



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Joseph Manyara (Deceased) (Succession Cause  
25 of 2016) [2024] KEMC 87 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEMC 87 (KLR)

**REPUBLIC OF KENYA  
IN THE GITHONGO LAW COURTS  
SUCCESSION CAUSE 25 OF 2016  
AT SITATI, SPM  
JUNE 28, 2024**

**IN THE MATTER OF THE ESTATE OF JOSEPH MANYARA (DECEASED)**

**BETWEEN**

**DAVID GITONGA MANYARA ..... OBJECTOR**

**AND**

**MWORIA M'TUERANDU M'ITUMA ..... PETITIONER**

**JUDGMENT**

1. By an Amended Summons dated 4<sup>th</sup> September, 2023 supported by an affidavit of similar date, the Applicant prayed for:
  1. (Spent).
  2. That the Grant of Representation to the estate of JOSpeh Manyara Issued To Mworia M'tuerandu M'ituma On 20<sup>th</sup> March, 2017 and confirmed on 22.11.2017 be revoked and fresh grant do issue to the applicant herein.
  3. (Spent).
  4. (Spent).
  5. That costs of the application be provided for.
2. The applicant relied on the 10 grounds as appeared on the face of the Summons:
  - a. That the grant was obtained fraudulently without consent of the Applicant and that of his siblings' beneficiaries being biological children of the deceased.
  - b. That there was concealment of material acts that the deceased was survived by the applicant and other 7 children.



- c. That the applicant and his siblings' consent was never obtained before filing the cause.
  - d. That despite the fact that the petitioner knew very well where the applicant lived in Mombasa he did not bother to seek his consent before filing the succession cause.
  - e. That the petitioner is fully aware that the entire land belongs to the deceased and that is why he secretly decided to carry out the succession cause in order to short change the applicant and other beneficiaries.
  - f. That the grant was obtained following untrue allegations of fact, forgery and misrepresentation of material facts.
  - g. That the petitioner is now in a rush to evict the applicant family from the suit estate.
  - h. That as can be seen on court record, the petitioner used orders of the court to go and subdivided the land without involvement of the applicant but through intimidation of the applicant's elderly and sickly mother Esther Karambu.
  - i. That the petitioner does not and had never lived on any part of the suit land because he has his land at Githongo market together with other uncle namely M'murithi M'ituma.
  - j. That the petitioner wants to steal the estate from the beneficiaries which move should not be entertained by this Honourable Court.
33. In support of the summons for revocation, he relied on the following 9 annexures:- death certificate showing date of death as 7<sup>th</sup> December, 1995 and not 7<sup>th</sup> October, 1995- Chief's letter introducing the applicant and his siblings as beneficiaries- affidavit of service to challenge alleged service on the applicant- notice of appointment to his former counsel instructing him to apply for revocation- Letters of administration Intestate issued to the Petitioner- Court order dispensing with the production of the original title deed which was in the applicant's custody.- court order authorizing OCS Githongo to provide security to the sub-division of land.- mutation form for the land sub-division- death certificate and burial permit of the applicant's mother Esther Karambu showing that she died on 15<sup>th</sup> December, 2023.-witness statement of the deceased Esther Karambu- current search certificate dated 14<sup>th</sup> October, 2022 showing that Nyaki/Mulanthankari/38 and Ruiru/Rwarera/438 were the deceased's properties but were omitted.
4. The firm of Thangicia M. David & Company Advocates acted for the objector/applicant.

### **The Petitioner/ Respondent's Reply**

5. By a replying affidavit dated 29<sup>th</sup> September, 2023 the Petitioner opposed the summons for revocation. The replying affidavit contained 41 paragraphs which could be condensed into 9 main averments -
- i. LR Number Ntima/Igoki/4089 was owned in common between the deceased M'murithi M'ituma And M'twerandu M'ituma in the ratio of 2/12 for each of them as opposed to being registered in the joint names of 3 persons: the deceased Joseph Manyara, M'Murithi M'Ituma and M'Twerandu M'Ituma.
  - ii. All the children of the deceased were born and raised on the subject parcel Ntima/Igoki/4089.
  - iii. The petitioner's grandfather gifted the deceased land near the Meru School for the deaf whereto the deceased Joseph Manyara moved while the same grandfather gifted M'Murithi and M'Twerandu lands in Githongo whereto they moved.



- iv. The Petitioner did approach the Applicant/Objector herein together with his siblings and mother and explained that he wanted to file the succession cause so that each beneficiary could have his/her share but the approach was rebuffed by the applicant and his family.
  - v. The chief summoned the applicant and his family to his offices but the applicant refused to cooperate but instead insulted the applicant.
  - vi. When the Applicant's mother refused to institute the succession cause in the estate of her deceased husband, he filed Citation vide Meru High Court Citation Cause 202/2014 which was duly served by a process server (called Joseph Kithinji Kiambati) on the applicant together with several mentions and hearing notices through his mother but the citation was not challenged.
  - vii. There being no response to the Citation, the High Court allowed the Citation by the Petitioner herein on 18<sup>th</sup> September, 2019.
  - viii. As a result, he pursued the process to its logical conclusion including engaging the surveyors who subdivided the land into 3 equal parts as per the respective shares of each beneficiary
  - ix. That the applicant had sought by all means to prevent the legal course from being followed for his own selfish ends yet the Petitioner herein had no ulterior motives.
6. The Petitioner/Respondent relied on his supplementary affidavit of 22<sup>nd</sup> August, 2022 and the following 13 annexures:-
1. Search certificate dated Ntima/Igoki/4089.
  2. Chief's letter dated 8<sup>th</sup> March, 2014.
  3. Citation dated 24<sup>th</sup> February, 2015 filed in Meru HIGH Court Citation Cause No. 202/2014.
  4. Affidavit of service by Joseph Kithinji M'Kiambati for mentions and hearings of 20/04/2014 and 17/02/2016.
  5. Hearing and mentions notices dated 05/09/2016, 21/04/2016 served on 1<sup>st</sup> August, 2016.
  6. High Court order dated 5<sup>th</sup> September, 2016 allowing the Citation cause.
  7. Temporary grant dated 20<sup>th</sup> March, 2017.
  8. Certificate of Confirmation of grant dated 22<sup>nd</sup> November, 2017.
  9. Letter dated 30<sup>th</sup> May, 2019 addressed to the Applicant's mother served on 6<sup>th</sup> June, 2019.
  10. Application and order dated 6<sup>th</sup> August, 2019 granting the applicant to proceed with the land subdivision without the production of the original title deed which the Applicant herein had withheld.
  11. The Applicant's own exhibit DGM3(b) confirming that the applicant was aware of the proceedings.
  12. Consent of the Divisional Land Control Board for the subdivision of the land.
  13. Mutation form showing the equal subdivision of the subject land.
7. The firm of Kiautha Arithi Company Advocates represented the petitioner. The suit went for hearing via viva voce evidence.



## A. The Applicant's Case

8. After adopting his witness statement and producing the exhibits, the applicant was cross-examined and the following came to light: The applicant was a son to the deceased Joseph Manyara and Esther Karambu (now deceased). He admitted that his mother had superior priority ranking in law when it came to succession matters ahead of her children. He denied knowledge of the letter dated 22/03/2011 by Kiautha Arithi Advocates. It was true as per the affidavit of service that his mother was duly served by the process server as reflected by paragraph 3 thereof and that she accepted service for herself and on the behalf of all her 7 children. The succession cause was the subject of Gazette notice but he denied seeing the same. He admitted that the registration detail of Ntima/Igoki/4089 showed the owners were with distinct shares in the ratio of 2/12 each although he denied that this meant tenancy in common. In the certificate of confirmation dated 22<sup>nd</sup> November, 2017 Esther Karambu the widow of Joseph Manyara was allotted 2/12 share of Ntima/Igoki/4089 to hold in trust for herself and her children. It was true that the petitioner was entitled to a share out of the estate. It was true that he had in his possession the original title deed Ntima/Igoki/4089 but denied unreasonably withholding it for the purposes of transmission of shares for each beneficiary. Esther Karambu lived on Ntima/Igoki/4089 till the date of her demise and left her son and grandson occupying her portion. He admitted that his mother Esther Karambu informed him that she had been served with the succession pleadings including the citation.
9. In re-examination, he insisted that he was not personally served with the court papers although the same was served on his mother. He insisted that Ntima/Igoki/4089 solely belonged to his deceased father Joseph Manyara but the petitioner wanted to grab it. He insisted further that the registration of the 3 names was to protect the interest of one of the brothers since the step-brother wanted to grab everything. He pointed out that the citation did not include all the beneficiaries as it omitted Isaac Nkonge And Peter Kiriinya (deceased).

## B. The Petitioner/respondent's Case

10. After adopting his witness statement and producing his exhibits, the following came to light during the cross-examination: The applicant was one of the children of the deceased Joseph Manyara. M'murithi was a brother to the deceased but had already given evidence and never said that the subject land Ntima/Igoki/4089 was wholly owned by the deceased Joseph Manyara. He admitted that Ntima/Igoki/4089 was registered in the 3 names but denied that they held it in trust for Joseph Manyara. The deceased Joseph Manyara had other parcels which were omitted Nyaki/Mulanthankari/38 and Ruiru/Rwarera/438. It was true that the deceased Joseph Manyara had other children other than those listed. It was true that only Joseph Manyara remained behind on 4089 in 1963 when his brothers moved to Githongo. It was true that Esther Karambu was notified of and served with court pleadings.
11. At the end of their respective cross-examinations, the parties closed their cases and exchanged written submissions as directed by the court.

## A. The Applicant's Submissions

12. Through written submissions dated 2<sup>nd</sup> May, 2024 the applicant submitted that since he was not served court pleadings, the whole process was illegal. He argued further that the subject property was his father's sole property and further that the acts of the respondent satisfied the threshold for revocation under section 76 of the *Law of Succession Act*.



## **B. The Respondent's Submissions**

12. The Respondent relied on following sections of the *Law of Succession Act* cap 160 in support of his submissions dated 6<sup>th</sup> June, 2024 which have been studied fully by the court that the revocation was unmerited since no fraud nor illegality had been proved: 51, 66, 71, 76 and rule 21 of the Probate and Administration Rules.

## **Issue For Determination**

13. The only issue for determination is whether or not the applicant had satisfied the legal threshold for revocation of the grant of representation and the certificate of the confirmation thereof.

## **Determination**

14. Revocation of grants is regulated by Section 76 of the *Law of Succession Act* which states as follows:

“76. Revocation or annulment of grant

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 order or allow; 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. From the tested evidence on the record, the court noted that the now deceased Esther Karambu was duly served not only with the citation but also the substantive succession cause but she opted not to participate. Furthermore, as the applicant himself admitted the said Esther Karambu who was his mother, notified him that she had been served with the court pleadings. To that extent, the Petitioner/ Respondent had acted lawfully and in full compliance with section 66 of the *Law of Succession Act* which stipulates that:
66. Preference to be given to certain persons to administer where deceased died intestate



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;

16. It appears that out of indolence and pure intransigence, the applicant did not participate in the succession cause in spite of his own mother notifying and briefing him of the proceedings. This indolence and intransigence has legal consequences as was discussed in *Amina Karama v Njagi Gachangua & 3 others* [2020] eKLR (Y.M. Angima J.) where the learned Judge expounded the maxim of equity thus:

“20. It has been held that equity aids the vigilant and not the indolent. It has also been held that delay defeats equity. In the case of *Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi* [2014] eKLR the court quoted the following passage from Snell’s Equity by John MC Ghee Q.C. (31<sup>st</sup> Edition) at page 99:

“The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing.”

17. As is well captured in section 66 aforesaid, his mother ranked in superior priority to him for the purposes of taking out the legal processes and she was duly regarded as such when she was served. She then took the reasonable step and in return she notified the applicant herein and his siblings. Therefore, the contention that the Petitioner acted secretly in the succession process is itself untrue and is rejected in toto. Related to this is the allegation of fraud: none was proved.

18. On the other ground that the petitioner omitted some properties Nyaki/Mulanthankari/38 and Ruiru/Rwarera/438 to warrant the revocation of grant, this Honourable Court finds the contention lame in the light of the express provisions of rule 20 in the Fifth Schedule to the *Law of Succession Act* which provide the cure for such omissions.

19. The cure is not a revocation but the issuance of fresh probate limited to the un-administered part especially where the administrator who was originally issued with the grant of representation died as had happened in present case:

20. Grants of effects unadministered

If the executor to whom probate has been granted has died, leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.

20. The final major contention was that the subject property Ntima/Igoki/4089 belonged to the applicant’s father solely having been held in trust for him by his brothers. Nothing could be further from the truth. The official search certificate dated 18<sup>th</sup> February, 2014 produced by the petitioner and conceded to by the applicant showed that the property Ntima/Igoki/4089 was registered as a tenancy-in-common with each tenant having 2/12 share. The mere movement of the other co-registered owners to utilize other parcels, without more, did not lead to an inference of trust by those left behind. Nothing



could have been easier for the parties than to just indicate in the Lands Register that one of them held the property in trust for the rest but this was not done. Instead, it was registered as tenancy-in-common.

21. The effect of a tenancy-in-common as opposed to a joint tenancy were discussed in the authority of *Diana Muchiri v Lydia Wariara Njenga & another* [2022] eKLR (S.Okong'o J.) where the learned Judge explained thus:

13. The distinction between joint tenancy and tenancy in common was made in *Isabel Chelangat v Samuel Tiro Rotich & 5 others* (2012) eKLR, as follows:

“At this juncture, I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land. To expound on this point, I have borrowed heavily from two texts, Megary & Wade, *The Law of Real Property* 6<sup>th</sup> Edition and Cheshire & Burn’s, *Modern Law of Real Property*, 16<sup>th</sup> Edition. According to Burn, at P242 “...a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares...” Further, that “there is a thorough and intimate union between joint tenants. Together, they form one person.”

A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities”. The right of survivorship (*jus accrescendi*) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are

- (i) The unity of possession.
- (ii) The unity of interest.
- (iii) The unity of title.
- (iv) The unity of time.

On unity of possession, each co-owner is entitled to possession of any part of the land as the other/s. (P477) One co-owner cannot point to any part of the land as his own to the exclusion of the other/s. If he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other/s, so that an action for trespass cannot lie against another co-owner. Unity of interest means that the interest of each joint tenant is the same in extent, nature and duration, for in theory of law, they hold just one estate. Unity of title means that each joint tenant must claim his title to the land under the same act or document. This is satisfied by having the joint tenants acquiring their rights by the same conveyance and being so registered as joint tenants. Unity of time means that the interest of each tenant must vest at the same time.

Tenancy in common on the other hand is different from joint tenancy. In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected



by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential.

A joint tenancy can be converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders so remain.”

22. That being so, this Honourable Court holds the considered view that the subject land Ntima/Igoki/4089 was factually held through a tenancy-in-common and neither brother could inherit the other brother’s share upon the demise of one or the other. The petitioner, was therefore, entitled to apply for letter of administration for the specific share of his father who was a tenant-in-common with the applicant’s father.
23. On the last ground that the petitioner had failed to complete the administration, it was clear that the it was the applicant’s own misconduct of self-exclusion and unreasonably withholding the original title deed that had caused the petitioner to take long to run through the succession process. This state of affairs was of the applicant’s own making and he should live with the attendant consequences as no man is permitted by law to take advantage of his own wrong to the detriment of others: At page 193 of *The Broom’s Maxims of Law - A Selection of legal Maxims : Classified and Illustrated (1864)* by Herbert Broom there is a chapter on “Fundamental Legal Principles” discussing this legal maxim : *Nullus commodum capere potest de injuria sua propria* : No man shall take advantage of his own wrong.

“It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong, and this maxim which is based on elementary principles, is full recognised in Courts of law and equity, and indeed, admits of illustration from every branch of legal procedure. The reasonableness and necessity of the rule being manifest, we shall proceed at once to show its practical application by reference to decided cases; and in the first place, we may observe, that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law – *frustra legis auxilium quaerit qui in legem committit*

25. At page 195 the Maxim further provides that :-

“It is moreover a sound principle, that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned.”

## Conclusion

26. Revocation is such an adverse and monumental order that the ends of allowing the revocation should far outweigh the inconvenience that would arise: In *Mary Wangari Kihika –vs- John Gichuhi Kinuthia & 2 Others (2015)eKLR* it was held:

“The above finding of concealment of material facts or untrue allegations of facts essential in point of law on the part of the respondent would warrant a revocation by the court of the confirmed grant. However, taking into account the fact that the present case been ongoing since 1997 that would not be a just course of action, a revocation of the confirmed grant would cause the parties to return to the drawing board and it could likely take a long time before the distribution of the suit is concluded.”

27. The inevitable result of the foregoing analysis is that the Summons for revocation of grant lacks merit and is dismissed with costs. It is so ordered. Right of appeal is 30 days.

**DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 28<sup>TH</sup> DAY OF JUNE, 2024**



**HON.T.A. SITATI**  
**SENIOR PRINCIPAL MAGISTRATE**  
**GITHONGO LAW COURTS**

Present

Mr. Mugambi for the Petitioner

Mr. Thangicia for the Applicant.

Petitioner in person

