

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

SUCCESSION APPEAL NO. E013 OF 2024

IN THE MATTER OF THE ESTATE OF ELOISE NGUNJU

NDEGWA aka NGUNJU w/o NDEGWA

**AMOS WANDERI NDEGWA
APPELLANT**

VERSUS

**MATHEW MAINA WANGECHI 1ST
RESPONDENT**

**STEPHEN GICHUHI WANGECHI 2ND
RESPONDENT**

JUDGMENT

1. This is an appeal from the decision of Hon. Mary Gituma given on 17.07.2024 in Nyeri Succession Cause Number 120 of 2018. The decision of the lower court involved a summons for revocation dated 12.03.2024. The lower court allowed the same, resulting in the appeal herein.

2. The Respondents filed an application dated 12.3.2024 and sought the following prayers:

a) ...

b) ...

- c) ...
 - d) The grant of letters of administration and the subsequent certificate of confirmation of the grant be revoked.
 - e) Any subsequent title deed registered pursuant to the certificate of confirmation dated 30.11.2021 be cancelled, and the mother title be reinstated.
 - f) The estate be shared equally among all the beneficiaries of the estate.
3. The grounds were that the grant was obtained fraudulently through concealment of the facts that the applicants are children of a son of the deceased. The applicant did not list all assets, especially livestock. The application was supported by the first Respondent's affidavit dated 12.03.2023.
4. They listed the 8 units of the estate as indicated in the chief's letter, excluding the late Obadiah Muthui Ndegwa (deceased). They indicated that when the late Obadiah Muthui Ndegwa (deceased) died, the applicant's mother, the late Florence Wangechi Githui took out letters of administration to the said estate vide cause No. 17 of 2004.
5. The late Florence Wangechi Githui (deceased) died on 24.09.2013 and was buried in Land parcel Number Tetu/Kabage/446. The said land was fraudulently transferred vide another succession cause to the appellant on 24.04.2022.

6. The second respondent decided to search Land parcel Number Euaso Nyiro/Suguroi Block III/429 and discovered that it was transferred to the appellant. He sought legal advice and noted that the primary court succession cause had been instituted. He stated that the appellant had colluded with the area chief to leave out the estate of the late Obadiah Muthui Ndegwa (deceased). This, by extension, left out the late Florence Wangechi Githui (deceased), and sons Mathew Maina Wangechi and Stephen Gichuhi Wangechi. They had a fraudulent mediation agreement which was not signed by Hellen Muthoni Ndegwa, a beneficiary and even the consent to confirmation. He stated that he had no knowledge of the succession proceedings.

7. In a further affidavit, he stated that the obituary of the late Obadiah Muthui Ndegwa (deceased) named the respondents as the children of the deceased. The late Florence Wangechi Githui (deceased), resided on the Kanyinya farm, which has two titles, that is, Land parcel Number Tetu/Kabage/466 and Land parcel Number Euaso Nyiro/Suguroi Block III/429, in the names of Eloise Ngunju Ndegwa *aka* Ngunju W/O Ndegwa the deceased herein, and in the names of the estate of the late Richard Ndegwa Muthui, respectively. The latter portion measures 1.74 hectares.

8. The application was opposed by the appellant. He conceded that the deceased Eloise Ngunju Ndegwa aka Ngunju W/O Ndegwa had 8 children, and as such, Obadiah Muthui Ndegwa (deceased) was his brother. He stated that the late Obadiah Muthui Ndegwa (deceased) did not survive the deceased herein.
9. He stated that after marriage to the late Florence Wangechi Githui (deceased), his brother was open to him and told him that the wife had two children from a previous marriage. Hence, they are precluded from being his by dint of section 188 of the Evidence Act. To the appellant, it did not matter that the last section of the Evidence Act is section 183. He stated that they, as a family, agreed to pursue the letters of administration. At that time, the late Florence Wangechi Githui had died. He did not include her name and does not know how she was included. He said that his advocate advised him that the widow's interest is a life interest and therefore terminates on her death.
10. He stated that he only included survivors to the estate. He stated that the late Obadiah Muthui Ndegwa (deceased) had a matrimonial home in Ruring'u in Nyeri, the late Florence Wangechi Githui used to reside there until her demise. She never resided in any of the deceased's property. The late is said to have had a poor relationship with the deceased. Such

information is not useful in an intestate succession which has nothing to do with the merit or likeability of a person. He proceeded that the late Florence Wangechi Githui and his sons sold off livestock. This was essentially an admission of the existence of these souls.

11. However, the court allowed the application dated 12.03.2024 and made the following orders:

- a) The certificate of confirmation of grant dated 30.11.2021 is hereby revoked.
- b) An order is issued that any subsequent title deed registered pursuant to the certificate of confirmation dated 30.11.2021 and Tetu/Kabage/466 and Land Parcel Number Euaso Nyiro/Suguroi Block III/429 be cancelled and revert to the deceased's name.
- c) The claim to remove the appellant and for livestock was rejected as details were availed.

12. The appellant was aggrieved with the decision given on 17.07.2024, filed this appeal, and set forth the following grounds of appeal:

- a) That the learned trial magistrate failed to address her mind to the pleadings on record and evidence by the appellant.

- b) The learned trial magistrate erred in law and facts by failing to consider and evaluate the entire evidence as well as supporting documents presented by the appellants and or their counsel on record.
- c) The learned trial magistrate erred in law and facts by wrong interpretation of the term child or children under the law of succession and therefore coming to a wrong conclusion that the respondents were children for purposes of succession.
- d) The learned trial magistrate erred in law and fact by stating that the respondents were beneficiaries of the above-mentioned estate, yet there was no proof of dependency for them to have been considered as beneficiaries.
- e) The learned trial magistrate erred in law and fact by finding that the respondents had proved to the required standard all the ingredients required for revocation of grant of letters of administration intestate.
- f) The learned trial magistrate erred in law and facts by failing to consider that the respondents did not

present any evidence that they are dependants of Obadiah Muthui Ndegwa (deceased) and hence they did not have locus to institute the application for revocation of grant in the first place.

g) The learned trial magistrate erred in law and facts by considering the Respondents as grandchildren of the deceased without any sufficient evidence to support the same.

h) The learned trial magistrate erred in law and fact by failing to appreciate the elaborate weight of the evidence presented by the appellant and thus ending up with wrong findings of revoking a legally granted grant.

13. In summary, the Appellant contends that the learned trial magistrate failed to properly consider the pleadings, evidence, and supporting documents on record, and did not evaluate the case in its entirety. Their case was that the court misinterpreted the terms “child” or “children” under the law of succession and wrongly concluded that the Respondents qualified as children and beneficiaries of the estate of Obadiah Muthui Ndegwa, without proof of dependency or sufficient evidence that they were the deceased's grandchildren. He maintained that the Respondents failed to establish the legal grounds for revocation of the grant, lacked locus standi, given

that they did not prove that they were dependants. I was urged to allow the appeal.

14. I pointed out to the parties at the very onset that, whether or not the court was correct, the appellant had fraudulently obtained a grant without indicating the other beneficiaries. There was no evidence of renunciation on record by any beneficiary.
15. The entire gamut of the appeal turns on one question, that is, that the court erred in determining that the respondents were dependents of the deceased. In reality, there was one question camouflaged as a legal question, whether children of an heir of the estate, not born within wedlock, are entitled to inherit. This appears to have arisen from the lack of understanding of the concept of survivorship.
16. The court will address the twin issues shortly. However, suffice it to say that the deceased herein, as far as it can be discerned from the evidence, died and left the following properties.
 - a. Land parcel Number Tetu/Kabage/466 measuring 1.74 hectares
 - b. Land parcel Number Euaso Nyiro/Suguroi Block III/429 measuring 7.08 hectares.
 - c. Some livestock

17. The deceased, a widow of the late Richard Ndegwa Muthui (deceased) had the following children, that is:

- a. Lilian Wanjiku Kimani
- b. Obadiah Muthui Ndegwa(Deceased)
- c. Elias Ndungu Ndegwa (Deceased)
- d. Hellen Muthoni Ndegwa
- e. Annah Nyaguthii Ndegwa
- f. Nyawira Koge
- g. Amos Wanderi Ndegwa
- h. Mary Wanjugu Ndegwa

18. It is not clear when the late Elias Ndungu Ndegwa (Deceased) died. The court will proceed on the premise that he survived the deceased and had dependants of his own. From the affidavits herein, there is also a raging dispute over the estate of the late Richard Ndegwa Muthui (deceased). This is not part of the dispute herein.

19. From the record, it can be seen that upon the demise of the matriarch, Eloise Ngunju Ndegwa aka Ngunju W/O Ndegwa, the appellant petitioned for letters of administration, and the grant was finally confirmed to him as the sole heir. Thereafter, the Appellant caused both parcels of land, namely Land Parcel Numbers Tetu/Kabage/466 and Euaso Nyiro/Suguroi Block III/429, to be transferred into his name.

20. This was notwithstanding the fact that, at the time of confirmation of the grant, the Respondents were in possession of substantial portions of the estate comprised in the said parcels. This was also notwithstanding the allegations made that the respondents were selling some properties in the estate. Failure to include the respondents or, at worst, the estate of their mother was fraudulent.

21. The Appellant now describes the respondents as trespassers. Persons in possession have certain rights and must be disclosed, even when they are not heirs. It is further noteworthy that the deceased had eight children, as earlier listed, yet no provision was made for them as beneficiaries of the estate.

22. The respondents indicated that their father was buried on land parcel number Tetu/Kabage/446, which is in the names of their grandfather. They indicated that the applicant fraudulently transferred the said parcel to his name in another succession cause. Of course, it is expected that the applicants will move and have the grant revoked for being fraudulently obtained in that other cause or commence appropriate legal proceedings. It is thus not a subject of this appeal.

23. However, upon perusing the chief's letter, it is apparent that the Appellant did not disclose to the chief that the estate

of Obadiah Muthui Ndegwa survived Richard Ndegwa, deceased herein. That omission is material.

24. Further, the position of the deceased's daughters in the entire succession matrix remains unclear, as there is no satisfactory explanation as to whether or how they were considered in the distribution of the estate.

25. Regrettably, the record reveals that ex parte proceedings, in a miscellaneous cause, culminated in an order for the exhumation of the body of the widow of the late Obadiah Muthui Ndegwa (deceased), namely, the late Florence Wangechi Githui, from her husband's portion of land in the estate of Richard Richard Ndegwa. Such an order does little credit to the administration of justice and inevitably casts the Appellant in an unfavourable light.

26. There is evident concern that, if unchecked, the Appellant's conduct and unquenchable greed, may prejudice the proper administration of the estate. The manner in which he has dealt with the estate property suggests a risk that, unless appropriately supervised, the estate may be substantially diminished to the detriment of other rightful beneficiaries; an unquenchable thirst.

27. The case had initially been filed in the High Court of Nyeri as Nyeri HCP&A 520 of 2014. It was later transferred to the

lower court as Number 120 of 2015. Subsequently one of the deceased children filed for succession indicating that he had other siblings but excluding the late Obadiah Muthui Ndegwa (deceased).

28. It is not in doubt that the late Obadiah Muthui Ndegwa (deceased) was a child of the deceased herein. He died on 1.09.2003 and was survived by a widow. The Succession Act provides for the situation at hand. Section 35(1) and (5) provides as follows:

5. (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

- (a) the personal and household effects of the deceased absolutely; and
- (b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her remarriage to any person.

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon

the surviving child, if there be only one, or be equally divided among the surviving children.

29. The widow referred to relates to the widow of the deceased.

A woman who is a son's widow is not a widow but a daughter-in-law. Whatever she gets is not a life interest but an absolute interest, together with any children or dependants of the deceased. What a daughter-in-law gets does not revert to the estate of the deceased patriarch or matriarch. In that context, the late Obadiah Muthui Ndegwa (deceased) left behind a widow, that is the late Florence Wangechi Githui (deceased). Consequently, the daughter-in-law succeeded to the estate of her husband. When property is being given out, it will be irrelevant whether the daughter-in-law had children. The rules of testacy or intestacy will apply in respect of her estate or the estate of Obadiah. Nothing refers to the matriarch's estate.

30. Therefore, whether the Respondents were or were not dependants is a question not for this estate but the estate of the late succeeded the estate of the late Obadiah Muthui Ndegwa (deceased). The only relevant part is that the estate of the late Florence Wangechi Githui (deceased), as a daughter in law, survived the estate of the deceased herein.

31. Dependents are defined in Section 29 of the Succession Act as follows:

For the purposes of this Part, "dependant" means—
(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

32. Grandchildren are counted, and they step into their father's shoes as provided in Section 41 of the Law of Succession Act, as follows:

Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under

that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate (underline mine).

33. The question with the respondents who were children is irrelevant for these proceedings. What is relevant is that the estate of the late Obadiah and consequently the estate of the late survivor survived the deceased herein. Luckily, those estates have administrators. The appellant is not one of them and cannot pretend to question who the heirs of his brother and sister-in-law are, it is a waste of the court's time.
34. Therefore, the court was right that the estate of Obadiah, though the respondents survived the deceased, was entitled to inherit from the deceased's estate. Succession does not depend on benevolence, relationship, or friendship. It is a vertical and empirical relationship.
35. This court has to establish a basis to revoke the grant and interfere with the mode of distribution proposed in the certificate of confirmation of grant as urged by the applicant. The Grounds for revocation or annulment of grant of Letters of

Administration are set out in Section 76 of the [Law of Succession](#) as follows:

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.

36. The appellant denied that had had concealed material particulars. However, by his own admissions, he did not disclose the existence of his own brother, the late Obadiah Muthui Ndegwa, his wife, and the appellant's sister-in-law, the late Florence Wangechi Githui, and their sons, or dependants, Mathew Maina Wangechi and Stephen Gichuhi Wangechi.

37. Such failure was fatal to the case. The appellant did not disclose or give any share to Hellen Muthoni Ndegwa. She had not renounced her right to disinherit. Those who are not interested can renounce their rights, but cannot renounce on behalf of others.

38. To address each ground, the court notes that the court below considered all grounds. The finding about who the children were, though not necessary, was spot-on.

39. The question whether or not the respondents were or were not beneficiaries of the estate of the late Obadiah Muthui Ndegwa did not have an effect on the determination of the share due to the testate so long as the deceased herein was survived by the widow of a son, the late Florence Wangechi Githui, and subsequently sons or dependants that is, Mathew Maina Wangechi and Stephen Gichuhi Wangechi.
40. The so-called evidence that the appellant attached does not go to the root of section 76 of the Law of Succession Act. The duty of the succession court is to divide the estate equally among the 8 beneficiaries, unless some renounce their rights. However, given the state of the Kanyinya farm, the court may consider any benefits from the spouse of the deceased.
41. The net effect is that the appeal lacks merit. Before going to costs, the court notes that the court below still retained the appellant as an administrator. When a court finds fraud, such an administrator is not fit to proceed. The court below shall therefore replace the appellant with one or two heirs in addition to the one or both respondents and administrators to the exclusion of the appellant. It is the only way to fight fraud in succession. The court should therefore proceed and revoke the letters of administration intestate issued on 23.09. 2024. The court below shall appoint one or both Respondents and any other beneficiary as administrators, excluding the

applicant who fraudulently obtained the grant that has since been revoked.

42. This leaves the issue of costs, which are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

"It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter, with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

43. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case **of Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR)**, as follows:

18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the

preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

44. The Appellant's actions caused the Respondents to incur unnecessary costs as a direct consequence of these proceedings. While it is appreciated that the parties are family, the circumstances justify an award of costs. Such an order will compensate the Respondents for having been subjected to a wholly unmeritorious appeal.

45. A sum of Ksh 85,000/= will thus suffice in the circumstances of the case.

Determination.

46. In the circumstances, I make the following orders:

- a) The estate of the late Obadiah Muthui Ndegwa(deceased) survived the deceased herein. The said late Obadiah Muthui Ndegwa was survived by his widow, the late Florence Wangechi Githui, and sons Mathew Maina Wangechi and Stephen Gichuhi Wangechi.
- b) The appeal lacks merit and is accordingly dismissed with costs of 85,000/=, payable within 30 days in default execution do issue.
- c) The appellant shall surrender to the court the original titled deeds for Numbers Tetu/Kabage/466 and Euaso Nyiro/Suguroi Block III/429 within 30 days to the court.
- d) The court below shall appoint one or both Respondents and any other beneficiary as administrators, excluding the applicant who fraudulently obtained the grant that has since been revoked.
- e) The file is closed.

DELIVERED, DATED and SIGNED at **NYERI** on this **19TH** day of **February, 2026**. Judgement delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of:

Mr. Gichuki for the Appellant.

Mr. Muchangi for the Respondent.

Court Assistant - Michael