



**Mbae v Kathomi & 2 others (Miscellaneous Succession Cause  
E017 of 2022) [2025] KEHC 4600 (KLR) (25 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4600 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
MISCELLANEOUS SUCCESSION CAUSE E017 OF 2022**

**LW GITARI, J**

**MARCH 25, 2025**

**IN THE MATTER OF THE ESTATE OF GILBERT  
KIMATHI ALIAS GILBERT KIMANDI [DECEASED]**

**AND**

**IN THE MATTER OF AN APPLICATION FOR REVOCATION AND/OR  
ANNULMENT OF GRANTS ISSUED IN CHUKA CHIEF MAGISTRATE'S  
COURT SUCCESSION CAUSE NO. E173 OF 2021 AND IN RESPECT  
OF THE DECEASED'S ESTATE LR. MWIMBI/CHOGORIA/4682**

**BETWEEN**

**JANE GACHERI MBAE ..... APPLICANT**

**AND**

**DAMARIS KATHOMI ..... 1<sup>ST</sup> RESPONDENT**

**DAVID MUGENDI MBAYA ..... 2<sup>ND</sup> RESPONDENT**

**JANE CIRINDI KITHINJI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The matter relates to the estate of Gilbert Kimathi alias Gilbert Kimandi Mbaya deceased who died intestate on 17/08/2009. A grant of letters of Administration was issued to and confirmed on 27/6/2022. The estate was distributed as follows:

LR. Mwimbi/Chogoria/4681

Damaris Kathomi to hold in trust for herself and:



Midia Mwendu KimathiEdna Kendi KimathiPamela Nyawira KimathiHaron Mutugi  
Kimathi

LR. Mwimbi/Chogoria/4682

Damaris Kathomi to hold in trust for herself and:

Midia Mwendu KimathiEdna Kendi KimathiPamela Nyawira KimathiHaron Mutugi  
Kimathi

2. The said grant was issued and confirmed in the Chief Magistrates Court at Chuka Succession Cause No. E173/2021. What is now pending before this court is the Summons for Revocation of Grant dated 16/09/2022 seeking orders that the grant issued to the 1<sup>st</sup> & 2<sup>nd</sup> respondents be revoked and the Title Deed issued to the 3<sup>rd</sup> respondent on 12/07/2022 in respect of LR. Mwimbi/Chogoria/4682 be cancelled. That this court be pleased to hear and determine the Succession Cause in respect of the state.
3. The summons is based on the ground that the 1<sup>st</sup> and 2<sup>nd</sup> respondent filed the Chuka Succession Cause No. E173/2021 secretly and deliberately failed to notify the applicant who was and is still residing on Land Parcel No. Mwimbi/Chogoria/4682 at the exclusion of the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents. It is also concluded that the proceedings to obtain the said grant was defective in that it was filed secretly without the consent of the applicant who was a biological sister of the deceased and had a superior hand to administer the estate of the deceased.
4. The applicant further avers that the grant was obtained fraudulently by making of a false statement and concealing something material to the case namely that Land Parcel No. Mwimbi/Chogoria was to be administered by the applicant.
5. The summons was supported by the Affidavit of the applicant who avers that the deceased was her late brother while the 1<sup>st</sup> respondent is the wife of the deceased. That the deceased was supposed to hold Mwimbi/Chogoria 4682 on her behalf after the subdivision of Land Parcel No. Mwimbi/Chogoria/3862 and the deceased interest was in Land Parcel No. Mwimbi/Chogoria/4681. That the 1<sup>st</sup> and 2<sup>nd</sup> respondent fraudulently colluded and filed the succession cause and deliberately failed to seek her consent, yet she was living on the land, eventually selling the land parcel to 3<sup>rd</sup> respondent. The transfer of the Land Parcel No. Mwimbi/Chogoria/4682 was fraudulent as he 1<sup>st</sup> and 2<sup>nd</sup> respondents were registered in trust and had no authority to transfer.
6. The summons was opposed by the respondent Damaris Kathomi vide an affidavit sworn on 31/10/2022. Her averments are that the proceedings of the succession cause relate to her husband Gilbert Kimathis whose beneficiaries were herself and her children namely Midian Mwendu, Edna Kendi, Pamela Nyawira and Haron Mutugi who were introduced vide a Chief's letter dated 30/04/2021 who also confirmed that the deceased owned the two land parcels in dispute. She contends that the applicant is a stranger to the estate of the deceased and this court has no jurisdiction to entertain her claim which is based on trust. That the applicant was not a beneficiary of the estate of the deceased and she had no obligation of informing her.
7. The 3<sup>rd</sup> respondent filed an affidavit sworn by Kithinji Ngaruthi Mukanga who holds a power of Attorney and avers that she bought Land Parcel No. LR Mwimbi/Chogori/4682 from the 1<sup>st</sup> respondent after exercise of due diligence and the transaction is protected under Section 93(1) of the [Law of Succession Act](#). The summons proceeded by way of oral evidence in court.



### **Applicant's Case**

8. Jane Gacheri Mbae (PW1) adopted her affidavit as her evidence. In cross-examination she testified that Land Parcel No. 4682 belonged to her mother but the title was not in her mother's name. That the land was sold to 3<sup>rd</sup> respondent without her knowledge.
9. PW2 Kellen Gatakaa testified that the applicant is her neighbour and the applicant's mother had said her portion of land should go to Gacheri. In cross-examination she admitted that the land was sub-divided into three portions and each of the three got a portion.
10. PW3 – Kiriungi M'rewa - He adopted his witness statement. He did not know whether the mother and the applicant were given lands as those are deep family issues. All he did was to assist the applicant to obtain a letter from the chief so that she could lodge a caution. He testified that he had never seen the title deed to know who was registered.

### **Respondent's Case**

11. The 1<sup>st</sup> respondent adopted her affidavit. In cross-examination, she told the court that the Land Parcel No. 3682 belonged to her husband and was given to him by his grandfather. The land was Parcel No. 3682 was sub-divided into two and was not supposed to be registered in the name of the applicant. She told the court that the applicant does not live on the land as she is married and lives in Kiwani which is a different area from the one where the plot in dispute is located. That she lived on the plot for eight years and the applicant never came to claim the land from her husband.
12. David Mugendi (DW2) adopted his affidavit as his evidence. He told the court the deceased is his brother and that the applicant was not supposed to get land of his brother. He filed succession in the estate of his brother and he had no claim over the estate. The deceased had four children and none of them was omitted. That the applicant had no claims over the estate of the deceased. The witness testified that they got the land from their grandfather and their uncle registered it in their joint names and they later had it subdivided into three portions. He told the court that the applicant was given a portion and she has not been living on the applicant's portion.
13. DW3 – Kithinji Nguruthi testified that the land in question was sold to him by the applicant and the sale was concluded without any objection. She represents Jane Cirindi, the 3<sup>rd</sup> respondent who has donated a Power of Attorney to her. The respondent obtained a title deed and the land was never registered in trust.
14. The parties filed submissions. The applicant submits that the proceedings to obtain the grant were defective. He relies on the case of *Re Estate of Nazer Khan Mohamed (deceased)* where the court held that the proceedings to obtain the grant were defective as the objection and answer to cross-objection were not in the court file. The applicant submits that the grant was obtained fraudulently.
15. She relies on *Re Estate of the late Epharus Nyambura Nduati (deceased)* where the grant was revoked and the administrator had concealed material facts. It is also submitted that the grant was obtained by means of untrue allegation and relies on *Charles Mukonu Kiruki v Celina Nyai Kariuki*. He further relies on in *Re estate of Agwang Wasiro* where the court held that the administrator was not the proper person to file the application. The applicant prays that the application be allowed.

### **Respondents Submissions**

16. The respondent submits that the law on revocation of grant is anchored under Section 76 of the *Law of Succession Act*. That the applicant is claiming proprietary interest on the basis that the respondent



obtained the grant by concealment of a material fact that she was entitled to the suit land as she was a sister of the deceased. That she had proprietary interest in the land. He relied on *In Re – Estate of Ileri Baini Njau (Deceased)* (Succession Cause 12A of 2017) (2022) (Ruling) where the court held that

“A probate and Administration Court has jurisdiction to enforce the *Law of Succession Act* (Cap 160 Laws of Kenya) on administration of estates of deceased persons...”

The court held that as the applicant was challenging the deceased’s title, and that the applicant’s claims does not fall within the preview of the court’s jurisdiction as a probate court.

17. The respondent further relies on is *Re Estate of Julius Wachira (deceased)* 2022 eKLR where Lady Justice Maureen Odero while Quoting the decision of William Musyoka stated:

“The applicants (the respondent herein) claim existence of a trust in their favour it could very well be that such a trust does not exist. However, it is not for this court to declare it. None has been demonstrated by way of declaration of a court of competent jurisdiction. Ideally, the applicant ought to have filed a civil suit in land court to make a decision of trust in their favour which they would then seek to seek enforce against the estate. In the absence of a declaration by a court, there is no basis upon which I can declare such a trust in a revocation of grant application. He submits that the summons is misconceived and should be dismissed.”

### **Analysis and Determination**

18. The issue which arises for determination is whether the application meets the threshold for revocation of grant under Section 76 of the *Law of Succession Act*.

19. I have considered the application, the averments in the parties’ affidavits, the evidence and the submissions. The applicant claims dependency from the estate of the deceased. The *Law of Succession Act* is concerned with the identification of the estates of deceased persons and the distribution of the estate to its lawful beneficiaries. See my decision *in Re Estate of Ileri Baini Njau (deceased)* (Succession Cause 12A (2017) (2022) KEHC 9816 where I stated that:

“A probate and Administration Court has jurisdiction to enforce the *Law of Succession Act* (Cap 160 of the Laws of Kenya) on Administration of estates of deceased.”

20. The applicant claims that she is entitled to the land which was registered in the name of the deceased. It is not in dispute that the deceased was registered owner of the Land Parcel No. Mwimbi/Chogoria/4682 which the applicant is claiming. The property formed his estate. The definition of estate under the *law of Succession Act* is that it is the free property of a deceased person. On the other hand, free property in relation to a deceased person means 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.

21. The applicant claims entitlement to this property as the deceased was registered in trust. The applicant is not a dependant as envisaged under Section 29 of the *Law of Succession Act* which provides 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, 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; 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.”

On the other hand, the applicant has not proved the condition under Section 29(b) of the *Law of Succession Act* (*supra*) that she was being maintained by the deceased prior to his death. Her claim for dependency must fail.

22. Her claim to the estate ought to have been brought before the confirmation of grant. Section 30 of the *Law of Succession Act* provides that

“No application under this part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided under Section 71.”

The applicant claims to the estate has been brought after the confirmation of grant and is therefore time barred.

23. The applicant has applied for the revocation of grant. Section 76 of the *Law of Succession Act* Constitutes the law on revocation of grant. The Section provides:

“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.”



24. *In Re Estate of Prisca Onyango Nande (deceased)* (2020) eKLR it was held that,

“a grant letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective either because some mandatory procedural step was omitted or the persons applying for representation was not competent or suitable for appointment or, the deceased died testate having made a valid will and then a grant of letters of administration intestate was made instead of a grand of probate or *vises versa*. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons. The second is where the grant was obtained procedurally but he administrator failed or fails to apply for confirmation of grant within the time allowed. The third is where the grant has become useless and inoperative following subsequent circumstances...”

25. The applicant’s quest for revocation of grant is based on the grounds that the grant was obtained secretly by failing to notify the applicant and no consent was sought from her and yet she had an interest in the estate and that the grant was obtained fraudulently by making false statement or by concealment from the court of something material to the case. In particular, she contends that the applicant failed to inform the court that Mwimbi/Chogoria/4682 ought to have been administered by the applicant who was left on the land of the deceased.

26. The record shows the 1<sup>st</sup> respondent instituted the succession proceedings vide a chief letter dated 30/4/2021 which confirmed that the 1<sup>st</sup> respondent was the surviving wife of the deceased and the other beneficiaries listed were the children of the deceased. The succession cause was published vide Gazette Notice No.10796 of 7/10/21 and the District Registrar Chuka Law Courts issued a notice to all parties concerned that a petition for a grant of letters of administration intestate had been filed by Damais Kathomi and David Mugendi Mbaya. The notice invited objections to be lodged at the registry within 30 days of the notice. No objection was lodged within the stipulated period and a grant of letters of Administration Intestate was issued on 8/11/2021 and later confirmed on 27/6/2022. The 1<sup>st</sup> respondent was a competent person to apply for the grant of letters of administration in the estate of her deceased husband. In Section 66(a) of the *Law of Succession Act*, a surviving spouse has priority in the estate of his/her deceased wife or husband. It provides:

“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...”

27. The first respondent had priority as an administrator of the estate of her deceased husband. The 1<sup>st</sup> respondent did not need to seek consent from the applicant as she was neither a beneficiary of the estate of the deceased nor a person with priority to file the succession of the estate of the deceased. The 1<sup>st</sup> respondent had annexed a certificate of official search for Land Parcel No. Mwimbi/Chogoria/4682 when filing the succession cause and it shows that it was in the name of Gilbert Kimandi Mbaya and David Mugambi Mbaya. The property was therefore a free estate of the deceased which was available for distribution to his lawful beneficiaries. This is also reflected on the green card annexed by the applicant as annexure JGM-7. The deceased was registered on 29/7/2009. The applicant lodged a



caution on 29/6/2022 claiming license's interest. There is no indication that the deceased was registered in trust for the applicant.

28. I find that the 1<sup>st</sup> and 2<sup>nd</sup> respondents obtained the grant lawfully and the applicant has not proved any of the grounds under Section 76 of the *Law of Succession Act* to warrant this court to grant the prayer for the revocation of grant.
29. The applicant has claimed that the deceased was registered in trust. This was however, not supported by the certificate of official search or the green card. There is undisputed evidence that the deceased had two brothers and the three of them were given land by their grandfather and their uncle caused it to be registered in the joint names of the brothers, The deceased and the 2<sup>nd</sup> respondent. It is the contention by the 2<sup>nd</sup> respondent that the applicant does not live on the land. The applicant has not proved that she was entitled to the two parcels of land forming the estate of the deceased.
30. The applicant had lodged a caution on the properties of the deceased as a licensee, see annexure JGM6. She claims that the deceased was registered in trust. The applicant is therefore challenging the title of the deceased. This being a probate and Administration Court, it lacks jurisdiction to determine issues of trust. It was upon the applicant to move the court with jurisdiction to declare whether the trust exists or not. The applicant has not proved the existence of trust as none has been demonstrated by way of a declaration by a court of competent jurisdiction. See *Re Estate of Julius Wachira (deceased)* (*supra*).

### **Conclusion**

31. For the reasons stated herein, I find that the applicant has not proved any of the grounds under Section 76 of the *Law of Succession Act* to warrant this court to order revocation of the grant issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Under Section 82 of the *Law of Succession Act*, the 1<sup>st</sup> respondent had the power to sell the Land Parcel No. Mwimbi/Chogoria/4682 which she sold to the 3<sup>rd</sup> respondent to raise school fees for her children. At the time she sold the plot she, the grant had been confirmed. The purchase of the said parcel by the 3<sup>rd</sup> respondent was therefore Lawful and is protected under Section 93(1) of the *Law of Succession Act*.
32. I find that the application for revocation of grant is without merits and is dismissed. I award costs to the respondents.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 25<sup>TH</sup> DAY OF MARCH 2025**

**HON. LADY JUSTICE L. GITARI**

**JUDGE**

