

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT SUCCESSION APPEAL CASE NO. E016 OF 2025**

**ELIZABETH WANGUI MUTURI.....**

**APPELLANT**

**VERSUS**

**JOSIAH WANJOHI MUTURI .....1<sup>ST</sup>**

**RESPONDENT**

**STANLEY MUNYI MUTURI.....2<sup>ND</sup>**

**RESPONDENT**

**ANN WANJIKU KARIUKI.....3<sup>RD</sup>**

**RESPONDENT**

**JUDGEMENT**

1. Before this Court is the Memorandum of Appeal dated **17<sup>th</sup> June 2024** by which the Appellant **ELIZABETH WANGUI MUTURI** sought the following orders:-

**“(a) THAT the appeal be allowed.**

**(b) THAT the Ruling/Order of the subordinate court delivered on 20<sup>th</sup> May 2024 to be set aside.**

**(c) THAT the Appellant's suit dated 19/07/2023 be allowed.**

**(d) THAT costs of the Appeal and in the trial court be awarded to the Appellant.**

**(e) Any other relief which this Court may deem fit and just to grant.”**

2. The Respondents **JOSIAH WANJOHI MUTURI, STANLEY MUNYI**

**MUTURI** and **ANN WANJIKU KARIUKI** opposed the appeal.

3. The appeal was canvassed by way of written submissions. The appellant filed the written submissions dated **25<sup>th</sup> August 2025** whilst the Respondents relied upon their written submissions dated **29<sup>th</sup> August 2025**.

#### **BACKGROUND**

4. This succession cause related to the estate of the late **JAMES MUTURI MACHARIA** who died intestate on **1<sup>st</sup> October 2016**. Following the demise of the Deceased Grant of letters of Administration Intestate were issued to the Respondents on **29<sup>th</sup> May 2017**. That grant was duly confirmed on **10<sup>th</sup> July 2023**.

5. The Appellant filed in the Lower Court a Summons for revocation of Grant dated **19<sup>th</sup> July 2023**. The grounds upon which the appellant sought to revoke the grant was that the grant had been obtained fraudulently by concealment of a material fact to wit that the Respondent (Administrators) had already sold off the only asset comprising the estate i.e the parcel of land known as LR No. **6326/12** (hereinafter the '**suit land**') That the suit land had been sold way back in the year **2019** without the knowledge and/or the consent of the other beneficiaries to the estate and that the Respondents were only awaiting confirmation of the Grant in order to transfer the property to the buyer.
6. That summons was heard by the Lower Court and the same was dismissed vide the ruling delivered on **20<sup>th</sup> May 2024** by **Hon. E. N ANGIMA Senior Resident Magistrate**.
7. Being aggrieved by this ruling, the appellant filed the present appeal which is premised upon the following grounds;-

**“1. THAT the Learned trial Magistrate erred in law and in fact in finding that the Appellant was an**

abusing Court process in filing an application for revocation of grant upon discovery of the sale of the suit property subject matter of the Cause by the Administrators.

2. **THAT** the learned trial Magistrate erred in law and in fact in failing to find that the Application before her had raised substantial issues of law on intermeddling with the Estate of the deceased.
3. **THAT** the learned trial Magistrate erred in law and in fact in finding that the allegations of sale of the subject matter of the cause were unsubstantiated contrary to the evidence presented before Court.
4. **THAT** the learned trial Magistrate erred in law and in fact in digressing from the issues before her to attack Counsel on record for the filing of the Application thereby applied extraneous matters in arriving at the decision.
5. **THAT** the learned trial Magistrate erred in law and in fact in failing to find the Court lacked

**pecuniary jurisdiction to determine the Cause on account of the subject matter being land located within Nyeri Municipal/Town Measuring 25 Acres valued approximately Kshs. 250,000,000/=.**

- 6. THAT the learned trial Magistrate erred in law and in fact in failing to find that the Appellant had initially protected the subject matter which was about to be grabbed by their uncle by joining the cause as an interested party and successfully arguing for the family.”**

### **ANALYSIS AND DETERMINATION**

8. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusion **[see Peters -vs- Sunday post limited [2958] E.A 424]**
9. In **SELLE and Another -vs- ASSOCIATED MOTOR BOAT COMPANY LTD & Others [1968] 1 E.A 123** it was stated that

**“An appeal to this court from the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence.”**

10. Likewise in **GITOBU IMANYARA & 2 Others -vs- ATTORNEY**

**GENERAL [2016] eKLR**, the Court of Appeal stated as follows:-

**“An appeal to this court is by way of a retrial and the principles upon which this court acts in such**

**an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make allowance in this respect.”**

11. **Section 76** of the **Law of Succession Act Cap 160, Laws of Kenya** sets out the grounds upon which a Grant maybe revoked 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 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
- (iv) that the grant has become useless and inoperative through subsequent circumstances.”

12. In the case of **Jamleck Maina Njoroge -vs- Mary Wanjiru Mwangi [2015] eKLR** the court expound on the circumstances under which a grant may be revoked as follows:-

**“The circumstances that can lead to the revocation of grant have been set out in Section 76, law of succession. For a grant to be revoked either on the Application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain**

**fraudulently by making of a false statement or by or by concealment of something material to the case or that the grant was obtained by means of untrue allegations of facts essential in point of law.”**

13. The power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the case of **Albert Imbuga Kisigwa vs Recho Kawai Kisigwa Succession Cause No. 158 of 2000** where **Mwita J** stated:-

**“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”**

14. The obvious question that arises is whether the appellant has sufficiently demonstrated any of the grounds set out in **Section 76** to warrant revocation of the Grant.

15. It is trite law that he who alleges must prove. **Section 107(1)** of the **Evidence Act Chapter 80** of the **Laws of Kenya** provides as follows:-

**“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

16. **Sections 109 and 112** of the same provide that:

**“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

**“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”**

17. The two provisions were discussed in the case of **Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, in which the Court held as follows:

**“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”**

18. The burden of proof is on the party that alleges specific matters. The Appellant made certain allegations against the respondent. As such the burden lay on the appellant to prove the said allegations on a balance of probabilities. In **Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR** the court held that:

**“As a general proposition, the legal burden of proof lies upon the party who invokes the aid of**

**the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person.... The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given on either side.”**

19. Similarly in **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 3 Others (2014) eKLR** the **Supreme Court of Kenya** held inter alia:

**“The person who makes such allegations must lead evidence to prove the fact. She or he bears initial legal burden of proof, which she or he must discharge. The legal burden in this regard**

**is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence of a fact in issue.”**

20. The appellant claimed that the respondents had already sold the suit land to a third party. Who was this third party and when exactly did this sale take place? How much was the land sold for? All these critical questions remain unanswered.
21. The appellant further alleged that the respondents were only awaiting confirmation of the grant so that they could transfer the suit land to this phantom purchaser. Well the grant was confirmed on **10<sup>th</sup> July 2023**. To date no evidence has been tendered by the Appellant to show that the suit property has been transferred, to a third party. In any event the Respondents (or indeed any beneficiary) are quite at liberty

to sell and/or transfer their portion of the estate if they so wish once the Grant has been confirmed. It is not the duty of the court to police the estate after confirmation of Grant to see what each beneficiary does with the share allocated to them.

22. The Appellant had alleged that the Grant was obtained fraudulently. To merely allege fraud will not suffice. The appellant is required to adduce evidence of the nature of that fraud and to provide specifics of the same.

23. The standard of proof on allegation of fraud was discussed in the case of **Urmila W/O Mahendra Sha Vs. Barclays Bank International Ltd & Another (1979) eKLR** thus:-

**“As was said by this Court’s predecessor in RATILAL GORDHANBHAI PATEL VLALJIMAKANJI [1957] EA 314, 317:**

**“There is one preliminary observation which we must take on the learned judge’s treatment of this evidence: he does not anywhere.... expressly direct himself on the burden of proof or on the standard of proof required. Allegations of fraud**

**must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.**

**There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not.”**

**[emphasis my own]**

24. Likewise in the case **Kuria Kiarie & 2 Others Vs. Sammy Magera (2018) eKLR** in quoting **Vijay Morjaria Vs Nansingh Madhusingh Darbar & Another [2000] eKLR** the **Court of Appeal** stated that:-

**‘It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it**

**is not allowable to leave fraud to be inferred from the facts.** [Emphasis added].

25. No instances of fraud were specified by the Appellant much less proved. In conclusion I find no merit in this appeal. The same is hereby dismissed in its entirety. Costs will be met by the Appellant.

**Dated in Nyeri this 19<sup>th</sup> of March 2026**

.....  
**MAUREEN A. ODERO**  
**JUDGE**