



In re Estate of Wanaki Mutongawanjiru alias Wanaki Mungai (Deceased) (Succession Cause 399 of 2010) [2024] KEHC 604 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEHC 604 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 399 OF 2010**

MW MUGAI, J

JANUARY 25, 2024

**IN THE MATTER OF THE ESTATE OF WANAKI MUTONGA
WANAJIRU ALIAS WANAKI MUNGAI (DECEASED)**

BETWEEN

MIRRIAM MUTHONI NJENGA MUNGAI APPLICANT

AND

JOSEPH MUNGAI MUTONGA 1ST RESPONDENT

JOHN MBUGWA MUNGAI 2ND RESPONDENT

RULING

1. By a Summons for Revocation or Annulment of Grant dated and filed on 19th May 2020, Mirriam Muthoni Njenga Mungai the Applicant herein sought the following orders:-
 1. That this application be certified urgent and the same be heard exparte in the first instance and thereafter be listed for hearing interpartes.
 2. That an order of temporary injunction be issued against the respondents, their agents and / or any other persons claiming under the restraining them from subdividing, selling, alienating and/or disposing off and /or any other way interfering with land parcel Machakos/Kitanga/35 or any other plots emanating from any purported subdivision or therefrom which form part of Machakos/Kitanga/35 pending hearing and determination of this application.
 3. That the Grant of Letters of administration intestate issued to the petitioners/respondents Joseph Mungai Mutonga and John Mbugwa Mungai on 5/4/2011 and confirmed on 15/7/2013 be revoked or annulled and fresh grant be issued.
 4. That the costs of the application be provided for.



2. The Chamber Summons is based on the following grounds:-
 - a. That the land parcel Machakos/Kitanga/35 belonged to the late Wanaki Mutonga Wanjiru aka Wanaki Mungai who is the registered owner of the parcel of land.
 - b. That the late Wanaki Mutonga Wanjiru aka Wanaki Mungai left the following beneficiaries surviving her:-James Njenga Maina- son- deceased
Joseph Mungai Mutonga-son
Edward Gaturu Mungai- son
John Mbugua Mungai-son
Teresia Nyathira-daughter in law
Wangari Gichuhi Mungai- daughter in law
Andrew Nganga Mungai – son
 - c. That the respondents fraudulently concealed from the court that James Njenga Mungai was their brother, and that he or his estate was entitled to an equal beneficiary to a share of the estate of the deceased mother
 - d. That at the time of his death, the said James Njenga Mungai had daughters, one whom is the applicant herein and they were entitled to inherit apart of the estate of the deceased herein.
 - e. That the children of James Njenga Mungai were fraudulently concealed from the Court and these proceedings by the petitioners/ respondents
 - f. That the applicant herein is a daughter of the late James Njenga Mungai and was at the time of the deceased death living on the parcel of land Machakos/ Kitanga/35.
 - g. That the applicant was omitted from the list of the beneficiaries of the estate
 - h. That the applicant has prima facie case with a high probability of success
 - i. That the respondents have ganged up against the family of their late brother since 2014 and have chased them out of the said land parcel and pulled down their houses leaving the applicant herein destitute.
 - j. That the respondents obtained the grant and were to hold the land parcel Machakos/ Kitanga/35 in trust on behalf of the beneficiaries but have purported to subdivide and sell some of them being Machakos/Kitanga/915-922 unregistered.
3. The Summons is supported by the affidavit of Mirriam Muthoni Njenga Mungai- one of the children of the late James Njenga Mungai. According to the deponent, the respondents are well aware that the late James Njenga Mungai had daughters who were the beneficiaries of the estate of Wanaki Mutonga, obtained letters of administration intestate and failed to disclose that the deceased had 7 sons.
4. Mirriam Muthoni Njenga averred that even before the death of her father, she lived on the land parcel Machakos/Kitanga/35 and continued to live there even after death of her father and that she used to take care of her grandmother until her demise and that she left instructions that she should continue staying in her house and tilling her land.



5. The Applicant averred that the respondents and her other uncles ganged up against their family and in 2014 chased them away and demolished their house. She reported the same to Kyumbi police station but no prosecution had occurred to date.
6. The Applicant further averred that she found out that the respondents obtained a grant from Court by concealing that the deceased had 7 sons and other beneficiaries.
7. That upon inquiring from the respondents as to why her father's beneficiaries were omitted, they filed an application for rectification of grant dated 7/11/2016 and included her as a beneficiary and later withdrew the application without informing her.
8. The applicant averred that the respondents have purported to subdivide and sell the said parcel of land illegally as they were to hold the said land parcel in trust for the other beneficiaries and it is clear that the grant was fraudulently obtained as the respondents failed to disclose all the beneficiaries of the estate.
9. The Applicant averred that she had a strong case with high probability of success and the balance of convenience tilts in her favour.
10. The summons was supported by the affidavit of Joseph Kanyaa Musau who swore the affidavit on 15th June 2020 and deponed that the applicant was a neighbour at Mua Hill and he was aware of the succession cause against her uncles.
11. According to him, on 6/6/2020, he heard some commotion and noise and on dashing to see what was happening, he found a Nyambura with a big piece of wood shouting at the applicant to sign a document or she would kill her and that the document was to say the applicant was withdrawing the case filed against her uncles.
12. He averred that the commotion continued and the applicant was crying for mercy in which she then thumb printed on the document. He later on 9/6/2020 accompanied the applicant to report the incident at Kyumbi Police Station and was aware that the matter was noted as OB10/9/06/2020.

Replying Affidavit Sworn on 17/6/2020

13. The Respondents, Joseph Mungai Mutonga and John Mbugwa Mungai swore a replying affidavit on 17th June 2020 and deponed that they were the sons of the deceased Wanaki Mutonga and that the applicant was the daughter to their late brother James Njenga.
14. They deponed that they concerted their efforts with their brother and helped educate the applicant and that before the death of their brother, the applicant had already gotten married and living with her husband. According to the deponent, there is no house that has ever been demolished in the deceased's person homestead as has been claimed and that their brother was well catered for since he sufficiently benefited vide a gift bequeathed to him in form of land parcel No. 83 which is situate in Kitale and that the applicant and her siblings will in turn benefit their father's estate as was hived off from the deceased estate.
15. They averred that the applicant was not a dependant of the deceased since they are the ones who educated her and catered for her basic needs and that the applicant has been under care and in the dependency of her husband even before their mother died.
16. They averred that since she was not a dependant of the deceased, she does not qualify as a beneficiary of the estate and that the exclusion of their deceased brother as a beneficiary from the suit property was because he was sufficiently catered for during the lifetime of their deceased mother.



17. They further averred that the applicant's application was actuated by greed and malice since she cannot seek to gain twice from the same estate and that the applicant had unconditionally agreed to withdraw her summons for revocation.
18. That the applicant has siblings who are content with the way the estate was distributed and it was strange that she was the only one who had qualms with the method adopted
19. They urged the court to dismiss the Summons with as it was unmerited.

Further Affidavit Sworn on 18/06/2020

20. In her further affidavit Miriam Muthoni Njenga deposed that the respondents were merely misleading the court alleging that she had willingly withdrawn her application which was not true and that the document purporting to have been signed by her was obtained through coercion and duress at the threat of death by the family of the respondents.
21. She narrated that on 6/6/2020, one of her cousins held her by the collar of her dress and was shouting that if she did not sign the piece of paper she was holding to withdraw her application she would kill her and she signed the document out of the fear of the threat to her life and she reported the matter to Kyumbi Police Station in the presence of Joseph Munyaa who had witnessed the ordeal.
22. She averred that she was not withdrawing the application and did not intend to withdraw the same at any point and that she was a beneficiary under- section 29(b) of the [Law of Succession Act](#) and that the respondents were hell bent to use all manner of ways to disinherit her.
23. She averred that her father never owned any property in Kitale and in fact from the search it was clear the purported land belonged to Rufus Waweru Kairu.
24. She urged the court to deal with the application and disregard all the sideshows as she stands disinherited by the respondents.

Applicant's Submissions

25. On behalf of the Applicant, it is submitted that from the protestor's testimony it is clear that she is the daughter of James Mungai who is the first born son of the deceased and it is clear that the family of James Mungai was never taken into account during the distribution of the estate in the confirmed grant.
26. It is submitted that section 29 of the [Law of Succession Act](#) provided for whoa dependant is and that grandchildren are categorized as dependants who are entitled to a share of the Estate.
27. Reliance was placed in the case of [Elizabeth Wairimu Thimba & 2 others V Wilfred Njogu Mbutia & 2 others](#) [2014] eKLR where Section 41 was discussed in detail on the rule of substitution of a grandchild for his or her parent in cases of instestacy where the parent dies before the intestate is known as the principle of representation.
28. It is submitted that the respondent's case was heard and the respondents called 2 witnesses and in summary their case was that the applicant's father had been provided for during the lifetime of the deceased and that they had agreed to allocate 2 acres to the applicant. On cross examination, the respondents confirmed that they had not provided the court any documents confirming their allegations that the applicant's father had inherited the alleged parcel of land at Kitale and confirmed that the applicant's father had been buried in the suit property Machakos/Kitanga/35 where he was living before his death.



29. It is submitted that the respondents failed to explain to the court why they had not included the applicant in the list of distribution since the alleged that the deceased Wanaki had allocated the applicant 2 acres.
30. It is submitted that the only inference is that the respondents purposely and deliberately excluded the beneficiaries of James Njenga and thereafter decided to include them after the applicant confronted them about it.
31. It is submitted that by the act of the respondents filing for the grant of letters of administration intestate, it is clear that the deceased died intestate and the claims that the deceased had distributed her estate is therefore an afterthought made to disinherit the applicant and her siblings.
32. The court was urged to find that the applicant is entitled to an equal share in the estate as her father was a beneficiary yet his family was excluded from the distribution. Thus the application be allowed and the grant be revoked and annulled and orders fresh and equal distribution of the estate.

Respondent's Submissions

33. On behalf of the Respondents, it is submitted that they wished to reiterate the contents of their replying affidavit, witness statements and documents produced .
34. Reliance was placed on section 76 of the *law of Succession Act* with regard to revocation of grant and In the case of *Re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR where the court stated that under section 76, a court may revoke a grant as long as the grounds listed under that section are disclosed.
35. It is submitted that the applicant prays that the grant issued to the petitioners be annulled and the grounds for the revocation are that the proceedings were defective in that the grant was obtained fraudulently by making false statements and or concealment from court things material to the case and that specifically that the deceased had other beneficiaries who were chased out of the land parcel Machakos/Kitanga/35 leaving them destitute. The applicant also alleged that the grant was obtained through concealment of the fact that she was a beneficiary of the deceased by virtue of being a grand daughter and her interests as a grandchild were not taken care of.
36. It is submitted that the applicant further alleged that the administrators have kicked her out of the land registered as Machakos/Kitanga/35 which she claimed that as a grandchild was entitled to as the other beneficiaries.
37. It is submitted that the petitioners on the other hand testified that James Mungai was their brother and son of the deceased and that he and Esther Kageshi karongo were in 1963 given money by the deceased herein to go purchase land elsewhere and that Esther purchased a parcel at Duka Moja in Kitale where has settled to date and James Njenga purchased a parcel at Kitale Town known as Sabuti/Shikendu Block 1 Mucharage/83 where he build his house and had been staying there upto sometimes towards his demise when he came back to seek medical attention and he succumbed. Due to high cost of transport the family decided to bury him on the land parcel Machakos/Kitanga/35 and his daughter sold the land after the demise of her father.
38. It is submitted that James Njenga was not entitled to a share of Machakos/Kitanga/35 as he had been given money and had bought his land and settled but the petitioners bearing in mind that the land was sold decided to give 0.81 Hectares to the applicant because the applicant was divorced and had nowhere to stay. The applicant has refused to take possession of her portion of land and opted to rent a place in the neighbouring market.



39. It was submitted that it was therefore not true that the grant was obtained fraudulently and through concealment of material facts as the applicant had been provided for and that she wanted a bigger share than what was allocated to her.
40. It is submitted that the applicant had not disclosed whether she brought the suit on behalf of the estate of James Njenga or for her personal gain. She has not disclosed how many siblings she has.
41. The court was urged to dismiss the applicant's application with costs.

Hearing

42. The evidence adduced with regard to revocation of grant application in a nutshell was as follows;
 - a. Protestor/ Applicant testified that she had rented a home in Makutano and she is a casual labourer. That she was the grandchild of Wanaki Mutonga(deceased) and the daughter of James Njenga. That Joseph Mungai Mutonga & John Mbugua were the brothers to her father. Machakos /Kitanga/35 belonged to her grandmother and that her father James Njenga was entitled to a share of the deceased Estate. She stated that she did not know if they included his late father in the list of beneficiaries. Her uncles did not include her father as son of the deceased. She had come to court to protest the confirmed grant. She was living at the market and she left Kitanga because there were problems and when she filed the affidavit of revocation of grant, she was threatened because she brought the case in court. She stated that she did not want the 2 acres she was being given but her father's shares. She stated that she wanted to produce the documents as exhibits 1-6. And that the shamba that was being given to her was full of stones. She was seeking for revocation of grant so that she is included. That they were seven children(all girls) and none of them was included.

On cross examination she stated that she knew that she was not included in the succession proceedings and she was the daughter of James Njenga, her mother died and she did not have the documents. That the other six sisters are in Kitale and it was not their father's land. She was not aware that her father was given money to go and buy land elsewhere by his mother and was not aware of Saboti/Shikendu Block 1/Mucharage/83. She was living with her grandmother in her shamba and did not go with her father to Kitale. Her father was sick, sold his shamba and came back. She had been living in the suit property since 2014 and she was chased away and her house demolished. She reported to the police and nothing happened. She did not file any case to report or photographs to confirm her house were demolished.

- b. Esther Kageshi testified for the Petitioners and stated that she was the daughter of the deceased Wanaki Mutonga and that she lived in Kitale and James Njenga was her brother. That together with her brother they were given money by their late mother to go and buy land because she insisted that the parcel of land in Machakos was for their younger brothers. That her brother then purchased a parcel of land at Duka Moja in Kitale known as saboti/Shikendu block 1mucharage/83 where he settle with his family. She also bought a parcel at Duka moja where she resides upto date.

She testified that on a later date her brother fell sick and came back to their motherland where he passed on.

On Cross examination she stated that her mother gave her kshs 10,000 and her brother kshs 50,000 and each of them decided what to do with the money. The shamba in Kitale was 5 acres and she did not know whether it had a title or not. She knew the applicant ,she was living in Kitale, her mother was sick and died and also the father was sick and went home died and



was buried there. That Miriam her niece was given 2 acres by her grandmother and that her brother's shamba was sold by his daughter Warunga Njenga.

- c. John Mbugua testified that he was a farmer and James Njenga was his brother and Mirriam was his child by virtue of being his late brother's daughter. He stated that his brother James Njenga was given kshs 50,000 to go and buy land in Kitale.

On cross examination he stated that James Njenga was buried in Kitanga Machakos due to funeral Constraints. That her mother in 1988 told them to give Miriam 2 acres and they did not include Miriam in the Grant because they had set aside her 2 acres. There was no evidence of the land given to Miriam. They had documents to show that the land that belonged to James was 5 acres and the land in Machakos/Kitanga /35 was 60 Acres.

Determination

43. The Court considered the pleadings and submissions filed by parties through learned Counsel and the issues that emerge for determination are;
 - a. Whether James Njenga Mungai is entitled to the Estate of his Mother's Estate and Consequently if his dependants are beneficiaries?
 - b. Whether the grant issued on 5th April 2011 and confirmed on 15th July 2013 should be revoked or not ?
44. On the 1st issue of whether James Njenga is entitled to the Estate of Wanaki, it is undisputed that James was the son of the deceased as confirmed by the brothers and the daughter. The brothers who are the respondents averred that he was not entitled to a share of the estate of the deceased because the deceased had given him money during her lifetime to buy property elsewhere.
45. I find that this reasoning cannot hold because there is no provision that if one is given money or gifted a property during his lifetime then it is a done deal for him and therefore, he cannot be entitled to any share of his deceased mother. By the definition of a dependant and beneficiary, then the late James Njenga is a beneficiary and is entitled to the Estate of his deceased mother.
46. It is settled law that the grandchildren of the deceased cannot inherit directly from the estate of the deceased unless through their deceased parents. Grandchildren may however be included in distribution of the estate of the deceased as provided under clause 4 of the Second Schedule to the Probate and Administration Rules provides:

“In determining the degree of consanguinity of a person from the deceased by tracing through an intermediate relative it is not necessary that such relative was living at the death of the deceased, e.g. a grandchild of the deceased living at the latter's death would be included among the relatives notwithstanding that his parent (i.e. the deceased's child) had died before the deceased.”
47. Further, in the case of *In re Estate of Florence Mukami Kinyua (Deceased)* [2018] eKLR it was held thus:

“A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take



the parent's share in the estate of the grandparents. This was stated in *Re Estate of Wabome Njoki Wakagoto (2013)* eKLR where it was held:-

“Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

48. In the premises, the finding of the Court is that the father of the deceased James Njenga was indeed a beneficiary and in his absence being that he is deceased, his children qualify to be beneficiaries of his share of property. The applicant and her siblings thus qualify as beneficiaries.

49. On the issue of whether the Grant issued on 5/4/2011 and confirmed on 15/7/2013 should be revoked: The Summons is premised on Section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya provides;

“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.”

50. The Applicant contend that the grant herein was obtained fraudulently by the Respondents by making of a false statement or by the concealment from the court of something material to the case. According to the Applicant, the Respondents failed to include her late father as one of the beneficiaries and being that his father is deceased then the applicant and her siblings falling on next on the line of consanguinity are entitled to be listed as beneficiaries.
51. The Respondents alleged that they did not include the Applicant as a beneficiary because she had been given 2 Acres of land by her grandmother and had set aside that for her. I take note that the Applicant stated that they were seven children in their family, out of the seven only the Applicant has come out to be listed as a beneficiary. I find it odd that the Applicant is only looking at her interest. She should at the least be advocating to the interest of the siblings as beneficiaries of the estate of their deceased father. The beneficiaries, survivors and /or dependents of the deceased’s estate are entitled legally to completion of administration of the estate and distribution fairly, equitably of the assets that comprise of the deceased’s estate.
52. From the evidence on record, the Applicant has provided sufficient evidence to warrant the revocation of grant on the fact that she is a beneficiary by virtue of being her late father’s daughter who was entitled to a share of the Estate of his late Mother Wanaki Mutonga’s estate. The court however notes that the Applicant and her siblings are all equally entitled to the share as opposed to the applicant solely.

Disposition

1. The Summons for Revocation of Grant dated 19th May 2020 succeeds.
2. Summons for confirmation of Grant to be filed within six (6) months including the share of the Applicant.
3. Each party meet their own costs.

It is so ordered.

RULING DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 25TH JANUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

In the Presence of:

Mr. Langalanga h/b Mr. Musyoka Kimeu for the Respondents

Ms Kavita for the Applicant

Patrick - Court Assistant

