



**In re Estate of Selipha Nduta Guthiga alias Zelipha Nduta (Deceased) (Succession Cause 841 of 2015) [2025] KEHC 5034 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5034 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
SUCCESSION CAUSE 841 OF 2015**

**DKN MAGARE, J**

**APRIL 29, 2025**

**IN THE MATTER OF THE ESTATE OF SELIPHA NDUTA  
GUTHIGA ALIAS ZELIPHA NDUTA (DECEASED)**

**BETWEEN**

**LILY WACHUKA GUTHIGA ..... APPLICANT**

**AND**

**DAVID KIMUKWA S. GUTHIGA ..... RESPONDENT**

**AND**

**EPHANTUS MACHARIA GUTHIGA ..... INTERESTED PARTY**

**HAROLD FUNDI GUTHIGA ..... INTERESTED PARTY**

**RULING**

1. The deceased herein Zelipha Nduta Guthiga, died on 12/01/2012 at the ripe old age of 104 years. She had many years earlier duelled with the Applicant herein. As history is replete with tendencies to repeat itself, another duel of epic proportions has arisen 50 years later. At the time of her death, she left land parcel number Iriaini/Kairia/109, which measured 2.47 hectares. The said parcel of land was registered on 14.08.1978, with two proprietors as follows:
  - a. Zelipha Nduta Guthiga - 3.05 acres
  - b. Lily Wachuka Guthiga - 3.05 acres
2. David Kimukwa S. Guthiga filed a caution on 02.10.1978. On 22.2.1980, a prohibitory order emanating from Nyeri HCCC 9 of 1980 was registered. No other action was carried out in the register. The state of the land has persisted with peaceful occupation of the two families.



3. The Respondent herein filed Citation proceedings on 5 November 2015 against all his siblings, Ephantus Macharia Guthiga, Esther Wamaitha Guthiga and Harold Fundi Guthiga.
4. Subsequently, he filed a Summons General dated 10 March 2016, petitioning for letters of Grant. The Respondent then filed a summons for confirmation of grant via an application dated 7 July 2017 and another application dated 29 January 2018. One glaring error was the indication that the deceased owned 2.47 hectares of land, a fact they knew was not true. There was no reason to lie about the acreage unless someone was dealing with a situation of Mythomania.
5. The effect of the filing of summons to be given a grant was to skip a crucial step, publication in the Kenya Gazette.
6. The court issued a certificate of Confirmation of Grant on 11<sup>th</sup> June 2018. The certificate revealed that the property known as Iriaini/Kairia/109 would be divided as follows:
  - a. David Kimukwa S. Guthiga - 4.06 acres;
  - b. Ephantus Macharia Guthiga - 1.0166 acres and;
  - c. Harold Fundi Guthiga - 1.0166 acres.
7. The Applicant then filed a Summons for Revocation of Grant dated 28<sup>th</sup> February, 2020 where she asked for the following orders:
  - a. That the grant of letters of administration made to David Kimukwa S. Guthiga be revoked.
  - b. That a fresh grant be issued to the Applicant and any other beneficiaries in the estate.
  - c. Costs be provided for.
8. The said application was supported by an affidavit dated 28<sup>th</sup> February, 2018 by Lily Wachuka Guthiga wherein she stated that:
  - a. She has been authorized to sign the affidavit on their household's behalf.
  - b. That the following children live on part of the estate – Ann Gathoni Macharia, wife of her son Justus Macharia; Ephraim Kimukwa, Ephantus Muita, Purity Mumbi.
  - c. That the estate to which this cause relates involves her deceased co-wife, to whom we have been living on the land the subject of this estate for over 67 years, having married in 1953.
  - d. That the deceased in this estate and herself are the wives to the late Guthiga Kimukwa alias Stanley Guthiga Kimukwa, who was the first registered owner of the parcel of land Iriaini/Kairia/109, the subject asset in the estate.
  - e. That upon the demise of the deceased they proceeded to Karatina District Magistrate Court via Land Succession Cause No. 113 of 1977.
  - f. That the proceedings were to the effect that the land was to be shared equally between the two widows of the late Guthiga Kimukwa each taking 3.05 acres.
  - g. That the land was registered in their joint names then and the official search reveals as much.
  - h. That the petitioner did not disclose this fact.
  - i. That the deceased in this estate successfully appealed the judgment of the trial court of Karatina via Nyeri Appeal Case No. 13 of 1981.



- j. That despite the success of the appeal they have continued to reside on the estate of the deceased peacefully and cultivating the same and setting up permanent structures.
  - k. That she filed an appeal against the judgment of the High Court via Nyeri High Court No. 30 of 1982 whose status is unknown and attempts to trace the record have borne no fruit.
  - l. That members of the petitioner's household did not participate and would have provided insight on ground actualities.
  - m. That the petitioner extracted the decree in Nyeri Appeal No. 13 of 1981 on 26<sup>th</sup> June 2018 without leave of the court and without disclosing to court that she was alive.
  - n. That it is just and mete to set the grant aside.
9. The Respondents Replying Affidavit dated 17<sup>th</sup> July, 2020 revealed that:
- a. That the grant was issued upon due process being followed and disclosure of all matrimonial facts were disclosed.
  - b. That during the lifetime of the deceased the applicant had a case against her which was dismissed.
  - c. That the deceased herein was granted a life-interest by the lower court over LR. Iriaini/ Kairia/109 which devolved to her sons who are the interested parties, and himself.
  - d. That the interested parties were duly informed of the succession process but did not show up.
  - e. That the allegations that she was married to the late Guthiga Kimukwa were dealt by the court in 1978 and in 1987 and cannot appeal against such decisions 40 years later.
  - f. That the Applicant has not attached the order from the appeal issued in 1987.

### **Evidence**

- 10. The Applicant filed her submissions dated 8<sup>th</sup> August 2022 in court on 11<sup>th</sup> August 2022. The Applicant contended that she was a co-wife of the deceased. The Applicant gave a historical narrative of the proceedings, beginning with Karatina Land Succession No. 113 of 1977, wherein it was adjudged in 1978 that the property be divided into two. The same was appealed in 1982 via Nyeri Appeal No. 13 of 1981, and that judgment set aside the judgment of 1978. The Applicant filed Nyeri High Court Appeal No. 30 of 1982 which was not pursued.
- 11. The Applicant stated that they continued living on the parcel in harmony undisturbed by the 1978 judgment despite the prohibitory orders registered on 2/10/1978 and 22/02/1980. The Applicant contends that the official search of the land shows her as a co-owner of the land and thus entitled to 3.05 acres.
- 12. The Applicant cited Section 76 of the Succession Act and contends that there was material non-disclosure as to why she was not served the petition yet the land was registered in her name as a co-wife. The Applicant also stated that the two interested parties did not participate in the citation proceedings.
- 13. The Respondent contended that whereas via Succession No. 113 of 1977 the property was divided into two, the same was successfully appealed against via Nyeri Appeal No. 13 of 1981, which deemed the Applicant was not a legal wife of the deceased, Stanley Guthiga, and could not inherit as a wife. The same was appealed via Nyeri Civil Appeal No. 30 of 1982, whose fate remains unknown.



14. The Respondent contended that he filed citation proceedings against his two brothers, who did not attend the proceedings. Subsequently, a certificate of Grant was issued on 11 June 2018, and the estate was distributed in accordance with the Certificate of Confirmation of Grant, which was not contested by the beneficiaries until today.
15. Stanley Guthiga's estate was duly distributed via the judgment of the Appeal Civil Case No. 13 of 1981 on 11/11/1982, which held that the Applicant was not the wife of the deceased. This judgment overturned the judgment of Succession 113 of 1977, which held that the Applicant was a co-wife of the deceased. The judgment of 1982 was appealed against via Nyeri Court of Appeal 30 of 1982, whose fate is unknown as it was not pursued.
16. The Respondent claimed that the assertion of fraud ought to be proved explicitly by the Applicant which she has not done. The Respondent relied on the decision in Eldoret Succession Cause 217 of 2003 Re Estate David William Kigumi Kimemia [Deceased] 2021 eKLR.

### Analysis

17. 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 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—
  - a. 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
  - b. to proceed diligently with the administration of the estate; or
  - c. 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
  - d. that the grant has become useless and inoperative through subsequent circumstances.”

18. Section 76 was well articulated on 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 problems with the exercise of administration, and thirdly, where the grant has become useless and inoperative following subsequent circumstances.

19. The Applicant invited the court to revoke the grant of letters of administration because the Respondent/Petitioner materially misrepresented that the Applicant was not a wife of Stanley Guthiga, who died in 2015. She relied on the fact that she was not served with the petition, which was filed in 2015, and further that an official search of the property shows that she was a co-owner with one Zelipha Nduta Guthiga.
20. The Applicant attached the proceedings of Karatina 113 of 1977 which found that the Applicant was a wife of Stanley Guthiga and an outcome of this was that the title of the land formerly in the name of Stanley Guthiga was transmitted in the names of Lily Wachuka and Zelipha Nduta. The Applicant attached a search over the single asset of the estate namely Iriaini/Kairia/109, which divulged as much.
21. They posited that, however, the judgment of Karatina 113 of 1977 was overturned by Nyeri Appeal Civil Case No. 13 of 1981, delivered on 11/11/1982, which held that the Applicant was not a wife of the deceased.
22. This case turns on the most rudimentary of all the laws. The succession court deals only with the free property of the deceased. The deceased, at the time of her demise, was a registered owner of only 3.05 acres of land and nothing more. It was thus fraudulent for the Respondents to succeed land that is in the name of a living person. This is more crucial when the deceased was not in possession of the suit land.
23. In the decision of the Court of Appeal [Usinga, Gatembu & M’Inoti, JJ.A.] in the case of Jane Njeri Nderi v Rachel Wangari Nderi [2020] eKLR, the court rendered itself as hereunder:

The court cannot find fraud proved by mere conjecture or speculation, which is what the appellant is inviting us to do when she contends that John Kamau Nderi could not have thumb-printed the consent because he is literate. The appellant was obliged to adduce cogent evidence to satisfy the court, beyond a balance of probabilities, that the widow obtained John Kamau Nderi’s signature or thumb-print on the consent order by fraud. In *R. G. Patel v. Lalji Makanji* [1957] EA 314, the former Court of Appeal for Eastern Africa stated thus on proof of fraud:

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.”

And in *Richard Akwesera Onditi v. Kenya Commercial Finance Co Ltd*, CA. No. 329 of 2009), this Court reiterated that:

Fraud is a serious accusation and requires a very high standard of proof, certainly above mere balance of probability.”

(See also *Koinange & 13 Others v. Koinange* [2008] 1 KLR (G&F) 698).

24. What is not in dispute is that the parties shared the 3.05 acres belonging to the deceased equally, while David Kimukwa S. Guthiga added 3.05 acres registered in the Applicant's name to make 4.06 acres. From the proceedings, the applicant is still alive, and her succession is not due. There was no involvement of other beneficiaries at all and there was no consent given by the persons entitled under form number 38. No wonder the Applicant ended with the lion’s share, including a share from a living



person. In the case of *Beatrice Mbeere Njiru v Alexander Nyaga Njiru* [2022] eKLR, the court, L. Njuguna, posited as follows:

29. I agree with the court herein that the filing of a consent under provisions of Rule 40(8) is mandatory, and before a court can proceed to hear an application for confirmation of the grant, there is need to have a written consent duly executed by all beneficiaries consenting to the confirmation of the grant. In my view, proceeding to confirm the grant in the absence of Form 37, is simply unprocedural and against the law as it is a mandatory requirement before hearing of the confirmation for grant. The filing of Form 37 aids the court in determining whether the beneficiaries are aware of the proceedings before it and whether they have consented to the said proceedings.
30. Further, the court in *Succession Cause No. 878 OF 2014, Estate of Aomo Oyowe (Deceased)* [2017] eKLR opined that failure to observe the mandatory provisions of Rule 26 (1) and (2) and Rule 40 (8) of the Probate and Administration Rules rendered the proceedings to obtain the grant defective in substance.
25. The decisions of this court and the court of appeal have no bearing on finding the free property of the deceased. This is informed by 3 pertinent issues that were disregarded. The question as to whether the applicant was a wife was a matter in the estate of the late Guthiga Kimukwa alias Stanley Guthiga Kimukwa, which is not before the court. Further, whether the Applicant is a wife or not does not disinherit her children. However, those were issues that were to be dealt with in the estate of Guthiga Kimukwa alias Stanley Guthiga Kimukwa. They are now moot.
26. The Respondent knew that the children of the late Guthiga Kimukwa alias Stanley Guthiga Kimukwa and the applicant were living on the land. He ought to have disclosed that fact. However, even if he did not disclose, the children of the deceased herein could only inherit the maximum of 3.05 acres held in the name of the deceased, Zelipha Nduta Guthiga. The other half is still registered in the names of the Applicant. It is still her free property. She can give it out to whomever she wishes.
27. Zelipha Nduta Guthiga [deceased] died before enforcing a judgment given in 1981 and 1983. The two judgments, whatever their contents, became stale in 1993 and 1996 respectively. This is by dint of Section 4(4) of the *Limitation of Actions Act*, which provides as follows:

An action may not be brought upon a judgment after the end of twelve years from the date on which, the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.
28. Zelipha Nduta Guthiga did not seek to have any judgment enforced or the registration set aside. Independent of the Judgment, the claim over the land registered in the applicant's name became stale after 12 years, from the date of occupation. The Applicant is thus the absolute indefeasible owner of 3.05 acres of land in land parcel number Iriaini/Kairia/109. It is thus important that to avoid future disputes between the estates of the deceased herein and the Applicant, her 3.05 acres, as reflected in the current occupation, be curbed out and leave the deceased's land to be inherited. In the case of *M'ikiara M'Rinkanya & Another V Gilbert Kabeere M'mbijiwe* [2007] eKLR, the Court of Appeal posited as follows:

In *Lougher v Donovan* the landlord obtained against the tenant an order of possession of demised house from the court. The order for possession was extended so long as the rent



was paid. After the landlord defaulted in paying rent a warrant for possession was obtained by the landlord but it expired. The warrant was thereafter extended for six months. After the tenant died, his widow remained in occupation of the house. She was later substituted as a defendant in the old action for possession. The landlord thereafter applied for extension of time for enforcing the old warrant for possession given more than 12 years before. The widow filed a defence pleading limitation to both the claim for possession and to the proceeding for the first order for possession against her deceased husband. The order for extension was granted. On second appeal against the order by the widow, the court of appeal held that the application for extension of time was an “action” and that the claim was barred by section 2 (4) of the Limitation Act, 1939. Section 2 (4) of English Limitation Act 1939 and the definition of the word “action” in the English Act is identical to section 4 (4) of our Act and the definition of “action” in section 3 (1) of the *interpretation and General Provisions Act* respectively.

The case of *W. T. Lamb & Sons Ltd* concerned the enforcement of a money decree after the period of six years stipulated by the Rules of Supreme Court. It was argued in that case that the execution of a judgment is an “action” – a proceeding in a court of law, and, that under section 2 (4) of Limitation Act, 1939, such proceedings may be brought within twelve years from the date on which the judgment became enforceable, and, accordingly, the rule of procedure limiting time for execution of decrees to six years was ultra vires in so far as it cuts down the right of execution. The court in effect, held that section 2 (4) dealt with substantive law and not procedural law of execution and that the issue of execution is within the discretion of the court after the six years limitation period had elapsed. The Court said in part at page 407 paragraph G:

It follows from the above brief survey that the right to sue on a judgment has always been regarded a matter quite distinct from the right to issue execution under it and that the two conceptions have been the subject of different treatment. Execution is essentially a matter of procedure – machinery which the court can, subject to the rules from time to time in force, operate for the purpose of enforcing its judgments or orders .....

29. Having found that the applicant fraudulently applied for grant and included 3.05 acres that were not part of the estate, the court has no option other than set aside the confirmation. For being guilty of fraud, the Applicant cannot continue to be an administrator. I relieve him of the duties as an administrator and in lieu thereof, I appoint Ephantus Macharia Guthiga and Harold Fundi Guthiga as administrators. It is not lost to me that sharing 7 acres out of available 3.05 is a nullity. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning while delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

30. The estate cannot remain unadministered. The confirmed grant was in excess of the land available. The court equally notes that one dependant was left out. There is no evidence of renunciation. The court will correct the anomaly and have all beneficiaries get their shares equally. This is in line with Section 38 of the *Law of Succession Act*, which posits as doth:



38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.
31. The deceased left 3.05 acres of land out of land parcel Iriaini/Kairia/109. The deceased also left 4 dependants, namely;
- a. David Kimukwa S. Guthiga
  - b. Ephantus Macharia Guthiga
  - c. Harold Fundi Guthiga
  - d. Esther Wamaitha Guthiga
32. It is thus fair that the children of Zelipha Nduta Guthiga, share her share equally as follows:
- a. David Kimukwa S. Guthiga – 0.30875 ha (0.7629 acres)
  - b. Ephantus Macharia Guthiga -- 0.30875 ha (0.7629 acres)
  - c. Harold Fundi Guthiga – 0.30875 ha (0.7629 acres)
  - d. Esther Wamaitha Guthiga – 0.30875 ha (0.7629 acres)
33. If any of the dependants is deceased or dies before transmission, their share shall be registered in the names of the estates of the respective estates pending succession in the estate.
34. To avoid conflicts, the property registered in the names of the Applicant should be carved out of the said parcel having regard to the occupation of the 3.05 acres registered in the names of Lily Wachuka Guthiga.
35. The applicant does not need to participate in the succession any further. Her claim concerns her 3.05 acres, which are registered in her name.
36. In the circumstances, the application for revocation is allowed.
37. The next issue is the question 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.
38. 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.

39. The presence of fraud in a matter is ipso facto an invitation to award costs. Nothing will be less edifying than the perpetrator to pay costs of Kshs. 85,000/= for the application for revocation.

### **Determination**

40. The upshot of the findings above is that the Application dated February 28, 2022, is merited and is allowed in the following terms: -
- a. The grant of representation issued to the Respondent, David Kimukwa S. Guthiga, and confirmed on 11.06.2018, was obtained fraudulently and is consequently set aside.
  - b. David Kimukwa S. Guthiga is removed as an administrator. In lieu thereof, I appoint Ephantus Macharia Guthiga and Harold Fundi Guthiga as administrators.
  - c. The deceased left 3.05 acres of land out of land parcel IRIAINI/KAIRIA/109.
  - d. The other part, 3.05 acres is not part of the deceased's estate.
  - e. The deceased also left 4 dependants, namely,
    - i. David Kimukwa S. Guthiga
    - ii. Ephantus Macharia Guthiga
    - iii. Esther Wamaitha Guthiga
    - iv. Harold Fundi Guthiga
  - f. It is thus fair that the children of Zelipha Nduta Guthiga, share her share of 3.05 acres (1.235 hectares) equally as follows:
    - i. David Kimukwa S. Guthiga – 0.30875 ha (0.7629 acres)
    - ii. Ephantus Macharia Guthiga -- 0.30875 ha (0.7629 acres)
    - iii. Harold Fundi Guthiga – 0.30875 ha (0.7629 acres)
    - iv. Esther Wamaitha Guthiga – 0.30875 ha (0.7629 acres).
  - g. If any of the dependants is deceased or dies before transmission, their share shall be registered in the names of the estates of the respective estates pending succession in the estate.
  - h. To avoid conflicts, the property registered in the Applicant's name should be curved out of the said parcel regarding the occupation of the 3.05 acres and registered in the name of Lily Wachuka Guthiga.
  - i. The applicant does not need to participate in the succession any further. Her claim concerns her 3.05 acres, which are registered in her name.



- j. The land registrar, Nyeri County, to remove all entries on the register and all inhibitions and prohibitions and partition the said parcel as per ownership as registered. The deceased's portion be shared in the manner aforesaid.
- k. David Kimukwa S. Guthiga, shall bear the Applicant's costs of Ksh 85,000/= payable within 30 days, in default execution do issue.
- l. The new administrators and the applicant to conclude the partition within 30 days.
- m. The new administrators are to conclude transmissions by 30.10.2025.
- n. In case of default in the partition, the Deputy Registrar of this court to execute on behalf of any recalcitrant party.
- o. The former administrator, David Kimukwa S. Guthiga to surrender the cancelled grant to court within 7 days from the date hereof.
- p. Any party requiring security to apply to the court for the same.
- q. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29<sup>TH</sup> DAY OF APRIL, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

Represented by: -

Nderi & Kiingati Advocates for the Applicant

J. Wangechi & Co. Advocates for the Respondent

Court Assistant – Michael

**M. D. KIZITO, J.**

