



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. E046 OF 2024

HARRISON MURIMI KEGA.....APPELLANT

VERSUS

MONICA NJOKI KEGA.....

.....RESPONDENT

JANE NYAWIRA KEGA.....INTERESTED

PARTY

**(Being an appeal from the Judgment of Hon. Wanjiru M.N (S.R.M) in Gichugu
Succession Cause No. E008 of 2021 delivered on 26/4/2024)**

JUDGMENT

[1] On 5/10/2023, the Appellant filed Summons for Revocation of grant of letters of administration issued to Monica Njoki Kega on 13th September, 2023, on the ground that the proceedings therein were defective in substance, and the grant was fraudulently obtained by making false statements and concealing from the court something material. He accused his mother, namely Jane Nyawira Kega and his step sister, namely Monica Njoki Kega, of proceeding with the determination of the pertinent issue, whether he and his sisters were children of the deceased without his involvement and/or participation.

[2] The Respondent filed a Notice of Preliminary Objection on 2/11/2023 on the grounds that:

1. *The application herein is misconceived, misdirected, and bad in law and abuse of the due process of this Honorable Court.*
2. *This Honourable Court is functus officio having conclusively pronounced itself with regard as to whether the applicant and his siblings were children or dependents of the deceased herein.*

3. *Further the application herein is Res Judicature in the issues having been previously determined on 01/09/2023 and the invite by appellant is for this court to sit on its own appeal.*
4. *This Honorable court having pronounced itself on the issues lacks jurisdiction to entertain the said prayers and the only remedy available is on appeal.*

[3] In its impugned ruling, the trial court ruled:

“The basis for the application is that the applicant who is a son to one Jane Nyawira Kega is also a son the deceased and he ought to have been involved in the proceedings so that he can prove he is a rand entitled to inheritance. The applicant was not a named party in the succession cause. His mother however was, as a protestor. His claim would have come through her. There was no obligation for him to be served personally as his mother was the spouse entitled to a portion of the estate on her behalf and that of her children. She was tasked with proving that the children she was claiming for belonged to the deceased. She was in fact best placed to prove this more than the applicant being the mother and wife. She prosecuted her case for herself and her children. She opted not to call either of them as a witness. As has been analysed above, this court determined with finality the issue of the protestors children, including the applicant were dependants of the deceased and therefore entitled to inheritance. The preliminary objection is therefore found to be merited and it is upheld. Consequently, the application dated 05/10/2023 is hereby dismissed.”

The Appeal

[4] On appeal, the Appellant filed his memorandum of appeal dated 6/5/2024 raising 9 grounds as follows:

1. *The learned Magistrate erred in law and fact in finding that the application for Revocation of Grant was Res judicata when indeed the Applicant had not participated in the entire Succession Proceedings.*
2. *The learned Magistrate erred in law and fact when she failed to find that the Applicant being an adult and a child of the deceased ought to have been informed of the Succession proceedings hence the Application for Revocation in the circumstances was appropriate and not Res judicata.*

3. *The learned magistrate erred in not allowing the application for Revocation to proceed when the applicant had availed overwhelming evidence that indeed he was a son of the deceased fact known by other beneficiaries.*
4. *The learned Magistrate erred in finding that the court was Functus Officio in a matter for Revocation when indeed the law allows for Revocation of Grant and hearing the Succession matter afresh or redistributing the estate.*
5. *The learned Magistrate erred in law when she found that the Succession proceedings did not involve the same parties so as to qualify for being Res judicata*
6. *The learned Magistrate erred in not finding that the Applicant in his Application for Revocation had raised good enough and strong grounds to warrant the hearing of the application for Revocation and making a determination thereof.*
7. *The learned Magistrate erred in law in applying Section 7 of the Civil Procedure Rules in matter of Revocation under Section 76 of the Succession Act and Rule 44 of the Probate and Administration Rules.*
8. *The learned magistrate erred blocking the applicant from ventilating his cause for good despite him showing that he had an arguable application.*
9. *The learned Magistrate erred in law and fact when she found that the applicant's interests were to be advanced by the Applicant's mother and not himself as an adult.*

Duty of the court

- [5] 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**).

Oral Evidence

- [6] **Protestor's Witness 1, Jane Nyawira Kega**, the Interested Party herein, testified that, *"I am a farmer. I come from Nyagithochi. I am the protestor. I have a protest dated 16/1/2022 and 22/2/2023. I wish to rely on them as the court makes a determination in the matter."*

- [7] On cross examination, she stated that, *“The deceased left some children on the land. They have houses on the land. Harrison Murimi has a house. He has no tea bushes. We live together with him. I will give him tea. The father of all those other children are KEGA MURIITHI. He raised them. None of them pick tea in the land. I am ready to give them if they want. The other children pick tea on the land. I do not know how many shares in KCB and Fortune Sacco. I started living with the deceased when the children were 2-8 years. He educated them all till his demise. John Kinyua was not given land. PW1 referred to the affidavit of protest paragraph 6. Yes, he is not entitled to a share of the estate. I already gave him land. The other children do not reside on the land. John Kinyua lives elsewhere. The others are married. Deceased left having said that his estate be divided the way I have proposed. He told me so. He did not actualize it himself. The land is 5 acres. The daughters of the estate are to go to their mother. I have 3 daughters. The other wife/petitioner has 3 daughters. I have given the sons one acre each plus my acre and Monica one acre. Harrison Murimi Kega stays in Mwea. The deceased took him in home when he was young. I do not know if deceased was his father. He brought them up and educated them in Nyagithuchi primary school. The last born stayed with my mother.”*
- [8] In re-examination, she stated that, *“I stay in plot no. 32 Nyagithuchi. It belonged to the deceased. We live there with him. I stay with Harrison there. I have 5 children. I lived with all of them when they were young. Deceased took them in. We used to farm on the shambas when deceased was alive. All of us had our portions to cultivate. We were stopped from farming after he died. I am picking tea in Gachara/Gachigi/2. It is about 1 acre. I am also in Mwea/Ngucwi I am farming there with my family. PW1 referred to affidavit of protest dated 16/12/2022. I have given everyone land in paragraph 4 of it.”*
- [9] **Petitioner’s Witness 1 Monicah Kega Njoki** and the Respondent herein testified that, *“I am the administrator of the estate. I filed an application or confirmation of grant. It is supported by affidavit dated 6/10/2022. I would want to rely on it. I also filed supporting affidavit dated 10/1/2023. I would like to rely on it. I also filed a pay slip. I would want the court to rely on them. One is missing. The one for Nelius. He has tea leaves. Those that have constructed on the land is Nicela, Francis and Stephen. No one else has a house on the land. No one else has a house elsewhere. Our father subdivided the land. It is our children that are cultivating on the land.*

Josephine, John, Dennis, Jacinta are not picking tea on our land. I have never seen them on our land.”

[10] On cross examination, she stated that, *“I have come from Gachigi location. I went to the chief and he gave me a letter. PW1 referred to a letter dated 5/8/2021. The chief gave the protestor the original chiefs letter. He gave us a photocopy. It gave all names of children including people we do not know. We were not there when he wrote it. Jane Kega is a 2nd wife of my father. She was married having children. It was in around 2000. They did not live on our home. They lived on plot No. 32. I do not know those children. I know of Harrison. He used to visit. He does not have any tea. Jane has about 1 acre in the land Kabare. Our father gave her the land. She also farms Mwea/Ngucwi/185 1 acre given by father. Baragwe Kariru is farmed by Stephen and Francis. They have not leased it. The rest in Mwea we farm as myself, Juliet and Nicella. Lock up 22 is a plot. No one uses it. Plot 32 Jane lives there. My mother leases part of it too.”*

[11] In re-examination, she stated that, *“I brought an application in court asking for the chief to come to court and produce a letter. He did not come. The court allowed us to file the succession without it. We went to the D.O before court. The chief told us he had done the letter and given to Jane. We were not there when he was writing it. He wrote it only for Jane. Nicella, Stephen, Jane, Monica, Juliet and myself pick tea on the land. 3 people have constructed houses. In Baragwe Kariru, Francis, Stephen farm. Jane, Nelius, Monica, Stephen, Juliet farm on the other land. Lock up 22 is farmed by Stephen nappier grass. Jane uses lock up 32. She stays on one house. My mother leases another portion. Jane came as a tenant at lock up 32. They then started staying with my father. She had no children when she 1st came. They stayed tougher on the rented house to date. None of her children have constructed on any of our fathers parcels of land.”*

[12] **Petitioner’s Witness 2 Francis Njogu Kega** testified that, *“I lived in Gachigi/Kabare 2. I did a joint statement with others. I wish to adopt it.”*

[13] On cross examination, he stated that, *“Jane was my father’s 2nd wife. She has children. I know Harrison Murimi. I see the others. John Kinyua, Josephine Karuara, Jacinta Nyaguthii. Doris Wambui. I see them once in a while. Jane farms on Kabare/Gachigi. Baragwe/Kariru she does not farm. Mwea/Ngucwi 1 acre she farms. She was given by father plot no. 32. Jane lives on a house there. She came there as a tenant. She was left there. Deceased farmed on Baragwe Kariru. He was alone. He*

lived there alone. Jane would not come there. He however lived in plot 32 with Jane at the time. There is a house in Kariru. It's a small house like a shed. No one lives there. Deceased used to go farm and live in Kiandai during the planting season. My mother is Nicella Muthoni. They both assisted him when he was farming."

[14] In re-examination, he stated that, *"Deceased stayed with both wives. He left in 2002 to stay home with Jane. She came there as a tenant. She had no children there. Father did not give any of her children land. They do not farm on any of our father's land. The chief wrote a letter and gave only to Jane. It did not indicate the correct children. He gave us a copy."*

[15] **Petitioner's Witness 3 Daniel Gachohi** testified that, *"I live in Gachigi. I know deceased. He was my cousin. I did statements. I want to rely on it. Stated dated 20/2/2023 adopted in evidence. Deceased had 5 children."*

[16] On cross examination, he stated that, *"Deceased had 5 children. I know him well. He had 1 wife Nicella Muthoni. I do not know Jane Nyawira Kega. I have never seen her. I live on Githuci. Deceased lived in No 2 Kabare/Gachige. I know Lock up 2. He lived there too. I would see him there. I did not see him with Jane. Deceased did not tell she had a 2 wife. He did not tell me he had given Jane any land or plot. I knew deceased well."*

[17] In re-examination, he stated that, *"I have not told anything different in court from my statement. I did not say he was the deceased's tenant and that they started living together. I did use to see her around."*

[18] **Petitioner's Witness 4 Nicella Muthoni** testified that, *"I did my affidavit and filed in court. I wish to rely on it."*

[19] On cross examination, she stated that, *"Deceased was my husband. He did not marry Jane. He just kept her. He did not bring her home. I have said in my affidavit that there are two houses. I have not said that Jane is a 2nd wife. She had been employed as a worker. I know DWI and DW2. They are my children. Deceased and Jane did cohabit. Kabare/Gachigi i where I stay. I have tea there. Jane has 1 acre there. Deceased gave it to her. Mwea/Ngucwi. She does not farm on it. Nothing was left to her there. She farmed once and stopped. I may not remember what I indicated in the papers I have filed in court. Jane worked in the shamba. There is no other worker that was given land. Deceased would stay with Jane and come back to me. They stayed in the plot."*

[20] In re-examination, she stated that, “Jane lives on the plot she was left by my husband. I collect the rent on the other part of the plot. She did not and does not now stay on the plot with her children. Harrison visits and stays with her sometimes. On Kabare/Gachigi, Francis, Stephen myself have constructed on the land. No one else. Jane picks tea on the land. Her children do not work or stay on the land. None was given land or tea. Jane has only been given that land. She can be taken as a wife without the children. Her children were not sired by my husband. I would not know if he paid their school fees. They stayed away from me. They did not live on the plot with the children.”

Submissions

[21] The Appellant urged that the cause was filed without his knowledge, yet he was a male adult son of the deceased. He lamented that he was denied an opportunity to participate in these proceedings or even defend his case as a child of the deceased. He faulted the trial court for failing to consider the overwhelming evidence exhibited in the application for revocation, proving that he was a dependent under Section 29 of the Law of Succession Act.

[22] The Respondent urged that all the dependants consented to the mode of distribution proposed by the administrator, save for the protestor. She urged that the trial court’s judgment dated 26/04/2024 dealt conclusively with the issue whether the children of the protestors were the children of the deceased, and cited **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR, Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR and Shade Manufacturers & Hotel Ltd v Serah Mweru Mutuu & 3 others [2022] eKLR**. She urged that the Appellant failed to prove his case on a balance of probabilities, and cited **Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others [2013] KECA 378 (KLR)**.

[23] The Interested Party urged that the doctrine of functus officio does not apply to bar the court from entertaining an application for revocation of grant, and cited **Makabulu & Another v Munyeti (Legal Representaive of the Estate of the late Simeon Munyeti Andashe) & 2 other (Succession Cause 105 of 2021) [2023] KEHC 24442 (KLR) (Family) (30 October 2023)**. She urged that the Appellant was never a party to these proceedings, for the doctrine of Res Judicata to take effect, and cited **Re**

Estate of Riungu Nkuuri (Deceased) [2021] eKLR. She maintained that the Appellant was a son of the deceased who was thus entitled to be heard, and cited **Re Estate of Amos Kiteria Madeda – Deceased (Probate & Administration E004 of 2021) [2022] KEHC 12950 (KLR) (21 September 2022).**

Analysis and Determination

[24] From the grounds of appeal, the issue for determination is whether the Summons for revocation of the grant was barred by the doctrine of *Res Judicata*.

[25] In her affidavit in support of the summons for confirmation of grant dated 6/10/2022, the Respondent listed Nicela Muthoni Karimi – widow, Jane Nyawira Kega – widow, Stephen Kinyua Kega - son, Nellius Wambeti Kega – daughter, Monica Njiko Kega, Francis Njogu Kega – Son and Juliet Nyawira Kega – daughter as the only beneficiaries of the estate.

[26] In her affidavit of protest filed on 20/12/2022, the Interested Party included her children namely John Kinyua Nyaga, Josphine Karwana Kihara, Jecinta Nyaguthii Nyaga, Dorris Wambui Mwangi and Harrison Murimi Kega as beneficiaries to the estate of the deceased.

[27] The Appellant’s mother reiterated that, ***“The deceased left some children on the land. They have houses on the land. Harrison Murimi has a house. He has no tea bushes. We live together with him. The father of all those other children are KEGA MURIITHI. He raised them. I started living with the deceased when the children were 2-8 years. He educated them all till his demise. Harrison Murimi Kega stays in Mwea. The deceased took him in home when he was young. He brought them up and educated them in Nyagithuchi primary school.”***

[28] The Respondent restated that, ***“Jane Kega is a 2nd wife of my father. She was married having children. It was in around 2000. They lived on plot No. 32. I know of Harrison. He used to visit.”***

[29] The Respondent’s brother acknowledged in his testimony that, ***“Jane was my father’s 2nd wife. She has children. I know Harrison Murimi. I see the others. John Kinyua, Josephine Karuara, Jacinta Nyaguthii. Doris Wambui. I see them once in a while. Deceased farmed on Baragwe Kariru. He however lived in plot 32 with Jane at the time.”***

[30] The Respondent’s mother also admitted that, ***“Jane lives on the plot she was left by my husband. Harrison visits and stays with her sometimes. She can be taken***

as a wife without the children. Her children were not sired by my husband. I would not know if he paid their school fees. They stayed away from me.”

[31] In the affidavit in support of the summons for revocation of grant, the Appellant annexed documentary evidence demonstrating that the deceased assumed the responsibility for the payment of his school fees. Further, the Appellant’s baptism card expressly indicates the deceased as his father.

[32] In their respective testimonies, the Respondent and her witnesses conceded that the Appellant was well known to them and his mother was indeed the 2nd wife of the deceased. They further acknowledged that the deceased and the Appellant’s mother resided separately from them, and consequently, they were not in a position to controvert or confirm whether he maintained the Appellant during his lifetime.

[33] Section 29 (b) of the Law of Succession Act provides that:

“For the purposes of this Part, “dependant” means — (b) such of the deceased’s parents, step-parents, grand-parents, 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.”

[34] This court is satisfied that the evidence on record, as a whole, is proof on a balance of probabilities that the Appellant was a dependant of the deceased within the meaning of Section 29 of the Law of Succession Act.

[35] Accordingly, the court finds that the trial court fell into error in dismissing the Appellant’s application for revocation of grant, on the ground of *Res Judicata*. As aptly observed by the trial court, the Appellant was not a party to the proceedings that culminated in the issuance of the Grant. It must be appreciated that the Appellant’s mother, notwithstanding her status as a beneficiary of the estate, lacked the requisite *locus standi* to prosecute or safeguard the Appellant’s interests in the estate, particularly in light of the uncontroverted evidence that the Appellant was an adult of sound mind fully capable of advancing his claim in his own right.

[36] Rule 26 (1) of the Probate and Administration Rules provides that, ***“Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”***

[37] The provisions of section 76 of the Law of Succession Act are clear and the court will not hesitate to revoke a grant where it is demonstrated either that the

proceedings to obtain the grant were defective in substance or 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.

ORDERS

[38] Accordingly, for the reasons set out above, the appeal is merited, and it is hereby allowed.

[39] The impugned Ruling is hereby set aside and substituted with an order reinstating the application for revocation of Grant dated 5/10/2023, for hearing on merits.

[40] There shall be no orders as to costs.

Order accordingly.

DATED AND DELIVERED THIS 20TH DAY OF FEBRUARY 2026.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Ms. Ndungu for Mr. Magee for the Appellant.

Ms. Wanjiru Wambugu for the Respondent.