



REPUBLIC OF KENYA



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In re Estate of Nderitu Kanyi alias Moses Nderitu Kanyi (Deceased) (Succession Cause 242 of 1997) [2025] KEHC 6555 (KLR) (24 March 2025) (Ruling)

Neutral citation: [2025] KEHC 6555 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 242 OF 1997
DKN MAGARE, J
MARCH 24, 2025**

**IN THE MATTER OF THE ESTATE OF NDERITU
KANYI ALIAS MOSES NDERITU KANYI (DECEASED)**

BETWEEN

CYRUS KABUI NDERITU APPLICANT

AND

JANET KABUI NDERITU 1ST RESPONDENT

RICHARD KANYI NDERITU 2ND RESPONDENT

ISAAC NDIRITU 3RD RESPONDENT

RULING

1. The late Moses Nderitu Kanyi (deceased) died on 19. 10.1991. He was married to three women: Tabitha Wangeci (deceased), Janet Kabui Ndiritu, and Ruth Gathoni Ndiritu. Succession proceeded herein and the three Respondents were given a grant of letters of administration intestate. The grant was confirmed, and a certificate of confirmation of the grant was issued on 29.09.1997. The assets were divided equally among the three houses.
2. The Applicant contended that he discovered the existence of the cause and alleged that he was aggrieved that some beneficiaries were left out. As a result, he filed a summons dated 16.02.2018. He sought the revocation of the grant of letters of administration premised on the usual grounds that the proceedings to obtain the grant were defective in substance. He stated further that the grant was obtained fraudulently by making a false statement and by concealing something material to the case from the court. This something material to the case was not disclosed.
3. The said application was supported by an affidavit dated 16.02. 2018 by Cyrus Kanyi Nderitu. He stated that he is a son of the deceased's third house. according to him, he became aware of the matter on



- 12.02.2018 when he came across the hearing notice served upon his mother Ruth Gathoni Nderitu. the notice was not exhibited.
4. The Applicant continued that Janet Kabui Nderitu, Richard Kanyi Nderitu Isaac Ndungu Nderitu and his mother proceeded with the succession matter without involving other beneficiaries. he named the said beneficiaries left out as Cyrus Kanyi Nderitu, Lucy Wamukira Nderitu, Erena Wambui Nderitu, Purity Wangui Nderitu, Julius Wanjohi Nderitu, John Ngatia Nderitu, Francis Mwangi Nderitu, Gidraff Githogori Nderitu, Alice Njeri, Paul Ndegwa Nderitu and Shadrack Kabage Nderitu. He stated that the administrators are likely to transfer the properties to themselves to the exclusion of others.
 5. It did not bother the Applicant that some of these beneficiaries were children when the grant was applied for and confirmed. The following were then minors at the time of application in 1992:
 - a. Jane Wangui Ndiritu
 - b. Annie Wahito Ndiritu
 - c. Julius Wanjohi Ndiritu
 - d. John Ngatia Ndiritu
 - e. Francis Mwangi Ndiritu
 - f. Alice Njeri Ndiritu
 - g. Gidraf Githogori Ndiritu
 - h. Paul Ndegwa Ndiritu
 - i. Shadrack Kabagi Ndiritu
 6. The 1st Respondent filed a Replying Affidavit dated 16.03.2018. She stated that the grant was issued on 23.09.1997, whereby the deceased's estate was shared equally among the three houses. It was her position that the applicant was aware of the succession. She further maintained that the Applicant accompanied her co-petitioner through the pendency of the proceedings. She maintained that the Applicant's mother got a third of the deceased's estate. It is instructive that the Applicant did not find it wise to include the mother or disclose his mother's whereabouts.
 7. The first Respondent posited that none of the co-petitioners lodged a review or appeal in dissatisfaction with the said Ruling issued by the Senior Resident Magistrate. She stated that it has been over 20 years since the grant was confirmed, and the Applicant has been aware of this fact. She noted that the parcels had been subdivided and demarcated on the ground per the schedule. The parcels subdivided are Land parcel number Othaya/Thuti/66, Othaya/Thuti/395, and Plot No 8 Gatugi market as per the schedule. The parties also lived in their respective parcels of land.
 8. The first Respondent stated that the applicant was present on the day they engaged a surveyor to subdivide Othaya/Thuti/66, Othaya/Thuti/395, and Plot No 8 Gatugi market. The survey was done in the presence of the then-area chief, Mr. Karimi, the Local administration Police, and all beneficiaries. According to her, the Applicant indeed assisted the surveyors in erecting the new beacons on the new portions.
 9. After the demarcation, the Applicant occupied a third portion of land parcel number Othaya/Thuti/395. The parcel of land that the Applicant occupies is the same portion given to his mother's



house. The Applicant has excluded his mother and other siblings. These proceedings were meant to oppress the remaining beneficiaries of the deceased's estate.

10. The other beneficiaries for the two houses, including the Respondent, have planted tea and extensively developed my respective portions on Land Parcel No Othaya/Thuti/66, Land parcel No Othaya/Thuti/395 and plot No 8 Gatugi market. Having partaken in the proceeds of the grant and participated fully, the applicant cannot now come and allege fraud in obtaining the grant. She maintained that the Applicant fully participated in the succession proceedings. She stated that no fraud was perpetrated in obtaining the certificate of confirmation of the grant issued on 23.09.1997 as it was issued in the presence of all the beneficiaries.
11. She posited that the fund held by the Public Trustee was given to the three widows and shared equally between the three Petitioners, a fact that the applicant knows too well. She continued to state that the Applicant's mother's share of the funds held by the Public Trustee was used for the medical treatment of the Applicant after he was involved in a road accident. This particular fact was not disputed. This appears to be the zenith of human greed and gluttony, inundated by an unsatiable appetite for freebies at the expense of other beneficiaries.
12. The first Respondent further stated that Plot No 8 Gatugi market was divided into three portions: Plot 8A, Plot 8C, and Plot 8C. The Applicant's mother and Richard Kanyi have disposed of their respective portions. She attached evidence to that effect.
13. She continued that on 24/8/1999, the applicant attempted but failed to transfer the property to himself and two others fraudulently. She stated that the fraudulent transfer was, however, rejected. It was her case that she had leased her portion of plot 8 at Gatugi Market, that is, Plot 8B, to one Moses Ndegwa and received rent. They stated that they agreed to have the deceased's estate shared equally amongst his three wives from the onset. Further, as early as 28/1/1992, they withdrew funds held by the deceased at a Cooperative bank and shared them equally among his three houses, and an agreement to that effect was drawn and signed by all three.
14. She posited that the Applicant's mother, under Section 35(2) under Cap 160, has the power of appointment of all or part of the net intestate by way of gift taking immediate effect among the surviving child or children. Still, that power shall not be exercised by will nor in such manner as to take effect at any future date, and thus, the Applicant ought to pursue his mother to exercise said power.
15. She concluded that the Application herein was motivated by the application filing dated 23.11.2017 to have the deputy registrar sign all the relevant documents on behalf of Ruth Gathoni Nderitu, Richard Kanyi Nderitu & Isaac Ndungu Nderitu to give effect to the certificate of grant issued herein on 23.09.1997. She requested that the summons for the Revocation or Annulment of Grant dated 16th February 2018 be made in bad faith to frustrate or delay the cause herein and, more particularly, to stop the distribution of title land parcel No Othaya/Thuti/66 and land parcel No Othaya/Thuti/395.

Submissions

16. The Applicants' case was that he became aware of this matter on 12/2/2018 when he came across a hearing notice from his mother. He asserted that the succession matter proceeded without involving all beneficiaries, and therefore, the grant was obtained by concealing material facts.
17. The Applicant cited Section 76(a)(b)(c) of the *Law of Succession Act* Cap and cited the authority of *in Re Estate of Prisca Ongayo Nande (Deceased)* [2020] eKLR. The Applicant contended that he was not aware of the succession case until it was too late and, therefore, was denied the chance to participate in the decision towards the distribution of his father's estate together with 11 other beneficiaries who



have been listed in the Applicant's supporting affidavit. That the failure to include and disclose all beneficiaries in the succession of the deceased estate amounts to concealment of material facts as their presence might affect the estate's distribution differently.

18. The Respondents equally produced verbatim the provisions of Section 76 of the Law of Succession Act. They supplied the authority of In the Matter of the Estate of L.A.K. (Deceased) [2014] eKLR on the grounds in which a grant may be revoked. The Respondents mooted that the power to revoke is discretionary as was held in Albert Imbuga Kisigwa v Recho Kawai Kisigwa Succession cause no 158 of 2000. The Respondent contended that the Applicant was part of the proceedings. He stated that grounds were held in re Estate of Benjamin Kiregenyi Muiri (Deceased) [2022] eKLR.
19. The Respondents contend that the deceased's family were in agreement from 28/1/1992, where they agreed to withdraw funds from the deceased's bank account, and that the grant was confirmed over 20 years ago, and no one lodged an appeal or review. The Respondent contends that the proceedings to obtain the grant were not defective because the applicant's mother was a co-petitioner in the first succession and has been aware of the proceedings since he used to accompany his mother to court, which led to the issuance of the grant that he now seeks to withdraw.
20. The issue for determination herein is whether the Applicant's application meets the threshold for the revocation of a grant within the meaning of Section 76 of the Law of Succession Act. For avoidance of doubt, Section 76 of the Law of Succession Act states as follows:
 - a. "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—
 - i. that the proceedings to obtain the grant were defective in substance;
 - ii. 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;
 - iii. 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;
 - iv. that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - b. 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
 - c. to proceed diligently with the administration of the estate; or
 - d. 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
 - i. that the grant has become useless and inoperative through subsequent circumstances."
21. Section 76 was well articulated by the court in re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR, where it was stated that A grant of letters of administration may be revoked where the process of obtaining the grant was attended by problems. Secondly, where the grant was obtained procedurally, but the administrator thereafter got into difficulties with the exercise of administration, and thirdly, where the grant has become useless and inoperative following subsequent circumstances.



22. The Applicant invited the court to revoke the grant of letters of administration for the reasons that the lower court did not involve some beneficiaries, this being a material non-disclosure of material facts from the subordinate court,
23. The Certificate of Confirmation of grant issued on 29TH September 1997 was an adoption of an Arbitration award. The award was read out on 21st April 1993. Judgment was entered in terms of the award on 16th April 1996 after an application to set it aside was dismissed. In effect, the arbitral award became the court's judgment. The arbitral award identified three houses, so to speak, with each house identified by the surviving widow and in one house the children of one widow who has since been deceased (Tabitha Wangechi Ndiritu). To wit, in no particular order: House One Janet Kabui Ndiritu; House Two Ruth Gathoni Ndiritu; and House 3 Richard Kanyi Ndiritu & Isaac Ndungu Ndiritu who divided the three properties as per the order.
24. In his application, the Applicant has identified Ruth Gathoni Ndiritu as his mother, one of the three widows the deceased. the said Ruth Gathoni Ndiritu was, and indeed one of the Petitioners in this matter
25. It is recalled that, while the matter was in the lower court, it was known as Succession Number 40 of 1992. When the matter was transferred to the High Court via the court order dated 16 June 1994, it took on the number Succession Cause 75 of 1999—*In the matter of the Estate of Ndiritu Kanyi Alias Moses Kanyi [Deceased] & Janet Kabui Ndiritu, Ruth Gathoni Ndiritu, and Richard Kanyi Ndiritu.*
26. A scrutiny of the file Succession Cause 75 of 1999 identifies a replying Affidavit dated 4.1.1993 made by Ruth Gathoni Ndiritu, the mother of the Applicant, made in response to a chamber summons dated 15th December 1992, wherein in paragraphs 3 and 4 of the replying affidavit, she stated verbatim:

“ ...

3. That I am the youngest wife of the deceased and as such, I have the following children in school and under my care
 - a. Elena Wambui Ndiritu--- 2nd year university student
 - b. Jane Wangui Ndiritu-- Form II student 1993
 - c. Cyrus Kanyi Ndiritu --at home unemployed
 - d. Annie Wahito Ndiritu --Form I 1993
 - e. Julius Wanjohi Ndiritu --Standard 7-1993
 - f. John Ngatia Ndiritu-- Standard 6-1993
 - g. Francis Mwangi Ndiritu --Standard 4-1993
 - h. Alice Njeri Ndiritu--Standard 5-1993
 - i. Gidraf Githogori Ndiritu--Standard 2-1993
 - j. Paul Ndegwa Ndiritu--Standard 2-1993
 - k. Shadrack Kabagi Ndiritu --Nursery-1993



4. That when the deceased died, I automatically became the sole breadwinner of the said children in that I have to meet exorbitant school fees, food and clothing especially now-a-days when the cost of living is very high...”
27. The same listing of children above, in the same fashion, was repeated in yet another affidavit dated 15 March 1993, paragraphs 3 and 4.
28. The arbitral award that saw six elders witness it, two each nominated by each house, and more specifically that Ruth Gathoni Ndiritu was represented by Paul Wangati Gatere ID No 551XXXX/68 and Samson Ndegwa Mwatha ID No 1388XXXX/64 had the arbitral award judgment read,
- “Statement from Janet Kabui Ndiritu: Your honour we have agreed to share the assets equally.
- Question from D.O.: Do you mean there is no dispute now?
- Janet: No There isn't as we have all agreed to share the assets amongst us.
- Judgements: All three Contestants agreed to share the assets equally, and hence, there is no need to proceed with the case.”
29. The aforementioned elders, Paul Wangati and Samson Ndegwa, duly appended their signatures and fingerprints. the subdivision was thus between the houses. in this case, it indicated that Ruth Gathoni Ndiritu and her children were catered for in the award. the only question that can be entertained, even suo moto, is the entitlement of each beneficiary in each house.
30. From the arbitral award adopted as an order of the court on 24.09.1997 and the Certificate of Confirmation of grant issued on 29.09.1997 each matraich was reposable to their houses. Ruth Gathoni, who was responsible for the land held in trust for the children of the third house. The replying affidavits dated 4.1.1993 and 15. 03.1993 for the 11 issues therein named cover the same persons alleged by the applicant to have been left out.
31. Such evidence is unbelievable. The beneficiaries of the deceased from the house of Ruth Gathoni, as listed by the Applicant in his application, were provided. The replying affidavits made of Ruth Gathoni Ndiritu, sworn on 4.1.1993 and 15.1.1993, list all 11 children including the Applicant. The adoption of the arbitration award as a court order wherein the Applicant and his siblings where, his mother, Ruth Gathoni Ndiritu attended the arbitral tribunal. the assets were shared between houses. The houses were well represented in arbitration and decided to share the assets equally.
32. The subsequent confirmation of the Grant, issued on 29.09. 1997, resulted from the adoption of the Arbitration award as the court's order. There was no party or beneficiary left out. the only recourse the applicant has is to dissolve the trust given to the mother, hold a life interest, and for the children to share equally. This cannot be done by alleging fraud but by failing to prove the same.
33. The power to revoke or uphold a grant is truly discretionary, as was persuasively held in *Albert Imbuga Kisigwa v Recho Kawai Kisigwa* Succession Cause No 158 of 2000. However, it is essential to note that the applicant received his share and has sold the same. He is trying to frustrate the other houses. If it is not true that the applicant did not know about succession, how come he sold the deceased's property without succession? It is either he was intermeddling, or he knew. Unsurprisingly, he also sold what was given in the grant and nothing else. The question of the grant that is confirmed and transmitted



was dealt with in the case of Eldoret CACA 308 of 2019- [*Mary Wambui Kibunya v Peter Kariuki and James Ngugi*](#), the court of Appeal posited as follows:

The appellant's complaint is that the 2nd deceased surreptitiously obtained letters of administration to the estate of their father to the exclusion of herself and her two sisters. The 2nd deceased died before the application for the revocation of the grant could be heard. He did not even file a response to the summons for revocation of the grant. Teresiah Mukuhi Muriithi who is one of the people proposed to be appointed in the place of the 2nd deceased cannot surely defend the interests of the 2nd deceased. Additionally, even though the respondents are the sons of the 2nd deceased, they are not in a position to defend the 2nd deceased for they never assisted him in administering the estate of the 1st deceased. The parties who bought the land from the deceased are not parties to the succession proceedings. Allowing the appellant's application for substitution will put the properties of the purchasers at risk yet they have not been heard. Further, and as correctly submitted by the respondents, the estate of the 1st deceased was distributed and nothing remains to hassle over.

34. The grant was given to Janet Kabui Ndiritu, Richard Kanyi Ndiritu, and Isaac Ndungu Ndiritu. They got shares for their houses. they have created interests that are protected by section 93 of the [*law of Succession Act*](#),
35. Finally, the holder of the share for the third house is the mother of the Applicant herein. If there is a claim, arising, out of the land that the matter is holding in trust for the third house, the Applicant is to await the mother to die and if not already dead and succeed. Secondly, it is to pursue trust. It must not be lost that the Applicant has already sold some parcels. The Applicant should be comforted by the recent Supreme Court decision in the case of [*Kiebia v M'lintari & another*](#) (Civil Case 10 of 2015) [2018] KESC 22 (KLR) (5 October 2018) (Judgment) as follows:
 58. What are we to make of these changes? Several interpretations are plausible. It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the [*Registered Land Act*](#) (now repealed), in Section 25 of the [*Land Registration Act*](#), it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered Land Act, have now been subsumed in the "customary trusts" under Section 25 (b) of the [*Land Registration Act*](#). Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land.
36. The court is satisfied that the applicant was involved from the case's inception. He took part in every step of the way. He is now bothering others after hoarding the entire entitlement in land parcel number land parcel No Othaya/ Thuti/395. his application is unmerited.
37. The petitioners did not conceal any information, and the applicant did not prove any fraud on the part of the administrators. The threshold for setting aside was not met. It is apparent that the applicant made the application with mala fides, and it was not meant to advance the cause of justice. The net effect of the findings is that the application must fail.



38. The next question is the award of costs. 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.

39. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR, 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, before, during, and subsequent to the actual process of litigation.... 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.

40. The 1st respondent is entitled to the costs of defending a baseless application. Sometimes, the courts look at family relations in declining to award costs. However, some applications that pass the vexatious threshold cannot be dismissed without costs following the event. In this case, the Applicant knew that he was involved but went ahead and filed the application. This was to forestall the application dated 23.11.2017. This has succeeded in holding the wheels of justice for half a decade. The Applicant may not entirely be to blame for the delay. However, the Respondents were vexed. Costs will be a just reward.

Determination

41. The upshot of the foregoing is that I make the following orders:

- a. The Application dated 16.2.2018 is dismissed with costs of 45,000/= payable within 30 days, in default execution do issue.
- b. The file is closed.

**DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 24TH DAY OF MARCH, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE



Represented by: -

No appearance for the Appellant

Mr Magua for the Respondent

Court Assistant –Michael

