay, out of the estate of the deceased, all his debts.

[21] Section 86 of the Law of Succession Act provides that ***“Debts of every description enforceable at Law and owed by or out of an estate shall be paid before any legacy.”***

[22] This court finds that the Respondent was, in the strict legal sense, a creditor to the estate, who was beneficially entitled to the suit land. That question fell squarely within the jurisdictional realm of the trial court, sitting as a succession court, to ascertain the assets, liabilities, beneficiaries and creditors to the estate.

ORDERS

[23] Accordingly, for the reasons set out above, the appeal is without merit and it is dismissed.

[24] Costs of the appeal to the Respondent.

Orders accordingly.

DATED AND DELIVERED THIS 7TH DAY OF OCTOBER 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Nyaga for Mr. Maina Kagio for Appellants.

Mr. Mutiso for Mr. Kamuga for the Respondent.