



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. E139 OF 2024

IN THE MATTER OF THE ESTATE OF THE LATE M'MWITARI
MUTUERA

KANYUA KAURO
.....APPELLANT

VS.

GAKII M'MWITARI.....
.....RESPONDENT

***(Being an Appeal from the Ruling delivered by Hon.
T.M.Mwangi (PM) on 8th August,2024 in Meru Succession
Cause No. 316 of 2021)***

JUDGEMENT

1. The appeal herein arises from a decision of the trial court, in Meru Succession Cause No. E316 of 2021, delivered on 8th August,2024.
2. That decision was in regard to an application by the Appellant herein dated 1st September,2023, where the Appellant had sought for;

- a) The revocation of the grant of letters of Administration issued to the Respondent herein and confirmed on 17th April, 2023,
- b) That the cause be heard afresh,
- c) Her appointment as the Administrator of the estate
- d) An order of inhibition to be issued and registered against the Land Parcel known as NYAKI/THUURA/2148 to restrict any dealings or transfer of the said parcel
- e) An order that the Land Registrar in Meru be directed to registrar the said inhibition against the parcel of land.

3. The application was premised on grounds inter alia that;

- a) The Appellant was the wife and legal representative of the estate of DOMISIANO KAURO M'MWITARI (deceased) who was the son of the deceased herein;
- b) That the respondent secretly and fraudulently filed this cause without the Appellant's knowledge and had distributed the estate solely to herself;
- c) That the petitioners with her purchasers have commenced subdivision of the estate and the court should thus issue the inhibition order sought;

d) That the petitioner misled the court that she and her two children i.e. Mary Kabuko and Rose Karutu M'mwitari were the only beneficiaries of the deceased yet the deceased had two other wives with children and that consent of all beneficiaries were not obtained prior filing of this cause.

4. The Application was vehemently opposed by the Respondent vide her replying affidavit sworn on 25th September, 2023 wherein she averred that the deceased was married to three wives i.e. Tabitha M'Mwitari, Kangai M'Mwitari and Gakii M'mwitari. That the deceased owned land parcel number Nyaki/Thuura/972 measuring about 6 acres and had subdivided the same into three parcels, namely Nyaki/Thuura/2148, 2149 and 2150 each measuring 2 acres and gave each house their portion.

5. It was her further deposition that she was given land parcel number Nyaki/Thuura/2148 together with her children and she had always had the title deed of the same in her custody while the Applicant's house share was Nyaki/Thuura/2149 but the same was registered in the name of one of the sons,

John Muthamia, who is from the same house with the Applicant's deceased husband, one Domisiano Kauro M'Mwitari.

6. She asserted that subsequently John Muthamia gave Domisiano Kauro M'Mwitari land parcel No. Nyaki/Giaki/1504 and as such Domisiano Kauro could not claim Nyaki/Thuura/2149 and that the Applicant and her family still lived on the said parcel of land Nyaki/Giaki/1504.
7. She deponed that the Applicant's husband Domisiano Kauro fraudulently transferred Nyaki/Thuura/2148 to himself and subsequently sold it to one Gerald Mutua Mutea which act necessitated her to file Meru ELC NO. 205/2018 against Gerald Mutua Mutea for cancellation of the title deed and for his eviction, and that judgement in the ELC suit was delivered in her favour.
8. She averred that the Appellant herein applied to be joined in the above case and fully supported the fraud that was perpetuated by her said late husband and Gerald Mutua Mutea.

9. She asserted that the Appellant was thus not a beneficiary of the deceased herein and her consent was unnecessary prior the petitioning for grant of letters of Administration.
10. The Appellant in response to the said replying affidavit swore a further affidavit on 11th December,2023 wherein she disputed that the deceased had shared his parcel of land as alleged by the Respondent. She asserted that the deceased gave John Muthamia M'mwitari L.R No. Nyaki/Thuura/2149 and since the Respondent herein had no son, Domisiano Kauro M'Mwitari was given L.R No. Nyaki/Thuura/2148 with condition that he accommodates the Respondent and share with her one acre each.
11. She deponed that the daughters were accommodated by their brothers from their respective houses and stated that the fact that her deceased husband was found to have fraudulently transferred L.R No. Nyaki/Thuura/2148 to Gerald Mutua Muteu should not be visited against her and her children.
12. The Application was urged through written submissions. In a ruling delivered on 8th August,2024, the trial court held that

having found in the aforementioned ELC matter that the land in issue was the lawful inheritance to the respondent herein, the Applicant and the houses of the co-wives of the respondent had no lawful rights whatsoever over the land and proceeded to dismiss the Appellant's Application.

13. Aggrieved by the trial court's decision, the Appellant lodged the instant appeal premised on the following grounds: -

- a) That the Learned trial Magistrate erred in law and fact in finding that there were no grounds to warrant the setting of the grant dated 17th April, 2023.
- b) That the Learned trial Magistrate erred in law and fact in disregarding the Appellant's evidence and finding that the Appellant's Application was founded on web of lies.
- c) That the Learned trial Magistrate erred in law and fact in holding that the Appellant herein was the vessel of Gerald to take back the land No. NYAKI/THUURA/2148.
- d) That the Learned trial Magistrate erred in law and fact in his interpretation of Section 76 of the Law of Succession Act.

- e) That the Learned trial Magistrate erred in law and fact in failing to consider and/or disregard the Appellant's evidence, submissions and case laws cited.
- f) That the Learned trial Magistrate's ruling was biased in favour of the Respondents against the Appellant's, is full of errors, against the weight of evidence and a travesty of Justice.
- g) The Judgement was clearly against the weight of evidence on record.

14. The Appellant thus prayed that the Appeal be allowed and the impugned ruling to be set aside in its entirety and the grant of letters of Administration issued to the Respondent herein and confirmed on 17th April,2023 be revoked. The Appellant also prayed for costs of this Appeal and in the lower court to be awarded to her.

15. The Appeal was canvassed through written submissions.

Appellant's Submissions

16. The Appellant framed only one issue for determination namely; whether the Learned Trial Magistrate erred in finding that there were no grounds to warrant setting aside of the grant dated 17th April,2023.
17. The Appellant submitted in the affirmative for reasons that the evidence on record showed that the Respondent failed to disclose all the beneficiaries of the deceased and the fact that L.R No. Nyaki/Thuura/2148 was to be shared between Domisiano Kauro M'Mwitari and herself.
18. It was her submissions that the deceased had three houses as follows: -
 - A. Tabitha Gacheri(deceased) who bore the following children;
 - i. Karambu M'Mwitari- Deceased
 - ii. Kigetu M'Mwitari- Alive
 - iii. John Muthamia M'Mwitari- Alive
 - iv. Domisiano Kauro M'Mwitari- Deceased
 - v. Cecelia Kathuni M'Mwitari- Deceased.
 - B. Kangai M'Mwitari(deceased) who bore the following children;

- i. Consolata Mwarionjiru- Deceased
- ii. Benedict Kanoti- Deceased
- iii. Tarsisio Mburutha Mwitari- Alive

C. Gakii M'Mwitari who bore the following children;

- i. Mary Kabuko- Alive
- ii. Karuthu M'Mwitari- Alive

19. She argued that the Respondent's failure to disclose the above amounted to concealment of material facts.
20. She argued that the evidence on record further demonstrated that the Respondent obtained the grant without the knowledge and consent of all the beneficiaries of the deceased.
21. The Appellant thus prayed that the Appeal be allowed. In buttressing her submissions, reliance was placed on Section 76(b) and (c) of the Law of Succession Act and the cases of **In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR** & **In re Estate of Magangi Obuki (Deceased) [2020] eKLR**

Respondent's submissions

22. The respondent submitted that the only issue for determination was whether the appellant had met the legal threshold for the annulment or revocation of the grant, as set out under section 76 of Law of Succession Act.
23. It was submitted that the decision to revoke a grant is a discretionary one which should be exercised with caution and one that should be supported by evidence. Cited in support of this point was the decision in **Tirus Mwaniki Njiru v Jane Igandu (2021) eKLR.**
24. It was further submitted that it was not in dispute that the deceased had three(3) wives. That the Deceased owned land parcel number NYAKI/THUURA/972 measuring approximately six acres which he subdivided into three land parcel numbers NYAKI/THUURA/2148, 2149 and 2150 each measuring approximately 2 acres and gave a portion to each of his

wives. That the Appellant's husband was entitled to a share of land parcel number NYAKI/THUURA/2149 which was registered in the name of one of the sons of the Deceased, John Muthamia, who was from the same house as the Appellant's deceased husband. That the said John Muthamia gave Domisiano Kauro M'Mwitari land parcel number NYAKI/GIAKI/1504 so that he could not claim land parcel number NYAKI/THUURA/2149 and the Appellant together with her family still lived on land parcel number NYAKI/GIAKI/1504.

25. It was further submitted that the Court in ELC Suit No. 205 of 2018 which the Respondent filed seeking the cancellation of the Title Deed issued to Gerrald Mutua Mutea, it was held that the Appellant's deceased husband illegally transmitted land parcel number NYAKI/THUURA/2148 by forging Letters of Administration and a certificate of confirmed Grant and thereafter transferred the same to one Gerrald Mutua Mutea. That the ELC Court delivered judgment in her favour.
26. The Respondent further submitted that as a wife to the Deceased herein she had a superior beneficial interest over

land parcel number NYAKI/THUURA/2148 by virtue of the fact that the same had been given to her by the Deceased. That the Appellant was a daughter-in-law to the Deceased, and so she was not a beneficiary to his Estate and therefore the Respondent was under no obligation to obtain her consent prior to instituting succession proceedings.

27. It was further submitted that the said Gerrald Mutua Mutea had lodged an appeal against the decision in ELC Suit No. 205 of 2018 which was dismissed, and that he was only using the Appellant to take back the said land parcel from the Respondent.

Analysis & Determination

28. This being a first appeal, the court is obliged pursuant to the provisions of section **78 of the Civil Procedure Act** to: **determine a case finally; remand a case; frame issues and refer them for trial; take additional evidence or require the evidence to be taken; or order a new trial** and in doing so, the court ought to have the same powers and shall perform as nearly as may be the same duties as

are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

29. The above provisions were the subject of interpretation by the Court of Appeal in **Selle v Associated Motor Boat Company Ltd.[1968] EA 123** where it was held, *inter alia*:

***“This court must consider the evidence, evaluate it itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.*”**

30. With the above established principles in mind, I will now determine this Appeal.
31. Having considered the entire Record of Appeal and the submissions on record, I opine the only issue for determination is whether the trial court erred in dismissing the Appellant's Application dated 1st September 2023.
32. The Appellant in the aforementioned application primarily sought for revocation of the confirmed grant dated 17th April, 2023.
33. She averred that she is the legal representative of the estate of Domisiano Kauro M'Mwitari, who was a son of the deceased. Her position is that the grant in issue was procured through concealment of material facts considering that the respondent petitioned for it without the knowledge or consent of all the deceased's beneficiaries.
34. The circumstances under which a court will order revocation of grant are well laid out under **Section 76 of the Law of Succession Act**. It 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.”

35. The court, in the case of **Jamleck Maina Njoroge vs Mary Wanjiru Mwangi (2015) eKLR** at paragraph 11 of its ruling in revoking a grant reiterated the grounds upon which a grant can be revoked. It stated 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 the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, 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."

36. The Respondent does not dispute the Appellant's assertion. In fact, at paragraph 15 of her Replying affidavit she acknowledged that the other children of the deceased from the other houses were not listed in the Chief's letter and they had no objection.
37. Her reason for failing to include all the beneficiaries in the petition for grant is that the deceased subdivided land parcel number Nyaki/Thuura/972 into three equal portions, namely 2148, 2149, and 2150 and distributed to each of his three houses. She stated that she received parcel 2148 together

with her children and has always held its title deed and as such, the appellant being a non-beneficiary of parcel 2148, her consent was not required before petitioning for letters of administration.

38. It is not in dispute that the suit land is still registered in the deceased's name and thus free property available for distribution.
39. The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property and the rightful beneficiaries must be identified. The court also has a duty to ensure that as far as is practicable, there is equal and equitable distribution to all beneficiaries.
40. Section 3 of the **Law of Succession Act** defines an "estate" to mean the free property of a deceased person, while "free property" in relation to a deceased person is defined to mean the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.

41. In **In re Estate of Job Ndunda Muthike (Deceased)** (2018) eKLR the court (Odunga J) while expounding on the said section stated that:

“It is therefore clear that any property which the deceased was not legally competent freely to dispose during his lifetime and in respect of which his interest had been terminated by his death cannot form part of his estate and cannot be the subject of an application for confirmation of grant.”

42. The Respondent, in my view, ought to have disclosed all the property of the deceased and all the beneficiaries thereof in her petition for grant of letters of administration.

43. This means that apart from land parcel No. 2148, she should have also included land parcels No. 2149 and No. 2150, if they were still in the name of the deceased. If those other properties had been transferred to the other wives/houses during the deceased’s lifetime, then that was an issue to be determined at the time of confirmation of the grant, by considering them as gifts *inter vivos*. As such the children of

those other wives/houses would have had to get their share of the estate from their houses' share. That means that the appellant would have had to get her husband's share from the 2 acres given to his house, and not from the share that went to the respondent.

44. Therefore, the arguments advanced by the Respondent would have supported her in the proposed mode of distribution of Parcel No. 2148.
45. The trial court dismissed the application on the basis that ownership of the subject parcel had been previously determined in ELC Case No. 205 of 2018.
46. In the said suit the court found that the transfer of Land Parcel No. 2148 to Damisiano was fraudulent .The court noted that the Respondent was the lawful possessor of the suit parcel and therefore, she had beneficial interest on the suit land.
47. I have considered the matter. I find that in as much as the respondent did not disclose all the beneficiaries in her petition, there was no prejudice caused to the appellant since her husband was not from the respondent's house. He

was thus not entitled to benefit from the share that the deceased had reserved for the respondent and her children.

48. The appellant's husband had held the share reserved for his house and went ahead to transfer it to a third party. His attempt to also take up the respondent's share was thwarted by the ELC court. What the appellant is doing is to try and do exactly what her husband had done. Her husband having taken up and disposed of his house's two(2) acres of land, the appellant cannot be allowed to now seek a share of the respondent's house's two (2) acres, that she is to give to her own children.
49. Consequently, I do not see any need to revoke the grant. Even if this is done, the appellant would not be entitled to anything in Land parcel No. 2148. The court will thus be wandering into an academic exercise that would not benefit the appellant in any way. She cannot be allowed to benefit from her husband's craftiness and mischief.
50. From the foregoing I find that this appeal is not merited and it is dismissed.

51. This being a family matter, each party will bear their own costs.

52. It is so ordered.

Dated, Signed and Delivered at Meru this 7th day of May, 2026.

**H. M. NYAGA
JUDGE**